RECEIVED
JUL 11 2019
S.C. SUPREME COURT

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

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.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI
VOLUME I

Justin Lucey (Bar: 15438)
Josh Evans (Bar: 77448)
Dabny Lynn (SC Bar: 78703)
JUSTIN O'TOOLE LUCEY, PA
415 Mill Street
Mount Pleasant, SC 29464
(843) 849-8400
(843) 849-8406 (fax)
jlucey@lucey-law.com
jevans@lucey-law.com
dlynn@lucey-law.com
Attorneys for the Petitioners

Brian Duffy (Bar: 16247)
Julie Moore (Bar: 78677)
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044
(843) 720-2047 (fax)
bduffy@duffyandyoung.com
jmoore@duffyandyoung.com
Attorneys for Respondents

Shawn Willis (Bar: 71155)
NELSON MULLINS
Liberty Center
151 Meeting Street, Suite 600
Charleston, SC 29401
(843) 534-4230
(843) 722-8700 (fax)
shawn.willis@nelsonmullins.com
Attorney for I'On Assembly

TABLE OF CONTENTS

Table of Contents iii

OPINION OF COURT OF APPEALS
AND DOCUMENTS REGARDING REHEARING

VOLUME 1

Opinion of the Court of Appeals filed August 8, 2018 1

Appellants' Petition for Rehearing filed August 23, 2018 35

Respondents' Petition for Rehearing filed August 23, 2018 60

Order of the Court of Appeals Granting Appellant's Petition, denies Respondent's Petition and Withdraws Opinion No. 5588 and substitutes Opinion filed February 27, 2019 85

Substituted Opinion of the Court of Appeals filed February 27, 2019 87

Appellants' Petition for Rehearing of Substituted Opinion filed March 17, 2019 116

Respondents' Petition for Rehearing filed April 15, 2019 122

Order of the Court of Appeals denying both Appellants' and Respondents' Petition for Rehearing filed May 22, 2019 200

BRIEFS AND SUPPLEMENTAL CITATIONS

Appellant's Final Brief filed March 23, 2016 202

Appellant's Final Reply Brief filed March 23, 2016 279

Respondents' Final Brief filed April 20, 2016 308

Respondents' Supplemental Citation filed September 10, 2018 391

Appellants' Supplemental Citation filed September 21, 2018 413

RECORD ON APPEAL

Cover Page to Record on Appeal 435

Index to Record on Appeal 437

March 15, 2012 Order 445

November 16, 2012 Order 447

February 20, 2014 Order 449

February 26, 2014 Order 452

June 20, 2014 Order 454

August 11, 2014 Order 455

June 15, 2015 Order Denying JNOV and Motion for New Trial 457

VOLUME 2

June 15, 2015 Order Denying Adkins Petition for Unjust Enrichment 500

June 16, 2015 Order Declaring the Invalidity of The 2000 Recreational Easement 506

July 13, 2015 Order Denying The I'On Company's Petition for Fees 515

July 13, 2015 Order Awarding Walbeck Attorney's Fees and Costs 520

July 16, 2015 Order Finding Defendants in Contempt for Destruction of Evidence 537

December 22, 2010 Summons and Complaint 552

March 8, 2011 Amended Complaint 565

May 27, 2011 Answer 577

February 7, 2012 Second Amended Complaint 587

January 2, 2014 Third Amended Complaint 604

January 9, 2014 Verifications to Third Amended Complaint by Plaintiffs 620

January 14, 2014 Answer to Third Amended Complaint and Counterclaim 622

May 12, 2014 Complaint – The I'On Company, LLC v. Walbeck 635

June 16, 2014 Fourth Amended Complaint 749

July 18, 2014 Answer to Fourth Amended Complaint and Amended Counterclaims 766

January 13, 2014 Hearing Transcript 827

July 24, 2014 Hearing Transcript 868

January 13 – January 17, 2014 Trial Transcript Excerpts 903

VOLUME 3

July 28, 2014 – August 1, 2014 Trial Transcript 916

i. Direct Examination of Tim Eble by Ms. Lynn.....1036
ii. Cross-Examination of Tim Eble by Mr. Duffy 1054
iii. Redirect Examination of Tim Eble by Ms. Lynn 1068
iv. Direct Examination of Thomas Graham by Mr. Lucey.....1070
v. Cross-Examination of Thomas Graham by Mr. Young 1206
vi. Redirect Examination of Thomas Graham by Mr. Lucey 1263
vii. Recross Examination of Thomas Graham by Mr. Young 1283
viii. Direct Examination of Lee Ann Adkins by Mr. Evans 1287
ix. Cross-Examination of Lee Ann Adkins by Mr. Duffy.....1316
x. Redirect Examination of Lee Ann Adkins by Mr. Evans.....1369
xi. Recross Examination of Lee Ann Adkins by Mr. Duffy.....1372
xii. Direct Examination of Julie O'Connor by Mr. Duffy 1374
xiii. Cross-Examination of Julie O'Connor by Mr. Lucey 1377
xiv. Direct Examination of Stuart Whiteside by Mr. Young.....1381
xv. Cross-Examination of Stuart Whiteside by Mr. Lucey 1389
xvi. Redirect Examination of Stuart Whiteside by Mr. Young 1397

VOLUME 4

xvii. Direct Examination of Brad Walbeck by Ms. Lynn.....1398
xviii. Cross-Examination of Bradley Walbeck by Mr. Duffy 1418
xix. Direct Examination of Julie Hussey by Mr. Evans 1432
xx. Cross-Examination of Julie Hussey by Mr. Duffy.....1465
xxi. Direct Examination of Edward Clem by Mr. Young 1523
xxii. Cross-Examination of Edward Clem by Mr. Evans.....1543
xxiii. Redirect Examination of Edward Clem by Mr. Young.....1547
xxiv. Direct Examination of David Thompson by Mr. Duffy.....1554
xxv. Cross-Examination of David Thompson by Mr. Lucey.....1558
xxvi. Direct Examination of Vincent Graham by Mr. Duffy 1562
xxvii. Cross-Examination of Vincent Graham by Mr. Lucey 1656
xxviii. Redirect Examination of Vincent Graham by Mr. Duffy.....1742
xxix. Recross Examination of Vincent Graham by Mr. Lucey 1752
xxx. Redirect Examination of Vincent Graham by Mr. Duffy.....1753
xxxi. Recross Examination of Vincent Graham by Mr. Lucey 1754
xxxii. Direct Examination of Debra Bedell by Mr. Duffy.....1756
xxxiii. Cross-Examination of Debra Bedell by Mr. Bouch 1791
xxxiv. Cross-Examination of Debra Bedell by Mr. Evans.....1793
xxxv. Redirect Examination of Debra Bedell by Mr. Duffy.....1797
xxxvi. Direct Examination of Michael Robinson by Mr. Young.....1825
xxxvii. Cross-Examination of Michael Robinson by Mr. Evans.....1857

VOLUME 5

xxxviii. Redirect Examination of Michael Robinson

by Mr. Young.....1874

May 27, 2011 Motion to Dismiss 2229

May 31, 2012 Motion for Summary Judgment.....2231

October 22, 2012 I'On Memorandum in Support of Motion for Summary Judgment, Ex. A: Walbeck Deposition Excerpts.....2234

January 8, 2014 Motion for Summary Judgment.....2274

June 6, 2014 Defendants' Motion to Amend Answer to Third Amend Complaint and Counterclaims.....2279

July 10, 2014 Defendants' Motion *in Limine* to Exclude Evidence of Settlement.....2282

July 31, 2014 Memorandum in Support of Directed Verdict 2286

Verdict Form.....2321

August 11, 2014 Motion for Judgment Notwithstanding the Verdict 2329

August 11, 2014 Walbeck Petition for Attorneys' Fees with Exhibits and Supplemental Memorandum in Support 2335

August 11, 2014 Adkins' Petition for Unjust Enrichment. 2365

VOLUME 6

August 11, 2014 Plaintiffs' Motion Regarding Easement and Brief in Support of Judgment.....2369

August 12, 2014 I'On Company, LLC's Petition for Attorneys' Fees.....2376

August 25, 2014 Defendants' Memorandum in Opposition to Plaintiffs' Motion in Support of Judgment on the Validity of the 2000 Recreational Easement....2381

August 25, 2014 Defendants' Memorandum in Support of Motion for JNOV 2389

September 4, 2014 Plaintiffs' Memorandum in Opposition to Defendants' Motion for JNOV.....2434

Court's Exhibits

1 Affidavit of Non-Service as to Russo 2492

2 Stipulation re Settlement Agreement.....2493

5 Verification of Lea Ann Adkins 2494

Plaintiffs' Trial Exhibits

3 1997 I'On Impact Assessment 2495

4 August 10, 1999 I'On Plan View Dock No. 1 2516

5 August 10, 1999 I'On Plan View Dock No. 1 2517

6 Notice from Office of Ocean and Coastal 9.9.1999 Resource Management 2518

7 Newkirk Response to Comments 2525

8 Bruce Kinney Letter to Thomas Graham 2527

12 Purchase and Sale Agreement – Creek Club 2529

13 Deed from I'On Club to 148 Civitas 2541

14 Email Chain with Jo Ann Stubblefield 2551

15 Email Chain with Chad and Russo 2554

16 148 Civitas Settlement Statement 2557

26 Emails re Creek Club Under Contract 2560

28 Easement for Use of Boating 2561

29 Creek Club Purchase and Sale Agreement 2576

30 I'On Ordinance 2593

31 *Civitas – The I'On Journal*, Inaugural Issue 2596

32 I'On Ponsbury Neighborhood Plan 2604

33 SC DHEC Critical Area Permit 2608

34 1999 Department of the Army Permit 2627

36 Joint Federal and State Application Form for Activities Affecting Waters 2645

36(a) Office of Ocean and Coastal Resource Management Permit 2649

37 Joint Public Notice for Permit to Construct 6 Community Docks 2653

38 Agreement Between The I'On Company and GR 2673

40 DHEC Permit Approval Letter to Kenneth Hance 2677

41 I'Onsborough Neighborhood Plan....2678
43 Recreational Easement....2682
44(a) Quitclaim Deed from Club to Grahams....2685
46 Fact Sheet for I'On....2690
47 Handover Agreement....2692
48 Fact Sheet for I'On....2694
49 I'On Media Kit Fact Sheet....2696
51 I'On *Celebration 10 Years* Community Brochure....2697
53 Property Report Transmittal Letter....2705
55 Response Letter from Bouch to Adkins....2707
56 Letter from Kinney to Tom Graham....2708
57 Letter from Adkins to Bouch....2710
58 Update Memo/Email from Besenfelder to Gottshalk....2712
58(a) Besenfelder to Russo Email....2714
59 Emails Between Walsh and Adkins....2717
60 Emails among Walsh, Graham, Kinney and Adkins....2719
61 Letter from Tidsdale to The I'On Company....2724
62 Letter from Vincent Graham to Tisdale....2726
62(a) Graham Email Attached to Ex. 62....2727
63 Letter from Adkins to Vincent Graham....2732
64 Interstate Land Sales Subdivisions by Name Search Results....2734
65 Response Letter from Vincent Graham to Adkins....2735
65(a) Resolution Authorizing Sale....2736
66 CV5 Deed by Grahams to 148 Civitas....2739
67 Lot 275 Deed by I'On Company to 148 Civitas....2747
68 Assignment of Certain Club Owner's Rights and Obligations....2756
71 Letter from Walbeck to Vince Graham....2761

72 Letter from Vince Graham to Walbeck 2762

75 Signage at Dock 2763

76 I'On Website Printouts 2767

77 I'On Neighborhood Plan Brochure 2769

85 Newkirk and I'ON emails re Community Dock 2776

86 Permit Application from Newkirk to US Army COE 2780

88 Letter from COE to I'On Requesting a Response to Comments 2805

90 Post and Courier Affidavit of Publication 2806

102 HUD Letter to Vince Graham 2807

103 Request for Voluntary Suspension of Effectiveness 2809

108 Email from Thomas Graham to Martin 2810

109 Agreement Between I'On Company and GR, LLC 2811

111(a) Board Meeting Minutes 2818

115 Email from Russo to Besenfelder 2822

115(a) Chart of Pre-Amendment Lot Purchase Agreement 2823

116 Email from Russo to Besenfelder 2827

116(a) Chart of Lots Contracted of Closed 2829

VOLUME 7

117 Griffith to Graham re Proposal 2832

118 Barnes to Walbeck re Congratulations 2879

119 Russo to Besenfelder re Outline 2880

120 July 13, 2008 Russo to Besenfelder re Prior Proposal 2882

121 July 17, 2008 Russo to Besenfelder re Prior Proposal 2883

122 July 25, 2008 Russo to Besenfelder re Confidentiality Agreement 2886

123 July 28, 2008 Russo to Besenfelder re Confidentiality Agreement 2887

124 Russo to Besenfelder re Purchase Offer 2889

125 Russo to Besenfelder re Proposal 2890

126 Russo to Besenfelder re Confirming Revisions 2891
127 Purchase Agreement 2893
128 Russo to Besenfelder re Contracts 2903
129 Russo to Besenfelder re Besenfelder Prior Email 2904
130 Russo to Besenfelder re Meeting 2909
131 Russo to Besenfelder re Lease 2911
132 Russo to Besenfelder re Numbers 2914
133 Russo to Besenfelder re Meeting 2915
134 Russo to Besenfelder re Creek Club Purchase Agreement 2916
135 Russo to Besenfelder Forwarding Walsh Email 2917
136 Russo to Besenfelder re Amended Recreational Agreement 2921
137 December 11, 2008 Russo to Besenfelder re Creek Club Agreements 2936
139 April 14, 2009 Russo to Besenfelder re Creek Club Agreements 2937
140 Besenfelder to Russo re Due Diligence 2938
143 Graham Letter Suspending ISLA Registration 3092
145 I'On Grand Plan 3093
146 Russo Production 3094
147 Amended and Restated Purchase Agreement for CV6 3176
148 Final Purchase Agreement for CV6 3189
150 Property Report Receipts 3206

VOLUME 8

154 Russo to Besenfelder re Creek Club Sale 3328
156 Steve Speer Message Board Posting 3329
167 Developer Letters to Walbeck 3331
168 Dock 2 Photos 3334
179 Besenfelder to Martin re I'On Common Areas 3338
180 Besenfelder to Grahams re Creek Club Options 3341

181 Tom Graham to Besenfelder re Alternate to Sale of Creek Club 3343
182 Tom Graham to Besenfelder re Kinney and Easement.....3348
183 Tom Graham to Vince Graham re Kinney Letter 3361
184 Tom Graham to Vince Graham re Recreational Easement.....3365
185 Dock 3 Photos.....3368
186 Dock 4 Photos.....3377
187 Ariel Photo of Hobcaw 3383
188 Ariel Photo of Wando 3384
189 December 8, 1998 Vince Graham to Joe and Lewis Griffith 3385
190 Joe and Lewis Griffith to Vince Graham.....3387
191 March 24, 1999 Vince Graham to Joe and Lewis Griffith 3391
192 Ariel Photos of Hobcaw.....3382
193 Email from Besenfelder to Grahams re Creek Club Options 3396
194 Email from Tom Graham to Kinney re Creek Club 3399
195 Email from Tom Graham to Besenfelder et al re Creek Club Transaction.....3402
196 Email from Quinn to Besenfelder re I'On Creek Club.....3404
200 Plat of HOA Open Space 3407
201 Email from Besenfelder re Final To-Do List for HOA Turnover.....3408
202 Besenfelder to Grahams re Creek Club Options.....3411
203 Gabriel to Besenfelder re I'On Facilities.....3414
204 Besenfelder to Tom Graham re Thoughts on PD Amendment.....3415
205 Besenfelder to Vince Graham re Communication with Russo 3418
208 Besenfelder to Vince Graham re Mundy Email.....3419
209 Besenfelder to Grahams re Creek Club Sale.....3422
210 Tom Graham to Besenfelder re Creek Club Easement and HOA 3423
212 Tom Graham to Vince Graham re Creek Club Issues 3425

213 Besenfelder to Tom Graham re Olde Park Agreement 3427
214 Vince Graham to Tom Graham re Creekside Park 3432
215 Besenfelder to Vince Graham re I'On Update 3435
216 Besenfelder to Grahams re Russo Letter 3436
217 Tom Graham to Kinney re Creek Club Sale 3439
218 Besenfelder to Grahams re Docks 3440
220 Vince Graham to Tom Graham re Impact Statement 3444
221 Tom Graham to Besenfelder re Creek Club Sale 3446
222 Tom Graham to Russo re Creek Club Transaction 3457
223 Vince Graham to Tom Graham and Russo re I'On Message Board 3458
224 Tom Graham to Kinney et al. re HUD Document 3460
225 Russo Settlement Agreement 3464
227 Plat 3468
228 Plat 3481

Defendants' Trial Exhibits

3 Creekside Park Plats 3482
4 I'On Dock Master Plan Plat 3487
5B Image of Community Dock 2 3488
8 1997 Aerial Photo 3489
14 Photo of School Under Construction Spring 2007 3490
15 Photo of East Cooper Charter Montessori School 3491
17 Photo of Pouring Foundation Slab at Holy Ascension, October 2006 3492
18 Photo of Completed Exterior, Holy Ascension, June 2008 3493
19 Google Earth Image 3494
22 1998 Property Report 3495
23 April 2000 Property Report 3531
24 December 2000 Property Report 3570

25 Akins Lot Purchase Agreement 3609

27 Recreational Easement and Agreement to Share Costs 3627

28 August 16, 2000 to I'On Club 3642

32 March 5, 2009 Letter from Adkins to Tim Bouch 3648

33 February 23, 2009 BOZA Meeting Minutes 3650

34 Walbeck Lot Purchase Agreement 3658

38 I'On Assembly Proposed 2004 Budget Summary 3669

39 Draft I'On Assembly 2005 Budget Summary 3671

40 I'On Assembly Draft 2006 Budget Summary 3673

41 I'On Assembly Draft 2007 Budget Summary 3675

42 I'On 2008 Budget 3677

43 I'On 2009 Budget 3680

44 I'On 2010 Proposed Budget 3683

49 Certificate of Occupancy for Creek Club 3686

54 First Amended and Restated Operating Agreement of The I'On Company, LLC 3687

55 Fifth Amended and Restated Operating Agreement of The I'On Company, LLC 3706

56 Second Amended and Restated Operating Agreement of The I'On Club, LLC 3747

59 Certificate of Existence of I'On Club, LLC 3764

60 Certificate of Existence of I'On Company, LLC 3765

62 Andy Gowder I'On Lot Purchase Agreement 3766

63 Andy Gowder Purchaser Receipt 3776

70 Notice of January 7, 2003 Assembly Annual Meeting 3777

71 Proof of Mailing of January 7, 2003 Annual Meeting Notice 3789

72 Walbeck Sign-in Page from January 7, 2003 Annual Meeting 3790

73 Notice of December 3, 2003 Assembly Annual Meeting with Proof of Mailing....3791

74 Mailing List for December 3, 2003 Annual Meeting Notice....3802

75 Walbeck Sign-in Page from December 3, 2003 Annual Meeting....3820

VOLUME 9

76 Notice of December 2, 2004 Assembly Annual Meeting....3821

77 Notice of December 7, 2005 Assembly Annual Meeting....3830

78 Walbeck Sign-in Page from December 7, 2005 Assembly Annual Meeting....3838

79 Notice of December 6, 2006 Assembly Annual Meeting....3839

80 Adkins and Walbeck Sign-in Page from December 6, 2006 Assembly Annual Meeting....3849

81 Notice of December 12, 2007 Assembly Annual Meeting....3851

82 Adkins and Walbeck Sign-in Page from December 12, 2007 Assembly Annual Meeting....3870

83 Notice of December 11, 2008 Assembly Annual Meeting....3872

84 Walbeck Sign-in Page from December 11, 2008 Assembly Annual Meeting....3891

87 Letter from Alan Barbieri re PUD Amendment....3892

98 "Inspiration for a Neighborhood" advertisements....3895

105 February 24, 2009 Email to Ward Mundy....3897

106 Brock Correspondence Opposing I'On 1995-1997....3899

107 December 3, 2003 Assembly Meeting Minutes....3925

108 February 12, 2004 Assembly Meeting Minutes....3928

109 August 5, 2004 Assembly Meeting Minutes....3932

110 October 21, 2004 Assembly Meeting Minutes....3937

111 November 11, 2004 Assembly Meeting Minutes....3940

112 January 27, 2005 Assembly Meeting Minutes.....3944
113 February 9, 2005 Assembly Meeting Minutes.....3947
114 February 23, 2005 Assembly Meeting Minutes.....3960
115 March 23, 2005 Assembly Meeting Minutes.....3962
116 April 27, 2005 Assembly Meeting Minutes.....3965
117 July 27, 2005 Assembly Meeting Minutes.....3968
118 July 27, 2005 Assembly Meeting Minutes.....3970
119 August 24, 2005 Assembly Meeting Minutes.....3974
120 September 28, 2005 Assembly Meeting Minutes.....3978
121 December 7, 2005 Assembly Meeting Minutes.....3981
122 April 26, 2006 Assembly Meeting Minutes.....3984
123 February 28, 2007 Assembly Meeting Minutes.....3988
124 April 25, 2007 Assembly Meeting Minutes.....3996
125 May 18, 2007 Assembly Meeting Minutes.....4004
126 July 25, 2007 Assembly Meeting Minutes.....4009
127 August 22, 2007 Assembly Meeting Minutes.....4017
128 September 26, 2007 Assembly Meeting Minutes.....4023
129 October 24, 2007 Assembly Meeting Minutes.....4031
130 January 16, 2007 Assembly Meeting Minutes.....4051
131 October 30, 2008 Assembly Meeting Minutes.....4059
132 January 15, 2009 Assembly Meeting Minutes.....4064
133 February 26, 2009 Assembly Meeting Minutes.....4068
137 August 27, 2007 Proposal to Amend I'On Planned Development Zoning Ordinance.....4071
140 GIS of Marshwalk.....4075
141 November 21, 2000 Deed to Marshwalk.....4077
142 Staging Dock Photo.....4085

150 March 23, 2010 Chad Besenfelder Response to Emails from Kent Prause 4086
151 Photo of Avant Garden 4094
152 Mt. Pleasant Board of Zoning Appeals Order 4095
153 Zoning Appeal Petition 4104
155 2004 Ed Clem Emails 4106
157 June 23, 2004 Email from Brad Walbeck re Landscaping 4108
164A Photo of Dock 3 4110
167 Photo of Boat Ramp and Creek Club 4111
173 September 19, 2007 Adkins Email 4112
174 March 22, 2007 Minutes 4113
180 Email re Vote on PD Amendment 4118
182 Creek Club Building Costs 4120
139 Declaration of Covenants, Conditions and Restrictions 4122

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2015-001590

Appeal From Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5588
Heard April 12, 2018 – Filed August 8, 2018

AFFIRMED IN PART AND REVERSED IN PART

Brian C. Duffy, Seth W. Whitaker, and Julie L. Moore, all of Duffy & Young, LLC, of Charleston, for Appellants.

Justin O'Toole Lucey and Joshua F. Evans, both of Justin O'Toole Lucey, P.A., of Mount Pleasant, for Respondents.

Timothy W. Bouch and Yancey Alford McLeod, III, both of Leath Bouch & Seekings of Charleston, for Respondent I'On Assembly, Inc.

GEATHERS, J.: In this action alleging violation of the Interstate Land Sales Full Disclosure Act (ILSA), 42 U.S.C. §§ 1701 to -1720 (1994), Appellants, 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, seek review of the circuit court's orders (1) denying their motion for a judgment notwithstanding the verdict (JNOV) or new trial absolute and new trial nisi remittitur, (2) declaring a recreational easement invalid, (3) denying their motion for attorney's fees against Respondent Lea Ann Adkins, and (4) granting attorney's fees to Respondent Brad J. Walbeck.

Appellants argue (1) Walbeck and Adkins could not pursue this action as a derivative action; (2) Respondents' claims are barred by the statute of limitations; (3) the disputed recreational easement was valid and perpetual; (4) there was no fiduciary duty to convey certain common areas to the homeowners association, Respondent I'On Assembly, Inc.; (5) the directed verdict on Appellants' abuse of process counterclaim was improper because I'On presented ample evidence of an ulterior purpose and a willful act in the use of the process not proper in the regular conduct of the proceedings; (6) I'On was entitled to attorney's fees as the prevailing party on Adkins' breach of contract claim; (7) the attorney's fees award to Walbeck was unreasonable because he was awarded merely nominal damages on his ILSA claim; (8) the circuit court's ruling that Appellants were amalgamated was improper; and (9) Walbeck failed to show he relied on any representation made by I'On and, therefore, he failed to establish a claim under ILSA.

We reverse the denial of Appellants' JNOV motion as to the negligent misrepresentation and ILSA claims because they are barred by the statute of limitations, but we affirm the denial of Appellants' JNOV motion as to all other grounds. We affirm the order declaring the Recreational Easement invalid and the order denying Appellants' request for attorney's fees against Adkins. Finally, we reverse the award of attorney's fees to Walbeck.

FACTS/PROCEDURAL HISTORY

At the heart of this convoluted case is a developer's promise to convey certain recreational facilities in a residential community to a homeowner's association. Specifically, Respondents allege that Appellants promised they would convey the Community Dock and Creekside Park located on lot CV-6 in I'On Village to Respondent I'On Assembly, Inc. (the HOA) but instead sold these facilities to a third party. Appellants, however, allege they promised to convey a

"generic" community dock and creekside park to the HOA but not the specific ones located on lot CV-6. Appellants also allege they conveyed the recreational facilities as promised.

I'On Village is located in Mount Pleasant. It was conceived by Thomas Graham and his son, Vince Graham. Thomas Graham's company, Graham Development, was the original majority owner of the I'On Company, LLC (the I'On Company), and Vince Graham was the company's manager. The I'On Company's subsidiary, I'On Realty, LLC (I'On Realty), employed real estate agents to market the lots in the I'On community.

On November 27, 1999, Walbeck entered into a contract to purchase a lot in I'On Village. Walbeck's purchase contract incorporated a property report (the 1998 Property Report) that the I'On Company had filed with the United States Department of Housing and Urban Development (HUD) on November 3, 1998, pursuant to ILSA.[1] The report set forth information deemed necessary to protect prospective purchasers, including the amenities that would be provided to lot owners.

Specifically, the report included a chart listing recreational facilities to be built during the first two phases of the development. Among the facilities to be built in Phase II was a "Creekside Park" and a "Community Dock." Under this listing was the following language:

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

Throughout the years after Walbeck received the 1998 Property Report, Appellants built multiple community docks and parks in I'On Village. Nonetheless, Respondents considered the Community Dock and Creekside Park listed in the 1998 Property Report to be located on the civic lot on which the boat

---

[1] *See* 42 U.S.C. § 1707 (setting forth requirements for the contents of a property report, relating to the lots in a subdivision, to be made available to the public).

ramp was located (lot CV-6)—this lot had at least 300 feet of deep water access to Hobcaw Creek. The I'On Company also completed construction of a building on lot CV-6 that became known as the "Creek Club." The Creek Club was intended as a venue for wedding receptions and other events and hosted its first event circa 2003.

Appellants vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park. At trial, Thomas Graham admitted that the Creek Club overlooked a park. He also admitted that when the I'On Company was planning its parks in 1999, the plans included "the Creek Club Park." In his deposition, Thomas Graham testified that the "Community Dock" listed in the 1998 Property Report referred to the main dock at the Creek Club that was adjacent to the boat ramp on lot CV-6; the boat ramp was built in 1999 or 2000, and the Creek Club dock was completed in 2000 or 2001.[2] However, at trial, he disputed that the "Community Dock" listed in the 1998 Property Report referred to the Creek Club dock. He explained the reference to a community dock in the 1998 Property Report "was to a generic community dock" and not to a specific property as Respondents contend. He stated, "[T]his was before we had designed anything -- got anything permitted or approved, even bought the land . . . . We didn't know whether -- at that time, . . . we thought sure we'd get one -- at least one community dock, but we didn't know how many, so that was a reference to that community dock."

On February 9, 2000, the I'On Club, LLC (the I'On Club) executed a "Recreational Easement and Agreement to Share Costs" (Recreational Easement) purporting to "provide access to the [HOA] members for them to use the docks and the boating ramp" off lot CV-6.[3] The Recreational Easement also included language purporting to grant an easement to the I'On Club for use and access to other common areas within I'On Village. On page three of the document, the easement is described as perpetual. However, section 4.2 of the Recreational Easement states that either party can terminate the easement after thirty years upon six months' notice. Thomas Graham described this language as a mistake because the I'On Club intended for the Recreational Easement to be permanent.

---

[2] Vince Graham testified that the dock was completed in late 2000 or early 2001, before the Certificate of Occupancy was issued for the Creek Club itself on April 10, 2001.

[3] Curiously, the I'On Club did not obtain title to lot CV-6 until six months later.

Section 3.1 of the Recreational Easement required the HOA to pay assessments "to cover a share of the costs incurred by [the I'On Club] in maintaining, repairing, replacing, operating[,] and insuring the Boating Facilities." The Boating Facilities were identified as "certain recreational facilities, including a boat ramp and dock and a driveway and parking area to serve them."

On April 10, 2000, the I'On Company completed an amended property report for filing with HUD (first amended Property Report). Whereas the 1998 Property Report listed a "Creekside Park" and a "Community Dock" among the facilities to be built in Phase II, the first amended Property Report's list substituted "Marshwalk (park)" for "Creekside Park" and "Community Docks" for "Community Dock." (emphasis added). The first amended Property Report also changed the language regarding transfer of these facilities to the HOA—whereas the 1998 Property Report provided for transfer of the Creekside Park and Community Dock to the HOA, the first amended Property Report stated, "The recreational facilities listed in the chart above, other than the sidewalks and community dock, 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." (emphasis added).

Jo Anne Stubblefield, the I'On Company's attorney for ILSA compliance, explained the amendment to the Property Report this way:

> [I]n early 2000[,] the decision was made to have the I'On Club own and maintain a parking area, boat ramp[,] and dock as part of the Club Facilities and grant an easement to the [HOA] for use of all of these facilities so that property owners would have the same use rights they would have had in the "community dock" referenced in the original Property Report, but in addition would have rights to use the parking area and boat ramp (which had not been mentioned in the original Property Report and which the property owners would otherwise have had no right to use unless they joined the Club). The Recreational Easement was drafted to create that easement and to provide for the [HOA] to contribute to the costs incurred by the Club in maintaining the boat dock, boat ramp, and parking area. Once that was finalized and recorded, we amended the HUD Property Report (effective April 2000) to reflect that . . . .

Thomas Graham testified that the name of the Creekside Park was changed to Marshwalk after the 1998 Property Report was provided to Walbeck to avoid confusion with a nearby neighborhood called "Creekside Park." He also testified that the Marshwalk was not on lot CV-6 or adjacent to Hobcaw Creek but ran for over two miles along the marsh, which was adjacent to a tributary of Hobcaw Creek. Vince Graham also testified that the "Creekside Park" was actually the Marshwalk.

On August 15, 2000, the I'On Company conveyed ownership of lot CV-6, including the Creek Club and boat ramp, to the I'On Club. Appellants conveyed the Marshwalk park to the HOA on November 21, 2000. Vince Graham testified that the conveyance included "docks two and three."

In late June 2007, in response to homeowner concern over "non-residents cutting bait and cleaning fish off the docks," Thomas Graham asked the I'On Company's then-current manager, Chad Besenfelder, to advise him "what rights" the HOA had "over the docks and boat ramp." Before receiving a response, Thomas Graham sent another e-mail to Besenfelder expressing his desire to keep ownership of the Community Dock. In a later e-mail, he expressed his intent to "capitalize [the] potential value" of the Community Dock.

In July 2008, Mike Russo with 148 Civitas, LLC (Russo) submitted a proposal to buy lot CV-6, together with overflow parking on an adjacent lot (CV-5). The proposal included a provision for transfer of the "boat docks" to the HOA. Subsequent communications between Appellants and Russo indicated an intent to ultimately convey ownership of the boat ramp and dock off lot CV-6 to the HOA. However, in November 2008, Russo and Appellants entered into an agreement that would include the boat ramp and Community Dock in the transfer of lot CV-6 to Russo, which was concerning to HOA members. The then-current president of the HOA's Board of Trustees (Board), Bruce Kinney, contacted Thomas Graham regarding modifying the Recreational Easement to protect the HOA members. One of the modifications Kinney sought was making the easement perpetual. However, on January 5, 2009, Thomas Graham notified Chad Besenfelder that Appellants would not modify the Recreational Easement while the Creek Club was under contract for sale to Russo.

On March 11, 2009, Board President Kinney sent an e-mail to Thomas Graham indicating the Board's discovery of the 1998 Property Report's representation that the Community Dock would be conveyed to the HOA. Kinney

expressed the HOA's expectation that the Community Dock would be excluded from the sale to Russo. Kinney's e-mail also inquired about the 1998 Property Report's listing of the Creekside Park as an additional amenity to be conveyed to the HOA.

Later in March 2009, Russo advised Kinney that he was cancelling the purchase agreement, and subsequently, Thomas Graham advised Kinney that Besenfelder was working out details for transferring ownership of the Community Dock to the HOA. Likewise, Besenfelder advised the HOA's management company that ownership of the Community Dock would be transferred to the HOA. However, by August 1, 2009, the HOA learned that Appellants and Russo had recently entered into a new contract for the sale of CV-6 to Russo, including the Creek Club, the boat ramp, and Community Dock.

On August 5, 2009, the I'On Club conveyed ownership of lot CV-6 to Russo in consideration of $1,400,000. On this same day, Thomas Graham, Vince Graham, and Geoff Graham conveyed ownership of lot CV-5 to Russo in consideration of $225,000.00.[4] The conveyance of lot CV-6 to Russo was expressly subject to the Recreational Easement, and the I'On Club executed a written assignment of its rights and obligations under the Recreational Easement to Russo.

On December 22, 2010, Walbeck filed his Complaint against Appellants and 148 Civitas, LLC, alleging causes of action for violation of ILSA, Breach of Contract, Breach of Fiduciary Duty, Fraud, Negligent Misrepresentation, Civil Conspiracy, violation of the South Carolina Unfair Trade Practices Act (UTPA), Unjust Enrichment, Promissory Estoppel, "Veil Piercing/Alter Ego," and Tortious Interference with Contract. On March 8, 2011, Walbeck filed an Amended Complaint adding Mike Russo (in his individual capacity) and I'On Realty as defendants. Appellants filed a motion to dismiss Walbeck's action on May 27, 2011, asserting, *inter alia*, Walbeck's claims were barred by the statute of limitations.

On February 7, 2012, Walbeck filed a Second Amended Complaint and Lea Ann Adkins joined Walbeck as a plaintiff. Walbeck and Adkins also asserted their claims derivatively on the HOA's behalf pursuant to Rule 23(b)(1), SCRCP (*see infra* Part IV), added the HOA as a defendant, and added an allegation that Appellants were amalgamated. On January 2, 2014, Respondents filed a Third

[4] Geoff is the son of Thomas and brother of Vince.

Amended Complaint adding a cause of action for Aiding and Abetting against Russo. On January 13, 2014, Russo entered into a settlement agreement with Respondents. The terms of the settlement included Russo's sale of lot CV-6 to the HOA for $495,000 and the HOA's lease of the building, lawn, and three parking spaces back to Russo. The settlement terms also allowed the HOA access to the Creek Club for 13 dates per year and Russo's future conveyance of lot CV-5 to the HOA.

Subsequently, Respondents' action against Appellants proceeded to trial on January 14, 2014, but the action ended in a mistrial on January 17, 2014. On February 21, 2014, the HOA realigned its party status and adopted the other Respondents' claims set forth in the Third Amended Complaint. On May 12, 2014, Appellants filed a separate action against Respondents, seeking a declaration that the Recreational Easement was perpetual. The circuit court granted Appellants' motion to consolidate their action with the present action.

On June 16, 2014, Respondents filed their Fourth Amended Complaint reflecting the HOA's realignment as a plaintiff, Russo's dismissal from the action, and elimination of the claims for Tortious Interference and Aiding and Abetting. Exactly one year later, the circuit court issued an order declaring the Recreational Easement invalid and void ab initio because the I'On Club lacked title to lot CV-6 at the time it executed the easement. The circuit court also concluded the easement was not perpetual but was limited to a term of thirty years.

The parties re-tried the case from July 28 through August 1, 2014. The jury returned verdicts for Walbeck on his claims for violation of ILSA ($1), Negligent Misrepresentation ($20,000), and Breach of Contract ($10,000) and for the HOA on its claims for Breach of Contract ($1,000,000), Breach of Fiduciary Duty ($1,750,000), and Negligent Misrepresentation ($1,000,000). The HOA elected to recover on its Breach of Fiduciary Duty claim, and Walbeck elected to recover on his Negligent Misrepresentation claim. The circuit court denied Appellants' motion for a JNOV or new trial absolute and new trial nisi remittitur. The circuit court also denied Appellants' motion for an award of attorney's fees against Adkins and awarded attorney's fees to Walbeck pursuant to ILSA. This appeal followed.

ISSUES ON APPEAL

1. Were Respondents' claims barred by the statute of limitations?

2. Did the circuit court err by directing a verdict for Respondents on Appellants' abuse of process counterclaim?

3. Did the circuit court err by declaring the Recreational Easement invalid?

4. Did Respondents properly file and maintain a derivative action on the HOA's behalf?

5. Did the circuit court err by denying Appellants' JNOV motion as to the HOA's breach of fiduciary duty claim?

6. Did the circuit court err by concluding that Appellants were amalgamated?

7. Did the circuit court err by denying Appellants' JNOV motion as to Walbeck's ILSA claim?

8. Did the circuit court err by awarding attorney's fees to Walbeck?

9. Did the circuit court err by denying Appellants' request for attorney's fees against Adkins on her breach of contract claim?

STANDARD OF REVIEW

"In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* The appellate court "will reverse the trial court's rulings on these motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law." *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

"When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (quoting *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Ct. App. 1998), *abrogated on other grounds by Webb v. CSX Transp., Inc.*, 364 S.C. 639, 653, 615 S.E.2d 440, 448 (2005)). A "JNOV should

not be granted unless only one reasonable inference can be drawn from the evidence." *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154.

As to questions of law, this court's standard of review is de novo. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

LAW/ANALYSIS

I. Statute of Limitations

Appellants assert that Walbeck's claims "are time-barred because they accrued before December 22, 2007," which was exactly three years before Walbeck filed the initial complaint.[5] Appellants also assert that the HOA's claims "are time-barred because they accrued before February 7, 2009," which was exactly three years before Walbeck and Adkins filed the Second Amended Complaint on the HOA's behalf. Therefore, Appellants argue, the circuit court erred in submitting the issue to the jury and in denying Appellants' JNOV motion on this ground. We agree as to the negligent misrepresentation and ILSA claims because the circuit court committed an error of law in submitting to the jury the question of when these claims accrued. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 (holding the appellate court "will reverse the trial court's rulings on [directed verdict or JNOV] motions only [when] there is no evidence to support the rulings *or [when] the rulings are controlled by an error of law*" (emphasis added)).

The three-year statute of limitations, section 15-3-530(5) of the South Carolina Code (2005),[6] applies to the negligent misrepresentation and breach of fiduciary duty claims. With the exception of medical malpractice actions, "all actions initiated under [s]ection 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence *should have known* that he [or she] had a cause of action." S.C. Code Ann. § 15-3-535 (2005) (emphasis added). The "exercise of reasonable diligence" means "the injured party must act with some promptness [when] the facts and circumstances of an injury

---

[5] Appellants do not dispute the applicability of the twenty-year statute of limitations to the breach of contract claim because Walbeck's contract to purchase his lot was a sealed instrument. *See* S.C. Code Ann. § 15-3-520 (2005) (providing for a twenty-year statute of limitations for actions on a sealed instrument).

[6] Subsection 5 provides for a three-year limitation on "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and [medical malpractice actions]."

place a reasonable person of common knowledge and experience on *notice* that a claim against another party *might* exist." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363–64, 468 S.E.2d 645, 647 (1996) (second emphasis added). In other words, the discovery rule does not "require absolute certainty a cause of action exists before the statute of limitations begins to run." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001).

> The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and *when the testimony is conflicting upon the question,* it becomes an issue for the jury to decide. However, when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim *becomes a matter of law to be decided by the trial court.*

Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009) (emphases added) (citation omitted), *aff'd in part, rev'd in part on other grounds*, 392 S.C. 116, 708 S.E.2d 766 (2011).

The statute of limitations for the ILSA claim is "three years after discovery of the violation or after discovery should have been made *by the exercise of reasonable diligence*." 15 U.S.C. § 1711(a)(2) (emphasis added). There is a dearth of published case law interpreting this provision, but the opinion in *Streambend Properties III, LLC v. Sexton Lofts, LLC*, 297 F.R.D. 349, 359 (D. Minn.), *aff'd*, 587 F. App'x 350 (8th Cir. 2014), indicates an interpretation similar to *Dean*'s interpretation of the identical standard in section 15-3-535, i.e., "three years after the person knew or *by the exercise of reasonable diligence* should have known that he [or she] had a cause of action." (emphasis added).

In the present case, the jury found the date that Respondents knew or should have known they had a claim against Appellants was August 5, 2009, the date Appellants sold the disputed property to Russo. However, Appellants argue the initial representation on which Respondents claim they relied was that Appellants would convey the disputed property to the HOA free of charge upon completion of construction, and Respondents knew or should have known upon completion of construction in early 2001 that they did not receive such a conveyance.[7] Thus,

[7] The 1998 Property Report stated,

Appellants argue, Respondents knew or should have known they might have a claim against Appellants, and their claims accrued, at that time. The logical extension of this argument is that Walbeck, in his individual capacity and as a representative of the HOA, certainly should have known before December 22, 2007, approximately six years after the completion of construction, that he and the HOA had a claim against Appellants.

Even viewing the evidence in the light most favorable to Respondents, we agree with Appellants that the negligent misrepresentation and ILSA claims accrued well before December 22, 2007. However, the claims did not necessarily accrue upon completion of construction or even immediately thereafter. Further, we disagree with Appellants as to the HOA's breach of fiduciary duty claim because the allegations in that claim are not limited to the falsity of the representations in the 1998 Property Report. We base our determination of each claim's accrual on the particular claim's allegations concerning breach of duty.

Negligent Misrepresentation

In the negligent misrepresentation claim, Respondents alleged:

> 88. The I'On Defendants made oral and written representations that the Community Dock and Creekside Park would be transferred to the [HOA].
>
> . . .

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

It is undisputed that construction of the Community Dock and Creekside Park was completed in early 2001, no later than April 10, 2001.

> 90. The Defendants owed a *duty* of care to the Plaintiffs *to communicate truthfully all information regarding [their] purchase in I'On*, without material omission.
>
> 91. The Defendants[] breached that duty owed *by misrepresenting facts* [that], in conjunction with other representations, *induced the Plaintiffs and other lot purchasers to enter into contracts for the purchase of lots* in I'On.
>
> 92. The Plaintiffs, the [HOA], and its members have suffered a pecuniary loss as a direct and proximate result of [their] *reliance* on the Defendants' false representations.

(emphases added). Paragraph 88 referred to the representation made in the 1998 Property Report. Paragraph 91 designates the breach of Appellants' duty of care as misrepresenting facts that induced Walbeck to purchase his lot. Thus, as to the negligent misrepresentation claim, the question is when Walbeck, in his individual and representative capacity, knew or should have known of the falsity of the representation that induced him to buy his lot, i.e., the statement in the 1998 Property Report.

To accept Appellants' argument that the negligent misrepresentation claim accrued upon completion of construction would require the conclusion that Walbeck's purported reliance on the 1998 Property Report was accompanied by a duty to inquire about the conveyance immediately after construction was completed. Such a conclusion is unrealistic and unreasonably harsh. Rather, this claim accrued when Walbeck first received information indicating the HOA did not own the Community Dock and Creekside Park.

Walbeck admitted receiving copies of the HOA's proposed annual budgets, which began including a "Creek Club Dock usage Fee" as early as October 10, 2004, for the 2005 budget year, if not earlier. The proposed 2005 budget was mailed to HOA members on November 1, 2004. The listing of a fee being paid by the HOA for use of the Community Dock should have alerted Walbeck to the fact that the HOA did not have title to the Community Dock. Therefore, the only reasonable inference that can be drawn from the evidence is that the negligent misrepresentation claim accrued in early November 2004. *See* § 15-3-535 (stating

that with the exception of medical malpractice actions, "all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or *by the exercise of reasonable diligence* should have known that he had a cause of action." (emphasis added)); *Turner*, 381 S.C. at 110, 671 S.E.2d at 641 ("[W]hen there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.").

In its order denying Appellants' JNOV motion, the circuit court concluded that even if the date Respondents should have discovered their claims preceded the three-year limitations period, equitable estoppel would have served to toll the statute of limitations in light of Appellants' misrepresentations and efforts to conceal their negotiations with Russo. The circuit court did not refer to any exhibits or testimony showing the referenced misrepresentations or concealment, except for a quotation from an April 18, 2007 e-mail written by Chad Besenfelder, the I'On Company's manager. The circuit court also found that Appellants repeated their promise to convey the disputed property "over the course of many years" and included the June 2005 Handover Agreement in the list of exhibits to support this finding. However, this agreement does not reference any specific common areas. The other exhibits cited by the circuit court are e-mails that were written in the years 2006 through 2009.

Yet, there is no evidence that Appellants made any representations that could be construed as an expression of intent to convey the property between the time Walbeck received the 1998 Property Report and early November 2004, when he received the HOA's proposed budget for 2005. Therefore, the doctrine of equitable estoppel is not availing to Respondents as to the representation in the 1998 Property Report.

The circuit court also stated that it was "concerned with the existence of any evidence supporting the jury's findings and ha[d] no authority to resolve conflicts purportedly created by the jury's disregard of other evidence," citing *Curcio* as supporting authority. *See Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 ("When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" (quoting *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154)). However, in the present case, there were no conflicts in the testimony or other evidence as to when Walbeck should have known Respondents might have a claim against Appellants for the representation in the 1998 Property Report. In any event, there

was only one reasonable inference from the evidence on this question. Therefore, this question was one of law to be decided by the circuit court. *See Turner*, 381 S.C. at 110, 671 S.E.2d at 641 ("[W]hen there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.").

Based on the foregoing, the negligent misrepresentation claim accrued no later than early November 2004 as a matter of law, and therefore, the circuit court erred in submitting this question to the jury. Because Walbeck failed to file the Complaint until December 22, 2010 and failed to file the Second Amended Complaint on the HOA's behalf until February 7, 2012, the negligent misrepresentation claim is barred by the statute of limitations. Accordingly, we reverse the corresponding denial of Appellants' JNOV motion as to this claim.

ILSA

In the ILSA claim, Respondents alleged:

> 60. Defendants have violated [ILSA] by: (1) issuing a Property Report that made representations to prospective purchasers of lots that were false; . . . (2) continually distributing copies of the Property Report to potential purchasers, with knowledge that it contained false representations and that these representations would likely be relied upon, and were in fact relied upon by numerous lot purchasers in I'On; [or] (3) failing to honor the representations therein.

Like the negligent misrepresentation claim, the question as to the ILSA claim is when Walbeck knew or should have known of the falsity of the representations in the 1998 Property Report. As we previously explained, the only reasonable inference from the evidence is that Walbeck should have known of the falsity of these representations by early November 2004. Therefore, the circuit court erred in submitting this question to the jury. Accordingly, we reverse the corresponding denial of Appellants' JNOV motion as to this claim.

Breach of Fiduciary Duty

The HOA's breach of fiduciary duty claim included the following allegations:

> 72. Defendants have a fiduciary relationship to the Plaintiffs by virtue of their capacity as the developer and steward of the I'On community amenities and their former capacity controlling the Board of [the HOA].
>
> 73. Defendants breached the fiduciary relationship by failing to honor their trust, by failing to disclose their breach of duty, by failure to enforce [the HOA's] rights, and by self-dealing.

Unlike the allegations in Walbeck's negligent misrepresentation claim, the allegations of paragraph 73 cover more than one breach, i.e., failing to honor their trust, failing to disclose their breach of duty, failure to enforce the HOA's rights, and self-dealing. While these breaches include the representation in the 1998 Property Report that induced certain homeowners to purchase their lots, they are not limited to that one act of wrongdoing. Thus, the question is when should the HOA's representatives (Walbeck and Adkins) have known of these other breaches.

More than one reasonable inference exists as to when Walbeck and Adkins should have known of Appellants' alleged failures and their alleged self-dealing beyond the alleged false promise in the 1998 Property Report. HOA members learned of Russo's November 2008 agreement to purchase lots CV-5 and CV-6, including the Community Dock and boat ramp. However, in March 2009, Russo advised the HOA's president, Bruce Kinney, that he had abandoned his agreement. Appellants then advised Kinney and the HOA's management company that ownership of the Community Dock would be transferred to the HOA. Yet, on August 1, 2009, the HOA's members learned of a new contract of sale between Appellants and Russo when Kinney posted an "I'On Community Bulletin" advising members of the contract. Appellants and Russo then closed the deal on August 5, 2009.

Based on the foregoing, the circuit court properly submitted to the jury the question of when the HOA's breach of fiduciary duty claim accrued. *See Sabb*, 350 S.C. at 427, 567 S.E.2d at 236 ("In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions."); *id.* ("The trial court must deny the motions when the

evidence yields more than one inference or its inference is in doubt."). Therefore, we affirm the denial of Appellants' JNOV motion as to the accrual of the HOA's breach of fiduciary duty claim.

II. Abuse of Process

Pursuant to Rule 220(b), SCACR, and the following authorities, we affirm the circuit court's directed verdict on Appellants' counterclaim for abuse of process: *Pallares v. Seinar*, 407 S.C. 359, 370–71, 756 S.E.2d 128, 133 (2014) (holding that the ulterior or improper purpose element of abuse of process "exists if the process is used to secure an objective that is *'not legitimate in the use of the process*'" (emphasis added) (quoting *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2012))); *Swicegood v. Lott*, 379 S.C. 346, 353, 665 S.E.2d 211, 214 (Ct. App. 2008) ("The improper purpose usually takes the form of coercion to obtain a *collateral* advantage, *not properly involved in the proceeding itself*, such as the surrender of property or the payment of money, by the use of the process as a threat or club." (emphases added) (quoting *Huggins v. Winn–Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967))).

III. Recreational Easement

Appellants maintain the circuit court erred in (1) finding that section 4.2 of the Recreational Easement limited the term of the easement to thirty years, superseding previous language stating the easement was perpetual, and (2) concluding that the Recreational Easement was invalid. However, Appellants did not appeal all of the grounds on which the circuit court based its declaration of invalidity. Namely, they failed to challenge the circuit court's conclusion that the Recreational Easement was not an arms-length transaction. Therefore, this court will affirm the circuit court's declaration under the two-issue rule. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the [two-issue] rule, [when] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *id.*, 692 S.E.2d at 903–04 (noting that the two-issue rule can be applied to situations not involving a jury); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (affirming the trial court's decision because the plaintiff did not appeal all grounds for the decision); *see also* Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 214 (3rd ed. 2016) ("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.").

Even if Appellants had challenged the conclusion that the Recreational Easement was not an arms-length transaction, we agree with the circuit court. The evidence shows that the same individual, Joe Barnes, the I'On Company's general manager, signed the Recreational Easement on behalf of all three parties to the transaction, the I'On Company, the I'On Club, and the HOA. Therefore, we may affirm on this basis as well. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

As we affirm the circuit court's declaration of invalidity, we need not address Appellants' challenge to the finding that the Recreational Easement was limited to a term of thirty years. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

IV. Derivative Action

Appellants argue the circuit court erred by concluding Walbeck and Adkins properly filed and maintained their derivative claims against Appellants. Appellants request this court to dismiss the derivative claims on the grounds that (1) Walbeck and Adkins neither pleaded nor proved that they made a demand on the HOA to initiate litigation or that such a demand would have been futile, and (2) Walbeck and Adkins did not fairly and adequately represent the interests of other HOA members similarly situated in enforcing the HOA's rights. We disagree.

Rule 23(b)(1), SCRCP, addresses the procedural requirements for individuals seeking to file a derivative action. It states,

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. *The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he*

> *desires from the directors or comparable authority* and, if necessary, from the shareholders or members, *and the reasons for his failure to obtain the action or for not making the effort.* The derivative action may not be maintained if it appears that the plaintiff *does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.*

(emphases added).

The demand requirement referenced in Rule 23 originated in our state's substantive law. *See Grant v. Gosnell*, 266 S.C. 372, 374, 223 S.E.2d 413, 414 (1976) ("Generally, in order for a stockholder to be able to sue for corporate injuries, he must allege that he has exhausted his remedies within the corporation or show a sufficient reason for not doing so." (citing *Latimer v. Richmond & D.R. Co.*, 39 S.C. 44, 17 S.E. 258 (1893) and *Thompson v. Thompson*, 214 S.C. 61, 51 S.E.2d 169 (1948))); *Latimer*, 39 S.C. at 52–53, 17 S.E. at 261 ("[B]efore the shareholder is permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. . . . [H]e must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity . . . ."); Rule 23(b)(1), Note ("This Rule 23(b)(1) is the language of present Federal Rule 23.1. *Existing State practice* permits a class action in these circumstances. The Rule simply provides more specific guidance for the procedure." (emphasis added) (citations omitted)).[8]

In *Grant*, our supreme court held that the question of whether the plaintiff's failure to seek redress within the bank of which he was a stockholder was

---

[8] This court's opinion in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000), *certiorari granted* August 23, 2001, has been cited in all of the parties' appellate briefs. After our supreme court granted certiorari in *Whittle*, the parties settled the case and the court issued an order on January 10, 2003, stating that this court's opinion would "remain viable in result only." Therefore, we do not view *Whittle* as binding precedent.

excusable was "a factual question, the resolution of which . . . should be affirmed unless unsupported by the evidence or influenced by error of law." 266 S.C. at 375, 223 S.E.2d at 414. The court evaluated the circuit court's conclusion that the plaintiff's pursuit of redress within the bank would have been futile and held it was supported by the evidence because "[t]he record reflect[ed] that [the defendant] was chairman of the board of directors, and the owner of a majority of [the bank's] stock" when the plaintiff filed his derivative action alleging the defendants' fraud and mismanagement. *Id.* at 375–77, 223 S.E.2d at 414–15. "Possessed of this control of the stock of the corporation, *it is reasonable to infer* that [the defendant] would not voluntarily permit corporate action designed to grant relief for the grievances alleged in the complaint in which he is named as a wrongdoer." *Id.* at 376, 223 S.E.2d at 415 (emphasis added).

In the present case, Walbeck's and Adkins' derivative claims survived Appellants' motion to dismiss and motion for summary judgment. Undoubtedly, "the denial of a motion for summary judgment is not appealable, even after final judgment." *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003). On the other hand, when judicial economy is served, the denial of a motion to dismiss may be considered in an appeal from other appealable rulings in the same action. *See Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) ("Here, an [appealable] order . . . is before the [c]ourt and, in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy), we will consider [the respondent's] cross-appeal."). However, judicial economy would not be served by limiting our review to the record as it existed when the circuit court denied the motion to dismiss. Rather, as a result of surviving the motion to dismiss and the summary judgment motion, Walbeck and Adkins endured the time and expense of a lengthy trial on the derivative claims. Therefore, it would be wasteful, not to mention unfair, to ignore the evidence generated at trial on this issue.

Therefore, we will look to the record before the circuit court at trial. The documentary evidence, namely the Declaration of Covenants, Conditions, and Restrictions (Covenants), as well as the testimony before the circuit court showed that Appellants had a veto power over the decisions of the Board. Section 9-104(c) of the Covenants states, in pertinent part,

> So long as the [the I'On Company] Membership exists, the [the I'On Company] shall have a right to disapprove any action, policy[,] or program of [the HOA, the Board,] and any committee [that], in the sole judgment of [the

> I'On Company], would tend to impair rights of [the I'On Company] or Builders under [the Covenants] or the Bylaws, or interfere with development or construction of any portion of I'On, or diminish the level of services being provided by [the HOA].

Further, one Board member, Debra Bedell, testified regarding her understanding that the veto power would have prevented the Board from initiating litigation.[9] Therefore, the evidence shows that a demand on the Board to initiate litigation against Appellants would have been futile.

Additionally, the circuit court properly found Walbeck and Adkins fairly and adequately represented the interests of the other HOA members because Walbeck and Adkins were represented by highly qualified counsel and were similarly situated to the other HOA members. *See* Rule 23(b)(1) ("The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members *similarly situated* in enforcing the right of the corporation or association." (emphasis added)); *cf. Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983) (interpreting the fourth class action requirement under Rule 23(a), FRCP, and holding, "In determining whether [the plaintiff] would be an adequate class representative, this court should look at two criteria—(1) the representative must have common interests with the unnamed members of the class; and (2) it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel."); *Jordon v. Bowman Apple Prod. Co.*, 728 F. Supp. 409, 412 (W.D. Va. 1990) ("Rule 23.1

---

[9] At oral argument, Appellants stated that Bedell "recanted" her testimony. However, we do not view her clarification of her initial testimony as a recantation. Counsel for the HOA had initially asked Bedell if there was anything in the HOA's controlling documents preventing the Board from filing suit against Appellants. Bedell responded that any attempt by the Board to file suit against Appellants would have been subject to Appellants' veto power. Later in the trial, Appellants' counsel recalled Bedell to the witness stand, outside the jury's presence, to question her regarding Appellants' veto power. At this time, Bedell clarified that she did not serve on the Board until after Walbeck and Adkins had already filed suit against Appellants on the HOA's behalf. 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."

places no minimum numerical limits on the number of shareholders who must be 'similarly situated.' In appropriate circumstances a single shareholder may be situated in a unique position and thus constitute a legitimate 'class of one.'" (citation omitted) (quoting *Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177, 180 (N.D. Ill. 1987))); *Halsted*, 115 F.R.D. at 180 ("Rule 23.1[, FRCP] does not require a derivative action plaintiff to represent the interests of shareholders with whom he is not similarly situated.").

According to the circuit court, the testimony of three HOA members, Julie Hussey, Tim Eble, and Deborah Bedell, indicated that Walbeck's and Adkins' assertion of the derivative claims advanced the interests of the HOA's members. The testimony of these witnesses supports the circuit court's finding. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 (holding an appellate court may reverse the circuit court's rulings on JNOV motions only when there is no evidence to support the rulings or when the rulings are controlled by an error of law).

Appellants also allege that Walbeck and Adkins were required to make another demand following the settlement of their claims against Russo. Appellants argue the settlement resulted in the HOA gaining ownership of the disputed property and realigning its party status to join Walbeck and Adkins as plaintiffs.[10] Appellants further argue, "[t]he nature of the relief sought against Appellants thus changed substantially . . . enough that Respondents' claims are new claims." Appellants refer to damages claimed "based on the cash price of the settlement, the alleged leasehold value of the Creek Club building, and the alleged price of the buyout of years 21-30 of that lease." We disagree.

A new demand was unnecessary following the settlement because the resulting change to the damages sought did not change the nature of the original claims. Moreover, the HOA's realignment as a plaintiff allowed the jury to award damages to the HOA as if Walbeck and Adkins had never brought a derivative action.

Based on the foregoing, we affirm the circuit court's ruling that Walbeck and Adkins properly maintained a derivative action on the HOA's behalf.

V. Fiduciary Duty

[10] The order realigning the HOA as a party plaintiff was made upon Appellants' motion.

Appellants argue the circuit court erred in concluding they owed a fiduciary duty to convey title to the disputed property to the HOA. We agree, but we conclude that Appellants owed a fiduciary duty to protect the rights of the HOA's members to the unfettered use and enjoyment of the disputed property and there was evidence showing Appellants breached this duty. Therefore, we affirm the circuit court's denial of the JNOV motion as to the fiduciary duty claim. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

In its order denying Appellants' JNOV motion, the circuit court stated, "When considering facts similar to those presented here, South Carolina courts have found a fiduciary relationship exists between developers and property owners."[11] The circuit court further stated,

> [A] developer's failure to convey community properties in their entirety is at least the equivalent of conveying them in "substandard condition" (if not worse), and thus, any distinction between properties which *should have been conveyed* and *properties which were actually conveyed in a substandard condition* is a distinction without a difference. . . . In other words, by failing to convey the community properties *as promised* to the [HOA, Appellants] failed to act in the best interest of the [HOA], and therefore, breached at least one of the fiduciary duties it owed the [HOA].

(circuit court's emphases). As the circuit court's ruling concerns a question of law, this court reviews the ruling de novo. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) ("Whether the law recognizes a particular duty is an issue of law to be decided by the [c]ourt."); *Fesmire*, 385 S.C. at 302, 683 S.E.2d at 807 ("This [c]ourt reviews all questions of law de novo.").

---

[11] The circuit court was referring to *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 562 S.E.2d 633 (2002) and *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993). Both cases involved a developer conveying to a homeowners association title to common areas that were in substandard condition. We will discuss these two opinions further below.

Appellants maintain the circuit court confused the contractual duty allegedly created by the 1998 Property Report with a fiduciary duty to the HOA. "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Hendricks*, 353 S.C. at 456, 578 S.E.2d at 714. "Ordinarily, the common law imposes no duty on a person to act. [When] an act is *voluntarily undertaken*, however, the actor assumes the duty to use due care." *Id.* at 456–57, 578 S.E.2d at 714 (emphasis added). Consistent with this proposition is this court's explanation of the foundation for a fiduciary duty: "A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Goddard*, 310 S.C. at 414, 426 S.E.2d at 832 (quoting *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987)). "Courts of equity have been careful to define fiduciary relationships so as not to exclude new cases that may give rise to the relationship." *Id.*

In *Goddard,* this court compared the duty of a developer of a planned unit development (PUD) to its villa owners, prior to the formation of the villa owners association, to the duty of the promoters of a corporation: "Both are entrusted by interested investors to bring about a viable organization to serve a specific function. Both should be expected to use good judgment and act in utmost good faith to complete the formation of their organizations." 310 S.C. at 415, 426 S.E.2d at 832. The court found merit in the appellants' argument that the developer had a responsibility to ensure the common areas were in good repair when they were conveyed to the villa owners' association. *Id.* The court also recognized the evidence showing that the common areas were substandard when the developer turned them over to the association. *Id.*

The court highlighted evidence that the developer "seized the opportunity . . . to 'unload' the common areas on the [a]ssociation without a plan to establish a reserve or a plan to fund the [a]ssociation until such time as assessments were adequate to cover maintenance expenses." *Id.* The court stated, "It seems unfair to the villa owners for the [d]eveloper to burden them with substandard or deteriorated common areas that required an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures." *Id.* In *Concerned Dunes West*, our supreme court adopted this court's analysis in *Goddard* and held, "The developer of a PUD owes a duty to [a homeowners association] to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for

bringing the common areas up to standard." 349 S.C. at 256–57, 562 S.E.2d at 637.

Here, the evidence shows Appellants met their promoter-like duty to bring about a viable homeowners association, complete with a funding mechanism and guidance for self-governance through the Covenants. We do not view the failure to honor the contractual commitment allegedly created by the 1998 Property Report as a violation of Appellants' promoter-like fiduciary duty. Rather, as we explain below, Appellants' retention of control over the HOA throughout the years preceding the sale of lot CV-6 to Russo created a continuing fiduciary relationship between Appellants and the HOA.

Prior to recognizing the fiduciary duty a developer owes to homeowners as the development's promoter, the *Goddard* court addressed the appellants' argument that a fiduciary duty arose from the developer's control of the villa owners' association. 310 S.C. at 413, 426 S.E.2d at 831. Specifically, the villa owners asserted that the superior voting strength of the developer and its president created "a fiduciary obligation to assess the villa owners at a level necessary to maintain sufficient reserves to adequately maintain the common areas." *Id.* The court stated, "*Assuming a fiduciary relationship exists* between the appellants and respondents because of their superior voting power, it is clear that the respondents have refrained from exercising their superior voting strength to effectuate higher assessments in deference to the wishes of the appellants to keep the assessments low." *Id.* at 414, 426 S.E.2d at 832 (emphasis added). Rather than rejecting the existence of a fiduciary duty at this stage in the relationship, the court declined to hold that this particular conduct of the developer violated a fiduciary duty to the villa owners. *Id.*

Again, the court recognized, "Courts of equity have been careful to define fiduciary relationships so as not to exclude new cases that may give rise to the relationship." *Id.* Instead, the court invoked the business judgment rule *as to the developer's determination of assessments only.*[12] When the court turned to the developer's transfer of the common areas to the association, it detected a

[12] The business judgment rule states, "In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." *Id.*

fundamental unfairness in the developer's seizing of the opportunity "to 'unload' the common areas" on the association in substandard condition and without adequate funding. *Id.* at 415, 426 S.E.2d at 832. The court indicated that this particular conduct triggered the rule set forth in *Island Car Wash*: "A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Id.* at 414, 426 S.E.2d at 832 (quoting *Island Car Wash,* 292 S.C. at 599, 358 S.E.2d at 152).

Here, Appellants retained continuing control of the HOA up to and including the date they conveyed lot CV-6 to Russo. The Covenants provided that the I'On Company, as Founder, had the authority to "appoint, remove[,] and replace the members of [the HOA's] Board of Trustees" for a limited period of time not to exceed twenty years after the Covenants' recording. The I'On Company also had the authority to

> disapprove any action, policy[,] or program of the [HOA], the Board of Trustees, and any committee [that], in the sole judgment of the [I'On Company], would tend to impair rights of [the I'On Company] or Builders under [the Covenants] or the Bylaws, or interfere with development or construction of any portion of I'On, or diminish the level of services being provided by the [HOA].

At trial, Thomas Graham testified that the I'On Company still retained these veto rights.

Appellants contend there were no developer-appointed directors serving on the HOA's Board after December 2005 and Appellants have never exercised any of the I'On Company's veto rights.[13] However, as in *Goddard,* Appellants' asserted restraint does not speak to the *existence* of a duty arising from their veto power but rather to the manner in which they carried out such a duty. *See id.* (assuming arguendo the existence of a fiduciary duty and declining to find a violation of any such duty by invoking the business judgment rule). Therefore, we reject

[13] Appellants admit that in 2014, the I'On Company appointed a Board member, Chad Besenfelder, but he was excluded from participating in "Board decisions that would potentially be adverse to the I'On Company."

Appellants' argument that their restraint from exercising the veto power precludes the existence of a fiduciary duty.

Nonetheless, the circuit court's denial of Appellants' JNOV motion was based on its extrapolation of a duty *to convey title* to all common areas from the duty pronounced in *Goddard* and *Dunes West*, i.e., the duty to turn over common areas that are not substandard and that are in good repair. Current South Carolina case law does not recognize the precise duty to convey title to all common areas, and thus, the denial of Appellants' JNOV motion was based on an error of law. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 ("[The appellate court] will reverse the [circuit] court's rulings on [directed verdict and JNOV] motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law.").

Rather, we view Appellants' fiduciary duty as a duty to "act in good faith and with due regard to the interests of the" HOA's members. *See Goddard*, 310 S.C. at 414, 426 S.E.2d at 832 ("A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." (quoting *Island Car Wash*, 292 S.C. at 599, 358 S.E.2d at 152)). Because of Appellants' retention of continuing control of the HOA and their representations in 2008 and 2009 that they would convey the disputed property to the HOA, they are governed by standards set forth in *Island Car Wash*:

> [A]nyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. . . . [C]ourts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage *at the expense of the person under his influence*.

292 S.C. at 599, 358 S.E.2d at 152 (emphasis added).

In the present case, all parties considered the disputed property to be common areas, designated by the Covenants as "Commons," because the HOA

purportedly held "use rights," via the Recreational Easement,[14] "for the common use and enjoyment of Titleholders." Hence, the HOA was "exclusively responsible for the control and management" of the disputed property, and the I'On Company's control of the HOA undoubtedly required the I'On Company to preserve the rights of the HOA's members to the unfettered use and enjoyment of these common areas.

Yet on at least two occasions, Appellants placed the HOA's members in a position of having to compete with non-members for access to the disputed property. First, in 1998 and 1999, the I'On Group, then known as Civitas, negotiated with a neighboring subdivision's developer for the sale of access rights to the Community Dock and the boat ramp on lot CV-6, which was owned by the I'On Company at the time. This occurred without the knowledge of the HOA's members. While the Covenants allow the HOA to grant easements over common areas, the purpose of such an easement must be "consistent with the interests of the [HOA]."[15]

Next, the I'On Company relinquished its ownership interest in lot CV-6 to the I'On Club and ultimately to Russo. While the I'On Club made the conveyance of lot CV-6 to Russo expressly subject to the Recreational Easement when its validity was not being questioned, this easement was "nonexclusive." Again, this placed the HOA's members in a position of having to compete with non-members for access to the disputed property. Further, there is evidence in the record from which the jury could have reasonably inferred Appellants' bad faith. In the light most favorable to Respondents, the evidence shows Appellants' intent to profit from the disputed property at the expense of the HOA's members. *See Sabb*, 350 S.C. at 427, 567 S.E.2d at 236 ("In ruling on directed verdict or JNOV motions, the [circuit] court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the

---

[14] Before the present action was filed, the parties believed the Recreational Easement was valid. Therefore, the instrument's invalidity did not affect the parties' actual treatment of the disputed property as common areas for purposes of the fiduciary duty analysis.

[15] On April 8, 2000, Appellants amended the Covenants to state that the I'On Company had an easement over the common areas for the purpose of conducting parades, sporting events, and "other activities of general community interest." We do not interpret this provision as encompassing the regular, continuing access of non-members to the amenities on lot CV-6.

motions."); *id.* ("The [circuit] court must deny the motions when the evidence yields more than one inference or its inference is in doubt.").

In late June and early July 2007, Thomas Graham asked Chad Besenfelder to advise him "what rights" the HOA had "over the docks and boat ramp." Before receiving a response, Thomas Graham sent another e-mail to Besenfelder expressing his desire to keep ownership of the Community Dock. In a later e-mail, he expressed his intent to "capitalize [the] potential value" of the Community Dock. Yet, Appellants continued to assure the HOA's members that they intended to convey the Community Dock and boat ramp to the HOA. These assurances led the HOA's members to "repose[] a special confidence in" Appellants, binding Appellants to "act in good faith and with due regard to the interests of" the HOA's members. *See Goddard*, 310 S.C. at 414, 426 S.E.2d at 832 ("A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." (quoting *Island Car Wash*, 292 S.C. at 599, 358 S.E.2d at 152)).

In the light most favorable to Respondents, the foregoing evidence shows Appellants acted in bad faith and profited at the expense of the HOA's members. In sum, there is sufficient evidence of Appellants' breach of their fiduciary duty to the HOA's members to affirm the denial of Appellants' JNOV motion as to this claim.

VI. Amalgamation

Appellants next argue the circuit court's ruling that Appellants were amalgamated was improper because the circuit court failed to consider the factors required by *Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984) for "piercing the corporate veil" to hold a corporation's principals personally liable for the corporation's wrongdoing. We disagree.

Our supreme court recently examined the "amalgamation of interests theory" in *Pertuis v. Front Roe Restaurants, Inc.*[16] The court recognized this court's previous applications of the theory in *Magnolia North Property Owners' Ass'n v.*

[16] Op. No. 27823 (S.C. Sup. Ct. filed July 5, 2018) (Shearouse Adv. Sh. No. 27 at 22). A petition for rehearing in this case is currently pending before the supreme court.

Heritage Communities, Inc.[17] and *Kincaid v. Landing Development Corp.*[18] as well as its own reference to the theory in *Kennedy v. Columbia Lumber & Manufacturing Co.*[19] In *Magnolia*, this court analyzed the relationship of the defendant corporations to their officers, directors, headquarters, employees, functions, written representations, and admissions of liability to determine whether there existed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." 397 S.C. at 358–60, 725 S.E.2d at 117–18 (quoting *Kincaid*, 289 S.C. at 96, 344 S.E.2d at 874). We concluded the evidence supported the trial court's ruling that the corporations were amalgamated. *Id.* at 360, 725 S.E.2d at 118.

In *Pertuis*, the court formally recognized the amalgamation of interests theory for the first time and indicated a preference for the term "single business enterprise theory." *Id.* at 33–34. Notably, the court held, "the single business enterprise theory requires a showing of more than the various entities' operations are intertwined," as the theory had previously been applied by our courts. *Id.* at 34. Rather, "[c]ombining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* In comparison, the *Sturkie* requirements for holding a corporation's principals personally liable for the corporation's wrongdoing are (1) the failure to observe corporate formalities and (2) "an element of injustice or fundamental unfairness if the" corporation's acts are "not regarded as the acts of" its principals. *See Mid-S. Mgt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597–98, 649 S.E.2d 135, 140–41 (Ct. App. 2007) (explaining *Sturkie*'s "two-prong[ed] test to determine whether a corporate veil should be pierced").

Therefore, the requirements for the single business enterprise theory as adopted by our supreme court overlap with the *Sturkie* requirements for piercing the corporate veil. The single business enterprise theory does not require a showing of the corporate defendants' failure to observe corporate formalities. However, the theory dovetails with the second prong of the *Sturkie* test, i.e., an element of injustice or fundamental unfairness, to place accountability where it belongs.

[17] 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012).
[18] 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986).
[19] 299 S.C. 335, 340–41, 384 S.E.2d 730, 734 (1989).

Here, in its order denying Appellants' JNOV motion, the trial court discussed in detail the fundamental unfairness inherent in Appellants' "misuse of [their] collective control" of the amenities promised to the HOA. Further, there is evidence of both an intertwining of the entities' operations and Appellants' bad faith. In particular, there was evidence of Appellants' common employees, principals, and activities as well as the confusion displayed by those who dealt with Appellants as to which entity they were dealing with. *Cf. Mid-S.*, 374 S.C. at 605, 649 S.E.2d at 145 (rejecting the appellants' amalgamation argument and noting, *inter alia*, there was no evidence that the plaintiffs could confuse a corporate defendant with its parent companies).

Further, the evidence shows that Appellants' common employees and principals acted in concert to profit at the expense of the HOA's members. The intertwining of the operations of Appellants' entities undoubtedly facilitated this behavior, making it fundamentally unfair to assign liability to any one or more of these entities to the exclusion of the others. For example, in 1998 and 1999, the I'On *Group*, then known as Civitas, negotiated with a neighboring subdivision's developer for the sale of access rights to the Community Dock and the boat ramp on Lot CV-6, although the rights were owned by the I'On *Company* at the time. This occurred without the knowledge of the HOA's members. In 2000, the I'On Company transferred lot CV-6 to the I'On Club, LLC, for inadequate consideration ($5.00) before it was ultimately sold to Russo.

This intertwining also played a role in Besenfelder's March 2009 representation to the HOA's management company that the I'On Company would deed the Community Dock on lot CV-6 to the HOA when, in fact, the I'On *Club* owned lot CV-6. Besenfelder's other communications likewise show that he referred to the various entities interchangeably. Also preceding the sale of lot CV-6 to Russo was Thomas Graham's secret expression of a desire to "capitalize [the] potential value" of the Community Dock. The realization of Graham's intent through the sale to Russo, in addition to the 1999 sale of access rights, placed the HOA's members in a position of having to compete with non-members for access to the disputed property. In other words, the secret sale of access rights to a neighboring subdivision's developer as well as the surprise sale of ownership to Russo benefitted Appellants at the expense of the HOA's members.

Based on the foregoing, we affirm the circuit court's conclusion that Appellants were amalgamated.

VII. ILSA Claim

Appellants maintain that Walbeck's ILSA claim fails because Walbeck did not rely on any representations made in the 1998 Property Report. We need not address this argument because the ILSA claim is barred by the statute of limitations. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

VIII. Attorney's Fees for Walbeck

We need not address Appellants' challenge to the amount of fees awarded to Walbeck pursuant to 15 U.S.C. § 1709(c) because his ILSA claim is barred by the statute of limitations and, thus, he may not recover attorney's fees under § 1709(c). We reverse the circuit court's award under this statute.

IX. Attorney's Fees against Adkins

Appellants claim they were entitled to an award of attorney's fees against Adkins on her breach of contract claim because they were the prevailing party pursuant to the fee-shifting provision in Adkins' lot purchase agreement. We affirm the circuit court's order denying attorney's fees against Adkins.

Appellants sought an award of attorney's fees against Adkins pursuant to the following provision in her lot purchase agreement: "If either party requires services of an attorney to enforce obligations under this Agreement, the prevailing party shall be due from the non-prevailing party reasonable attorneys' fees, costs[,] and expenses actually incurred." The circuit court denied the requested award because Adkins prevailed on three of her derivative claims against Appellants and there was "no practical or legal way to separate the derivative verdicts from Adkins or to attribute them more to Walbeck[] just because he prevailed on his claim for personal damages and Adkins did not." The circuit court also noted that while Adkins did not prevail on her breach of contract claim, she prevailed as to Appellants' counterclaim for abuse of process, "resulting in a draw on the individual claims."

In *Heath v. County of Aiken*, our supreme court interpreted the term "prevailing party" within the context of section 15-77-300 of the South Carolina Code (Supp. 1989), which authorizes the recovery of attorney's fees and costs by a party contesting state action. 302 S.C. 178, 182–83, 394 S.E.2d 709, 711–12 (1990). The determination of whether the movant was a prevailing party was one

of the factors under the statute examined by the court, which reviewed the circuit court's award under an abuse of discretion standard of review. *Id.* at 182, 394 S.E.2d at 711. The court stated, "A prevailing party has been defined as:

> [t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.

Id. at 182–83, 394 S.E.2d at 711 (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (Alaska 1964)).

The "prevailing party" analysis in *Heath* lends support to the circuit court's analysis of Appellants' request for attorney's fees pursuant to the fee-shifting provision in Adkins' lot purchase agreement, even considering that one of the three derivative claims (negligent misrepresentation) is barred by the statute of limitations. Further, this court may affirm for any ground appearing in the record. Rule 220(c), SCACR. Here, Appellants' petition for attorney's fees does not indicate that the addition of Adkins as a plaintiff required any significant increase in the efforts of counsel to defend this case. While the petition requests one-half of the total fees and expenses incurred from the date of the Second Amended Complaint's filing through the end of trial, it does not state that Adkins' presence in the case actually generated a corresponding amount of time or money expended. Moreover, counsel's attorney's fee affidavit is not in the record.

Based on the foregoing, we affirm the denial of Appellants' request for attorney's fees against Adkins.

CONCLUSION

We reverse the denial of Appellants' JNOV motion as to the negligent misrepresentation and ILSA claims because they are barred by the statute of limitations, but we affirm the denial of Appellants' JNOV motion as to all other grounds. We affirm the order declaring the Recreational Easement invalid and the order denying Appellants' request for attorney's fees against Adkins. Finally, we reverse the award of attorney's fees to Walbeck.

AFFIRMED IN PART and REVERSED IN PART.

LOCKEMY, C.J., and HUFF, J., concur.

87644

RECEIVED
AUG 23 2018
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

PETITION FOR REHEARING

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

Attorneys for Appellants

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

I. THE COURT MISAPPREHENDS THE LAW OF FIDUCIARY DUTY.

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

App. 2003); *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); *Nat'l Loan & Exch. Bank v. New York Life Ins. Co.*, 149 S.C. 378, 147 S.E. 322, 323 (1929); *see also* Ap. Reply Br. at 16.

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

(Op. at 139 (emphasis added).)

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

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

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

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

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

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

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

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

[5] *See also* Section I.c, *infra*.

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

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

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

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

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

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

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

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

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

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

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

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

> **represented as a part of the planned development**, in good condition, or with the funds to effectuate any needed repairs; and to act in the best interests of property owners while controlling the development's property owners association.
>
> Whenever a fiduciary relationship exist between two parties, **and a business transaction occurs between them**, and the superior party obtains an advantage or a possible benefit, a presumption arises against the transactions validity, and shifts the burden of proving the good faith nature of said transaction upon the superior party.
>
> Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material. When this duty to disclose is triggered, a party's silence may constitute fraud.
>
> Furthermore, a fiduciary relationship is one of mutual trust and confidences, imposing upon the party the requirements of loyalty, good faith, and fair dealing. One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relationship.
>
> In a breach of fiduciary duty case, the **Plaintiff is entitled to damages for harm by the breach of fiduciary duty owed to him or her. Damages in an action for breach of a fiduciary duty, are those proximately resulting from the wrongful conduct of the defendant**.

(R. pp. 1699-1701 (emphases added).)[7]

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

III. THE COURT MISAPPREHENDS THE SINGLE BUSINESS ENTERPRISE THEORY.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

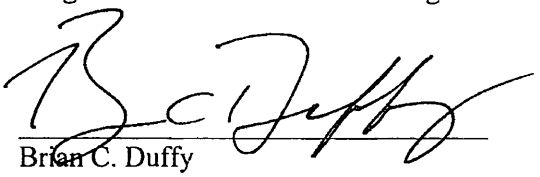
It is unnecessary for the Court to borrow the definition of "prevailing party" from a case analyzing a statutory provision for attorney's fees. After misplacing its focus on a singular, inapplicable case, the Court entirely ignores Appellants' discussion of case law that makes clear that it is an abuse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

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

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

CONCLUSION

Appellants request that the Court grant this Petition for Rehearing.



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

August 22, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
AUG 23 2018
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

PROOF OF SERVICE

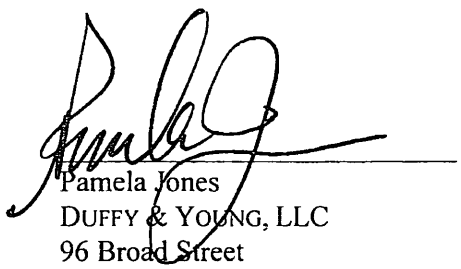
I, Pamela Jones, Paralegal for Duffy & Young, LLC, certify that I have served the **PETITION FOR REHEARING** on Respondents on August 22, 2018 by U.S. mail to their attorneys of record as shown below:

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

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

Timothy W. Bouch, Esq.
Yancey A. McLeod, III, Esq.
Leath Bouch & Seekings
92 Broad Street
Charleston, SC 29401
Phone: 843-937-8811

Attorneys for Respondent I'On Assembly, Inc.



Pamela Jones
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)
Paralegal

August 22, 2018
Charleston, South Carolina

DUFFY & YOUNG LLC
96 BROAD STREET, CHARLESTON SC 29401
telephone 843-720-2044 facsimile 843-720-2047
ATTORNEYS AT LAW

August 22, 2018

VIA FEDERAL EXPRESS

RECEIVED
AUG 23 2018
SC Court of Appeals

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

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

Dear Ms. Kitchings:

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

Please file the originals and return a file-stamped copy of the Petition for Rehearing and Proof of Service to our office in the enclosed self-addressed stamped envelope.

I appreciate your assistance in this matter. Should you have any questions or concerns, please do not hesitate to contact me.

Respectfully,

Pamela Jones
Parelegal

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

pjones@duffyandyoung.com
WWW.DUFFYANDYOUNG.COM

FedEx. FedEx. FedEx.

ORIGIN ID:RBWA (843) 720-2044
DUFFY & YOUNG
96 BROAD STREET
CHARLESTON, SC 29401
UNITED STATES US

SHIP DATE: 22AUG18
ACTWGT: 1.00 LB
CAD: 7846748/INET4040

BILL SENDER

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

COLUMBIA SC 29201
(803) 734-1890 REF.
INV
PO DEPT

552J163309/DCA5

FedEx. Express

REL# 3785346

THU - 23 AUG 10:30A
PRIORITY OVERNIGHT

TRK# 0201 7730 4084 9870

28 USCA

29201
SC-US CAE

RECEIVED
AUG 29 2018
SC Court of Appeals

FedEx 146525 Rev. 02/09 RRDO 15

FedEx. FedEx. FedEx.

After printing this label:
1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.
Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com. FedEx will not be responsible for any claim in excess of $100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim. Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of $100 or the authorized declared value. Recovery cannot exceed actual documented loss. Maximum for items of extraordinary value is $1,000, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

APPENDIX 0059

87052

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED
AUG 23 2018
SC Court of Appeals

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

RESPONDENTS' PETITION FOR REHEARING

Justin O'Toole Lucey, Esquire
SC Bar No.: 15438
Joshua F. Evans, Esquire
SC Bar No.: 77448
JUSTIN O'TOOLE LUCEY, PA
415 Mill Street
Mount Pleasant, South Carolina 29464
(843) 849-8400
(843) 849-8406 (fax)
jlucey@lucey-law.com
jevans@lucey-law.com
Attorneys for the Respondents

PETITION FOR REHEARING

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

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

QUESTIONS TO REHEAR

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

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

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

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

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

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

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

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

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

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

---

[1] The "Respondents" are: Brad Walbeck ("Walbeck"), Lee Ann Adkins ("Adkins"), and the I'On Assembly, Inc. ("HOA").
[2] "ILSA" refers to the Interstate Land Sales Full Disclosure Act, 42 U.S.C. §§1701-1720 (2010).
[3] The "Appellants" or "developers" are: The I'On Company, LLC, The I'On Club, LLC; The I'On Group, LLC f/k/a Civitas, LLC; and, I'On Realty, LLC.

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Opinion p. 127) (emphasis added).

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

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

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

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

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

A: It could be either one.

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

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

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

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

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

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

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

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

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

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

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

B. The Singular Inference this Court Drew is in Doubt

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

CONCLUSION

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

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

Justin O'Toole Lucey, Esquire
Joshua F. Evans, Esquire
415 Mill Street
Mt. Pleasant, SC 29464
(843) 849-8400
(843) 849-8406 (fax)
jlucey@lucey-law.com
jevans@lucey-law.com

Attorneys for the Respondents

Mt. Pleasant, South Carolina
August 23, 2018

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED
AUG 23 2018
SC Court of Appeals

Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

Case Tracking No.: 2015-001590

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

Respondents,

v.

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

Appellants.

PROOF OF SERVICE

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

JUSTIN O'TOOLE LUCEY, PA

Justin O'Toole Lucey, Esquire (Bar No. 15438)
Joshua F. Evans, Esquire (Bar No. 77448)
415 Mill Street
Mt. Pleasant, SC 29464
Telephone: 843.849.8400
Attorneys for the Respondents

JUSTIN O'TOOLE LUCEY, PA

Attorney at Law

Justin Lucey
Joshua F. Evans
Stephanie D. Drawdy
Dabny Lynn
James L. Floyd, III

415 Mill Street, Mount Pleasant, SC 29464
Reply to: P.O. Box 806, Mount Pleasant, SC 29465
Phone: 843.849.8400 · Fax: 843.849.8406 · office@lucey-law.com

Anna S. McCann
Lauren M. Milton
Taylor M. Morris
Sohayla M. Roudsari
Collin H. Fuller

August 23, 2018

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

RECEIVED
AUG 23 2018
SC Court of Appeals

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

Dear Ms. Kitchings:

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

Thank you for your time and attention to this matter.

Sincerely,

Faith

Faith Frink
Paralegal

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

The South Carolina Court of Appeals

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

v.

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

Appellate Case No. 2015-001590

ORDER

Appellants and Respondents have filed petitions for rehearing. After careful consideration of these petitions, the Court grants Appellants' petition, denies Respondents' petition, withdraws Opinion Number 5588, filed August 8, 2018, and substitutes the attached opinion.

C.J.

J.

J.

Columbia, South Carolina

FILED

February 27, 2019

cc:
Brian C Duffy, Esquire
Seth Warren Whitaker, Esquire
Julie Lauren Moore, Esquire
Justin O'Toole Lucey, Esquire
Joshua Fletcher Evans, Esquire
Timothy W. Bouch, Esquire
Yancey Alford McLeod, III, Esquire
The Honorable Stephanie P. McDonald

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2015-001590

Appeal From Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5588
Heard April 12, 2018 – Filed August 8, 2018
Withdrawn, Substituted and Refiled February 27, 2019

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Brian C. Duffy, Seth W. Whitaker, and Julie L. Moore, all of Duffy & Young, LLC, of Charleston, for Appellants.

Justin O'Toole Lucey and Joshua F. Evans, both of Justin O'Toole Lucey, P.A., of Mount Pleasant, for Respondents.

GEATHERS, J.: In this action alleging violation of the Interstate Land Sales Full Disclosure Act (ILSA), 42 U.S.C. §§ 1701 to -1720 (1994), Appellants, 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, seek review of the circuit court's orders (1) denying their motion for a judgment notwithstanding the verdict (JNOV) or new trial absolute and new trial nisi remittitur, (2) declaring a recreational easement invalid, (3) denying their motion for attorney's fees against Respondent Lea Ann Adkins, and (4) granting attorney's fees to Respondent Brad J. Walbeck.

Appellants argue (1) Walbeck and Adkins could not pursue this action as a derivative action; (2) Respondents' claims are barred by the statute of limitations; (3) the disputed recreational easement was valid and perpetual; (4) there was no fiduciary duty to convey certain amenities to the homeowners association, Respondent I'On Assembly, Inc.; (5) the directed verdict on Appellants' abuse of process counterclaim was improper; (6) Appellants were entitled to attorney's fees as the prevailing party on Adkins' breach of contract claim; (7) the attorney's fees award to Walbeck was unreasonable because he was awarded merely nominal damages on his ILSA claim; (8) the circuit court's ruling that Appellants were amalgamated was improper; and (9) Walbeck failed to show he relied on any representation made by Appellants and, therefore, he failed to establish a claim under ILSA.

We affirm in part, reverse in part, and remand for a new trial on Walbeck's breach of contract claim and the dismissal of all other claims.

FACTS/PROCEDURAL HISTORY

At the heart of this convoluted case is a developer's promise to convey certain amenities in a residential community to a homeowner's association. Specifically, Respondents allege that Appellants promised they would convey to Respondent I'On Assembly, Inc. (the HOA) the Community Dock and Creekside Park located on the civic lot on which the boat ramp was located (lot CV-6) in I'On Village but instead sold these amenities to a third party. Appellants, however, allege they promised to convey a "generic" community dock and creekside park to the HOA but not the specific ones located on lot CV-6. Appellants also allege they conveyed the amenities as promised.

I'On Village is located in Mount Pleasant. It was conceived by Thomas Graham and his son, Vince Graham. Thomas Graham's company, Graham Development, was the original majority owner of the I'On Company, LLC (the I'On

Company), and Vince Graham was the company's manager. The I'On Company's subsidiary, I'On Realty, LLC (I'On Realty), employed real estate agents to market the lots in I'On Village.

On November 27, 1999, Walbeck entered into a contract to purchase a lot in I'On Village. Walbeck's purchase contract incorporated a property report (the 1998 Property Report) that the I'On Company had filed with the United States Department of Housing and Urban Development (HUD) on November 3, 1998, pursuant to ILSA.[1] The report set forth information deemed necessary to protect prospective purchasers, including the amenities that would be provided to lot owners.

Specifically, the report included a chart listing amenities to be built during the first two phases of the development. Among the amenities to be built in Phase II was a "Creekside Park" and a "Community Dock." Under this listing was the following language:

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

The report also included the following notification:

> VARIOUS RECREATIONAL FACILITIES IN THE SUBDIVISION MAY BE OWNED AND OPERATED BY PERSONS OTHER THAN THE [HOA]. THERE IS NO GUARANTEE THAT ANY SUCH FACILITIES WILL BE AVAILABLE FOR USE BY LOT OWNERS. ANY, OR ALL OF SUCH FACILITIES MAY BE OPERATED AS A PRIVATE CLUB FOR MEMBERS AND THEIR GUESTS. THERE IS NO ASSURANCE THAT YOU WILL BE ACCEPTED FOR MEMBERSHIP IN ANY SUCH PRIVATE CLUB IF

[1] *See* 42 U.S.C. § 1707 (setting forth requirements for the contents of a property report, relating to the lots in a subdivision, to be made available to the public).

YOU APPLY. IF ACCEPTED, THE COSTS OF SUCH A MEMBERSHIP MAY BE SUBSTANTIAL AND ARE IN ADDITION TO THE PURCHASE PRICE OF YOUR LOT. NO REFUND OF THE PURCHASE PRICE OF YOUR LOT WILL BE MADE IF YOU CANNOT OBTAIN A MEMBERSHIP. SINCE THE VALUE OF YOUR LOT MAY BE ADVERSELY AFFECTED BY YOUR INABILITY OR FAILURE TO OBTAIN A MEMBERSHIP, YOU SHOULD CAREFULLY CONSIDER YOUR PURCHASE OF A LOT IF IT IS BASED UPON YOUR PRESUMED ABILITY TO OBTAIN A MEMBERSHIP IN ANY PRIVATE CLUB AND TO USE ITS RECREATIONAL FACILITIES.

Throughout the years after Walbeck received the 1998 Property Report, Appellants built multiple community docks and parks in I'On Village. Nonetheless, Respondents considered and expected the Community Dock and Creekside Park listed in the 1998 Property Report to be located on lot CV-6—this lot had at least 300 feet of deep water access to Hobcaw Creek. The I'On Company also completed construction of a building on lot CV-6 that became known as the "Creek Club." The Creek Club was intended as a venue for wedding receptions and other events. It operated as a private club and hosted its first event circa 2003.

Appellants vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park. At trial, Thomas Graham admitted that the Creek Club overlooked a park. He also admitted that when the I'On Company was planning its parks in 1999, the plans included "the Creek Club Park." In his deposition, Thomas Graham testified that the "Community Dock" listed in the 1998 Property Report referred to the main dock at the Creek Club that was adjacent to the boat ramp on lot CV-6; the boat ramp was built in 1999 or 2000, and the Creek Club dock was completed in 2000 or 2001.[2] However, at trial, Thomas Graham disputed that the "Community Dock" listed in the 1998 Property Report referred to the Creek Club dock. He explained the reference to a community dock in the 1998 Property Report "was to a generic community dock" and not to a specific property as Respondents contended. He stated, "[T]his was before we had designed anything -- got anything permitted or approved, even bought the land . . . . We didn't know

[2] Vince Graham testified that the dock was completed in late 2000 or early 2001, before the Certificate of Occupancy was issued for the Creek Club itself on April 10, 2001.

whether -- at that time, . . . we thought sure we'd get one -- at least one community dock, but we didn't know how many, so that was a reference to that community dock."

On February 9, 2000, the I'On Club, LLC (the I'On Club) executed a "Recreational Easement and Agreement to Share Costs" (Recreational Easement) purporting to "provide access to the [HOA] members for them to use the docks and the boating ramp" off lot CV-6.[3] The Recreational Easement also included language purporting to grant an easement to the I'On Club for use and access to certain common areas within I'On Village. On page three of the document, the easement is described as perpetual. However, section 4.2 of the Recreational Easement states that either party can terminate the easement after thirty years upon six months' notice. Thomas Graham described this language as a mistake because the I'On Club intended for the Recreational Easement to be permanent.

Section 3.1 of the Recreational Easement required the HOA to pay assessments "to cover a share of the costs incurred by [the I'On Club] in maintaining, repairing, replacing, operating[,] and insuring the Boating Facilities." The Boating Facilities were identified as "certain recreational facilities, including a boat ramp and dock and a driveway and parking area to serve them."

On April 10, 2000, the I'On Company completed an amended property report for filing with HUD (first amended Property Report). Whereas the 1998 Property Report listed a "Creekside Park" and a "Community Dock" among the amenities to be built in Phase II, the first amended Property Report's list substituted "Marshwalk (park)" for "Creekside Park" and "Community Docks" for "Community Dock." (emphasis added). The first amended Property Report also changed the language regarding transfer of these amenities to the HOA—whereas the 1998 Property Report provided for transfer of the Creekside Park and Community Dock to the HOA, the first amended Property Report stated, "The recreational facilities listed in the chart above, other than the sidewalks and community dock, 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." (emphasis added).

Jo Anne Stubblefield, the I'On Company's attorney for ILSA compliance, explained the amendment to the Property Report this way:

---

[3] Curiously, the I'On Club did not obtain title to lot CV-6 until six months later.

> [I]n early 2000[,] the decision was made to have the I'On Club own and maintain a parking area, boat ramp[,] and dock as part of the Club Facilities and grant an easement to the [HOA] for use of all of these facilities so that property owners would have the same use rights they would have had in the "community dock" referenced in the original Property Report, but in addition would have rights to use the parking area and boat ramp (which had not been mentioned in the original Property Report and which the property owners would otherwise have had no right to use unless they joined the Club). The Recreational Easement was drafted to create that easement and to provide for the [HOA] to contribute to the costs incurred by the Club in maintaining the boat dock, boat ramp, and parking area. Once that was finalized and recorded, we amended the HUD Property Report (effective April 2000) to reflect that . . . .

Thomas Graham testified that the name of the Creekside Park was changed to Marshwalk after the 1998 Property Report was provided to Walbeck to avoid confusion with a nearby neighborhood called "Creekside Park." He also testified that the Marshwalk was not on lot CV-6 or adjacent to Hobcaw Creek but ran for over two miles along the marsh, which was adjacent to a tributary of Hobcaw Creek. Vince Graham also testified that the "Creekside Park" was actually the Marshwalk.

On August 15, 2000, the I'On Company conveyed ownership of lot CV-6, including the Creek Club and boat ramp, to the I'On Club. Appellants conveyed the Marshwalk park to the HOA on November 21, 2000. Vince Graham testified that the conveyance included "docks two and three."

In July 2008, Mike Russo with 148 Civitas, LLC (Russo) submitted a proposal to buy lot CV-6, together with overflow parking on an adjacent lot (CV-5). The proposal included a provision for transfer of the "boat docks" to the HOA. Subsequent communications between Appellants and Russo indicated an intent to ultimately convey ownership of the boat ramp and dock off lot CV-6 to the HOA. However, in November 2008, Russo and Appellants entered into an agreement that included the boat ramp and Community Dock in the transfer of lot CV-6 to Russo, which was concerning to HOA members. The then-current president of the HOA's Board of Trustees (Board), Bruce Kinney, contacted Thomas Graham regarding modifying the Recreational Easement to protect the HOA members. One of the

modifications Kinney sought was making the easement perpetual. However, on January 5, 2009, Thomas Graham notified Chad Besenfelder that Appellants would not modify the Recreational Easement while the Creek Club was under contract for sale to Russo.

On March 11, 2009, Board President Kinney sent an e-mail to Thomas Graham indicating the Board's discovery of the 1998 Property Report's representation that the Community Dock would be conveyed to the HOA. Kinney expressed the HOA's expectation that the Community Dock would be excluded from the sale to Russo. Kinney's e-mail also inquired about the 1998 Property Report's listing of the Creekside Park as an additional amenity to be conveyed to the HOA.

Later in March 2009, Russo advised Kinney that he was cancelling the purchase agreement, and subsequently, Thomas Graham advised Kinney that Besenfelder was working out details for transferring ownership of the Community Dock to the HOA. Likewise, Besenfelder advised the HOA's management company that ownership of the Community Dock would be transferred to the HOA. However, by August 1, 2009, the HOA learned that Appellants and Russo had recently entered into a new contract for the sale of CV-6 to Russo, including the Creek Club, the boat ramp, and Community Dock.

On August 5, 2009, the I'On Club conveyed ownership of lot CV-6 to Russo in consideration of $1,400,000. On this same day, Thomas Graham, Vince Graham, and Geoff Graham conveyed ownership of lot CV-5 to Russo in consideration of $225,000.00.[4] The conveyance of lot CV-6 to Russo was expressly subject to the Recreational Easement, and the I'On Club executed a written assignment of its rights and obligations under the Recreational Easement to Russo.

On December 22, 2010, Walbeck filed his Complaint against Appellants and 148 Civitas, LLC, alleging causes of action for violation of ILSA, Breach of Contract, Breach of Fiduciary Duty, Fraud, Negligent Misrepresentation, Civil Conspiracy, violation of the South Carolina Unfair Trade Practices Act, Unjust Enrichment, Promissory Estoppel, "Veil Piercing/Alter Ego," and Tortious Interference with Contract. The complaint also alleged that Walbeck was bringing the action on behalf of himself and derivatively on the HOA's behalf. On March 8, 2011, Walbeck filed an Amended Complaint adding Mike Russo (in his individual capacity) and I'On Realty as defendants. Appellants filed a motion to dismiss Walbeck's action on May 27, 2011 pursuant to Rule 12(b)(6), SCRCP, asserting,

[4] Geoff is the son of Thomas and brother of Vince.

inter alia, Walbeck's claims were barred by the statute of limitations and Walbeck failed to satisfy the pleading requirements of Rule 23(b)(1), SCRCP, for a derivative action.

On February 7, 2012, Walbeck filed a Second Amended Complaint and Lea Ann Adkins joined Walbeck as a plaintiff. Walbeck and Adkins also added the HOA as a defendant and added an allegation that Appellants were amalgamated. On March 15, 2012, the circuit court issued an order denying Appellants' Rule 12(b)(6) motion to dismiss. On January 2, 2014, Respondents filed a Third Amended Complaint adding a cause of action for Aiding and Abetting against Russo. On January 13, 2014, Russo entered into a settlement agreement with Respondents. The terms of the settlement included Russo's sale of lot CV-6 to the HOA for $495,000 and the HOA's lease of the building, lawn, and three parking spaces back to Russo. The settlement terms also allowed the HOA access to the Creek Club for 13 dates per year and Russo's future conveyance of lot CV-5 to the HOA.

Subsequently, Respondents' action against Appellants proceeded to trial on January 14, 2014, but the action ended in a mistrial on January 17, 2014. On February 21, 2014, the HOA realigned its party status and adopted the other Respondents' claims set forth in the Third Amended Complaint. On May 12, 2014, Appellants filed a separate action against Respondents, seeking a declaration that the Recreational Easement was perpetual. The circuit court granted Appellants' motion to consolidate their action with the present action.

On June 16, 2014, Respondents filed their Fourth Amended Complaint reflecting the HOA's realignment as a plaintiff, Russo's dismissal from the action, and elimination of the claims for Tortious Interference and Aiding and Abetting. Exactly one year later, the circuit court issued an order declaring the Recreational Easement invalid and void ab initio because the I'On Club lacked title to lot CV-6 at the time it executed the easement. The circuit court also concluded the easement was not perpetual but was limited to a term of thirty years.

The parties re-tried the case from July 28 through August 1, 2014. The jury returned verdicts for Walbeck on his claims for violation of ILSA ($1), Negligent Misrepresentation ($20,000), and Breach of Contract ($10,000) and for the HOA on its claims for Breach of Contract ($1,000,000), Breach of Fiduciary Duty ($1,750,000), and Negligent Misrepresentation ($1,000,000). The HOA elected to recover on its Breach of Fiduciary Duty claim, and Walbeck elected to recover on his Negligent Misrepresentation claim. The circuit court denied Appellants' motion for a JNOV or new trial absolute and new trial nisi remittitur. The circuit court also

denied Appellants' motion for an award of attorney's fees against Adkins and awarded attorney's fees to Walbeck pursuant to ILSA. This appeal followed.

ISSUES ON APPEAL

1. Did Respondents properly file the derivative claims on the HOA's behalf?

2. Did the circuit court err by denying Appellants' JNOV motion as to the HOA's breach of fiduciary duty claim?

3. Were Respondents' claims barred by the statute of limitations?

4. Did the circuit court err by directing a verdict for Respondents on Appellants' abuse of process counterclaim?

5. Did the circuit court err by declaring the Recreational Easement invalid?

6. Did the circuit court err by concluding that Appellants were amalgamated?

7. Did the circuit court err by awarding attorney's fees to Walbeck?

8. Did the circuit court err by denying Appellants' request for attorney's fees against Adkins on her breach of contract claim?

STANDARD OF REVIEW

"In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* The appellate court "will reverse the trial court's rulings on these motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law." *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

"When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (quoting *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 634, 500

S.E.2d 145, 154 (Ct. App. 1998), *abrogated on other grounds by Webb v. CSX Transp., Inc.*, 364 S.C. 639, 653, 615 S.E.2d 440, 448 (2005)). A "JNOV should not be granted unless only one reasonable inference can be drawn from the evidence." *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154.

As to questions of law, this court's standard of review is de novo. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

LAW/ANALYSIS

I. Derivative Action

Appellants argue the circuit court erred by concluding Walbeck and Adkins properly filed derivative claims against Appellants pursuant to Rule 23(b)(1), SCRCP. We agree.

Rule 23(b)(1) addresses the procedural requirements for individuals seeking to file a derivative action. It states,

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. *The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority* and, if necessary, from the shareholders or members, *and the reasons for his failure to obtain the action or for not making the effort.* The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

(emphases added). Further, the determination of whether a plaintiff has met the requirements of Rule 23 is limited to assessing the sufficiency of the allegations

within the complaint. *See McCormick v. England*, 328 S.C. 627, 632–33, 494 S.E.2d 431, 433 (Ct. App. 1997) ("A ruling on a motion to dismiss a claim must be based solely on the allegations set forth on the face of the complaint.").[5]

"The purpose of the demand requirement is to 'affor[d] the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right.'" *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991)) (alteration in original) (quoting *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 533 (2009)). "Thus, the demand requirement implements 'the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders.'" *Kamen*, 500 U.S. at 101 (quoting *Daily Income Fund,* 464 U.S. at 530).

Here, Respondents' pleadings fall short of alleging facts indicating either an adequate demand by Walbeck or Adkins directed to the Board or the futility of making such a demand. The pleadings allege that "[s]everal I'On homeowners" repeatedly demanded the Board "to secure [the HOA] and its members the rights to the Creekside Park and Community Dock," including "unencumbered title, access, and use of" these amenities. The pleadings also include allegations that Walbeck and Adkins directed a demand to Appellants to convey title to these amenities to the HOA. However, the pleadings do not allege that either Walbeck or Adkins directed a demand to the Board to initiate litigation against Appellants to enforce the HOA's alleged rights and recover the disputed amenities.

Further, the pleadings do not adequately allege facts indicating that a demand of the Board would have been futile. The pleadings allege that additional demands would be futile because the Board failed to timely act to protect the rights of the HOA and its members and Appellants' conveyance of the Creekside Park and the Community Dock to Russo "evidences the Board's failure to secure the rights to" these amenities and "the futility of further demand." However, there are no allegations that a demand on the Board to initiate litigation to *recover* these amenities

---

[5] This court's opinion in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000), *certiorari granted* August 23, 2001, has been cited in all of the parties' appellate briefs. After our supreme court granted certiorari in *Whittle*, the parties settled the case and the court issued an order on January 10, 2003, stating that this court's opinion would "remain viable in result only." Therefore, we do not view *Whittle* as binding precedent.

would have been futile. Further, there are no allegations that the non-developer members of the Board were guilty of some wrongdoing that would give them an incentive to automatically reject such a demand or that Appellants had veto power over the Board such that they would prevent the Board from initiating litigation against them.

Based on the foregoing, we reverse the circuit court's ruling that Walbeck and Adkins properly filed derivative claims on the HOA's behalf.[6] We order the circuit court to dismiss these claims.

II. Fiduciary Duty

Even assuming the derivative claims were properly before the circuit court, we agree with Appellants that the circuit court erred in concluding Appellants had a fiduciary duty to convey title to the Creekside Park and Community Dock on lot CV-6 to the HOA.

Specifically, Appellants argue the circuit court erred in concluding that (1) a developer in control of a homeowners association may not make decisions that benefit the developer's own interest at the expense of the association and its members; and (2) a developer's failure to convey common areas to a homeowners association "is at least the equivalent of conveying them in 'substandard condition.'" As to the second conclusion, we agree that the circuit court erred. As both challenged conclusions concern questions of law, this court reviews them de novo. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) ("Whether the law recognizes a particular duty is an issue of law to be decided by the [c]ourt."); *Fesmire*, 385 S.C. at 302, 683 S.E.2d at 807 ("This [c]ourt reviews all questions of law de novo.").

Appellants maintain the circuit court confused the contractual duty to convey title allegedly created by the 1998 Property Report with a fiduciary duty to the HOA. "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Hendricks*, 353 S.C.

---

[6] As we base our holding on the failure to meet the demand requirement of Rule 23, we decline to address Appellants' argument that Walbeck and Adkins did not fairly and adequately represent the interests of other HOA members similarly situated in enforcing the HOA's rights. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

at 456, 578 S.E.2d at 714. "Ordinarily, the common law imposes no duty on a person to act. [When] an act is *voluntarily undertaken*, however, the actor assumes the duty to use due care." *Id.* at 456–57, 578 S.E.2d at 714 (emphasis added). Consistent with this proposition is this court's explanation of the foundation for a fiduciary duty: "A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is *bound to act in good faith and with due regard to the interests of the one imposing the confidence*." *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (emphasis added) (quoting *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987)). "Courts of equity have been careful to define fiduciary relationships so as not to exclude new cases that may give rise to the relationship." *Id.*

In *Goddard,* this court compared the duty of a developer of a planned unit development (PUD) to its villa owners, prior to the formation of the villa owners association, to the duty of the promoters of a corporation: "Both are entrusted by interested investors to bring about a viable organization to serve a specific function. Both should be expected to use good judgment and act in utmost good faith to complete the formation of their organizations." 310 S.C. at 415, 426 S.E.2d at 832. The court found merit in the appellants' argument that the developer had a responsibility to ensure the common areas were in good repair when they were conveyed to the villa owners' association. *Id.* The court also recognized the evidence showing that the common areas were substandard when the developer turned them over to the association. *Id.*

The court highlighted evidence that the developer "seized the opportunity . . . to 'unload' the common areas on the [a]ssociation without a plan to establish a reserve or a plan to fund the [a]ssociation until such time as assessments were adequate to cover maintenance expenses." *Id.* The court stated, "It seems unfair to the villa owners for the [d]eveloper to burden them with substandard or deteriorated common areas that required an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures." *Id.* In *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, our supreme court adopted this court's analysis in *Goddard* and held, "The developer of a PUD owes a duty to [a homeowners association] to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for bringing the common areas up to standard." 349 S.C. 251, 256–57, 562 S.E.2d 633, 637 (2002).

Prior to recognizing the fiduciary duty a developer owes to homeowners as the development's promoter, the *Goddard* court addressed the appellants' argument that a fiduciary duty arose from the developer's control of the villa owners' association. 310 S.C. at 413, 426 S.E.2d at 831. Specifically, the villa owners asserted that the superior voting strength of the developer and its president created "a fiduciary obligation to assess the villa owners at a level necessary to maintain sufficient reserves to adequately maintain the common areas." *Id.* The court stated, "*Assuming a fiduciary relationship exists* between the appellants and respondents *because of their superior voting power*, it is clear that the respondents have refrained from exercising their superior voting strength to effectuate higher assessments in deference to the wishes of the appellants to keep the assessments low." *Id.* at 414, 426 S.E.2d at 832 (emphases added).

Thus, rather than rejecting the existence of a fiduciary relationship arising from the developer's superior voting power, the court declined to hold that the developer's assessment determinations violated a fiduciary duty to the villa owners. *Id.* The court merely invoked the business judgment rule, which implicitly recognizes the obligation of the directors of a homeowners association to act in good faith: "In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of *bad faith*, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." *Id.* (emphasis added). This is compatible with the good faith requirement for fiduciaries: "A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act *in good faith* and with due regard to the interests of the one imposing the confidence." *Id.* (emphasis added) (quoting *Island Car Wash,* 292 S.C. at 599, 358 S.E.2d at 152). Therefore, we reject Appellants' argument that the business judgment rule precludes the existence of a fiduciary relationship between a developer in control of a homeowners association and the association's members.

Here, Appellants retained continuing control of the HOA up to and including the date they conveyed lot CV-6 to Russo. The Declaration of Covenants, Conditions, and Restrictions (Covenants) provided that the I'On Company, as Founder, had the authority to "appoint, remove[,] and replace the members of [the HOA's] Board of Trustees" for a limited period of time not to exceed twenty years after the Covenants' recording. The I'On Company also had the authority to

> disapprove any action, policy[,] or program of the [HOA], the Board of Trustees, and any committee [that], *in the*

> *sole judgment of* the [I'On Company], would tend to impair rights of [the I'On Company] or Builders under [the Covenants] or the Bylaws, or interfere with development or construction of any portion of I'On, or diminish the level of services being provided by the [HOA].

(emphasis added). At trial, Thomas Graham testified that the I'On Company still retained these veto rights.

Appellants contend there were no developer-appointed directors serving on the HOA's Board after December 2005 and Appellants have never exercised any of the I'On Company's veto rights.[7] However, as in *Goddard*, Appellants' asserted restraint does not speak to the *existence* of a fiduciary relationship and the duty to act in good faith arising from their veto power but rather to the manner in which they carried out such a duty. *See id.* (assuming arguendo the existence of a fiduciary relationship and declining to find a violation of a fiduciary duty by invoking the business judgment rule). Therefore, we reject Appellants' argument that their restraint from exercising the veto power precludes the existence of a fiduciary relationship.

Rather, we define Appellants' fiduciary duty arising from its retention of control over the HOA by the standards set forth in *Island Car Wash*:

> [A]nyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. . . . [C]ourts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.

292 S.C. at 599, 358 S.E.2d at 152.

Based on the foregoing, the circuit court did not err in concluding that a developer in control of a homeowners association may not make decisions that

[7] Appellants admit that in 2014, the I'On Company appointed a Board member, Chad Besenfelder, but he was excluded from participating in "Board decisions that would potentially be adverse to the I'On Company."

benefit the developer's own interest at the expense of the association and its members. This deduction logically flows from the above standards set forth in *Island Car Wash*, *Goddard*, and our supreme court's decision in *Concerned Dunes* adopting *Goddard*'s analysis.

Nonetheless, the circuit court's denial of Appellants' JNOV motion was based on its extrapolation of a specific fiduciary duty *to convey title* to common areas from the duty pronounced in *Goddard* and *Dunes West*, i.e., the fiduciary duty to ensure common areas are in good repair before turning them over to a homeowners association. South Carolina precedent does not impose on developers a generic fiduciary duty to convey title to a subdivision's common areas to the homeowners association in every conceivable case. Rather, when reference to a particular subdivision's restrictive covenants resolves issues involving the common areas, those covenants control. *See Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006) ("Where . . . issues involving the common area of a subdivision—as raised by the pleadings—are resolved by reference to the applicable restrictive covenants, those covenants control."). Here, the Covenants' definition of "Commons" is "Real Property and interests therein [that] the [HOA] owns *or otherwise holds possessory or use rights in* for the common use and enjoyment of Titleholders."[8] (emphasis added). Therefore, the Covenants do not require the HOA to hold an ownership interest in a common area.

Further, and of critical import, the 1998 Property Report included language notifying prospective homeowners that certain amenities in I'On Village "may be owned and operated by persons other than the [HOA]." The notification emphasized that there was no guarantee a homeowner would have access to these amenities because they could be operated as a private club for its members and guests. This language placed prospective HOA members on notice that they would be buying into a community that would likely be shared with non-HOA members.

In sum, the record in this case does not support the conclusion that Appellants had a fiduciary duty to convey to the HOA those specific amenities associated with the Creek Club on lot CV-6. Therefore, the circuit court's conclusion that Appellants breached their fiduciary duty to the HOA's members by failing to convey title to the disputed amenities was controlled by an error of law. Accordingly, we reverse the

[8] "Titleholder" is defined in the Covenants as "one or more persons who hold record title to any Real Property in I'On, other than persons who hold an interest merely as security for the performance of an obligation."

denial of Appellants' JNOV motion as to this claim. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 ("[The appellate court] will reverse the [circuit] court's rulings on [directed verdict and JNOV] motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law.").

III. Statute of Limitations

Appellants assert that Walbeck's claims are time-barred because they accrued before December 22, 2007, which was exactly three years before Walbeck filed his initial complaint. With the exception of the breach of contract claim,[9] we agree. Appellants also assert that the HOA's claims, assuming they meet the standards for derivative claims, are time-barred because they accrued before February 7, 2009, which was exactly three years before Walbeck and Adkins filed the Second Amended Complaint on the HOA's behalf. Walbeck first asserted derivative claims in his initial complaint, but their derivative nature was not reflected in the case caption until Walbeck filed the Second Amended Complaint. Nonetheless, the derivative claims, other than breach of contract, are time-barred even if they were first filed with Walbeck's initial complaint.

The three-year statute of limitations, section 15-3-530(5) of the South Carolina Code (2005),[10] applies to Respondents' negligent misrepresentation claims.[11] With the exception of medical malpractice actions, "all actions initiated under [s]ection 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence *should have known* that he [or she] had a cause of action." S.C. Code Ann. § 15-3-535 (2005) (emphasis added). The "exercise of reasonable diligence" means "the injured party must act with some promptness [when] the facts and circumstances of an injury place a reasonable

---

[9] Appellants do not dispute the applicability of the twenty-year statute of limitations to Respondents' breach of contract claims because Walbeck's contract to purchase his lot was a sealed instrument. *See* S.C. Code Ann. § 15-3-520 (2005) (providing for a twenty-year statute of limitations for actions on a sealed instrument).

[10] Subsection 5 provides for a three-year limitation on "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and [medical malpractice actions]."

[11] We decline to reach the question of when the breach of fiduciary duty claim accrued as we reverse the circuit court's ruling on the merits of this claim. *See supra* section II; *Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

person of common knowledge and experience on *notice* that a claim against another party *might* exist." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363–64, 468 S.E.2d 645, 647 (1996) (second emphasis added). In other words, the discovery rule does not "require absolute certainty [that] a cause of action exists before the statute of limitations begins to run." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001).

> The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and *when the testimony is conflicting upon the question,* it becomes an issue for the jury to decide. However, when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim *becomes a matter of law to be decided by the trial court.*

Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009) (emphases added) (citation omitted), *aff'd in part, rev'd in part on other grounds*, 392 S.C. 116, 708 S.E.2d 766 (2011).

The statute of limitations for the ILSA claim is "three years after discovery of the violation or after discovery should have been made *by the exercise of reasonable diligence*." 15 U.S.C. § 1711(a)(2) (emphasis added). There is a dearth of published case law interpreting this provision, but the opinion in *Streambend Properties III, LLC v. Sexton Lofts, LLC*, 297 F.R.D. 349, 359 (D. Minn.), *aff'd*, 587 F. App'x 350 (8th Cir. 2014), indicates an interpretation similar to *Dean*'s interpretation of the identical standard in section 15-3-535, i.e., "three years after the person knew or *by the exercise of reasonable diligence* should have known that he [or she] had a cause of action." (emphasis added).

In the present case, the jury found the date that Respondents knew or should have known they had claims against Appellants was August 5, 2009, the date Appellants sold the disputed amenities to Russo. However, Appellants argue the initial representation on which Respondents claim they relied was that Appellants would convey the disputed amenities to the HOA free of charge upon completion of construction, and Respondents knew or should have known upon completion of construction in early 2001 that they did not receive such a conveyance.[12] Therefore,

[12] The 1998 Property Report stated,

at that time, Respondents knew or should have known they might have claims against Appellants. The logical extension of this argument is that Walbeck, in his individual capacity and as a representative of the HOA, certainly should have known before December 22, 2007, approximately six years after the completion of construction, that he and the HOA had claims against Appellants.

Even viewing the evidence in the light most favorable to Respondents, we agree with Appellants that the negligent misrepresentation and ILSA claims accrued well before December 22, 2007. We base our determination of each claim's accrual on the particular claim's allegations concerning breach of duty.

Negligent Misrepresentation

As to the negligent misrepresentation claims, Respondents alleged:

> 88. The I'On Defendants made oral and written representations that the Community Dock and Creekside Park would be transferred to the [HOA].
>
> . . .
>
> 90. The Defendants owed a *duty* of care to the Plaintiffs *to communicate truthfully all information regarding [their] purchase in I'On*, without material omission.
>
> 91. The Defendants[] breached that duty owed *by misrepresenting facts* [that], in conjunction with other

---

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

It is undisputed that construction of the Community Dock and Creekside Park was completed in early 2001, no later than April 10, 2001.

> representations, *induced the Plaintiffs and other lot purchasers to enter into contracts for the purchase of lots* in I'On.
>
> 92. The Plaintiffs, the [HOA], and its members have suffered a pecuniary loss as a direct and proximate result of [their] *reliance* on the Defendants' false representations.

(emphases added). Paragraph 88 referred to the representation made in the 1998 Property Report. Paragraph 91 designates the breach of Appellants' duty of care as misrepresenting facts that induced Walbeck to purchase his lot.

Thus, as to the negligent misrepresentation claims, the question is when Walbeck, in his individual and representative capacity, knew or should have known that the representation purportedly inducing him and other HOA members to buy their lots, i.e., the statement in the 1998 Property Report indicating that title to certain amenities would be conveyed to the HOA **upon completion of construction**, was unfulfilled. By April 10, 2001, Appellants completed construction of the Community Dock and Creekside Park. By early November 2004, when Walbeck received information indicating the HOA might not own the Community Dock or Creekside Park, Walbeck should have known that the statement indicating title to these amenities would be conveyed upon completion of construction was unfulfilled. *See Dean*, 321 S.C. at 363–64, 468 S.E.2d at 647 (stating that the "exercise of reasonable diligence" means "the injured party must act with some promptness [when] the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party *might* exist" (second emphasis added)); *Bayle*, 344 S.C. at 126, 542 S.E.2d at 741 (stating that the discovery rule does not "require absolute certainty a cause of action exists before the statute of limitations begins to run").

Walbeck admitted receiving copies of the HOA's proposed annual budgets, which began including a "Creek Club Dock usage Fee" as early as October 10, 2004, for the 2005 budget year, if not earlier. The proposed 2005 budget was mailed to HOA members on November 1, 2004. The listing of a fee being paid by the HOA for use of the Community Dock should have alerted Walbeck to the fact that the HOA might not have title to the Community Dock or the other amenities listed in the 1998 Property Report, such as Creekside Park. He could have deduced from this budget item alone that the statement indicating title to these amenities would be conveyed upon completion of construction was unfulfilled. Hence, Respondents'

negligent misrepresentation claims accrued no later than early November 2004 and expired no later than early November 2007.

Therefore, the only reasonable inference that can be drawn from the evidence is that Respondents' negligent misrepresentation claims accrued well before December 22, 2007. *See* § 15-3-535 (stating that with the exception of medical malpractice actions, "all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or *by the exercise of reasonable diligence* should have known that he had a cause of action." (emphasis added)); *Turner*, 381 S.C. at 110, 671 S.E.2d at 641 ("[W]hen there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.").

In its order denying Appellants' JNOV motion, the circuit court concluded that even if the date Respondents should have discovered their claims preceded the three-year limitations period, equitable estoppel would have served to toll the statute of limitations.

> A defendant will be estopped to assert the statute of limitations in bar of a plaintiff's claim when the delay that otherwise would give operation to the statute has been induced by the defendant's conduct.
>
> The doctrine is, of course, most clearly applicable [when] the aggrieved party's delay in bringing suit was caused by his opponent's intentional misrepresentation; but deceit is not an essential element of estoppel. It is sufficient that the aggrieved party reasonably relied on the words and conduct of the person to be estopped in allowing the limitations period to expire.
>
> The conduct may involve either inducing the plaintiff to believe that an amicable adjustment of the claim will be made without suit or inducing the plaintiff in some other way to forbear exercising his right to sue.

Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 372–73, 725 S.E.2d 112, 125–26 (Ct. App. 2012) (quoting *Dillon Cnty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 218–19, 332 S.E.2d 555,

561 (Ct.App.1985), *overruled on other grounds by Atlas Food Sys. & Serv., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995)). Here, Walbeck has not presented evidence showing that he reasonably relied on the words or conduct of any representative of Appellants in allowing the limitations period for Respondents' negligent misrepresentation claims to expire in early November 2007. Therefore, the doctrine of equitable estoppel is not availing to Respondents.

The circuit court also stated that it was "concerned with the existence of any evidence supporting the jury's findings and ha[d] no authority to resolve conflicts purportedly created by the jury's disregard of other evidence," citing *Curcio* as supporting authority. *See Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 ("When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" (quoting *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154)). However, in the present case, there was only one reasonable inference from the evidence as to when Walbeck should have known Respondents might have claims against Appellants for the representation in the 1998 Property Report. Therefore, this question was one of law to be decided by the circuit court. *See Turner*, 381 S.C. at 110, 671 S.E.2d at 641 ("[W]hen there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.").

Based on the foregoing, Respondents' negligent misrepresentation claims accrued well before December 22, 2007, as a matter of law, and therefore, the circuit court erred in submitting this question to the jury. Because Walbeck failed to file the Complaint until December 22, 2010, Respondents' negligent misrepresentation claims are barred by the statute of limitations. Accordingly, we reverse the denial of Appellants' JNOV motion as to these claims.

ILSA

In the ILSA claim, Respondents alleged:

> 60. Defendants have violated [ILSA] by: (1) issuing a Property Report that made representations to prospective purchasers of lots that were false; . . . (2) continually distributing copies of the Property Report to potential purchasers, with knowledge that it contained false

> representations and that these representations would likely be relied upon, and were in fact relied upon by numerous lot purchasers in I'On; [or] (3) failing to honor the representations therein.

Like the negligent misrepresentation claims, the question as to the ILSA claim is when Walbeck knew or should have known that the representation in the 1998 Property Report was unfulfilled. As we previously explained, the only reasonable inference from the evidence is that Walbeck should have known well before December 22, 2007, that the statement indicating title to the Community Dock and Creekside Park would be conveyed upon completion of construction was unfulfilled. Therefore, the circuit court erred in submitting this question to the jury. Accordingly, we reverse the denial of Appellants' JNOV motion as to this claim and order the circuit court to dismiss this claim as well as the negligent misrepresentation claims.[13]

IV. Abuse of Process

Pursuant to Rule 220(b), SCACR, and the following authorities, we affirm the denial of Appellants' JNOV motion as to their counterclaim for abuse of process: *Pallares v. Seinar*, 407 S.C. 359, 370–71, 756 S.E.2d 128, 133 (2014) (holding that the ulterior or improper purpose element of abuse of process "exists if the process is used to secure an objective that is *'not legitimate in the use of the process*'" (emphasis added) (quoting *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2012))); *Swicegood v. Lott*, 379 S.C. 346, 353, 665 S.E.2d 211, 214 (Ct. App. 2008) ("The improper purpose usually takes the form of coercion to obtain a *collateral* advantage, *not properly involved in the proceeding itself*, such as the surrender of property or the payment of money, by the use of the process as a threat or club." (emphases added) (quoting *Huggins v. Winn–Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967))).

V. Recreational Easement

---

[13] Because this holding is dispositive of Walbeck's ILSA claim, we decline to address Appellants' argument that Walbeck did not rely on any representations made in the 1998 Property Report. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

Appellants maintain the circuit court erred in (1) finding that section 4.2 of the Recreational Easement limited the term of the easement to thirty years, superseding previous language stating the easement was perpetual, and (2) concluding that the Recreational Easement was invalid. However, Appellants did not appeal all of the grounds specifically listed by the circuit court to support its declaration of invalidity. Namely, they failed to challenge the circuit court's conclusion that the Recreational Easement was not an arms-length transaction. Therefore, this court will affirm the circuit court's declaration under the two-issue rule. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the [two-issue] rule, [when] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *id.*, 692 S.E.2d at 903–04 (noting that the two-issue rule can be applied to situations not involving a jury); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (affirming the trial court's decision because the plaintiff did not appeal all grounds for the decision); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 214 (3rd ed. 2016) ("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.").

In any event, we agree with the circuit court that the I'On Club's lack of title to lot CV-6 on the date the easement was executed was fatal to the easement's validity. Although Appellants argue they may rely on the doctrine of after-acquired property to ratify the Recreational Easement,[14] they do not cite any South Carolina authority for the proposition that this doctrine applies to the grant of an easement. Because our supreme court has not spoken on this precise issue, we decline to apply this doctrine to the Recreational Easement. Therefore, we affirm the circuit court's conclusion that the Recreational Easement was invalid.

As we affirm the circuit court's declaration of invalidity, we need not address Appellants' challenge to the finding that the Recreational Easement was limited to a term of thirty years. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (providing that

---

[14] *See Richardson v. Atl. Coast Lumber Corp.*, 93 S.C. 254, 75 S.E. 371, 372 (1912) ("[I]f a grantor conveys land, with the usual covenants of warranty, to which at that time he has no title, but afterwards acquires a title, he is estopped from claiming that he did not have title at the time of the sale; and the after-acquired title inures to the benefit of his grantee." (*dictum*)).

an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

VI. Amalgamation

Appellants next argue the circuit court's ruling that Appellants were amalgamated was improper because the circuit court failed to consider the factors required by *Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984) for "piercing the corporate veil" to hold a corporation's principals personally liable for the corporation's wrongdoing.

Our supreme court recently examined the "amalgamation of interests theory" in *Pertuis v. Front Roe Restaurants, Inc.*[15] The court recognized this court's previous applications of the theory in *Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc.*[16] and *Kincaid v. Landing Development Corp.*[17] as well as its own reference to the theory in *Kennedy v. Columbia Lumber & Manufacturing Co.*[18] In *Magnolia*, this court analyzed the relationship of the defendant corporations to their officers, directors, headquarters, employees, functions, written representations, and admissions of liability to determine whether there existed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." 397 S.C. at 358–60, 725 S.E.2d at 117–18 (quoting *Kincaid*, 289 S.C. at 96, 344 S.E.2d at 874). We concluded the evidence supported the trial court's ruling that the corporations were amalgamated. *Id.* at 360, 725 S.E.2d at 118.

In *Pertuis*, the court formally recognized the amalgamation of interests theory for the first time and indicated a preference for the term "single business enterprise theory." *Id.* at 655, 817 S.E.2d at 280. Notably, the court held, "the single business enterprise theory requires a showing of more than the various entities' operations are intertwined," as the theory had previously been applied by our courts. *Id.* Rather, "[c]ombining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* at 655, 817 S.E.2d at 281. In comparison, the *Sturkie* requirements for holding a corporation's principals personally liable for the corporation's wrongdoing are (1) the failure to observe

---

[15] 423 S.C. 640, 817 S.E.2d 273 (2018).
[16] 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012).
[17] 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986).
[18] 299 S.C. 335, 340–41, 384 S.E.2d 730, 734 (1989).

corporate formalities and (2) "an element of injustice or fundamental unfairness if the" corporation's acts are "not regarded as the acts of" its principals. *See Mid-S. Mgt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597–98, 649 S.E.2d 135, 140–41 (Ct. App. 2007) (explaining *Sturkie*'s "two-prong[ed] test to determine whether a corporate veil should be pierced").

Therefore, the requirements for the single business enterprise theory as adopted by our supreme court overlap with the *Sturkie* requirements for piercing the corporate veil. The single business enterprise theory does not require a showing of the corporate defendants' failure to observe corporate formalities. However, the theory dovetails with the second prong of the *Sturkie* test, i.e., an element of injustice or fundamental unfairness, to place accountability where it belongs.

Here, even though there is evidence showing the various entities' operations are intertwined, there is no evidence of "bad faith, abuse, fraud, wrongdoing, or injustice *resulting from* the blurring of the entities' legal distinctions." *Pertuis*, 423 S.C. at 655, 817 S.E.2d at 281 (emphasis added). Therefore, we reverse the circuit court's conclusion that Appellants were amalgamated.[19]

Appellants seek the remedy of a new trial because the circuit court's ruling relieved Respondents of the burden of establishing liability as to each individual Appellant and likewise relieved the jury members from their responsibility to evaluate the liability of each individual Appellant. Appellants also assert that the circuit court's instruction to the jury that Appellants were amalgamated suggested that Appellants had engaged in misconduct and the resulting prejudice requires a new trial. We agree and order the circuit court to conduct a new trial on Walbeck's breach of contract claim.

VII. Attorney's Fees for Walbeck

We need not address Appellants' challenge to the amount of fees awarded to Walbeck pursuant to 15 U.S.C. § 1709(c) because his ILSA claim is barred by the statute of limitations and, thus, he may not recover attorney's fees under § 1709(c). We reverse the circuit court's award under this statute.

VIII. Attorney's Fees against Adkins

[19] We acknowledge that the circuit court did not have the benefit of the *Pertuis* decision when it ruled on this issue.

Appellants claim they were entitled to an award of attorney's fees against Adkins on her breach of contract claim because they were the prevailing party pursuant to the fee-shifting provision in Adkins' lot purchase agreement. We affirm the circuit court's order denying attorney's fees against Adkins.

Appellants sought an award of attorney's fees against Adkins pursuant to the following provision in her lot purchase agreement: "If either party requires services of an attorney to enforce obligations under this Agreement, the prevailing party shall be due from the non-prevailing party **reasonable** attorneys' fees, costs[,] and expenses **actually incurred**." (emphases added). The circuit court based its denial of the requested award on two grounds: (1) Adkins prevailed on three of her derivative claims against Appellants and there was "no practical or legal way to separate the derivative verdicts from Adkins or to attribute them more to Walbeck[] just because he prevailed on his claim for personal damages and Adkins did not"; and (2) while Adkins did not prevail on her breach of contract claim, she prevailed as to Appellants' counterclaim for abuse of process, "resulting in a draw on the individual claims." In light of our holding that the derivative claims were not properly filed, the first ground no longer serves as a valid basis for the circuit court's ruling. However, the second ground remains a valid basis for declining to rule in favor of Appellants as the "prevailing party."

Moreover, this court may affirm for any ground appearing in the record. Rule 220(c), SCACR. Here, Appellants' petition for attorney's fees does not indicate that the addition of Adkins as a plaintiff required any significant increase in the efforts of counsel to defend this case. While the petition requests one-half of the total fees and expenses incurred from the date of the Second Amended Complaint's filing through the end of trial, it does not state that a corresponding amount of time and expenses were **actually generated** from Adkins' breach of contract claim or the addition of Adkins as a named plaintiff for the derivative claims. Further, counsel's attorney's fees affidavit is not in the record.

Based on the foregoing, Appellants have not shown that the amount of attorneys' fees and expenses they requested was either **reasonable** or **actually incurred**, as required by the fee-shifting provision in Adkins' lot purchase agreement. Therefore, we affirm the denial of Appellants' request for attorney's fees against Adkins.

CONCLUSION

We affirm the order declaring the Recreational Easement invalid and the order denying Appellants' request for attorney's fees against Adkins. We affirm in part and reverse in part the order denying Appellants' motion for a JNOV or new trial absolute and new trial nisi remittitur. We reverse the order granting attorney's fees to Walbeck. Finally, we remand for a new trial on Walbeck's breach of contract claim and the dismissal of all other claims.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

LOCKEMY, C.J., and HUFF, J., concur.

DUFFY & YOUNG LLC
96 BROAD STREET, CHARLESTON SC 29401
telephone 843-720-2044 facsimile 843-720-2047
ATTORNEYS AT LAW

March 13, 2019

VIA FEDERAL EXPRESS

JAN 14 2019

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

RE: Brad Walbeck v. The I'On Company
Civil Action No.: 2010-CP-10-10490
Appellate Case No.: 2015-001590

Dear Ms. Kitchings:

Enclosed for filing please find one original and seven copies of the Petition for Rehearing and the $50.00 filing fee in the above-referenced matter. Also, enclosed for filing is the original and one copy of the Certificate of Service.

Please file the originals and return a file-stamped copy of the Petition for Rehearing and Certificate of Service to our office in the enclosed self-addressed stamped envelope.

I appreciate your assistance in this matter. Should you have any questions or concerns, please do not hesitate to contact me.

Respectfully,

Pamela P. Jones
Paralegal

Enclosures

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

ldurvea@duffyandyoung.com
WWW.DUFFYANDYOUNG.COM

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

PETITION FOR REHEARING

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

Attorneys for Appellants

Appellants petition the Court to rehear its opinion filed February 27, 2019, pursuant to Rule 221(a) of the South Carolina Rules of Appellate Procedure. The Court misapprehends that the Recreational Easement was invalid and misapprehends that a developer's *theoretical* control over an HOA creates a fiduciary duty. While the Court's discussion of a fiduciary duty arising out of a developer's control of an HOA is not a determining factor in the ultimate ruling, Appellants petition the Court to rehear this issue so as not to be bound by the Court's discussion as the law of the case.

I. THEORETICAL CONTROL DOES NOT CREATE A FIDUCIARY DUTY AS A MATTER OF LAW.

The Court found there was no fiduciary duty on the part of a developer to convey real property to the Assembly and Appellants do not challenge the Court's decision to reverse the trial court's denial of JNOV. (Op. at 43-44.) However, the Court engaged in an analysis unnecessary to the resolution of the fiduciary duty issue, opining that Appellants' retention of the right of control over the Assembly gave rise to the fiduciary duty set forth in *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987), even though Appellants never exercised this control. This discussion overlooks that the fiduciary duty South Carolina has recognized for developers does not arise in the absence of the exercise of control. Moreover, the Court's finding is dicta.[1]

[1] "Dictum is not the law." *Gordon v. Lancaster*, 425 S.C. 386, 823 S.E.2d 173, 177 (2018) (Few, J., dissenting) (quoting *Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007)) ("[D]ictum is a statement on a matter not necessarily involved in the case, is not binding as authority and is not the court's decision.") (internal quotations, citation omitted).

Because Appellants' control over the Assembly is only theoretical—it never exercised this control—and because this discussion is inconsequential to the Court's conclusion, the Court should grant rehearing for the limited purpose of removing this dicta from its well-reasoned opinion.

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

The Court's *sua sponte* application of the two-issue rule is misplaced. (Op. at 51.) While the Court is correct that Appellants did not separately and expressly argue the trial court's reference to the "arms-length transaction" in its briefing, this is not an additional ground for the purposes of the two-issue rule. Rather, it is a reiteration of the trial court's other reasons for declaring the Recreational Easement invalid—all of which were thoroughly briefed. (Ap. Br. at 36-41.) Importantly, Respondents do not contend that the two-issue rule is applicable here.[2]

The Court summarily addresses the merits, opining: "Because our supreme court has not spoken on this precise issue, we decline to apply [the after-acquired title] doctrine the Recreational Easement." (Op. at 51.) South Carolina has recognized the after-acquired title doctrine for more than a century and there is no indication that it is not applicable to servitudes. *See, e.g., Nettles v. Cummings*, 30 S.C. Eq. (9 Rich. Eq.) 440, 448 (1857) (explaining that a grant of goods which were not in existence, or which do not belong to the grantor at the time of executing the deed, is void,

[2] *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting) ("I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a 'gotcha' game with attorneys by showcasing their alleged mistakes, at the expense of their clients. . . . I believe that where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation. When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw.").

unless the grantor ratifies the grant by some act done by him with that view, after he has acquired the property); *Tolar v. Marion Cty. Lumber Co.*, 93 S.C. 274, 75 S.E. 545 (1912) (allowing ratification of a deed of conveyance made during infancy after reaching age of majority); *Corbin v. Carlin*, 366 S.C. 187, 192-93, 620 S.E.2d 745, 748 (Ct. App. 2005) ("The principle is settled beyond controversy in this state that if a grantor conveys land, with the usual covenants of warranty, to which at that time he has no title, but afterwards acquires a title, he is estopped from claiming that he did not have title at the time of the sale; and the after-acquired title inures to the benefit of his grantee.").

Appellants addressed the trial court's equitable concerns about the execution of the Recreational Easement at length. (Ap. Br. at 37-39.) The Court should rehear this issue, determine that the 2000 Recreational Easement was valid and consider the merits of Appellants' argument that the easement was perpetual.

CONCLUSION

Appellants request that the Court grant this Petition for Rehearing.

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

March 13, 2019
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

CERTIFICATE OF SERVICE

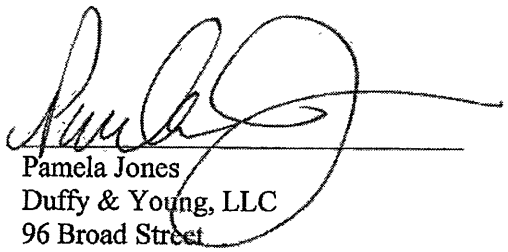
I, Pamela Jones, Paralegal at Duffy & Young, LLC, certify that I have served the **PETITION FOR REHEARING** on Respondents on March 13, 2019 by U.S. First Class mail to their attorneys of record as shown below:

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

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

Timothy W. Bouch, Esq.
Yancy A. McLeod, III, Esq.
Leath Bouch & Seekings
92 Broad Street
Charleston, SC 29401
Phone: (843) 937-8811

Attorneys for Respondent I'On Assembly, Inc.



Pamela Jones
Duffy & Young, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)
Paralegal

March 13, 2019
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

RESPONDENTS' PETITION FOR REHEARING

RECEIVED
APR 15 2019
SC Court of Appeals

Justin O'Toole Lucey, Esquire (SC Bar No.: 15438)
Joshua F. Evans, Esquire (SC Bar No.: 77448)
Dabny Lynn, Esquire (SC Bar No.: 78703)
JUSTIN O'TOOLE LUCEY, PA
415 Mill Street
Mount Pleasant, South Carolina 29464
(843) 849-8400
(843) 849-8406 (fax)
jlucey@lucey-law.com
jevans@lucey-law.com
Attorneys for the Respondents

PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure ("SCACR"), Respondents[1] respectfully file this Petition for Rehearing of this Court's Substituted Opinion filed February 27, 2019 (Opinion No. 5588) ("Substituted Opinion"). Respondents seek a rehearing because this Court overlooked and misapprehended points of law and fact in partially affirming and reversing the circuit court, and in partially reversing this Court's Original Opinion.

INTRODUCTION

By all appearances, the promised, waterfront Amenities were possessed, owned, or to be owned, by the I'On community from shortly after inception until late 2008 because the homeowners used and enjoyed these Amenities.

Even for those who realized that a use easement was in place, there was nothing in the easement that indicated the homeowners would not be deeded the Amenities; and, use was assured by the easement's purportedly, perpetual term. Unbeknownst to the homeowners, the Developers[2] had implemented stage one of their deception by initially starting with this easement, instead of a deed to facilitate the undisclosed, Olde Park deal.

It was not until the first, attempted sale of the Amenities in Fall 2008 that it was realized a contrary term buried in the easement limited it to thirty years, a third of which expired by the time of discovery; half of which would expire before the Developers completed construction; and, two-thirds of which will have expired by the time this Petition is ruled upon. The thirty-year term was the second of the Developers' efforts to retain the ultimate value of the Amenities.

---

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

[2] The "Developers" or "Appellants" are: The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC; and, I'On Realty, LLC.

Even once the term ambiguity was discovered, no one understood that the easement was void *ab initio* because the conduct of the later amalgamated Developers obscured that the Grantor of the easement did not own the property subject to the easement. This third defect was not discovered until after this litigation was filed.

By the foregoing, the Developers camouflaged for over a decade that these "waterfront" Amenities they promised to the HOA and I'On homeowners would eventually be lost and the neighborhood would no longer be a waterfront community.

The jury, by its verdict, and circuit court, by its post-trial orders, agreed that the Developers promised these "waterfront" Amenities to the I'On community, wrongfully failed to keep this promise, and that they could not justify or otherwise defend this failure.

The Developer's earliest, factual defense at trial was that the obligation to convey the Amenities matured "upon the completion of construction," which, as to the Community Dock, occurred in 2001. Respondents showed that "completion of construction" just as logically referred to the completion of construction of the neighborhood – which had not occurred at the time of the attempted sales. The jury found for Respondents on this factual issue.

The Developers' second, factual defense at trial was that a line item buried in an annual budget received in late 2004 should have commenced the running of "the knew or should have known" discovery period. Respondents presented contrary evidence and the jury found for Respondents.

The Developers' third factual defense at trial was that the representations and promised Amenities were ambiguous and generic – and had been satisfied by the transfer of a few crab docks and a "Marshwalk" path. Implicit in this representation is that the Developers believed they complied with their obligations – and that reasonable minds could so agree; therefore, a

"homeowners knew or should have known" statute of limitations defense by the Developers is not palatable. The jury discredited this testimony when it found for Respondents on nearly all causes of action; and, found that August 5, 2009 is when these claims accrued.

The circuit court found adequate evidence and testimony to support the jury's verdict. This Court originally agreed with the circuit court (and jury) in multiple respects; yet, completely reversed itself in a Substituted Opinion that if, left uncorrected, provides a "how to wrongfully manipulate and profit from a HOA" guide for Developers, upends fundamental equitable principles, and subverts South Carolina's substantive law as well as this state's long-standing public policy of protecting homeowners.

QUESTIONS TO REHEAR

I. Did the Court err in its dismissal of Walbeck's and Adkins' derivative claims?

a. Did the Court err in considering Developers' Motion to Dismiss when Developers failed to appeal this Order ?

b. Did the Court err in failing to consider Developers' Answer to Respondents' Complaints in which Developers admitted demands were made to the HOA which the HOA refused to act on?

c. Did the Court err in overlooking Developers' failure to seek the dismissal of Walbeck's derivative negligent misrepresentation claim?

d. Is the Court's ultimate decision to dismiss Respondents' derivative claims irreconcilable with the Supreme Court's recent decision in *Patterson versus Witter*?

e. Did the Court err in limiting its substituted derivative analysis to the pleadings available at the Motion to Dismiss stage versus the evidence available at the JNOV stage?

f. Did the Court err in discounting the demands described in Respondents' Complaints?

g. Did the Court err in following "non-binding" precedent throughout its derivative analysis?

h. Did the Court err in analyzing what is required to maintain a derivative action and by ignoring the "lenient" standard for excusing a demand as recognized by the Supreme Court?

i. Does a circuit court have the discretionary authority to excuse a derivative demand where it finds sufficient facts of futility are pled and then proven?

j. Did the Court wrongfully increase the threshold Rule 23 derivative demand requirement by requiring a specific request to "initiate litigation"?

k. Is it wasteful and unfair for a Court to ignore ample evidence of demands made and demand futility in dismissing derivative claims which survived dismissal, summary judgment, and JNOV?

l. Did the Court err in overlooking that the HOA's direct claims mooted any pleading defect?

II. Did the Court err in reversing its original conclusion that Developers' violated their fiduciary duties to the HOA?

a. Did the Court err in ignoring its original finding that Developers failed to act in good faith and with due regard to the HOA and its members?

b. Do developers, who control an HOA for years, make multiple misrepresentations while in control, and then sell common property they promised to give to a HOA free and clear, act against the HOA's interest and in violation of the fiduciary duties they owe the HOA?

c. Did the Court err in relying upon *Cedar Cove* in its fiduciary duty analysis?

d. Does self-dealing, *e.g.*, the sale to a third party of common areas promised to a HOA, shift the burden of proof to the fiduciary to show the fairness of the transaction?

III. Did the Court err in finding that Walbeck's negligent misrepresentation and ILSA claims were barred by the Statute of Limitations?

a. Did the Court err in substituting its own judgment for that of a jury when there is more than one reasonable inference as to when these claims were discovered?

b. Did the Court err in finding Walbeck's claims are barred when more than one inference can be drawn from the proposed budget and surrounding evidence?

c. Did the Court err in overlooking Developers' omissions and affirmative representations in its equitable estoppel analysis?

d. Did the Court err in failing to consider the applicability of equitable tolling to Respondents' claims?

IV. Did the Court of Appeals err in reversing its original finding that Developers were amalgamated?

a. Did the Court err by overlooking Developers' consent to the circuit court deciding amalgamation?

b. Did the Court err by overlooking the ample evidence of Developers' bad faith and unfairness resulting from Developers' collective evasive conduct which makes the single business enterprise theory especially applicable here?

V. Did the Court err in reversing itself and depriving Respondents of the remedies awarded to them in this admittedly convoluted case?

SUMMARY OF ARGUMENT

This Court's Substituted Opinion departs 180 degrees from its Original Opinion[3] and rewards Developers who, as expressly found by a jury, "recklessly, willfully, or wantonly"[4] took advantage of a HOA they created and controlled for years.

In completely reversing itself, this Court concluded: (1) derivative claims it originally found were proper are now improper; (2) Developers it originally found were liable for acting against a HOA's best interest are no longer liable for their bad acts; (3) Developers who it originally found voluntarily undertook to convey Amenities to a HOA now owe nothing to that HOA for failing to convey these Amenities as promised; (4) promises which it originally found were made by the Developers to the HOA and its members no longer preclude the Developers from relying on the statute of limitations as a defense; (5) evidence it originally found established fundamental unfairness resulting from the Developers' intertwining of their operations no longer exists; and, (6) the multiple inferences it originally found could be drawn from the evidence now only lead to one conclusion.

---

[3] In addition to substantively altering its initial analysis, the Court's Substituted Opinion also addresses unraised issues and creates new questions which were not applicable to the Court's Original Opinion or Respondents' Petition to Rehear that Opinion ("Original Order Petition"). As such, Respondents submit this Petition to address the Court's Substituted Opinion ("Substituted Order Petition"). Rather than repeat questions and arguments already asserted, Respondents fully incorporate their Original Order Petition into this Substituted Order Petition by reference.

[4] (R. pp. 1858-59) (Verdict Form).

The Court not only erred as to its substituted conclusions, it also erred by overlooking important points, including that: (1) the HOA's direct claims are unaffected by any alleged Rule 23 pleading defect; (2) the HOA's direct claims are not barred by the statute of limitations; (3) the Circuit Court's Order denying the Developers' Motion to Dismiss is the law of the case because Developers failed to appeal this Order; (4) Developers admitted in their Answer that a demand to bring this suit was made to the HOA which refused to act on this demand; (5) prevailing Supreme Court precedent does not limit derivative determinations to the pleadings; (6) Developers repeatedly violated their fiduciary duty to Respondents by acting in their interest as opposed to the HOA's interest; (7) Developers' failure to convey promised Amenities also violated their fiduciary duty to Respondents; (8) Developers continually concealed claim-related information which justifies the application of equitable estoppel; (9) Developers controlled and misled the HOA and its members from day one which justifies the application of equitable tolling; (10) Developers waived any right to challenge the verdict rendered by the jury collectively against them; (11) "Fundamental unfairness" resulted from Developers' abuse of the corporate form; and, (12) Developers' continued evasiveness makes the single business enterprise theory especially applicable here.

As part of the foregoing, this Court has come to the illogical and unsustainable conclusion that a developer who deprives a community of a promised common area, does not breach a fiduciary duty; when the jury, charged with the same fiduciary duty precedent espoused by this Court in its Original and Substituted Opinions, considered the facts and decided otherwise.

This Court's Substituted Opinion has far-reaching negative, public policy implications unless rectified by this Court; this Court should grant the rehearing requested for each of the foregoing reasons.

STANDARD OF REVIEW

Rule 221, SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law or fact to petition for rehearing. *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 172-73, 167 S.E.2d 234, 238 (1933) ("The purpose of such a petition is to aid the court in deciding correctly a case heard by it" and a properly drawn rehearing petition must state "the points. . .overlooked or misapprehended by the court.").

ARGUMENT

I. This Court Erred in Reversing its Original Opinion and the Circuit Court's Ruling that Walbeck and Adkins Properly Filed Derivative Claims

This Court's new decision reversing the circuit court's ruling on Walbeck and Adkins' derivative claims is procedurally and substantively flawed, places form over substance, disregards the pleadings and the evidence, and ignores prevailing precedent which establish these derivative claims were properly pled and ultimately proven.

A. The Court Overlooked Developers' Failure to Appeal the Circuit Court's Ruling on the Pleadings, and Consequently, Misapplied the Law

The Court erred procedurally in reversing the circuit court's denial of Developers' Motion to Dismiss because this ruling is the law of the case and cannot be reversed. In a huge departure from its original derivative analysis, the Court limited its substituted derivative analysis to the pleadings and the circuit court's ruling on these pleadings at the motion to dismiss stage. *Compare* (Opinion, p. 144) (finding "judicial economy would not be served by limiting our review to the record as it existed when the circuit court denied [Developers'] motion to dismiss") *with* (Substituted Opinion, pp. 10-11) ("[T]he determination of whether plaintiff has met the requirements of Rule 23 is limited to assessing the sufficiency of the allegations within the

complaint."). However, this Court missed the fact that Developers did not appeal this ruling, and consequently, this ruling stands regardless of whether it's right or wrong. (R. p. 9).

On May 27, 2011, Developers filed a Rule 12(b)(6) Motion seeking the dismissal of only three of the four or more derivative claims (fraud, breach of contract, and breach of fiduciary duty) asserted by Walbeck. (R. pp. 1763-64).

On March 15, 2012, following a Second Amended Complaint filed by Walbeck and Adkins, the circuit court issued an Order denying Developers' Motion ("2012 Dismissal Denial"). In the 2012 Dismissal Denial, the circuit court ruled that the pleadings "were sufficient to state a claim upon which relief can be granted on these three causes of action." (R. p. 9) (emphasis added).

Developers did not file a Motion to Reconsider the 2012 Dismissal Denial and did not appeal this Denial after final judgment was rendered. (Developers' Notice of Appeal filed July 20, 2015 omitting the 2012 Dismissal Denial from the list of Orders on appeal);[5] *see also* Rule 203, SCACR; Rule 59, SCRCP; *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 542-43 (2014) ("As a matter of procedure. . .Appellants have only appealed. . .the Dismissal Order. As such, the merits of the underlying discovery orders, including the Privilege Order and the Discovery Order, are not before us for consideration.") (emphasis added); *see also Overland, Inc. v. Nance*, 423 S.C. 253, 257, 815 S.E.2d 431, 433 (2018) ("The failure to serve a Rule 59(e) motion within ten days of receipt of notice of [order entry] converts the order into a final judgment, and the aggrieved party's only recourse is to file a notice of intent to appeal.") (emphasis added).

[5] According to their Notice of Appeal, Developers only appealed five of the circuit court's trial-related Orders, including the Order Denying Developers' Motion for JNOV ("2015 JNOV Denial"), the Order Denying the 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.

Therefore, this Court cannot reverse the 2012 Dismissal Denial's ruling that the "pleading were sufficient" because this ruling is not preserved for appellate review. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) ("[D]ifferent preservation rules apply to an *appellant*—the losing party in the lower court. 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.") (emphasis in original and added).

Further, the circuit court's ruling that the "pleadings were sufficient" is the law of the case, and this Court must accept that ruling as correct. *Town of Mt. Pleasant v. Jones*, 335 S.C. 295, 298-99, 335 S.E.2d 468, 470 (Ct. App. 1999) *citing ML–Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997) (an unchallenged ruling, right or wrong, is the law of the case); *Continental Ins. Co. v. Shives*, 328 S.C. 470, 474, 492 S.E.2d 808, 810 (Ct. App. 1997) (an unappealed ruling is the law of the case, and the appellate court must assume the ruling was correct).[6]

Simply stated, it's procedurally impossible for this Court to "revers[e] the circuit court's ruling that Walbeck and Adkins properly filed derivative claims on the HOA's behalf" because Appellants never appealed this ruling. (Substituted Opinion, p. 12). This Court must correct this

[6] In its Original Opinion, this Court cited to *Edge versus State Farm* for the proposition that "the denial of a motion to dismiss may be considered in an appeal from other appealable rulings in the same action". (Opinion, p. 144) *citing Edge*, 366 S.C. 511, 523 S.E.2d 387 (2005). *Edge* is distinguishable from this case because it involved a denial of a motion to dismiss that was immediately appealed to the Supreme Court. *Edge*, 366 S.C. at 517, 523 S.E.2d at 390. Here, Developers did not appeal, immediately or otherwise, the 2012 Dismissal Denial which, even under *Edge*, means this Court is precluded from considering this Denial. *Id.* at 520, n. 6, 523 S.E.2d at 392, n. 6. ("The trial judge dismissed the 3rd and 4th causes of action against the Facility and the plaintiffs did not appeal the dismissal.") (emphasis added).

procedural error and acknowledge that this ruling is the law of the case and is precluded from appellate review.

B. The Court Overlooked that the Circuit Court's JNOV Denial is the Only Ruling Appealed by Developers

The Court also erred by failing to recognize that the only circuit court ruling Developers appeal from which discusses derivative claims is the circuit court's post-trial denial of their JNOV Motion. *See* (Notice of Appeal).[7] This Court's review of the 2015 JNOV Denial is in no way limited to the pleadings; rather, this Court must consider all the evidence. *See, e.g., Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (the denial of a JNOV motion is within the trial court's discretion and its rulings will not be disturbed on appeal unless no evidence supports the ruling or the ruling is controlled by an error of law) (emphasis added); *see also* (App. Br. at. 20-21) (agreeing as to the applicability of the JNOV standard).

This is an important point: The primary reason this Court reversed itself in its substituted derivative analysis is because it considered the wrong motion which, in turn, resulted in the Court applying the wrong standard. The Court is precluded from reviewing the 2012 Dismissal Denial, and thus, the Rule 12(b)(6) pleading standard is not applicable here.[8] The Court is not precluded

[7] *See* Footnote 5, *supra.*

[8] In *Patterson versus Whitter*, the South Carolina Supreme Court decided an analogous issue in the derivative action context. In *Patterson*, the Supreme Court confronted the issue of whether a circuit court erred by failing to convert a Rule 12(b)(6) Motion to a Rule 56 Motion. 425 S.C. 213, 225-26, 821 S.E.2d 677, 684 (2018) ("In considering a motion for dismissal under Rule 12(b)(6), if matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated and disposed of as provided in Rule 56.") (citations and quotations omitted) (emphasis added). The Supreme Court held the motion to dismiss was converted into a motion for summary judgment and the Court **"review[ed] it as such."** *Id.* at 226, 821 S.E.2d at 685 (emphasis added). *Patterson*, therefore, establishes that the standard applicable to derivative determinations is a function of the standard applicable to the derivative ruling appealed. Here, the only derivative ruling appealed is a JNOV ruling, and consequently, the JNOV standard applies.

from reviewing the 2015 JNOV Denial, but in so reviewing, the Court must consider the evidence, which is exactly what the Court did in its Original Opinion:

> [J]udicial economy would not be served by limiting our review to the record as it existed when the circuit court denied the motion to dismiss. Rather, as a result of surviving the motion to dismiss and the summary judgment motion, Walbeck and Adkins endured the time and expense of a lengthy trial on the derivative claims. Therefore, it would be wasteful, not to mention unfair, to ignore the evidence generated at trial on this issue.
>
> Therefore, we will look the record before the circuit court at trial. The documentary evidence. . .as well as the testimony before the circuit court showed that Appellants had veto power over the decisions of the Board. . .Further, one Board member, Deborah Bedell, testified regarding her understanding that the veto power would have prevented the Board from initiating litigation. Therefore, the evidence shows that a demand on the Board to initiate litigation against the Appellants would have been futile.
>
> Additionally, the circuit court properly found Walbeck and Adkins fairly and adequately represented the interests of other HOA members because Walbeck and Adkins were represented by highly qualified counsel and were similarly situated to the other HOA members. . .According to the circuit court, the testimony of three HOA members, Julie Hussey, Tim Eble, and Deborah Bedell, indicated that Walbeck's and Adkins' assertion of the derivative claims advanced the interests of the HOA's members. The testimony of these witnesses supports the circuit court's finding. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 (holding an appellate court may reverse the circuit court's ruling on JNOV motions only when there is no evidence to support the rulings or when the ruling is controlled by an error of law)
>
> A new demand was unnecessary following the settlement [of their claims against Russo] because the resulting change to the damages sought did not change the nature of the original claims. Moreover, the HOA's realignment as a plaintiff allowed the jury to award damages to the HOA as if Walbeck and Adkins had never brought derivative claims.
>
> Based on the foregoing, we affirm the circuit court's ruling that Walbeck and Adkins properly maintained a derivative action on the HOA's behalf.

(Opinion, pp. 144-46) (emphasis added) (some internal citations omitted); *see also Grant v. Gosnell,* 266 S.C. 372, 375, 223 S.E.2d 413, 414 (1976) (noting the issue of whether the failure to

seek redress within the corporation is excusable is a factual question, the resolution of which by trial court should be affirmed unless unsupported by the evidence) (emphasis added).[9]

Because this Court has already affirmed the circuit court's JNOV ruling that "Walbeck and Adkins properly maintained a derivative action," and this is the only derivative ruling properly before this Court, it should grant rehearing, note the correct standard, and reinstate the derivative verdicts that it wrongfully vacated it its Substituted Opinion.

C. The Court Ignored Developers' Admission that Demands were Made Upon the HOA to Initiate Litigation Which the HOA Refused to Act on

The Court additionally erred in disregarding Developers' admission that an adequate demand was made to the HOA and refused by the HOA. *Compare* (Opinion, p.144-46) (refusing to limit its analysis to the motion to dismiss record) *with* (Substituted Opinion, pp. 10-11) (limiting its analysis to the motion to dismiss record).

In its Substituted Opinion, this Court found that (1) the "pleadings fall short of alleging facts indicating an adequate demand by either Walbeck and Adkins directed to the Board or the futility of making such demand;" and, (2) "the pleading do not allege that either Walbeck or Adkins directed a demand to the Board to initiate litigation against Appellants to enforce the HOA's alleged rights and recover the disputed amenities." (Substituted Opinion, pp. 11-12).

None of this is correct given Developers' pleadings concede that HOA members made an adequate demand upon the HOA and the HOA refused to act on this demand. The same day Developers filed their Motion to Dismiss, they filed an Answer admitting:

> [A] certain member or members of the [HOA] had **made demands upon the [HOA] to bring suit regarding the issue raised in the Amended Complaint and that the [HOA] refused to do so**.

[9] The Court's additional reasons for originally not limiting its review to the pleadings are also still valid. (Opinion, pp. 144-46).

(R. p. 144) (emphasis added); *see also* (R. pp. 141-50) (Answer filed on May 27, 2011); (R. pp. 1763-74) (Motion filed on May 27, 2011); *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2nd Cir. 2011) (finding a defendant's answer and exhibits attached or integral to the answer can be considered in making derivative determinations).[10] This concession establishes that an adequate demand was made; and further, evidences the futility of any further demand. *See, e.g., Johnson v. Alexander,* 413 S.C. 196, 201-02, 775 S.E.2d 697, 700 (2015) ("In determining the scope of Alexander's duty, we accept his consistent characterization of this responsibility—ensuring Johnson received good title. In her complaint, Johnson alleged '[d]efendants had professional duties to ensure that Plaintiff was receiving good and clear title. . .and if there was a problem. . .to correct said deficiencies and/or advise Plaintiff how to correct said deficiencies.' In Alexander's answer he *admitted* those allegations. Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions.") (emphasis in original).

D. The Court Overlooked Developers' Failure to Seek Dismissal of Walbeck's Direct and Derivative Negligence Misrepresentation Claim

Again assuming this Court's analysis is "limited to the record at the time the circuit court decided the motion to dismiss," the Court also erred by overlooking the fact that Developers only moved to dismiss three derivative claims: breach of fiduciary duty, breach of contract and fraud. Developers did not move to dismiss the negligent misrepresentation claim; the circuit court did not rule on the sufficiency of the negligent misrepresentation claim; and, the jury later returned a

[10] The *Patterson* Court cited to this decision in its derivative analysis. *Patterson,* 425 S.C. at 235, 821 S.E.2d at 685; *see also United Educational Distributors, LLC v. Educational Testing Services*, 350 S.C. 7, 13, 564 S.E.2d 324, 327-28 (Ct. App. 2002) (acknowledging that a dismissal on the pleadings is considered a drastic procedure, and therefore, the pleadings should be construed liberally and presumed to be true as pled so that substantial justice is done between the parties).

$1,000,000 verdict in favor of the HOA and a $20,000 verdict in favor of Walbeck on this claim. (R. pp. 1763-64) (Developers' Motion to Dismiss excluding Walbeck's direct and derivative negligent misrepresentation claim); (R. p. 9) (2012 Dismissal Denial ruling on the breach of fiduciary duty, breach of contract and fraud claims); (R. pp. 1858-59) (Verdict form awarding the HOA $1,000,000 and Walbeck $20,000 for "negligent misrepresentation"). Because the negligent misrepresentation claim was neither raised to, nor ruled upon, at the motion to dismiss stage, this Court's reversal of the circuit court's 2012 Dismissal Denial does not affect this claim. *Lucas v. Rawl Family Ltd. Pship.*, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court."); *Elam v. S. Carolina Dep't of Trans.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (noting a party must file a Rule 59(e) motion "when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."). The Court should modify its Substituted Opinion to correct this error; and, should the Court choose not to restate the HOA's and Walbeck's elected awards despite the arguments outlined herein, it should alternatively restate the HOA's and Walbeck's negligent misrepresentation awards.[11]

II. The Court's Substituted Opinion Misapprehends Both the Law and the Facts as it Relates to Rule 23's Derivative Requirements

The Court's substituted derivative analysis is also wrongfully limited to the pleadings contrary to prevailing Supreme Court precedent and ignores the entirety of the allegations and the evidence which establish these derivative claims are proper.

[11]Respondents briefed the issue of restating non-elected claims in their Original Petition and refer this Court to that Petition for this argument. (Original Petition, pp. 18-19). Further, given this Court's Substituted Opinion remanded, albeit erroneously, Walbeck's breach of contract claim and ordered a new trial as to that claim, it appears the Court is already inclined to permit such alternative relief. (Substituted Opinion, p. 26).

A. The Court's Substituted Derivative Analysis Disregards the Supreme Court's Recent Decision in *Patterson* and Applies the Wrong Standard

In *Patterson versus Witter*, the Supreme Court recently held derivative determinations are not limited to the pleading and expressly rejected the approach taken by this Court in its substituted derivative analysis. 425 S.C. at 226, 821 S.E.2d at 684; *see also* Rule 12(b)(6), SCRCP.

Patterson involved a misappropriation action brought by members of a home builders corporation and purported trust fund the corporation established. *Id.* at 218, 821 S.E.2d at 680. A dispute arose after the corporation's Board of Directors announced plans to wind down the fund and use $5 million from the fund to establish a separate, insurance company — monies which should have been returned to the members according to the trust agreement. *Id.* at 219-20, 821 S.E.2d at 680-81.

In February 2012, the members filed an initial complaint against the fund and the corporation's Board seeking, among other things, their share of the $5 million. *Id.* at 222, 821 S.E.2d at 682. The fund and Board moved to dismiss the members' complaint on several grounds, including that the complaint was derivative in nature and did not meet Rule 23's derivative requirements. *Id.* In September 2012, a hearing was held on the motion to dismiss, during which the circuit court indicated it was inclined to dismiss the complaint based on the probate court's exclusive jurisdiction over trusts. *Id.*

On January 30, 2013, after the hearing but before the circuit court issued its written order, the members sent a written, demand letter to the attorneys for the fund and Board itemizing specific requests, none of which included a request to "initiate litigation". *Id.* at 222-23, 821 S.E.2d at 682-83. The fund and Board did not respond to the members' demand; and, on March 5, 2013, the circuit court issued an order dismissing the action without prejudice for lack of jurisdiction. *Id.* at 223-24, 821 S.E.2d at 683.

Still having received no response to their January 2013 demand, the members refiled their action in probate court on April 9, 2019. The probate complaint alleged the same causes of action and included a new paragraph which stated:

> [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.

Id. at 224, 821 S.E.2d at 683 (emphasis added).

The probate action was removed to circuit court; the corporation and fund then moved to dismiss the probate complaint on similar grounds as the first complaint; and, ultimately, the circuit court held that the complaint failed to comply with Rule 23. *Id.* at 225, 821 S.E.2d at 683. Members filed a Rule 59(e) Motion, arguing their January 2013 demand was properly made, the circuit court's order elevated form over substance, and that they should be able to amend their pleadings if more detail was needed. The circuit court denied this Motion and members appealed. *Id.* On appeal, this Court affirmed the circuit court, finding that the members' complaint did not properly allege a Rule 23 demand. *Id.* at 225, 821 S.E.2d at 684.

The Supreme Court then granted certiorari and reversed this Court's decision because it found members satisfied Rule 23's derivative requirements and that the Court of Appeals erred in multiple respects.

First, the Supreme Court held that a court's review of motions to dismiss are not necessarily limited to the pleadings:

> If matters outside the pleading are presented to and not excluded by the Court, a [Rule 12(b)(6)] motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . .Because the parties submitted matters outside the pleadings that were not excluded by the court and certain factual findings in the circuit court's order exceeded the scope of the facts alleged in the complaint, we find this motion to dismiss was converted into a motion for summary judgment and we review it as such.

Id. at 226, 821 S.E.2d at 684.

Second, the Supreme Court disagreed with this Court's reliance on *Whittle*[12] and found *Patterson* clearly distinguishable:

> The facts of this case are distinguishable from those in *Whittle*. Here, although the [January 2013 demand] was not expressly incorporated by reference into the complaint, unlike in *Whittle*, the [January 2013] letter *does* constitute an adequate demand in this case. Another issue here is [members] failure to include the magic

[12] Approximately twenty years before *Patterson*, this Court addressed the derivative issue in *Carolina versus Whittle*. 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000), *certiorari granted* August 23, 2001, *remains viable in result only* by Order dated January 10, 2003. In a departure from the Supreme Court's derivative decisions, the *Whittle* Court wrongfully imposed additional pleading requirements, restricted the demand requirement as recognized under South Carolina's substantive law, and limited its derivative analysis solely to the pleadings. While this Court makes a point to note that it does not consider *Whittle* "binding precedent" following the Supreme Court's 2003 Order indicating that *Whittle* "remains viable in result only," this Court quotes extensively from *Whittle* in explaining its interpretation of Rule 23's derivative requirements. (Substituted Opinion, p. 11, n. 5) ("[w]e do not view *Whittle* as binding precedent"). In fact, the legal discussion included in the Court's substituted derivative analysis appears to be derived from *Whittle* – the Court just does not cite *Whittle* and choses instead to cite the same cases cited in *Whittle* to try to justify applying the same flawed analysis here. In other words, the primary point this Court attempts to make in its Substituted Opinion – that derivative determinations should be limited to only reviewing the pleadings – appears entirely based on its former decision in *Whittle* which the Court admits is non-binding precedent. *Compare* (Substituted Opinion, pp. 10-11) (noting "the determination of whether a plaintiff has met the requirements of Rule 23 is limited to assessing the sufficiency of the allegations within the complaint.") (emphasis added) *with Whittle*, 343 S.C. at 188-189, 539 S.E.2d at 409 ("the sufficiency of the pleading in meeting the requirements of Rule 23 must be based solely upon the allegations contained within it.") (emphasis added). Not only is this proposition not binding per this Court's own admission, it's wrong. *Whittle*, like this Court, relied on *McCormick versus England* for the proposition that derivative determinations can only be based on the pleadings; yet, *McCormick* did not involve Rule 23 – it concerned whether a physician's breach of confidentiality constituted a cause of action. *Compare* (Substituted Opinion, pp. 10-11) *with McCormick*, 328 S.C. at 632-33, 494 S.E.2d at 434 (referencing Rule 23 nowhere). Further, the Supreme Court makes clear in *Patterson* that derivative determinations are not limited to the pleadings, and *Patterson* is the prevailing authority on this issue. On a separate, but equally important note, this Court in *Whittle* also acknowledged that the appellants in that case, like here, failed to appeal the circuit court's order granting the dismissal of their complaint. *Id.* at 190-91, 539 S.E.2d at 410 ("Shareholders have not appealed this ruling, nor have they appealed the refusal to allow further amendment to the Third Amended Complaint. An unappealed ruling is the law of the case. . .and is not properly before us on appeal.") (emphasis added). Thus, even according to this Court in *Whittle*, this Court erred procedurally in considering the unappealed 2012 Dismissal Denial.

> phrase "which is incorporated herein by reference" [when describing the demand in their complaint]. Indeed, the allegations concerning the [demand] in [members'] complaint are appreciably more detailed than those in *Whittle*. And certainly, when the [January 2013 demand] is considered in conjunction with the complaint, there is ample evidence that Rule 23 is satisfied.

Id. at 234, 821 S.E.2d at 688 (emphasis added).

Third, the Supreme Court expressly rejected the approach that this Court has taken here in its Substituted Opinion:

> [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.") *quoting Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004). . .

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

B. The Court Erred in Concluding that Rule 23's Derivative Requirements Were Not Met

Applying Rule 23 and *Patterson* to this case, it is clear that all applicable derivative requirements are satisfied, regardless of which "pleading" or "evidentiary" standard is applied, and this Court erred in concluding otherwise.

Like *Patterson*, these complaints allege Walbeck and Adkins' member status and the efforts they, and other members, made to "obtain the action desired" – securing the HOA's rights to the Creekside Park and Community Dock. For example, the Amended Complaint provides:

> 1. [Walbeck]. . .is an owner of a [home] located in. . .I'On.
>
> 2. [Walbeck] brings this action on behalf of himself, and derivatively on behalf of the [HOA] and its members, the other property owners in I'On, because the [HOA] has failed to protect and enforce the rights of [the HOA] and its members with respect to the matters alleged herein.

(R. p. 132) (emphasis added).

The Amended Complaint, much like *Patterson's* probate complaint, also includes a paragraph that provides:

> 35. Several I'On homeowners have made repeated demands upon the [HOA] and its Board to secure the [HOA] and its members rights to the Creekside Park and Community Dock; and, provided the Board with the necessary information to do so. However, the Board has failed to secure the rights and has acquiesced to the sale of these amenities.

Compare (R. p. 132) (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 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.") (emphasis added).

The Second Amended Complaint, which was in the record at the time of the 2012 Dismissal Denial, provides even more detail and expressly references repeated "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 Creekside Park and Community Dock," all "to no avail":

> 4. [Adkins]. . .is an owner of a [home] located in. . .I'On.
>
> 21. [HOA] is the homeowners association for the I'On neighborhood.
>
> 22. By virtue of property ownership in I'On, Walbeck and Adkins are members of the [HOA], and have been members of the [HOA]. . .
>
> 45. On or about February 26, 2009, [HOA] member and I'On property owner Catherine Templeton made a demand upon the [HOA] (the "Templeton Demand") to act in order to secure the [HOA] and its members' unencumbered title, access, and use of the Creekside Park and Community Dock. . .
>
> 46. Plaintiffs were contemporaneously aware of the Templeton Demand as Templeton's Demand was made both by letter and overtly and publicly at an [HOA] meeting.

47. On or about March 5, 2009 and March 11, 2009, Adkins made a request to the [HOA's] attorney (the "Adkins/Bouch" Demand). . .to investigate the allegations that the I'On Company was contractually obligated to convey the Community Dock and Creekside Park to the [HOA].

48. Walbeck was contemporaneously aware of the Adkins/Bouch Demand.

49. On or about 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 or about March 11, 2009, the [HOA's] Board President demanded that [Appellants] convey the Community Dock to the [HOA] but failed to demand conveyance of the Creekside Park.

52. During the month of April 2009, Adkins and [HOA] Board Member. . .discussed the [Appellants'] obligation to convey the Creekside Park and Community Dock to the [HOA]. Concurrently, the [HOA Board Member] relayed Adkins demands to [Appellants]. Walbeck was contempareously aware of these communications.

53. During the months of June and July 2009, Walbeck and Adkins made demands upon the [Developers] to convey the Creekside Park and Community Dock 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 unencumbered title, access and use of Creekside Park and Community Dock.

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 amenities to a third-party evidenced the Board's failure to secure the rights to the Property, and the futility of further demand on the [HOA] and its Board.

(R. pp. 156-57) (emphasis added).

Further, after considering the evidence and specific demands that are referenced in these pleadings, there is no doubt that Rule 23 is met. For example, this Court failed to consider the Templeton Demand that was "integrated" in the Second Amended Complaint. This Demand, sent by an HOA member on February 26, 2009 and received by the HOA Board, Walbeck, Adkins, and other HOA members "pre-suit", constitutes an "adequate demand" under Rule 23:

Dear [HOA Board President],

Provided to you and the Board is copy of the property report for I'On which is required under [ILSA]. . .On page 21 of the report you will find a list of recreational properties. On the following page is the clear requirement that these properties be deeded to the HOA upon completion.

The [HOA Board] is on notice that action must be taken immediately to secure any of these properties which have not been so far titled to the [HOA]. . .

If the Board has taken any action that has served to limit rights of use by Titleholders or otherwise release, limit or abandon those rights or ownership or control of property identified, such actions must be unambiguously and immediately reversed.

That specifically applies to the Community Dock at the Creek Club. It has been previously reported that the Board declined to accept ownership of the Community Dock. . .If this is an accurate account, the Board did not have the authority to deprive individual Titleholders of the ownership of property.

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 that this Board, and perhaps previous Boards, failed in their fiduciary responsibility to the [HOA]. The current Board must consider, not simply ownership, but pursuit of damages from the [Appellants] on the presumption that the [HOA] has met its obligations. . .

(R. pp. 2229-2230).[13]

[13] This Court's Substituted Opinion wrongfully imposes ultra-heightened pleading requirements for derivative actions. According to this Court, a member cannot demand that a corporation protect its or its members' interest, and then file a derivative lawsuit on the corporation's behalf when its board fails to protect these interests, unless the member sends another demand specifically requesting that the board "initiate litigation" and then files suit alleging that specific member made this specific demand. (Substituted Opinion, pp. 11-12) (dismissing Respondents' derivative claims because "the pleadings do not allege that either Walbeck or Adkins directed a demand to the [HOA] Board to initiate litigation against the [Developers] to enforce the HOA's alleged rights;" "there are no allegations that a demand on the Board to initiate litigation to recover these amenities would have been futile;" "there are no allegations that [Developers] had veto power over the Board that they would prevent the board from initiating litigation against them.") (emphasis added). Nowhere in Rule 23 is there a requirement that "a member must direct a demand to a corporation's board to initiate litigation" before the member can assert derivative claims. Rather, according to the Rule's plain language, there are only four requirements that a member must satisfy to properly maintain derivative action: (1) verification of a complaint that alleges (2) member status at the time of a challenged corporate act, (3) the efforts, if any, made by the member to get the corporation to act; and, (4) the reasons for the member's failure to get the corporation to act as requested or

Similarly, this Court disregarded the letters Adkins exchanged with the HOA's attorney in March 2009 that were also referenced in the pleadings. (R. pp. 2231, 2234-35). 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 for the declarations and covenants". (R. p. 2231). This is important for four reasons. First, it can be reasonably inferred that Adkins' first letter to the HOA's attorney demanded that the Board act to prevent the sale of amenities rightfully belonging to the HOA or else the HOA's attorney would not have referenced that it was the Board's understanding that this was not happening and that the Board would fulfill its responsibilities by making sure this would not happen. *Id.* Second, it shows that Board had a duty to ensure that the amenities were not sold to a third-party and Adkins personally made a "good faith effort" to "induce the Board to act" to prevent such a sale from occurring. *Id.* Third, it establishes that any demand made by Adkins upon the Board to "initiate litigation" about these amenities would have been futile because it was the Board's "understanding" that these amenities were not going to be sold. Fourth, it indicates that the then-Board had not sufficiently acted on the earlier demands made by the homeowners or else Adkins would not have had to write the HOA's attorney in the first place.

---

the member's inability to make such a request. Rule 23(b)(1), SCRCP. Not only is Rule 23 void of any language requiring a "litigation-specific" demand, South Carolina's substantive law has recently recognized no such demand is required. In *Grant versus Gosnell*, for example, the South Carolina Supreme Court found that members must only allege that they have "exhausted their remedies within the corporation or show a sufficient reason for not doing so" in order to maintain a derivative action. *Grant v. Gosnell*, 266 S.C. 372, 374, 223 S.E.2d 413, 414 (1976). Just last year, the *Patterson* Court found a complaint referencing requests for action, which did not include a request to sue, and made to a corporation's attorney (not directly to the corporation's Board), satisfied Rule 23's derivative requirements. *Patterson,* 425 S.C. at 688-89, 821 S.E.2d at 233-35.

In fact, a week after he received Adkins' letter, the HOA's attorney first wrote the developers and admitted that the Board "would have dealt with this matter much sooner," but nevertheless, still expected "a smooth transition since discussions about turning over the docks have been going on for some time." *Compare* (R. p. 2231, 2234-35) *with* (R. p. 2233) ("As stated earlier [to the developers], the [Board] just became aware of the HUD Report and the Impact Statement. Otherwise, this matter would have been dealt with much sooner. However, since discussions about turning the docks over to the [HOA] have been going on for some time, I would expect this to be a smooth transition."). This letter from the HOA's attorney to Developers also shows that the Board demanded the "turn-over" of only the Community Dock but failed to demand the "turn-over" of the Creekside Park. *Id.* The same day the Board wrote the 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 amenities] – the [Community Dock] and Creekside Park." (R. pp. 2234-35) (emphasis added).

Approximately one month later, and as referenced in the pleadings, Adkins and HOA Board Member, Matt Walsh, discussed the amenities via e-mails and phone calls. In an April 1, 2009 e-mail between Adkins and Walsh, Walsh writes:

> There is no sale that we are aware of. I am sure that [Developers] will try again, but right now, I am not aware of anything and have been told by the [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 from the amended HUD and will share it when I get it. As for Creekside [P]ark, I assume you are not satisfied with Vince's definition, though I am not sure where there is a concrete alternative. The docks should be deeded to the HOA soon, and we are working with [the developers] to make sure that is done properly.

A few hours later, Adkins responds:

> I will admit I was astounded that not one person on the Board had a question for [Developers] in the meeting regarding the linear park explanation. . .The burden is

> on the [Developers] to PROVE what Creekside Park is – in the absence of a map with it stamped on the marshwalk, we have to look to other proof. . .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?

(R. pp. 2241) (emphasis added).

After Walsh received Adkin's e-mail, he immediately sent portions of it to the Developers so that they "could clear up what seems to be some confusion". (R. p. 2243). Adkins then responds with a letter to Walsh, stating:

> From the beginning of events involving the Creek Club property, the Board has shown little initiative or interest in representing the [HOA] and insuring 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 the question of whether the properties even *could* be sold to private investors by the [Developers]. 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 1998 HUD Property Report, which promised [HOA] ownership of certain [amenities] in I'On, the Board took no action to secure them. When told in March by [the Developers] that the 1998 HUD 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 last information from the president involved four pages of his explanation about the new easement he negotiated with the Creek Club buyers – which was later confirmed to have been *verbatim* what the buyers proposed to him in the first place. 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 Creek Club and Civic Site 6 property effect the property rights and values of every, single titleholder in I'On. The Board's failure to secure the properties 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 even 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.

(R. p. 2245) (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 the developers; (c) the 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 given that the same requests had been repeated multiple times, all to no avail. Moreover, by this point, homeowners like Adkins feel "uncomfortable" communicating with the Board, to make a demand or otherwise, because of the Board's propensity to share what they considered "intra-corporate" communications. *Id.*

Yet, that's not all. The pleadings also reference another demand made by Walbeck's and Adkins' then-attorneys on June 25, 2009. 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 Amenities:

> The crux of [Walbeck's and Adkin's] complaint against [Developers] is that they were assured by various means that [the Amenities] would be conveyed to [the HOA]. . .[E]nclosed herewith is a copy of [a] draft Complaint for the purpose of

> informing [Developers] of the claims. Our clients have been informed [that] there is no room for discussion on the topic of [the Amenities], which we understand amounts to a refusal to convey [the Amenities]. 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. The purpose of this letter is to ask you and your counsel to review the claims that are proposed and to consider complying with the request of our clients that the property described in the Complaint be conveyed to the [HOA]. . .

(R. p. 2248) (emphasis added).

On July 3, 2009, Developers responded in a letter, copied to Board President, Bruce Kinney, and Board Member, Matt Walsh, which "attempted to clarify" that the Amenities had already been 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 Mr. Walsh's note was an excerpt from an e-mail that was sent to him by one of these neighbors concerning the park definition. On April 3, 2009, I responded to Mr. Walsh with an email intending to clarify the issue. A copy of that e-mail correspondence is attached to this letter.
>
> [Adkins] sent me a letter dated April 1, 2009, which I read on April 6, 2009. As this letter contained language identical to that of the excerpt sent by Mr. Walsh, I assumed – incorrectly – that Mr. Walsh had forwarded my attempt a clarification to those neighbors who had contacted him with concerns about the definition. . .
>
> 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. A third dock in Phase 2 is owned by [Developers]. [Developers] enables members of the [HOA] use of this dock for recreational facilities such as fishing and boating. . .I hope this clarifies matters for you and your clients.

(R. p. 2250) (emphasis added); *see also* (R. pp. 2251-54) (referenced April 2009 e-mails between Developers and these same Board members wherein Developers represent that the Creekside Park is really the "Marsh Walk" and has already been conveyed to the HOA).

This exchange further establishes demand futility and provides ample reason for excusing a demand in this instance because it is "reasonable to infer" that then-Board would not act to recover Amenities it believed Developers had already conveyed. After considering *Patterson* and the above-referenced demands, meetings, discussions, and other communications, all of which were referenced in the pleadings, it is clear that Walbeck's and Adkins' derivative claims were properly pled and this Court erred in finding otherwise.

C. Even Under a Pleading Standard, These Derivative Claims are Properly Pled

Even assuming this Court's analysis was limited solely to "the record as it existed when the circuit court denied the motion to dismiss", the allegations of the Second Amended Complaint, when considered in conjunction with the allegations of the Amended Complaint and Appellants' Answer to the Amended Complaint, establish that Rule 23 is satisfied.[14] There is nothing that precluded the circuit court or this Court from reviewing these pleadings since they were filed before the 2012 Dismissal Denial. Like *Patterson*, the derivative allegations in these pleadings "are appreciably more detailed" than the pleadings previously considered by our appellate courts.[15]

---

[14] The Supreme Court's earlier decisions also differ from this Court's Substituted Opinion as to what is required to maintain a derivative action, whether there is a demand requirement, whether a demand can be excused, and which standard is applied in these various scenarios. Based on the Supreme Court's pre-*Patterson* (and, largely, pre-Rule 23) decisions, so long as there was "an allegation that a demand has been made and refused" or "an allegation of an effort to have grievances redressed" or "an allegation that such effort would have been useless" or "an allegation of wrongdoing or control" then "there was enough alleged". *See, e.g., Grant v. Gosnell,* 266 S.C. 372, 373-74, 223 S.E.2d 413, 414 (1976); *Thompson v. Thompson*, 214 S.C. 61, 68, 51 S.E.2d 169, 173 (1948); *Kickbusch v. Ruggles*, 105 S. C. 525, 90 S. E. 163, 166 (1928); *Stahn v. Mills*, 53 S.C. 519, 31 S.E. 498, 498-99 (1898); *Latimer v. Richmond*, 39 S.C. 44, 17 S.E. 258, 260 (1893). The Supreme Court also adopted a "lenient" approach "in excusing demand" based upon the facts of a given case. *Grant*, 266 S.C. at 375-77, 223 S.E.2d at 414-15 ("In evaluating the 'excuse' allegations in a derivative suit, [c]ourts have generally been lenient in excusing demand. . .").

[15] These pleadings are far more detailed than the "vague, unclear, and indefinite" pleadings discussed in earlier South Carolina decisions, and include the allegations those decisions indicated would suffice. *See Grant, Thompson, Stahn, Kickbusch, Latimer, supra.* For example, the pleadings contain a formal demand upon the board of directors, and a refusal by them to act. *See,*

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 reached just to make the case go away. *Id.*

This is not the case here -- these are legitimate claims brought for legitimate reasons as evidenced by the jury's verdict. Further, it has been over eight years since Respondents commenced this action, thousands of documents have been reviewed, multiple discovery requests have been answered, several depositions have been taken, more than thirty motions have been decided, two trials have occurred, both sides' appeals have been briefed and were originally determined, but then, this Court took a 180-degree turn and decided to deny these Respondents and hundreds[16] of I'On homeowners any relief. The United States Supreme Court in *Surowitz* made clear that Rule 23 should not prevent the adjudication of legitimate cases such as this one:

> The basic purpose of the Federal Rules 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

---

e.g., (R. p. 144) (Developers admitting "a certain member or members of the [HOA] had made demands upon the [HOA] to bring suit regarding the issue raised in the Amended Complaint and that the [HOA] refused to do so."); (R. p. 156-57) ("Adkins made a request to the [HOA's] attorney (the "Adkins/Bouch Demand") to investigate"); ("Despite repeated demands to the [Developers] and the [HOA] Board, the Board has failed to take the necessary action. . ."). The pleadings contain allegations of the Board's failures. *See, e.g.*, (R. p. 132) ("[T]he Board has failed to secure the rights and has acquiesced to the sale of these amenities."); (R. pp. 156-57) ("[T]he [HOA's] Board President demanded that [Developers] convey the Community Dock to the [HOA] but failed to demand conveyance of the Creekside Park."). The pleadings describe the many efforts made to try to get the HOA to act. (R. pp. 132, 156-57) (alleging multiple demands, meetings and other communications wherein HOA members, including Walbeck and Adkins, made efforts to induce HOA action, but to no avail). The pleadings also allege that any demand is futile. *Id.*; *see also* (R. p. 157) (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 amenities to a third-party evidenced the Board's failure to secure the rights to the Property, and the futility of further demand on the [HOA] and its Board.").

[16]There are approximately 768 residences in I'On.

> 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.

III. This Court's Substituted Opinion Ignores the HOA's Direct Claims

This Court's substituted derivative analysis also fails to acknowledge the direct claims of the HOA contrary to its original analysis. The HOA was added as a nominal defendant in February 2012 so that it would be bound by any verdict rendered. (R. p. 153). Thereafter, the circuit court realigned the HOA as a plaintiff[17] and the HOA adopted Walbeck's and Adkins' breach of fiduciary duty, negligent misrepresentation and breach of contract claims. (R. pp. 16-17) ("[HOA]. should be deemed to have adopted [Respondents'] claims, and [Appellants'] responses to [Respondents'] Complaint should be deemed to serve as responses to the [HOA's] adopted claims."). The circuit court charged the jury accordingly. (R. pp. 1676:10-178:12). The HOA was a named plaintiff on the verdict form, and the jury returned a verdict favoring the HOA on each of these three claims. (R. pp. 19; 1857-58). As a result, whether the derivative claims asserted by Walbeck and Adkins are properly pled is a moot point; the same claims were brought directly by the realigned HOA; and, the jury found in the HOA's favor on its direct claims. (R. pp. 1857-1858).

As correctly found by this Court in its Original Opinion that "the HOA's realignment as a plaintiff

[17] The South Carolina Supreme Court recognizes the authority of a trial court to use its "sound discretion" to realign parties "at any stage of the action." *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010).

allowed the jury to award damages to the HOA as if Walbeck and Adkins never brought a derivative action." (Opinion, p. 22).

IV. Alternatively, the HOA's Breach of Contract or Negligent Misrepresentation Verdict Should Be Reinstated

Alternatively, this Court should reinstate the $1,000,000 award to the HOA under either its breach of contract claim or negligent misrepresentation for several reasons. First, if the HOA's breach of fiduciary duty claim should have been directed out, as ruled in the Substituted Opinion, there would have been no election, and these $1,000,000 verdicts would have stood on their own. Second, the sealed nature of the contract, and the applicable twenty-year statute of limitation, is uncontested by Appellants. Third, South Carolina law supports this post-election remedy. Our state law is clear that the purpose of the election of remedies doctrine is to "prevent double recovery for a single wrong." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 56, 691 S.E.2d 135, 152–53 (2010); *see also Jones by Robinson v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 175, 456 S.E.2d 429, 431 (Ct. App. 1995) ("Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts."). For that reason, the doctrine's application "should be confined to cases where double compensation of the plaintiff is threatened." *Save Charleston Found. v. Murray*, 286 S.C. 170, 175, 333 S.E.2d 60, 64 (Ct. App. 1985). That is no longer the case here.

Here, the HOA elected to recover on the jury's breach of fiduciary duty award immediately post-trial. (R. p. 19). However, in its Substituted Opinion, this Court determined that the HOA's breach of fiduciary duty award is unrecoverable – a ruling which, if upheld on rehearing, removes the threat of double recovery. Because the HOA still has two available remedies, it should be

allowed to recover on at least one of these claims.[18] In sum, when a verdict, elected by a plaintiff as his remedy, was only rendered due to the circuit court's error, a plaintiff should be allowed to invoke and satisfy a different jury verdict. The alternative, refusing to reinstate either the HOA's breach of contract or negligent misrepresentation award, would leave the HOA without any remedy for the jury's findings in his favor. To ensure a just result, this Court should reinstate either the HOA's breach of contract or negligent misrepresentation verdict.

V. The Court's Substituted Breach of Fiduciary Duty Analysis Misapprehends Both the Law and the Facts

This Court erred in its substituted fiduciary duty analysis by: (a) overlooking facts that demonstrate the Developers' failure to act in good faith and in due regard to the HOA and its members; (b) failing to properly conduct the case-specific fiduciary duty analysis required under South Carolina law; and, (c) failing to recognize that when Developers sold the Creekside Park and Community Dock for a profit to a third party, the burden of proof shifted to Developers to show the fairness of this transaction.

A. The Court Overlooked Evidence Showing the Developers Failed to Act in the Interests of the HOA and its Members

This Court references two circuit court conclusions in its Substituted Opinion, one of which it found was correct and one of which it found was incorrect The first, and correct conclusion, is that: "a developer in control of a homeowner association may not make decisions that benefit the developer's own interest at the expense of the association and its members." (Substituted Opinion,

[18] *See* Footnote 11, *supra*; *see also Ebner v. Haverty Furniture Company*, 138 S.C. 74, 136 S.E. 19, 21 (1926) ("The application of the doctrine [of election of remedies] is not a Procrustean rule; whether at common law or equity side of the court, it does not depend upon technical rules, but upon principles of equity and justice."); *Ex Parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible.").

p. 12). The second, and purportedly incorrect conclusion, is that: "a developer's failure to convey common areas to a homeowners association is at least the equivalent of conveying them in substandard condition." *Id.* (internal quotations omitted). There was considerable discussion on the second conclusion in this Court's substituted analysis but no discussion of the first conclusion despite this Court's original findings that:

- "[Developers] owed a fiduciary duty to protect the rights of the HOA's members to the unfettered use and enjoyment of the [Amenities] and there was evidence showing that [Developers] breached this duty".

- "[Developers'] control of the HOA undoubtedly required the [Developers] to preserve the rights of the HOA's members to the unfettered use and enjoyment of these common areas. Yet, on two occasions, Developers placed the HOA's members in a position of having to compete with non-members for access to these [common areas]."

- Developers made representations to the HOA, separate from those in the 1998 Property Report, that they would convey the disputed property to the HOA.

- "[T]here is evidence in the record from which the jury could have reasonably inferred [Developers] bad faith. . .[T]he evidence shows [Developers'] intent to profit from the [Amenities] at the expense of the HOA's members."

- "[Developers'] assurances led the HOA's members to 'repose a special confidence' in [Developers], binding [Developers] to act in good faith. . ."

- "[Developers] acted in bath faith and profited at the expense of the HOA's members. . .there is sufficient evidence of [Developers'] breach of fiduciary duty to the HOA's members to affirm [the circuit court]."

(Opinion, pp. 146, 151-53).[19]

This Court should reinstate these original determinations because the facts presented at trial showing Developers' conduct to this end are plentiful. For instance:

- Developers agreed to allow residents of a neighboring subdivision, Olde Park, to use the Community Dock if Olde Park paid Developers a $350,000 fee but failed to inform Brad Walbeck and I'On residents of this material change to their use and enjoyment of the Dock. (R. pp. 2899-2900; 2901-2905).

[19] Respondents address the Court's errors as to that conclusion separately in Section V(B) below.

- Developers removed their obligation to convey Creekside Park and the Community Dock from the amended 1998 Property Report without informing I'On purchasers such as Walbeck. (R. pp. 2845-2847).

- Developers entered into a "2005 Handover Agreement" with the HOA, which the record shows Developers failed to adhere to, providing details on the transfer of common areas to the HOA, Developers' performance of repairs as to the common areas, and the "asset handover forecast" to be included in the HOA's budget relating to these common areas. (R. pp. 2216-2217).

- Developers subsequently failed to disclose to homeowners a second, material change when, upon realizing they still owned the property in 2006, they discussed how to "capitalize" on the "potential value" of the Community Dock but kept their ideas "quiet for now". (R. pp. 2855-2861; 2910-2912; 2922-2924). Developers provided no indication that they were not going to honor the 2005 Handover Agreement for the waterfront "common areas".

- Developers engaged in talks with a potential buyer, Russo, regarding the sale of the Creekside Park and Community Dock, and even entered into a purchase contract with Russo in 2008, while simultaneously representing to the HOA that Developers had "not sold or initiated the sale of the Creek Club". (R. pp. 2933-2935). This offer/contract to purchase these Amenities was allegedly withdrawn in late March 2009. (R. pp. 2842, 2950-2951).

- Developers reiterated several times to the HOA that it intended to transfer the Creekside Park and Community Dock to the HOA all the while Developers and Russo resumed negotiating the sale of these Amenities and reached a contract in June of 2009. (R. pp. 2236; 2946-2949; 2953). That contract acknowledged the existence of homeowner claims relating to the deep-water amenities. (R. pp. 2703-2719).

- Despite the HOA's request to deed these Amenities and multiple demands that these Amenities be excluded from the sale, Developers sold the Community Dock, Creekside Park, and their associated parking lot, resulting in restrictions in use of the disputed property for the HOA and its members, including repeated dock closures, increased traffic, drunken parties, and rowdy visitors on what was promised to be conveyed to the HOA and which was promised to be free and clear of all such encumbrances. (R. pp. 2845-2847).

Based on this evidence, the Court's original conclusions were correct – Developers breached the fiduciary duties they owed to the HOA. *Welch*, 342 S.C. at 299, 536 S.E.2d at 418 ("When reviewing the denial of a motion for. . . .JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the

nonmoving party."). Furthermore, the jury was properly charged on South Carolina's fiduciary duty law:

> The plaintiffs have asserted a claim for breach of fiduciary duty. A **developer** of a planned unit development **owes fiduciary duties to both the property owners association, as well as the individual homeowners**. The developer's fiduciary duties include the duties to hand over common elements, which the developer has represented as a part of the planned development, in good condition, or with the funds to effectuate any needed repairs; and **to act in the best interests of property owners while controlling the development's property owners association**.
>
> Whenever a fiduciary relationship exist[s] between two parties, and a business transaction occurs between them, and **the superior party obtains an advantage or a possible benefit**, a **presumption arises against the transactions validity**, and **shifts the burden of proving the good faith nature of said transaction upon the superior party.**
>
> Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material. When this duty to disclose is triggered, a party's silence may constitute fraud.
>
> Furthermore, a fiduciary relationship is one of **mutual trust and confidences**, imposing upon the party the **requirements of loyalty, good faith, and fair dealing.** One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relationship.
>
> In a breach of fiduciary duty case, the Plaintiff is entitled to damages for harm by the breach of fiduciary duty owed to him or her. Damages in an action for breach of a fiduciary duty, are those proximately resulting from the wrongful conduct of the defendant.

(R. p. 1699-1701) (emphasis added). Based on this charge, which this Court originally agreed with, the jury properly concluded that Developers failed to prove their good faith, especially considering the overwhelming evidence of their bad faith. (R. p. 1857) (verdict in favor of HOA on breach of fiduciary duty claim); *Welch*, 342 S.C. at 300, 536 S.E.2d at 419 ("The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision.") (emphasis added).

Thus, this Court's reversal of the circuit court's denial of JNOV based solely on the circuit's court second conclusion is incorrect. (Substituted Opinion, p. 6). This reversal is improper because the circuit court recognized at least two bases for its determination that the jury's verdict should be sustained, one of which was the developer's failure to act in the interests of the HOA. (R. p. 49) (JNOV Order providing "the record reflects the developers were in the process of repairing the community dock in preparation for transfer, per the request of the [HOA], while simultaneously, negotiating the sale of this very property to a third-party for profit."). On this basis alone, Developers' failure to act in the HOA's interests, the Court's original conclusion was correct, and as a result, the circuit court's denial of JNOV should be sustained.

B. The Court Failed to Properly Conduct the Case-Specific Fiduciary Duty Analysis Required Under South Carolina Law

The Court also erred in its analysis of fiduciary duty law by: (1) relying on *Cedar Cove*; (2) misapplying provisions of the Covenants; (3) misconstruing an ambiguous disclaimer in the 1998 Property Report; and, (4) overlooking evidence of the HOA's right to own the disputed property, including the developer's unequivocal representations that these common areas were to be owned and operated by the HOA.

1. The Court Misapplied *Cedar Cove*

First, this Court erroneously pointed to *Cedar Cove* to resolve whether a particular fiduciary duty exists to convey title to common areas in this case. (Substituted Opinion, p. 6). This approach is fatally flawed. *Cedar Cove* concerned a dispute between a HOA and neighborhood resident regarding rights emanating solely from the restrictive covenants. *Cedar Cove*

Homeowners Association, Inc. v. DiPetro, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006).[20]

Here, the dispute does not emanate solely from the restrictive covenants, nor was it pled or tried based on only the restrictive covenants. It emanates from, was pled, and tried based upon Developers' conduct, including a decade of representations, omissions, and assurances made by the Developers to the homeowners and HOA. *See, e.g.*, (R. p. 154) (Second Amended Complaint alleging "[i]n the property report, [Developers] represented to the [Respondents] and others that homeowners would have unencumbered access and use of the "Creekside Park" and the "Community Dock" and that the owners' use of these amenities would be transferred and conveyed to [the HOA] for the use and benefit of all owners in I'On"); (R. pp. 3022-33) (1998 Property Report promising transfer of the "Community Dock" and "Creekside Park" to the HOA and availability for use of the "Community Dock" and "Creekside Park" to lot owners and other members of the HOA); (R. pp. 963:4-964:10; 965:4-19) (Brad Walbeck testifying that Developers failed to disclose their revised plans in subsequent communications to him and the HOA); *see also* Section VIII(A)(1), *infra* (detailing Developers' continued silence and subsequent assurances to the HOA and its members). Also, there was no Developer involved in *Cedar Cove* and no fiduciary relationship between the parties, as there is here. Consequently, *Cedar Cove* should not apply to this Court's fiduciary duty analysis. *See Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) ("Courts of equity have been careful to

[20] The *Cedar Cove* complaint cited "no source to support its claim for relief [from the brick patio that encroached approximately three feet onto the common area of the subdivision] other than the restrictive covenants", and the HOA's charge of trespass "was pled and tried on the theory that the [resident] violated the restrictive 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 restrictive covenants." *Id.*

define fiduciary relationships so as not to exclude new cases that may give rise to the relationship.").

2. The Court Erred in Citing to the Restrictive Covenants to "Resolve" Whether a Common Law Fiduciary Duty Exists Here

Next, this Court wrongfully concluded that the definition of common elements in the Covenants resolved whether this HOA was entitled to own the Community Dock and Creekside Park. (Substituted Opinion, p. 6). This, too, is problematic. In addition to the fact that the Covenants do not necessarily "resolve[] issues involving the common areas," and therefore, do not control, the Court's conclusion conflates the appropriate analysis of whether these circumstances give rise to another common law fiduciary duty under South Carolina law, with a definition of what property in this subdivision constitutes common elements under the Covenants. *Cedar Cove*, 368 S.C. at 259, 628 S.E.2d at 286. Further, if by this Court's analysis, the Developers' fiduciary duty to "convey title" is a function of the Covenants, where the Covenants the Developers drafted indicate title to the common areas are to be held by the HOA, a fiduciary duty to convey does arise. That is the case here – the Covenants state, contrary to the Court's conclusion, that the HOA is to hold "title" to these common areas:

> ARTICLE VI
> The Commons
>
> **§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 vote of two-thirds (2/3) or more of outstanding Titleholder votes, the [HOA] may transfer title to some or all of the Commons to another entity.

(R. p. 3634). This reading is in accordance with the representations made by Developers in the 1998 Property Report, the 2005 Handover Agreement, and in their subsequent representations, that

the facilities listed in the chart shall be conveyed to the HOA. *See also* Section VIII(A)(1), *infra*. Further, the fact that the Developers' express grant of ownership rights in common elements is located in the 1998 Property Report, not to mention Developers' other representations of "HOA ownership", makes this right no less enforceable than if it appeared in the Covenants.

3. The Court Overlooked Pertinent Language from the 1998 Property Report in its Analysis

This Court further erred in relying on a purported "notification" from the 1998 Property Report ("Report").[21] Its finding, that the Report "emphasized that there was no guarantee a homeowner would have access" to "certain amenities in I'On Village" because "these amenities could be operated as a private club for its members and guests" and "may be owned or operated by persons other than the [HOA]", is erroneous because the "notification" does not apply to the Community Dock and Creekside Park.

a. Developers' Express Grant of Unimpeded Access and Use of the Amenities

Developers listed the Community Dock and Creekside Park in the Report's recreational facilities chart, and expressly provided that the facilities listed in the Report's 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 the costs of ownership, operation, and maintenance of the facilities conveyed to it. Such costs will increase the responsibilities of the [HOA]. and its board of trustees

[21] Notably, this Court originally found that it "disagreed with [Developers] as to the HOA's breach of fiduciary claim because the allegations in that claim are not limited to the falsity of the representations in the 1998 Property Report"; yet, in its substituted analysis, the Court improperly relies on the purported "critical import" of the 1998 Property Report to disregard the Developers' failures to act in the homeowners' best interest. *Compare* (Opinion, p. 136) (emphasis added) *with* (Substituted Opinion, p. 16).

and could result in an increase in future assessments or special assessments payable by lot owners to the [HOA].

Who May Use the Facilities

The recreational **facilities** listed **in the chart** above **will be available for use by lot owners and other members of the [HOA]**, including the developer, and their respective guests.

(R. pp. 3022-23) (emphasis added). In doing so, the Developers granted the HOA and its members unfettered access to and use of these Amenities. (R. p. 3023).[22]

b. Provisions Addressed to Other Property and the Purported "Notification"

The Developers also described potential instances when private ownership and operation of "**additional** recreational facilities in the subdivision which are **not** listed in the above chart" may limit HOA members' access to privately-owned facilities:

There **may be additional recreational facilities in the subdivision which are not listed in the above chart** and which will be privately owned and operated by a person or entity other than the [HOA]. The operation and use of, and access to, **such facilities** is not guaranteed and is subject to the terms and conditions and payment of such fees as the owner and operator of such facilities may establish from time to time. Any or all of **such facilities** may be operated as a private club for members and their guests. Membership in any **such club** may be subject to application, approval and availability, and payment of such initiation fees, dues and other charges as the owner/operator of the facility may establish and change in its sole discretion.

Id. (emphasis added). The purported "notification" language, cited by the Court in its Substituted Opinion, followed the foregoing and described potential limitations in access to "various" facilities not owned by the HOA:

[22] As one HOA member reasonably understood, the Report:

> [P]rovide[d] that there will be other facilities not listed in the chart and that the "use of, and access to, such (not listed) facilities is not guaranteed." By implication, this indicates that use of and access to all charted recreational facilities is **guaranteed.**

(R. p. 2230) (emphasis added).

> VARIOUS RECREATIONAL FACILITIES IN THE SUBDIVISION MAY BE OWNED OR OPERATED BY PERSONS OTHER THAN THE [HOA]. THERE IS NO GUARANTEE THAT ANY **SUCH FACILITIES** WILL BE AVAILABLE FOR USE BY LOT OWNERS. ANY OR ALL OF **SUCH FACILTIIES** MAY BE OPERATED AS A PRIVATE CLUB FOR MEMBERS AND THEIR GUESTS. THERE IS NO ASSURANCE THAT YOU WILL BE ACCEPTED FOR MEMBERSHIP IN ANY **SUCH PRIVATE CLUB** IF YOU APPLY. IF ACCEPTED, THE COSTS OF SUCH A MEMBERSHIP MAY BE SUBSTANTIAL AND ARE IN ADDITION TO THE PURCHASE PRICE OF YOUR LOT. NO REFUND OF THE PURCHASE PRICE OF YOUR LOT WILL BE MADE IF YOU CANNOT OBTAIN A MEMBERSHIP. SINCE THE VALUE OF YOUR LOT MAY BE ADVERSELY AFFECTED BY YOUR INABILITY OR FAILURE TO OBTAIN A MEMBERSHIP, YOU SHOULD CAREFULLY CONSIDER YOUR PURCHASE OF A LOT IF IT IS BASED UPON YOUR PRESUMED ABILITY TO OBTAIN A MEMBERSHIP IN ANY PRIVATE CLUB AND TO USE ITS RECREATIONAL FACILITIES.

(R. p. 3024) (emphasis added).

c. The "Notification" is Inapplicable, Or Alternatively, Ambiguous

By its plain language, the "notification" quoted by this Court does not apply to the HOA and its members' rights to the Community Dock and Creekside Park.[23] First, the provision is addressed to facilities which may **not** be owned or operated by the HOA; that is, where the Developers have not specified ownership or operation in the Report. *Id.* (emphasis added). The Report **requires** ownership and operation of the Community Dock and Creekside Park by the HOA. (R. p. 3023). The "various" facilities referenced in the provision, consequently, should not be read to include the Community Dock or Creekside Park. *See Bardsley v. Gov't Employees Ins. Co.*, 405 S.C. 68, 76, 747 S.E.2d 436, 440 (2013) ("It is a well-settled principle of contract interpretation that absent a contractual definition to the contrary, contract language is given its

[23] These different provisions and the non-applicability of the latter "notification" was reviewed at length with the Graham witnesses. (R. pp. 635:7-636:14; 1111:20-1112:18; 1208:3-1209:17) (Developers admitting that Property Report included a promise to convey a Community Dock and Creekside Park to the HOA and Developers subsequently changed their plan to fulfill this promise); *see also* (R. pp. 963:4-964:10) (Walbeck testifying that the language of the Property Report indicated that the Creekside Park and Community Dock was to be conveyed to the HOA).

ordinary and plain meaning."); *Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405, 414, 661 S.E.2d 62, 67 (2008) ("Agreements, in general, are interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense.").

Second, the purported notification adds, rather than alters, other provisions in the Report on the same subject matter. The "notification" provision does not change the Developers' express grant of unimpeded access to and use of the facilities in the chart to the HOA and its members. *See 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 or superfluous."); *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015) ("[I]n the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and, where possible, all the language used should be given a reasonable meaning."). As a result, the provision should be applied to those facilities whose ownership and/or operation are not settled by the Report.

Further, to the extent it is unclear which facilities the drafters/Developers intended to include within the "various recreational facilities", the provision should be read in favor of the non-drafting parties, the HOA and its members, whose access and usage rights in the Community Dock and Creekside Park are explicitly granted by the Developers in this Report. *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. After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings.").

C. The Court Failed to Recognize that the Burden of Proof Shifted to Developers

The Court additionally erred by failing to recognize that it was Developers' burden to prove that they acted in the best interest of the HOA and that they had no independent duty to convey these Amenities to the HOA. Where a fiduciary relationship exists and there is evidence of self-dealing, the burden shifts to the fiduciary to demonstrate that the transaction was, in fact, fair. *See, e.g., Wilson v. Wilson*, 117 S.C. 454, 112 S.E. 330, 331 (1920) ("[W]herever 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 its validity, throwing the burden upon him to prove his good faith."); *see also Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987) ("It is a doctrine repeatedly announced by the courts of this nation that **courts** of equity will **scrutinize with the most zealous vigilance** transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.") Developers, owing fiduciary obligations to the HOA and its members, have not met their burden, therefore, the presumption that Developers' sale of the common elements for profit to Russo was unfair is unrebutted. (Substituted Opinion, pp. 15-16). The Court's fiduciary duty analysis should be revised to recognize this unrebutted presumption. This burden shifting was charged to the jury without objection and is the law of this case. *See* (R. pp. 1699-1701) (Jury charge setting forth that "[w]henever a fiduciary relationship exist[s] between two parties, and a business transaction occurs between them, and the superior party obtains an advantage or a possible benefit, a presumption arises against the transactions validity, and shifts the burden of proving the good faith nature of said transaction upon the superior party."). (emphasis added).

VI. The Circuit Court Did Not Err in Submitting Statute of Limitations to the Jury

This Court erred in concluding the only inference that can be drawn from the evidence is that Walbeck should have discovered "that he had a claim" by late 2004 when he received a proposed budget listing a cost paid by the HOA for the "Creek Club Dock". (Opinion, pp. 137, 139); (Substituted Opinion, p. 20). The simple fact that this Court originally recognized Walbeck's "claim accrued when he received the proposed budget indicating the HOA did not own the Dock;" yet, now recognizes that the budget "might not" have indicated this, establishes that the statute of limitations question was properly submitted to the jury. *Compare* (Opinion, p. 137) *with* (Substituted Opinion, p. 20).

To be clear, this Court's substituted analysis includes an important change which indicates that at least two inferences can be drawn from the proposed budget. Originally, the Court found "the listing of a fee being paid by the HOA for use of the Community Dock should have alerted Walbeck to the fact that the HOA did not have title to the Community Dock". (Opinion, p. 137) (emphasis added). The Court, however, altered this finding by changing the critical words of "did not have title" to "might not have title" in its Substituted Opinion: "the listing of a fee being paid by the HOA for use of the Community Dock should have alerted Walbeck to the fact that the HOA might not have title to the Community Dock [or Creekside Park]". (Substituted Opinion, p. 20) (emphasis added).

This is important because it establishes that there is more than one inference which can be drawn from the budget – either the HOA "might" or "might not" have title to the Community Dock or Creekside Park. Of these two inferences, the one favoring Walbeck is that the HOA had title to these Amenities, and this Court must accept this inference. *Sabb*, 350 S.C. at 427, 567 S.E.2d at 236 (Courts are required to view the evidence and inferences reasonably drawn "in the light most favorable to the party opposing the motions."). Applying this inference, the proposed budget did

not put Walbeck on notice that he had a claim concerning the conveyance of these Amenities because it appeared these Amenities were already conveyed.

The evidence also shows that there are many reasons why Walbeck should not necessarily not deduce "from the Creek Club Dock usage fee budget item alone" that the Developers' failed to fulfill their promise to convey these Amenities. (Substituted Opinion, p. 20) ("[Walbeck] could have deduced from this budget item alone that the statement indicating title to these amenities would be conveyed upon completion of construction was unfulfilled.").

First, the Developers' did not promise to convey the Amenities upon the completion of their construction; rather, according to Developers, they promised to convey the Amenities upon completion of the construction of the developmental phases that made up I'On. (R. p. 3022) (1998 Property Report drafted by Developers indicating that the "Creekside Park" and "Community Dock" were to be built during "Phase II" of I'On's development.). The Community Dock and Creekside Park were among the facilities to be built in Phase II, a Phase which was not completed until several years after Walbeck received the proposed budget in 2004. *Id.*; *see also* (R. p. 1130:14-25) (Vince Graham admitting that he was uncertain as when construction of each I'On Phase was completed and which recreational facilities were contained in these phases).

Walbeck could not, and admittedly did not, deduce from the budget that Developers had failed to fulfill their promise to convey the Amenities as of 2004 because several of I'On's developmental phases were still in process at this time:

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

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

Q: Now, what's your understanding of the obligation in the Property Report, what does the completion of construction reference mean to you? Is that when -- those facilities are complete, or does it mean when the builders finish building everything in I'On?

A: It could be either one.

(R. pp. 978:24-979:5) (emphasis added); *see also* (R. p. 880:3-16) (Lea Ann Adkins similarly testified that there was confusion as to what the Property Report meant in terms of "upon completion of construction"); (R. p. 698:16-20) (Tom Graham testifying it was the Developers intent to "turn over" the Community Dock to the HOA in 2006); (R. pp. 3475-3477) (December 7, 2005 Meeting Minutes) (Developer-appointed Board Member indicating to the HOA at a meeting Walbeck attended that the Developers were still in the process of "complet[ing] the turnover for phases 1-7" in 2006); (R. p. 3480) (April 26, 2006 HOA meeting minutes noting the Developers were still improving the Marshwalk); (R. p. 3559) (January 15, 2009 HOA meeting minutes noting the Developers were "working on deeding over the [M]arshwalk docks and marsh area to the [HOA].").

Second, any homeowner who glanced at the 2005 proposed budget would not be able to deduce that Developers had not, or were not going to, convey the Community Dock and Creekside Park to the HOA just because it included an ambiguous, "usage" line item as it relates to the $4,044 dock fee. The HOA's proposed budget mentions only the "Creek Club Dock", not the "Creekside Park", and the HOA's 2005 proposed budget did not mention a "Creek Club Rental Fee" as suggested by Developers. (R. pp. 3332; 3441).[24] Assuming this budget did mention such a fee, there's still multiple inferences which can be drawn as to who "owned" the land upon which the Creek Club was built.

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

As to the "Creek Club Dock usage fee", 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* (R. p. 3332) (2005 proposed budget describing 2004 proposed budget) *with* (R. p. 3301) (listing "dock maintenance" fee of $4,044); *see also* (R. p. 3285) (HOA 2003 proposed budget listing $4,044 dock maintenance fee). This leads to two "deductions" – either the usage fee should be a maintenance fee, or the maintenance fee should be a usage fee. At minimum, an ambiguity exists which must be construed against the drafters of this budget which, here, are the Developers since they made up the HOA Board at this time. *Chan v. Thompson*, 302 S.C. 285, 290, 395 S.E.2d 731, 734 (Ct. App. 1990) (any ambiguity will be construed against author of the documents). Construed properly in favor in Walbeck, the "usage" fee is a "maintenance" fee 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. (R. pp. 3022-3023).

This is also an important point: the Property Report indicates that "[u]pon completion of the recreational facilities described in the chart," the HOA will be responsible for "the annual cost to maintain, **operate**, and insure" the facilities and it is this "annual cost" that is included in the 2005 proposed budget. "Operate" is synonymous with "use". *See, e.g.*, Merriam-Webster, *Thesaurus*, https://www.merriam-webster.com/thesaurus/operate (listing "use" as the first word related to "operate") (last visited April 13, 2019). Thus, it can equally be construed that the "usage" fee is an "operation" fee which did not alert Walbeck that the representations in his Property Report were false. (R. pp. 3022-3023).

Finally, even if the "usage" fee indicated that the "ownership" interest was a perpetual easement, that gave the HOA like rights, this would not be notice that the HOA could be deprived of its never-ending, ownership-like rights by the Developers' scheme.

VIII. This Court Erred in Disregarding the Application of Equitable Estoppel and Equitable Tolling

This Court also erred in concluding that equitable estoppel is "unavailing" to the HOA's and Walbeck's claims and by disregarding the application of equitable tolling to sustain these claims.

A. This Court Overlooked Developers' Control, Omissions and Representations in its 2004-2007 Equitable Estoppel Analysis

Contrary to this Court's substituted estoppel analysis, equitable estoppel does not only apply where a party can show "that he reasonably relied on the words or conduct" of another. *Compare* (Substituted Opinion, p. 22) ("Walbeck has not presented evidence showing that he reasonably relied on the words or conducts of [Developers]") (emphasis added) *with* (Opinion, p. 136) (agreeing that the developers owed a duty to truthfully convey all information regarding Walbeck's purchase without material omission) (emphasis added). Rather, equitable estoppel also applies where, like here, there is evidence Developers failed to disclose facts materials to a 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) ("It is a well-recognized principle of equity 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); *Welch v. Edisto Realty, Co.*, 170 S.C. 31, 169 S.E. 667, 671 (1933) ("Silence, where it is so intended, or where it has that effect, to mislead a party, to his disadvantage, and to the other party's advantage, is an equitable estoppel; and passive acquiescence *estops* equally with active interference.") (citations and internal quotations omitted) (emphasis in original); *Provident Life and Acc. Ins. Co. v. Driver*, 317 S.C. 471, 475, 451 S.E.2d 924, 928 (Ct. App. 1994). ("Estoppel by silence arises when the estopped party owes a duty to speak to the other party but refrains from doing so, thereby leading the other party to believe in an erroneous state of facts.").

1. Developers' Omissions and Misrepresentations

Here, the evidence shows that Developers failed to disclose information they were duty-bound to disclose[25] from 2000-2008; and, between 2004 and 2007, Developers continued to conceal the fact that they were not going to convey the Creekside Park and Community Dock to the HOA.[26]

Developers never disclosed to these homeowners in 2004, 2005, 2006 or 2007, that the "perpetual" easement they unilaterally granted which allowed the homeowners to use the Creekside Park and Community Dock was "flawed" and "should be fixed". (R. pp. 1225-26)

[25]There is no question developers had a duty to disclose information to the HOA and its members due to their fiduciary relationship. *See* (Opinion, pp. 147-48, 151-52) (finding that a fiduciary relationship existed between the Developers and HOA until at least 2009).

[26] The Court's substituted, equitable estoppel analysis focuses on "evidence of Developers' misrepresentations" between 2004 and 2007 based upon its erroneous conclusion that Walbeck's three-year claim clock started running upon his receipt of an ambiguous budget in late 2004. The jury found Walbeck's claim accrued on August 5, 2009, and Petitioners have previously briefed the many reasons why the jury's findings should be upheld (or, at minimum, this Court should restate its original finding that "HOA members" discovered their claims upon learning of the sale in either 2008 or 2009). Rather than repeat these reasons previously briefed, Petitioners incorporate them by reference and focus on Developers' pre-2007 omissions and representations here.

(Vince Graham admitting the easement is "flawed" and "should be fixed"); (Substituted Opinion, p. 5) ("[Tom] Graham described this language as a mistake. . .").

Developers never told these homeowners that they changed their mind between 1998 and 2000 and no longer intended to provide the HOA the Creekside Park and Community Dock as promised in their Property Reports. *Compare* (R. p. 1209) (Vince Graham agreeing that change from deeding the dock to the HOA occurred between November 3, 1998 and February 9, 2000); (R. p. 1216) (Vince Graham explaining that the "Marshwalk" was intended to be the "Creekside Park" described in the Property Report) *with* (R. p. 1233) (Vince Graham indicating Walbeck should rely on his "Property Report" although Developers had decided not to abide by the descriptions in this Property Report and failed to disclose this to Walbeck); *see also* (Opinion, p. 128) ("[Developers] vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park. . .[A]t trial, [Developers] disputed that the 'Community Dock' listed in the 1998 Property Report referred to the Creek Club dock."); (Opinion, p. 130) ("Vince Graham testified that the 'Creekside Park' was actually the Marshwalk").

Developers never corrected homeowners "when they were walking through the neighborhood talking to the homeowners" that the "Community Dock & Boat Ramp" referenced in multiple marketing materials distributed throughout the years was not the "staging dock and main dock" on Hobcaw Creek. (R. pp. 1235-39) (Vince Graham testifying that he walks through I'On and speaks with homeowners about the Amenities).

Developers never informed homeowners that their plans for the Creekside Park and Community Dock "changed depending on the circumstances" or corrected misperceptions created by their representatives, like Chad Besenfelder, who would "sometimes say things in earnest to try to keep a deal going without consulting" the principal Developers. *Compare* (R. pp. 1244-48)

(Vince Graham testifying "I remember. . .that we were going to have community docks. They were going to be made available to the neighborhood. And at 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 Community Dock 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]. That's in Chad's view, yes. That's what they say. . .").

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 mislead?
>
> A: Yeah, they would.
>
> Q: Somebody would be mistaken?
>
> A: [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"].

(R. pp. 1118-19). 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. *Compare* (R. pp. 1118-19) *with* (R. p. 2250) (Vince Graham explaining to Walbeck and Adkins' 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.") *and* (R. pp. 2285-86) (Vince Graham explaining to Walbeck in 2009 that the Creekside Park and Community Dock detailed in his Property Report and the

Impact Assessment are the "[Marshwalk] and two [crabbing] docks" previously deeded to the HOA).

In an addition to these omissions which caused Walbeck and the HOA to believe that Developers still intended to convey the Creekside Park and Community Dock as this was Developers' verbalized intention all along, there is evidence that Developers continued to conceal their true intentions specifically within the 2004-2007 time frame:

First, the June 2005 Handover Agreement between the Developers and the HOA (which, according to this Court, Walbeck should be aware of "as a representative of HOA")[27] formalized the process for handing over "common area property and structures to the HOA." (R. pp. 2216-17). As part of this process, "a formal review of the property to be handed over [must] be agreed to by all parties" and an HOA representative "must make a judgment whether the condition of the areas to be transferred" are acceptable. (R. p. 2216). The Developers never informed the homeowners that the "common area property and structures" referenced in this Agreement excluded the Creekside Park and Community Dock. Further, after comparing the June 2005 Handover Agreement to the September 2007 Board Meeting minutes, it is clear the HOA believed the Creekside Park and Community Dock were included in the "common areas" referenced by the Agreement. *Compare* (R. pp. 2216-17) *with* (R. p. 3519). The 2007 meeting minutes indicate that, after Chad Besenfelder told the HOA "he would like to turn over the Community Dock", HOA members responded that they had inspected the Dock and it was in need of repair – which is the exact "handover" process for "common areas" described by 2005 Handover Agreement. *Id.* Besenfelder confirmed the HOA's belief that the Community Dock was a "common area" encompassed by the Handover Agreement by acknowledging that he would "look into needed

[27] *See* Substituted Opinion, p. 19.

repairs" prior to turning over the Dock to the HOA, but never disclosed that his bosses and Principal Developers, the Grahams, were also outlining their options to sell the Dock at this time. *See* 2006 and 2007 Omission Discussion below. This amounts to both an affirmative representation that Developers were going to convey the Community Dock as well as a concealment of their internal change of plan. Regardless, the Developers are not being truthful within the three years that Walbeck's claims purportedly accrued.

Next, in December 2005, Developers informed I'On homeowners, including Walbeck, that "the turnover for phases 1-7" was near completion. (R. pp. 3475-77); *see also* (R. p. 3342) (Walbeck Sign-in Page from December 7, 2005 Assembly Annual Meeting). Notably, the Community Dock and Creekside Park described in Walbeck's Property Report were to be built "in Phase 2" which is still in the process of being turned over at this time. Developers never mentioned this "turn over" excluded the Creekside Park or Community Dock or that they were considering keeping these properties for themselves. (R. pp. 3475-77); *see also* (R. p. 980:18-21).

By 2006, the Developers are actively conspiring on how to "capitalize" on the "potential value" of the Community Dock and outlining their options in "selling community facilities," all the while keeping their ideas "quiet for now". (R. p. 2855). Not only do Developers fail to disclose their true intention to keep, and later profit from, the sale of the Amenities in the Board and HOA meetings happening around this time, they superficially maintain that it's still their intention to give these Amenities to the HOA. *See, e.g.,* (R. p. 698:16-20) (Tom Graham admitting that a July 18, 2006 e-mail illustrated Developers' intent to turn over the boat ramp); (R. p. 2922-24) (July 18, 2006 e-mail).

Next, in Summer 2007, the 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. . ." (R. pp. 706-08). Despite the Principal 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. (R. p. 3519). 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 also promised to "look into the needed repairs." *Compare* (R. p. 3159) *with 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.'") (emphasis added). Besenfelder did not disclose that the Principal 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 that needed repairs would be investigated, leading the HOA to believe that everything was okay. Even this Court 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." (Opinion, p. 152) (emphasis added) (citation omitted). It naturally follows that these same assurances delayed the "HOA's members" from filing suit because they "trusted" that Developers would act in their best interest.

Developers also distributed a brochure in 2007, which Walbeck received, describing "the Community Dock & Boat Ramp", "the Creek Club," and "2.5 Miles of Marshfront Paths" as I'On "Amenities". (R. pp. 2221-28) (Brochure titled "I'On: Celebrating 10 years" with bates noting it was given to Walbeck); *see also* (R. pp. 1234:4-1235:13) (Vince Graham testifying this brochure was distributed for I'On's 10-year anniversary in 2007). Developers did not highlight any difference between "Amenities" or "Common Areas", did not include an asterisk indicating that the HOA did not "own" these Amenities, and did not include a disclaimer that these Amenities could be sold to third-parties or otherwise "taken away". *See* (R. p. 708) (Tom Graham conceding to a 2007 e-mail from Chad Besenfelder that stated "[t]he docks are too controversial, and taking away even part of this community amenity would cause trouble.") (emphasis added).

Due to Developers' repeated non-disclosures and mistruths, the only thing Walbeck and the HOA understood between 2004 and 2007 was that common areas or amenities, including the "Community Dock" and "Creekside Park", were to be conveyed to the HOA. Even if Walbeck was able to deduce from the proposed budget that a "usage" fee was charged for the "Creek Club Dock", Developers failure 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 Amenities, led Walbeck to believe he had nothing to worry about originally until November 2008. When that deal collapsed, Developers against stated that transfer as in process; and, Respondents did not learn otherwise until August 1, 2009. *See* (Opinion p. 140) (finding that the "HOA members" learned of a "November 2008 agreement to purchase lots CV-5 and CV-6, including the Community Dock and boat ramp" and "the HOA's members" learned of a new contract of sale for the Dock from an "I'On Community Bulletin" posted August 1, 2009).

2. Developers Knew the Real Facts and Concealed these Facts to Avoid this Litigation

Developers were the only persons who knew that they were going to sell the Creekside Park and Community Dock instead of conveying it to the HOA. As the sole steward of information pertaining to these Amenities, the real facts about the status of these Amenities 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 these facts were "willfully, recklessly, or wantonly" concealed by the Developers.

Each time Developers concealed these salient facts, their intention was to camouflage their course of conduct. 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. (R. p. 3342) (Walbeck Sign-In from December 2005 Meeting); (R. p. 3353) (Walbeck Sign-In from December 2006 Meeting); (R. p. 3374) (Walbeck Sign-In from December 2007 Meeting); *see also* (R. p. 980:18-21) (Walbeck at trial confirming he attended the annual HOA meetings from 2004-2007); (R. p. 3475-77) (December 2005 Meeting Minutes indicating "LeGrand Elebash introduced and thanked Chad Besenfelder who oversees the property owned by the [Developers]."); *see also Metromont Pennell,* 270 S.C at 22, 239 S.E.2d at 760 (recognizing estoppel applies when a party fails to speak or act "at the first proper and opportune moment."). Yet, Developers continued their secret scheme because they knew if they "kept things quiet" that it would only benefit themselves. *See, e.g.,* (R. p. 753) (Tom Graham conceding that Developers "ke[pt] the [sale] quiet because of all the brew ha ha and filings.").

Moreover, the fact the jury found the developers acted "recklessly, willfully or wantonly" means one of two things: the Developers intentionally concealed material facts or carelessly disregarded their duty to speak the truth. Either one eliminates Walbeck's burden to prove: (1) the Developers' intent to deceive; (2) his reliance of the Developers' representations; and, (3) his due diligence in "discovering" otherwise undiscoverable claims. *Compare* (R. p. 1860) *with* (Opinion pp. 134-35) (suggesting Walbeck bore burdens he didn't have to prove).

"He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to be silent." *Welch v. Edisto Realty, Co.*, 170 S.C. 31, 169 S.E. 667, 671 (1933) (citations and quotations omitted). Developers did not speak the truth for over a decade and, when they did speak, it was to again conceal the real fact that their promise to convey the Creekside Park and Community Dock to the HOA was an empty one. Having chosen to remain silent while simultaneously assuring the HOA and its members to "trust them", Developers cannot speak now. The elements of equitable estoppel are satisfied.

B. This Court Disregarded the Application of Equitable Tolling as to the HOA's Claims

This Court also failed to consider that the equitable tolling doctrine requires the extension of the statute of limitations applicable to the HOA's claims because the evidence establishes: (a) the HOA was effectively controlled by the Developers for more than a decade; (b) Developers' veto power prevented derivative claims on behalf of the HOA; (c) Developers unfairly mislead the HOA and it members through multiple misrepresentations and omissions; (d) Developers committed many "wanton, willful, and reckless" acts at the expense of the HOA and the homeowners; and, (e) Developers destroyed evidence and obstructed justice in multiple respects.

Unlike equitable estoppel, South Carolina courts have not "limited" the application of equitable tolling based upon a defendant's misrepresentation, misconduct or omission. *See, e.g.,*

Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115-16, 687 S.E.2d 29, 33 (2009) ("Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.") (citations and quotations omitted); *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).[28]

Instead, our Courts recognize that equitable tolling may be applied in any case where "justified under all the circumstances"; and, our Courts have found tolling is justified in circumstances which mirror the circumstances here. *Magnolia North,* 397 S.C. at 372, 725 S.E.2d at 125. For example, our Courts acknowledge that tolling applies: (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. *Id.* at 371-72, 725 S.E.2d at 125 (extending the statute of limitations applicable to a homeowners' association until after the developer's control over the association ended) (citations and quotations omitted).

Importantly, South Carolina courts have invoked equitable tolling when confronted with any one of these circumstances; and here, there is all three plus additional evidence of injustice:

---

[28] *See also Hooper,* 386 S.C. at 116, 687 S.E.2d at 33 *citing Machules v. Dep't of Admin.*, 523 So.2d 1132, 1134 (Fla. 1988) ("[E]quitable tolling. . .does not require misrepresentation by the defendant; rather, it serves to ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits.") (emphasis added); 54 C.J.S. *Limitations of Actions* § 85 ("It may be found that the statute of limitations should be tolled where its policies are outweighed by the interests of justice in vindicating the Plaintiffs' rights) (emphasis added).

1. The HOA Was Controlled by the Developers

First, "Developers retained continuing control of the HOA up to and including the day they conveyed lot CV-6 to Russo". (Substituted Opinion, p. 14); (Opinion, p. 14) (emphasis added); *see also* (Opinion, p. 148) ("[Developers] retention of control over the HOA throughout the years preceding [the sale] created a continuing fiduciary relationship between [Developers] and the HOA") (emphasis added); (Opinion, p. 151) ("[Developers'] control of the HOA undoubtedly required the [Developers] to preserve the rights of the HOA's members to the unfettered use and enjoyment of these common areas.") (emphasis added).

The evidence supports this Court's determination and shows the Developers controlled the HOA through at least 2009 (when Developers sold the Amenities to Russo) due to Developers' 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.

For example, the Covenants provide that Developers' powers "extend until" all lots in I'On are sold to someone other than Developers, and these powers include:

- The power to conduct all activities requires to complete the Neighborhood Plan 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 development activities of Developers. . ."

- The power to control any action, including litigation, 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. . ."

- 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.

(R. pp. 3637-38).

Because there is no question that Developers controlled the HOA from its inception until at least 2009, and that Developers would not initiate litigation against themselves, the HOA's claims were equitably tolled until at least 2009. *Magnolia,* 397 S.C. at 272, 725 S.E.2d at 125 ("In the present case, the POA board consisted of Appellants' officers until the date of "turnover," September 9, 2002. We find unpersuasive Appellants' claim that an organization they controlled would have initiated an action against itself during this period."). [29] Following 2009, the evidence also shows that Developers continued to control the HOA by, among other things, exercising their

[29] *Magnolia, Goddard,* and *Concerned Dunes West* also support the application of the "adverse domination" or "adverse dominion" doctrine which is a form of South Carolina's equitable tolling doctrine adopted by several other states that tolls the statutes of limitation 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 statute of limitation 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. *See, e.g., Resolution Trust Corp. v. Gardner,* 798 F. Supp. 790, 795 (D.D.C.1992); *Resolution Trust Corp. v. O'Bear, Overholser, Smith & Huffer*, 840 F. Supp. 1270, 1284 (N.D. Ind. 1993); *Fed. Deposit Ins. Corp. v. Bird,* 516 F. Supp. 647, 651 (D.P.R.1981); *Resolution Trust Corp. v. Smith*, 872 F. Supp. 805, 813 (D. Or. 1995); *Shields v. Nat'l Union Fire Ins. Co. of Pittsburgh (In re Lloyd Secs., Inc.)*, 153 B.R. 677, 683 (E.D. Pa.1993); *Resolution Trust Corp. v. Scaletty*, No. 72,230, 1995 WL 111986, at *3-*7 (Kan. Mar. 17, 1995); *Wilson v. Paine,* 288 S.W.3d 284, 288–89 (Ky. 2009); *Hecht v. Resolution Trust Corp.*, 635 A.2d 394 (Md. 1994); *NCP Litigation Trust v. KPMG,* 399 N.J. Super. 606, 945 A.2d 132, 148 (2007); *Clark v. Milam*, 452 S.E.2d 714, 718-20 (W. Va. 1994). The crux of adverse domination is that the individuals who are in the position of bringing the claims are ill-suited from a motivational, ethical, and practical perspective to bring such claims due to their needing to take adverse action against themselves or actions attacking their own decisions, actions, or transactions. Those individuals, and the corporation which they control, are in effect incapacitated from bringing the claims. In adverse domination, the statute of limitation is tolled until those persons no longer control or "dominate" the corporation and the corporation is in the hands of those who have the right, ability and capacity to sue for the wrong done. Thus, the doctrine of adverse domination is not necessarily dependent upon the "discovery" of a wrong—it is premised upon the appropriate parties being in a position to assert the claims against the wrongdoers. The adverse domination doctrine should be applied here to toll both Walbeck and the HOA's claims because it appears the doctrine has been applied in South Carolina based on *Magnolia*; the doctrine is consistent with South Carolina law based on *Goddard's* and *Concerned Dunes West's* comparison of "developers" to "corporate promoters; and, as such, there is a sufficient basis to conclude that the South Carolina Supreme Court would adopt this doctrine.

right to remove and replace and Board members in 2012, and again, in 2014. This evidence of control justifies extending the tolling period all the way through 2014 when the HOA was realigned as a plaintiff which means the HOA's claims are timely under any scenario manufactured by Developers.[30]

2. The HOA Could Not Assert Claims Due to Developers' Veto Power

Second, it was impossible for the HOA to sue the Developers due to the Developers' "Supreme Court-like" veto power which still existed at trial. (Opinion, pp. 144-45) (acknowledging that the Covenants give the Developers the "right to disapprove any action, policy, or program" of the HOA); *see also* (R. p. 3638); (R. p. 642:4-10) (Developers conceding their veto power); (R. p. 642:11-23) (Developers admitting they exercised their right to appoint and remove Board members in 2012); (Substituted Opinion, p. 15) (acknowledging Developers appointed Board members as late as 2014). Consequently, 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. *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.").

3. The HOA Was Misled from Day One

Third, the evidence and testimony show that the HOA was wrongfully manipulated by Developers for over a decade. *See, e.g.,* (Opinion, pp. 128, 144-45, 148, 151-53). For years, the Developers mischaracterized the "Creekside Park" as a "Marshwalk" and the "Community Dock"

[30] Developers' maintain that the HOA's claims are untimely by using the HOA's 2014 realignment date as the date the HOA first asserted claims. This is incorrect. The HOA adopted the derivative claims filed by Walbeck and/or Adkins, and therefore, the HOA's direct claims "relate back" to when Walbeck's and/or Adkins' derivative claims were first asserted.

as "Crabbing Docks". *See, e.g.,* (R. pp. 1130:5-25; 2250; 2285-86). This Court agreed in its Original Opinion. *Compare* (Opinion, p. 128) (finding Developers "vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park") (emphasis added); *with* (R. pp. 977:20-978:15) (Walbeck testifying there was confusion about what "made up" the Creekside Park and Community Dock); *see also* (R. p. 435) (Adkins testifying that she also "never heard of CV-6" being referenced as the "Creekside Park"); (R. p. 1130:14-25) (Developer testifying it was "confusing" as to when construction of each I'On Phase was completed, and which recreational facilities were contained in these phases); (R. p. 3480) (April 26, 2006 Meeting Minutes noting Developers were still improving the Marshwalk).

For years, the Developers "kept quiet" and, when "concerns were raised", Developers lulled the HOA and its members into a false sense of security through repeated promises that the Creekside Park and Community Dock were "in the process" of being turned over, a promise Developers reiterated on the very day they negotiated the sale of these Amenities. *See, e.g.,* (R. pp. 2216-17; 2232-33; 2236-37; 2404-48; 2842; 2855-61; 2910-20; 2922-32; 2939-40; 2946-67; 3558-61) (evidence showing Developers' repeated promises to convey the Creekside Park and Community Dock to the HOA while also negotiating the sale of these Amenities).

For years, the Developers acted in their own interest as opposed to the interest of the HOA and its members by drafting unconscionable Covenants giving Developers unfettered power over the HOA, its members, and these Amenities; issuing admittedly "misleading" marketing materials describing these Amenities; granting a flawed easement instead of ownership of these Amenities; negotiating side deals with neighboring properties to use the Amenities; having closed-door discussions "to keep" and "profit from" these Amenities; concealing the real status of the turn-over of these Amenities; and, selling these promised Amenities behind the HOA's and thousands

of I'On homeowners' backs. *See, e.g.,* (R. pp. 706-08; 1118-19; 1209; 1225-26; 1233; 1244-48; 2216; 2221-28; 2250; 2285-86; 2404-48; 2855; 3475-77; 3519).

There is no doubt the HOA and its members "trusted" Developers and would have acted sooner to prevent Developers' then-hidden "willful, reckless, or wanton" conduct, but for Developers' silence and their promises to turn over these Amenities that "had been going for some time". Developers never informed these homeowners that they were going to sell the "Creekside Park" and "Community Dock" promised; rather, they admittedly "ke[pt] the transaction quiet because of all the brew ha ha and filings." (R. p. 753); *see also* (Opinion, p. 152) ("[Developers'] assurances led the HOA's members to "repose[] a special confidence" in Developers. . ."). The HOA and its members were unaware of the need to make a claim prior to this sale because either the Amenities had been conveyed or were going to be conveyed. Further, they were powerless to bring a claim through the HOA because of Developers' veto power and effective control over the HOA. In other words, the homeowners had no choice[31] but to depend on the Developers to agree to sue themselves in order to bring an action in the HOA's name to recover the Amenities. The jury, circuit court, and this Court originally agreed. (Opinion, pp. 128, 144-45, 148, 151-53).

When viewed in the HOA's favor, this evidence and testimony establishes "extraordinary" unfairness. Compounding this unfairness, is the fact that Developers' misconduct continued

[31]The "unfairness" determination in the context of equitable tolling is similar to the "unconscionability" determination in the context of contract interpretation. In both instances, "there is no specific set of factual circumstances establishing the line which must be crossed" and it's important to utilize "a case-by-case analysis in order to address unique circumstances" *Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 36, 644 S.E.2d 663, 674 (2007); (emphasis added); *see also Holler v. Holler,* 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case."). Notably, "unconscionability" exists where the circumstances show (1) "adhesiveness" or an absence of meaningful choice; and, (2) "oppressiveness" or unjust hardship and constraint. Here, the circumstances show both.

throughout this litigation as evidenced by their deletion of over 50,000 files, 229 of which expressly related to these Amenities at issue, and all of which were obviously adverse to Developers. *See, e.g., Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990) (noting when evidence is lost or destroyed by a party an inference may be drawn that the evidence which was lost or destroyed by that party would have been adverse to that party.). Equitable tolling is intended to prevent exactly this type of misconduct by defendants that makes it unfair for those defendants to hide behind the limitations defense and employ it as a weapon to defeat legitimate claims. Equitable tolling is also intended to prevent the incredible injustice that will result should this Court refuse to restate the verdicts rendered by 12 reasonable people who unanimously determined that Developers wrongfully took advantage of Walbeck and the HOA, leaving neither with an adequate remedy, and instead, rewarding Developers for their bad acts.

Clearly, the overwhelming evidence of Developers' control, manipulation, misrepresentations, obstruction, and "willfulness, recklessness, or wantonness," coupled with the resulting unfairness to the I'On Community which stands to lose all relief a jury awarded them on obviously legitimate claims, justifies the application of equitable tolling here under well-established, equitable principles, South Carolina law and South Carolina public policy. If not, this Court needs to explain to the millions of South Carolina homeowners who reside in developer-controlled regimes, several of which are in litigation at this very moment, what additional injustice this Court will tolerate before equity necessitates the Court to act.

IX. The Court's Substituted Opinion Misapprehends Both the Law and the Facts as it Relates to the Single Business Enterprise Theory

This Court's new amalgamation holding requires revision for three reasons: (a) the verdict form error was self-induced and not preserved for review; (b) the Court's original exemplars of

unfairness were correct; and, (c) the single business enterprise theory should be applied here to place accountability where it belongs.

A. Errors Related to the Jury's Verdict are Unappealable Because They Were Not Preserved

First, the Court overlooked that Developers induced any error relating to the jury's verdict and, as a result, they are precluded from challenging the jury's verdict on appeal. Because the Court missed this, it erred when it wrote:

> [T]he circuit court's ruling relieved Respondents of the burden of establishing liability as to each [Developer] and likewise relieved the jury members from their responsibility to evaluate the liability of each [Developer] [and]. . . .the circuit court's instruction to the jury that [Developers] were amalgamated suggested that [Developers] had engaged in misconduct and the resulting prejudice requires a new trial.

(Substituted Opinion, p. 26).

Respondents proposed, and agreed to, a verdict form that had a finding as to each Developer. (R. pp. 1460-61). The circuit court asked each party if they wanted the amalgamation issue to go to the jury or not. Developers repeatedly indicated that it should not go to the jury. (R. pp. 1460; 1478-79). After several colloquies, Respondents relented, and the circuit court decided the issue. (R. p. 1480). By consenting to the circuit court's decision being made in advance, and in lieu of, submitting amalgamation to the jury, Developers consented knowing that the decision could be favorable or unfavorable. If Developers were concerned about whether the circuit court's ultimate 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) ("This Court has repeatedly held that 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."). Consequently, Developers waived any argument that the jury's verdict was tainted because it was rendered post the amalgamation ruling Developers specifically requested.

B. The Court's Original Exemplars of Unfairness Were Correct

Second, the Court's original finding of amalgamation under *Pertuis* is supported by the evidence. *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 817 S.E.2d 273 (2018), *reh'g denied* (Aug. 16, 2018).[32] In its review of the Court of Appeals' decision in *Pertuis*, our Supreme Court examined South Carolina's amalgamation of interests theory and set forth a shift in the theory's application – its application would need to conform to what is known as the single business enterprise theory (the "SBE theory"). 423 S.C. at 655, 817 S.E.2d at 280. The crux of

[32] In *Pertuis*, former restaurant manager Kyle Pertuis brought claims against his former employer, Mark Hammond and Larkin Hammond (the "Hammonds"), asserting that he was an oppressed minority shareholder squeezed out of the business in bad faith by the Hammonds, the majority shareholders. 423 S.C. at 645–47, 817 S.E.2d at 275–76 (2018). Pertuis oversaw three restaurants for the Hammonds; and, each was organized by the Hammonds as a separate, s-corporation. *Id.* The Hammonds and Pertuis agreed upon a compensation package that granted Pertuis shares in each of the restaurants. *Id.* Pertuis' shares would vest based on the length of his service for the two North Carolina restaurants; and, his shares in the third South Carolina restaurant would vest when profitability benchmarks were reached. *Id.* After parting ways with the restaurant business, Pertuis argued he was entitled to a forced buyout, including a 10% ownership share in the South Carolina restaurant, though the profitability benchmark, a net operating profit of $500,000, had not been reached. *Id.* The circuit court found the three corporate entities should be amalgamated, citing to "considerable movement of corporate funds between the three corporate Defendants"; "the same shareholders and the same managing partner (Pertuis) who oversaw all three restaurants", a shared website; and, "conveyance of a boat from the Hammonds to Pertuis without any corporate formality. . .to avoid liability and high insurance premiums." 423 S.C. at 656, 817 S.E.2d at 281 (internal citations omitted). The Court of Appeals affirmed, but noted that the circuit court found a "*de facto* partnership" instead of an amalgamated corporate entity. *Id.* Our State's Supreme Court issued a writ of certiorari and reversed the Court of Appeals pointing to: (1) the fact that the circuit court's finding was one of amalgamation, despite its use of the phrase "*de facto* partnership"; (2) the fact that the circuit court failed to assign the burden of proof to the plaintiff as the party seeking amalgamation; (3) the fact that the entities were s-corporations, which are statutorily permitted to disregard the corporate formalities that the circuit court identified as lacking; and, most importantly, (4) the fact that the Supreme Court found "no evidence of bad faith by the Hammonds" in the record. 423 S.C. at 656–57, 817 S.E.2d at 281 (emphasis added).

the change to this State's amalgamation law is that, under the SBE theory, there must be "evidence of some sort of injustice or abuse of the corporate form" to warrant treatment of the entities as a single enterprise. 423 S.C. at 654, 817 S.E.2d at 280.

Both the Court's Original and Substituted Opinions found that the SBE theory overlapped with veil piercing in that it requires a showing of "an element of injustice or fundamental unfairness, **to place accountability where it belongs**." (Opinion, p. 154); (Substituted Opinion, p. 26) (emphasis added). The injustice or unfairness includes "evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.*; *Pertuis*, 423 S.C. at 655, 817 S.E.2d at 281. This would include "evasion of existing obligations". *Pertuis*, 423 S.C. at 654-55, 817 S.E.2d at 280 *quoting SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008) (emphasis added).

Unlike *Pertuis*,[33] there is evidence of bad faith here.[34] This Court found multiple incidents of wrongdoing to support the circuit court's ruling in its Original Opinion:

- There was "confusion displayed by those who dealt with [Developers] as to which entity they were dealing with" (Opinion, p. 154);
- In March 2009, Besenfelder "represent[ed] to the HOA's management company that the I'On *Company* would deed the Community Dock on lot CV-6 to the HOA when, in fact, the I'On *Club* owned lot CV-6" *Id.* at 155 (emphasis added);
- "Besenfelder's other communications likewise show that he referred to the various entities interchangeably" *Id.*;

[33] 423 S.C. at 657, 817 S.E.2d at 281 ("[O]ur thorough review of the extensive record yields no evidence of bad faith by the Hammonds.").

[34] *Pertuis* also did not involve parties in a fiduciary relationship. *See* (Substituted Opinion, p. 16) (finding Developers' owed a fiduciary duty to the HOA and its members). The fiduciary nature of the relationship here presents a novel question: whether the burden of proving the propriety of the transactions involved rests with the superior, corporate entities when those entities owed a fiduciary duty to the inferior party and the inferior party alleged that the superior parties were amalgamated. South Carolina law appears to answer in the affirmative.

- "[Developers'] common employees and principals **acted in concert to profit at the expense of the HOA's members**" – a "behavior" "undoubtedly **facilitated" by "[t]he intertwining of the operations of [Developers'] entities**" *Id.* (emphasis added);

- In 1998 and 1999, "without the knowledge of the HOA's members", "the I'On *Group*, then known as Civitas, negotiated with a neighboring subdivision's developer for the sale of access rights to the Community Dock and boat ramp on Lot CV-6, although the rights were owned by the I'On *Company* at the time" *Id.* (emphasis added and in original);

- In 2000, "the I'On *Company* transferred lot CV-6 to the I'On *Club*, for inadequate consideration ($5.00) before it was ultimately sold to Russo" *Id.* at 154-55 (emphasis added);

- "[P]receding the sale of lot CV-6 to Russo was Thomas Graham's secret expression of a desire to capitalize [the] potential value of the Community Dock" *Id.* (emphasis added);

- "[T]he HOA's members [were placed] in a position of having to compete with non-members for access to the disputed property" when " Graham's intent [to profit from the disputed property was realized] through the sale to Russo, in addition to the 1999 sale of access rights" *Id.* (emphasis added); and,

- The Developer's conduct concerning the disputed property ("the **secret sale of access rights to a neighboring subdivision's developer** as well as the **surprise sale of ownership to Russo**") "benefited [Developers] at the expense of the HOA" *Id.* (emphasis added).

The Substituted Opinion negates these prior findings – for no explained reason and without new precedent. *Compare* (Opinion, pp. 154-55) *with* (Substituted Opinion, p. 26). This is error; the Court's original findings were proper.[35]

[35] Alternatively, *Pertuis* should not be applied retroactively because the circuit court did not have the benefit of *Pertuis* when this case was heard and when the circuit court ruled on JNOV. *See* (Substituted Opinion, p. 26, n. 19) (expressly acknowledging "the circuit court did not have the benefit of the *Pertuis* decision when it ruled on [amalgamation]"). Respondents should not be held to a standard that did not exist at the time of trial or the circuit court's JNOV determination. *Toth v. Square D Co.*, 298 S.C. 6, 9, 377 S.E.2d 584, 585-86 (1989) (recognizing where a decision "effect[s] more than remedial or procedural change", *e.g.*, when a judicial decision creates "liability where none had previously existed", retroactive application is "unfair and

C. The Single Business Enterprise Theory Should be Applied Here to Place Accountability Where It Belongs

Third, this case is a storybook model for the application of the single enterprise theory.[36] The facts include numerous exemplars of the kinds of exploitive and evasive conduct "that the corporate structure should not shield". *Pertuis*, 423 S.C. at 654, 817 S.E.2d at 280.

The I'On Company, LLC ("TIC") developed the I'On subdivision and established The I'On Club, LLC ("I'On Club") and I'On Realty, LLC ("I'On Realty"). (R. pp. 822:22-834:19). I'On Realty was a subsidiary of TIC. (R. pp. 681; 768). I'On Group managed TIC from its inception in 1998. (R. p. 824:8-17).

1. Developers' Secret Intentions and Verbalized Promises Between 1998 and 2004

I'On Group, also known as Civitas, was Vince Graham's I'On management company. (R. p. 1220). I'On Group was in existence and was managing TIC when TIC published the initial Property Report in 1998 which promised the HOA ownership of the Community Dock and Creekside Park. (R. pp. 817-18). I'On Group's sole member, Vince Graham, signed the Property Report. (R. p. 3032). I'On Realty distributed the Property Report and made marketing representations to the purchasers, Walbeck included, that these Amenities would be conveyed. (R.

---

inappropriate."). Assuming, *arguendo*, that the Court's Substituted Opinion properly analyzed and applied *Pertuis* and the SBE theory to this case, the Court utilized a test for amalgamation unlike those previously recognized in South Carolina. *See, e.g., Kincaid v. Landing Development Corp.*, 289 S.C. 89, 91 344 S.E.2d 869, 871 (Ct. App. 1986) (requiring, for an amalgamation claim, comingling of corporate interests, entities, and activities which blurs legal distinction between the corporation and their activities). The new test fundamentally changed our State's amalgamation law. Given that the circuit court's amalgamation rulings (i) were based on South Carolina law in existence at the time of trial and its JNOV ruling; and, (ii) the fundamental shift in the new test as applied by the Court, the new test should not disturb the jury's verdict, properly sustained by the circuit court.

[36]Developers did not, and do not, seriously contest the blurring of operations as found by the circuit court; rather, they argue the fairness prong.

pp. 519-23). I'On Realty wrote the sales contracts referencing the recreational facilities chart in the Property Report. *Id.*

At trial, Vince Graham conceded the Developers decided **not** to convey the Amenities to the HOA eight months prior to contracting to sell Walbeck his lot in a contract that said otherwise.[37] (R. p. 1229). Developers made this decision while negotiating the sale of rights to Olde Park in a transaction which violated the representations made in the Property Report. (R. pp. 1211-14). The Olde Park transaction, negotiated by I'On Group, involved TIC obligating I'On Club to share what was supposed to be the homeowner/HOA's "waterfront" Amenities with a different neighborhood. (R. p. 828). Stated differently, **I'On Group arranged for TIC to compel I'On Club to breach TIC's obligations to the homeowners on TIC's behalf**.

The I'On Group, TIC, and I'On Realty subsequently failed to update or correct the original representations before or after Walbeck's purchase (despite writing Walbeck letters three times, before and after his closing).

I'On Club purported to implement the change from HOA "ownership" to HOA "access" by granting a limited easement to the HOA on property it did not own (CV-6 a/k/a Creekside Park and Community Dock). The easement was invalid *ab initio*. TIC and I'On Club concede that the I'On Club did not own the property and had no rights to grant an easement when they attempted to grant an easement to the HOA. (R. pp. 684-85).[38]

---

[37] Vince's offer to Olde Park occurred on December 8, 1998, five weeks *after* the date of the 1998 Property Report and almost one year *before* the Property Report was provided to Walbeck. (R. pp. 643, 649-50). The Olde Park deal was finalized before the Walbeck contract occurred. (R. p. 672). But, no disclosure was given to Walbeck regarding the Olde Park deal or how it modified the Property Report or the recreational facilities chart therein that was incorporated into Walbeck's contract. (R. pp. 672-73). Follow up letters to Walbeck also failed to disclose these changes. (R. p. 676).

[38] When TIC and the I'On Club contend they were unaware that the easement was invalid for thirteen years, how can this Court hold Respondents to a different, higher standard? *Compare*

Civitas supplied the I'On Group employee, Joe Barnes, that staffed the three entities signing the easement, permitting him to sign the invalid, non-perpetual easement for all three entities. (R. pp. 3131-3141) (easement signed by Barnes on behalf of all three entities); *see also* (R. pp. 676:20-679:15) (Tom Graham admitting Joe Barnes signed the flawed easement).

The Developers' switch from ownership to easement and the invalidity of the easement **went unnoticed** by the homeowners/HOA as the title was held a I'On Developer entity and the common areas transfer process was long and detailed. *See* Sections VII and VIII(A)(1), *infra.*

An amended Property Report was issued in 2000 to affect the removal of the waterfront amenities. (R. pp. 3035-73). No effort was made to notify recipients of the 1998 Property Report of the 2000 amended report that removed the Community Dock from the HOA's owned amenities. (R. p. 695).

2. Developers' Evasive Conduct Continued Between 2001 and 2005

Vince Graham, acting on behalf of the I'On Group, appointed the HOA's Board President from 2000-2005. (R. p. 640). The President worked for, and was employed by, TIC during this period. (R. pp. 640-41). Tom Graham testified that TIC, as founder, retained its veto right after turning the HOA over to the homeowners in late 2005, which continued through the date of trial in 2015. (R. p. 641). Tom Graham described the veto as being like "the Supreme Court." (R. p. 642).

In 2005, Developers and the HOA entered into a handover agreement. (R. pp. 2216-17). The agreement was signed by TIC and the HOA's President and Vice President. (R. p. 2217). That

(Substituted Opinion, pp. 20-21) (concluding that Walbeck's claims accrued no later than late 2004 and expired no later than late 2007) *with* (R. p. 686) (Vince Graham admitted that Developers did not know for 13 years that the easement was granted before Developers owned the property).

agreement required TIC to initiate the handover process as to the common areas which, as mentioned previously, included the Creekside Park and Community Dock. (R. p. 2216-17).

3. Developers Covertly Explored Their True Intention, Taking the Amenities Away From the HOA, Between 2006 and 2007

As of 2006, TIC and the I'On Group were still indicating to the HOA, the HOA's property manager, and the Board, that the Appellants still intended to turn over the boat ramp and Community Dock, now owned by I'On Club. (R. pp. 698-99); (R. p. 2922).

As of June 2007, TIC and I'On Group were unclear of what rights the HOA had over the docks and boat ramp. (R. p. 706).

However, TIC, through Tom Graham, decided to exploit the value of these Amenities further in 2007. (R. pp. 706-08). This was contrary to its manager's warning that "[t]he docks are too controversial and taking away even part of this community amenity would cause trouble." (R. p. 708).

TIC failed to disclose its revised intentions to the HOA. Instead, in September of 2007, it was agreed that Chad Besenfelder (TIC manager) and Ward Mundy (HOA Board Member) would jointly ascertain the condition of the docks to see if they were ready for turnover to the HOA. (R. pp. 1233-34) (Tom Graham admitting he had no information that contradicted Besenfelder and Mundy's inspection of the docks in advance of the promised turn over); (R. p. 3519) (Sept. 2007 Board minutes).

4. Developers' Deceptive Conduct Escalated Between 2008 and 2009

In 2008, Besenfelder, on behalf of I'On Group and TIC, wrote to the State of South Carolina that "We [TIC & I'On Group] are ready to deed this community dock and ramp to the homeowners and wish to comply with regulations." (R. pp. 1239-40); (R. p. 2300). Vince Graham was not sure which entity owned the Amenities. (R. p. 1480:24-1481:19) (circuit court ruling

Developers were amalgamated because, among other things, "Mr. Vince Graham on the stand couldn't even remember which entity an action had been taken on behalf of."); *see also* (R. pp. 680:24-687:10) (Tom Graham was also unsure which entity owned the Amenities when Developers granted the easement). Besenfelder, like his predecessor Joe Barnes, "wears many hats." (R. p. 1240). In 2008, he was the manager of both TIC and the I'On Group. (R. pp. 1240-41).

The intent to "honor" Vince's "promise"..."to hand over" the Amenities to the HOA, was confirmed many times in writing in 2008, and again, in 2009, before TIC and Group reversed themselves and decided to sell the docks to Russo in 2008, and again, in 2009. (R. pp. 709; 711; 714-16; 719; 1240-44; 1248; 1251-55; 1263-65; 1276-77; 1298); *see also* (R. p. 2078). The representations were typically made by the I'On Group, on behalf TIC, regarding the disputed property owned by the I'On Club. *Id.*

TIC, through Tom Graham, and the I'On Group, through Vince Graham, refused to amend the easement in 2008 and 2009 to make it perpetual (R. pp. 724; 1282-83) and refused to acknowledge it as perpetual prior to trial (R. pp. (R. pp. 1225-26). The I'On Club was the vehicle eventually used to sell the TIC and Realty-promised Amenities to a third-party. (R. pp. 2065-74). This transaction was negotiated by Bessenfelder. (R. p. 723:2-13). Tom Graham was not sure which company Besenfelder worked for. (R. p. 697). TIC hid the 2008 sale from the homeowners with lies that it was just a change in management. (R. pp. 1239:1-1258:14). All of the I'On entities participated in the evasion of existing obligations and deception; this is a poster child for single business enterprise theory.

After the buyer withdrew from the 2008 purchase contract, Tom Graham, through TIC, expressly wrote to the HOA that TIC was working on the turnover of the Amenities in March 2009. (R. p. 743). The I'On Group manager made the same representation. (R. pp. 749-50).

When the HOA's Board tried to stand up to TIC and the I'On Company, the Grahams and their manager became contemptuous, "toying" with the HOA Board; "slam[ing] the door on this foolishness;" and, putting an end to the "Mickey Mouse" issues and "Creek Park BS". (R. pp. 732; 1280-81). Notably, it was not until five months after the sale of the disputed property that the HUD Registration Statement was withdrawn. (R. p. 1283).

Even when the homeowners got wind of the new contract a few days before closing, Tom Graham lied, denied its existence, and described the transaction as a change in management. (R. pp. 752-53). At trial, Developers admitted they sold the waterfront Amenities that were promised to the homeowners. (R. pp. 653-54; 753; 1201; 1216-17) ("they sold the park"). And, the Developers sold the property to Russo knowing that the buyer could terminate the HOA's access to the amenities when the thirty-year term ran out in twenty-one years (now eleven years!). (R. p. 679).

The ultimate sale of the common areas negotiated by the I'On Group involved five sellers acting in concert: TIC, I'On Club, and the owners of TIC (one of whom owned I'On Group). (R. p. 827). As these facts demonstrate, the record supports this Court's original treatment of the I'On entities as a single enterprise. The deception (i) began when Developers' initial change in plans, not to convey the Amenities to the HOA, was not disclosed to Walbeck; (ii) continued into 2007 during turnover discussions when the Developers' failure to disclose to homeowners their changed plans; and, escalated when (iii) Developers denied the existence of the 2008 contract that did exist; and, (iv) described the 2009 contract to sell the Amenities as a change in management. Developers

were obligated to convey the Community Dock and Creekside Park to the HOA, and through using their fragmented corporate form, effectively explored how they could profit from evading their obligation and they did just that. This Court's Substituted Opinion was in error; Developers should be held accountable for their acts by application of the single business enterprise theory.

CONCLUSION

Based upon the foregoing reasons, this Court should grant rehearing and/or rehearing proceedings to correct its Substituted Opinion. In so correcting, this Court should: (1) find the 2012 Dismissal Denial is the law of the case and not preserved for appellate review; (2) hold that the Developers admitted the properness of Walbeck and Adkin's derivative claims; (3) affirm the circuit court's ruling finding Walbeck and Adkin's satisfied Rule 23's derivative requirements; (4) conclude that derivative determinations are not limited to the pleadings, and here, the JNOV standard applies to the Court's derivative analysis; (5) restate the verdicts it vacated as to the HOA's direct and non-derivative claims; (6) affirm the jury's finding and circuit court's ruling that Developers acted against the HOA's interest in breach of their fiduciary duty owed the HOA; (7) affirm the circuit court's ruling that Developers were fiduciarily obligated to convey the Creekside Park and Community Dock and failed to fulfill this obligation; (8) vacate its denial of JNOV as to Walbeck's direct and derivative claims based upon the Statute of Limitations; (9) affirm the circuit court's ruling that equitable estoppel precludes the Developers from relying on the Statute of Limitations; (10) affirm the circuit court's ruling that both Walbeck's and the HOA's claims were tolled under well-established equitable tolling principles; (11) affirm the circuit court's ruling that Developers were amalgamated; (12) reinstate Walbeck's attorney fee award under ILSA or pursuant to his purchase contract; and, (13) affirm the circuit court's decisions with respect to all

issues in this appeal; and/or alternatively, reinstate either Walbeck's and the HOA's breach of contract or negligent misrepresentation award.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

Justin O'Toole Lucey, Esquire
Joshua F. Evans, Esquire
Dabny Lynn, Esquire
415 Mill Street
Mt. Pleasant, SC 29464
(843) 849-8400
(843) 849-8406 (fax)
jlucey@lucey-law.com
jevans@lucey-law.com
dlynn@lucey-law.com
Attorneys for the Respondents

Mt. Pleasant, South Carolina
April 15, 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

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.

RECEIVED
APR 15 2019
SC Court of Appeals

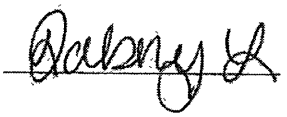
PROOF OF SERVICE

I, Dabny Lynn, hereby certify that on April 15, 2019 I served a copy of the ***Respondents' Petition for Rehearing*** on the following counsel, via United States Mail, postage pre-paid, and addressed as follows:

Brian C. Duffy
Seth W. Whitaker
Julie L. Moore
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
Attorneys for Appellants

Shawn R. Willis
Nelson Mullins
Liberty Center
151 Meeting Street, Suite 600
Charleston, SC 29401
Attorneys for I'On Assembly, Inc.

Tim W. Bouch
Yancey A. McLeod, III
Leath Bouch & Seekings
92 Broad Street
Charleston, SC 29401
Former Attorneys for I'On Assembly, Inc.

Signed: 

April 15, 2019
Mt. Pleasant, SC

The South Carolina Court of Appeals

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

v.

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

Appellate Case No. 2015-001590

ORDER

Appellants and Respondents have filed petitions for rehearing. After careful consideration of the petitions, the Court has found no material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, both petitions are denied.

C.J.

J.

J.

Columbia, South Carolina

FILED
May 22, 2019

cc:
Brian C Duffy, Esquire
Seth Warren Whitaker, Esquire
Julie Lauren Moore, Esquire
Justin O'Toole Lucey, Esquire
Joshua Fletcher Evans, Esquire
Timothy W. Bouch, Esquire
Yancey Alford McLeod, III, Esquire
The Honorable Stephanie P. McDonald

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

RECEIVED
MAR 23 2016
SC Court of Appeals

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

FINAL BRIEF OF APPELLANTS

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

FACTS 5

STANDARD OF REVIEW 20

ARGUMENT 21

I. RESPONDENTS CANNOT PURSUE THIS ACTION AS A DERIVATIVE ACTION. 21

1. Respondents have never pleaded or proved a proper demand and refusal. 23

2. Respondents have failed to plead or prove futility of demand. 23

3. New claims arose following the partial settlement of this action in January 2014, for which no demand and refusal or futility of demand has ever been alleged or established. 25

4. Respondents' claims are contrary to the interests of the Assembly and many of its other members, and thus may not be maintained derivatively. 26

II. RESPONDENTS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS AS A MATTER OF LAW. 28

1. Respondents knew or should have known of the existence of the claims against Appellants. 29

a. The Assembly hired a lawyer to analyze the Recreational Easement, which makes clear that the Assembly does not and will not own the property in dispute. 30

b. The Assembly paid to use the Creek Club and the Creek Club dock and provided

written notice of its budget to its members, including Adkins and Walbeck, annually. 31

c. The Assembly repeatedly discussed and considered purchasing Lot CV-6. 32

d. The Assembly Board was comprised of several recipients of the 1998 Property Report....33

2. Respondents' failure to exercise reasonable diligence bars application of equitable estoppel. 34

III. THE 2000 RECREATIONAL EASEMENT AND AGREEMENT TO SHARE COSTS WAS VALID, AND THE EASEMENT GRANTING THE ASSEMBLY ACCESS TO THE CREEK CLUB DOCKS WAS PERPETUAL. 36

1. The 2000 Recreational Easement was valid. 37

2. The Assembly's easement for use of the boating facilities was perpetual. 39

IV. APPELLANTS DO NOT HAVE A FIDUCIARY DUTY TO CONVEY AMENITIES TO THE ASSEMBLY AS A MATTER OF LAW. 41

1. Appellants satisfied their fiduciary duty as a promoter of the Assembly. 42

2. Appellants satisfied their fiduciary duty to convey amenities in good repair. 42

3. South Carolina has refused to impose a broad developer fiduciary duty....44

4. The trial court mistook a contractual duty for a fiduciary duty....45

V. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AS TO APPELLANTS' COUNTERCLAIM FOR ABUSE OF PROCESS WHERE A SMALL GROUP OF OBJECTORS, IN CONTINUATION OF THEIR LONGSTANDING EFFORTS TO THWART THE I'ON COMPANY'S PLANS, SOUGHT TO OBTAIN PROPERTY FOR FREE, WITHOUT PROPER

JUSTIFICATION, AND THROUGH IMPROPER USE OF LEGAL PROCESS.....46

VI. THE I'ON COMPANY IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS AS THE PREVAILING PARTY ON ADKINS' BREACH OF CONTRACT CLAIM.....50

VII. THE TRIAL COURT'S AWARD OF $225,000.00 IN ATTORNEY'S FEES TO WALBECK WHEN THE JURY AWARDED HIM $1.00 IS NOT REASONABLE.....53

1. Neither ILSA nor South Carolina common law support an award of attorney's fees for the success of another party on other claims. 54

2. A reasonable fee for Walbeck's ILSA verdict is no fee at all.....55

VIII. A NEW TRIAL SHOULD BE GRANTED BECAUSE THE TRIAL COURT IMPROPERLY RULED THAT APPELLANTS WERE AMALGAMATED.....57

IX. WALBECK'S CLAIM FOR VIOLATION OF THE INTERSTATE LAND SALES ACT FAILS FOR LACK OF RELIANCE ON APPELLANTS' STATEMENTS.....60

1. The better-reasoned authorities hold that reliance may not be presumed in anti-fraud actions under ILSA.....61

2. Walbeck cannot establish actual reliance on any material misrepresentation for ILSA purposes. 62

CONCLUSION 65

TABLE OF AUTHORITIES

Cases

Arant v. Kressler, 327 S.C. 225, 489 S.E.2d 206 (1997). 28

Austin v. Stokes-Craven Holding Corp.,
406 S.C. 187, 750 S.E.2d 8 (2013). 55

Baker v. Equitable Leasing Corp.,
275 S.C. 359, 271 S.E.2d 596 (1980). 58

Basic, Inc. v. Levinson, 485 U.S. 224 (1988). 62

Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn,
348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001). 31

Bivens v. Watkins, 313 S.C. 228, 437 S.E.2d 132 (1993). 42

Brinker v. Chicago Title Ins. Co., ___ F. Supp. 2d. ___,
2012 U.S. Dist. LEXIS 44503 (M.D. Fla. 2012). 62

Bristow v. Drake St. Inc., 41 F.3d 345 (7th Cir. 1994). 56

Carolina First Corp. v. Whittle,
343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000). 21-24, 26

Citizens & S. Nat'l Bank of S.C. v. State Budget & Control Bd.,
246 S.C. 140, 142 S.E.2d 874 (1965). 32

Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.,
349 S.C. 251, 562 S.E.2d 633 (2002). 42-45

Corbin v. Carlin, 366 S.C. 187, 620 S.E.2d 745 (Ct. App. 2005). 37

Cramblit v. Fikse, 33 F.3d 633 (6th Cir. 1994). 56

Dedes v. Strickland, 307 S.C. 155, 414 S.E.2d 134 (1992). 52

Dongelewicz v. First E. Bank, 80 F. Supp. 2d 339 (E.D. Pa. 1999). 61

Drury Dev. Corp. v. Found. Ins. Co.,
380 S.C. 97, 668 S.E.2d 798 (2008). 58, 59

Farrar v. Hobby, 506 U.S. 103 (1992). 56

Fici v. Koon, 372 S.C. 341, 642 S.E.2d 602 (2007). 52

Gibbes v. Rose Hill Plantation Dev. Co.,
794 F. Supp. 1327 (D.S.C. 1992). 61, 63, 64

Gibson v. Bank of Am., N.A.,
383 S.C. 399, 680 S.E.2d 778 (Ct. App. 2009). 21, 29, 32

Goddard v. Fairways Dev. Gen. P'ship,
310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993). 42-45

Harbison Cmty. Ass'n, Inc. v. Mueller,
319 S.C. 99, 459 S.E.2d 860 (Ct. App. 1995). 31

Hedgepath v. Am. Tel. & Tel. Co.,
348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001). 36

Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003). 41

In re Greenwood Supply Co., 295 B.R. 787 (Bankr. D.S.C. 2002). 54, 55

I'On, L.L.C. v. Town of Mt. Pleasant,
338 S.C. 406, 526 S.E.2d 716 (2000). 7

Ivar v. Elk River Partners, LLC, 705 F. Supp. 2d 1220 (D. Colo. 2010). 61

Jones v. Enter. Leasing Co.,
383 S.C. 259, 678 S.E.2d 819 (Ct. App. 2009). 59

K & A Acquisition Group, LLC v. Island Pointe, LLC,
383 S.C. 563, 682 S.E.2d 252 (2009). 40

Kebe ex rel. K.J. v. Brown, 91 F. App'x 823 (4th Cir. 2004). 56

Kelly v. Logan, Jolley, & Smith, L.L.P.,
383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009). 34-36

Kennedy v. Columbia Lumber & Mfg. Co.,
299 S.C. 335, 384 S.E.2d 730 (1989). 59

Kincaid v. Landing Dev. Corp.,
289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986).....59, 60

Krepps by Krepps v. Ausen,
324 S.C. 597, 479 S.E.2d 290 (Ct. App. 1996). 21

Magnolia North Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.,
397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). 34, 59, 60

Martin v. Companion Healthcare Corp.,
357 S.C. 570, 593 S.E.2d 624 (Ct App. 2004). 30

McBride v. Sch. Dist. of Greenville Cnty.,
389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010). 50

McCullough v. Wall, 38 S.C.L. (4 Rich.) 68 (1850). 38

Meetze v. Saylors, ___ S.C. ___, 2005 WL 7082989,
(Ct. App. 2005). 52, 53

Mercer v. Duke Univ., 401 F.3d 199 (4th Cir. 2005). 56

Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp.,
374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007). 57-60

Millvale Plantation, LLC v. Carrison Family Ltd. P'ship,
401 S.C. 166, 736 S.E.2d 286 (Ct. App. 2012). 39-40

Moore v. Reynolds, 285 S.C. 574, 330 S.E.2d 542 (Ct. App. 1985). 37

Nettles v. Cummings, 30 S.C. Eq. (9 Rich. Eq.) 440 (1857). 37

Noronha v. Stewart, 199 Cal. App. 3d 485, 245 Cal. Rptr. 94 (2d Dist. 1988). 38

Pallares v. Seinar, 407 S.C. 359, 756 S.E.2d 128 (2014). 47

Pope v. Heritage Communities, Inc.,
395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011). 59, 60

Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 (Ct. App. 1990). 52

Romberg v. Nichols, 48 F.3d 453 (9th Cir. 1994). 56

Rushing v. McKinney,
370 S.C. 280, 633 S.E.2d 917 (Ct. App. 2006). 35

Sanders v. Hartzog, 6 S.C. 479 (1876). 38

Scott v. McCain, 275 S.C. 599, 274 S.E.2d 299 (1981). 48

Seabrook Island Prop. Owners' Ass'n v. Berger,
365 S.C. 234, 616 S.E2d 431 (Ct. App. 2005). 21

Sikes v. Teleline, Inc., 281 F.3d 1350 (11th Cir. 2002). 62

Sturkie v. Sifly, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984). 58-60

Supraner v. Citizens Sav. Bank, 303 Mass. 460, 22 N.E.2d 38 (1939). 37

Taplett v. TRG Oasis (Tower Two) Ltd., L.P.,
755 F. Supp. 2d 1197 (M.D. Fla. 2009). 62

Taylor v. Nix, 307 S.C. 551, 416 S.E.2d 619 (1992). 55

Terre Du Lac Assoc., Inc. v. Terre Du Lac, Inc.,
772 F.2d 467 (8th Cir. 1985). 54

Thomas v. Thomas, 286 S.C. 294, 333 S.E.2d 76 (Ct. App. 1985). 31

Tolar v. Marion Cty. Lumber Co.,
93 S.C. 274, 75 S.E. 545 (1912). 37

Waller v. Seabrook Island Prop. Owners Association,
300 S.C. 465, 388 S.E.2d 799 (1990). 27

Ward v. Atlas Const. Co., 276 S.C. 346, 278 S.E.2d 621 (1981). 55

West v. Gladney, 341 S.C. 127, 533 S.E.2d 334 (Ct. App. 2000). 52

Wilson v. Friedberg, 323 S.C. 248, 473 S.E.2d 854 (Ct. App. 1996). 58, 59

Statutes

15 U.S.C. § 1701 *et seq.* 60

15 U.S.C. § 1703(a)(2). 60, 62, 64

15 U.S.C. § 1709(c). 53

15 U.S.C. § 1711(a)(2). 28

S.C. Code Ann. § 15-3-520. 28

S.C. Code Ann. § 15-3-530. 28

S.C. Code § 33-1-200. 58

S.C. Code § 33-3-102 58

S.C. Code § 33-6-220(b). 58

Rules

Rule 23(b), SCRCP. 21-23, 26, 47

17 CFR 240.10b-5. ..... 61, 62

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in holding that Adkins and Walbeck met the requirements to maintain a derivative action on behalf of the I'On Assembly?

II. Did the trial court err in denying Appellants' JNOV motion as to the statute of limitations when Respondents knew as early as 2001 that the I'On Assembly did not own Lot CV-6 or the Creek Club dock and that construction of each had been completed?

III. Did the trial court err in ruling that Appellants owed Respondents a fiduciary duty to convey amenity property to the I'On Assembly as a matter of law?

IV. Did the trial court err in holding that the 2000 Recreational Easement was void *ab initio*, and if so, is the portion conveying an easement to the I'On Assembly for the use of the Creek Club docks perpetual?

V. Did the trial court err in directing a verdict as to Appellants' counterclaim for abuse of process where a handful of antagonists sought to continue their longstanding efforts to thwart The I'On Company's plans and to obtain property for free and where such individuals repeatedly used legal process improperly to those ends, including Walbeck and Adkins knowingly verifying false allegations in an attempt to survive challenges to their purported derivative action?

VI. Did the trial court abuse its discretion in denying The I'On Company's petition for attorney's fees and costs when The I'On Company prevailed on Adkins' claim for breach of contract which has a mandatory fee-shifting provision?

VII. Did the trial court abuse its discretion in considering the success of the Assembly's claim for breach of fiduciary duty in awarding Walbeck $225,000.00 in attorney's fees and costs on his claim for violation of the Interstate Land Sales Full Disclosure Act when the jury awarded him only $1.00?

VIII. Did the trial court err in ruling that Appellants were amalgamated without conducting the legal analysis for disregarding the corporate form and piercing the corporate veil?

IX. Did the trial court err in holding that reliance is not required to establish a claim under the anti-fraud provision of the Interstate Land Sales Full Disclosure Act?

STATEMENT OF THE CASE

This is an appeal from a jury trial that reached verdict on August 1, 2014, in the Charleston County Court of Common Pleas. The case involves a dispute between property owners and a developer regarding a promise made in 1998 to convey a community dock and a park to the homeowners association. Appellants contend that the developer fulfilled this promise in 2001 upon completion of construction and conveyance of those amenities. Respondents contend that the developer should have conveyed different property. In any event, the construction of the amenities on the property Respondents target was completed by April of 2001. No respondent brought suit until December 22, 2010.

Two property owners, Brad Walbeck and Lea Ann Adkins, alleged claims in their individual capacities as well as derivatively on behalf of the homeowners association, the I'On Assembly. The defendants included the developer, The I'On Company, LLC, and several related entities: The I'On Club, LLC, The I'On Group, LLC, I'On Realty, LLC, Vince Graham, and Tom Graham (collectively the "I'On Defendants"). Respondents also sued the purchaser of the property they contend had been promised to them, 148 Civitas, LLC, and its principal, Mike Russo.

Walbeck alone filed suit on December 22, 2010, but never served the summons and complaint. (R. pp. 116-128.) Walbeck filed an amended summons and complaint on March 8, 2011, alleging violation of the Interstate Land Sales Full Disclosure Act ("ILSA"), breach of contract, breach of fiduciary duty, fraud, and negligent misrepresentation. (R. pp. 129-140.) The I'On Defendants filed a motion to dismiss, answered, and counterclaimed for abuse of process. (R. pp. 1763-1764; R. pp. 141-150.)

The I'On Defendants challenged the pleading based on, *inter alia*, the expiration of the statute of limitations, the absence of the alleged fiduciary duty, and the failure to properly bring the derivative claims. (*Id.*)

On the day before the hearing on the motion to dismiss, February 7, 2012, Adkins joined Walbeck in a second amended complaint purporting to assert claims individually and derivatively on behalf of the Assembly. (R. pp. 151-167.) Walbeck and Adkins each verified the facts and allegations and sought to bolster the claims as to the derivative procedure. (R. pp. 166-167.) They added the Assembly as a defendant to the action. (*Id.*) The court denied the motion to dismiss. (R. pp. 9-10.) The I'On Defendants later moved for summary judgment based, in part, on expiration of the statute of limitations and the plaintiffs' failure to bring a proper derivative claim. (R. pp. 1765-1767.) The court also denied that motion. (R. pp. 11-12.)

On January 2, 2014, Walbeck and Adkins filed a third amended summons and complaint. (R. pp. 183.) The plaintiffs later verified this complaint. (R. pp. 184-185.) The I'On Defendants answered and counterclaimed. (R. pp. 186-198.)

On the eve of what proved to be a mistrial, January 13, 2014, the plaintiffs reached a settlement with defendants Mike Russo and 148 Civitas, LLC. (R. pp. 13-15.) In that settlement agreement—in which the Assembly acquired more than anyone had ever contended was promised it—the Assembly agreed to support the plaintiffs' claims against the I'On Defendants. (R. pp. 2968-2971; R. p. 415:24-416:16; R. p. 1375:7-16, R. p. 1379:4-6.) The case proceeded to trial the following day, but the court declared a mistrial on January 17, 2014. On February 26, 2014, in light of the settlement agreement, the court realigned the Assembly as a nominal plaintiff. (R. pp. 16-17.) The Assembly

never filed pleadings alleging any causes of action against the I'On Defendants. Walbeck and Adkins prosecuted the Assembly's claims, and only in a derivative capacity.

On May 12, 2014, The I'On Company and The I'On Club filed a separate suit against Walbeck, Adkins, and the Assembly seeking a declaration that an agreement which included two easements executed in 2000 was valid, and that the easement for use of the boating facilities contained therein was perpetual. (R. pp. 199-312.) The trial court consolidated the declaratory judgment action with the present action. (R. p. 18.)

The case was tried to verdict from July 28 to August 1, 2014. At the close of the plaintiffs' case, the court denied the I'On Defendants' motion for directed verdict. (R. p. 1019:11-1066:15; R. pp. 1820-1854.) At the close of the defendants' case, the court directed a verdict in favor of the plaintiffs as to the I'On Defendants' counterclaim for abuse of process. (R. p. 1465:15- 1469:16.) The court denied the I'On Defendants' renewed motion for directed verdict at the close of evidence. (R. p. 1445:23- 1473:12.)

The jury returned a verdict in favor of the I'On Defendants as to all claims for fraud and violation of the South Carolina Unfair Trade Practices Act, and as to all claims brought by Adkins, including breach of contract, violation of ILSA, fraud, and negligent misrepresentation. (R. pp. 1855-1862.) The jury returned a verdict in favor of Walbeck in the amount of $1.00 for his claim for violation of ILSA; $10,000.00 for breach of contract; and $20,000.00 for negligent misrepresentation. (*Id.*) The jury returned a verdict in favor of the Assembly in the amount of $1,000,000.00 for breach of contract; $1,750,000.00 for breach of fiduciary duty; and. $1,000,000.00 for negligent misrepresentation. (*Id.*) The jury also found that each of the plaintiffs knew or reasonably should have known that a claim existed against the defendants on August 5, 2009. (*Id.*)

The court entered judgment on August 11, 2014. (R. pp. 19-20.)

The I'On Defendants moved for judgment notwithstanding the verdict, or, in the alternative, a new trial. (R. pp. 1863-1868.) Walbeck petitioned for attorney's fees and costs, Adkins petitioned for unjust enrichment, and plaintiffs moved for judgment as to the validity of the 2000 Recreational Easement. (R. pp. 1869-1898; R. pp. 1899-1902; R. pp. 1903-1909.) The I'On Company petitioned for attorney's fees and costs as the prevailing party in Adkins' breach of contract action. (R. pp. 1910-1914.)

On July 16, 2015, the court filed orders denying Adkins' petition for unjust enrichment; denying the I'On Defendants' motion for JNOV and a new trial; denying The I'On Company's petition for attorney's fees; declaring the 2000 Recreational Easement void and invalid; and awarding Walbeck $225,000.00 in attorney's fees and costs. (R. pp. 21-63; R. pp. 84-100; R. pp. 70-78; R. pp. 79-83; R. pp. 64-69.) On July 20, 2015, Appellants timely served notice of appeal.

FACTUAL BACKGROUND

A few longtime protesters of the I'On development manufactured this lawsuit in order to frustrate The I'On Company's latest development efforts, to quash the sale of I'On Club property, and to obtain that property for free. This group ("the Gang") knew the property was not rightfully theirs, and they never claimed any right to it for the near decade they now contend the homeowners were supposed to have had ownership.[1] Ultimately, the Gang decided to redirect its failed efforts to circuit court and recruited Walbeck to assert claims they manufactured. (R. p. 1795:5-19.)

[1] The Gang included Respondent Lea Ann Adkins, Steve Brock, Assembly Board member Ward Mundy, and attorney Catherine Templeton. (R. pp. 3401-3402.) Respondent Brad Walbeck was recruited to join the Gang for the purpose of filing this action. (R. p. 1795:5-19.)

Walbeck's initial complaint claimed that the developer's promise to convey a "Creekside Park" and a "Community Dock" included in a 1998 ILSA Property Report actually referred to (1) Lot CV-6, an entire waterfront lot designated for civic use;[2] (2) multiple docks; (3) a boat ramp; (4) a parking lot; and (5) the 2,967 square-foot Creek Club. At trial, after having acquired rights to receive another parking lot down the street, Lot CV-5, as part of the 2014 settlement with 148 Civitas, LLC, Respondents grabbed for even more. (R. pp. 2968-2971; R. p. 1313:13- 1314:11; R. p. 1315:10- 1316:5.) The plaintiffs swore under oath for the first time, directly contradicting their prior testimony, that this additional lot, at least ten parcels and 750 feet away from Lot CV-6, was also part of the simple 1998 promise to convey a "Creekside Park" and a "Community Dock."[3] (*Compare* R. p. 861:15-862:13; R. p. 890:3- 91:1; R. p. 894:11-895:5; R. p. 896:1-7 *with* R. p. 415:24- 416:16; R. p. 402:1-403:7; R. p. 1307:19-24.)

I. The Developer's Vision of I'On and Efforts to Realize It.

The I'On community is an award-winning, early example of a "new urbanism" development located off of Mathis Ferry Road in Mount Pleasant, South Carolina. (R. p. 2993.) I'On's visionaries, Vince Graham and his father, Tom Graham, planned a mixed-use development with designated residential, commercial, and civic spaces. The Grahams sought to recapture the charm of traditional walking neighborhoods such as downtown

[2] The "civic use" designation in I'On is distinct from residential, commercial, and other parcels designated for common homeowners' ownership. Civic properties in I'On, for example, are owned and operated by churches, a school, and The I'On Club. (R. p. 2995; R. pp. 2996-2998; R p. 892:20-24; R. p. 1176:23-1178:17.) In fact, many civic lots were donated to those civic organizations. (R. p. 1143:25-1144:7; R. p. 1171:2-21.) Walbeck and Adkins concede that the lot they seek here, Lot CV-6, was always designated for a civic use and that they knew as much when they purchased. (R. p. 977:3-10; R. p. 892:12-893:9.)

[3] Prior to trial Respondents informed the trial court that "under no theory of this present case would [the Assembly] have any claim . . . at all" to Lot CV-5. (R. p. 415:24-416:16.)

Charleston and the Old Village of Mount Pleasant. (R. pp. 2128-2131.) From its inception, I'On "was going to be a community, not just a subdivision" designed "so that neighbors would have more interaction with each other." (R. p. 594:18-22; R. p. 1164:5-24.) Every residential lot is within a three-minute walk of a playground or park. (R. p. 1170:4-23.) The Grahams envisioned many amenities including multiple parks and trails, docks and boating facilities, commercial spaces, churches, schools, and swim and tennis facilities. (R. p. 1124:20-1125:4, R. p. 1125:16-1126:2; R. p. 1169:21-1171:7.) By design, these amenities would promote this sense of community spirit. By design, most of these amenities, including the civic spaces, were not intended to be owned by the Assembly. (R. p. 1126:3-17; R. p. 1171:2-13; R. p. 3024.)

The Grahams' relatively radical promotion of higher density development had detractors from the outset. Respondent Adkins and her domestic partner Steve Brock (now an I'On resident but neither a lessee nor owner) were chief among them. (R. p. 3404-3428; R. p. 900:5-22; 1188:11-1189:1; 1191:21-1193:4; 1194:15-22; 1195:12-1196:4.) Despite ironically becoming residents of the project they sought to stifle, Adkins and Brock have consistently continued to oppose The I'On Company's development efforts. (R. pp. 3403-3428; R. pp. 3582-3583; R. p. 1191:23-1193:4; R. p. 1194:15-22; R. p. 1197:14- 1198:25.)

After years of zoning and legal battles beginning in 1995, the family business where Tom Graham supported his son's commitment to the vision for I'On has been a resounding success.[4] The development has been featured in the *Wall Street Journal* and

[4] *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (rejecting effort by citizens to block development pursuant to voter referendum on zoning).

Southern Living magazine, recognized by the Department of Natural Resources, and has attracted tours by the National Mayors Institute of Design, colleges, and developers from all over the world. (R. p. 1179:16- 1180:22.) The residents even bestowed upon Vince Graham the singular honor of dedicating a public garden to him with a fitting monument. (R. p. 1174:8- 1175:10; R. p. 3588.) Even the Gang recognizes the achievement it represents: neither Respondents nor a witness who received the 1998 Property Report could testify that the "Creekside Park" and "Community Dock" issues central this lawsuit were material to their decision to purchase in I'On. (R. p. 605:8-18; R. p. 610:25-611:15; R. p. 898:9-13; R. p. 973:21-974:4; R. p. 1078:17-25.) It's no wonder—their property values have increased dramatically, at least 400% from 2000 and at least 100% since 2003. (R. p. 1181:11-22.)

II. The 1998 Property Report.

On November 3, 1998, The I'On Company prepared a property report pursuant to ILSA ("Property Report") which addressed expectations for Phase II of the development. (R. pp. 2999-3034.) I'On Realty distributed this Property Report to prospective purchasers of property in Phase II. It included this table:

RECREATIONAL FACILITIES

Facility	% of Construction Now Complete	Estimated Date of Start of Construction (Month/Year)	Estimated Date Available for Use (Month/Year)	Financial Assurance of Completion	Buyer's Annual Cost or Assessments
PHASE 2					
Creekside Park	0%	1/1999	9/1999	None	Part of annual HOA Assessment
Community Dock	0%	1/1999	9/1999	None	Part of annual HOA Assessment
Sidewalks, paths and trails	0%	1/1999	10/1999	None	Part of annual HOA Assessment
Parks and Open Space	0%	1/1999	10/1999	None	Part of annual HOA Assessment

(R. p. 3022.) Appellants' only obligation to convey any amenity arose from this chart. The Property Report provided that these amenities would be conveyed to the Assembly "upon completion of construction" in Phase II. (R. pp. 3022-3023.) The Property Report also prominently disclosed that other recreational facilities may be owned by persons other than the Assembly. (R. p. 3024.)

The Property Report's promises were intentionally conservative and generic because much of the plan for I'On was still a vision at the time the report was prepared. (R. p. 806:1-13; R. p. 811:1-8; R. p. 1110:6-15; R. p. 1111:20- 1112:18.) The Property Report does not provide any further description of the planned amenities, does not indicate any proposed locations for the amenities, and does not contain maps or photographs. (R. pp. 2999-3034; R. p. 813:16- 816:6.) Adkins even concedes that the terms "Creekside Park" and "Community Dock" are "vague" and that determining what

they mean "requires" review of other documents. (R. p. 878:12-23; R. pp. 3152-3153.) Walbeck also had to refer to other documents to define these terms. (R. p. 974:22- 975:7.) The I'On Company did not purchase the Phase II parcel of land until March of 1999 after the Town of Mount Pleasant rezoned the property—several months after the Property Report was issued. (R. pp. 2986-2990; R. p. 1109:18-1110:5.) It therefore could not obtain a dock permit until December of 1999. (*Compare* R. p. 2991 *with* R. pp. 2132-2150.)

The I'On Company amended the Property Report in April and December of 2000. (R. pp. 2999-3034; R. pp. 3035-3073; R. p. 1126:18-1127:5.) Potential purchasers after those dates were provided with an amended report—not the 1998 Property Report. (R. p. 1140:21-1141:21.) The three reports applied only to Phases I through IV of the ten phases of the development. (R. p. 3070; R. p. 3109.) Ultimately, The I'On Company determined that ILSA's reporting requirement did not apply to I'On and stopped distributing the reports altogether. It even changed the form of the lot purchase agreement—which form was used for Adkins' agreement—to make clear that ILSA did not apply. (R. p. 3117.) All purchase agreements, however, contained a merger clause and a disclaimer of reliance on oral representations as to amenities. (R. pp. 3113-3130; R. pp. 3162-3172.)

III. The I'On Company Exceeded the Promises Contained in the 1998 Property Report.

The I'On Company over-delivered on the promises made in the Property Report. (R. p. 1127:6-11.) The "Creekside Park" is a 2.86 acre linear park, the Marshwalk, which runs along Shelmore Creek and other areas. (R. p. 810:10-20; R. p. 811:16- 813:13; R. p. 1128:12-13; R. p. 3565; R. pp. 3571-3578.) The concept of a linear park, and this park in particular, had long been part of the vision of I'On, and The I'On Company

advertisements confirm that. (R. pp. 3399-3400; R. p. 1011:16-1013:13.) The I'On Company conveyed this "Creekside Park" to the Assembly on November 21, 2000. (R. p. 1122:0-12; R. p. 811:9-812:12; R. p. 3569; R. pp. 3571-3578.)

Respondents contend that the promise to convey a "Creekside Park" is a reference not to the Marshwalk, but to Lot CV-6. The primary improvement to Lot CV-6 is the Creek Club, a 2,967 square-foot event facility built at a cost of more than $600,000.00. (R. pp. 3614-3615.) The I'On Club received the certificate of occupancy for the Creek Club on April 10, 2001 and immediately began operating the facility as a private event venue. (R. p. 3190; R. p. 615:8-25.) Lot CV-6 also has two docks, a boat ramp, and a parking lot. These improvements were all complete by April of 2001. (R. p. 3190; R. p. 3604; R. p. 3605; R. p. 1132:4-22.)

Respondents conveniently took their position only *after* they began looking for ways to use legal process to disrupt Appellants. When she read the promise to convey a "Creekside Park" many years after her purchase, Adkins unwittingly conceded that she had to go check other documents—besides the Property Report—to determine what these two words mean. (R. pp. 3152-3153.) Tellingly, Adkins did not see these other documents, which she declares are crucial to her position, before she bought her lot in I'On. (R. p. 878:24- 879:3.) Walbeck followed the same path—reviewing documents ten years after his purchase to determine what he thinks the 1998 Report means. (R. p. 974:22- 976:7.)

In 2007, Adkins did not openly support the Assembly's consideration of a potential purchase of Lot CV-6, but her opinion on the matter revealed a truth she cannot escape. She never believed that The I'On Company was legally obligated to convey Lot

CV-6 to the Assembly for free:

> *I heard someone jokingly say once that they should give it to us; I laughed thinking that wasn't a serious consideration.* After thinking about it, it began to sink in that perhaps they should – in lieu of other mega-donations to various causes. There is, I believe, big opposition to the churches receiving such large donations, and these comments come from church-going individuals. Also, the school has its own fundraising. The I'On Trust .....c'mon.....and I'm a member! But I realize Vince gets a tax deduction for all these huge donations, as well. And probably takes a loss on the "sale" of the Creek Club. A proposal more people could get behind would involve nixing the donations to the organizations. And *no $$ exchanged for the club....*

(R. p. 3606 (emphasis added); *see also* R. pp. 3612-3613.)[5]

Respondents could not testify that the Creek Club facility, a boat ramp, a staging dock, or a parking lot were promised to the Assembly. (R. p. 891:16-19; R. p. 976:22-977:2; R. p. 977:20-978:17.) In fact, before the Assembly promised to cooperate with Respondents' case, its President, Deborah Bedell, told the Assembly membership that The I'On Company "did not promise the Creek Club or a particular dock or a deep water dock." (R. p. 1318:13-1320:17; R. p. 1323:4-15.) After the Assembly directed its attorneys to support Respondents' case, Bedell attempted to reverse her position but was impeached at trial. (*Id.*; R. p. 1334:13-18.) The Gang manufactured a claim that the two lone words "Creekside Park" meant the Assembly was entitled to the free acquisition of Lot CV-6, the Creek Club event facility, multiple docks, a boat ramp, and Lot CV-5. (R. p. 861:15- 862:13; R. p. 890:3-891:1; R. p. 894:11-895:5; R. p. 896:1-7.)

[5] The proposed Lot CV-6 transaction in 2007 coincided with a proposal for the Assembly's cooperation regarding an amendment to the planned development zoning that would allow development of "Phase 11." (R. pp. 3511, 3565-3568.) As part of the Phase 11 lot sales, The I'On Company proposed donating $60,000.00 per lot and up to $2.88 million among the Assembly, the I'On Trust (a charity created to provide cultural events for the community and promote volunteerism), church organizations, and the community's Montessori school. (*Id.*)

As to the "Community Dock" promise in the 1998 Property Report, The I'On Company built and conveyed to the Assembly not one, but two, community docks as part of Phase II. (R. p. 814:3-13; R. p. 816:7-9; R. p. 831:8-20; R. p. 1140:17-20; R. p. 2897; R. p. 3579; R. p. 3604; R. p. 2992.) The Creek Club dock, the largest dock in the community, was owned and operated by The I'On Club, the entity created to build and manage the boating facilities, the Creek Club, and the swim and tennis facilities. (R. p. 1124:9-1125:4; R. p. 1125:16-1126:2; R. p. 2994.) Respondents insist that the Creek Club docks are the "Community Dock" promised to the Assembly.

IV. The 2000 Recreational Easement.

On February 9, 2000, The I'On Club, The I'On Company, and the Assembly executed the Recreational Easement and Agreement to Share Costs. (R. pp. 3131-3145.) The Recreational Easement provided the Assembly members' rights to access the Creek Club docks, boating facilities and parking lot located at Lot CV-6.[6] (*Id.*) At this early stage of the development, the manager of The I'On Company also served as the manager of The I'On Club and as the President of the Assembly's board of directors. He executed the document on behalf of each entity. (*Id.*) The Recreational Easement was recorded and indexed to I'On's Declaration of Covenants, Conditions and Restrictions, rendering it a matter of public record contained in all subsequent lot purchasers' chains of title. (*Id.*)

The Recreational Easement unequivocally "grants to Assembly...a perpetual, nonexclusive easement" to access the amenities at Lot CV-6. (R. p. 677:2-8; R. pp. 3132-3133.) The "Agreement to Share Costs" portion sets forth a division of costs between The I'On Club and the Assembly for the maintenance of the boating facilities. (R. p. 3138.) A

[6] The Recreational Easement sets forth rights and obligations among the parties to considerable property besides the Creek Club dock and boating facilities. (*Id.*)

30-year limit on the term of the cost-sharing agreement gave Respondents a wedge which they used to galvanize support for their lawsuit by instilling fear in the Assembly's membership that it would also lose easement access after 30 years—although all parties to the document understood that the easement for use of the boating facilities was perpetual. The parties operated pursuant to the terms of this document for nearly a decade before the current dispute arose. (R. p. 1300:9-21; R. p. 1329:16-24.)

V. Walbeck and Adkins.

Brad Walbeck entered into his lot purchase agreement on November 27, 1999, and in doing so, acknowledged that he entered into the contract "without reliance on any warranties, statements or representations, either written or oral, express or implied, by Seller, or by any agent of the Seller ...." (R. pp. 3164-3165.) Walbeck received a copy of the 1998 Property Report, the amenity portion of which was incorporated into his contract. (R. pp. 3162-3172; R. p. 958:18- 959:2.) Walbeck built a home in I'On and has lived there and been a member of the Assembly for the decade before he filed suit. (R. p. 959:21- 960:4.) Walbeck understood that the amenities promised in the Property Report were to be constructed and conveyed to the Assembly "*in* Phase II." (R. p. 963:11-15 (emphasis added).) Each year, he received written notice of the Assembly's budget and attended the annual meetings, both of which put him on notice that the Assembly was paying for use of the Creek Club and the Creek Club Dock. (R. p. 979:14- 981:12; R. pp. 3281-3292; R. p. 3294; R. pp. 3295-3305; R. p. 3324; R. pp. 3334-3395.) Plainly and simply, Walbeck knew for years that the construction was complete and that those amenities had not been transferred to the Assembly. He never brought a claim until he was recruited to do so a decade later. (R. pp. 1795:5-19.) In fact, when he learned of the

proposed sale of Lot CV-6 to 148 Civitas, LLC, Walbeck raised questions, not about rights to ownership, but about whether the zoning of the lot was proper. (R. p. 985:19-986:3; R. pp. 3553-3557.)

On February 1, 2003, Lea Ann Adkins executed a purchase contract to buy a lot in Phase V of I'On—several years after Walbeck and several years after the 1998 Property Report had been amended. (R. pp. 3113-3130; R. p. 906:1-2.) Adkins conceded that the Creek Club and the Creek Club dock were constructed when she purchased her lot. (R. p. 879:15-21.) She testified that she received the 1998 Property Report prior to her purchase but could not testify as to when she actually read the very document on which she based her claims. (R. p. 846:25- 847:14; 912:24- 914:25; R. pp. 64-69.) The 1998 Property Report had been amended twice and was no longer provided to prospective purchasers by the time Adkins purchased her lot. There is no receipt of delivery of the Property Report to Adkins, as with the other early purchasers. (R. p. 908:4-12; R. p. 926:9- 927:8; R. p. 1140:21- 1141:21.) Adkins' transaction was expressly and prominently "exempt[ed] from the Interstate Land Sales Full Disclosure Act." (R. p. 3117; R. p. 904:18- 905:4.)

VI. The I'On Assembly.

The I'On Company organized and formed the I'On homeowners association, the I'On Assembly, as a South Carolina nonprofit corporation on June 4, 1998. (R. p. 3028.) All lot owners in I'On are members of the Assembly. (*Id.*) The Assembly's responsibilities include managing the organization's annual budget, operating and maintaining the common areas, and administering and enforcing the Declaration of Covenants. (R. p. 3029.)

As I'On continued to develop, Appellants accelerated transfer of control of the Assembly to the I'On homeowners. (R. p 1184:13-25.) By December of 2003, a majority of the Assembly's board of directors (the "Board") were I'On homeowners with no association with Appellants.[7] (R. p. 791:20-21; R. pp. 3429-3431.) After December of 2005, no developer representatives served on the Board. (R. p. 791:22- 792:8; R. pp. 3475-3477.) The Assembly's Finance Committee, which had primary responsibility for reviewing and preparing the Assembly's budget each year, contained no developer representatives from 2003 on, if ever.[8] (R. p. 1185:6-17; R. pp. 3429-3431.) Further, Appellants never exercised any of the limited veto rights the developer retained pursuant to I'On's Declarations. (R. p. 641:9-15; R. p. 792:18-23; R. p. 1425:14-1427:3; R. pp. 3472-3474.) Deborah Bedell, the current Board President, spoke with many former Board members and did not believe that Appellants controlled the Board. Bedell conceded that she is aware of *no* decision of the Board that Appellants' veto power impacted. (R. p. 1303:9-25; R. p. 1304:5-9; R. p. 1346:17-1347:5; R. p. 1426:23-1427:3.)

The Assembly knew that the construction of the amenities at issue was complete in 2001 and knew that it did not own this property. In fact, it paid for use of the property annually: for more than six years before this suit was filed, the Assembly paid The I'On Club to rent and maintain use of the very property Respondents claim the Assembly was supposed to own. (R. p. 615:8-25.) The Assembly's Finance Committee allocated

[7] The I'On homeowners serving on the Assembly Board at this time included Andy Gowder, Gaye Joyner, and Libby Eble. Each received the 1998 Property Report as part of their lot purchase. (R. pp. 3270-3279; R. pp. 3429-3431; R. pp. 2720-2841; R. p. 1183:17-p. 1184:12.)

[8] Members of the Finance Committee included Libby Eble, Annie Bonk, Ed Clem, and Andy Gowder. (R. pp. 3429-3431.) Each received a copy of the 1998 Property Report. (R. p. 1077: 1-5; R. p. 2753; R. p. 3280; R. p. 2741; R. pp. 3602-3603; R. p. 2729.)

$1,800.00 for "Creek Club Rental Fee" and $4,044.00 for "Creek Club Dock usage fee" to be included in the Assembly's 2005 budget. (R. pp. 3175-3176.) The Assembly's later budgets contained similar allocations for the Assembly's "Creek Club Rental Fee" as well as for "Creek Club Dock usage fee." (R. pp. 3177-3186.)

I'On resident Ed Clem was an active member of the Assembly's leadership for many years, serving on the Finance Committee and eventually on the Board. (R. p. 1069:20- 1070:9.) Clem purchased a lot in I'On in March of 1999 and received the 1998 Property Report. (R. p. 1069:4-11; R. p. 3269; R. p. 2753.) In 2004, Clem identified concerns with the Recreational Easement—a document that makes plain that The I'On Club and not the Assembly owned the subject property. (R. p. 1072:8-24.) The Assembly Board asked Clem to work with an attorney on the Assembly's behalf to review the Recreational Easement. (R. p. 1073:22-1074:12; R. p. 1074:8-24; R. pp. 3436-3440.) By May 6, 2004, that attorney, Rick Brownyard, had reviewed the Recreational Easement "from the point of view of the Assembly" and shared his initial thoughts. (R. p. 1075:5-9; R. pp. 3436-3440; R. pp. 3600-3601.) Brownyard offered to meet with Clem and the Assembly Board to further discuss proposed changes. (*Id.*)

Several months later, at the February 9, 2005 meeting, the Assembly Board again reviewed and discussed the terms of the Recreational Easement. (R. pp. 3451-3453.) The April 27, 2005 Assembly Board Minutes note that "the boat ramp agreement still holds" even if the Creek Club was sold. (R. pp. 3459-3461.) The July 27, 2005 Board Minutes state plainly that "the Creek Club is the property of the I'On Club." (R. pp. 3464-3467; R. p. 614:5-11.) The Assembly knew that the Recreational Easement provided access—as opposed to ownership—to the amenities at Lot CV-6, but it took no legal action.

Any lingering question as to whether the Assembly knew it did not own the property at issue and would not receive it for free may be answered by the Assembly's considering its purchase as early as 2005. (R. pp. 3451-3453; R. pp. 3464-3467; R. pp. 3482-3502; R. pp. 3511-3516; R. pp. 3565-3568.) On April 25, 2007, the Assembly again discussed a potential purchase of the Creek Club, noting that it would "include the building, boat dock, ramp, parking lot," and a separate, overflow parking lot down the street. (R. pp. 3490-3497.) The Assembly decided not to purchase Lot CV-6 at that time because of potential liability. (R. p. 1081:4-25.) On August 22, 2007, the Assembly entertained a proposal to purchase Lot CV-6, the Creek Club, and the boating facilities for $700,000.00. (R. p. 3567; R. pp. 3612-3613.) The Assembly received and considered the disparate views of more than one hundred members as to whether it should own the property. (R. pp. 3396-3397; R. pp. 3612-3613.) Throughout these discussions—occurring more than three years before any action was brought—there was no claim that the Assembly was entitled to receive Lot CV-6 for free.

On October 30, 2008, the Assembly met and discussed the potential sale of Lot CV-6, this time to 148 Civitas, LLC. (R. pp. 3553-3557.) Neither the derivative plaintiffs nor anyone else protested that the Assembly was supposed to receive Lot CV-6 pursuant to the 1998 Property Report. (*Id.*) Instead, the homeowners expressed concerns regarding the use of Lot CV-6 by the purchaser and what impact that may have on the nearby residents. (*Id.*) On August 5, 2009, The I'On Company sold Lot CV-6 to 148 Civitas, LLC. (R. p. 653:2-12.)

VII. The "Free Lot CV-6 Gang"

With the prospect of more events at the Creek Club exciting some interest in the community, the Gang took advantage of the opportunity to push its opposition to The

I'On Company and the proposed sale of Lot CV-6 to 148 Civitas, LLC. (R. pp. 3154-3161; R. p. 793:6-794:22; R. p. 794:10-16.) It did not initially seek ownership of the property. Rather, it challenged the zoning. The Gang's immediate goal was to block the sale. Why? One of the early Gang members articulated where a successful effort would lead it. At the January 15, 2009 Assembly Board meeting, Catherine Templeton explained that "should the zoning appeal find that the use of the Creek Club is commercial rather than civic then that would lessen the value of the Creek Club for the Graham family [and . . .] the Homeowners Association could then purchase the Creek Club for a dollar since it would be of no value to the Graham family and they would not be able to sell it." (R. pp. 3558-3559.) This dovetailed with Adkins' professed belief that The I'On Company should give Lot CV-6 to the Assembly instead of selling it and making charitable contributions. (R. p. 3606.) The Gang's goal was to scuttle the sale and obtain Lot CV-6 for free.

On the heels of hosting community meetings, the Assembly refused the pleas to join this effort or to fund it and instead spoke in support of the intended uses of the Creek Club as properly civic, a benefit to the community, and not overly commercial. (R. pp. 3162-3172; R. pp. 3562-3564.) At the February 23, 2009 meeting of the Board of Zoning Appeals, Templeton and Adkins spoke in opposition. (R. pp. 3154-3161; R. p. 909:10-910:8.) The challenge failed on April 7, 2009, when the Board of Zoning Appeals determined that use of Lot CV-6 was in compliance with the zoning code. (R. p. 795:2-6; R. pp. 3154-3161; R. pp. 3589-3597.)

The Gang regrouped the day after this defeat. It did not bemoan some injustice of another party selling property that rightfully belonged to the Assembly. It did not decry

the promises relied on in purchasing I'On property. Instead, it evaluated other ways to foil The I'On Company's sale, considering: "So . . . where do we go from here?" (R. pp. 3401-3402.) Ward Mundy, an attorney, suggested finding someone who received the 1998 Property Report on the theory that "I'On residents that purchased a lot directly from the I'On Company might have a civil claim for damages" pursuant to ILSA. (*Id.*) Not incidentally, Mundy identified a statute of limitations problem. Also telling, at that time, Adkins did not profess that *she* had received the 1998 Property Report when she purchased her lot in 2003—as she would later swear she had. (*Id.*) Enter Brad Walbeck, a recipient of the 1998 Property Report whom the Gang knew because he too raised concerns about zoning. He had never before insisted that the very same property at issue was supposed to be given to the Assembly or that he relied on that promise as part of his purchase—until Adkins recruited him for the effort. (R. p. 1795:5-19.)

The Gang sought counsel to bring its claims. Walbeck initiated the lawsuit. After years of paying to use the property, contemplating purchase of the property, and challenging zoning after learning of the potential sale of the property, the lawsuit asserted that the 1998 Property Report's promise to convey a "Creekside Park" and "Community Dock" meant The I'On Company would convey all of Lot CV-6 as well as its improvements to The Assembly. Later, after an eleventh-hour settlement with 148 Civitas, LLC also gave rights to Lot CV-5 to the Assembly, Respondents threw in Lot CV-5 as something else that those four words in the Property Report entitled the Assembly to for free. (*Compare* R. p. 861:15-862:13; R. p. 890:3-891:1; R. p. 894:11-895:5; R. p. 896:1-7 *with* R. p. 415:24-416:16; R. p. 443:1-444:7; R. p. 1307:19-24.)

STANDARD OF REVIEW

At the directed verdict and JNOV stages of trial, the trial court views the evidence and inferences that can be drawn therefrom in the light most favorable to the party opposing the motions. *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 680 S.E.2d 778 (Ct. App. 2009). When the trial court's ruling lacks evidentiary support or is controlled by an error of law, the appellate court will reverse. *Id.*

A decision to award attorney's fees and the denial of a motion for a new trial are reviewed for abuse of discretion. *Seabrook Island Property Owners' Ass'n v. Berger*, 365 S.C. 234, 240, 616 S.E2d 431, 434-35 (Ct. App. 2005) (applying abuse of discretion standard to an award of attorney's fees pursuant to contract); *Krepps by Krepps v. Ausen*, 324 S.C. 597, 608, 479 S.E.2d 290, 296 (Ct. App. 1996) ("The grant or denial of new trial motion...will not be disturbed on appeal unless [the court's] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.").

ARGUMENT

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

The rule governing derivative actions, Rule 23(b), SCRCP, "seeks to prevent the unrestrained use of derivative actions by minority shareholders, which would undermine the basic principle of corporate governance that the decisions of the corporation should be made by its management or, in certain situations, by an affirmative vote of a majority of the shareholders." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000). Respondents, as derivative plaintiffs, never met the requirements of alleging demand and refusal or futility of demand as required by Rule 23(b).

While hearing directed verdict motions following the close of all the evidence, the trial court suggested that the demand requirement had not been met because the Board

did not understand what was demanded, but nonetheless allowed the derivative action to proceed. (R. p. 1463:20-1464:9.) This casual dismissal of Rule 23 as a procedural technicality is contrary to established South Carolina law. The strict demand requirements for derivative suits serve an important purpose: to ensure that boards of directors retain control of the acts taken on their corporations' behalf. *Carolina First*, 343 S.C. at 185-87, 539 S.E.2d at 407-08. For a plaintiff to bring a derivative action, Rule 23(b) requires that the plaintiff "allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority." As this Court explained in *Carolina First*, "[a]t a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief. . . . Such a pre-suit demand must be alleged, not in a conclusory fashion, but through particularized allegations." *Id.* at 189, 539 S.E.2d at 409-10. The shareholder must make "an earnest, not a simulated, effort with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court." *Id.* at 186, 539 S.E.2d at 408.

Respondents never properly initiated and maintained a derivative action, despite an initial and four amended complaints. Specifically, Respondents failed to make or allege with verification and particularity proper demand on and refusal by the Assembly, and likewise failed properly to plead the futility of demand. Respondents conceded at trial that substantive facts they alleged and verified to be true were facts they did not know. They swore that other I'On residents had relied on the 1998 Property Report, but did not know anyone else who had done so. (R. p. 883:8-888:16.) Respondents convinced the trial court to permit a derivative action to proceed based on the verification of facts

which are untrue. This would be no less than to permit Respondents to use the rule requiring verification of derivative pleadings, which was designed to prevent shareholders from hijacking control of a corporation's litigation decisions through fraudulent allegations, to do exactly that. This Court should reverse and dismiss the derivative claims to prevent this abuse of the judicial process.

1. Respondents have never pleaded or proved a proper demand and refusal.

Respondents have argued that two demands were made on the Board, but neither is sufficient in law.[9] Respondents' principal effort to satisfy Rule 23(b) is what they call the "Adkins Demand." (R. pp. 3152-3153; R. pp. 2234-2235.) In these two letters to the Assembly Board's attorney, Adkins only requests that he give an opinion as to the Assembly's rights.[10] The allegations of the complaint, at all stages, have been equally vague regarding these "demands." Respondents repeatedly failed to describe specific wrongful acts, to identify the specific harm caused to the corporation, and to request any relief. (R. pp. 168-183.); *cf.* 343 S.C. at 189, 539 S.E.2d at 409-10. These Adkins "demands" are therefore an improper basis for a derivative suit. The trial court correctly found that Respondents' other alleged "demand," made by a person other than Respondents, Catherine Templeton, was not a proper demand.[11]

2. Respondents have failed properly to plead or prove futility of demand.

---

[9] Although Walbeck brought this suit initially, he never claimed to have made any demand on the Assembly Board for ownership of any property. (R. p. 985:19-986:3.) He should therefore have been dismissed as a derivative plaintiff. Rule 23(b)(1), SCRCP.

[10] The "Adkins Demand," if it exists, certainly did not include ownership of Lots CV-5 and 275 within its scope. (R. p. 1307:11-24.)

[11] (R. p. 1031:4-24; R. pp. 2229-2230.) Templeton settled her zoning claims against the Appellants, which were separate from this litigation. (R. p. 725:10-726:15.) The Templeton letter did not demand that the Board take the actions Respondents seek here. For these reasons, the trial court correctly held that Templeton's letter of February 26, 2009 is not a derivative demand.

Knowing their "demands" are legally insufficient, Respondents also pleaded and argued that demand was futile. If alleging futility, a shareholder must demonstrate "why the Board of Directors should not be allowed to decide whether to institute litigation." *Id.* at 188, 539 S.E.2d at 409. Respondents failed to show why the Board was not qualified to make that decision.

Up through and including the Third Amended Complaint, Respondents maintained this action by alleging and verifying that additional demands on the Assembly "would now be futile as The Assembly has failed to act to protect the rights of The Assembly and its members...." (R. p. 284.) This bare allegation falls far short of specific facts showing why the Assembly Board should not have been allowed to make the litigation decision.

Respondents' deficit goes beyond a pleading defect; the evidence demonstrates that the Assembly Board should have been permitted to make the decision whether or not to institute litigation. *Carolina First*, 343 S.C. at 188, 539 S.E.2d at 409. The decision was a complex one which the Assembly considered carefully. There was much conflict among Assembly members as to whether they wanted ownership of the Creek Club docks, the boating facilities, or the Creek Club itself when they were presented with opportunities to own them at various times over the years. (R. p. 1081:4-25; R. p. 1301:8-1302:13; R. p. 1318:2-12; R. pp. 3490-3544.) The Board hosted homeowner forums to hear community concerns regarding the sale of CV-6 which the Gang took issue with. (R. p. 618:18- 619:18; R. p. 1081:4-25; R. pp. 3545-3564.) It was very reasonable for the Board to exercise its business judgment to refuse to pursue the claims Respondents now allege. Although Respondents have argued that the developers had a "veto power" over

Board actions which would have rendered demand futile, they could not identify any decision regarding this litigation (or any other matter) made by the Board which the existence of such power actually influenced. (R. p. 1425:14-1427:3.) The Board president, Deborah Bedell, had previously testified that she did not believe that the developers maintained control over the Board; she attempted to reverse herself at trial and was impeached on the witness stand, eventually agreeing with her prior statement. (R. p. 1303:9-25; R. p. 1304:5-9; R. p. 1346:17-1347; R. p. 1425:14-1427:3.) Nor was any "veto power" ever used. (R. p. 641:9-15; R. p. 792:18-23.)

3. New claims arose following the partial settlement of this action in January 2014, for which no demand and refusal or futility of demand has ever been alleged or established.

In their most recent Fourth Amended Complaint, Respondents' prior allegation that demand "would *now be* futile" became "would *have been* futile." (R. p. 174; R. p. 319 (emphases added).) Respondents thus concede that demand is no longer futile. The Assembly instructed its attorney to support and cooperate with Respondents as part of a partial settlement on the eve of the mistrial of this case in January 2014. (R. p. 2971; R. p. 483:1-11; R. p. 494:2-14; R. p. 1307:2-10; R. p. 1332:5-15.) Immediately thereafter, the Assembly gained ownership of the property which Respondents claimed and was realigned with the Respondents. (R. pp. 16-17; R. p. 1341:25-1342:2; R. p. 1375:11-16; R. p. 1378:14-1379:6.)

The nature of the relief sought against Appellants thus changed substantially—substantially enough that Respondents' claims are new claims. (R. p. 1316:6-13.) Bedell testified at trial that the Assembly's damages all arose after the mistrial and settlement. (R. p. 1333:13-24.) Walbeck and Adkins likewise admitted in pre-trial depositions that all

their monetary damages arose post-settlement—an admission directly contrary to their earlier verified allegations. (*Compare* R. p. 1962:13-1963:11; R. p. 1966:8-1967:14 *with* R. pp. 175-180.) No demand has ever been presented to the Assembly to press Respondents' claims arising out of the settlement, including claims for damages based on the cash price of the settlement, the alleged leasehold value of the Creek Club building, and the alleged price of the buyout of years 21-30 of that lease. (R. p. 1316:14-24.)

The Assembly Board never refused a demand regarding these new claims because none has ever been made. (*Id.)* Nor is there any evidence suggesting futility of demand because the Assembly supported Respondents' new claims. (R. p. 2971; R. p. 1332:5-15.) The prosecution of such claims, therefore, could not be through a proper derivative action.

4. Respondents' claims are contrary to the interests of the Assembly and many of its other members, and thus may not be maintained derivatively.

A plaintiff bringing a derivative action must "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation." Rule 23(b)(1), SCRCP. If the plaintiff does not, "[t]he derivative action may not be maintained." *Id.* The Assembly Board is infinitely better placed to balance the interests of all its members than Respondents, who represent only one among many points of view with respect to the claims at issue here. To allow Respondents to proceed derivatively is contrary to the very essence of the sound policy that boards of directors should retain control of the acts taken on their corporations' behalf. *Carolina First*, 343 S.C. at 185-87, 539 S.E.2d at 407-08.

Respondents have perpetuated their case by taking positions in this litigation contrary to the entire Assembly's interests. As discussed in Part III, *infra*, they have

argued that the easement in favor of the Assembly granting perpetual access to the Creek Club docks and boating facilities was either invalid or not perpetual, for no purpose other than to stir up interest and to increase their damages. In no conceivable case could it be contrary to the Assembly's interests for it not to have perpetual *access* to these amenities. The issue calling for business judgment, as the Assembly rightly saw, was whether ownership was worth the liability and maintenance concerns. (R. p. 1081:4-25; R. p. 1318:2-12.) This manipulation of the facts by Respondents for a litigation advantage violates the requirement that derivative plaintiffs lack interests contrary to those of their corporation.

Respondents' claims also sharpen antagonisms among Assembly members. In *Waller v. Seabrook Island Property Owners Association*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990), the Supreme Court held that the mere fact that the plaintiffs were property owners in a large or populous development did not qualify them to represent the interests of the other property owners. Rather, the plaintiffs "must demonstrate they have no interest antagonistic to or in conflict with the interest of the unnamed members of the class such that they are fairly and adequately able to protect the interest of the purported class." *Id.* Respondents fail by a wide margin to meet this test.

The homeowners' legal interests require careful balancing. The evidence at trial revealed a wide range of opinion within the Assembly membership about whether outright ownership was in the Assembly's best interests. (R. p. 614:5-16; R. p. 930:2-931:19; R. p. 1081:4-25; R. p. 1099:22-1101:24; R. p. 1301:8-1302:13; R. p. 1318:2-12.) Because most homeowners did not receive the 1998 Property Report, their legal interests differed from Respondents'. (R. p. 1327:1-1328:1.) Rather than attempt to obtain

Assembly action by democratic processes, Respondents used the derivative action mechanism to have their own way.

Because Respondents' purported derivative claims are inherently antagonistic to the interests of both the Assembly as a whole and of many of its other members, this Court should reverse and dismiss all derivative claims in this action.

II. RESPONDENTS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS AS A MATTER OF LAW.

Any claim based on the pivotal 1998 promise to convey a "Creekside Park" and a "Community Dock" accrued "upon completion of construction" in 2001 when the conveyance was promised to occur, more than nine-and-a-half years before suit was filed. Respondents knew that Lot CV-6 and the adjacent Creek Club dock had been completed but had not been transferred to the Assembly: they were paying to use these amenities. Respondents knew there was no intent to transfer the property to the Assembly for free: they actively considered purchasing it for $700,000.00. With one exception, the claims at issue here are barred by the statute of limitations.

Respondents' claims are subject to a three-year limitations period and subject to the discovery rule.[12] *See* S.C. Code Ann. § 15-3-530(1), (2), and (5); 15 U.S.C. § 1711(a)(2). When there is no conflicting evidence, or when only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he had a claim becomes a matter of law and should not be submitted to the jury.[13] With the exception of his breach of contract claim, Walbeck's claims are time-

[12] The trial court determined that Walbeck's purchase contract was executed under seal and that his breach of contract claim was subject to a twenty-year limitations period pursuant to section 15-3-520(2) of the South Carolina Code.

[13] *See Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (finding trial court properly directed a verdict when there was no conflicting testimony regarding time

barred because they accrued before December 22, 2007—more than three years before suit was filed. (R. pp. 116-128.) Likewise, should the Court determine that plaintiffs' derivative action is proper, the claims brought on behalf of the Assembly are time-barred because they accrued before February 7, 2009. (R. pp. 129-140.) The trial court erred in submitting the question to the jury and in denying Appellants' JNOV motion.

1. Respondents knew or should have known of the existence of the claims against Appellants.

Respondents base their claims on Appellants' promise to convey a "Creekside Park" and "Community Dock" to the Assembly upon completion of construction. (R. pp. 2999-3034; R. p. 848:21-849:4; R. p. 853:5-11; R. p. 890:3-21; R. p. 896:1-7; R. p. 956:15-24; R. p. 968:7-11; R. p. 1323:20-22.) Respondents knew and repeatedly received further notice that the Assembly did not own Lot CV-6 and that Appellants did not intend to convey Lot CV-6 to the Assembly. Among the examples are the following:

- Upon completion of construction of amenities in Phase II in 2001, Appellants conveyed two community docks and the Marshwalk to the Assembly; (R. p. 3571.)
- When the Creek Club opened for business on April 10, 2001, Respondents knew that this facility was operated as a private event rental space that was not owned and operated by the Assembly; (R. p. 3190; R. p. 615:8-25; R. p. 1132:12-14.)
- The Recreational Easement was properly recorded on February 15, 2000 and made clear that the Assembly did not own Lot CV-6 or its amenities; (R. pp. 3131-3145.)
- The Assembly engaged counsel in 2004 to study its rights under the 2000 Recreational Easement; (R. pp. 3436-3440.)
- The I'On Company reminded the Assembly Board in 2004 in no uncertain terms that The I'On Club owned the Creek Club dock; (R. pp. 3432-3535.)
- The Assembly annually budgeted and paid fees to rent the Creek Club and to use the Creek Club docks; (R. pp. 3175-3189.)

---

of discovery such that the notice issue was one for the trial court to decide); *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 680 S.E.2d 778 (Ct. App. 2009) (reversing trial court's denial of JNOV motion when account statements put plaintiff on notice of claim more than three years before suit was filed).

- The Assembly mailed the budget to every homeowner every year and approved it at annual meetings; (R. pp. 3325-3341; R. pp. 3343-3352; R. pp. 3355-3373.)
- Walbeck and Adkins received the budgets and attended annual meetings; (R. p. 979:14- 980:20; R p. 3342; R. pp 3353-3354; R. pp. 3355-3373.)
- In 2007, the Assembly entertained offers to purchase Lot CV-6 and solicited feedback from I'On homeowners; (R. pp. 3451-3453; R. pp. 3464-3467; R. pp. 3482-3502; R. pp. 3511-3516; R. pp. 3565-3568.) and
- Adkins served on the Assembly's Boating Committee, whose purpose was to advise the Assembly Board on the community boat ramp, community dock, and to interpret the 2000 Recreational Easement. (R. pp. 3517-3524; R. p. 3542; R. p. 902:12- 903:4.)

The only reasonable inference that can be drawn from the Record is that Respondents knew or had notice that the Assembly did not own the subject property and failed to act to protect their alleged rights.

a. The Assembly hired a lawyer to analyze the Recreational Easement, which makes clear that the Assembly does not and will not own the property in dispute.

By May of 2004, a lawyer retained by the Assembly had completed a review of the Recreational Easement—a document that makes absolutely clear that the Assembly did not and would not own the Creek Club or the Creek Club docks. (R. pp. 3131-3145; R. pp. 3146-3151; R. pp. 3436-3440; R. pp. 3600-3601, R. p. 1073:22- 1074:12; R. p. 1074:8-24; R. p. 1075:5-9.) Despite receiving legal advice on the terms of the Recreational Easement, the Assembly made no claim that it was supposed to own Lot CV-6. *See Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004) (holding that a claim accrues when circumstances would put a person of common knowledge on notice that some right of his has been invaded—not when advice of counsel is sought or a full blown theory of recovery is developed).

In February of 2004, Vince Graham expressly told the Assembly: "the I'On Club owns the dock at the Club because of the easement agreement with the Assembly." (R.

pp. 3432-3435.) The Assembly continued to consider and evaluate the provisions of the Recreational Easement as well as the impact of any potential sale of the Creek Club to a third party. In November of 2004, the Assembly discussed a request that The I'On Company convert the Creek Club into a private residence but maintain the Assembly's rights to access the boating facilities. (R. pp. 3444-3447.) In 2005, the Assembly discussed frustrations over the terms of the cost sharing provisions of the Recreational Easement as well as the Assembly's rights to continue to access the boating facilities if The I'On Company ever sold the Creek Club. (R. pp. 3456-3461; R. pp. 3475-3477.)

Moreover, the 2000 Recreational Easement was properly recorded within all I'On purchasers' respective chains of title and cross-referenced to the I'On Declaration. (R. p. 3131.) The I'On Declaration was also included in all I'On purchasers' chains of title. *Harbison Cmty. Ass'n, Inc. v. Mueller*, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995) (finding a recorded declaration of covenants, restrictions, and easements that is noted in a deed is within chain of title and provides constructive notice to property owner). Property owners are charged with constructive notice of any restriction properly recorded within the chain of title. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001). The 2000 Recreational Easement was properly indexed, and as such "supplies inquiry notice of an instrument." *Thomas v. Thomas*, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985).

b. The Assembly paid to use the Creek Club and the Creek Club dock and provided written notice of its budget to its members, including Adkins and Walbeck, annually.

The Assembly budgeted funds to rent the Creek Club and use the docks and boating facilities at Lot CV-6. Beginning in at least 2004, the Assembly proposed an

annual budget that included an allocation for "Creek Club Rental Fee" as well as an allocation for "Creek Club Dock usage Fee." (R. pp. 3175-3180; R. p. 615:8-21.) The proposed budget was prepared by the Assembly's Finance Committee and sent to all members of the Assembly prior to the annual meeting.[14] (R. p. 979:20-980:20; R. pp. 3325-3375.) Walbeck and Adkins, along with every other Assembly member, received a notice of the Assembly's annual meeting along with a proposed budget each year. Walbeck and Adkins reviewed these written documents and attended the Assembly's annual meetings. (R. pp. 3281-3375; R. p. 979:14-981:12.) When a party is provided with written notice of a potential claim, his duty to investigate the claim is triggered. *Gibson*, 383 S.C. at 403-04, 680 S.E.2d at 780-81.

In *Gibson*, this Court determined that if the plaintiff would have reviewed the bank statements provided to her, she should have been prompted to investigate her potential claims that there had been wrongful withdrawals from her accounts. *Id.* The Court noted "[w]here the bank renders a statement to the depositor showing him the status of his checking account, it says to him in effect: 'This bank owes you this stated balance and no more.' Such statement may be fairly construed as a notice that any claim the depositor may make in excess of the stated balance would be resisted by the bank." *Id.* at 408, 680 S.E.2d at 783 (quoting *Citizens & S. Nat'l Bank of S.C. v. State Budget & Control Bd.*, 246 S.C. 140, 144, 142 S.E.2d 874, 875 (1965)). This analysis is equally applicable here. Each year, Respondents, along with every other member of the Assembly, received written notice that the Assembly did not own Lot CV-6.

c. The Assembly repeatedly discussed and considered purchasing Lot CV-6.

[14] As discussed above, many members of the Finance Committee also were recipients of the 1998 Property Report. (R. p. 2753; R. p. 3280; R. p. 2741; R. p. 2729.)

Perhaps the most inescapable evidence that Respondents knew they were not entitled to Lot CV-6 was the discussion about purchasing the property that persisted for several years and culminated in an offer for the Assembly to purchase it in 2007.

As described above, discussions regarding the Assembly's purchase of the property began as early as 2005. (R. pp. 3451-3453; R. pp. 3464-3467.) After the Assembly was initially approached with the 2007 proposal to purchase the property, the parties negotiated the potential sale of these amenities throughout the spring and into the fall of 2007—more than three years before this suit was filed. (R. pp. 3482-3516; R. pp. 3565-3567.) In response to this offer, the Assembly held a meeting to gather input and approximately 200 people attended. (R. p. 1081:4-17.) Each of these Assembly members knew Lot CV-6 had not been conveyed as a "Creekside Park" upon completion of construction and that the adjacent Creek Club docks had not been conveyed to the Assembly for free.

d. The Assembly Board was comprised of several recipients of the 1998 Property Report.

From December 3, 2003, through January 6, 2008, there was at least one I'On homeowner who received the 1998 Property Report in attendance at the vast majority of Assembly Board meetings. (R. pp. 3429-3443; R. pp. 3448-3552; R. pp. 3607-3611.) This is significant. Each time—over the course of five years—the Assembly reviewed the Recreational Easement, prepared a budget that allocated funds to rent the Creek Club and the Creek Club docks, or considered purchasing the property, none of these individuals ever claimed or suggested that the Assembly was entitled to own any of the property that is the subject of this lawsuit. To the contrary, Ed Clem testified: "It was my belief that [Lot CV-6] wouldn't become the property of the homeowners." (R. p. 1078:22-25.)

Viewed in any light, including that most favorable to Respondents, the only reasonable inference is that Respondents received repeated and express notice for *nearly a decade* that Lot CV-6 would not be conveyed to the Assembly at no cost. Respondents' claims are time-barred and judgment should be reversed.

2. Respondents' failure to exercise reasonable diligence bars application of equitable estoppel.

The trial court erred in holding that equitable estoppel would serve to toll the running of the limitations period even if the jury had determined that Respondents' claims accrued on a date outside the limitations period. (R. p. 42.) Respondents failed to demonstrate the elements of equitable estoppel and, as a result, this doctrine cannot excuse Respondents' failure to exercise due diligence to investigate potential claims within the limitations period.[15]

The party "claiming estoppel must prove that he or she (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped." *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). The party claiming estoppel must also

[15] The application of the equitable tolling doctrine is equally inappropriate. *See Magnolia North Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) (equitably tolling the limitations period for a property owners' association because the association's board of directors was composed entirely of officers of the developer until eight months before suit was commenced). As discussed above, I'On homeowners gained control over the Assembly Board in 2003. (R. p. 791:20-21; R. pp. 3429-3431.) The *Magnolia* court was persuaded by the diligence of the property owners association in filing suit just eight months after property owners gained control. *Id.* No action was filed for more than seven years after the Assembly's Board was controlled by I'On homeowners. Further, unlike *Magnolia*, this action was not brought by the Assembly. Here, long after the homeowners took control of the Board, the Assembly chose not to bring a claim. Even considering the trial court's finding of a December 2005 handover, tolling is insufficient to resuscitate claims long expired.

establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct to be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts. *Id.*

As discussed above, there is no tenable argument that Respondents lacked the means to obtain the truth regarding the ownership of Lot CV-6 or that Appellants ever concealed this information. Respondents were explicitly told the Assembly did not own it, they paid to use it, and considered buying it. *See Rushing v. McKinney*, 370 S.C. 280, 294, 633 S.E.2d 917, 925 (Ct. App. 2006) ("One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been mislead (sic)."). The public recording of the Recreational Easement only confirms these facts. (R. pp. 3131-3145.)

The trial court relied on representations made by an employee of Appellants, Chad Besenfelder, to the Assembly. None of Besenfelder's representations changes the analysis. First, the statute of limitations had expired by the time Besenfelder made any of the statements. Further, the representations pertained only to the conveyance of docks. For example, the Assembly Board Minutes dated September 26, 2007 state: "Chad Besenfelder advised he would like to turn over the community docks." (R. pp. 3517-3524.) On March 25, 2009, Besenfelder emailed the Assembly and stated "[t]he I'On Company is preparing to deed the community dock to the I'On Assembly. We plan to subdivide a parcel to be recorded and deeded." (R. pp. 2236-2237.) These representations do not support the conclusion that Respondents were led to believe Appellants intended to convey the Creek Club, Lot CV-6, or Lot CV-5 to the Assembly.

The trial court also pointed to private email exchanges between Besenfelder and Russo, the purchaser of Lot CV-6, as well as exchanges between Besenfelder and Appellants, as evidence of Appellants' misrepresentations to Respondents. (R. pp. 2404-2405; R. pp. 2855-2861.) The Record makes plain that none of these emails was sent to or shared with Respondents prior to the commencement of this litigation. These communications cannot suffice as evidence of Appellants' intent to mislead Respondents.

Further, for equitable estoppel to apply, the plaintiff must be aware that a claim might exist prior to the expiration of the statute of limitations, but due to "some conduct or representation by the defendant," the plaintiff must be "induced . . . to delay in filing suit." *Kelly*, 383 S.C. at 639, 682 S.E.2d at 8 (quoting *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001)). Left only with Besenfelder's representations to the Assembly regarding the conveyance of a dock located at Lot CV-6, these representations were made more than three years after Respondents knew or reasonably should have known they had a potential claim with regard to the ownership of that dock or of Lot CV-6 and could not have induced Respondents to delay taking legal action. The statute of limitations expired as to all claims prior to any of Besenfelder's representations concerning a transfer of the docks. Respondents' claims are time-barred as a matter of law and this Court should reverse and enter judgment in favor of Appellants.

III. THE 2000 RECREATIONAL EASEMENT AND AGREEMENT TO SHARE COSTS WAS VALID, AND THE EASEMENT GRANTING THE ASSEMBLY ACCESS TO THE CREEK CLUB DOCKS WAS PERPETUAL.

The trial court incorrectly held that the 2000 Recreational Easement and Agreement to Share Costs was void *ab initio*. The document's validity from the time of

its execution until the Assembly's acquisition of title to Lot CV-6 is important to this appeal, even though the easement regarding the boating facilities merged into the deed after the Assembly acquired the Creek Club boating facilities in February 2014, because it affects Respondents' measure of damages and title to other property in I'On.

1. The 2000 Recreational Easement was valid.

The trial court held that the 2000 Recreational Easement was invalid solely because it was executed prior to the transfer of the servient property to The I'On Club, LLC. This analysis ignores significant South Carolina precedent which permits parties to ratify such documents by their later conduct.

South Carolina has long recognized the "after-acquired title" doctrine, which provides that a deed which conveys property to which the grantor lacks title may be ratified by subsequent acts of the grantor after he acquires title. *See, e.g., Tolar v. Marion Cty. Lumber Co.*, 93 S.C. 274, 75 S.E. 545 (1912); *Nettles v. Cummings*, 30 S.C. Eq. (9 Rich. Eq.) 440, 448 (1857); *Corbin v. Carlin*, 366 S.C. 187, 192-93, 620 S.E.2d 745, 748 (Ct. App. 2005). There is no indication that the after-acquired title doctrine does not apply to servitudes. The sole case on which the trial court relies to reach its conclusion, *Moore v. Reynolds*, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985), is inapposite because it does not involve any claim of after-acquired title or ratification. Courts in other jurisdictions have applied the after-acquired title doctrine to easements. *See, e.g., Supraner v. Citizens Sav. Bank*, 303 Mass. 460, 465, 22 N.E.2d 38, 41 (1939) (applying doctrine to easement and stating that it "has been held to apply to easements").

The I'On Club, as servient landowner, and the Assembly, as easement holder, operated under the terms of the 2000 Recreational Easement—with respect to both the

use of the boating facilities and the Assembly's maintenance contributions—for many years after the conveyance of Lot CV-6 and the docks to The I'On Club. (R. p. 615:8-25; R. p. 1074:1-10; R. p. 1329:16-24.) The Assembly continued to do so even well after the Assembly Board was entirely composed of homeowners, by annually budgeting and paying dock usage and rental fees to The I'On Club. (R. pp. 3175-3186.) The Assembly also engaged legal counsel to advise it as to the easement, but never suggested any problem with its validity or term. (R. p. 614:5-11; R. p. 1075:13- 1076:6; R. pp. 3436-3440; R. pp. 3451-3453; R. pp. 3459-3461; R. pp. 3464-3467; R. pp. 3600-3601.) The parties repeatedly ratified the 2000 Recreational Easement's validity and cured any defect.

If the parties to a deed acquiesce, a third person cannot invalidate the deed by showing what might be fraud or mistake. *Sanders v. Hartzog*, 6 S.C. 479 (1876); *McCullough v. Wall*, 38 S.C.L. (4 Rich.) 68 (1850). Respondents therefore cannot challenge the validity of the 2000 Recreational Easement, only its interpretation.[16]

Respondents' position that the 2000 Recreational Easement was invalid is troublesome for another reason: it is contrary to the representations and interests of the Assembly, on behalf of whom Walbeck and Adkins purport to bring derivative claims. The 2000 Recreational Easement gives a significant benefit to the Assembly: a perpetual right to use and enjoy the boating facilities. Prior Assembly boards determined that easement access would be *superior* to outright ownership of the boating facilities because

[16] The present case is distinguishable from *Noronha v. Stewart*, 199 Cal. App. 3d 485, 491 (1998), which the trial court cited for the proposition (stated *in dicta* in *Noronha*) that a grantee cannot invoke the after-acquired title doctrine to validate a transfer when the grantee has knowledge of a title defect. Here, *all* parties to the easement acquiesced in its validity after the title defect was cured. In *Noronha*, the defect was never cured.

of liability and maintenance concerns. (R. p. 1081:4-25; R. p. 1318:2-12.) The trial court's order, however, aids Respondents in acting inequitably and contrary to the Assembly's best interests by rejecting this significant benefit for the litigation-driven purpose of artificially inflating their damages. True to form, after the partial settlement of the case required the Assembly to support the Respondents, the Assembly reversed its position and began claiming that the easement "might be" invalid. (R. p. 1330:1-12.) Rather than be required to prove the difference in value between the easement and outright ownership—which, as noted above, the Assembly had previously found to be negligible *or perhaps even negative*, Respondents were entitled by the invalidity finding to take the difference in value between no access to the boating facilities and outright ownership as their measure of damages. This was their measure of damages even though the Assembly *always had access* to the boating facilities, since all parties always believed and operated as though the easement was valid. This failure of the trial court to recognize the simple truth of the matter before it constitutes reversible error.

2. The Assembly's easement for use of the boating facilities was perpetual.

Because it found that the 2000 Recreational Easement was void *ab initio*, the trial court did not reach the question whether the easement which it provided to the Assembly to use the boating facilities was perpetual or limited to a term of 30 years. Standard rules of interpretation, as well as the language of the document itself, compel the conclusion that should this Court determine that the 2000 Recreational Easement was valid, the section granting I'On homeowners access to the boating facilities was perpetual.

A court must interpret the terms of deeds and easements as a whole and give effect to all of the provisions contained therein if possible. *Millvale Plantation, LLC v.*

Carrison Family Ltd. P'ship, 401 S.C. 166, 174, 736 S.E.2d 286, 290 (Ct. App. 2012); *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 682 S.E.2d 252, 262 (2009). Section 4.3 of the 2000 Recreational Easement reinforces this rule of law.

The 2000 Recreational Easement document has several components. It grants perpetual easements for the use and enjoyment of the boating facilities by the Assembly, and the I'On Commons by The I'On Club. It also establishes a cost-sharing agreement that obligates the Assembly and The I'On Club to contribute to boating facilities maintenance. The easement for use and enjoyment of boating facilities is "a perpetual, nonexclusive easement." (R. pp. 3132-3133.) The section pertaining to the easement for The I'On Club's use and enjoyment of the Commons contains similar language. (R. p. 3134.)

These provisions are reconcilable with Section 4.2 of the 2000 Recreational Easement, which establishes a 30-year duration for the Assembly's financial obligations with respect to boating facility maintenance. Appellants' proposed interpretation, unlike Respondents', gives effect to the perpetual nature of the use easement and the 30-year term of the cost-sharing agreement. The sections describing the cost-sharing agreement and the I'On Club and Assembly's respective maintenance obligations do not contain any durational language. (*See* R. pp. 3135-3138.) Finally, Section 4.2 states that "[t]his Agreement . . . shall have a term of 30 years." The Agreement is distinguishable from the perpetual easements for use and enjoyment of the boating facilities and I'On Commons. The distinction between easement and agreement is even made by the document title: Recreational Easement *and* Agreement to Share Costs. Appellants' interpretation complies with Section 4.3 and South Carolina precedent by giving effect to

all provisions of the 2000 Recreational Easement. Respondents' interpretation would ask the Court to ignore the language specifically establishing the easement contained therein as perpetual.

IV. APPELLANTS DO NOT HAVE A FIDUCIARY DUTY TO CONVEY AMENITIES TO THE ASSEMBLY AS A MATTER OF LAW.

Disregarding the existing law, the trial court pronounced that "a developer in control of an association may not make decisions which benefit its own interest at the expense of the association and its members." (R. p. 48.) The trial court's expansive new rule eliminates a developer's business judgment and, instead, subjects a developer who contemplates building common areas to an unrealistic and impractical standard. If endorsed by this Court, the new rule will stifle development generally and discourage developers' considerations of providing amenities. Even if a developer decided to build certain amenities but, instead of conveying them for free, opted to fund or operate the amenities through a small club, the developer would be subject to liability. The trial court's ruling constitutes legal error and, if upheld, would set a dangerously sweeping precedent that South Carolina courts have previously rejected.

South Carolina views the relationship between a developer and a homeowners association as fiduciary in nature in very limited circumstances and only at very specific times. A developer has a fiduciary duty to bring about a viable homeowners association, and any further fiduciary obligation is triggered only if the developer conveys common areas to the association. Outside these narrow parameters, South Carolina law has never held that a developer must act, not on its own behalf, but on behalf of property owners.[17]

[17] *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003) ("Historically, [our courts have] reserved imposition of fiduciary duties to legal or

Appellants are not liable to the Assembly for breach of fiduciary duty as a matter of law.

1. Appellants satisfied their fiduciary duty as a promoter of the Assembly.

Appellants organized and created a functional homeowners association. In *Goddard v. Fairways Development General Partnership*, this Court identified a "corollary between the promoters of a corporation and the developers of a PUD" and explained, "[b]oth are entrusted by interested investors to bring about a viable organization to serve a specific function. Both should be expected to use good faith and act in utmost good faith to complete the formation of their organizations." 310 S.C. 408, 415, 426 S.E.2d 828, 832 (Ct. App. 1993). Like a promoter of a corporation, a developer's fiduciary obligations are satisfied when a functional organization has been created.[18] Appellants incorporated the Assembly on June 4, 1998 and ceded control of the Assembly Board well in advance of the scheduled transition set forth in the governing documents. (R. p. 1184:13-25.) By 2014, this self-governing homeowners association had reserves on hand totaling $1.3 million and had long-made its own decisions on development issues. (R. pp. 3616-3674; R. p. 1308:3-8; R. p. 1303:9-25; R. p. 1304:5-9; R. p. 1346:17- 1347:5; R. p. 1426:23- 1427:3.)

2. Appellants satisfied their fiduciary duty to convey amenities in good repair.

Respondents do not claim that Appellants conveyed amenities to the Assembly that were in need of repair or created a financial burden. In *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, the Court confirmed that a developer's fiduciary

---

business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters.").

[18] *See Bivens v. Watkins*, 313 S.C. 228, 233 n.5, 437 S.E.2d 132, 135 n.5 (1993) (Promoters are persons or entities "who plan or organize a corporation." Promoters have a "duty to act in good faith and with due regard to [investors] interest in the formation and start-up of the corporation." *Id.* at 233, 327 S.E.2d at 135).

duty is triggered at the time the developer conveys common areas to a homeowners association: "the developer of a PUD owes a duty to the POA to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for bringing the common areas up to standard." 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002) (citing *Goddard*, 310 S.C. 408, 426 S.E.2d 828).

A limited developer fiduciary duty has been invoked to thwart decisions by a developer to saddle a homeowners association with the financial burden associated with ownership of common areas. After building and selling only five of the ninety units planned, the *Goddard* developer "unload[ed]" common areas to a newly created homeowners association that consisted of only five homeowners and did not have adequate financial resources to operate. 310 S.C. at 410-11, 426 S.E.2d at 830. The Court determined that "[i]t seem[ed] unfair to the villa owners for the Developer to burden them with substandard or deteriorated common areas that require an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures." *Id.* at 415, 426 S.E.2d at 832-33. Similarly, in *Concerned Dunes West*, the developer conveyed the common areas to the homeowners association within a week of discovering that the common areas were in need of "significant" repair at the time of conveyance. 349 S.C. at 255, 562 S.E.2d at 635-36.

Such facts are wholly absent here. The Record contains no claim that Appellants unloaded common areas to the Assembly to relieve themselves of maintenance costs or for Appellants' own financial well-being. Further, the Record contains no evidence that any of the amenities conveyed to the Assembly were in need of repair, were conveyed at a time when the Assembly was not financially ready to maintain them, or were conveyed

in a manner that created an unfair financial burden.[19]

3. South Carolina has refused to impose a broad developer fiduciary duty.

In the same two cases that announced a limited developer fiduciary duty, South Carolina has declined to recognize a broad fiduciary duty. The *Goddard* plaintiffs contended that the developer had a fiduciary obligation based on its superior voting strength on the homeowners association's board of directors. 310 S.C. at 413, 426 S.E.2d at 832. Significantly, this Court rejected this argument because even "assuming a fiduciary relationship exists" on this basis: (1) the evidence was clear that the developer had refrained from exercising its superior voting strength; and (2) in its role as a director, a developer's conduct should be judged by the business judgment rule. *Id.* at 413-14, 426 S.E.2d at 832. In *Concerned Dunes West*, the Supreme Court answered a certified question regarding a developer's obligation to maintain common areas during the period of time in which the developer exercises control of the homeowners association. 349 S.C. at 260, 562 S.E.2d at 638. In its analysis, the Court looked only to the obligations the developer undertook in the PUD's covenants to resolve the question. *Id.* at 260-61, 562 S.E.2d at 638-39. Given the opportunity to recognize a broad developer law fiduciary duty, the Court declined.

The fact that our courts have passed on the opportunity to recognize a broad developer fiduciary duty in both *Goddard* and *Concerned Dunes West* cannot be ignored. The specific fiduciary duty imposed on a developer at limited times during its dealings with a homeowners association strikes an appropriate balance between a developer's

[19] At the time the Assembly acquired Lot CV-6, the Creek Club, the Creek Club docks, the boating facilities and Lot CV-5 in its settlement with 148 Civitas, LLC, the acquisition did not require the Assembly to increase I'On homeowners' annual dues. (R. p. 1307:25-p. 1309:18.)

ability to operate its business and a homeowner's desire to protect his investment.

4. The trial court mistook a contractual duty for a fiduciary duty.

The trial court held "a developer's failure to convey community properties in their entirety is at least the equivalent of conveying them in 'substandard condition' (if not worse), and thus, any distinction between properties which should have been conveyed and properties which were actually conveyed in a substandard condition is a distinction without a difference." (R. p. 49.) The trial court also found: "by failing to convey the community properties as promised to the Assembly, [Appellants] failed to act in the best interest of the Assembly, and therefore, breached at least one of the fiduciary duties it owed the Assembly." (R. p. 49.)

Simply, if the 1998 Property Report did not include a promise to convey amenities to the Assembly, Respondents would admittedly have no basis for the claims pursued in this action. (R. p. 848:21- 849:4; R. p. 853:5-11; R. p. 890:3-21; R. p. 896:1-7; R. p. 956:15-24; R. p. 968:7-11; R. p. 1323:20-22.) At best, this evidence supports a claim for breach of contract and does not support a claim for breach of fiduciary duty. In *Goddard* and *Concerned Dunes West*, the Court was focused on fashioning a remedy because no existing legal theory fit the allegations made by the property owners, who had no contract requiring that amenities be conveyed in a certain condition. *See Goddard*, 349 S.C. at 257, 562 S.E.2d at 637; *Concerned Dunes West*, 349 S.C. at 255, 562 S.E.2d at 635-36. The question of whether amenities are promised at all, on the other hand, is one which can be expected to be covered by an agreement among parties—which was alleged here. No sweeping new fiduciary duty is needed to redress the allegations pursued by Respondents in this action.

The Record makes plain that there is no evidence that Appellants violated any fiduciary duty under South Carolina law. This Court should reverse and again refuse to recognize the sweeping duty pronounced by the trial court.

V. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AS TO APPELLANTS' COUNTERCLAIM FOR ABUSE OF PROCESS WHERE A SMALL GROUP OF OBJECTORS, IN CONTINUATION OF THEIR LONGSTANDING EFFORTS TO THWART THE I'ON COMPANY'S PLANS, SOUGHT TO OBTAIN PROPERTY FOR FREE, WITHOUT PROPER JUSTIFICATION, AND THROUGH IMPROPER USE OF LEGAL PROCESS.

Appellants' defense at trial centered on exposing the lawsuit as part of a scheme devised by the Gang—a handful of ardent I'On opponents and disgruntled lawyer residents. The Gang's actions and statements revealed the claims to be an effort to defeat The I'On Company and to obtain property for free—decidedly not an effort to redress any failure by The I'On Company to deliver on promises on which these individuals relied when purchasing property. Walbeck and Adkins were so committed to this cause that they admittedly verified pleadings they knew to be false in order to prosecute their derivative claims.

Unfortunately, the trial court did not properly evaluate the evidence of this improper motive and improper use of the legal process and even wrongfully refused to admit additional evidence of the antagonists' efforts against The I'On Company. (R. pp. 3403-3428; R. p. 1189:17- 1190:13; R. p. 1196:5-10.) The trial court erred in directing a verdict as to Appellants' counterclaim for abuse of process. Not only was relief on this cause of action not available to Appellants, the trial court's ruling told the jury that Appellants' contention that the claims were manufactured as part of a scheme with an ulterior purpose was baseless—scuttling Appellants' theory of the case. The trial court

should have let Appellants' claim for abuse of process go to the jury, and this Court should reverse.

Appellants provided ample evidence in support of both elements of an abuse of process claim: "(1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding." *Pallares v. Seinar*, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014).

Addressing the second element first, Appellants demonstrated an improper and willful act. Adkins and Walbeck each falsely swore to facts that were critical to alleging claims in a derivative capacity and surviving challenges as to the statute of limitations. The knowingly false statements are willful acts in the use of the process which are not proper. (R. p. 883:8-888:16; R. p. 981:13-982:8; R. p. 983:6-14.) As discussed above, Rule 23(b)(1) of the South Carolina Rules of Civil Procedure mandates that derivative claims be verified and provides that "[t]he derivative action may not be maintained" if the plaintiff does not fairly any adequately represent the other members' interests.

Adkins conceded that she did not know of any other purchaser who received the 1998 Property Report after it was amended, much less relied on it, despite the fact that she swore to the court that the 1998 report "continued to be distributed to potential purchasers with the intent that the information contained in said report would be relied upon by potential buyers when making their decision to purchase a lot in I'On." (R. p. 883:8- 885:18; R. p. 888:10-16; R. p. 155.) When asked the same question, Walbeck admitted that he could not identify anyone either. (R. p. 983:6-11.) This is a willful and improper act in the use of legal process to obtain Lot CV-6 for free.

As to the ulterior purpose, Appellants presented evidence that would allow a jury

to reasonably conclude that Respondents used legal process to obtain The I'On Company's property for free and that they did not believe that such a gratuitous conveyance was legally required. *See Scott v. McCain*, 275 S.C. 599, 601, 274 S.E.2d 299, 301 (1981) (holding that an improper purpose "usually takes the form of coercion to obtain a collateral advantage . . . such as the surrender of property or the payment of money, by the use of the process as a threat or club." (internal quotations omitted)).

The Gang knew the Assembly was not entitled to receive the subject property for free. When Assembly Board member Ward Mundy[20] solicited comments on the 2007 proposal for the Assembly to purchase the property, Adkins revealed what she and the Gang knew to be true—Appellants did not intend to convey Lot CV-6 to the Assembly for free. (R. p. 3606.) As the proposal was considered, neither Adkins nor Mundy[21] ever uttered a word about their purported beliefs that this property was supposed to belong to the Assembly or about relying on such a promise when purchasing their lots.

When it learned of the proposed sale of property it contends was promised to Assembly, the Gang did not cry foul or contend the Assembly should own the property. (R. pp. 3553-3564; R. pp. 3589-3597.) Rather, it decided to challenge the zoning to frustrate the sale. Prompted by the efforts of I'On resident and lawyer Catherine Templeton, the Gang initiated the January 2009 zoning appeal challenging the civic use of Lot CV-6 with the express purpose of driving down the value of the property to prevent a sale. (R. pp. 3558-3561.) At the February 26, 2009 Board Meeting, Adkins and

[20] When the Board discussed the proposal in October of 2007, Mundy only "expressed his concerns that the issue should be put to the vote of the owners" and suggested that the Assembly seek legal counsel. (R. pp. 3525-3544.)

[21] Mundy and Adkins both served on the Boating Committee, whose purpose included "utiliz[ing] and interpret[ing the] easement between the I'On Assembly and the I'On Company and its subsidiary organizations including the I'On Club." (R. pp. 3525-3544.)

Templeton discussed the Board's support of the zoning challenge and easement access to the docks in the event the Creek Club was purchased. (R. pp. 3562-3564.) Neither ever mentioned a belief the Assembly was entitled to own this property for free. The day after the zoning appeal failed, Adkins, along with the other members of the Gang, began evaluating other methods of interfering with Appellants' ability to sell Lot CV-6.

Walbeck had the same reaction. After learning of the potential sale of CV-6, Walbeck attended the Assembly meeting and raised concerns only about whether zoning was proper. (R. pp. 3553-3557; R. p. 984:15-986:3.) Despite proclaiming at trial that the potential sale was something he "couldn't fathom," Walbeck never uttered a word about Assembly ownership or relying on any promise of a conveyance at the time. (*Compare* R. p. 984:15-986:3 *with* R. p. 960:13-20.) In fact, he made no mention of any right to ownership until he was recruited for the second phase of the Gang's challenge. (R. p. 1795.) Ultimately, the Gang determined the best course of action to achieve its goals was to file this lawsuit. (R. pp. 3401-3402.) In their zeal, Walbeck and Adkins verified false statements both to bring derivative claims and to circumvent a big obstacle they recognized from the beginning: "there is a two-year statute of limitations." (*Id.*)

Moreover, the evidence revealed this specific effort to be part of a longstanding campaign against The I'On Company's development efforts. Members of the Gang have fought The I'On Company since 1997 and this lawsuit is just a recent effort to thwart The I'On Company's plans. Adkins and her domestic partner, Steve Brock, both opposed the concept of I'On from the beginning. (R. p. 1148:2-1149:1; R. p. 1149:19-1150:17.) In fact, Brock in mounting a challenge to the initial re-zoning effort for I'On Brock made plain he "intend[ed] to do everything in [his] power to defeat the [I'On] project." (R. pp.

3403-3428.) He sought out to do just that.[22] (R. pp. 3403-3428.) In 2010, after the zoning challenge, Adkins, Brock and Mundy also opposed a proposal to build an additional entrance to The I'On Club (R. pp. 3580-3587; R. p. 1194:15-25; R. p. 1196:14-1198:25.)

This evidence presented at trial demonstrated an ongoing campaign against The I'On Company and a quest to best the developer out of property and additional profit through any means necessary, including abuse of legal process. Appellants satisfied their burden of putting forth evidence that would permit a reasonable jury to conclude Respondents abused legal process. *See McBride v. Sch. Dist. of Greenville Cnty.*, 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2010) (reversing directed verdict as to abuse of process claim when more than reasonable inference can be drawn from evidence). The trial court erred in refusing to submit this counterclaim to the jury. The error was hugely prejudicial and affected the entire defense of the case. This Court should reverse and remand for a new trial.

VI. THE I'ON COMPANY IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS AS THE PREVAILING PARTY ON ADKINS' BREACH OF CONTRACT CLAIM.

The 2003 Lot Purchase Agreement between Adkins and The I'On Company contains a mandatory fee-shifting provision for the prevailing party in an action for breach of the agreement. (R. p. 3119.) Adkins brought a breach of contract claim, and The I'On Company prevailed. (R. p. 1857.) The trial court abused its discretion in denying The I'On Company's petition for attorney's fees and costs.

The trial court's order denying The I'On Company's petition for attorney's fees

[22] Brock led other opposition challenges to The I'On Company's plans, including: a proposal to add a street to connect I'On to an adjacent neighborhood (R. p. 1188:11-21; R. p. 1191:23- 1192:11); a proposal to convert approved houses from single family detached homes to attached dwellings (R. p. 1192:12-1193:4); and a neighbor's request to purchase a small parking space from The I'On Club (R. p. 1195:12-1196:4.)

and costs is based on two untenable conclusions: (1) Adkins was a prevailing party, and (2) the I'On Company was not. Perhaps the trial court veered off course when mistakenly holding that Adkins did not pursue a "direct breach of contract claim." (R. p. 80.) Adkins' claim was plainly included in the governing complaint and on the verdict form where the jury rejected it. (R. p. 1857.) In fact, the trial court recognized both Adkins' breach of contract allegations and several reasons why the jury rejected her claim in its order denying Adkins' petition for unjust enrichment. (R. pp. 67-68.)

Adkins' Lot Purchase Agreement expressly provides for attorney's fees and costs as follows:

> **Fees and Costs**: If either party requires services of an attorney to enforce obligations under this Agreement, the prevailing party shall be due from the non-prevailing party reasonable attorneys' fees, costs and expenses actually incurred.

(R. p. 3119.) In the face of this known risk of the fee-shifting provision, Adkins sought to pursue any and all potential avenues of recovery and alleged breach of this Lot Purchase Agreement. Although the jury found in favor of Walbeck on his contract claim, the jury specifically rejected Adkins' breach claim—along with every other claim she asserted. Adkins was not the "prevailing party" under the terms of the Lot Purchase Agreement. The trial court entirely disregarded the jury's resolution of these claims in favor of Appellants and analyzed Adkins' "success" based on the success of the Assembly's claims. (R. pp. 80-81.) The only logical conclusion that can be drawn from the jury's verdict completely rejecting Adkins' claims, however, is that the success achieved on behalf of the Assembly is not the result of her claims or efforts. Moreover, the trial court's order improperly shifts risk calculation that the parties' had bargained for in the contract and subsequently operated under throughout this litigation.

In similar cases, this Court has held that it was an abuse of discretion for the court to refuse to award attorney's fees pursuant to a contract in less than the specific amount agreed to by the parties. *West v. Gladney*, 341 S.C. 127, 135-36, 533 S.E.2d 334, 338 (Ct. App. 2000) (holding it is "not for us to determine whether the parties' agreement was reasonable or wise, or whether they carefully guarded their rights" when a contract unequivocally provides for attorney's fees at a specified rate); *Dedes v. Strickland*, 307 S.C. 155, 414 S.E.2d 134 (1992) ("[I]t is a well established principle of law that where there is a contract providing for such, the amount of attorneys fees is governed by the contract.").

Further, a trial court's discretion is limited to evaluating a "reasonable amount" of an attorney's fee award and does not include discretion to deny fees. In *Fici v. Koon*, the court denied the prevailing party's request for attorney's fees on the basis that the underlying contract was unenforceable. 372 S.C. 341, 348-49, 642 S.E.2d 602, 605-06 (2007). In reversing, the Supreme Court determined: "Under the terms of the contract, Sellers are entitled to attorney's fees as the prevailing party" and remanded with instruction enter an award of fees. *Id.* at 349, 642 S.E.2d at 606. In *Prevatte v. Asbury Arms*, this Court considered the statutory fee provision of the Landlord-Tenant Act and concluded: "The appellate courts of this state have never construed this language as giving the trial judge discretion to award or deny attorney's fees." 302 S.C. 413, 415, 396 S.E.2d 642, 643 (Ct. App. 1990). Instead, "[w]hat constitutes a reasonable fee is a matter for the court to determine as a matter of informed judicial discretion." *Id.* In an unpublished decision, this Court applied the analysis of *Prevatte* to reverse the trial court's denial of attorney's fees pursuant to a mandatory fee-shifting contract. *Meetze v.*

Saylors, ___ S.C. ___, 2005 WL 7082989, at *2 (Ct. App. 2005) ("Since the covenants contractually provide a prevailing party with the right to recover attorney's fees and costs, the court should have determined what constitutes a reasonable fee.").

In support of its petition, The I'On Company requested half of the attorney's fees and costs incurred to reflect only the time spent defending Adkins' claims. (R. pp. 1910-1911.) This amount is reasonable and the trial court abused its discretion in denying The I'On Company's petition. This Court should reverse and award The I'On Company attorney's fees in the amount of $264,115.25.

VII. THE TRIAL COURT'S AWARD OF $225,000.00 IN ATTORNEY'S FEES TO WALBECK WHEN THE JURY AWARDED HIM $1.00 IS NOT REASONABLE.

Walbeck requested that the trial court award him attorney's fees and costs for his claim for violation of ILSA. He asked the jury for $50,000.00 in damages and the jury awarded him the nominal amount of $1.00. Yet, the trial court awarded him $225,000.00 "for the Defendants' violation of ILSA"—almost five times what Walbeck asked for and 225,000 times what the jury actually awarded. (R. p. 100.) Only leaps in logic, skips over parties, and jumps across claims can explain this shocking result. The result is neither reasonable nor supported by law.

Analyzing Walbeck's fee petition under the Interstate Land Sales Act makes clear that no fee award was proper. ILSA affords the court the discretion to award "reasonable" attorney's fees and court costs to a prevailing party:

> The amount recoverable in a suit authorized by this section may include . . . interest, court costs, and reasonable amounts for attorneys' fees, independent appraisers' fees, and travel to and from the lot.

15 U.S.C. § 1709(c) (2012).

The trial court found:

> Walbeck's individual and derivative claims all involved a "common core of facts" based upon the I'On Defendants' repeated promises to convey certain amenities to the I'On Community. Thus, the overall success of Walbeck is not measured solely by the amount of monetary recovery he was awarded on the ILSA claim;[] rather, Walbeck's success is measured by: (a) the results Walbeck achieved on his negligent misrepresentation claim; and (b) the results Walbeck achieved on behalf of the I'On Assembly on its breach of fiduciary duty claim.

(R. p. 96.)

1. Neither ILSA nor South Carolina common law support an award of attorney's fees for the success of another party on other claims.

The trial court's award of fees can be upheld on appeal only if this Court endorses the flawed proposition that ILSA's fee provision entitles Walbeck to attorney's fees for the success of claims of a different party, the Assembly, on its non-ILSA claims. The trial court enabled Walbeck to bootstrap the success of the Assembly's breach of fiduciary duty claim to bolster his individual claim for attorney's fees and costs. (R. p. 96.) This was an abuse of discretion, particularly where the Assembly had no standing to even pursue an ILSA claim. *See Terre Du Lac Assoc., Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985) (holding that homeowners association lacks standing to assert ILSA claims on behalf of its members).

The trial court cannot treat the Assembly's success as Walbeck's success. Walbeck's claims in his individual capacity are entirely distinct from the Assembly's derivative claims. In a derivative action, "[t]he corporation or its shareholders can bring the cause of action on the corporation's behalf. If any relief is granted, it goes to the corporation; shareholders cannot recover the damages in their individual capacities because their loss is the indirect result of the injury to the corporation." *In re Greenwood*

Supply Co., 295 B.R. 787, 795 (Bankr. D.S.C. 2002); *Ward v. Atlas Const. Co.*, 276 S.C. 346, 347, 278 S.E.2d 621, 622 (1981) ("In a derivative action in this state the stockholder is the nominal plaintiff and the corporation is the real party in interest."). Moreover, the Assembly—not Walbeck—is responsible for legal fees resulting from any success on claims brought on the Assembly's behalf, by the parties' agreement. (R. p. 2016.)

South Carolina has never held that it is proper to award attorney's fees to one plaintiff based on the success of another plaintiff on another claim. The trial court erroneously relied on *Austin v. Stokes-Craven Holding Corporation*, 406 S.C. 187, 750 S.E.2d 8 (2013), to support this conclusion. (R. p. 96.) In *Austin*, however, the Supreme Court considered only whether a singular plaintiff who pursued several claims should be limited to collecting attorney's fees incurred for time spent on the cause of action providing for fees. 406 S.C. at 192-93, 750 S.E.2d at 80-81. *Austin* does not remotely suggest that it is appropriate to consider the success on other claims of other parties. *See also Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) (holding that fees related to non-statutory causes of action should be excluded from an attorney's fee award pursuant to statute to the extent it can be demonstrated that a portion of services was unrelated to the statutory claim).

2. A reasonable fee for Walbeck's ILSA verdict is no fee at all.

A reasonable fee on a $1.00 ILSA verdict is no fee at all. Courts have considered the propriety of an award of fees and costs after an award of nominal damages in the context of another federal fee-shifting statute: Section 1988 which governs Section 1983

civil rights litigation.[23] The United States Supreme Court determined that an award of no fee is the proper result when a plaintiff recovers only nominal damages. *Farrar v. Hobby*, 506 U.S. 103, 104 (1992). In a concurring opinion,[24] Justice O'Connor determined "[w]hen the plaintiff's success is purely technical or *de minimis*, no fees can be awarded. Such a plaintiff has either failed to achieve victory at all, or has obtained only a Pyrrhic victory for which the reasonable fee is zero." *Id.* at 117 (O'Connor, J., concurring).

The jury was instructed to make a full and complete award as to each of Walbeck's claims and, in light of the evidence presented, determined that Walbeck was entitled to $1.00 on his ILSA claim. (R. pp. 1855-1862.) Courts have declined to award fees based on similar nominal recoveries. *See Farrar*, 506 U.S. at 104 (reversing award of fees on a nominal-damages civil rights case because "the reasonable fee . . . was no fee at all"); *Kebe ex rel. K.J. v. Brown*, 91 F. App'x 823, 829 (4th Cir. 2004) (denying attorney's fees because plaintiff sought compensatory damages and was awarded only nominal damages).[25] The reasonable result, in light of the jury's nominal award, was for

---

[23] Appellants are aware of no case law specifically addressing the appropriateness of a fee award on an ILSA nominal damages award.

[24] Justice O'Connor identified three factors for the analysis of nominal damage awards in Section 1983 civil rights cases: courts consider "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served by the litigation." *Farrar*, 506 U.S. at 117 (O'Connor, J., concurring). This framework has been adopted by the Fourth Circuit to analyze fee awards in nominal damages cases. *See Mercer v. Duke Univ.*, 401 F.3d 199, 203-04 (4th Cir. 2005).

[25] *See also Romberg v. Nichols*, 48 F.3d 453, 455 (9th Cir. 1994) (affirming the denial of attorney's fees in § 1983 case when plaintiffs "requested a substantial sum, but received only one dollar each," noting that "although they prevailed, the [plaintiffs] did not succeed"); *Cramblit v. Fikse*, 33 F.3d 633, 635 (6th Cir. 1994) (affirming trial court's denial of attorney's fees in § 1983 case where the plaintiff received only nominal damages because the court found that the plaintiff's "primary goal in the underlying § 1983 action was to obtain monetary damages"); *Bristow v. Drake St. Inc.*, 41 F.3d 345, 352 (7th Cir. 1994) ("The Supreme Court has made clear that if all you win in a Title VII

the trial court to deny Walbeck's fee petition in its entirety.

The Assembly did not prevail on a claim for violation of ILSA and the trial court abused its discretion in considering the success on the Assembly's claims in evaluating Walbeck's petition for attorney's fees. The trial court further abused its discretion in awarding Walbeck attorney's fees on a nominal verdict. This Court should reverse and reject Walbeck's petition in its entirety. In the alternative, Walbeck's fee petition should be remanded to the trial court with the instruction that any consideration of the success of the Assembly's claims is wholly improper.

VIII. A NEW TRIAL SHOULD BE GRANTED BECAUSE THE TRIAL COURT IMPROPERLY RULED THAT APPELLANTS WERE AMALGAMATED.

The trial court held that Appellants were amalgamated. (R. p. 59.) Respondents were not required to prove—and the jury was not asked to evaluate—the liability of each individual Appellant. Thus the statutory and equitable protections afforded corporate entities were entirely neglected. The trial court's disregard of the corporate form does not comport with the law of South Carolina and merits a new trial.

"[A] corporation is an entity that is separate and distinct from, and its debts are not the individual debts of, its officers and stockholders." *Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007) (finding plaintiffs failed to prove necessity for piercing corporate veil to hold parent companies liable for subsidiary's obligations). A corporation is liable only for its own obligations. Business owners have the right to organize and conduct business affairs with the express

---

case is nominal damages . . . the reasonable attorney's fee, one commensurate with results obtained, is—zero.").

purpose of limiting liability. *See* S.C. Code §§ 33-1-200, 33-3-102, 33-6-220(b) (2006).

In light of these protections, our courts have concluded: "Although the corporate entity may be disregarded in some situations, piercing the corporate veil is not a doctrine to be applied without substantial reflection." 374 S.C. at 597, 649 S.E.2d at 140 (citing *Baker v. Equitable Leasing Corp.*, 275 S.C. 359, 367, 271 S.E.2d 596, 600 (1980)). Courts are generally reluctant to disregard the corporate entity:

> If any general rule can be laid down, it is that a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; but when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons.

Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) (quoting *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984)).

In *Sturkie*, this Court developed a two-part test to determine whether a corporate veil should be pierced. The first step analyzes the observance of corporate formalities and the second prong requires that there be an "element of injustice or fundamental unfairness" if the acts of the corporation are not regarded as the acts of the individual. *See Mid-S. Mgmt. Co.*, 374 S.C. at 598, 649 S.E.2d at 140-41 (citing *Sturkie*, 280 S.C. at 457-58, 313 S.E.2d at 318).

Piercing the corporate veil is the equitable remedy available when a plaintiff demonstrates an alter-ego claim or a claim that a corporation is a mere instrumentality of a controlling individual. *Drury*, 380 S.C. at 101-02, 668 S.E.2d at 800-01 (addressing alter-ego claims); *see Wilson v. Friedberg*, 323 S.C. 248, 253, 473 S.E.2d 854, 856-67 (Ct. App. 1996) (addressing the instrumentality rule). A plaintiff has always been required to demonstrate fraud, injustice, or fundamental unfairness before the corporate

form may be properly disregarded. *See Drury*, 380 S.C. at 101-02, 668 S.E.2d at 800; *see also Jones v. Enter. Leasing Co.*, 383 S.C. 259, 267-68, 678 S.E.2d 819, 824 (Ct. App. 2009) (requiring demonstration that retention of separate corporate personalities would promote fraud, wrong, or injustice in addition to control or dominance by a parent over a subsidiary); *Wilson*, 323 S.C. at 257, 473 S.E.2d at 859 (noting that the "instrumentality rule" should be used to pierce the corporate veil only where "retention of separate corporate personalities would promote fraud, wrong, or injustice or contravene public policy").

Amalgamation was first recognized in *Kincaid v. Landing Development Corp.*, where the trial court ruled that the "evidence revealed 'an amalgamation of corporate interests, entities, and activities so as to blur the distinction between the corporations and their activities.'" 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986). This Court affirmed in summary fashion: no cases or statutes were cited in support of its ruling, no analysis was provided as to whether the defendants observed corporate formalities, and no reason was stated as to why the court was not applying the *Sturkie* test. This lack of an informed holding on the issue is significant—all subsequent amalgamation cases rely on *Kincaid* as the primary precedent.[26]

Amalgamation was discussed again in *Mid-South Management Co. v. Sherwood Development Corp.*, 374 S.C. 588, 605, 649 S.E.2d 135, 144-45 (Ct. App. 2007). There, the trial court refused to find parent companies liable for the judgment obtained against a

[26] *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 340, 384 S.E.2d 730, 734 (1989); *Mid-South Mgmt. Co.*, 374 S.C. at 605, 649 S.E.2d at 144-45; *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 419, 717 S.E.2d 765, 773 (Ct. App. 2011); *Magnolia N. Prop. Owners' Ass'n v. Heritage Communities, Inc.*, 397 S.C. 348, 359, 725 S.E.2d 112, 118 (Ct. App. 2012), *cert. dismissed*, 2015 WL 5725683 (Sept. 30, 2015) (No. 27577).

subsidiary. *Id.* This Court affirmed without addressing whether the *Sturkie* analysis was required to amalgamate the defendants. *Id.* Most recently, in *Pope v. Heritage Communities, Inc.* and *Magnolia North Property Owners' Association, Inc. v. Heritage Communities, Inc.*, the Court relied entirely on *Kincaid* to affirm the trial court's amalgamation ruling. *See Pope*, 395 S.C. at 419, 717 S.E.2d at 773; *Magnolia*, 387 S.C. at 359, 725 S.E.2d at 118. In neither opinion is there any mention of corporate formalities, fundamental unfairness, or substantial injustice. *Sturkie*, 280 S.C. at 457-58, 313 S.E.2d at 318. The Court has never plainly ruled that the amalgamation doctrine may be applied without a demonstration of the *Sturkie* factors.

Here, the trial court failed to consider the *Sturkie* factors.[27] (R. pp. 59-61.) Amalgamation resulted in significant prejudice to Appellants. Respondents were relieved of their burden of establishing the liability as to each individual Appellant. Respondents were able to assert claims against all Appellants that were otherwise applicable as to only one or two of the Appellants. The ruling also suggested to the jury that Appellants had engaged in some form of misconduct and deserved to be stripped of their status as separate corporate entities. This Court should grant a new trial.

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

Respondents failed as a matter of law to establish claims under the anti-fraud provisions of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq.* To establish such a claim, a plaintiff must prove one or more of the fraudulent acts defined in

[27] Each Appellant is a properly formed, distinct South Carolina limited liability corporation created for a unique purpose. (R. pp. 3191-3267; 3268; 3598-3599; R. p. 768:1-769:16; R. p. 770:18-772:4; R. p. 772:11-774:8; R. p. 774:13-18.)

the statute. 15 U.S.C. § 1703(a)(2). Under ILSA, a plaintiff cannot construe ambiguities in a property report as material misstatements or omissions. *Gibbes v. Rose Hill Plantation Development Co.*, 794 F. Supp. 1327, 1335 (D.S.C. 1992). Where a term is not defined by a property report, allegations that such term was ambiguous and intended to encompass a specific meaning beyond its literal reading does not constitute violation of ILSA, so long as the developer satisfied the terms of the property report as written. *Id.* at 1335. As discussed in detail *supra*, Appellants provided a Creekside Park and Community Dock within the literal meaning of such terms.

1. The better-reasoned authorities hold that reliance may not be presumed in anti-fraud actions under ILSA.

A key question of law for this appeal is whether the anti-fraud provisions of ILSA require proof that the plaintiff actually relied on the defendant's statements, rather than permitting the court or jury to presume such reliance. A correct interpretation of the anti-fraud provisions of ILSA shows that they do require proof of reliance by the plaintiff, as with a common-law fraud claim. *See Ivar v. Elk River Partners, LLC*, 705 F. Supp. 2d 1220 (D. Colo. 2010); *Dongelewicz v. First Eastern Bank*, 80 F. Supp. 2d 339 (E.D. Pa. 1999). The *Dongelewicz* opinion resolves a split among prior authorities by holding that claims under the *reporting* requirements of ILSA, which have no discovery rule and are thus indisputably time-barred here, do not require reliance, but that the anti-fraud provisions do.

The question whether anti-fraud ILSA claims require reliance has a complex history, which is complicated by the attempts courts have made to apply to it the more developed jurisprudence under federal securities Rule 10b-5 on which ILSA was modeled. The interpretation of Rule 10b-5 has evolved over time, however, and securities

are distinguishable from real estate in important respects. An illustrative but distinguishable case is *Taplett v. TRG Oasis (Tower Two) Ltd., L.P.*, 755 F. Supp. 2d 1197 (M.D. Fla. 2009). *Taplett* notes that 15 U.S.C. § 1703(a)(2), the anti-fraud provision of ILSA, is modeled on Section 17 of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, which require reliance for affirmative misrepresentations. *Taplett* thus required reliance under Section 1703(a)(2) as well.

In modern securities law, a material omission calls forth a presumption of reliance, but a material misrepresentation does not. The justification for the presumption of reliance in Rule 10b-5 cases is set forth in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). Its basis is the so-called "fraud-on-the-market" theory, which holds that the market price of a stock reflects the public information available about it in a way very different from face-to-face transactions contemplated by common-law fraud cases.

The "fraud-on-the-market" theory has *no application* to sales of real estate. Courts considering the matter have refused to deviate from common-law fraud principles by applying the "fraud-on-the-market" theory to consumer fraud cases outside the securities context. *Brinker v. Chicago Title Ins. Co.*, ___ F. Supp. 2d. ___, 2012 U.S. Dist. LEXIS 44503, at *39-40 (M.D. Fla. 2012) (denying class certification in real estate fraud case because reliance issues required individualized proof); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1363-65 (11th Cir. 2002) (reversing class certification in telemarketing fraud case on same ground). A careful review of the cases compels the conclusion that under Section 1703(a)(2) of ILSA, reliance is not presumed for either misstatements or omissions, and must be proved in all cases.

2. Walbeck cannot establish actual reliance on any material misrepresentation for ILSA purposes.

Walbeck's claim under ILSA fails for lack of actual reliance. He could not have relied on the extrinsic documents which now form the basis of his interpretation of the meanings of the terms "Creekside Park" and "Community Dock" in making his purchase because he had never seen them at that time. (R. p. 957:11-24; R. p. 959:6-12; R. p. 974:22- 976:7.) He was never told orally that the Assembly would own the Creek Club building or Lot CV-6. (R. p. 976:8- 979:8.) Nor do any of the marketing materials make such a claim. Nor could he testify that the "Creekside Park" and "Community Dock" issues central this lawsuit would have changed his decision to purchase in I'On, making them immaterial. (R. p. 973:21- 974:4.)

A South Carolina federal district court addressed a similar issue in *Gibbes v. Rose Hill Plantation Development Co.*, 794 F. Supp. 1327 (D.S.C. 1992). In that case, plaintiffs contended a violation of ILSA on the ground that the "stables" and "docks" which had been promised to their homeowners association in two ILSA property reports were supposed to be a fifty-two acre "Equestrian Center" including a polo field and floating docks. *Id.* at 1335. Developer actually conveyed a 17.24 acre stable complex, no polo field, and non-floating docks. *Id.* at 1331, 1335. The *Gibbes* court granted summary judgment as to claims of false statements in the property report, because the property report did not define the terms "docks" or "stables" or specify their size or configuration, and the developer did in fact transfer docks and stables to the homeowners association; therefore, the property reports at issue neither misstated nor omitted any material fact on such points. *Id.* at 1335-36. Likewise here, the Assembly received a "Creekside Park" and "Community Dock" in the ordinary meaning of those terms, which the Property Report did not further define.

In fact, the *Gibbes* reasoning is even more appropriate here: Respondents somehow contend that the reference to "Community Dock" in the singular in the 1998 Property Report actually entitles them to *both* docks at Lot CV-6. The term "community dock" is in fact a legal term which DHEC and OCRM use in permitting. A community dock must be a certain length and be able to accommodate a certain size boat. (R. p. 1112:19-1114:9.) The uncontradicted evidence showed that the two docks in Phase 2 of I'On which were conveyed to the Assembly meet this legal definition of a community dock; DHEC and OCRM would not have allowed them to be built otherwise. (R p. 1114:5-9; R. p. 2991.) That conveyance satisfies the 1998 promise to convey a "Community Dock."

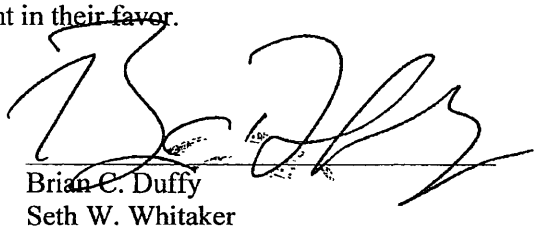
Walbeck attempted to circumvent the Property Report at trial by claiming reliance on oral representations by agents of Appellants under Section 1703(a)(2). In *Gibbes*, one plaintiff alleged that he had been told orally that the stables promised in the property report would be of a certain size, and was found to have established a genuine issue of fact for trial under Section 1703(a)(2). 794 F. Supp. 1336-37. Walbeck's claim is distinguishable. Importantly, *Gibbes* erroneously held that reliance could be presumed for the plaintiff's claim under Section 1703(a)(2) of ILSA. The *Gibbes* court noted the split among courts on this issue, but did not consider the difficulties in applying securities fraud concepts to the real estate context. 794 F. Supp. at 1336, n.22.

Walbeck also lacks evidence of a misrepresentation on which he could have actually relied as a purchaser. Walbeck testified at length about oral representations supposedly made to him by real estate agents of Defendants regarding *access* to the Creek Club and docks before his purchase. At no time have I'On residents lacked

reasonable access to the Creek Club and docks. (See Part III, *supra*.) But Walbeck admits that no one ever told him that the I'On Assembly would receive *ownership* of Lot CV-6. Rather, he *assumed* that since CV-6 was a civic lot on plans of I'On, it would be owned by the Assembly. Appellants have consistently stated that civic lots, such as those which are now home to schools and churches, can be privately owned. (R. p. 976:8-979:8.) Furthermore, Walbeck's purchase contract contains a standard no reliance clause prohibiting him from relying on statements other than those contained in his actual contract and certain specified documents, including the Property Report. (R. pp. 3164-3165.) His ILSA claim therefore fails as a matter of law.

CONCLUSION

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



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

March 21, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 23 2016
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

CERTIFICATE OF COUNSEL

I, Brian C. Duffy, certify that the Final Brief and Final Reply Brief of Appellants comply with Rule 211(b) of the South Carolina Rules of Appellate Practice.

Brian C. Duffy
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)

March 22, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 23 2016
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

PROOF OF SERVICE

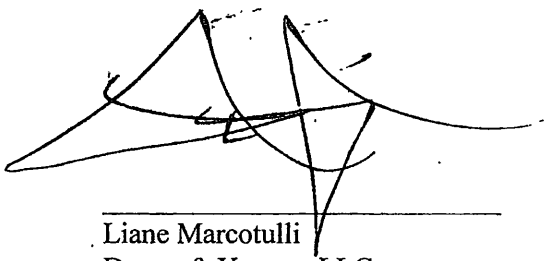
I, Liane Marcotulli, paralegal for Duffy & Young, LLC, certify that I have served the **FINAL BRIEF OF APPELLANTS** on Respondents on March 22, 2016 by hand delivery to their attorneys of record as shown below:

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

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

Timothy W. Bouch, Esq.
Yancey A. McLeod, III, Esq.
Leath Bouch & Seekings
92 Broad Street
Charleston, SC 29401
Phone: 843-937-8811

Attorneys for Respondent I'On Assembly, Inc.



Liane Marcotulli
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)
Paralegal

March 22, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 23 2016
SC Court of Appeals

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

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. INTRODUCTION. 1

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

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

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

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

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

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

ii. Marketing materials. 11

iii. 2008-2009 Email Communications. 12

4. Appellants' argument regarding the recording of the 2000 Recreational Easement is preserved for appellate review. 13

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

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

DEVELOPER CONVEYS COMMON AREAS TO THE ASSOCIATION. 15

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

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

3. The argument that what Respondents contend is a fiduciary duty is only a contractual obligation is preserved for appellate review. 18

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

VII. WALBECK'S CLAIM FOR VIOLATION OF THE INTERSTATE LAND SALES ACT FAILS FOR LACK OF RELIANCE ON APPELLANTS' STATEMENTS. 20

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Bayle v. S. Carolina Dep't of Transp.,
344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). 6

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

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

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

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

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

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

Gibbes v. Rose Hill Plantation Dev. Co.,
794 F. Supp. 1327 (D.S.C. 1992). 20

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

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

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

Kelly v. Logan, Jolley, & Smith, L.L.P.,
383 S.C. 626, 682 S.E.2d 1 (Ct. App. 2009). 5, 6

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

Nat'l Loan & Exch. Bank v. New York Life Ins. Co.,
149 S.C. 378, 147 S.E. 322 (1929). 16

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

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

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

Statutes

S.C. Code § 33-3-102.....19

S.C. Code § 33-3-200. 19

S.C. Code § 33-6-220(b). 19

S.C. Code § 33-7-400. 4

Rules

Rule 23(b), SCRCP. 2-5

ARGUMENT

I. INTRODUCTION.

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

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

---

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

[2] Of course, the property included in Respondents' claim for "Amenity Property" has expanded over time. (R. p. 1313:13-1314:11; R. p. 1315:10-1316:5; *compare* R. p. 861:15-862:13; R. p. 890:3-891:1; R. p. R. p. 894:11-895:5; R. p. 896:1-7 *with* R. p. 415:24-416:16; R. p. 443:1-444:7; R. p. 1307:19-24.)

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

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

As a preliminary matter, Respondents *admitted at trial that they misrepresented facts in their verified complaints* regarding other residents' reliance on the 1998 Property Report. (R. p. 883:8-888:16; R. p. 981:13-982:8; R. p. 983:6-14.) Respondents made these misrepresentations in their pleadings in an effort to establish derivative standing and sneak around early challenges that their claims were barred by the statute of limitations. This Court should not countenance such a practice.

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

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

"demands were repeatedly made upon the Assembly." (Resp. Br. at 32.) At no stage have either Respondents or the trial court given specifics regarding any such demand which meets the requirements of Rule 23.

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

The trial court summarily concluded that Appellants retained control over the Assembly's actions, and that such control made demand futile. They urge a purely theoretical definition of control under which Appellants' veto power—which has never been exercised and which the Assembly Board president testified has never affected any decision the Board made—was nonetheless sufficient to render demand futile. (R. p. 1303:9-25; R. p. 1304:5-9; R. p. 1346:17-1347:5; R. p. 1426:23-1427:3.)

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

Respondents' contention that Appellants do not raise any errors regarding the adequacy of the derivative plaintiffs' representation is false. (App. Br. at 26-28.) Respondents do, however, make one substantive assertion in their argument regarding derivative standing: that because the Assembly was a plaintiff by the time of trial, all defects are somehow magically cured. They ask the Court to ignore the vital practical consideration that prompted the Assembly to settle and support their position: concern that the Assembly would be responsible for the substantial legal fees of derivative Respondents' counsel, which were estimated at $1,070,550 in counsel's post-trial motion for fees. *See* S.C. Code § 33-7-400 cmt. ("The right of successful plaintiffs in derivative suits to [attorneys' fees from the entity] is so universally recognized . . . that specific reference was thought to be unnecessary."); *Cullen v. McNeal*, 390 S.C. 470, 491, 702 S.E.2d 378, 389 (2010) (citing official comment to section 33-7-400 as source of successful derivative plaintiff's right to recover fees from the entity). Rule 23 is meant to provide the Board the opportunity for sober

analysis of the Assembly's competing interests. Here, the trial court's repeated failures to enforce the derivative demand requirement coercively influenced the Board's decision-making on the eve of the first trial, when a settlement was reached among the other parties. That settlement dictated that the Assembly Board support Respondents, and limited what Respondents' counsel could seek from the Assembly for fees. In the settlement agreement, the Board took on obligations which many members had opposed for years because of liability and maintenance concerns. (R. p. 1081:4-25; R. p. 1318:2-12.)

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

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

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

The statute of limitations expired prior to the commencement of this litigation. Although Respondents would like this Court to disregard a basic principle of our jurisprudence, "[s]tatutes of limitations are not simply technicalities." *Kelly v. Logan,*

Jolley & Smith, LLP, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009). Respondents mischaracterize the appropriate standard of review, cite only to evidence that is irrelevant to the question of when they discovered their claims, and offer no explanation as to how the litany of evidence in the Record is insufficient to have provided notice of a potential claim prior to December 22, 2007. (*See* App. Br. at 28-36.) This Court should reverse and enter judgment in favor of Appellants.[4]

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

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

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

The discovery rule does not permit a party to wait until there is "absolute certain[ty]" that a claim exists. *Bayle v. S. Carolina Dep't of Transp.*, 344 S.C. 115,

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

126, 542 S.E.2d 736, 741 (Ct. App. 2001). Proper consideration of what constitutes notice of a potential claim is not concerned with the most recent event or even the most obvious event. The question of when the statute of limitations begins to run is focused *only* on when a reasonable person would have known a claim "might" exist. *Stokes-Craven Holding Corp. v. Robinson*, No. 2013-001452, 2015 WL 5247124, at *4 (S.C. Sept. 9, 2015).

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

of 2007 was an indication that the property would not be given to the Assembly for free.[5]

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

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

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

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

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

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

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

Respondents primarily rely upon the 1997 Impact Assessment. (R. pp. 2019-2039.) Respondents mischaracterize this document and would like this Court to see it as something it is not. The only purpose of the Impact Assessment was to state and describe the environmental impact the proposed development would have on the surrounding areas.[6] (R. p. 1109:13-1111:2; R. pp. 2023-2025.) Appellants prepared

[6] To say that the Impact Assessment "had the effect of law" is misleading. (Resp. Br. at 6.) The Town of Mount Pleasant incorporated the document into the ordinance approving the application to rezone the property as a statement of the scope of the development's impact on the environment. It is the 1998 Property Report—and only this document—that creates the obligation to convey any amenities to the Assembly. (R. pp. 3022-3023.)

the Impact Assessment as part of their submission to the Town of Mount Pleasant in efforts to rezone the property that sought to develop as I'On. (R. p. 1110:16-1111:2.)

The Impact Assessment does not contain promises or assurances that any property will be owned by the Assembly. (R. p. 1107:25-1109:4.) The Impact Assessment and other documents prepared in the planning phase of the I'On development[7] do not create legal obligations to transfer real property. Rather, this document describes Appellants' plan of developing a community that provided homeowners with access to recreational facilities, including the marshfront and waterfront:

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

(R. p. 2025 (emphasis added).)

> There will be no private docks in the neighborhood.[8] Instead, I'On residents will be able to use seven community docks which will provide **access** to the marsh and waters of Hobcaw Creek for fishing and boating.

---

[7] Respondents cite to other documents created during the planning phase of I'On and prior to the commencement of development, including a 1999 DHEC application, and a public notice filed with the Army Corps of Engineers in 1999. Similar to the Impact Assessment, these documents only reference "providing community access" and "community docks" and do not suggest that the Assembly will own any particular property. (R. pp. 2042-2048; R. pp. 2177-2198; R. pp. 2304-2328.)

[8] The Impact Assessment also states: "All parks, docks and other community facilities will be administered by the property owners association **and private clubs**. (R. p. 2027 (emphasis added); R. p. 3024.) Appellants did not want I'On to have a few private docks built by individual homeowners. Instead, Appellants envisioned that I'On residents would have access to community docks and amenities. (R. p. 1011:5-15; R. p. 1178:7-25.)

(R. p. 2026 (emphasis added).)

Respondents insist these statements prove Appellants promised to convey ownership of "Amenity Property" to the Assembly. Access does not mean ownership. As Vince Graham explained, providing an amenity for the community to enjoy does not mean the amenity is intended to be *owned* by the community. (R. p. 1292:14-16.) Appellants' goal of providing I'On homeowners with access to recreational facilities has materialized handsomely—I'On homeowners enjoy linear parks that line the perimeters of 98% of the lakes, marshes and waters of the Hobcaw Creek in I'On. (R. p. 1153:21-1154:6.)

Respondents also contend that they relied on the Impact Assessment and other similar permitting materials in persisting with their understanding that Appellants would convey "Amenity Property" to the Assembly. This contradicts the facts and misconstrues the applicable law. Respondents admittedly did not rely on these documents. (R. pp. 3152-3153; R. p. 878:24-879:3; R. p. 974:22-976:7.) Further, Walbeck's purchase contract expressly incorporated the 1998 Property Report and also contained a merger clause that provided that he entered into his contract "without reliance on any warranties, statements or representations, either written or oral, express or implied, by Seller, or by an agent of Seller . . . ." (R. pp. 3164-3165.)

ii. *Marketing materials.*

The undated marketing brochures cited by Respondents do not state that any amenities will be owned by the Assembly. (R. pp. 2120-2131; R. pp. 2202-2205; R. pp. 2218-2219; R. pp. 2221-2228; and R. pp. 2293-2299.) For example, the "I'On Ponsbury Plan" describes the recreational facilities as follows:

RECREATIONAL FACILITIES

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

(R. p. 2129.)

Another brochure provides this description:

RECREATIONAL FACILITIES

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

(R. p. 2295.)

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

iii. 2008 – 2009 Email Communications.

The majority of the email communications cited by Respondents are irrelevant to the analysis of the limitations period because Respondents never received these communications and, thus, could not have relied on them. These emails include several internal emails exchanged between Tom Graham, Vince Graham, and I'On Company employee, Chad Besenfelder. (R. pp. 2855-2861; R. pp. 2910-2912; R. pp. 2916-2917; R. pp. 2925-2927; R. pp. 2929-2932; R. pp. 2939-2940; R. pp. 2946-2952; R. pp. 2954-2957; R. pp. 2958-2959.) The other emails include exchanges between these individuals and Mike Russo, the eventual purchaser of the Creek Club.

(R. pp. 2404-2605; R. pp. 2842; R. pp. 2962-2963.) It is undisputed that these emails were not seen by Respondents until discovery commenced in this litigation and accordingly could not have induced reliance on any of the representations contained therein. As a result, these communications are irrelevant to the question of when Respondents knew or should have known they might have claims against Appellants.

In late March of 2009, Chad Besenfelder informed the Assembly Board that that the I'On Company was preparing to deed a community dock to the Assembly but that the I'On Club would continue to operate the Creek Club because the potential sale fell through. (R. pp. 2236-2237; R. pp. 2918-2920; R. p. 2953.) This communication only mentions conveyance of a community dock and does not reference any intention on the part of Appellants to convey "Amenity Property." (R. pp. 2236-2237.) Significantly, by the time this email was sent, the statute of limitations had long since expired—almost eight years had passed since the Marshwalk and two community docks were conveyed the Assembly, approximately four years had passed since Vince Graham reminded the Assembly that the I'On Club owned the Creek Club dock and the Assembly received legal advice regarding the terms of the 2000 Easement, and, by this time, Respondents had received at least five proposed Assembly budgets with line items for renting the Creek Club and maintaining the community docks. (App. Br. at 28-33.)

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

The issue of whether Respondents had constructive notice of the existence of the 2000 Recreational Easement is preserved for this Court's review. (Resp. Br. at 28). The rules of issue preservation require that an issue be raised to and ruled upon

by the trial judge in order to preserve it for appellate review. *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) ("The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.").

Appellants presented evidence that the Recreational Easement was recorded (R. p. 3131; R. pp. 3616-3674), raised the issue of whether evidence of constructive notice had been presented at trial (R. p. 1500:3-1501:5), and the trial court ruled on the issue. (R. pp. 243-244.) The issue is preserved for the Court's review.

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

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

Respondents' argument that Appellants failed to preserve the issue of whether the Recreational Easement is perpetual warrants brief discussion. Respondents contend that Appellants raised this issue in the trial court, but that it was not ruled on.[9] During the first trial, the trial court denied Appellants' motion for summary judgment on this precise issue. (R. pp. 1768-1807; R. p. 559:3-567:23.) After the second trial, the trial court ruled that the document was void *ab initio*, and, at that point, the trial court need not have reached issues requiring construction of its terms. Nonetheless, the trial court did also find that Section 4.2 of the Easement limited it to

[9] On May 12, 2014, Appellants filed a separate suit against Respondents seeking a declaration that the Easement was perpetual. (R. pp. 199-312.) The trial court consolidated that action with the present action. (R. p. 18.)

a 30 year term, that an ambiguity therefore existed between this provision and the perpetual language, and that Section 4.2 superseded the perpetual language. (R. p. 72; R. p. 75.) This is precisely the holding Appellants seek to reverse on appeal. The trial court therefore did rule on the perpetuity of the Easement, and the issue is preserved for review. *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014).

The validity and perpetuity of the easement were significant issues for both sides at trial. Both parties asked the trial court via cross-motions to rule on the easement issues on directed verdict before submitting the case to the jury, and both motions were denied. (R. p. 1471:11-1473:11.) In closing argument, Respondents' counsel made reference after reference to the invalidity and 30-year term of the Easement. (R. p. 1550:18; R. p. 1551:11-16; R. p. 1552:1-4; R. p. 1564:1-1565:8; R. p. 1571:8-11; R. p. 1573:9-13.) If the Easement had been determined to be valid and perpetual, this would have significantly affected Respondents' measure of damages. (App. Br. at 39.) This Court should therefore hold that the Easement was valid and perpetual as a matter of law and remand for a new trial based on that ruling.

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

The fiduciary duty a developer may owe a homeowners association was not triggered by the facts of this case. Respondents suggest that Appellants' concession of any scenario in which a developer owes a fiduciary duty to a homeowners association necessarily means Appellants' arguments fail. Respondents' semantic argument misses the point entirely. The trial court erred in pronouncing that "a developer in

control of an association may not make decisions which benefit its own interest at the expense of the association and its members." (R. p. 48.) This Court should reverse.

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

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

In keeping with the limited recognition of a developer fiduciary duty, our courts have also applied this analysis to the relationship between a bank and a customer. If a bank undertakes to advise a customer as part of its services, the bank may be held to a fiduciary duty in the provision of such advice. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Burwell v. South Carolina Nat'l Bank,* 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); *Nat'l Loan & Exch. Bank v. New York Life Ins. Co.*, 149 S.C. 378, 147 S.E. 322, 323 (1929). Outside of that limited and specific circumstance, a bank and a customer have an arm's length creditor-debtor relationship that is not fiduciary in nature. This limited duty, even after it has been triggered, has not been held to mean that the bank can no longer raise fees it charges the customer for checking services or that the bank must provide loans on terms that are in the best interest of that customer. Even once a bank takes on a fiduciary role with respect to providing investment advice, the bank is not always a fiduciary.

---

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

Here, Appellants satisfied all fiduciary duties South Carolina has held a developer owes to a homeowners association. Appellants satisfied their fiduciary duty as a promoter of the Assembly in bringing about a self-governing, sophisticated homeowners association that had available reserves totaling $1.3 million by 2014. (R. pp. 3616-3674; R. p. 1308:3-8; R. p. 1303:9-25; R. p. 1304:5-9; R. p. 1346:17-1347:5; R. p. 1426:23-1427:3.) It was never contended that Appellants conveyed amenities to the Assembly in a state of disrepair or at a time when the Assembly did not have the financial resources to maintain them. Outside of these two specific contexts, a developer is not in a fiduciary relationship with a homeowners association. *Goddard*, 310 S.C. at 415, 426 S.E.2d at 832 (discussing the developer's duty as a promoter of the homeowners association); *Concerned Dunes West*, 349 S.C. at 257, 562 S.E.2d at 637 (discussing the developer's duty to convey amenities in good repair).

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

Even assuming South Carolina embraced the trial court's recognition of a broad fiduciary duty, no evidence demonstrates that Appellants actually exercised any control over the Assembly that would justify imposition of some constant, boundless fiduciary duty. By December of 2003, the Assembly Board was comprised of a majority of I'On homeowners with no association with the I'On Company. (R. p. 791:20-21; R. pp. 3429-3431.) No developer-appointed directors served on the Assembly Board after December of 2005.[12] (R. p. 791:22-792:8; R. pp. 3475-3477.) The Assembly's Finance Committee, which had primary responsibility for creating

[12] Both the trial court and Respondents conclude that the Assembly Board was "turned over" to the I'On homeowners in December of 2005. (R. p. 33; Resp. Br. at 5).

and circulating the Assembly's budget each year, never contained any developer appointees. (R. p. 1185:6-17; R. pp. 3429-3431.)

No evidence in the Record establishes that Appellants "continued to maintain influence and control of the day-to-day operations of the Assembly" after control of the Assembly was transferred to the I'On homeowners. (Resp. Br. 5-6.) Appellants have never exercised any of the limited veto rights the developer retained pursuant to I'On's covenants. (R. p. 641:9-15; R. p. 792:18-23.) *See Goddard*, 310 S.C. at 413, 426 S.E.2d at 832 (rejecting the argument that a developer had a fiduciary duty based on its control over the homeowners' association board because the developer refrained from exercising such control). Further, Deborah Bedell, the President of the Assembly Board, did not believe that Appellants controlled the Assembly Board.[13] (R. p. 1346:17-1347:15.) Bedell further conceded that *no* decision of the Assembly Board has been impacted by Appellants' veto power since her involvement with the Board. (R. p. 1426:23-1427:3.)

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

Respondents' suggestion that Appellants failed to preserve the issue of whether Respondents' arguments supported only a contractual theory of liability as opposed to a claim for fiduciary duty is without merit. (Resp. Br. at 28.) Appellants pursued this argument throughout the trial as the trial court continued to consider whether to recognize a fiduciary duty based on the facts presented. (R. p. 1035:8-

[13] Respondents cite the 2014 appointment of Chad Besenfelder to the Assembly Board as evidence of Appellants' exercise of control. Bedell concedes, however, that the Board excludes Besenfelder from participating in Board decisions that would potentially be adverse to the I'On Company and that Besenfelder has not affected any decisions that relate to dealings with the I'On Company. (R. p. 1345:2-15.)

1036:9; R. p. 1063:22-1066:9; R. p. 1445:23-25; R. pp. 1820-1854.) Appellants renewed the argument in their JNOV motion. (R. p. 1940.) The trial court ultimately ruled that "by failing to convey the community properties *as promised* to the Assembly, the Developers failed to act in the best interest of the Assembly, and therefore, breached at least one of the fiduciary duties it owed the Assembly." (R. p. 49 (emphasis in original).) This issue was raised to and ruled upon by the trial court. *See Hill v. S.C. Dep't of Health and Env. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("[T]o preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court.").

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

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

Respondents discuss the close affiliation Appellants had in the development of I'On as support for the trial court's ruling. There is nothing improper about dividing businesses into multiple corporations for the purpose of limiting liability. Regardless of whether I'On was developed by a group of affiliated corporate entities that shared

similar names, principals and employees, Respondents failed to demonstrate, and the trial court did not require, any showing that any unfairness would result if Appellants' corporate form was not disregarded.

It is well-established South Carolina law that courts will disregard the corporate form only upon the showing of some equitable justification. *See Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) ("[A] corporation will be looked upon as a legal entity until sufficient reason to the contrary appears."); *see also Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984) (requiring an element of injustice or fundamental unfairness before the corporate form is disregarded). The trial court failed to require the demonstration of any such equitable justification before Appellants were found to be amalgamated. (R. p. 59.) This Court should grant Appellants a new trial.

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

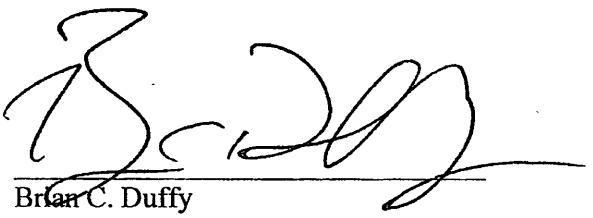
Appellants' Initial Brief argues at some length that the greater weight of authority supports the proposition that the anti-fraud provisions of ILSA require proof of actual reliance, and that the "fraud-on-the-market" theory justifying a presumption of reliance only applies in the securities law context. (App. Br. at 60-63.) Respondents cite a single, twenty-four-year-old federal district court case, *Gibbes v. Rose Hill Plantation Dev't. Co.*, 794 F. Supp. 1327, 1334 (D.S.C. 1992), which Appellants distinguish in their brief, as "prevailing Fourth Circuit precedent" opposing this argument. (Resp. Br. at 62.) This Court should therefore reverse on the ground that actual reliance under ILSA was required for Walbeck to prevail.

Respondents further argue that the trial court found that Walbeck actually

relied on Appellants' misrepresentations. Critically, the trial court did *not* make such a finding with respect to the ILSA claim, which calls for a different analysis. The trial court found that Walbeck's common-law negligent misrepresentation claim was supported by actual reliance on certain documents and statements. (R. pp. 58-59.) ILSA requires a different analysis, focused on the actual language of the property report, and under that analysis, no actual reliance was shown. (App. Br. at 63-65.) This Court should therefore reverse the trial court and enter judgment for Appellants on Walbeck's ILSA claim.

CONCLUSION

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



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

March 21, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED
MAR 23 2016
SC Court of Appeals

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

CERTIFICATE OF COUNSEL

I, Brian C. Duffy, certify that the Final Brief and Final Reply Brief of Appellants comply with Rule 211(b) of the South Carolina Rules of Appellate Practice.

Brian C. Duffy
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)

March 22, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

RECEIVED
MAR 23 2016
SC Court of Appeals

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

PROOF OF SERVICE

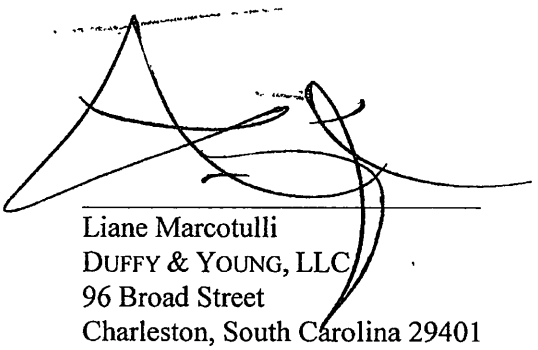
I, Liane Marcotulli, paralegal for Duffy & Young, LLC, certify that I have served the **FINAL REPLY BRIEF OF APPELLANTS** on Respondents on March 22, 2016 by hand delivery to their attorneys of record as shown below:

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

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

Timothy W. Bouch, Esq.
Yancey A. McLeod, III, Esq.
Leath Bouch & Seekings
92 Broad Street
Charleston, SC 29401
Phone: 843-937-8811

Attorneys for Respondent I'On Assembly, Inc.



Liane Marcotulli
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)
Paralegal

March 22, 2016
Charleston, South Carolina

RECEIVED
APR 20 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

Final Brief of Respondents, Brad J. Walbeck and Lea Ann Adkins, Individually and Derivatively on Behalf of I'On Assembly, Inc.

Justin O'Toole Lucey, Esquire
SC Bar No.: 15438
Joshua F. Evans, Esquire
SC Bar No.: 77448
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mount Pleasant, South Carolina 29464
(843) 849-8400
(843) 849-8406 (fax)
jlucey@lucey-law.com
jevans@lucey-law.com
Attorneys for the Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT OF THE ISSUES IN THE CASE 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 4

A. The Development of the I'On Community and Amenities 4

B. The Creation and Administration of the I'On Homeowners Association 5

C. Appellants Obligated Themselves to Convey the Amenity Property to the Assembly through Representations During the Planning and Development Phases of the I'On Community 6

1. The Impact Assessment 7

2. The 1998 Property Report 7

3. The Dock Application and Related Submittals 8

4. The I'On Plans and Plats 9

D. The Appellants Obligated Themselves to Convey the Amenity Property to the Assembly through Representations Made to Purchasers of Lots in the I'On Community 10

1. The Marketing Campaign 10

2. Representations of Real Estate Agents on Behalf of the Appellants 11

3. The 1998 Property Report was Distributed to Purchasers 12

4. The I'On Purchase Agreements 12

E. The Appellants Had Full Knowledge of Their Obligation to Convey the Amenity Property to the Assembly and its Members 13

F. The Appellants Breached Their Obligation to the Assembly and Its Members by Failing to Convey the Amenity Property 14

1. Initial Altering of Usage Rights to the Amenity Property 14

2. The 2000 Recreational Easement and Subsequent Internal Transfer 15

3. The Amendment of the 1998 Property Report 15

4. Sale of the Amenity Property to Buyers 16

5. Attempted Bait and Switch by the Appellants 18

G. The Assembly Initially Failed to Act in the Interest Best Interest of the Members, as it Continued to be Under the Control of the Appellants 19

H. The Assembly Eventually Settled with Buyers for a Portion of the Amenity Property 19

I. Orders on Appeal 20

1. Order Denying Appellants' JNOV Motion 20

a. Walbeck and Adkins' Satisfaction of Rule 23's Derivative Action Requirements 21

b. The Statute of Limitations Did Not Bar Respondents' Claims 21

c. Appellants Owed a Duty to Act in the Best Interest of the Assembly and its Members 22

d. Any Legal Distinction among Appellants' Corporate Interests is Blurred. 23

e. Walbeck's Reliance on Appellants' Amenity-Related Representations 24

2. Order Denying I'On Company's Petition for Attorneys' Fees 25

3. The Invalidity of the 2000 Recreational Easement 26

4. Order Granting Walbeck's Fee Petition 26

5. Order Granting Respondents' Directed Verdict Motion 27

STANDARD OF REVIEW 27

ARGUMENT 29

I. This Court Must Affirm the Trial Court's Rulings because the Trial Court's Findings are Supported by the Record and are not Controlled by any Error of Law. 30

II. The Trial Court did not Err in Finding Respondents Properly Maintained a Derivative Action on Behalf of the Assembly Because The Record Demonstrates Respondents Fulfilled the Derivative Action Requirements Set Forth in Rule 23(B), SCRCP 31

A. The Trial Court Did Not Err by Exercising the Discretion Afforded it in Finding Respondents Satisfied Rule 23(b)'s Demand and Futility Requirements 32

B. The Trial Court Did Not Err by Exercising the Discretion Afforded it in Finding Respondents Satisfied Rule 23(b)'s Adequacy Considerations 34

C. The Jury Rendered its Verdict in Favor of the Assembly on the Same Claim Respondents Alleged Since the Beginning of the Underlying Action 35

D. The Properness of Respondents' Derivative Action is Irrelevant Because the Assembly was Realigned as a Named Plaintiff and the Jury Found in its Favor 36

III. The Trial Court Did Not Err in Denying Appellants' Motion for JNOV based upon the Statute of Limitations or Submitting the Date of Discovery Question to the Jury 37

A. The Statute of Limitations was Properly Submitted to the Jury Given the Question of Fact as to when the Respondents Discovered Their Claims Against Appellants 37

B. The Jury Determined Respondents "Discovered" Their Claims on August 5, 2009 and Evidence in the Record Supports the Jury's Conclusion 38

C. Because Evidence in the Record Supports the Jury's Conclusion, the Trial Court Did Not Err in Denying Appellants' JNOV Motion Based Upon the Statute of Limitations 39

D. The Trial Court's Equitable Tolling Ruling Does Not Affect the Jury's Verdict as to the Statute of Limitations 39

E. Based Upon the Evidence Presented, the Jury Properly Determined the Purchase Contracts at Issue Were "Sealed Instruments," and thus, a 20-Year Statute of Limitations Applies to Walbeck's Breach of Contract Claim 40

IV. The Trial Court Did Not Err in Finding the Attempted 2000 Recreational Easement is Invalid and Void *Ab Initio* 41

A. Evidence in the Record Supports the Invalidity of the Easement 41

B. The After-Acquired Title Doctrine Does Not Apply in South Carolina and Cannot be Invoked Under the Facts of this Case 43

C. Whether the Easement is Perpetual or Subject to a 30-Year Term is Mooted by a Finding That the Easement is Void *Ab Initio* 44

D. The "Perpetual" Nature of the Easement for the use of the Boating Facilities is Unpreserved 44

E. The Intent of the Grantor was to Limit the Easement to a 30-Year Term 45

V. The Trial Court Correctly Denied the JNOV Motion because South Carolina Law Clearly Recognizes a Fiduciary's Duty to Act in the Best Interest of its Subjects and the Jury's Findings are Reasonably Supported by the Record. 46

A. Appellants' Concede the Existence of a Fiduciary Relationship and South Carolina Law Provides Anyone Acting in Such a Relationship (Including Developers) Cannot Use this Relationship to Benefit Personal Interest 46

B. Evidence in the Record Supports the Jury's Verdict Finding that Appellants Breached Their Fiduciary Duties 48

VI. The Trial Court Did Not Err in Granting Respondents' Motion for Directed Verdict on Abuse of Process 49

A. The Trial Court Correctly Found the Appellants Presented No Evidence Which Legitimately Established a Claim for Abuse of Process . 50

VII. The Trial Court Properly Acted Within its Discretion in Awarding Respondent Walbeck Attorneys' Fees and the Amount Awarded is Reasonable .. 51

A. Walbeck is Entitled to Recover Attorneys' Fees on his ILSA Claim Under South Carolina Law 52

B. Walbeck is Entitled an Award of Reasonable Attorneys' Fees Under His ILSA Claim Despite His Award of Nominal Damages 53

C. The Balance of the O'Connor Factors Weighs in Favor of Walbeck, and thus, Walbeck is Entitled an Award of Attorneys' Fees, Interest, and Costs 56

D. The Reasonableness of Walbeck's Fee Award is Supported by The Record 58

VIII. The Trial Court Did Not Err in Denying I'On Company's Petition For Attorneys' Fees Because the Record Reflects Respondent Adkins Qualifies as a Prevailing Party 60

IX. The Trial Court Did Not Err in Finding the Appellants were Amalgamated Given the Overwhelming Evidence in the Record Indicates Appellants Operated Their Companies as One in of the Same 61

X. Walbeck's ILSA Claim Does Not Fail as a Matter of Law because Federal Law Clearly Indicates Actual Reliance is not Required, and Further, the Trial Court Found Walbeck Actually Relied 63

XI. Appellants Other Factual Arguments and Distortions Similarly Fail 64

CONCLUSION 66

APPENDIX A 68

TABLE OF AUTHORITIES

Cases

Austin v. Stokes-Craven Holding Corp.,
387 S.C. 22, 64, 691 S.E.2d 135, 157 (2010) 52, 53
Austin v. Stokes-Craven Holding Corp.,
406 S.C. 187, 193, 750 S.E.2d 78, 81 (2013) 52
Baron Data Systems, Inc. v. Loter,
297 S.C. 382, 377 S.E.2d 296 (1989) 58
Blumberg v. Nealco, Inc.,
310 S.C. 492, 427 S.E2d 659 (1993) 58
Brandau v. Kansas,
168 F.3d 1179, 1182 (10th Cir. 1999) 56
Brown v. Finger,
240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) 38
Burns v. Universal Health Services, Inc.,
361 S.C. 221, 231-33, 603 S.E.2d 605, 611 (Ct. App. 2004) 29, 31
Buss v. Quigg,
91 F. App'x 759, 761 (3rd Cir. 2004) 54
Cabrera v. Jakabovitz,
24 F.3d 372 (2nd Cir. 1994) 55, 56
Carolina First Corp. v. Whittle,
343 S.C. 176, 192, 539 S.E.2d 402, 411 (Ct. App. 2000) 32, 33
Cartwright v. Stamper,
7 F.3d 106, 109-10 (7th Cir. 1993) 54
Clark v. Sims,
28 F.3d 420, 425 (4th Cir. 1994) 53
Collins v. Collins,
239 S.C. 170, 122 S.E.2d 1 (1961) 58
Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.,
349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002) 47, 48
Corbin v. Carlin,
366 S.C. 187, 192-93, 620 S.E.2d 745 (Ct. App. 2005) 43
Curcio v. Caterpillar, Inc.,
355 S.C. 316, 320 585 S.E.2d 272, 274 (2003) 28
Darden v. Witham,
263 S.C. 183, 209 S.E.2d 42 (1974) 58
Davis v. Greenwood Sch. Dist.
50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005) 47
Dedes v. Strickland,
307 S.C. 155, 414 S.E.2d 134 (1992) 58

Díaz-Rivera v. Rivera-Rodríguez,
377 F.3d 119, 125 (1st Cir. 2004) 54
EFCO Corp. v. Renaissance on Charleston Harbor, LLC,
370 S.C. 612, 617-618, 635 S.E.2d 922, 925 (Ct. App. 2006) 61
Ellis v. Davidson,
358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004) 47
Erickson v. Jones Street Publishers, LLC,
368 S.C. 444, 464, 629 S.E.2d 663-64 (2006) 28
Farrar v. Hobby,
506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) 53, 54, 55, 56
Fishburne v. Short,
268 S.C. 546, 550, 235 S.E.2d 118, 120 (1977) 40, 51, 64
Food Lion, Inc. v. United Food & Commer. Workers Int'l Union,
351 S.C. 65, 71, 567 S.E.2d 251, 253 (Ct. App. 2002) 50, 51
Gastineau v. Murphy,
331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998) 39
Gibbes v. Rose Hill Plantation Dev't Co.,
794 F. Supp. 1327, 1334 (D.S.C. 1992) 63, 65
Glasscock, Inc. v. U.S. Fidelity and Guar. Co.,
348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) 35
Goddard v. Fairways Dev. Gen. P'ship,
310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) 47, 48
Guider v. Churpeyes, Inc.,
370 S.C. 424, 429, 635 S.E.2d 562, 565 (Ct. App. 2006) 50
Guy v. Guy,
2008 M.E.141, 955 A.2d 212, 215 (2008) 42
Heath v. County of Aiken,
302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990) 60
Hendricks v. Clemson Univ.,
353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003) 47, 48
Hidden Oaks Ltd. v.
City of Austin, 138 F.3d 1036, 1052-53 (5th Cir. 1998) 54
Hildebrand v. Lewis,
281 F. Supp. 2d 837, 844-45 (E.D. Va. 2003) 36
Horry County v. Laychur,
315 S.C. 364, 434 S.E.2d 259 (1993) 29
Hotz v. Minyard,
304 S.C. 225, 231, 403 S.E.2d 634, 638 (1991) 36
Indianapolis v. Chase Nat'l Bank,
314 U.S. at 69 (1941) 36

Island Car Wash, Inc. v. Norris,
292 S.C. 595, 599 358 S.E.2d 150, 152 (Ct. App. 1987) 47, 48
Jama v. Esmor Correctional Services, Inc.,
577. F3d 169 (3rd Cir. 2009) 56
Jones v. Lockhart,
29 F.3d 422, 423-24 (8th Cir. 1994) 54
Kelley v. Snyder,
396 S.C. 564, 571, 722 S.E.2d 813, 817 (Ct. App. 2012) 41
Kirkland v. Allcraft Steel Co.,
329 S.C. 389, 392-93, 496 S.E.2d 624, 626 (1998) 41
Koster v. Lumbermens Mutual Casualty,
330 U.S. 518, 523, (1947) 36
Liddy v. Urbanek,
707 F.2d 1222, 1223 (11th Cir.1983) 36
Maercker Point Villas Condo. Assoc. v. Szymski,
275 Ill. App. 3d 481, 655 N.E.2d 1192 (1995) 47
Magnolia North Property Owners' Association versus Heritage Communities, Inc.,
397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) 47, 61, 62
Managers of Weathersfield Condo. Assoc. v. Schaumburg Ltd. Part.,
307 Ill. App. 3d 614, 717 N.E.2d 429 (1999) 47
Mercer v. Duke University (Mercer II),
50 Fed. Appx. 643, 646 (4th Cir. 2002) 53, 55
Mercer v. Duke University (Mercer III),
401 F.3d 199, 206-09 (4th Cir. 2005) 53, 54, 55
Millvale Plantation, LLC v. Carrison Family Ltd. Part.,
401 S.C. 166, 173, 736 S.E.2d 286, 290 (Ct. App. 2012) 45, 46
Mitchell v. Hawley,
83 U.S. 544, 550 (1872) 42
Moore v. Reynolds,
285 S.C. 574, 757 (1985) 41
Morales v. City of San Rafael,
96 F.3d 359, 361 (9th Cir. 1996) 54, 56
Murray v. City of Onawa,
323 F.3d 616, 619 (8th Cir. 2003) 56
Noronha v. Stewart,
199 Cal. App. 3d 485, 491, 245 Cal. Rptr. 94 (Cal. Ct. App. 2d Dist. 1988) 44
O'Shea v. Lesser,
308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992) 47
Peoples Fed. Sav. & Loan Ass'n v. Myrtle beach Golf & Yacht Club,
310 S.C. 132, 148, 425 S.E.2d 764, 775 (Ct. App. 1992) 62

Phelps v. Hamilton,
120 F.3d 1126, 1131-32 (10th Cir. 1997) 54
Reilly Mortgage Group, Inc. v. Mount Vernon Savings and Loan Assoc., 568 F. Supp. 1067, 1073 (E.D. Va. 1983) 36
Richard Gill Co. v. Jackson's Landing Owners' Ass'n,
758 S.W.2d 921 (Tex. App. 1988) 47
Richardson v. Atlantic Coat Lumber Corp.,
93 S.C. 254, 75 S.E. 371 (1912) 43
S.C.DOT v. M & T Enters. of Mt. Pleasant, LLC,
379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008) 44
Seabrook Island Property Owners' Ass'n v. Berger,
365 S.C. 234, 240, 616 S.E.2d 431, 434-45 (Ct. App. 2005) 28
Sheppard v. Riverview Nursing Center, Inc.,
88 F.3d 1332, 1336 (4th Cir. 1996) 56
Simmons v. Tuomey Reg'l Med. Ctr.,
330 S.C. 115, 118 n.1, 498 S.E.2d 408, 409 n.1 (Ct. App. 1998) 44
Sims v. Giles,
343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001) 28
Small v. Springs Industries,
300 S.C. 481, 487, 388 S.E.2d 808, 812 (1990) 48
Staubes v. City of Folly Beach,
339 S.C 406, 412, 529 S.E.2d 543, 546 (2000) 44, 45
Strange v. S. C. Dep't of Highways & Pub. Transp.,
314 S.C. 427, 445 S.E.2d 439 (1994) 39
Swinton Creek Nursery v. Edisto Farm Credit. ACA,
334 S.C. 469, 514 S.E.2d 126 (1999) 28, 51
Welch v. Epstein,
342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) 28, 34
Wilson v. Landstrom,
281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) 43
Wogan v. Kunze,
366 S.C. 583, 605, 623 S.E.2d 107, 119 (Ct. App. 2005) 47

Statutes

15 U.S.C. § 1709 (2012) 52
S.C. Code § 19-1-160 (1976) 41

STATEMENT OF THE ISSUES IN THE CASE

Is there any evidence to support the jury's verdict and the Court's rulings in this matter?

STATEMENT OF THE CASE[1]

This appeal arises out of a complex case tried before a jury in the Charleston County Court of Common Pleas concerning waterfront community amenities the Appellants[2] obligated themselves to convey to the I'On Assembly, Inc.[3] (the homeowners' association) and its members (I'On homeowners). Despite Appellants' repeated representations and promises to convey the waterfront amenities free and clear of all encumbrances and to maintain a public waterfront, the Appellants entered into talks in mid-2008 to sell the waterfront amenities to an unaffiliated, third-party for profit.[4] Upon learning of the potential sale, several Assembly members, including Respondents,[5] made demands upon the Assembly to secure the rights to the waterfront amenities. Thereafter, Buyers allegedly withdrew their offer to purchase the waterfront amenities. Subsequently, Appellants expressly represented to Assembly members that they were finalizing the paperwork necessary to transfer the waterfront amenities to the Assembly.

Unbeknownst to the Assembly or its members, Appellants and Buyers immediately resumed negotiations and reached a contract to sell the waterfront amenities to an outsider.

---

[1] Many of the exhibits entered in the underlying trial by Plaintiffs/Respondents and Defendants/Appellants are duplicative. In an effort to reduce the size of the Record on Appeal, counsel for Appellants and Respondents removed one of the duplicates and cite to the other exhibit which is contained in the Record on Appeal. Respondents provide a chart in "Appendix A" to this brief outlining the duplicate exhibits removed with cross-references to exhibits included in the Record on Appeal.

[2] Appellants consist of the following developers of the I'On: 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 (hereinafter collectively referred to as "Appellants").

[3] The I'On Assembly is hereinafter referred to as "Assembly".

[4] This third-party was previously a defendant in this case and is hereinafter referred to as "Buyers" or "Civitas".

[5] "Respondents" herein are Brad Walbeck ("Walbeck") and Lee Ann Adkins ("Adkins"), individually and derivatively on behalf of the Assembly. The Assembly, is also a Respondent.

Appellants' pending sale of the waterfront amenities came to light in late-July 2009, and the sale took place days later, on August 5, 2009. Following unsuccessful demands again made by Respondents and the Assembly's continued inability to secure the waterfront amenities, Respondent Walbeck initiated the underlying action against Appellants on December 22, 2010.[6] Respondents subsequently amended their Initial Complaint on March 8, 2011[7] and February 7, 2012[8], respectively. After the filing of Respondents' Amended Complaint, the Appellants moved for the dismissal of certain claims and/or parties, arguing that the statute of limitations had run; that they did not have a fiduciary duty to convey the waterfront amenities; and that Walbeck failed to satisfy the derivative requirements of Rule 23, SCRCP. (R. pp. 1763-1764). The Appellants' Motion to Dismiss was denied;[9] and, thereafter, the Appellants filed a Motion for Summary Judgment, which was also denied.[10]

Immediately prior to a date certain, February 18, 2013 trial, all parties settled in two, separate agreements. Buyers later abdicated their settlement agreement, which led to the collapse of the parallel settlement agreement involving Appellants. Therefore, the case was reinstated; Respondents filed their Third Amended Complaint on January 2, 2014; [11] and the matter was reset for trial on January 14, 2014.

---

[6] In initiating the underlying action, Respondent Walbeck asserted claims both on behalf of himself, and derivatively, on behalf of the Assembly. The initial claims asserted included violation of the Interstate Land Sales Full Disclosure Act ("ILSA"), breach of contract, breach of fiduciary duty, fraud/constructive fraud, negligent misrepresentation, civil conspiracy, unfair trade practices, unjust enrichment, promissory estoppel, veil piercing/alter ego, and tortious interference with contract. (R. pp. 117-128).

[7] In the Amended Complaint, Walbeck asserted essentially the same claims as in the Initial Complaint, but I'On Real Estate, Inc. and Mike Russo (principal of Buyers) were added as additional Defendants. (R. pp. 129-140).

[8] In the Second Amended Complaint, Walbeck joined Lee Ann Adkins as a Plaintiff to the action and asserted claims on behalf of themselves and, derivatively, on behalf of the I'On Assembly. (R. pp. 151-167).

[9] (R. pp. 9-10).

[10] (R. pp. 11-12).

[11] While Respondents' Third Amended Complaint included an additional cause of action for aiding and abetting, the other claims asserted by Respondents in their previously amended complaint remained essentially the same. (R. pp. 168-185).

On January 13, 2014, after the jury was struck, Respondents reached a settlement with Buyers. (R. pp. 13-15). On January 14, 2014, the matter proceeded to trial; but, ended in a mistrial on January 17, 2014. (R. p. 479, lines 22-24). As a part of the settlement agreement, the Assembly agreed to support Respondents' claims against Appellants, and consequently, was realigned as a named plaintiff. (R. pp. 16-17). On May 12, 2014, Appellants, The I'On Company and the I'On Club, filed a declaratory judgment action against Respondents seeking a declaration that an agreement, executed in 2000, which included two easements, was valid. (R. pp. 199-312). On June 20, 2014, the Trial Court consolidated the declaratory judgment action with the original action. (R. p. 18).

On June 16, 2014, Respondents filed a Fourth Amended Complaint,[12] and the case was re-tried beginning Tuesday, July 29, 2014 and ending Friday, August 1, 2014.[13]

On August 1, 2014, the jury returned a verdict in Respondents' favor and awarded damages in favor of Walbeck on the following causes of action: (a) Violation of the ILSA; (b) Negligent Misrepresentation; and (c) Breach of Contract. (R. pp. 1855-1862). In addition, the jury returned a verdict and awarded damages in favor of the Derivative Plaintiffs on behalf of the Assembly on the following causes of action: (a) Breach of Fiduciary Duty; (b) Negligent Misrepresentation; and (c) Breach of Contract. *Id.* The jury expressly found Appellants' conduct was *reckless, willful and/or wanton. Id.* Subsequently, Walbeck elected to recover the $20,000 in actual damages awarded to him under the negligent misrepresentation claim, while

[12] (R. pp. 313-329).

[13] At the close of the Respondents' case, the Trial Court denied the Appellants' Motion for Directed Verdict. (R. p. 1063, line 16 – p. 1066, line 15). Further, at the close of the Appellants' case, the Trial Court directed a verdict in favor of the Respondents as to the Appellants' counterclaim for abuse of process. (R. p. 1466, line 22 – p. 1469:16). Finally, at the close of evidence, the Trial Court denied the Appellants' renewed Motion for Directed Verdict. (R. p. 1473, lines 9-11).

the Derivative Assembly Plaintiffs elected to recover the $1,750,000 in actual damages awarded to it under the breach of fiduciary duty claim. (R. pp. 19-20).

Following the verdict, Appellants moved for judgment notwithstanding the verdict, or, in the alternative, a new trial. (R. pp. 1863-1868). In addition, Appellant, the I'On Company, petitioned for attorneys' fees and costs. (R. pp. 1910-1914). Respondents also filed post-trial motions as follows: Walbeck petitioned for attorneys' fees and costs; and Respondents moved for Judgment as to the validity of the 2000 recreational easement. (R. pp. 1869-1898; R. pp. 1903-1909).

On June 26, 2015, the Trial Court issued Orders: (a) denying Adkins' petition for unjust enrichment; (b) denying the Appellants' motion for judgment notwithstanding the verdict/new trial; (c) denying the I'On Company's petition for attorneys' fees; (d) declaring the 2000 recreational easement void and invalid; and (e) awarding Walbeck attorneys' fees and costs in the amount of $225,000; and (f) awarding sanctions in the amount of $23,337.26. (R. pp. 64-69; R. pp. 21-63; R. pp. 79-83; R. pp. 70-78; R. pp. 84-100; R. pp. 101-115).

On July 20, 2015, Appellants filed their Notice of Appeal.

STATEMENT OF THE FACTS

A. The Development of the I'On Community and Amenities

The I'On community in Mt. Pleasant, South Carolina was developed and operated by The I'On Company, LLC, a family owned business consisting of Tom Graham and Vince Graham. (R. p. 624, lines 14-21; R. p. 625, lines 20-23; R. p. 681, lines 1-18; R. p. 1109, line 5- p. 1111, line 5). During the initial planning phase of the I'On community, The I'On Company also established several other "I'On" entities that were involved in the various aspects of the development of the I'On community, including planning, financing, marketing, and execution, as

follows: I'On Realty, LLC was established as the listing and sales agent for the I'On home sites on behalf of the I'On Company;[14]and I'On Club, LLC was established to own and operate certain neighborhood amenities, including the pool and tennis club, as a private, members-only club.[15] (R. p. 681, line 22 - p. 682, line 2; R. p. 769, lines 1-8; R. p. 774, lines 12-18). The I'On Company, LLC served as the manager for both I'On Realty and I'On Club.[16] (R. p. 768, lines 1-5; R. p. 828, lines 12-16).

The development of the I'On community was based upon a "grand plan" to develop and market the I'On community as an upscale, residential neighborhood that featured many public, common areas as opposed to only private, individual home sites. (R. p. 2607). The I'On community was to include the waterfront amenities known as "Creekside Park" and the "Community Dock." The Community Dock included a boat ramp and associated parking, all of which are located along the deep waters of Hobcaw Creek on a specific civic lot within the I'On community known as "CV6." In addition, the waterfront amenities were to include an overflow parking facility, which is located on another civic lot within I'On known as "CV5." (The waterfront amenities, CV5 and CV6 are hereinafter collectively referred to as the "Amenity Property").

B. <u>The Creation and Administration of the I'On Homeowners Association</u>

The I'On Company created the Assembly in 1998. (R. p. 3028). The Assembly was to serve the I'On community through duties set forth in the Covenants, Conditions, and Restrictions filed on February 9, 1998. (R. pp. 3616-3674). As set forth therein, all property owners in the I'On community are members of the Assembly. (R. p. 3624; R. p. 3028).

---

[14] I'On Realty was a wholly owned subsidiary of the I'On Company. (R. p. 768, lines 1-5).
[15] I'On Club was a wholly-owned subsidiary of The I'On Company, LLC. (R. p. 828, lines 12-16).
[16] Collectively referred to hereinafter as "Appellants".

The Assembly Board was not "turned over" to the I'On property owners until December 2005. (R. pp. 2216-2217; R. pp. 3475-3477). Prior to the "turnover," the Appellants, by and through the I'On Company, remained in control of the Assembly and directed all aspects of the development of the I'On community. (R. pp. 3616-3674; R. p. 639, line 13- p. 641, line 5). However, the evidence demonstrates that not only did the Appellants direct, manage, and control all aspects of the I'On community through December 2005, but they also *continued* to maintain influence and control over the day-to-day operations of the Assembly, even *after* the control of the Assembly had been "transferred" to the I'On property owners; the trial testimony of Tom Graham confirmed that: (1) the Appellants retain and exercise their power to reinstate their own agents as members of the Assembly Board; and (2) the Appellants retain the absolute power to veto any Board action. (R. p. 639, line 13- p. 643, line 5).

C. Appellants Obligated Themselves to Convey the Amenity Property to the Assembly through Representations During the Planning and Development Phases of the I'On Community

At the outset of the planning and development of the I'On community, the Appellants made it crystal clear that their intention was to convey the Amenity Property, free and clear of all encumbrances, and at no cost to the Assembly and its members. This clear intention and obligation to convey the Amenity Property has been borne out in the evidence presented at trial through the Appellants' very own documents, which they drafted and executed in conjunction with the approval process for the planning and development of the I'On Community. (R. pp. 2999-3034; R. pp. 2019-2039; R. pp. 2042-2048; R. pp. 2049-2050; R. pp. 2177-2196; R. pp. 2918-2920; R. p. 2921; R. pp. 2954-2957).

1. The Impact Assessment

For example, in January of 2007, The Graham Company[17] filed an Impact Assessment with the Town of Mt. Pleasant, as a part of the planning phase for the I'On Community. The Impact Assessment provided as follows:

> There will be no private docks in the neighborhood. Instead, I'On residents will be able to use seven community docks which will provide access to the marsh and waters of Hobcaw Creek of fishing and boating. These docks will range from small crabbing docks to a larger community dock reminiscent of the dock pavilion at Newpoint or at the Sea Island Yacht Club in Rockville.

(R. p. 2026).

Notably, the Impact Assessment included a description of the Community Dock at Newpoint, which contained a boat landing and gazebo, similar to what was to be constructed on the Amenity Property. (R. pp. 2019-2039). The Town of Mt. Pleasant subsequently approved the developmental plans for the I'On community. As the Impact Assessment was part of the approved plans, it was incorporated by the Ordinance permitting the development of the neighborhood. (R. pp. 2117-2119; R. p. 826, lines 2-9). Therefore, the Impact Assessment had the effect of law.

2. The 1998 Property Report

Similarly, as a part of the planning and early development phases of the I'On community, the Appellants were required by the Interstate Land Sales Act to draft a Property Report to inform potential purchasers of its plans for I'On. The November 3, 1998 Property Report, drafted by the Appellants, pursuant to the ILSA requirement, contained various representations regarding the I'On community amenities. (R. pp. 2999-3034).

---

[17] The original development work for I'On was done in the name of The Graham Company. The Graham Company subsequently transferred the developmental aspect of the project to the I'On Company. (R. p. 1109, line 5- p. 1110, line 5).

The Property Report included a "Recreational Facilities" chart, which provided for a "Community Dock" and "Creekside Park" that would be conveyed to the Assembly at no cost during Phase II of the development process. (R. p. 3022). Further, the Property Report clearly separated the "Creekside Park" from the "sidewalks, paths, and trails" of the community. (R. p. 3022). This specific reference to "Creekside Park" indicated a distinction of the amenities that were to be transferred to the Assembly.[18] (R. p. 3022). Moreover, the Property Report described "major" characteristics of the I'On community, which included "300 feet of deep water frontage along Hobcaw Creek." (R. p. 3025). The Property Report further stated, "rather than subdividing into lots," CV6 was planned as "parks" that would serve "as an amenity for the residents." (R. p. 3011).

Further, as evidenced through Walbeck's testimony at trial, the Appellants and/or their agents represented the Community Dock and Creekside Park were located on CV6. (R. p. 956, line 15- p. 958, line 2). Moreover, the Appellants and/or their agents represented that the "300 feet of deep water frontage" on Hobcaw Creek would remain unencumbered, and thus, easily accessible to all I'On residents. (R. p. 959, lines 6-12).

3. The Dock Application and Related Submittals

Between June and October 1999, the Appellants submitted plans, applications, and letters to DHEC, through Newkirk Environmental, Inc., as a part of the planning and development phases of the I'On community. These submittals contain representations that CV6 and the Community Dock would be owned by the Assembly for the common, recreational use of its members, and that no docks in the I'On community would be private. (R. pp. 2304-2328). The Dock Application stated: "The purpose of the proposed structures (the docks) is for the common,

[18] *See,* Section F5 "The Attempted Bait and Switch by Appellants", *infra.*

recreational use of residents within the I'On community." (R. p. 2311). A letter to the Army Corps of Engineers from the Appellants, dated October 28, 1999, stated as follows:

> It is important to note that I'On's master plan does not provide for individual docks. The six docks requested by The I'On Company are for the use and enjoyment of the I'On community and are proposed in lieu of private docks along approximately 2,600 linear feet of waterfront.

(R. pp. 2049-2050) (emphasis added).

Importantly, the Dock Plan submitted by the Appellants, and later approved by DHEC, the Army Corps of Engineers, and a host of other governmental authorities, revealed the principal I'On dock as being the *only* dock with a boat ramp that sits on the *only* 300 feet of deep water frontage along Hobcaw Creek. (R. pp. 2177-2196; R. p. 2921). This principal dock and Creekside Park were clearly located on CV6. Moreover, the Dock Plan clearly sets forth the land adjacent to the dock as owned by the "HOA." (R. pp. 2177-2196).

4. The I'On Plans and Plats

Finally, the plans and plats prepared for the development of the I'On Community also clearly established the location of the "Creekside Park," "Community Dock," and boat ramp. Specifically, surveys prepared on behalf of the Appellants, by Seamon Whiteside & Associates and Palmetto Land Surveying, as well as hand-drawn plats prepared by Appellants' employee, Chad Besenfelder, clearly depict a community clubhouse (now known as the "Creek Club"), Community Dock and Boat Ramp, and "HOA Open Space" located on CV6, which, in turn, is located on Hobcaw Creek. (R. pp. 2918-2920; R. p. 2921; R. pp. 2954-2957; R. pp. 2972-2984; R. p. 2985; R. p. 2991). Additionally, the "stamped" civil plans that were prepared by Seamon Whiteside & Associates, and approved by the I'On Company, showed, from October 1998 through March 1999, that the area where the Community Dock was located was marked as

"HOA No. 1." (R. p. 2991; R. p. 947, line 22- p. 951, line 4, (discussing R. p. 2991 (Pl. Ex. 230/Def. Ex. 4))).

D. The Appellants Obligated Themselves to Convey the Amenity Property to the Assembly through Representations Made to Purchasers of Lots in the I'On Community

Not only did the Appellants clearly demonstrate their intention to convey the Amenity Property to the Assembly and its members through documents prepared for third-parties during the planning and early development phases, the evidence shows the Appellants also represented the very same promises to individuals purchasing homes in the I'On community. (*See, e.g.,* R. pp. 2120-2127; R. pp. 2128-2131; R. pp. 2202-2205; R. pp. 2218-2219; R. pp. 2221-2228; R. pp. 2293-2299). Moreover, Walbeck relied upon these representations in the decision to purchase a home in the I'On community, as the 1998 Property Report was expressly referenced in his Purchase Agreement. (R. pp. 3162-3172; R. p. 959, lines 6-20).

1. The Marketing Campaign

The Appellants launched a marketing campaign to attract potential buyers to the I'On community. The evidence reflects the marketing materials were replete with references to the community amenities, including the Creekside Park and Community Dock.

The Appellants created one such advertising/marketing document entitled, "I'On Neighborhood Plan." (R. pp. 2293-2299). The Neighborhood Plan continued to promote the representations included in the pre-amended 1998 Property Report. (R. pp. 2293-2299). Specifically, the amenity descriptions within the "Living at I'On" section of the Neighborhood Plan separately advertised "miles of waterfront paths" and "the parks," showing a distinction between the two. (R. p. 2295). In the "Recreational Facilities" section of the very same promotional document, a "boat ramp along Hobcaw Creek" that could be "enjoyed by all" was

proudly promoted. (R. p. 2295). These representations continued to be promulgated in other Neighborhood Plans that spanned through at least 2008. (R. pp. 2128-2131; R. pp. 2202-2205).

Similarly, in yet another piece of promotional material published and created by Appellants, the I'On community amenities were promoted as follows: "Community Dock and Boat Ramp," "3 Crab Docks," "12 Neighborhood Parks," and "2.5 Miles of Marsh-Front Paths." (R. pp. 2221-2228).[19]

Finally, 2005, 2006, and 2007 neighborhood fact sheets provided: "[t]he boat landing and community docks on Hobcaw Creek and Shelmore Creek are available to all I'On Residents." (R. pp. 2218-2219). Additionally, the inaugural issue of *Civitas*, the I'On Journal, represented neighborhood "parks provide access to the neighborhoods' lakes and community docks along Hobcaw Creek, [enabling] all the residents to enjoy its beauty." (R. pp. 2120-2127).

2. Representations of Real Estate Agents on Behalf of the Appellants

Potential purchasers were also given guided tours of the neighborhood by agents of the I'On Group, including Bill Orange. (R. p. 592, line 18- p. 593, line 8; R. p. 954, line 20- p. 955, line 23). Walbeck's trial testimony evidenced the representations made by Mr. Orange relating to the I'On Community amenities. (R. p. 955, line 12- p. 958, line 2). According to Walbeck, for example, Mr. Orange represented a park, a dock and boat ramp, as well as the "deepest porches in the Lowcountry," would be "located right around the bend" from his lot. (R. p. 955, line 12- p. 956, line 14). Walbeck further testified the lot "right around the bend" from his lot was, in fact, CV6. (R. p. 956, lines 15-21). Further, CV6 was the only place in I'On with a dock and boat ramp located on the *only* deep water of Hobcaw Creek. (R. p. 957, line 18- p. 958, line 2). Mr. Orange represented to Walbeck the Creek Club would be located on this same lot, CV6,

[19] The I'On Group "updated" its marketing materials. Some of these materials still referenced the 1998 Property Report, even after the Appellants had subsequently amended the report's recreational facilities listing. (R. pp. 2293-2299).

and overflow parking for the clubhouse and dock/boat ramp would be available on another, nearby lot, CV5. (R. p. 976, line 22- p. 978, line 17). Additionally, Adkins testified the Creek Club overflow parking lot was on CV5. (R. p. 862, lines 10-13). Similar representations regarding the many waterfront amenities and access to "deep water" were made to Julie Hussey, an I'On homeowner, who helped market I'On to potential purchasers. (R. p. 992, line 16- p. 993, line 19; R. p. 999, line 19- p. 1002, line 23; R. p. 1005, lines 4-16; R. p. 1007, line 15- p. 1009, line 6).

3. The 1998 Property Report was Distributed to Purchasers

Not only were potential purchasers provided a promotional campaign proudly showing off the I'On community amenities, the eventual lot purchasers were also provided with the 1998 Property Report, which, as above-described, clearly set forth the Amenity Property and the intention to convey the same to the Assembly and its members. (R. pp. 2720-2841; R. pp. 2347-2350; R. pp. 2353-2355; R. p. 958, line 6- p. 959, line 2; R. p. 995, line 5- p. 998, line 5). Walbeck was one such purchaser who relied upon the representations made in the 1998 Property Report. (R. p. 959, lines 6-20).

4. The I'On Purchase Agreements

Walbeck's Purchase Contract, dated November 27, 1999, evidences the Appellants' promise to convey the Amenity Property to the Assembly and its members. (R. pp. 3162-3172). The Walbeck Contract expressly referenced the 1998 Property Report which sets forth the following clear assertions: (a) the Community Dock and Creekside Park would be conveyed to the Assembly, at no cost, during the I'On development process; and (b) the "300 feet of deep water frontage along Hobcaw Creek" would serve "as an amenity" for I'On residents. (R. pp. 3162-3172). Additionally, the Walbeck Contract separately included a copy of the "Recreational

Chart" contained in the 1998 Property Report. (R. pp. 3162-3172). Moreover, the Walbeck Contract provided Walbeck could specifically "rely" on the representations included in both the Contract and the 1998 Property Report. (R. pp. 3162-3172).

Similarly, on February 1, 2003, Adkins, executed a purchase contract[20] with the I'On Group, and was provided the 1998 Property Report by the company's agent, who made no mention of any changes or modifications as to the common area elements described therein. (R. pp. 3113-3130).

E. The Appellants Had Full Knowledge of Their Obligation to Convey the Amenity Property to the Assembly and its Members

The record in this matter is replète with overwhelming evidence that the Appellants represented the Amenity Property was to be conveyed to the Assembly and its members. If this were not enough, the internal communications of individuals within the Appellant entities also clearly show that the Appellants were fully aware of the promises and obligations made regarding the Amenity Property. (R. pp. 2236-2237; R. pp. 2852-2854; R. pp. 2855-2856; R. pp. 2857-2861; R. p. 2928; R. pp. 2946-2948; R. p. 2949; R. p. 2953).

As evidenced by a November 15, 2006 e-mail between I'On Group employee, Chad Besenfelder, and the Grahams, the Appellants recognized they still owned "common areas" including the "Creek Club Boat Ramp and Dock," which belonged to the "HOA." (R. pp. 2852-2854). A few months later, between April and July of 2007, the Appellants outlined their options in connection with several of the I'On amenities, one of which included giving the HOA "the infamous boat ramp and docks" because "the docks [were] too controversial and taking away even part of this community amenity would cause trouble." (R. pp. 2855-2856; R. pp.

[20] The Adkins' purchase contract differed from the Walbeck purchase contract in that it did not incorporate the Property Report or amenity chart. (R. pp. 3113-3130). Nevertheless, Adkins was provided the Property Report at the time of contracting to purchase her lot. (R. p. 847, lines 5-14).

2857-2861). Similarly, in May of 2007, the Appellants provided a "list of venues being transferred to the I'On Assembly," a list which included "The Boat Ramp." (R. p. 2928). Perhaps most poignant, is the Besenfelder e-mail noting: "The docks were promised handover to the homeowners and Vince would like to honor that some day." (R. pp. 2238-2240). That same promise was repeated in 2009 when Appellants represented they were "preparing to deed the [C]ommunity [D]ock to the I'On Assembly." (R. pp. 2236-2237; R. pp. 2946-2948; R. p. 2949; R. p. 2953). The evidence clearly bears out the Appellants' knowledge of their many promises to convey the Amenity Property to the Assembly and its members.

F. The Appellants Breached Their Obligation to the Assembly and Its Members by Failing to Convey the Amenity Property

Despite their many representations regarding the Amenity Property, the evidence weaves a tale of the Appellants' nefarious, behind-the-scenes scheme to sell the promised Amenity Property to buyers in order to make money off of the valuable Amenity Property.

1. Initial Altering of Usage Rights to the Amenity Property

The very first attempt to alter the usage and access of the Amenity Property came in 1998, only one month after finalizing the Property Report, which represented the use of the Amenity Property solely by the I'On community. Unbeknownst to I'On residents until just before trial, Appellants submitted a proposal to a neighboring development, Olde Park, which allowed its residents to use "the I'On Club and I'On's community dock and boat ramp" for a usage fee of $350,000. (R. pp. 2899-2900; R. p. 2905). On February 19, 1999, Olde Park accepted the proposal. (R. pp. 2901-2904). This transaction evidences Appellants' attempt to garner a profit from the promised Amenity Property as early as 1998.

2. The 2000 Recreational Easement and Subsequent Internal Transfer

The second attempt to alter the future use of the Amenity Property occurred in 2000. On February 9, 2000, Appellant, I'On Club, LLC, recorded a Recreational Easement, which purportedly provided for "perpetual" access and usage of certain amenities located on the civic lots in the I'On community. (R. pp. 3131-3145). In the first operative paragraph of the Recreational Easement, the I'On Club, LLC purported to grant the Assembly and its members "perpetual" use and access of the Community Dock and associated boat ramp; a later paragraph included the "perpetual" right to temporarily park vehicles and boat trailers in the associated parking lot. (R. pp. 3131-3145). However, in Section 4.2, on the eighth page of the Recreational Easement, the "Term" of the agreement is limited to thirty years, thereby superseding any "perpetual" language referenced in the other provisions. (R. p. 3138).

Moreover, the Recreational Easement was invalid because the I'On Club did not actually own the subject property at the time the easement was granted. At the time the easement was granted, CV6 was still owned by The I'On Company, LLC. The I'On Club acquired title to CV6 on August 15, 2000 from the I'On Company for five dollars. (R. pp. 3146-3151). Therefore, the Recreational Easement was null and void. Nevertheless, this transaction again evidences the very early actions of the Appellants to disregard their obligations relating to the Amenity Property, while continuing to make representations to the contrary.

3. The Amendment of the 1998 Property Report

Also in 2000, the I'On Group amended the 1998 Property Report to remove the obligation to convey a "Creekside Park" and "Community Dock" to the Assembly and its members. (R. pp. 3035-3073). In fact, the amendment was made within days of Walbeck's closing, yet again, the Appellants never informed him of any changes to the amenities referenced

in his purchase contract. (R. p. 965, line 4- p. 967, line 14). Further, the Appellants sent Walbeck three letters around the time of the amendment, yet none of those letters informed him that the I'On Group was not going to fulfill its contractual obligations. (R. p. 965, line 4- p. 967, line 14; R. pp. 2845-2847).

4. Sale of the Amenity Property to Buyers

The initial, subtle efforts of the Appellants to change and limit the I'On community's access to the Amenity Property eventually morphed into the outright sale of the Amenity Property, in its entirety, to Buyers in order to make a tidy profit. (R. pp. 2065-2074).

In 2006, the Appellants entered into discussions on how to "capitalize" on the "potential value" of the Community Dock. (R. pp. 2855-2856; R. pp. 2857-2861; R. pp. 2922-2924). Internally, the Appellants' documents reference their nefarious scheme to keep their ideas "quiet for now" while outlining the options to "[sell] community facilities." *Id.* In a bold move, the Appellants first tried to sell the Creek Club to the Assembly, a sale which was contingent upon "additional lot entitlement to enable 5 or 6 lots on CV5," despite knowing the Creek Club could not be "functional without the parking lot" already located on CV5. (R. pp. 2910-2912).[21]

By mid-2007, despite repeated representations to convey the Amenity Property to the Assembly and its members, the Appellants entered into talks with Buyers to purchase both CV5 and CV6. Initially, the Buyers backed out of the sales discussions due to the "understanding [that the Appellants] were considering giving the Creek Club to the HOA." (R. p. 2932). At that time, the Buyers decided to wait and see whether "anything pan[ned] out" between the Appellants and the Assembly. (R. p. 2932).

[21] The Town of Mt. Pleasant had imposed a cap on the number of lots in I'On that the Appellants sought to circumvent. (R. pp. 2910-2912; R. p. 701, line 2- p. 702, line 21).

In mid-2008, the Appellants reinstated talks with the Buyers regarding the sale of the Amenity Property. In August 2008, the Buyers contracted to purchase CV6. (R. pp. 2417-2426). Although a contract for purchase was in place, the Appellants represented to the Assembly members that they had "not sold or initiated the sale of the Creek Club." (R. pp. 2933-2935).

In early 2009, Assembly members queried Tom Graham as to the location and existence of the "Creekside Park" and to the conveyance of the Amenity Property. Subsequently, on March 11, 2009, the Assembly Board wrote Graham and requested the docks be deeded to the Assembly. (R. pp. 2232-2233). Several times in March 2009, Appellants attempted to soothe the Assembly by reiterating their intention to transfer the Amenity Property. (R. pp. 2236-2237; R. p. 2953). Unfortunately for the Assembly and its members, the Appellants' continued representations were bold-faced lies, as they were concurrently negotiating the sale of the Amenity Property (both CV 5 and CV6) to the Buyers. Unbeknownst to the Assembly and its members, the Appellants reached a second contract with Buyers in June of 2009. (R. pp. 2053-2064).

On July 27, 2009 Bruce Kinney, Assembly Board President, called Tom Graham to discuss a phone call the Assembly's manager had fielded regarding the impending sale of the Amenity Property. (R. pp. 2916-2917). Graham testified he received the call from Kinney, but Graham did not disclose the sale of the Amenity Property; instead, Graham told Kinney the Creek Club was undergoing a "management" change. (R. pp. 2916-2917; R. p. 752, line 8- p. 753, line 9). It was not until five days later, on August 1, 2009, the Assembly learned the Amenity Property was again under contract to be sold. (R. p. 2084; R. p. 750, lines 16-20). Between August 1, 2009 and August 5, 2009, the Assembly orally demanded the docks be

excluded from the sale and/or that the modifications to the use agreement be consummated. (R. p. 720, line 20- p. 721, line 11; R. p. 728, line 10- p. 729, line 17; R. p. 751, line 23- p. 753, line 25). However, the Appellants ignored the Assembly's demands. On August 5, 2009, the Amenity Property, including the overflow parking on CV5, was officially sold to Buyers. (R. pp. 2065-2074).

As a final slap in the face to the Assembly and lot owners, the Amenity Property promised for their sole use and enjoyment was now the site of an increased number of third-party social gatherings, such as weddings, which, in turn, forced the I'On lot owners to endure repeated dock closures, increased traffic, drunken parties, and rowdy visitors – a far cry from what was promised to them. (R. p. 969, line 21- p. 972, line 11).

5. Attempted Bait and Switch by the Appellants

After the sale of the Amenity Property, the Appellants attempted to conceal their wrong-doing by claiming they conveyed *different* amenity property to the Assembly, which conveniently, Appellants now describe as the "Creekside Park" and the "Community Dock." (R. p. 1128, lines 2-4; R. p. 1131, lines 1-7). However, in actuality, this other conveyed property is a "Marshwalk" and several "crabbing docks." (R. p. 1128, lines 2-4; R. p. 1131, lines 1-7; R. pp. 3035-3073; R. pp. 3074-3112). The crabbing docks sit on a small creek and are impassable at low tide if there is a boat moored to the dock. (R. pp. 2848-2851; R. pp. 2882-2898; R. pp. 2906-2909).

The evidence demonstrates the promised Amenity Property was located on the *sole* deep water frontage of Hobcaw Creek; however, neither the Marshwalk nor the crabbing docks are located on the beautiful and prized deep waters of Hobcaw Creek. (R. p. 1004, line 21- p. 1005, line 16; R. p. 2607). In addition, there is no gazebo or boat ramp on the conveyed property, as

was originally depicted as a part of the *true* Amenity Property. (R. p. 820, line 12- p. 822, line 14; R. pp. 2999-3034; R. pp. 2019-2039; R. p. 2607).

G. The Assembly Initially Failed to Act in the Interest Best Interest of the Members, as it Continued to be Under the Control of the Appellants

This action was brought by Walbeck and Adkins on behalf of themselves, and derivatively, on behalf of the Assembly against the Appellants and the Assembly. (R. pp. 151-167). Because the Appellants maintained control and veto power over the Assembly, the Assembly was unable to act on behalf of the members to secure rights to the Amenity Property. (R. p. 640, line 9- p. 642, line 23).

In 2008, for example, several Assembly members, including Walbeck and Adkins, made demands upon the Assembly to secure the rights to the Amenity Property upon learning of the Appellants' first potential sale of the property. (R. pp. 3558-3561; R. pp. 2229-2230; R. pp. 3152-3153; R. pp. 2232-2233; R. pp. 2234-2235). Unfortunately, these demands were futile. (R. p. 961, lines 10-19). Therefore, Walbeck and Adkins had no choice but to bring this matter derivatively, as the Assembly was not, initially, a common ally.

H. The Assembly Eventually Settled with Buyers for a Portion of the Amenity Property

Ultimately, during the first trial, the Respondents and the Assembly settled with Buyers and acquired the title to CV6 in exchange for $495,000. Additionally, the settlement required the Assembly provide to Buyers a twenty-year lease at a dollar per year, with two, additional five-year options. (R. pp. 2968-2971).

Months after settlement, the Appellants filed a new, nearly identical declaratory action regarding the validity of the easement and moved to consolidate the new action with the pending matter. (Case No. 2014-CP-10-2984). In both the proposed counterclaim in the first action and the new action, the Appellants pled the transfer of title of CV6 to the Assembly in an attempt to

show that the Assembly was not damaged, as it had received the deep water Amenity Property (CV6) back. However, the Appellants objected to the admissibility of the amount of consideration paid by the Assembly for the Amenity Property, which had been initially promised to them at no cost. (R. pp. 1816-1819). The Trial Court ruled the amount of consideration was admissible; and therefore, the jury weighed this evidence in reaching its verdicts favoring Respondents at the conclusion of the second trail of this matter. (R. p. 1307, line 2- p. 1308, line 2).

I. Orders on Appeal

Appellants now appeal from nine rulings issued amongst five of the Trial Court's trial-related Orders, including the Order Denying Appellants' Motion for JNOV ("JNOV Order"), the Order Denying the I'On Company's Petition for Attorneys' Fees ("Def. Fee Order"), the Order Awarding Respondent Walbeck's Petition for Attorneys' Fees ("Pl. Fee Order"), the Order Declaring the 2000 Recreational Easement ("Easement Order"), and the Order Denying Appellants' Directed Motion on Abuse of Process ("DV Order").[22]

1. Order Denying Appellants' JNOV Motion

On July 16, 2015, the Trial Court denied the Appellants' JNOV Motion based upon the jury's verdict and the evidence presented at trial. (R. pp. 21-63). According to the Trial Court: (1) Walbeck and Adkins fairly and adequately represented the interests of the Assembly, and further, satisfied Rule 23's derivative action requirements; (2) the statute of limitations had not run on Respondents' claims; (3) Appellants owed a fiduciary duty to Respondents, and breached it; (4) Appellants were amalgamated; and (5) Walbeck actually relied on Appellants' amenity-related representations. (R. pp. 40-61).

[22] The only adverse Order not appealed is the Order awarding discovery sanctions.

a. Walbeck and Adkins' Satisfaction of Rule 23's Derivative Action Requirements

First, the Trial Court found Walbeck and Adkins fairly and adequately represented the interests of the Assembly, noting: "[I]t is clear that the representative Plaintiffs prosecuted this action in an effort to preserve *all* I'On lot purchasers' common interest in the amenity property." (R. p. 41). The Trial Court cited the testimony of the Respondents, as well as that of witnesses Julie Hussey, Tim Eble, and Deborah Bedell, as evidence of the common interests being advanced by Walbeck and Adkins' efforts. (R. p. 41). Further, the Trial Court noted the verdict, in and of itself, was evidence that the interests of all members of the neighborhood were protected by Respondents. (R. p. 40).

Additionally, the Trial Court found "any challenge by the Defendants as to the 'demands' made upon the Assembly is unavailing as demands were repeatedly made upon the Assembly, an Assembly controlled by the Defendants, thus evidencing the futility of any demand in the first place." (R. p. 41). The Trial Court cited the testimony of Deborah Bedell, who indicated Appellants, still today, exercised significant control over the neighborhood in at least three aspects: "(a) the transfer of control and community property from Defendants to the Assembly continued through the time of trial; (b) the Defendants retain and exercise their power to reinstate their own agents as members of the Assembly's Board; and (c) the Defendants retain the absolute power to veto any Board action." (R. p. 34).

b. The Statute of Limitations Did Not Bar Respondents' Claims

The Trial Court's Order denying JNOV also addressed the Appellants' claim that the Statute of Limitations was not properly considered, and had, in fact, expired. (R. pp. 42-43). The Trial Court noted the jury's verdict finding Respondents' claims arose on August 5, 2009 – the date upon which the Amenity Property was sold. (R. p. 42). The Trial Court further found

Appellants' arguments that the public notice and constructive notice doctrines triggered the statute of limitations clock at some earlier time were unavailing. (R. pp. 43-44). As the Trial Court observed, Appellants renewed their promise of a pending conveyance to the Assembly many times over in 2008 and 2009 in advance of the sale that ultimately gave rise to the litigation. (R. p. 43 (*citing* R. pp. 2216-2217, R. pp. 3558-3561 (Pl. Ex. 52/Def. Ex. 132), R. pp. 2232-2233, R. pp. 2236-2237, R. pp. 2404-2460, R. p. 2461, R. pp. 2462-2605, R. p. 2842, R. pp 2855-2861, R. pp. 2910-2920, R. pp. 2922-2932, R. pp. 2939-2940, R. pp. 2946-2957, R. pp. 2958-2967)). Moreover, "the Defendants bore the burden of demonstrating that the Plaintiffs had knowledge of the 2009 conveyance of the community property prior to 2009 – a burden the jury found Defendants failed to satisfy after considering the evidence presented by Defendants." (R. p. 44).

c. Appellants Owed a Duty to Act in the Best Interest of the Assembly and its Members

The Trial Court also found Appellants' claim that they had no duty to convey the Amenity Property unavailing. (R. pp. 46-49). "Simply stated, a developer in control of an association may not make decisions which benefit its own interest at the expense of the association and its members." (R. p. 48). Here, Appellants promised, and Respondents trusted, Appellants would construct, repair, and transfer common amenities to the Assembly. (R. p. 47). The evidence, as presented by the testimony of Vince and Tom Graham, established the Appellants managed and controlled the Assembly, as well as community property not yet conveyed to the Assembly. (R. pp. 47-48). Consequently, the Trial Court held Appellants' failure to convey the properties was a "fail[ure] to act in the best interest of the Assembly." (R. p. 49). Therefore, the Trial Court concluded Appellants "breached at least one of the fiduciary duties it owed the Assembly." (R. p. 49).

d. Any Legal Distinction among Appellants' Corporate Interests is Blurred

Prior to submitting the case to the jury, the Trial Court held Appellants were amalgamated as a matter of law. (R. p. 1480, line 12- p. 1481, line 21; R. p. 59). The Trial Court reiterated this holding in its Order denying Appellants' JNOV Motion, finding Respondents proved any distinction between the I'On Companies were blurred. (R. p. 59). As noted by the Trial Court, the evidence established the same individuals own, control, and managed all of these entities, and all collectively functioned as one in the day-to-day operations of all aspects of I'On's development. (R. p. 59). The Trial Court pointed to the 2000 Recreational Easement as evidence of such amalgamation, noting the same individual, the I'On Company's general manager, executed the agreement on behalf of all three parties subject to the agreement: the I'On Company, the I'On Club, and the I'On Assembly. (R. p. 60 (*citing*, R. pp. 3131-3145, (Pl. Ex. 10/Def. Ex. 27))). Subsequently, another general manager, Chad Besenfelder, represented to the Assembly, on behalf of the I'On Companies, that the "I'On Company [was] preparing to deed the [C]ommunity [D]ock to the I'On Assembly" in March of 2009 and the "I'On Club will continue to operate the facility." (R. p. 60 (*citing*, R. pp. 2236-2237)).

The Trial Court also pointed to the inadequate consideration paid by the I'On Companies when conveying the Amenity Property amongst its entities. (R. p. 61). For example, CV5 and CV6 were first transferred by the I'On Company to the I'On Club on August 15, 2000 for $5.00. (*See* R. pp. 3146-3151). Two years later, CV5 was conveyed by the I'On Club to the Grahams, individually, for another $5.00. *Id.* The Trial Court further noted, as evidence of amalgamation, the joint closing of the sale of CV5, CV6, and a residential lot on August 5, 2009, wherein CV5 was sold by the Grahams, CV6 was sold by the I'On Club, and the residential lot was sold by the

I'On Company. (R. p. 61 (*citing* R. pp. 2081-2083)). The Appellants, under the direction of the Grahams, executed the closing documents on behalf of both the I'On Company and the I'On Club, further evidencing the amalgamation between the entities. (R. p. 61). The Trial Court then pointed to the June 18, 2009 Purchase Agreement for the sale of the Creek Club/CV6. (R. p. 61 (*citing* R. pp. 2703-2719)). While the Purchase Agreement was entered into by the I'On Club, it was the I'On Companies that actually executed the Agreement.[23] (R. p. 61 (*citing* R. pp. 2703-2719)).

e. Walbeck's Reliance on Appellants' Amenity-Related Representations

Finally, the Trial Court found Walbeck actually relied on Appellants' amenity-related representations based on the evidence presented at trial. (R. pp. 58-59). Walbeck demonstrated: (1) Appellants made false representations to him; (2) Appellants had a pecuniary interest in making the statements; (3) Appellants owed a duty of care to communicate truthfully with Walbeck; (4) Appellants breached that duty; (5) Walbeck was justified in relying on Appellants' representations; and (6) Walbeck was directly and proximately damaged by his reliance on Appellants' representations. (R. pp. 56-57).

Specifically, the Trial Court noted Appellants repeatedly promised the pending conveyance of the Amenity Property "for one primary purpose – profit." (R. p. 57). The Trial Court observed: "[a]s the developers of the I'On Community, the Defendants' owed duties, including duties fiduciary in nature, to convey truthful information to Plaintiffs." (R. p. 57). The Trial Court concluded Appellants breached this duty, in part, "by failing to transfer the very amenities they represented would be transferred to the community" and "[selling] said amenities for profit on August 5, 2009." (R. p. 57). Given the nature of the relationship between Walbeck

[23] The Trial Court noted on the record when directing amalgamation that the Grahams didn't even know who worked for which company. (R. p. 1480, line 24- p. 1481, line 1).

and Appellants, the Trial Court determined Walbeck was entitled to rely upon Appellants' representations and Appellants were obligated to convey truthful information. (R. pp. 57-58). The Trial Court found Walbeck did, in fact, rely on Appellants' representations,[24] representations which the evidence established were inaccurate. (R. pp. 58-59).

2. Order Denying I'On Company's Petition for Attorneys' Fees

Also post-trial, the Trial Court denied the I'On Company's petition for attorneys' fees. (R. p. 83). The Trial Court found: "Defendants are not entitled to an award of attorneys' fee because Adkins did in fact prevail at trial as a derivative plaintiff on behalf of the I'On Assembly." (R. p. 80). The Trial Court indicated, "[t]here is simply no practical or legal way to separate the derivative verdicts from Adkins or to attribute them more to Walbeck, just because he prevailed on his claim for personal damages and Adkins did not." (R. p. 81). According to the Trial Court, "[a] plaintiff may achieve 'prevailing party' status so long as: (a) plaintiff succeeded on any significant issue raised in the action; or (b) the litigation, in its entirety, resulted in some benefit." (R. p. 81). Here, supported by the testimony of the Respondents and I'On residents, Julie Hussey, Tim Eble, and Deborah Bedell, the Trial Court concluded "the legal and public benefit achieved by Adkins and Walbeck outweighed any limited success by Defendants." (R. p. 80). The Trial Court went on to say that "[b]ut for the action of these Defendants, no attorneys would have been necessary to 'enforce obligations under this Agreement'." (R. p. 81).

[24] At trial, Walbeck testified he: (1) relied on information provided by Appellants' agent regarding the amenity "around the bend" from his lot; (2) relied on representations in his purchase contract regarding the Amenity Properties; (3) relied on the representations in the Property Report regarding the Amenity Properties; and (4) relied on the graphic representations of the Amenity Property located "around the bend" from his lot on maps provided by Appellants throughout the progression of I'On's development. (R. p. 955, line 12- p. 958, line 2; R. p. 959, lines 6-20).

3. The Invalidity of the 2000 Recreational Easement

Following cross-motions filed by Appellants and Respondents concerning the validity of the Easement, the Trial Court issued an Order declaring the Easement void as a matter of law for the simple fact that the party granting the easement did not own the property when it purported to grant it. (R. pp. 73-74) (noting at the time the Easement was granted by the I'On Club, the property was owned by the I'On Company). As additional sustaining grounds for its ruling, the Trial Court noted: (1) the Easement was also terminated by merger when the Assembly acquired the Amenity Property as part of its settlement with Buyers; and (2) equity prevented Appellants from benefiting from their misdeeds in their attempts to "ratify" the defective easement after the fact. (R. pp. 74-76). "Simply put, the Defendants cannot rely on equitable principles when the evidence, and the jury's verdict, demonstrate that Defendants acted inequitably." (R. p. 75).

4. Order Granting Walbeck's Fee Petition

Also post-trial, the Trial Court granted Walbeck's petition for attorneys' fees and costs, awarding him $225,000.[25] (R. p. 100). The Trial Court found Walbeck was entitled to an award of statutorily prescribed attorneys' fees under the provisions of ILSA, noting "[u]nder prevailing South Carolina jurisprudence, the recovery of statutorily prescribed fees and the recovery of actual damages under a separate, common law cause of action does not constitute double recovery." (R. p. 89). Despite Walbeck's nominal victory on the ILSA claim, he prevailed on a significant legal issue; thus, Appellants were legally responsible for violating Walbeck's rights under ILSA's anti-fraud provisions. (R. pp. 92-93). Additionally, the Trial Court found Walbeck's ILSA claim served an important public purpose: "Walbeck's victory signaled to developers, including the I'On Defendants, the importance of ensuring that their property-related advertisements and representations do not mislead innocent purchasers or otherwise violate

[25] Walbeck requested fees and costs of $1,070,500. (R. p. 1874).

ILSA's anti-fraud provisions." (R. p. 93). Further, the Trial Court held: "[n]ot only does Walbeck's ILSA claim serve a public purpose, the public interest is best served by shifting the burden of the expense of litigation onto the shoulders of those whose unfair and deceptive acts are responsible for the litigation in the first place." (R. p. 93). Lastly, the Trial Court determined, based upon the nature and complexity of the ISLA, as well as Respondents' Counsel's time spent prosecuting this claim, among other things, that an award of $225,000 in attorneys' fees was reasonable. (R. pp. 99-100). As noted by the Trial Court, Walbeck's counsel expended significant time and effort, having logged more than 4,000 hours of time in prosecuting this action – time that was necessary and validated by the verdict.[26] (R. p. 98).

5. Order Granting Respondents' Directed Verdict Motion

Given the lack of evidence suggesting a "scheme" promulgated by any "Gang," the Trial Court also found Respondents did not abuse the legal process. (R. p. 1466, line 22- p. 1468, line 2). The Trial Court noted an absence of any evidence tying Adkins or Walbeck to any improper act in furtherance of the process and found the evidenced presented showed Adkins and Walbeck were trying to "right a wrong." (R. p. 1466, line 22- p. 1468, line 2). The Trial Court further held that exercising a constitutional right to file an appeal with the Board of Zoning Appeals is not an abuse of the proper process. (R. p. 1466, line 22- p. 1468, line 2). "There's just not an issue of fact that there's been any abuse of the proper process by these plaintiffs." (R. p. 1466, line 22- p. 1468, line 2).

STANDARD OF REVIEW

Appellants' arguments all stem from the Trial Court's rulings on motions made during and after the trial of this case wherein the jury returned verdicts in favor of Respondents. This fact is critical to this Court's analysis because of the standard this Court must apply in reviewing

[26] The Trial Court also awarded fees and expenses for discovery sanctions; this Order has not been appealed.

a case tried before a jury and any rulings which relate to the case as tried. This standard is the abuse of discretion standard and, as even recognized by the Appellants, it applies to each and every issue presently on appeal. *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 464, 629 S.E.2d 653, 663-64 (2006) (In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings) (emphasis added); *Seabrook Island Property Owners' Ass'n v. Berger*, 365 S.C. 234, 240, 616 S.E.2d 431, 434-45 (Ct. App. 2005) (noting a trial court's decision to award attorneys' fees is subject to the abuse of discretion standard of review) (emphasis added); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (noting the trial court's denial of a directed verdict or JNOV motion is within the trial court's discretion and the court's rulings will not be disturbed on appeal unless no evidence supports the ruling or the ruling is controlled by an error of law) (emphasis added); *see also,* App. Br. at. 20-21 (noting the abuse of discretion standard applies to directed verdict, new trial and JNOV motions as well as attorneys' fees awards).

Given the applicability of the abuse of discretion standard, this Court is concerned only with two things: (1) the existence or non-existence of errors of law; and (2) the existence or non-existence of evidence. *Sims v. Giles*, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001); *Swinton Creek Nursery v. Edisto Farm Credit. ACA*, 334 S.C. 469, 514 S.E.2d 126 (1999) (noting the appellate court can only reverse the trial court when there is no evidence to support the trial court's rulings or the rulings are controlled by an error of law); *see also, Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320 585 S.E.2d 272, 274 (2003) (noting the appellate court does not have authority to decide credibility issues or to resolve conflicts in the testimony or the

evidence); *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993) (noting the appellate court cannot disturb the factual findings of a jury unless a review of the record shows no evidence which reasonably supports them). Where no errors of law exist and both the trial court's rulings and jury's factual findings are supported by at least one piece of evidence, this Court must affirm the trial court. *Id.; see also, Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-33, 603 S.E.2d 605, 611 (Ct. App. 2004) (noting the appellate court must affirm the trial court's ruling if there is any evidence that supports it and should uphold a jury's verdict if there is any evidence to sustain it).

ARGUMENT

As an initial matter, major portions of this appeal are based upon arguments that were not raised at the Trial Court and arguments that are improperly supported. For example, Section I(3) (New claims arose following the partial settlement...); Section II(1) (easement in each homeowner claim of title)[27]; Section III (arguing that the "Term" provision in paragraph 4.2 of the Easement only applied to cost sharing); and, Section IV(4) (arguing that the Trial Court mistook a contractual duty for a fiduciary duty) were not raised at the Trial Court; and, therefore, should not be considered by this Court. Additionally, Section V and many other sections of the Appellants' brief rely on evidence that was not admitted or adduced at trial. For example, Section V egregiously relies upon Def. Ex. 106, when Appellants have not appealed the Trial Court's denial of the admission of Def. Ex. 106. (App. Br. pp. 46, 50). Many of the Appellants' arguments rely on documents and evidence not adduced at trial, *e.g.*, summary judgment deposition exhibits. (*See, e.g.*, App. Br. pp. 5 n.1, 6 n.3, 14, 20, 49).

[27] There was absolutely no evidence that the easement would show up in individual homeowner claim of title at trial. Rather, Appellants argued that general recording of the easement in public records should constitute constructive notice.

I. This Court Must Affirm the Trial Court's Rulings because the Trial Court's Findings are Supported by the Record and are not Controlled by any Error of Law.

This Court should affirm each of the nine Trial Court rulings on appeal because South Carolina law and the evidence presented at trial supports these rulings as well as the verdicts rendered by the jury in favor of Respondents. Appellants' arguments to the contrary are meritless – Appellants made these same arguments to the Trial Court, who saw the witnesses testify and reviewed the evidence entered, and the Trial Court rejected all of them. (R. pp. 40-61). Now, Appellants repeat the exact same arguments and ask this Court to find facts contrary to what the Trial Court found – this is outside the scope of this Court's function. Essentially, Appellants are asking this Court to substitute its judgment for that of the Trial Court which determined:

a. Respondents satisfied the requirements to maintain a derivative action based upon the evidence presented (R. pp. 40-41);

b. Respondents discovered their respective claims on August 5, 2009 based upon the evidence presented (R. pp. 42-44);

c. Appellants owed, and breached, its fiduciary duty to convey amenity property to The Assembly based upon the evidence presented (R. pp. 46-49);

d. The 2000 Recreational Easement granted by Appellants is *void ab nitio* based upon the evidence presented (R. pp. 73-75);

e. Respondents, Walbeck and Adkins, did not abuse the legal process based upon the evidence presented (R. p. 62);

f. Respondents - not Appellants - are the prevailing parties based upon the evidence presented (R. pp. 81-82; R. pp. 89-91, 94-97);

g. Appellants are amalgamated based upon the evidence presented (R. pp. 59-61); and

h. Respondent, Walbeck, actually relied on Appellants' amenity-related representations based upon the evidence presented (R. pp. 58-59).

Because the evidence presented during and after the trial of this case supports each of these finding reached by the Trial Court, all of the Appellants' arguments fail and warrant no further consideration by this Court. *See, e.g., Burns*, 361 S.C. at 231-33, 603 S.E.2d at 611 (noting the appellate court must affirm the trial court's ruling if there is any evidence that supports it and should uphold a jury's verdict if there is any evidence to sustain it); *see also,* Rule 220, SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). In other words, the true issue on appeal is whether the Trial Court properly denied Appellants' JNOV and new trial motions. Here, the Trial Court, acting within the very discretion afforded it under South Carolina law, did properly deny these motions, and thus, the jury's verdicts stand. Because the jury's verdicts stand and Respondents' fee award stands, Appellants' lack of a fee award stands. Therefore, any question concerning the validity of the 2000 Recreational Easement or Appellants' abuse of process claim is a moot point. Viewed in this proper context, Appellants' "issues" on appeal do not, and cannot, change the ultimate result achieved at the trial of the underlying case; and thus, this Court should affirm the Trial Court.[28]

II. The Trial Court did not Err in Finding Respondents Properly Maintained a Derivative Action on Behalf of the Assembly Because The Record Demonstrates Respondents Fulfilled the Derivative Action Requirements Set Forth in Rule 23(B), SCRCP.

Contrary to Appellants' initial contention, the Trial Court did not err in finding Respondents satisfied Rule 23(b)'s derivative action requirements,[29] and thus, properly maintained a derivative action on behalf of the Assembly. The Trial Court's finding is supported

[28] Nevertheless, Respondents address each of the nine issues raised on appeal given Appellants' singularly-stated arguments.

[29] Rule 23(b)(1), SCRCP, requires: (a) the verification of a derivative complaint; (b) particular allegations of the plaintiff's efforts to "obtain action the desires from the directors or comparable authority;" and (c) "the reason for the plaintiff's failure to obtain the action or for not making the effort." Rule 23(b)(1) further provides a plaintiff maintaining a derivative action must "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."

by (a) the jury's verdict in favor of the Assembly (which indicates Respondents' "fairly and adequately" represented the interests of the Assembly); and (b) evidence in the record (which indicates Respondents satisfied Rule 23(b)'s verification, demand and futility requirements). (R. pp. 40-41). Accordingly, there is no reversible error, and this Court should affirm the Trial Court's derivative action ruling.

Appellants' derivative action argument boils down to three points, each of which is unpersuasive because each ignores the discretionary authority our law provides a trial court in deciding the fulfillment of Rule 23(b)'s derivative action requirements. Stated differently, Appellants cannot establish an "error of law" committed by the Trial Court when "the law" defers to the Trial Court in deciding the properness of a derivative action. Consequently, the only consideration properly before this Court is whether the Trial Court's derivative action ruling is supported by any evidence. Here, the Trial Court's ruling expressly cites corroborating evidence, explicitly acknowledges the jury's verdict entered in favor of the Assembly, and thus, is properly supported by the record. (R. pp. 40-41; R. pp. 1857-1858). Based upon this fact alone, this Court should affirm the Trial Court's derivative action ruling. Rule 220(c), SCACR – ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"). Yet, in an abundance of caution, Respondents address the merits of each of Appellants' derivative-related points below:

A. The Trial Court Did Not Err by Exercising the Discretion Afforded it in Finding Respondents Satisfied Rule 23(b)'s Demand and Futility Requirements

First, Appellants maintain the Trial Court "erred" by "casually dismissing" Rule 23(b)'s "demand" requirement. (App. Br. at 21-22). Notably, Appellants' demand argument is based entirely on this Court's decision in *Carolina First Corporation v. Whittle*, wherein this Court

recognized a trial court's discretionary authority to excuse a demand where the trial court finds sufficient facts of "futility" are pled. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 192, 539 S.E.2d 402, 411 (Ct. App. 2000) ("[I]f the court finds sufficient facts [of futility] are pled, then it will be lenient in excusing demand – a matter within its discretion.") (citations omitted).[30] Here, the Trial Court found Respondents pled and verified sufficient facts of futility; and thus, it was within the Trial Court's discretion to excuse Rule 23(b)'s demand requirement.[31] (R. p. 41; R. pp. 184-185). However, the Trial Court did not only excuse this requirement as Appellants suggest, but rather, the Trial Court found Respondents satisfied all of the requirements necessary to maintain a derivative action under Rule 23, including sufficiently pleading, and ultimately proving, both the demand and futility requirements:

> [T]he record clearly reflects Plaintiffs' satisfied Rule 23's verification, demand and futility requirements. . . (*See,* Plaintiffs' Complaints). . . Any challenge by the Defendants as to the "demands" made upon the Assembly is unavailing – as this Court recognized, demands were repeatedly made upon the Assembly, an Assembly controlled by the Defendants, thus evidencing the futility of any demand in the first place.

(R. p. 41) (emphasis added).[32]

---

[30] Recognizing the broad discretion afforded a trial court in deciding whether Rule 23(b)'s derivative action requirements are met, the *Carolina First* Court did not reverse a trial court which found the derivative plaintiffs failed to sufficiently establish the futility requirement. *Id.* at 192, 539 S.E.2d at 411. ("The trial judge found that [the Shareholders] did not meet [the sufficiently pled futility] requirement, and we will only overturn that decision for an abuse of discretion.") *citing Grant,* 266 S.C. at 375, 223 S.E.2d at 414 (noting the issue of whether the failure to seek redress within the corporation is excusable is a factual question, the resolution of which by trial court should be affirmed unless unsupported by the evidence). Here, the Trial Court found Respondents did meet the futility requirement, along with every other Rule 23(b) requirement, and this Court must acknowledge this finding by similarly affirming the Trial Court.

[31] In other words, even if the Trial Court did "dismiss" the demand requirement as Appellants' suggest, this dismissal is not an "error" because the Trial Court found Respondents' allegations and proof of futility sufficient. The Trial Court's futility finding is supported by the record as well as Appellants' own brief, which notes: (a) "Respondents pleaded and argued that demand was futile;" (b) "Respondents maintained this action by alleging and verifying that additional demands on the Assembly 'would now be futile as The Assembly has failed to protect the rights of The Assembly and its members. . .';" and (c) "Respondents have argued that the developers had a 'veto power' over Board actions which would have rendered the demand futile . . . ." (App. Br. 24-25).

[32] Upon learning of the 2008 potential sale of the amenity property, the record shows several Assembly members, including Respondents made oral demands at Assembly meetings and written demands upon the Assembly to secure the rights to the Creekside Park and Community Dock property. (*See, e.g.*, R. pp. 3558-3561; R. pp. 2229-2230; R. pp. 3152-3153; R. p. 2231; R. pp. 2232-2233; R. pp. 2234-2235). Respondents also demanded the Appellants fulfill

Consequently, Appellants' first contention is without merit – the record reflects the Trial Court considered all Rule 23(b) derivative action requirements, casually dismissing none; and, even if the Trial Court excused the futility requirement, this does not amount to an error of law under prevailing precedent.

B. The Trial Court Did Not Err by Exercising the Discretion Afforded it in Finding Respondents Satisfied Rule 23(b)'s Adequacy Considerations

Like Appellants' demand argument, Appellants' next argument concerning the adequacy of Respondents' derivative representation ignores the fact the Trial Court found Respondents satisfied Rule 23(b)'s adequacy considerations:

> [T]he record reflects Plaintiffs' satisfied . . . the aforementioned adequacy considerations. . . First, there is a common interest between the named Plaintiffs and the Assembly members, as all Assembly members suffered due to Defendants' conveyance of amenity property promised to the Assembly. Moreover, Plaintiffs testified they were not part of any "Civic Lot Gang" and had no interests adverse to other members of the I'On Assembly – in fact, Plaintiffs advanced these members' interests according to the testimony of Julie Hussey, Tim Eble and Deborah Bedell. Second, by virtue of the verdict and monetary awards rendered in favor of Plaintiffs, its clear Plaintiffs successfully, and vigorously, prosecuted this action in an effort to preserve *all* I'On lot purchasers' common interest in the amenity property.

(R. p. 41).

Appellants do not raise a single "error" purportedly committed by the Trial Court in reaching this conclusion, and thus, raise no legitimate issue on appeal. The Trial Court found the Respondents' satisfied Rule 23(b)'s adequacy considerations and cited evidence supporting Respondents' adequateness in its Order Denying Appellants' JNOV – there is no abuse of discretion here. (R. pp. 40-41); *Welch*, 342 S.C. at 300, 536 S.E.2d at 418-419 (noting the trial

---

its obligations to convey the Creekside Park and Community Dock to the Assembly. (*See, e.g.*, R. pp. 2256-2257; R. p. 871, line 7-873, line 25; R. p. 960, lines 13-20; R. p. 961, lines 10-19; R. p. 984, line 15- p. 985, line 12).

court's denial of a JNOV motion is within the trial court's discretion and the court's rulings will not be disturbed on appeal unless no evidence supports the ruling).

C. The Jury Rendered its Verdict in Favor of the Assembly on the Same Claim Respondents Alleged Since the Beginning of the Underlying Action

Appellants' final argument concerning "purported" new claims arising following the partial settlement of the underlying action is equally misplaced. Again, Appellants' ignore the Trial Court's ruling finding Respondents satisfied the derivative action requirements – period. (R. pp. 40-41). Appellants' argument also ignores the fact the $1.75 Million verdict entered in favor of the Assembly was on Respondents' breach of fiduciary claim – a claim included in Plaintiffs' Initial Complaint, and since included, in every Amended Complaint. (R. p. 1857; R. pp. 122-123; R. pp. 134-135; R. pp. 159-160; R. p. 322). In other words, no "new claims arose" which in anyway prejudiced Appellants – the derivative claim the jury awarded damages on is the same derivative claim the Appellants were of aware of since the commencement of the underlying case. Appellants cite zero authority supporting its proposition that because a party's damages change via mitigation efforts, somehow its substantive claims change, and require the re-issuing of demand. Appellants' argument is unsupported by both the record and the law, and thus, must be rejected. *Glasscock, Inc. v. U.S. Fidelity and Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]tatements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). Further, it was Appellants that inserted this issue into the case via their amended counterclaim and second easement action.

D. The Properness of Respondents' Derivative Action is Irrelevant Because the Assembly was Realigned as a Named Plaintiff and the Jury Found in its Favor

Finally, although clear from the record that Respondents' case is a proper derivative action, any argument to the contrary is futile because the Assembly was a named plaintiff at the time of trial. A claim asserted by a plaintiff "in derivative suit is not her own; instead, the claim belongs to the corporation and the plaintiff is merely 'a nominal plaintiff.'" *Koster v. Lumbermens Mutual Casualty*, 330 U.S. 518, 523 (1947); *Reilly Mortgage Group, Inc. v. Mount Vernon Savings and Loan Assoc.*, 568 F. Supp. 1067, 1073 (E.D. Va. 1983). Most often, the corporation is "a defendant in a derivative action . . . to ensure the presence of an indispensable party in the litigation." *Hildebrand v. Lewis*, 281 F. Supp. 2d 837, 844-45 (E.D. Va. 2003); *see also, Liddy v. Urbanek*, 707 F.2d 1222, 1223 (11th Cir. 1983); *Reilly*, 568 F. Supp. at 1073. "Thereafter, once the corporation is properly joined in the suit, it can then be realigned as a plaintiff, if appropriate, in accordance with its true interests in the litigation." *Hildebrand*, 281 F. Supp. 2d at 844-45; *see also, Indianapolis v. Chase Nat'l Bank*, 314 U.S. at 69 (1941) (recognizing that courts must "look beyond the pleadings, and arrange the parties according to their sides in the dispute"). "[C]orporations are typically aligned as plaintiffs in stockholder derivative actions, since they stand to benefit from a successful suit." *Hildebrand*, 281 F. Supp. 2d at 844-45.

Here, the Assembly was added as a nominal defendant in February 2012 so that it would be bound by any verdict rendered. (R. p. 153); *see also, Hotz v. Minyard*, 304 S.C. 225, 231, 403 S.E.2d 634, 638 (1991). Thereafter, the Trial Court, in its discretion, realigned the Assembly as a Plaintiff. (R. pp. 16-17). The Assembly was a named Plaintiff in the Fourth Amended Complaint. (R. p. 314). The Assembly was a named Plaintiff on the verdict form. (R. p. 1855).

The Assembly was the named party on the verdict form under the breach of fiduciary duty cause of action. (R. p. 1857). The Trial Court charged the jury accordingly. (R. p. 1712, lines 13-19). As a result, whether Respondents' case is a proper derivative action is irrelevant. The Assembly was a named plaintiff, and the jury found in its favor. (R. p. 1857-1858).

III. The Trial Court Did Not Err in Denying Appellants' Motion for JNOV based upon the Statute of Limitations or Submitting the Date of Discovery Question to the Jury

The Trial Court correctly concluded Respondents' claims are not barred by the statute of limitations based upon the jury's verdict finding August 5, 2009 as the date upon which Respondents "discovered" their claims against Appellants. Neither the Trial Court, nor this Court, can disturb the factual findings of a jury, and here, the jury's finding as to the date of discovery means Plaintiffs claims were brought within the applicable statute of limitations. Accordingly, there is no error of law and this Court must affirm the Trial Court's denial of Appellants' JNOV.

A. The Statute of Limitations was Properly Submitted to the Jury Given the Question of Fact as to when the Respondents Discovered Their Claims Against Appellants

During the trial of the underlying case, the Appellants and the Respondents offered conflicting testimony and evidence as to when the Respondents "discovered" their claims against the Appellants. Appellants have reiterated the evidence and testimony that they presented during the trial, which they believe evidences the "discovery date" as occurring prior to August 5, 2009. (App. Br. at 29-30[33]). However, Respondents have presented evidence that they had assurances that the Amenity Property would be conveyed to the Assembly and they relied upon those promises, until August 5, 2009, when they discovered the Amenity Property had been sold. (*See,*

[33] (App. Br. at 29-30)(*Citing* R. pp. 3131-3145; R. pp. 3175-3189; R. p. 3190; R. pp. 3325-3373; R. pp. 3432-3435; R. pp. 3436-3440; R. pp. 3451-3453; R. pp. 3464-3467; R. pp. 3482-3502; R. pp. 3511-3544; R. pp. 3565-3568; R. p. 615, lines 8-25; R. p. 902, line 12- p. 903, line 4; R. p. 979, line 14- p. 980, line 20; R. p. 1132, lines 12-14)).

e.g., R. pp. 2019-2039; R. pp. 2999-3034; R. pp. 2042-2048; R. pp. 2128-2131; R. pp. 2177-2196; R. pp. 2202-2205; R. pp. 2236-2237; R. pp. 2293- 2299; R. pp. 2855-2861; R. pp. 2946-2949; R. p. 2953; R. p. 956, line 15- p. 959, line 20). Most notably, as late as March 25, 2009, Appellants emailed the Assembly representations that they were in the process of transferring the Community Dock and adjacent property to the Assembly. (R. pp. 2236-2237). Given the competing evidence concerning the "discovery" date, a question of fact existed as to the statute of limitations – a question of fact rightfully left for the jury to resolve. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (noting the burden of establishing a statute of limitations defense rests on the party asserting it, and when testimony conflicts upon this question, it becomes an issue for the jury to decide).

B. The Jury Determined Respondents "Discovered" Their Claims on August 5, 2009 and Evidence in the Record Supports the Jury's Conclusion

After observing the witnesses and weighing the evidence, the jury determined the Respondents did not "discover" their claims until August 5, 2009. (R. pp. 1855-1856). The jury's conclusion as to this discovery date is supported by the evidence presented at trial, which demonstrates the Appellants sold the amenity property promised to the Respondents to an unaffiliated, for-profit entity on August 5, 2009. (*See,* R. pp. 2263-2270; R. pp. 2271-2279; R. pp. 2280-2284; R. pp. 2703-2719). This evidence documenting the August 5, 2009 conveyance as well as the evidence reflecting the Appellants' repeated promise to convey this property to the Assembly, a promise Appellants reiterated on the very day they negotiated the sale of the amenity property, sustains the jury's findings. (*See,* R. pp. 2216-2217; R. pp. 3558-3561; R. pp. 2232-2233; R. pp. 2236-2237; R. pp. 2404-2460; R. p. 2461; R. pp. 2462-2605; R. p. 2842; R.

pp 2855-2861; R. pp. 2910-2920; R. pp. 2922-2932; R. pp. 2939-2940; R. pp. 2946-2957; R. pp. 2958-2967).

C. Because Evidence in the Record Supports the Jury's Conclusion, the Trial Court Did Not Err in Denying Appellants' JNOV Motion Based Upon the Statute of Limitations

According to South Carolina law, a trial court must deny a JNOV motion where the evidence yields more than one reasonable inference and that is exactly what occurred here – the evidence regarding the date Respondents' "discovered" their claims yielded more than one inference; and ultimately, the jury resolved the evidence in Respondents' favor. *Strange v. S. C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994) (noting a trial court must deny a JNOV motion where the evidence yields more than one reasonable inference or the inference is in doubt).[34] Because at least one piece of this evidence supports a discovery date of August 5, 2009, the Trial Court appropriately refused to disturb the jury's conclusion and rightfully denied Appellants' JNOV Motion based upon the statute of limitations. *See,* Section B, *supra*; *see also,* SCARC Rule 220(c) (noting the appellate court may affirm the trial court for any reason appearing in the record).

D. The Trial Court's Equitable Tolling Ruling Does Not Affect the Jury's Verdict as to the Statute of Limitations

Lastly, Appellants' contention regarding the Trial Court's alternative equitable tolling ruling has no bearing on the ultimate properness of this Court's denial on Appellants' JNOV Motion as to the Statute of Limitations. (R. p. 42, n.15). As previously noted, the Trial Court rightfully submitted the Statute of Limitations question to the jury, and the Trial Court correctly denied Appellants' Motion given the jury's answer to this question is supported by the record –

[34] In averring "[t]he trial court erred in submitting the [statute of limitation] question to the jury and in denying Appellants' JNOV Motion," the Appellants ignore South Carolina law which indicates: "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998) (emphasis added).

thus, any error the Trial Court purportedly committed in including an additional sustaining ground in its denial is a harmless one. *Fishburne v. Short*, 268 S.C. 546, 550, 235 S.E.2d 118, 120 (1977). Further, the equitable tolling decision is well-supported by the evidence and precedent set forth in the JNOV Order.

E. Based Upon the Evidence Presented, the Jury Properly Determined the Purchase Contracts at Issue Were "Sealed Instruments," and thus, a 20-Year Statute of Limitations Applies to Walbeck's Breach of Contract Claim

The 20-year statute of limitation applicable to Walbeck's breach of contract claim further renders moot Appellants' temporal-based arguments. The evidence sustains the jury's findings that Walbeck's purchase contract was a "sealed instrument." (R. pp. 1855-1862).

The signature page of Walbeck's purchase agreement includes an attestation clause referencing a "seal," and in addition to the attestation clause, twice references the agreement was "signed, *sealed* and delivered" – once in connection with Walbeck's signature and once in connection Appellants' signature. (R. pp. 3162-3172). Thus, Walbeck's purchase agreement contains a minimum of three references to a "sealed" instrument, the combination of which clearly supports the jury's findings that the agreement was, in fact, sealed. (R. pp. 3162-3172).

"Testimony" from a party revealing a special intent to create a sealed instrument is simply not required; rather, one need only look at the instrument, itself, to ascertain whether there was an intent to seal the same. Indeed, Section 19-1-160 of the South Carolina Code provides:

> *Whenever it shall appear from the attestation clause or from any other part of any instrument in writing* that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.

S.C. Code § 19-1-160 (1976) (emphasis added). Here, the jury properly found it "appeared" from the many "sealed" references existing within Walbeck's purchase contract that the contract was intended to be a "sealed instrument." (R. pp. 1855-1862).

IV. The Trial Court Did Not Err in Finding the Attempted 2000 Recreational Easement is Invalid and Void *Ab Initio*

Appellants' next argument concerning the validity of the Recreational Easement ("Easement") fails for a similar reason because the Trial Court's Easement ruling does not, and cannot, affect the jury's verdict. Because the jury's verdict stands irrespective of the Easements validity or invalidity, the end result remains the same, and thus, remand is unwarranted. As demonstrated below, Appellants' Easement-related arguments also fail on its merits given: (a) the Trial Court's Easement Ruling is sufficiently supported by the record; (b) the after-acquired title doctrine is not recognized in this State; and (c) Appellants' failed to preserve the "perpetual" issue for appellate consideration.

A. Evidence in the Record Supports the Invalidity of the Easement

First, the Trial Court's ruling regarding the invalidity of the Easement is clearly supported by the record which indicates the grantor of the Easement did not possess title to the land over which the Easement was granted. (R. p. 78; R. pp. 3146-3151); *see also, Kelley v. Snyder*, 396 S.C. 564, 571, 722 S.E.2d 813, 817 (Ct. App. 2012) (noting the existence of an easement is a question of fact and is subject to the any evidence standard of review.).[35]

According to South Carolina law, an easement cannot be granted by a party who does not have any interest in the land. *Moore v. Reynolds*, 285 S.C. 574, 757 (1985) (recognizing the

[35] Not only supported by the record, Appellants concede the grantor had zero interest, let alone title, in the subject property at the time it purported to grant Easement. (R. p. 1916). (Appellants concede: "At the time the 2000 Recreational Easement was executed, the I'On Company still held title to the real property encompassing the 'Club Property'...", and that the I'On Club did not become owner of the same until August 15, 2000.). *See also, Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 392-93, 496 S.E.2d 624, 626 (1998) (Concessions made in a judicial proceeding are binding upon those who make them and the opposite may not be asserted on appeal.).

invalidity of an easement granted on property no longer owned by the grantor at the time the easement was executed). This basic tenant – one cannot convey something he does not own – is as old as property law, itself, and is recognized by virtually every jurisdiction.[36] Here, the Appellants concede (and the Trial Court found) the I'On Company was the owner of the property at the time the Easement was executed by the I'On Club and recorded. (R. p. 1916; R. p. 72). This fact, alone, made it impossible for the I'On Club to convey any interest, including an easement, in the Community Dock, boat ramp, and parking lot. (R. pp. 3139-3142) (signed February 9, 2000, six months before August 15, 2000 when the I'On Club took title to the property). Consequently, the Easement is invalid as a matter of South Carolina law and the Trial Court did not err in recognizing this invalidity. (R. p. 74).

Moreover, the Trial Court addressed Appellants' "equitable" argument—the doctrine of after-acquired title – seeking to circumvent this inevitable conclusion and determined any "ratification" of the Easement in light of Appellants' notice, knowledge, and unclean hands would be unjustified. (R. p. 76). For example, the Trial Court found the fact that the same I'On employee, Joe Barnes, executed the Easement on behalf of all parties was sufficient to give "pause" even before considering the Appellants' other inequitable behavior. (R. pp. 3139-3142) (Joe Barnes signed on behalf of all parties to the Easement); (R. p. 75). The Trial Court also found the Appellants' representations to Respondents in 2009 regarding their intent to convey the subject property to Respondents while, at the same time, negotiating to convey the same to a third-party for profit entity were made in an effort to "keep the Assembly and concerned homeowners at bay." (R. p. 75). These two facts, alone, each justify the Trial Court's

[36] Indeed, this principle, *nemo dat quod non habe* (one cannot convey what he does not own), was recognized by the United States Supreme Court. *Mitchell v. Hawley*, 83 U.S. 544, 550 (1872). Furthermore, in its Order, the trial court cited a non-exhaustive list of cases from other jurisdictions that acknowledge an easement cannot be granted by a party over land he does not own. *See, e.g. Guy v. Guy*, 2008 M.E.141, 955 A.2d 212, 215 (2008).

determination that Appellants were barred from any equitable remedy based on their own, inequitable conduct.[37] *Wilson v. Landstrom*, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984).

B. The After-Acquired Title Doctrine Does Not Apply in South Carolina and Cannot be Invoked Under the Facts of this Case

The "after-acquired title doctrine," discussed *ad nausem* by Appellants, cannot operate to validate the invalid Easement for numerous reasons: (1) the doctrine has never be recognized as applying to easements in South Carolina; (2) the doctrine is intended to be utilized as a method to estop the grantor of inequitable conduct; and (3) the doctrine does not apply in favor of a grantee who has notice or knowledge that the grantor does not have the title he purports to convey.

Indeed, no case law supports Appellants' proposition that South Carolina courts apply the after-acquired title doctrine to transactions involving easements. *See,* App. Br. at 37 (citing no law to support the proposition the after-acquired title doctrine applies to easements in South Carolina). Rather, our courts regularly apply the doctrine to benefit a grantee who received title from a grantor under standard covenants of warranty to which the grantor did not possess title. *Corbin v. Carlin*, 366 S.C. 187, 192-93, 620 S.E.2d 745, 748 (Ct. App. 2005), *citing Richardson v. Atlantic Coat Lumber Corp.* 93 S.C. 254, 75, S.E. 371 (1912). Here, the Appellants attempt to utilize this doctrine to revive a botched, non-arm's length transaction, originally executed to benefit the grantor, I'On Club. (Easement Order at 6). Further, the doctrine cannot be applied to protect a party when it has notice or knowledge the other party does not have what they purport to convey. (Easement Order at 7); *see also, Noronha v. Stewart*, 199 Cal. App. 3d 485, 491, 245

[37] Respondents note the Trial Court also found the Appellants acted unfairly in carrying out fiduciary duties; and, the jury found the Appellants violated certain disclosure and anti-fraud provisions of the Interstate Land Sales Act and misrepresented the availability, accessibility, and future ownership of the community amenities to the Assembly and the homeowners for one reason – to make a profit. (R. p. 76).

Cal. Rptr. 94 (Cal. Ct. App. 2d Dist. 1988). Here, a single employee of the Appellants signed on behalf of all three of the entities involved in the easement transaction. (R. pp. 3139-3142). Thus, the Trial Court found all parties to the transaction were on notice and had actual knowledge that the I'On Club was granting an easement over land to which it did not hold title. (R. p. 76). Based upon the foregoing, the Trial Court's determination that the Easement cannot be ratified by the doctrine of after-acquired title is neither controlled by an error of law nor unsupported by evidence. *See, e.g., S.C.DOT v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008) (The appellate court does not have to disregard the findings of the trial judge who was in a better position to gauge the evidence and the witnesses' credibility).

C. Whether the Easement is Perpetual or Subject to a 30-Year Term is Mooted by a Finding That the Easement is Void *Ab Initio*

If the Trial Court did not abuse its discretion in finding the 2000 Recreational Easement void *ab initio*, then Appellants' easement duration argument is moot. *Simmons v. Tuomey Reg'l Med. Ctr.*, 330 S.C. 115, 118 n.1, 498 S.E.2d 408, 409 n.1 (Ct. App. 1998) (holding that a court's decision on one argument may render additional arguments irrelevant and unnecessary to address). The invalidity of the easement eliminates the need for this Court to address whether the easement is perpetual or limited to 30 years and renders any such argument irrelevant.

D. The "Perpetual" Nature of the Easement for the use of the Boating Facilities is Unpreserved

Appellants' final Easement-related argument concerning the "perpetual" nature of the Easement is not properly before this Court. This issue was raised, but not ruled upon, by the Trial Court, and therefore, is not properly preserved for appeal. *Staubes v. City of Folly Beach*, 339 S.C 406, 412, 529 S.E.2d 543, 546 (2000) (In order for an issue to be preserved for appellate

review, it must have been raised to and ruled upon by the trial judge.). The Appellants did not file a Rule 59(e), SCRCP, motion following the Trial Court's Easement Order; and, in this Order, the Trial Court never addressed the perpetual or non-perpetual nature of the easement. Because the Trial Court never ruled on the Easement's "perpetual" nature, this issue is precluded from appellate consideration. *Staubes*, 339 S.C. at 412, 529 S.E.2d at 546 ("Without an initial ruling by the trial court, a reviewing court cannot evaluate whether the trial court committed error.")

E. The Intent of the Grantor was to Limit the Easement to a 30-Year Term

Should this Court determine the Trial Court abused its discretion in finding the Recreational Easement void *ab initio*, it should find the same was limited to a 30-year term. First, Tom Graham testified, at the time the Amenity Property was sold to the third-party, he was aware the easements were limited to a 30-year term. (R. p. 679, lines 4-25). Further, Vince Graham acknowledged the easement was "flawed" and, when confronted with his deposition testimony, admitted he stated the easement only had 18 years left on it, and did not know whether it would be extended, and had no "opinion one way or the other" on the matter. (R. p. 1224, line 2- p. 1226, line 15). *See, Millvale Plantation, LLC v. Carrison Family Ltd. Partnership*, 401 S.C. 166, 173, 736 S.E.2d 286, 290 (Ct. App. 2012) (In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law.).

It is clear from the document and testimony that the 30 year term was intended to apply to the easements. Appellants are attempting to subdivide a single document to benefit their own interests. (R. pp. 3131-3145). (The document is a single, fifteen-page document with all of the parties' signatures at the end). In evaluating the duration of the easement, this Court cannot

ignore the "General" terms section as Appellants so desire this Court to do. *Millvale Plantation, LLC*, 401 S.C. at 174 (A deed must be construed as a whole and effect given to every part). Contrary to Appellants' position, Article Four, the article containing the language limiting the "Term" to 30 years, makes multiple references to the easements, not just the cost sharing terms. (R. p. 3139) (In addition to limiting the duration to 30 years, Article Four limits the liability of the parties to the easements and contains language that attempts to make the easements binding upon all successors). When considered as a whole, and in conjunction with the testimony, it is clear it was the intent of the parties to limit the easements to 30 years; and this Court should so find.

V. The Trial Court Correctly Denied the JNOV Motion because South Carolina Law Clearly Recognizes a Fiduciary's Duty to Act in the Best Interest of its Subjects and the Jury's Findings are Reasonably Supported by the Record.

Next, Appellants maintain the Trial Court erred in denying their JNOV Motion as to breach of fiduciary duty because the Trial Court supposedly "expanded" the duties imposed on "developers" fiduciaries and erred in upholding the jury's verdict finding Appellants breached these well-established duties. Appellants' argument, again, fails for both procedural and substantive reasons.

A. Appellants' Concede the Existence of a Fiduciary Relationship and South Carolina Law Provides Anyone Acting in Such a Relationship (Including Developers) Cannot Use this Relationship to Benefit Personal Interest

First, Appellants' arguments fail because they do not challenge the existence of a fiduciary relationship between the Appellants and Respondents; rather, Appellants challenge what duties this fiduciary relationship entails, arguing the Trial Court erred by creating a "new" duty owed by "developer" fiduciaries to act in the best interest of the regimes they develop. (App. Br. p. 41). The Trial Court's ruling regarding this "general fiduciary duty" is neither

"new" nor "erroneous." A fiduciary is a fiduciary; and the general duty of a "developer" fiduciary is no different than the general duty of any other fiduciary under our jurisprudence – "anyone acting in a fiduciary relationship shall not be permitted to make use of said relationship to benefit his own personal interests." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599 358 S.E.2d 150, 152 (Ct. App. 1987) ("[I]t is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of said relationship to benefit his own personal interests.").

Consequently, the Trial Court's "expansion" of South Carolina law in recognizing a "general" fiduciary duty of developers to act in the best interests of property owners while controlling the development's property owners association" is no "expansion" at all – it is undisputed a that a fiduciary relationship exists here;[38] and it is clear South Carolina law

[38] Although not an issue on appeal, the evidence presented makes it clear a fiduciary relationship exists between the Appellants and the Assembly. Under our jurisprudence, "[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." *Wogan v. Kunze,* 366 S.C. 583, 605, 623 S.E.2d 107, 119 (Ct. App. 2005); *see also, Davis v. Greenwood Sch. Dist.* 50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005); *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003); *O'Shea v. Lesser,* 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); *Ellis v. Davidson*, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004); *Goddard v. Fairways Dev. Gen. P'ship,* 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993); *Island Car Wash, Inc. v. Norris,* 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). "Courts of equity have been careful to define fiduciary relationships so as **not** to exclude new cases that may give rise to the relationship." *Goddard,* 310 S.C. at 414. Indeed, South Carolina courts – and courts throughout the country – have held a fiduciary relationship exists between developers and the homeowners associations which they control. See, *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993); *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002); *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 375, 725 S.E.2d 112, 127 (Ct. App. 2012); *Maercker Point Villas Condo. Assoc. v. Szymski*, 275 Ill. App. 3d 481, 655 N.E.2d 1192 (1995); *Managers of Weathersfield Condo. Assoc. v. Schaumburg Ltd. Part.*, 307 Ill. App. 3d 614, 717 N.E.2d 429 (1999). The Goddard Court found that a fiduciary relationship did, in fact, exist between a developer and homeowners. *Id.* (stating developers should be expected to use good judgment and act in utmost good faith); *Id.* at 832-833 (citing *Richard Gill Co. v. Jackson's Landing Owners' Ass'n*, 758 S.W.2d 921 (Tex. App. 1988) (fiduciary relationship established between condominium developer and condominium association because developer assumed responsibility for managing condominium until owners association could be formed). The South Carolina Supreme Court reaffirmed the existence of a fiduciary relationship between developers and homeowners associations in *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002); *see also, Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 375, 725 S.E.2d 112, 127 (Ct. App. 2012). Here, like *Goddard* and *Concerned Dunes W. Residents*, the record is clear that the Appellants were in the role of fiduciary over the Assembly and its residents. The Developer designed, planned, marketed, and developed the community. The Appellants controlled the Assembly through its veto power. The Trial Court correctly found the existence of a

recognizes fiduciaries cannot taken advantage of such "special" relationships. *Id.* Because the Trial Court's fiduciary duty ruling is properly grounded within our jurisprudence, it is not controlled by an error of law, and nothing Appellants maintain to the contrary changes the fact.[39]

B. Evidence in the Record Supports the Jury's Verdict Finding that Appellants Breached Their Fiduciary Duties

Furthermore, the record is replete with evidence Appellants used their role as fiduciary to benefit themselves to the detriment of the Assembly. *See, e.g., Small v. Springs Industries*, 300 S.C. 481, 487, 388 S.E.2d 808, 812 (1990) ("As an action at law this Court's review is limited to correcting errors of law, it may not overturn the factual findings of a jury unless there is no evidence in the record which reasonably supports the jury's findings").

The record contains evidence from which the jury could have based its verdict that the Appellants used their role as a fiduciary for financial gain to the determinant of the Assembly. In fact, the evidence has shown that as early as 1998, Appellants were attempting to make a profit from the Amenity Property by negotiating the sale of usage rights in the community amenities to a third-party without disclosing it to the Assembly or homeowners. (R. pp. 2899-2900; R. pp. 2901-2904; R. p. 644, line 12- p. 645, line 18). The Appellants transferred property to The I'On

---

fiduciary relationship between the Appellants and the Assembly. Whether the Appellants breached that relationship, by using its role as fiduciary to its own advantage, and to the determinant of the Assembly was a question for the jury. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 458-59, 578 S.E.2d 711, 715-16 (2003).

[39]Contrary to Appellants' contention *Goddard* and *Concerned Dunes West Residents* do not renounce the existence of a "broad fiduciary duty." *See Concerned Dunes W. Residents*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002); *Goddard*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993). Instead, those cases lay the foundation for the express responsibilities of a developer fiduciary recognized by South Carolina – the duty to properly maintain and transfer a development's common areas and to establish a fund sufficient to maintain said areas – and further solidify the assertion that the mere existence of the fiduciary relationship creates the obligation that the developer act in good faith and with the interests of the association in mind. Appellants' misstate the purpose of the Trial Court's pronouncement that "a developer in control of an association may not make decisions which benefit its own interest at the expense of the association and its members. Instead, with this pronouncement the Trial Court was simply stating the requirements any fiduciary must fulfill. Following the excerpt embellished by the Appellants the Trial Court went on to say: "[by] insert[ing] itself on the Board, whether by having a person actually on the Board or by retaining a veto power of anything the Board does" the developer has a fiduciary obligation to act in good faith and with the interests of the association in mind when a conflict of interest exists that would be detrimental to the developers own financial interests. (R. p. 1456, lines 11-14; R. p. 48).

Club without disclosing the transfer to the Respondents or the Assembly. (R. pp. 3131-3145; R. pp. 3146-3151). The evidence has shown, in 2006, the Appellants again entered into discussions as to how to "capitalize" on the "potential value of the Community Dock, while keeping the ideas "quiet for now." (R. pp. 2855-2856; R. pp. 2857-2861; R. pp. 2922-2924). Finally, The Appellants sold Creekside Park to a third party, for-profit entity, for their own benefit without disclosure to the Assembly. (R. pp. 2065-2074). The Appellants represented they were preparing to transfer Creekside Park to the Assembly to appease the homeowners while they were double-dealing to make the previously mentioned sale. (R. pp. 2236-2237). Pursuant to longstanding South Carolina law, these acts constituted breaches of the fiduciary relationship and subjected the Appellants to liability. *See,* Footnote 39, *supra.* The jury agreed, and unanimously found in favor of the Assembly on its breach of fiduciary duty claim. (R. p. 1857).

Because there is sufficient evidence in the record to support the jury's conclusion, the Trial Court's denial of the JNOV motion should be affirmed.

VI. The Trial Court Did Not Err in Granting Respondents' Motion for Directed Verdict on Abuse of Process

This Court should also affirm the Trial Court's grant of Respondents' Motion for Directed Verdict on their abuse of process claim. (R. p. 1468, line 23- p. 1469, line 16; R. p. 62). Appellants bore the burden of proving their abuse of process claim to the Trial Court and the Trial Court found Appellants failed to meet this burden. (R. p. 62). Appellants cannot circumvent the Trial Court's ruling by citing the same "evidence" the Trial Court already determined no reasonable jury would construe in Appellants' favor – this is an abuse of the appellate process.

A. The Trial Court Correctly Found the Appellants Presented No Evidence Which Legitimately Established a Claim for Abuse of Process

Appellants' contention regarding the denial of their abuse of process claim avers the Trial Court erred in "evaluating the evidence" of "a scheme" devised by a "Gang," which the record reflects did not exist. (App. Br. at 46). In other words, the "evidence" Appellants maintain the Trial Court failed to consider is Appellants' own conjecture – this is not evidence and only evidence goes to a jury. *Cf. Guider v. Churpeyes, Inc.*, 370 S.C. 424, 429, 635 S.E.2d 562, 565 (Ct. App. 2006) (A directed verdict is appropriate when the evidence to be submitted to the jury is speculative, theoretical and hypothetical.).

Appellants' abuse of process claim required Appellants establish, through sufficient and legitimate evidence, an ulterior purpose for the litigation and a willful act in the use of the process not proper in the conduct of the proceeding. *Food Lion, Inc. v. United Food & Commer. Workers Int'l Union*, 351 S.C. 65, 71, 567 S.E.2d 251, 253 (Ct. App. 2002). Here, Appellants failed to produce any evidence satisfying either requirement; and thus, their abuse of process claim failed as a matter of law. On appeal, Appellants maintain their argument was the "evidence" they presented to establish ulterior purpose. (App. Br. at 46-48) (Appellants argue the lawsuit was a "scheme" devised by a "Gang" of I'On opponents "to obtain the I'On Company's property for free").[40] In reality, there is no evidence of either a "scheme" or a "Gang" existing in the record. Neither Respondents nor Appellants ever testified to the actual existence of any such "Free Civic Lot Gang."[41] Moreover, Respondents indicated they had no

[40] The Appellants used this same "Gang" theory in its opening statement and closing arguments to no avail. (R. p. 575). (Appellants' counsel in opening statements stated "[Respondents] joined the Free Civic Lot Gang . . ."). Appellants also referenced the existence of this "Gang" multiple times in their closing arguments after evidence from the trial indicated no such "Gang" existed. (R. p. 1614, lines 1-2; R. p. 1621, lines 14-17; R. p. 1644 lines 18-19).

[41] At trial, when Respondents were questioned as to their involvement in any such "Gang," the response was a resounding no. (R. p. 607, lines 4-11; R. p. 859, lines 5-12; R. p. 962, lines 16-20). (When asked about their

plan to scheme or manufacture the claims asserted, and successfully prosecuted, against the Appellants. (R. p. 859, lines 2-9; R. p. 962, lines 21-23). (Both Adkins and Walbeck stated they were never a member of a gang or scheme to do anything wrong). Simply stated, the overwhelming "evidence" indicated Respondents' "motive" was nothing more than to "right a wrong – a wrong which affected not only [Respondents], but also community and public interests." (R. p. 62). The Trial Court, in its discretion, determined no reasonable jury could find that Respondents abused any process based upon the total lack of evidence presented; and ultimately, the jury did not either – it found Appellants wronged Respondents, not vice versa. *Id.* This Court may not overturn the Trial Court if there is any evidence to support the ruling below. *Swinton Creek Nursery*, 334 S.C. at 477, 514 S.E.2d at 130.[42] Further, having prevailed on the derivative claims, Respondents have proved that their use of process was legitimate.

VII. The Trial Court Properly Acted Within its Discretion in Awarding Respondent Walbeck Attorneys' Fees and the Amount Awarded is Reasonable

Additionally, Appellants' own argument indicates the Trial Court did not err in awarding Walbeck attorneys' fees on his ISLA claim. Appellants concede "ILSA affords the court the discretion to award 'reasonable' attorneys' fees to a prevailing party;"[43] and here, the record reflects both Walbeck's prevailing party status and the reasonableness of the fee awarded him. (R. p. 1856; *see also,* R. pp. 97-100) (citing evidence supporting all six of the elements

involvement in the "Free Civic Lot Gang" the witness stated they were not involved in any such "Gang" and found the term "insulting" and "contriving.").

[42] Although the foregoing proves dispositive of this issue, Appellants also produced no evidence that the use of process was improper because it was unauthorized or aimed at an illegitimate collateral objective – there was no "willful" or "malicious" act. *Food Lion, Inc*, 351 S.C. at 71 (A willful act is "some definite act . . . not authorized by the process or aimed at an object not legitimate in the use of the process required."). As such, the Trial Court's order granting Respondents' directed verdict motion should be affirmed. At minimum, Appellants claim for abuse of process is mooted by the jury's verdict. Any error made by the Trial Court regarding the abuse of process claim is harmless error. *Fishburne v. Short*, 268 S.C. 546, 550, 235 S.E.2d 118, 120 (1977) (An error creates no prejudice and is harmless when it appears that the jury was not misled by the error.). The jury entered a significant verdict in favor of the Respondents, and further, found Appellants conduct was "reckless, willful and/or wanton." (*See,* R. pp. 1857, 1860). Appellants were not prejudiced by the Trial Court's grant of Respondents' abuse of process directed verdict motion and any error in granting the same was harmless.

[43] App Br. at. 54.

considered by our Courts in granting a "reasonable" fee award). Because the fee award is supported by the law, the record, and Appellants' admission, there is no abuse of discretion; and this Court must affirm the Trial Court's grant of $225,000 in fees to Walbeck.[44]

A. Walbeck is Entitled to Recover Attorneys' Fees on his ILSA Claim Under South Carolina Law

The Trial Court correctly concluded South Carolina law entitled Walbeck to an award of attorneys' fees, interest under the provisions of ILSA,[45] in addition to the actual damages Walbeck elected to receive under his common law, negligent misrepresentation claim. (R. pp. 88-97); *see also,* 15 U.S.C. § 1709(a)-(c) (2012) (allowing statutory recovery of attorneys' fees, interest and costs).

Under prevailing South Carolina jurisprudence, the recovery of statutorily prescribed fees and the recovery of actual damages under a separate, common law cause of action does not constitute double recovery. Similarly stated, a Plaintiff may recover attorneys' fees, costs and interest under a statutory claim, such as ILSA, in addition to actual damages under a common law claim, such as negligent misrepresentation. *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 193, 750 S.E.2d 78, 81 (2013) *citing Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 64, 691 S.E.2d 135, 157 (2010) ("[A] plaintiff who elects to receive damages awarded under a common law theory may also be entitled to recover statutory costs and attorney fees to which he is entitled under a separate verdict."). "[T]he rationale for this position is that an award for [damages] does not amount to double recovery for a single wrong given attorneys' fees are intended to make such claims economically viable for private citizens . . ." *Id.*

---

[44] Respondents note Appellants' arguments concerning fee awards have no bearing on the verdicts entered in the underlying case. (App. Br. at 57) (Appellants' fee-related arguments, albeit erroneous, primarily request this Court reject Walbeck's fee petition and accept their fee petition without remand to the Trial Court).

[45] The Interstate Land Sales Full Disclosure Act ("ILSA") provides for the recovery of attorneys' fees, interest and court costs when a developer violates the disclosure or anti-fraud provisions contained therein. *See,* 15 U.S.C. § 1709(b) (2012).

Here, as in *Austin*, Walbeck's recovery of interest, cost, and attorneys' fees under his statutory claim, ILSA, is not duplicative of the award of actual damages under his common law claim, negligent misrepresentation. *Id.* (finding that because an award of attorneys' fees under plaintiff's statutory claim was not duplicative of the award of damages under plaintiff's common law claim, the decision "in favor of [plaintiff] would not violate the election of remedies doctrine's prevention of double redress for a single wrong.") (internal citations omitted). Accordingly, the Trial Court correctly concluded Walbeck is entitled to a fee award on his ILSA claim under South Carolina jurisprudence.

B. Walbeck is Entitled an Award of Reasonable Attorneys' Fees Under His ILSA Claim Despite His Award of Nominal Damages

The Trial Court also correctly determined Walbeck is entitled a fee award despite his recovery of "nominal" damages on his ISLA claim. (App. Br., p. 53). The United States Supreme Court's decision in *Farrar* does not serve to automatically preclude attorneys' fees awards in nominal damages case. *See, Mercer v. Duke University (Mercer III),* 401 F.3d 199, 206-09 (4th Cir. 2005), *citing Mercer v. Duke University (Mercer II),* 50 Fed. Appx. 643, 646 (4th Cir. 2002) ("[w]e have never interpreted *Farrar* as automatically precluding attorney's fee awards in all nominal-damage cases.") (unpublished); *Clark v. Sims,* 28 F.3d 420, 425 (4th Cir. 1994) (remanding fee award in nominal-damage case for reconsideration in light of plaintiff's limited success). Rather, in *Farrar*, the Supreme Court held where a prevailing party[46] recovers nominal damages, "the only reasonable fee is usually no fee at all." *Farrar,* 506 U.S. at 115 (emphasis added); *Id.* at 121 (O'Connor, J., concurring) ("[n]ominal relief does not necessarily a

[46] "[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby,* 506 U.S. 103, 111–12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). This standard is satisfied by a "judgment for damages in any amount, whether compensatory or *nominal*." *Id.* at 113 (emphasis added). Accordingly, the award of nominal damages in favor of Walbeck on his ILSA claim suffices to qualify Plaintiff as a prevailing party.

nominal victory make."); *Id.* at 124 (White, J., dissenting) (noting that the majority did not hold "that recovery of nominal damages *never* can support the award of attorneys' fees").

Because the *Farrar* Court "provides little guidance for courts considering whether an award of attorneys' fees is warranted" in nominal damage cases,[47] the Fourth Circuit follows Justice O'Connor's concurring opinion in *Farrar* wherein she identified three factors to be considered in determining how to assess attorneys' fees to a nominally prevailing party:

(1) The difference between the amount of damages sought and recovered;

(2) The significance of the legal issue on which the plaintiff has prevailed; and

(3) Whether the litigation has accomplished some public goal other occupying the time and energy of counsel, court and client.

Mercer III, 401 F.3d at 203; *Farrar,* 506 U.S. at 121, 113 S.Ct. 566 (O'Connor, J., concurring).

Relying on the "O'Connor factors," several courts of appeals, including the Fourth Circuit, often permit attorneys' fees awards despite the award of only nominal damages.[48] In

[47]The *Farrar* majority reasoned that where a plaintiff's recovery was nominal or minimal, the deciding court can "lawfully award low fees or no fees" without having to first calculate the lodestar amount or apply the twelve factors bearing on reasonableness. Thus, the majority created a limited exception for *calculating* attorneys' fees: where a prevailing plaintiff recovers only nominal damages and the victory was merely technical or de minimis, the lower court can determine the amount of fees within its discretion, dispensing with the lodestar calculation. The *Farrar* majority: (a) did not create a bright-line rule precluding fee awards in nominal damages; (b) did not define what constitutes "nominal" damages; (c) did not define what constitutes a "technical" victory; and (d) did not provide insight as to whether a fee award is warranted in a given case. Rather, the *Farrar* majority indicates the decision to award attorneys' fees, as well as the amount of fees awarded, remains within the trial court's discretion.

[48] The First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits all employ the O'Connor factors in determining whether a prevailing plaintiff who recovers only nominal damages will receive attorneys' fees. *See, e.g., Díaz-Rivera v. Rivera-Rodríguez,* 377 F.3d 119, 125 (1st Cir. 2004) (upholding district court's award of attorneys' fees to plaintiff based on three O'Connor factors); *Buss v. Quigg,* 91 F. App'x 759, 761 (3rd Cir. 2004) (citing O'Connor factors for assessing whether plaintiff with nominal damage award should recover attorneys' fees); *Hidden Oaks Ltd. v. City of Austin,* 138 F.3d 1036, 1052-53 (5th Cir. 1998) (applying O'Connor factors in assessing whether plaintiff entitled fee award); *Cartwright v. Stamper,* 7 F.3d 106, 109-10 (7th Cir. 1993) (holding that three O'Connor factors should guide court in prevailing party inquiry); *Jones v. Lockhart,* 29 F.3d 422, 423-24 (8th Cir. 1994) (applying O'Connor factors to assess reasonableness of attorneys' fees award to partially successful plaintiff); *Morales v. City of San Rafael,* 96 F.3d 359, 361 (9th Cir. 1996) (overruling district court's calculation of attorneys' fees because of failure to consider second and third O'Connor factors); *Phelps v. Hamilton,* 120 F.3d 1126, 1131-32 (10th Cir. 1997) (applying three O'Connor factors to evaluate plaintiff's success and reversing district court's holding that plaintiff should not recover any fee award). Further, the Second Circuit applies the O'Connor factors

Mercer, for example, the plaintiff was awarded only "nominal" damages, however, the Fourth Circuit upheld an award of $350,000 in attorneys' fees despite the de minimis compensatory relief.[49] *Mercer III*, 401 F.3d 199 at 206-09. As noted by the *Mercer III* Court:

> Because the Court in *Farrar* held that plaintiffs recovering only nominal damages *usually* or *often* will not be entitled to an award of attorney's fees, it is clear that such plaintiffs will at least *sometimes* be entitled to a fee award. Our cases have recognized as much.
>
> Although the majority opinion in *Farrar* provides little guidance for courts considering whether an award of attorney's fees is warranted, Justice O'Connor in a separate concurring opinion addressed the question in more detail . . . She suggested that when determining whether attorney's fees are warranted in a nominal-damages case, courts should consider "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served" by the litigation . . .

---

implicitly. *See, Cabrera v. Jakabovitz*, 24 F.3d 372, 393 (2nd Cir. 1994) (upholding fee award based on significance of legal issue on which plaintiff prevailed and accomplishment of public purpose).

[49]The Fourth Circuit's decision in *Mercer versus Duke University* resolved a number of issues previously tried in a number of courts, all of which originated from an initial action brought by Heather Mercer, a former kicker on Duke University's Division I-A football team, who was terminated from the team in violation of Title IX. Mercer filed suit against Duke University and Goldsmith, seeking declaratory, injunctive, and monetary relief, alleging they violated Title IX by discriminating against her on the basis of sex. The United States District Court for the Middle District of North Carolina dismissed Mercer's complaint based on an interpretation of the statutory "contact-sport exception." On appeal, the Fourth Circuit reversed the decision, holding that the contact-sport exception was inapplicable, and remanded the issue to the district court for further proceedings. On remand to the district court, a federal jury found that Goldsmith had discriminated against Mercer in violation of Title IX, awarding Mercer two million dollars in punitive damages, one dollar in compensatory damages, and approximately $389,000 in attorneys' fees and costs. On appeal, however, the Fourth Circuit in *Mercer II* vacated the punitive damages award, finding private litigants may not recover punitive damages under Title IX based upon the United States Supreme Court decision in *Barnes v. Gorman,* 536 U.S. 181 (2002). Despite vacating Mercer's award of punitive damages, leaving her with only one dollar in compensatory damages, the *Mercer II* Court rejected Duke's claim that Mercer was no longer entitled to attorneys' fees as a matter of law. Instead, the court remanded the issue to the district court to decide "in light of Mercer's now limited success at trial" whether she should recover attorney's fees and, if so, what amount. In remanding the case, the *Mercer II* Court suggested that the Supreme Court's holding in *Farrar versus Hobby* should guide the district court in deciding attorneys' fees and costs. In particular, the *Mercer II* Court referred to Justice O'Connor's concurring opinion, in which she articulated additional grounds for a court to award attorneys' fees to a nominally-recovering plaintiff. On remand, the district court held that Mercer should still recover the attorneys' fees from her Title IX claim. Notably, the district court utilized Justice O'Connor's three factor test from her concurring opinion in *Farrar*, and in applying these three factors, the court concluded that Mercer's victory was neither pyrrhic nor de minimis, and thus, she should recover reasonable attorneys' fees. The district court then calculated the amount that it deemed reasonable for recovery, resulting in a total award to Mercer of $349,243.96 for attorneys' fees. Following the district court's decision, Duke appealed to the Fourth Circuit again in *Mercer III,* arguing that the district court erred in awarding attorneys' fees and that the appropriate award "is an award of no fees at all." The *Mercer III* Court affirmed the district court's holding, concluding that Mercer was entitled to attorneys' fees as a prevailing party, and upholding the amount of fees established by the district court.

> We believe that the factors set forth by Justice O'Connor help separate the usual nominal-damage case, which warrants no fee award, *from the unusual case that does warrant an award of attorney's fees.* Accordingly, we will consider the district court's decision to award attorney's fees by way of the factors identified by Justice O'Connor.

Mercer III, 401 F.3d 199 at 203-04 (emphasis in original and added); *see also, Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1336 (4th Cir. 1996) (referring to the O'Connor factors when analyzing the question of attorneys' fees in nominal damages cases).[50]

C. The Balance of the O'Connor Factors Weighs in Favor of Walbeck, and thus, Walbeck is Entitled an Award of Attorneys' Fees, Interest, and Costs

The Fourth Circuit recently followed the majority of circuit courts in utilizing the O'Connor factors to determine whether a "nominally-recovering" plaintiff should recover attorneys' fees. The Fourth Circuit's interpretation of the O'Connor factors supports awarding attorneys' fees, interest and costs to Walbeck. Decided after *Farrar*, the Fourth Circuit in *Mercer* opined attorneys' fees are warranted in cases "which [serve] a significant public purpose" and where a plaintiff "succeed[s] on a significant legal issue," regardless of the monetary degree of such success. *Mercer III*, 401 F.3d 199 at 207-08; *see also, Diaz-Rivera*, 377 F.3d at 125) ("[T]he Supreme Court has explicitly rejected the proposition that fee awards... should necessarily be proportionate to the amount of damages . . . plaintiff actually recovers.") (internal quotations omitted); *Cabrera*, 24 F.3d at 393 (2nd Cir. 1994) (upholding fee award based on significance of legal issue on which plaintiff prevailed and accomplishment of public

[50] Similarly, in *Jama v. Esmor Correctional Services, Incorporated*, 577. F3d 169 (3rd Cir. 2009), the Third Circuit noted no case was found in which a court of appeals had interpreted *Farrar* to require the automatic denial of fees when only nominal damages are awarded. The *Jama* court agreed with their sister courts of appeals that a district court determining the degree of a plaintiff's success should consider not only the difference between the relief sought and achieved, but also the significance of the legal issue decided and whether the litigation served a public purpose. *Id. at* 577 F.3d at 176. *See also, Diaz-Rivera*, 377 F.3d at 125 (affirming district court's award of attorneys' fees by applying second and third Justice O'Connor's factors); *Murray v. City of Onawa*, 323 F.3d 616, 619 (8th Cir. 2003) (applying the three O'Connor factors when considering whether a plaintiff who received nominal damages was entitled to an award of attorneys' fees); *Morales*, 96 F.3d at 363 (same); *Brandau v. Kansas*, 168 F.3d 1179, 1182 (10th Cir. 1999) (same).

purpose); *Jama.,* 577 F.3d at 176 (finding the degree of a plaintiff's success should consider not only the difference between the relief sought and achieved, but also the significance of the legal issue decided and whether the litigation served a public purpose); *Morales,* 96 F.3d at 361 (overruling district court's calculation of attorneys' fees because of failure to consider second and third O'Connor factors). In other words, it is the balancing of all O'Connor factors that proves dispositive of whether a plaintiff is entitled a fee award.

Here, the Trial Court determined this balance weighed in favor of Walbeck, and thus, the Trial Court's fee award is properly supported by the law. (R. pp. 92-97) (finding (1) Walbeck succeeded on a significant legal issue because "Walbeck's case resulted in a first of its kind liability determination – the facts as found by the jury determined the [Appellants] were legally responsible for violation Walbeck's rights under ILSA's anti-fraud provisions; (2) Walbeck's ILSA claim served an important legal purpose because "Walbeck's victory signaled to developers . . . the importance of ensuring that their property-related representations do not mislead innocent purchasers or otherwise violate ILSA's anti-fraud provisions"); and (3) Walbeck's total recovery was not nominal because "[t]he crux of Walbeck's ILSA claim, and the nucleus from which it stemmed, resulted in both a substantial success for the Assembly, of which he is a member, as well as a significant success for the public at large."[51]). This Court need only review the Trial Order's granting Walbeck's fee petition to reach the same conclusion. (R. pp. 86-100)[52]

[51] Notably, the Trial Court also found "...but for the [Appellants'] destruction of ISLA evidence . . . Walbeck's ILSA verdict may well have been more than one dollar.") (R. p. 96, n. 10) *citing* (Order Finding the [Appellants] in Contempt for the Destruction of Evidence).

[52] As an additional sustaining ground, Respondents note Appellants' argument (both to the Trial Court, and again, on appeal) addresses only the first O'Connor factor, and only in the sense of a limited monetary recovery. Because Appellants failed to effectively challenge the other two O'Connor factors, it necessarily follows Appellants cannot effectively challenge the Trial Court's ruling finding the balance of all three factors weigh in favor of Walbeck on appeal. Moreover, the fact Walbeck received a limited monetary recovery does not warrant the reversal of the Trial

D. The Reasonableness of Walbeck's Fee Award is Supported by The Record

The reasonableness of the $225,000 fee award is supported by the record. In assessing the "reasonableness" of an award of attorneys' fees, the Court considers six factors: (1) nature, extent, and difficulty of legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in locality for similar services; and (6) beneficial results obtained. *See, Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961); *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E2d 659 (1993); *Dedes v. Strickland*, 307 S.C. 155, 414 S.E.2d 134 (1992). The Court gives consideration to all six criteria in establishing the attorneys' fees awarded and none of these factors is controlling. *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989), *citing Darden v. Witham*, 263 S.C. 183, 209 S.E.2d 42 (1974). Here, the Trial Court based its award on the evidence presented through the Affidavit of Justin Lucey ("Respondents' Counsel") and supporting fee records,[53] along with its impression of the case presented by Respondents' Counsel at trial. The Trial Court considered all six criteria established by *Collins* as follows:

(1) In evaluating the nature, extent and difficulty of the legal services rendered, the Trial Court found, among other things, Respondents' Counsel "spent considerable time and effort on the prosecution of this complex and lengthy case;"[54]

(2) In evaluating the time and labor devoted to the case, the Trial Court "reviewed the time records" of Respondents' Counsel which indicated counsel "expended more than 4,000 hours of time in prosecuting this action." The Trial Court further found the "verdicts speak to both the preparation and competency of [Respondents' Counsel] as well as the amount of time, labor and expenses exhausted in the prosecution of this lawsuit;"[55]

Court's fee award – the Trial Court still retained its discretion to award what it deemed a "reasonable" attorneys' fees based upon Walbeck's prevailing party status alone. (R. p. 97, n. 14) (citations omitted).

[53] R. pp. 98-99.

[54] R. pp. 97-98.

[55] R. p. 98.

(3) In evaluating the professional standing of counsel, the Trial Court found Respondents' Counsel consisted of experienced, skilled attorneys, of high professional standing in the community and in good standing with the Bar of this State; [56]

(4) In evaluating the contingency of Respondents' Counsel's fee, the Trial Court found Respondents' Counsel "accepted this case on a contingency basis, with no assurance that is would be able to collect the attorneys' fees incurred" and "recovery remained almost completely contingent up and until a week before trial." The Trial Court also found Walbeck's fee agreement was for "38.5% of any award or the fee awarded, whichever is greater" and that "a contingency award would yield a greater sum then the fees and costs awarded by this court today;"[57]

(5) In evaluating the fee customarily charged, the Trial Court found "[Respondents' Counsel kept contemporaneous time records throughout this case and these records indicate that the hourly rates charged . . . are reasonable and commensurate with rates charged by other firms with the same or similar experience in complex litigation;"[58] and

(6) In evaluating the beneficial results obtained, the Trial Court found Respondent obtained a substantial benefit, "not only in monetary compensation," from the legal services provided by Respondents' Counsel.[59]

Exercising the discretion afforded it, the Trial Court awarded Walbeck what it deemed was a "reasonable" fee award on his ILSA claim after considering the six criteria established by our Supreme Court for determining attorneys' fees. (R. p. 100). (The Trial Court further noted "[i]n awarding a fee in an amount significantly less than that sought by [Respondent], the court attempts to reflect the proportionately in the award as to both the degree of success obtained and the hours devoted to the ILSA claim. . .").

[56] R. pp. 98-99.
[57] R. p. 99.
[58] R. p. 99.
[59] R. pp. 99-100.

VIII. The Trial Court Did Not Err in Denying I'On Company's Petition For Attorneys' Fees Because the Record Reflects Respondent Adkins Qualifies as a Prevailing Party

Contrary to Appellants' next contention, the Trial Court did not err in denying I'On Company's Fee Petition because the record demonstrates both the Trial Court and the jury found Adkins "did, in fact, prevail at trial." (R. p. 80) (noting "the jury found in favor of the Assembly on three causes of action . . . initiated by Walbeck and Adkins); *see also,* Verdict Form. Appellants' argument, at its simplest point, is one of semantics – Appellants maintain Adkins does not qualify as a "prevailing party under the terms of Adkins Lot Purchase Agreement," yet, Appellants cite no "term" of the Agreement defining "prevailing party." (R. pp. 3113-3130). In other words, the Agreement, like South Carolina law, left the question of who qualifies as a "prevailing party" to the Trial Court. Here, the jury found Adkins "prevailed" on three claims, claims which involved Appellants' "obligations" to fulfill their property-related representations.[60] Based upon the jury's verdicts as well as the evidence presented, the trial judge also considered Adkins the "prevailing party" as a matter of law:

> A plaintiff may achieve "prevailing party" status so long as: (a) plaintiff succeeded on any significant issue raised the action; or (b) the litigation, in its entirety, resulted in some benefit . . . Here, both of the foregoing factors are satisfied; Adkins succeeded on her derivative claims and the litigation of these claims directly benefitted Adkins, personally, as well as hundreds of other I'On homeowners who are a part of the Assembly by virtue of their lot ownership in I'On. Not only did the jury find the [Appellants] breached various duties owed to the I'On Assembly, into whose shoes Adkins stepped, the jury also found the [Appellants] did so recklessly, willfully and/or wantonly. Consequently, Adkins qualifies as a "prevailing party."

(R. p. 81) (citations omitted); *see also, Heath v. County of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990); *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612,

[60] As evidenced by the verdict form, the jury found in favor of the Assembly on the following causes of action causes initiated by Adkins and Walbeck: (1) breach of fiduciary duty, (2) breach of contract, and (3) negligent misrepresentation. (*See* R. pp. 1857-1858.)

617-618, 635 S.E.2d 922, 925 (Ct. App. 2006) (The South Carolina Supreme Court defines "prevailing party" as "one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention and is the one is whose favor the decision or verdict is rendered and judgment entered.").[61]

Appellants cite no authority which suggests a party, proceeding on multiple claims based upon a single (and similar) nucleus of facts, can only "prevail" when it succeeds on all of them. Rather, the only authority Appellants cite relates to the fee award a prevailing party may be entitled to depending upon the circumstances. Appellants, thus, put the cart before the horse – one does not get to the fee issue without first being qualified as a prevailing party. Here, the Trial Court found Adkins qualified as a prevailing party, and the Trial Court's ruling is supported by both the law and the record. Accordingly, the Trial Court's denial of the I'On Company's petition for attorneys' fees and costs should be affirmed.[62]

IX. The Trial Court Did Not Err in Finding the Appellants were Amalgamated Given the Overwhelming Evidence in the Record Indicates Appellants Operated Their Companies as One in of the Same

The Trial Court correctly found the Appellants' were amalgamated. Appellants' argument to the contrary confuses the theories of amalgamation and "veil-piercing." For example, Appellants' lengthy discussion regarding the distinction between a corporation and its stockholder and officers, along with the description of the two-part test for veil piercing is irrelevant. As this Court indicated in *Magnolia North Property Owners' Ass'n versus Heritage Communities, Inc.*, the theories of amalgamation and veil-piercing are separate and distinct; here, the trial court's focus was on amalgamation which only requires a showing of "blurred"

[61]The main issue in the underlying action was whether the Appellants improperly sold the amenity property to a third-party thereby violating their obligation to convey this property to the Assembly and its members. (R. p. 1539, lines 11-17). Adkins alleged this main issue on behalf of the Assembly and its members (including herself) and prevailed on this main issue under three separate claims. (*See* R. pp. 1855-1858.)

[62]*See,* Footnotes 45-49, *supra.*

corporate distinctions. 397 S.C. 348, 359, 725 S.E.2d 112, 118 (Ct. App. 2012), *cert. dismissed as improvidently granted*, No. 27577 (Sept. 30, 2015). Given the evidence in the record clearly demonstrates the blurred distinction among the I'On Companies and this blurred distinction constitutes amalgamation under South Carolina law, this Court should affirm the Trial Court's amalgamation ruling.

Amalgamation is based on a finding that the corporate interest, entities, and activities between various corporations are so co-mingled that the legal distinction between the corporations and their activities is blurred. *Id.* As the trial court acknowledged, amalgamation does not require a showing of a parent company's "domination" of its subsidiary. *Peoples Fed. Sav. & Loan Ass'n v. Myrtle beach Golf & Yacht Club*, 310 S.C. 132, 148, 425 S.E.2d 764, 775 (Ct. App. 1992) (Total domination of the subservient corporation is a required to show liability under the instrumentality doctrine.). Here, the record reflects the I'On Company and I'On Group dictated the day-to-day operations of the other Appellants and controlled all business decisions related to the I'On development. (R. p. 59). Tom Graham testified to the degree in which both he and Vince Graham directed the managers of the I'On Companies when making business decisions and controlled the conceptual planning of the I'On neighborhood. (R. p. 681, lines 9-23). Moreover, the Trial Court found the I'On Companies all employ the same general manager, Joe Barnes, and that Mr. Barnes executed documents on behalf of all the I'On Companies in the same transaction. (R. p. 60 (Mr. Barnes signed the Recreational Easement and Agreement to Share Costs on behalf of all of the I'On Companies)). Indeed, the I'On Companies were so intermingled that even the I'On Companies own agents treated the companies as one in the same. Chad Bessenfelder, the general manager of I'On Company, used the companies' names interchangeably when he made a statement regarding the sale of the community dock to the I'On

homeowners.[63] The Trial Court noted on the record, when directing amalgamation, that the Grahams did not even know who worked for which company. (R. p. 1480, line 24- p. 1481, line 1). Due to overwhelming amount of evidence in the record supporting the Trial Court's findings, and the proper application of those findings to law, this Court should affirm the Trial Court's determination that the I'On Companies are amalgamated.

X. Walbeck's ILSA Claim Does Not Fail as a Matter of Law because Federal Law Clearly Indicates Actual Reliance is not Required, and Further, the Trial Court Found Walbeck Actually Relied

Finally, Appellants maintain Walbeck's ILSA claim fails "as matter of law" because the anti-fraud provisions of ILSA "should be interpreted" to require actual reliance. (App. Br. at 61-63). Appellants' argument is fatally flawed for two reasons. First, prevailing Fourth Circuit precedent clearly indicates a plaintiff need not prove actual reliance to prevail under ILSA's anti-fraud provisions. *Gibbes v. Rose Hill Plantation Dev't Co.,* 794 F. Supp. 1327, 1334 (D.S.C. 1992) ("In order to prevail on an ILSA claim, a plaintiff does not need to prove that a defendant intended to defraud or deceive or that the plaintiff relied on the property report.")(emphasis added). Thus, Walbeck's ILSA claim does not fail as a matter of law – the law indicates actual reliance is not required. *Id.* Second, the Trial Court found Walbeck actually relied on Appellants' property-related misrepresentation, and its finding is supported by the overwhelming evidence in the record. (R. pp. 58-59) (finding Walbeck actually relied on Appellants' negligent misrepresentations).[64] Thus, even under Appellants' interpretation, Walbeck's ILSA claim does not fail and any "error" purportedly committed by the Trial Court is harmless. *Fishburne v.*

[63] In March of 2009 Mr. Besenfelder, on behalf of the I'On Group, represented to the Assembly that the "I'On Company [was] preparing to deed the [C]ommunity [D]ock to the I'On Assembly. We plan to subdivide a parcel to be recorded and deeded." (R. pp. 2236-2237, emphasis added). However, at the time the statement was made, the I'On Club owned the dock.

[64]Appellants contend Walbeck "cannot establish actual reliance on any material misrepresentation for ILSA purposes," ignoring the Trial Court's express finding that Walbeck sufficiently proved reliance for a multitude reasons, including the fact Walbeck testified as to his "actual reliance" on the Property Report, I'On agents and other marketing materials concerning the amenity property. (R. p. 955, line 12- p. 958, line 2; R. p. 959, lines 6-20).

Short, 268 S.C. 546, 550, 235 S.E.2d 118, 120 (1977) (An error creates no prejudice and is harmless when it appears that the jury was not misled by the error.)

XI. Appellants Other Factual Arguments and Distortions Similarly Fail

As even the increased page limit permitted for this brief does not permit Respondents to address every unsupported factual argument and/or misstatement contained within Appellants' brief. [65] Respondents set forth several additional examples below:

A) Respondents should have known Appellants had not timely transferred the Amenity Property:

No: Exhibits 47, 58, 58a, 179, 180, 181, 203, 214, 215, 217 (R. pp. 2216-2217; R. pp. 2236-2237; R. pp. 2238-2240; R. pp. 2852-2854; R. pp 2855-2856; R. pp. 2857-2861; R. p. 2928; R. pp. 2946-2948; R. p. 2949; R. p. 2953) and many others evidence that the amenity handover process essentially started in 2005 and continued at the time of trial in 2014. (R. p. 1085, lines 5-15; R. p. 1090, line 6- p. 1091, line 16; R. p. 1173, line 17- p. 1174, line 3). All the while, the homeowners enjoyed unencumbered use to the Amenity Property, just like any owner would, until the sale to Buyers; and Appellants continued to represent the turnover was in process.

B) Respondents should have known because members had to pay rent for the use of the clubhouse and dock maintenance fees (App. Br. at 16):

No: Paying rent or a fee to use the clubhouse could not give rise to the notion that the park and dock was not and would never be owned by the Assembly. Any such fee was seen as the cost for general maintenance and upkeep of the facilities. Respondents were accustomed to, and expected to, pay for the upkeep of their property, much like they did for the fountain and seasonal flowers. (R. p. 614, line 17- p. 615, line 14). In budgets

[65] Additionally, Appellants intentionally confuse issues and evidence: 1) relating to the Creek Club zoning versus the transfer of the amenities; and 2) a claim for the Creek Club versus the filed claim for the Creekside Park and adjacent Community Dock. Respondents have consistently claimed they were entitled to the Creekside Park by virtue of Appellants' promises. Whatever Appellants elected to construct or place on Creekside Park property is incidental to the promised conveyance. (R. p. 891, lines 2-15; R. p. 976, line 22- p. 977, line 2; R. p. 1321, line 24- 1322, line 10). Further, the evidence demonstrates that Respondents were led to believe that a clubhouse would exist on or near the Creekside Park. (R. p. 844, lines 13-25; R. p. 861, lines 16-20; R. p. 955, line 12- p. 956, line 14). Thus, there was no surprise or cause for concern when the Creek Club was constructed at Respondents' park. Moreover, Appellants' own attorney described the Creek Club as being the "neighborhood clubhouse." (R. p. 924, line 19- p. 925, line 10). Likewise, Appellants attempt to confuse the zoning appeal with the underlying claims. The Court properly noted that pursuing a zoning challenge is a proper process. (R. p. 1466, line 22- p. 1468, line 2). Zoning, by definition, addresses the use of a property, not ownership. Here, another Assembly member complained of, and challenged, the "carnival like atmosphere" that surrounded the Creek Club, i.e., the use. (R. p. 1466, line 22- p. 1468, line 2). Her Zoning Appeal was dropped because Tom Graham threatened to sue her if she persisted with her appeal. (R. p. 725, line 16- p. 726, line 18).

prior to 2005 the line item was called "Dock Maintenance." (*See,* R. pp. 3173-3174). In 2005, Appellants changed it to "Creek Club Dock Usage." (R. pp. 3325-3333). The 2005 ownership situation did not foreclose the opportunity for Appellants to fulfill their promise to convey the property (R. p. 1090, line 21- p. 1091, line 16) whereas the 2009 sale did. Dock maintenance and/or use fees are part and parcel with ownership; it is prudent and expected to maintain that which you own, or will own in the future.

C) Respondents' Verified Complaints were false (*e.g.*, App. Br. at 46):

No: Respondents believed other homeowners had received the Property Report because of the pattern established by the developer in distributing the same. Indeed, this pattern was verified at trial by Tim Eble. (R. p. 599, line 20- p. 601, line 1). Respondents' belief was further corroborated at trial by Exhibit 150, 115(a), and 116(a) (R. pp. 2720-2841; R. pp. 2347-2350; R. pp. 2353-2355), which indicated hundreds of other homeowners had indeed received the Property Report before purchasing.

D) The Property Report required by ILSA was intentionally (and rightfully) vague because in 1998 I'On was still just a vision (App. Brief at 9):

No: This statement is simply inconceivable; the entire purpose for the creation of ILSA is to prevent fraud upon consumers who are purchasing lots in developments subject to the Act.[66] The global I'On Plat had already been approved by the Town of Mount Pleasant in 1997. (R. pp. 2117-2119; R. pp. 2120-2127; R. pp. 2347-2350; R. pp. 2353-2355; R. p. 2607; R. pp. 2720-2841).

E) By the time of the Adkins contract, ILSA no longer applied (App. Brief at 10):

No: This is contradicted by Appellants own actions; they did not withdraw the ILSA registration until December 2009. (R. p. 2606; R. p. 2333).

F) The court held Templeton's letter was not a demand (App. Br. at 16):

No. The transcript cited by Appellants does not support this assertion. (R. p. 1030, lines 4-24). If one looks at the entirety of the discussion, there is no such ruling; rather, the Court was recognizing the difference in the settlement of the zoning appeal as opposed to issues framed by the pleadings and evidence in this action. (R. p. 1031, line 19- p. 1032, line 18). The written Templeton demand, (R. pp. 2229-2230), certainly was a demand:

> Provided to you is a copy of the property report for I'On... On page 21 of the report you will find a list of recreational properties . . . The Board . . . is on

[66] The purpose of the Interstate Land Sales Act ("ILSA") is to ensure that an individual is informed of certain facts prior to purchasing a piece of property which would enable a prudent buyer to make an informed decision as to the purchase. *Gibbes v. Rose Hill Plantation Dev. Co.*, 794 F.Supp. 1327, 1333 (D.S.C. 1992).

notice that action must be taken immediately to secure any of these properties . . . That specifically applies to the Community Dock at the Creek Club . . .

(*Id*). Respondents were aware of this demand and the oral repeating of similar demands at Assembly member meetings. (R. p. 871, line 17- p. 873, line 24; R. p. 960, lines 13-20; R. p. 984, line 15- p. 985, line 12).

G) The Easement would have shown up in all purchasers' chain of title (App. Br. at 31):

No: This was neither alleged, stated, nor proven at trial. However, this Court can take judicial notice that a legal recording on an unrelated piece of property would not show up in an I'On homeowner's chain of title. Appellants' mistake this theory with that of community covenants which are recorded on all title in the neighborhood.

H) Adkins did not pursue a third party beneficiary claim (App. Brief at 51):

No: The complaint is clear that some of the contract claims were being pursued were as a third party beneficiary and Respondent Counsel was very clear in closing argument to the jury that Walbeck's claim was a direct breach of contract and the Assembly and Adkin's claims were on the basis of a third party beneficiary. (R. p. 1584, line 8- p. 1585, line 21).

Each of the foregoing assertions contained in Appellants' brief is either false or misleading, or requires this court to interpret the evidence in a manner contrary to the jury's findings.

CONCLUSION

The Trial Court correctly denied Appellants' motion for judgment notwithstanding the verdict/new trial and the I'On Companies' petition for attorneys' fees. Additionally, the Trial Court correctly declared the 2000 recreational easement void *ab inito* and awarded Walbeck attorneys' fees and costs in the amount of $225,000. The record and applicable precedent provides numerous grounds to sustain the Trial Court's Orders. Moreover, in reviewing, this Court gives great deference to the Trial Court's finding and may only reverse on a finding the Trial Court abused its discretion. Thus, for all the reasons stated herein, Respondents respectfully ask that this Court to overrule this appeal in all respects.

Respectfully Submitted,

JUSTIN O'TOOLE LUCEY, P.A.

Justin O'Toole Lucey, Esquire
Joshua F. Evans, Esquire
415 Mill Street
Mt. Pleasant, SC 29464
(843) 849-8400
(843).849-8406 (fax)
jlucey@lucey-law.com
jevans@lucey-law.com

Attorneys for the Respondents

Mt. Pleasant, South Carolina
April 15, 2016

APPENDIX A

Deleted	Referenced Duplicate
PLT 230	DEF 4
PLT 1	DEF 22
PLT 141	DEF 23
PLT 45	DEF 25
PLT 10 and PLT 42	DEF 27
PLT 11	DEF 28
PLT 54	DEF 32
PLT 2	DEF 34
DEF 52	PLT 32
DEF 61a	PLT 150 @ 34
DEF 67	PLT 150 @ 22
DEF 69	PLT 150 @ 33
PLT 111	DEF 128
PLT 52	DEF 132
DEF 158	PLT 150
PLT 84	DEF 139
PLT 37	PLT 89
PLT 142	DEF 24

JUSTIN O'TOOLE LUCEY, P.A.

Justin O'Toole Lucey, Esq.
Dabny Lynn, Esq.
Joshua F. Evans, Esq.
415 Mill Street
Mount Pleasant, SC 29464
(843) 849-8400
(843) 849-8409 (fax)

Attorneys for Respondents

Charleston, South Carolina
April 18, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
APR 20 2015
SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondents' Final Brief filed in this manner on behalf of Brad J. Walbeck and Lee Ann Adkins, individually, and derivatively on behalf of the I'On Assembly, Inc., complies with Rule 211(b), SCACR.

[SIGNATURE BLOCK ON NEXT PAGE]

JUSTIN O'TOOLE LUCEY, P.A.

Justin O'Toole Lucey, Esq.
Dabny Lynn, Esq.
Joshua R. Evans, Esq.
415 Mill Street
Mount Pleasant, SC 29464
(843) 849-8400
(843) 849-8409 (fax)

Attorneys for Respondents

Charleston, South Carolina
April 18, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

RECEIVED
APR 20 2016
SC Court of Appeals

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

PROOF OF SERVICE

I certify that I have served **Final Brief of Respondents, Brad J. Walbeck and Lea Ann Adkins, Individually and Derivatively on Behalf of I'On Assembly, Inc.** on Appellants by depositing a copy of it in the United States Mail, postage prepaid, on April 18, 2016, addressed to their attorneys of record as follows:

Brian C. Duffy, Esq, Seth W. Whitaker, Esq. Julie M. Rode, Esq. Duffy & Young, LLC 96 Broad Street Charleston, SC 29401	Timothy W. Bouch, Esq. Yancey A. McLeod, Esq. Leath, Bouch & Seekings, LLP 92 Broad Street Charleston, SC 29401

JUSTIN O'TOOLE LUCEY, P.A.

By: _____

Justin O'Toole Lucey, Esq.
Dabny Lynn, Esq.
Joshua F. Evans, Esq.
415 Mill Street
Mount Pleasant, SC 29464
(843) 849-8400
(843) 849-8409 (fax)

Attorneys for Respondents

RECEIVED
SEP 10 2018
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC,on behalf of themselves and others similarly situated, Petitioners,

v.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Homes Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund, Respondents.

Appellate Case No. 2016-002343

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27841
Heard May 24, 2018 – Filed September 5, 2018

REVERSED AND REMANDED

James Edward Bradley and S. Jahue Moore, both of Moore Taylor Law Firm, PA, of West Columbia, for Petitioners.

William W. Wilkins and Burl F. Williams, both of Nexsen Pruet, LLC, of Greenville, James Lynn Werner and Lawrence M. Hershon, both of Parker Poe Adams & Bernstein, LLP, and Poe D. Johnson, of Johnson & Barnett LLP, all of Columbia, for Respondents.

JUSTICE KITTREDGE: This case involves the South Carolina Home Builders Self Insurers Fund (Fund), which was created by the Home Builders Association of South Carolina, Inc. "for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act." The Fund at issue here was established in September 1995 by an "Agreement and Declaration of Trust" (Agreement) between the Home Builders Association of South Carolina, Inc. (Association) and the Fund's Board of Trustees (Board). The underlying dispute arose after the Board announced plans to wind down the Fund and use the Fund's remaining assets to finance a new mutual insurance company. Petitioners, who were members of the Fund, disagreed with that decision and challenged the Board's authority to use the Fund's assets in such a way. The trial court twice dismissed Petitioners' suit, first on the basis that it involved the internal affairs of a trust and therefore should have been filed in probate court, then in a subsequent proceeding, on the basis that the lawsuit was a shareholder derivative action and that the complaint failed to comply with the pleading requirements of Rule 23(b)(1), SCRCP.

On appeal, the court of appeals affirmed the dismissal of Petitioners' complaint, finding the trial court properly concluded (1) the Fund was not a trust; (2) Petitioners' claims were derivative in nature; and (3) that Petitioners' complaint was properly dismissed as it did not properly allege a pre-suit demand as required by Rule 23(b)(1). *Patterson v. Witter*, 418 S.C. 66, 791 S.E.2d 294 (Ct. App. 2016). We issued a writ of certiorari to review the court of appeals' decision. We reverse and remand, for Petitioners have satisfied the pleading requirements of Rule 23(b)(1), irrespective of whether the Fund is properly characterized as a trust.

I.

All employers conducting business in South Carolina must secure the payment of compensation to their injured employees. S.C. Code Ann. § 42-5-10 (2015). This may be accomplished either by purchasing workers' compensation liability insurance or by qualifying as a "self-insured" employer. To become self-insured, an employer must demonstrate to the Workers' Compensation Commission (Commission) that it has the "financial ability to pay directly the compensation in the amount and manner and when due as provided" by the Act. S.C. Code Ann. § 42-5-20 (2015).

The Act also allows employers to create a self-insured workers' compensation liability fund or "pool." *Id.* § 42-5-20 ("The [C]omission may, under such rules and regulations as it may prescribe, permit two or more employers in businesses of a similar nature to enter into agreements to pool their liabilities under the Workers' Compensation Law for the purpose of qualifying as self-insurers."). For a self-insurance fund to be approved, an officer of the proposed organization must submit to the Commission various documents, financial statements, and notably, "[a]n indemnity agreement which jointly and severally binds each member of the fund, signed by each proposed member." S.C. Code Ann. Regs. 67-1501(E)(1)–(8) (2012).[1] A self-insured fund must be approved by the Commission before it may begin operation. *Id.* § 67-1502 (2012).

The Agreement identified its purpose as:

> meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act; *to form an overall self-insurers fund* pursuant to Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits; to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage; and to minimize the cost of providing workers' compensation

[1] This requirement of joint and several liability for fund membership is not unique to South Carolina. *See infra* note 8.

> coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building Industry.

(emphasis added).

In addition to establishing the authority of Board members and extensive guidelines for the administration of the Fund, the Agreement further provided that amendments to the Agreement may be made by a majority of the Board, "However, this Agreement may not be amended so as to change its purpose as set forth [above] *or to permit the diversion or application of any of the funds of the [Fund] for any purpose other than those specified herein.*" (emphasis added). The Agreement also provided that "In the event of termination, the remaining funds available in the [Fund], after providing for all outstanding obligations, shall be distributed, through a formula determined by the [Board], to the participating members."

In the fall of 2003, the Board began discussing the idea of winding down the Fund and using the remaining monies on hand to capitalize a mutual insurance company, presumably to be comprised of the members of the Fund. Over the next several years, the Board continued to explore this "conversion" with the Association, the Commission, and the Department of Insurance (DOI); the two biggest challenges were identified as accumulating the $5 million necessary for the mutual insurance company's starting capital reserve and upgrading the Fund's existing computer systems to enable compliance with DOI's regulatory requirements.

In furtherance of the plan to create a mutual insurance company, the Board authorized expenditures from the Fund to purchase a custom computer software program; purchase office space costing $1.6 million; include "operations of the insurance company" in the scope of its directors and officers insurance coverage; and to subscribe to a national workers' compensation insurance-rating and data-collection bureau.

In May 2011, the Board notified the Commission it planned to cease accepting new members into the Fund effective July 1, 2011, and planned to withdraw the Fund from the self-insured program effective January 1, 2012. The Board also sought and received "approval" from the Commission to use $5 million in Fund assets to capitalize the reserve fund for the mutual insurance company; however, this "approval" included no evaluation of whether this use of Fund monies complied

with the terms of the Agreement. Indeed, the director of the self-insurance division of the Commission wrote to the Fund's administrator:

> In response to your request[,] we have approved the release of $5 million in non-pledged assets of the SC Home Builders Self-Insurers Fund to be used solely to capitalize the SC Builders Insurance Group, Inc., in conjunction with the closure of the self-insured [F]und. It is understood that the [F]und will cease accepting new members effective July 1, 2011[,] and will become no longer self-insured for workers' compensation in South Carolina effective January 1, 2012. *The outstanding liabilities of the [F]und at the time of closure, January 1, 2012, will remain the responsibility of the self-insured [F]und and its membership under joint and several liability.* The [F]und is required to provide a final audited financial statement following closure and will continue to provide the Commission[']s Form 11, Fund Quarterly Financial Report, until further notice. The [F]und will also be required to comply with Self-Insurance Tax and Second Injury Fund Assessment requirements following the [F]und[']s closure.

(emphasis added).

Petitioners are members of the Fund who, in February 2012, filed suit against the Fund, the Board, and the individual members of the Board (collectively "Respondents"). Petitioners alleged breach of fiduciary duty; breach of trust; breach of contract; and breach of contract accompanied by a fraudulent act. Petitioners alleged that the Board committed *ultra vires* acts in breach of its fiduciary duties by removing more than $5 million from the Fund to establish the mutual insurance company—monies which should have been returned to the Fund's members under the terms of the Agreement. Petitioners also alleged that in addition to not receiving their share of the $5 million paid-in surplus, they have suffered or will individually suffer additional tax consequences and additional liability exposure to cover the Fund's obligations. Petitioners alleged that all improper expenditures should be reimbursed to the Fund to reduce the amounts for which Fund members might ultimately be jointly and severally liable. Additionally, Petitioners sought an accounting and a declaration that Fund assets could not be used for the purpose of establishing a mutual insurance company.

Respondents moved to dismiss the complaint, asserting eight separate bases for

dismissal, including (1) the circuit court's lack of subject matter jurisdiction because the complaint involved the internal affairs of a trust, which fell within the exclusive jurisdiction of the probate court;[2] and (2) that the action was derivative in nature and did not meet the pleading requirements of Rule 23(b)(1), SCRCP.[3] The Respondents' motions sought protection from responding to Petitioners' discovery requests during the pendency of the motions; incorporated by reference an affidavit of the Fund's administrator, to which twelve separate exhibits were attached; and stated "the Court will be asked, pursuant to Rule 12(b)(6), SCRCP, to consider matters outside of the Complaint and treat the motion as one for summary judgment."

On September 4, 2012, a hearing was held on Respondents' motions to dismiss, during which the circuit court indicated it was inclined to dismiss the complaint based on the probate court's exclusive jurisdiction of the internal affairs of trusts and requested proposed orders. On January 30, 2013, after the hearing but before the circuit court issued its written order, Petitioners sent a written demand letter to Respondents' counsel itemizing specific requests:

> In particular, our clients believe the following actions are necessary and should be taken on behalf of the [F]und:

---

[2] *See* S.C. Code Ann. § 62-7-201(a) (Supp. 2017) (providing "the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts").

[3] Rule 23(b)(1) provides:

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains . . . . The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and . . . the reasons for his failure to obtain the action or for not making the effort.

1. The $5,000,000 which was taken out of the [F]und as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Builders Self Insurers Fund.

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.

3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of the Trustees.

4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.

5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

The letter also stated:

> [We] believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. [We] believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.
>
> If your clients' position is any different, please let [us] know so we can discuss this matter. If [we] do not hear from you regarding this, [we] will assume your clients refuse to take the actions as requested above, and we will take appropriate action.

Respondents did not immediately respond.

On March 5, 2013, the circuit court issued a written order of dismissal finding "[i]t is clear from the documents submitted to the Court that this dispute concerns a trust" and concluding the circuit court therefore lacked subject matter jurisdiction.

Nevertheless, the dismissal was without prejudice, allowing Plaintiffs to refile their complaint in Probate Court and subsequently remove the re-filed matter back to circuit court.[4]

Still having received no response to their January 30, 2013 letter, Petitioners refiled their lawsuit in probate court on April 9, 2013, alleging the same causes of action and including a new paragraph, which stated:

> 8. To the extent required by South Carolina Rule of Civil Procedure 23, the Plaintiffs allege:

[4] *See* S.C. Code Ann. § 62-1-302(d)(4) ("Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo: . . . (4) matters involving the internal or external affairs of trusts . . . .").

a. The Plaintiffs were beneficiaries of the trust at all times relevant including when the transactions complained of were made.

b. The Plaintiffs, 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 Defendants, meetings with counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

The re-filed suit was removed to circuit court.

Respondents moved to dismiss this second complaint, alleging, among other things, that the lawsuit *did not involve a trust* but rather was a shareholder derivative action and that the complaint failed to comply with the pleading requirements of Rule 23(b)(1) and therefore should be dismissed; Respondents submitted an affidavit in support of their motion.[5]

Ultimately, the circuit court dismissed Petitioners' complaint, finding the Fund was an unincorporated association, not a trust, and that the complaint was therefore subject to Rule 23(b)(1). The circuit court held that the complaint failed to comply with Rule 23(b)(1). Petitioners then filed a Rule 59(e) motion arguing the pre-suit demand was properly made and that the trial court's order elevated form over substance. In their motion, Petitioners also sought to supplement or amend their pleadings if more detailed pleadings were required. The circuit court denied this motion.

On appeal, the court of appeals affirmed, finding the circuit court properly concluded (1) the Fund was an unincorporated association and not a trust; (2) Petitioners' claims were derivative in nature; and (3) that Petitioners' complaint was properly dismissed as it did not properly allege a pre-suit demand as required by Rule 23(b)(1). *Patterson v. Witter*, 418 S.C. 66, 791 S.E.2d 294 (Ct. App.

[5] Respondents also alleged Petitioners lacked standing; that the contract claims fail because Petitioners were not parties to the Agreement; and that the complaint failed to meet the heightened pleading standard of Rule 9(b), SCRCP, as to the breach of contract accompanied by a fraudulent act claim.

2016). This Court issued a writ of certiorari to review the court of appeals' decision.

II.

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citation omitted). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Id.* (citation omitted). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id.* at 395, 645 S.E.2d at 247–48 (quoting *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)). "The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Id.* at 395, 645 S.E.2d at 248 (citation omitted).

In considering a motion for dismissal under Rule 12(b)(6), if "matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Rule 12(b), SCRCP; *see also, e.g., Brown v. James*, 389 S.C. 41, 47 n.5, 697 S.E.2d 604, 607 n.5 (Ct. App. 2010) (citations omitted) (finding that the trial court's consideration of matters beyond the pleadings converted the motion to dismiss into a motion for summary judgment). Because the parties submitted matters outside the pleadings that were not excluded by the court and certain factual findings in the circuit court's order exceeded the scope of the facts alleged in the complaint, we find this motion to dismiss was converted into a motion for summary judgment and we review it as such.

"[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[, then] the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006) (citations omitted). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *USAA Prop. & Cas. Ins. Co. v.*

Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (quoting *Middleborough Horizontal Prop. Regime Council of Co–Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995)).

A. Unincorporated Association or Trust

The court of appeals found that although the Agreement, by its terms, purported to create a trust, the Fund possessed many characteristics typically associated with business corporations, and thus, the Fund was properly considered an unincorporated association for the purposes of the pre-suit demand and pleading requirements of Rule 23. Petitioners argue the court of appeals erred in categorizing the Fund as anything other than precisely what it purports to be—a trust—and therefore, Petitioners argue the pre-suit demand and pleading requirements of Rule 23(b)(1) are inapplicable. Petitioners alternatively assert that in any event they satisfied the pleading requirements of Rule 23(b)(1). On this latter point, we agree with Petitioners. Nevertheless, we address the dispute over the proper characterization of the Agreement and its impact on the applicability of Rule 23(b)(1).

In construing a trust agreement, "a court must resort first to the language of the instrument, and if the language is perfectly plain and capable of legal construction, the language determines the form and effect of the instrument." *Germann v. N.Y. Life Ins. Co.*, 286 S.C. 34, 38, 331 S.E.2d 385, 388 (Ct. App. 1985) (citing *Chiles v. Chiles*, 270 S.C. 379, 242 S.E.2d 426 (1978)). "If the intention of the settlor appears on the face of the agreement, then the court will effectuate it, unless it is in conflict with principles of law." *Id.* (citing *Citizens & S. Nat'l Bank of S.C. v. Auman*, 259 S.C. 263, 191 S.E.2d 511 (1972)).

Despite this black-letter law, we acknowledge the truth in the court of appeals' observation that the Fund is, in many ways, dissimilar to a garden-variety trust. *Patterson*, 418 S.C. at 78–80, 791 S.E.2d at 301–02. Nevertheless, that dissimilarity is not dispositive. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462–66 (1980) (rejecting an argument that a business trust should be treated as an unincorporated association simply because it resembled a business association in several aspects, finding instead that the entity was an express trust, just as it purported to be, and that there was no basis for disregarding the trust's legal form). But many states permit (indeed, one state even requires[6]) workers' compensation

[6] *See* 77 Pa. Cons. Stat. § 1036.2(b)(8) (allowing a group of employers to create a

self-insured funds to be organized as trusts.[7] Also, it is common in many other states for fund participants to be subject to joint and several liability.[8] The

---

workers' compensation self-insured fund if the group "[e]xecutes a trust agreement under which each member agrees to jointly and severally assume and discharge the liabilities arising under this act").

[7] *See, e.g.*, Ala. Admin. Code r. 480-5-3-.08(9) (2018) ("Each Fund shall have a set of Bylaws or shall enter into a trust agreement which shall govern the operation of the Fund."); Ariz. Rev. Stat. Ann. § 23-961.01(A) (2018) ("Two or more employers, each of whom are engaged in similar industries, may enter into contracts to establish a workers' compensation pool to provide for the payment and administration of workers' compensation claims . . . [b]y the execution of a trust agreement . . . ."); 099-00-1 Ark. Code R. § 099.05(III)(A) (requiring a workers compensation self-insured group "to be administered under the direction of an elected board of trustees"); Ill. Admin. Code tit. 50, § 575.110 (2018) (defining the governing body of a workers' compensation self-insured fund as "any member of the pool's Board of Trustees, if the pool is a trust, or any member of the pool's Board of Directors, if the pool is any other type of entity"); 211 Mass. Code Regs. 67.06(2)(b)(2) (2018) (requiring self-insured group applicants to submit " a copy of the articles of association, trust agreement, or articles of organization"); Mich. Admin. Code r. 408.43d (2018) (requiring workers' compensation self-insured funds "to be administered under the direction of an elected board of trustees and to provide workers' compensation coverage for a group of private employers in the same industry or for public employers of the same type of unit"); Mo. Code Regs. Ann. tit. 8, § 50-3.010(1)(A)(13) (2018) (defining a workers compensation self-insured trust as "[a] combination of persons, businesses, firms, or corporations bound together to secure, jointly and severally, workers' compensation liability by holding the individual interests of each subservient to a common authority for the common interests of all. This shall also include the written instrument that creates the trust."); Tenn. Comp. R. & Regs. 0780-01-54-.04(2)(a)(1) (2018) (requiring workers' compensation self-insured fund applicants to submit "[t]he articles of incorporation, trust agreement, or any other similar document from which the pool is formed").

[8] *See* Ala. Admin. Code r. 480-5-3-.08(6) (2018) ("All participants shall sign Participation Agreements providing for joint and several liability for claims against the Fund during the coverage periods of their participation."); 099-00-1 Ark. Code R. § 099.05(III)(A)(1)(a) (2018) (requiring all fund participants to execute "[a]n

indemnity agreement jointly and severally binding the group and each member thereof to comply with the provisions of the Arkansas Workers' Compensation laws and Rules and Regulations of the Commission"); Cal. Code Regs. tit. 8, § 15479(a)–(b)(1) (2018) (requiring each member of a group self-insurer to execute an "agreement under which each member of a group self-insurer agrees to assume and discharge, jointly and severally, any compensation liability under Labor Code Section 3700-3705 of any and all other employers that are parties to the group self-insurer indemnity agreement"); 3 Colo. Code Regs. § 702-2:2-2-2(7) (2018) (requiring pool agreements to "jointly and severally bind each member to pay claims and comply with all provisions of the workers' compensation laws of the State of Colorado"); Fla. Admin. Code Ann. r. 69O-190.068(1) (2018) ("Each self-insurers fund member shall enter into an indemnity agreement jointly and severally binding the self-insurers fund and each member thereof to comply with the provisions of the Florida Workers' Compensation Law"); Ga. Code Ann. § 34-9-151(9) (2018) (requiring workers' compensation self-insured fund agreements to include a provision "through which each member agrees to assume and discharge, jointly and severally, any and all liability under this article relating to or arising out of the operations of the fund"); 37 La. Admin. Code tit. 37, § 1111(A) (2018) ("Each self-insurance fund member shall enter into an indemnity agreement jointly and severally binding the self-insurance fund and each member thereof to comply with the provisions of the applicable Louisiana Revised Statutes and rules, regulations, and directives of the Department of Insurance."); 02-031-250 Me. Code R. § III(B)(2)(d) (2018) (requiring members of workers' compensation group self-insured plans to submit an executed indemnity agreement); Md. Code Regs. 31.08.09.08(C)(13) (2018) (requiring a workers compensation self-insured fund to submit "[c]opies of executed agreements with each member assuming joint and several liability for obligations of the group in the event of insolvency of the Self-Insurers' Guaranty Fund"); 211 Mass. Code Regs. 67.06(2)(b)(17) (2018) (requiring that all members of a workers' compensation self-insured group are jointly and severally liable for all workers' compensation obligations); Mich. Admin. Code r. 408.43g(5)(j) (2018) (requiring workers' compensation group self-insured fund records to include "Individual membership applications containing signed indemnity agreements"); Minn. r. 2780.2800(3) (2018) (providing a workers' compensation self-insured group "shall not accept any liability for a new member until a signed indemnity agreement in the form set forth in part 2780.9920 has been completed by that new member and filed with the commissioner"); Code Miss. R. 20-2-1:1.7(B)(2)(b)(9) (conditioning approval of a workers compensation self-insured fund upon the workers compensation commission's receipt of "[a]n

indemnity agreement jointly and severally binding the group self-insurer and each member thereof to meet the workers' compensation obligations of each member"); Mo. Code Regs. Ann. tit. 8, § 50-3.010(5)(A)(1) (2018) (requiring that workers' compensation self-insured trusts include in the trust agreement "an indemnity clause which jointly and severally binds the group and each member thereof for payment of benefits to employees of members of the group and all other liability pursuant to Chapter 287, RSMo"); Mont. Admin. R. 24.29.621(1)(c)(i) (2018) (requiring members of a workers compensation self-insured group to execute an "agreement to accept joint and several liability for all workers' compensation benefits and occupational disease obligations incurred by the employer group"); N.J. Admin. Code § 11:15-1.3(b)(5) (2018) (requiring workers' compensation self-insured groups to obtain "[a]n indemnity and trust agreement, in a form satisfactory to the Commissioner, jointly and severally binding the group and each member thereof to meet the workers' compensation obligations of each member, and establishing a trust for the benefit of persons qualifying to receive workers' compensation awards or payments from employers participating in the group"); N.Y. Comp. Codes R. & Regs. tit. 12, § 317.9(b)(7) (2018) (allowing a group self-insurer "to immediately levy an assessment upon the group members or take such other action as may be appropriate in order to make up the deficiency"); Okla. Admin. Code 810:25-11-15(a)(1) (2018) (requiring "[e]very member of a group self-insurance association shall execute an indemnity agreement . . . under which each member agrees to assume and discharge, jointly and severally, liability under the AWCA of any and all employers party to such agreement"); Or. Admin. R. 436-050-0270(1)(g) (2018) (requiring employers applying for certification as a self-insured employer group to submit a "'Group Self-Insured Indemnity Agreement' or another form authorized by the director, that jointly and severally binds each member for the payment of any compensation and moneys due to the director by the group or any member of the group"); 34 Pa. Code § 125.133(c)(8)(i) (2018) (requiring workers' compensation group self-insured applicants to submit to the workers compensation bureau the group's "proposed trust agreement and bylaws, which shall include: (i) A pledge that each member will be jointly and severally liable for the expenses and other obligations of the fund and for each other member's workers' compensation liability which is incurred while it is a member, including liability for assessments on claims incurred during a member's membership but not issued until after it has terminated membership"); Tenn. Comp. R. & Regs. 0780-01-54-.04(2)(e)(2) (2018) (requiring workers' compensation self-insured pool applicants to submit for approval "[i]ndemnity agreements between the pool and each member establishing each

presence of joint and several liability among Fund members does not necessarily undermine a trust's identity as such; rather it is a function of the overriding policy concern of ensuring injured workers' claims are paid.

The Agreement resembles a trust in some respects, and it does not resemble a trust in other respects. However, the question of whether the Fund is a trust need not be resolved, for we elect to follow the precedent from other jurisdictions applying Rule 23(b)(1) to all actions which are derivative in nature, even if the entity in question is a trust. *See, e.g., Accredited Aides Plus, Inc. v. Program Risk Mgmt., Inc.*, 46 N.Y.S.3d 246, 255 (App. Div. 2017) (finding the "analysis applicable to derivative actions against corporations has been held to apply to trusts" and finding that the joint and several liability of workers' compensation group self-insured trust members "does not require us to set aside the legal distinction [] between derivative and direct claims"); *see also In re Mortg. & Realty Tr. Sec. Litig.*, 787 F. Supp. 84, 86 (E.D. Pa. 1991) (applying the Rule 23 demand requirement to a derivative action against the board of trustees of a real estate investment trust). The key inquiry is whether the underlying challenge is properly characterized as derivative in nature. Accordingly, the applicability of the pre-suit demand and pleading requirements of Rule 23(b)(1) are to be determined not on the basis of whether the entity involved is or is not a trust, but rather, whether the claims at issue are direct or derivative. We turn now to that issue.

---

member's joint and several liability to the pool for all expenses, liabilities, and claims asserted against the pool by any person or entity"); Tex. Lab. Code Ann. § 407A.056(a) (requiring applicants for a certificate of approval to operate a workers' compensation self-insured fund to submit an indemnity agreement that "jointly and severally bind[s] the group and each employer who is a member of the group to meet the workers' compensation obligations of each member"); 14 Va. Admin. Code § 5-370-40(A)(1) (2018) (providing "[a]n application submitted by a group self-insurance association shall be accompanied by the following items . . . 1. A copy of the members' indemnity agreement and power of attorney required by 14 VAC 5-370-120 binding the association and each member of the association, jointly and severally, to comply with the provisions of the Act and copies of any other governing instruments of the proposed group self-insurance association"); Wash. Admin. Code § 296-15-024(3)(a)(v) (2018) (requiring members of a workers' compensation group self-insurance fund to submit "[a]n indemnity agreement jointly and severally binding the group and each member to comply with the provisions of Title 51 RCW").

B. Direct or Derivative

Petitioners argue that the court of appeals erred in finding all of their claims were derivative in nature. Specifically, Petitioners allege that based on the joint and several liability the Act imposes upon members of the Fund, "the injury is to each beneficiary who must, individually, make up for any shortfall in trust assets." Based on this individual liability exposure, Petitioners argue their actions are direct rather than derivative. We agree in part and disagree in part, and we find Petitioners' complaint includes both direct and derivative claims.

"An action seeking to remedy a loss to the corporation is generally a derivative one." *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (citation omitted). An action regarding the fiduciary obligation of a director is ordinarily enforceable through a derivative action. *Id.* (citation omitted). "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation." *Id.* (citation omitted).

"If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder." *Id.* (quoting *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 703–04 (Ct. App. 1988)). "Of course, a suit based on the misconduct can be brought by the individual stockholder." *Id.* at 49, 557 S.E2d at 684–85 (quoting *Ward*, 295 S.C at 221, 367 S.E.2d at 703–04). "It becomes material, therefore, to inquire whether the acts of mismanagement charged to the directors affected the plaintiffs *directly*, or as their interests were submerged in the corporation whose assets were thus dissipated." *Id.* at 49, 557 S.E.2d at 685 (quoting *Stewart v. Ficken*, 151 S.C. 424, 427, 149 S.E. 164, 165 (1929)).

"Specifically, to distinguish a derivative claim from a direct one, the court considers: (1) who suffered the alleged harm, the corporation or the suing stockholders, individually, and (2) who would receive the benefit of any recovery or other remedy, the corporation or the stockholders individually." 19 Am. Jur. 2d *Corporations* § 1923. Direct and derivative claims may be brought simultaneously. 19 Am. Jur. 2d *Corporations* § 1922. "When determining whether a claim is derivative or direct, some injuries affect both the corporation and the stockholders; if this dual aspect is present, a plaintiff can choose to sue individually." *Id.* (citing *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618 (Del. Ch. 2013)); *see also Horizon House-Microwave, Inc. v. Bazzy*, 486 N.E.2d 70, 74 (Mass. App. Ct. 1985) (observing a shareholder may pursue both direct and

derivative claims in a single action).

In evaluating Petitioners' claims in the underlying complaint, the court of appeals found:

> In the instant case, [Petitioners] allege the Board's decision to remove $5 million from the Fund harmed the Fund's ability to adequately cover its risks. Thus, the action is premised on the alleged harm to the overall Fund, not to individual members. Accordingly, we find the circuit court correctly held [Petitioners'] claims were derivative and subject to the pleading requirements of Rule 23(b)(1).

Patterson, 418 S.C. at 81, 791 S.E.2d at 302 (citations omitted).

While we agree with the court of appeals that Petitioners' claim that the removal of the $5 million impacted the Fund's ability to cover its risk is derivative in nature, this claim is by no means the *only* claim asserted in the complaint. Indeed, the court of appeals overlooked various other causes of action and forms of relief requested in the complaint.

Though discovery has not been conducted, one or more of Petitioners' additional claims may be direct in nature. We thus find the court of appeals erred in concluding that the complaint alleged *only* derivative claims. *See Accredited Aides Plus*, 46 N.Y.S.3d at 255 (finding certain claims by members of a workers' compensation group self-insured trust were direct, not derivative, in nature and observing that "just as the trust's deficits are eventually passed through to employer members as assessments by the Board, any recovery by the Board upon its claims on behalf of the trust will benefit the employer members by reducing the trust's deficit and the employer members' corresponding liabilities"). To the extent the court of appeals affirmed the dismissal of Petitioners' direct claims based on Rule 23, this was error.

Although we believe Petitioners' complaint may involve some direct claims, we nevertheless believe the court of appeals correctly found that certain claims were derivative in nature. Accordingly we turn now to what we view as the critical question before the Court—whether Petitioners' complaint met the pleading requirements of Rule 23 (b)(1).

C. Compliance with Rule 23(b)(1)

Lastly, Petitioners argue that even assuming Rule 23(b)(1) applies to their claims, the court of appeals erred in finding the requirements of that rule were not satisfied. We agree, for even if all claims are derivative and Rule 23(b)(1) applies, the demand and pleading requirements of Rule 23(b)(1) have been met.

Both the trial court and the court of appeals found evaluation of whether Petitioners' complaint complied with Rule 23(b)(1) was governed by the court of appeals decision in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000). In *Whittle*, three shareholders of Carolina First Corporation brought a derivative action seeking to recover disproportionate stock bonuses paid to three executives. *Id.* at 180, 539 S.E.2d at 405. The complaint included general allegations that the plaintiffs made pre-suit demands upon the Board of Directors; however, the complaint stated "merely that the plaintiffs demanded 'certain information' and 'certain actions.'" *Id.* at 189, 539 S.E.2d at 409. The court of appeals concluded these allegations were not sufficiently particularized to satisfy the requirements of Rule 23(b)(1), holding "[a]t a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." *Id.* (citation

omitted). The court of appeals noted that although the plaintiffs submitted copies of letters purporting to meet the pre-suit demand requirement, the letters could not be considered because they were not attached to the complaint; and in any event, the letters did not satisfy the pleading requirements of Rule 23(b)(1). Therefore, the court of appeals concluded the trial court did not err in refusing to consider them. *Id.* at 190, 539 S.E.2d at 410.

The facts of this case are distinguishable from those in *Whittle*. Here, although the January 30, 2013 pre-suit demand letter was not expressly incorporated by reference into the complaint, unlike in *Whittle*, the January 30, 2013 letter *does* constitute an adequate demand in this case. Another issue here is Petitioners' failure to include the magic phrase "which is incorporated herein by reference" in their discussion of the letter in paragraph 8 of their complaint. Indeed, the allegations concerning the pre-suit demand in Petitioners' complaint are appreciably more detailed than those in *Whittle*. And certainly, when the January 30, 2013 letter is considered in conjunction with the complaint, there is ample evidence that Rule 23 is satisfied. The trial court simply found it was precluded from looking at the January 30, 2013 letter, which was error.

Moreover, in light of the parties' submission and the trial court's willingness to consider multiple affidavits and documents outside the four corners of the complaint, we reject an approach that approves of a trial court's consideration of everything *except* the pre-suit 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" (quoting *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004))); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 155 (2d Cir. 2002) (explaining that "when a district court considers certain extra-pleading materials and excludes others, it risks depriving the parties of a fair adjudication of the claims by examining an incomplete record"). Accordingly, we reverse the dismissal of Petitioners' complaint on the basis that it failed to comply with Rule 23(b)(1), SCRCP.

III.

For the foregoing reasons, we reverse the decision of the court of appeals and remand this case for further proceedings.

REVERSED AND REMANDED.

BEATTY, C.J., HEARN, FEW and JAMES, JJ., concur.

JUSTIN O'TOOLE LUCEY, PA

Attorneys at Law

Justin Lucey
Joshua F. Evans
Stephanie D. Drawdy
Dabny Lynn
James L. Floyd, III

415 Mill Street, Mount Pleasant, SC 29464
Reply to: P.O. Box 806, Mount Pleasant, SC 29465
Phone: 843.849.8400 · Fax: 843.849.8406 office@lucey-law.com

Anna S. McCann
Lauren M. Milton
Taylor M. Morris
Sohayla R. Townes
Collin H. Fuller

September 7, 2018

RECEIVED
SEP 10 2018
SC Court of Appeals

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *Brad J. Walbeck, et al. v. The I'On Company, LLC, et al.*
Lower Court Case No.: 2010-CP-10-10490
Appellate Case No.: 2015-001590

Dear Ms. Kitchings:

Pursuant to Rule 208(b)(7) of the South Carolina Appellate Court Rules, Respondents wish to make the Court aware of recently-decided authority, *Patterson versus Witter*, Op. No. 27841 (S.C. September 5, 2018), a copy of which is enclosed. *Patterson* is pertinent to the Petitions for Rehearing in the above-referenced case.

In *Patterson*, the South Carolina Supreme Court found the plaintiff's derivative claims satisfied Rule 23(b)(1), SCRCP's demand and pleading requirements and reversed the Court of Appeals' ruling to the contrary. Notably, the Supreme Court found the facts in *Carolina First Corporation versus Whittle*, cited by Appellants, are distinguishable from those in *Patterson* for similar reasons this Court articulated in its August 8, 2018 Opinion here.

Like *Patterson*, this Court found that Respondents satisfied Rule 23(b)(1)'s derivative requirements because pre-suit demands were made and were properly considered by the trial court. As such, the *Patterson* decision serves as additional authority supporting this Court's ruling on the derivative issue Appellants currently seek this Court to rehear.

Sincerely,

Joshua F. Evans

Enclosure (*as stated*)
cc w/encl.: Brian C. Duffy, Esq. and Julie L. Moore, Esq.

JUSTIN O'TOOLE LUCEY, PA
ATTORNEYS AT LAW
415 MILL STREET • P.O. BOX 806 • MT. PLEASANT, SC 29465-0806

RECEIVED
SEP 10 2018
SC Court of Appeals

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

RECEIVED
SEP 21 2018
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC,on behalf of themselves and others similarly situated, Petitioners,

v.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Homes Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund, Respondents.

Appellate Case No. 2016-002343

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27841
Heard May 24, 2018 – Filed September 5, 2018

REVERSED AND REMANDED

James Edward Bradley and S. Jahue Moore, both of Moore Taylor Law Firm, PA, of West Columbia, for Petitioners.

William W. Wilkins and Burl F. Williams, both of Nexsen Pruet, LLC, of Greenville, James Lynn Werner and Lawrence M. Hershon, both of Parker Poe Adams & Bernstein, LLP, and Poe D. Johnson, of Johnson & Barnett LLP, all of Columbia, for Respondents.

JUSTICE KITTREDGE: This case involves the South Carolina Home Builders Self Insurers Fund (Fund), which was created by the Home Builders Association of South Carolina, Inc. "for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act." The Fund at issue here was established in September 1995 by an "Agreement and Declaration of Trust" (Agreement) between the Home Builders Association of South Carolina, Inc. (Association) and the Fund's Board of Trustees (Board). The underlying dispute arose after the Board announced plans to wind down the Fund and use the Fund's remaining assets to finance a new mutual insurance company. Petitioners, who were members of the Fund, disagreed with that decision and challenged the Board's authority to use the Fund's assets in such a way. The trial court twice dismissed Petitioners' suit, first on the basis that it involved the internal affairs of a trust and therefore should have been filed in probate court, then in a subsequent proceeding, on the basis that the lawsuit was a shareholder derivative action and that the complaint failed to comply with the pleading requirements of Rule 23(b)(1), SCRCP.

On appeal, the court of appeals affirmed the dismissal of Petitioners' complaint, finding the trial court properly concluded (1) the Fund was not a trust; (2) Petitioners' claims were derivative in nature; and (3) that Petitioners' complaint was properly dismissed as it did not properly allege a pre-suit demand as required by Rule 23(b)(1). *Patterson v. Witter*, 418 S.C. 66, 791 S.E.2d 294 (Ct. App. 2016). We issued a writ of certiorari to review the court of appeals' decision. We reverse and remand, for Petitioners have satisfied the pleading requirements of Rule 23(b)(1), irrespective of whether the Fund is properly characterized as a trust.

I.

All employers conducting business in South Carolina must secure the payment of compensation to their injured employees. S.C. Code Ann. § 42-5-10 (2015). This may be accomplished either by purchasing workers' compensation liability insurance or by qualifying as a "self-insured" employer. To become self-insured, an employer must demonstrate to the Workers' Compensation Commission (Commission) that it has the "financial ability to pay directly the compensation in the amount and manner and when due as provided" by the Act. S.C. Code Ann. § 42-5-20 (2015).

The Act also allows employers to create a self-insured workers' compensation liability fund or "pool." *Id.* § 42-5-20 ("The [C]omission may, under such rules and regulations as it may prescribe, permit two or more employers in businesses of a similar nature to enter into agreements to pool their liabilities under the Workers' Compensation Law for the purpose of qualifying as self-insurers."). For a self-insurance fund to be approved, an officer of the proposed organization must submit to the Commission various documents, financial statements, and notably, "[a]n indemnity agreement which jointly and severally binds each member of the fund, signed by each proposed member." S.C. Code Ann. Regs. 67-1501(E)(1)–(8) (2012).[1] A self-insured fund must be approved by the Commission before it may begin operation. *Id.* § 67-1502 (2012).

The Agreement identified its purpose as:

> meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act; *to form an overall self-insurers fund* pursuant to Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits; to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage; and to minimize the cost of providing workers' compensation

[1] This requirement of joint and several liability for fund membership is not unique to South Carolina. *See infra* note 8.

> coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building Industry.

(emphasis added).

In addition to establishing the authority of Board members and extensive guidelines for the administration of the Fund, the Agreement further provided that amendments to the Agreement may be made by a majority of the Board, "However, this Agreement may not be amended so as to change its purpose as set forth [above] *or to permit the diversion or application of any of the funds of the [Fund] for any purpose other than those specified herein.*" (emphasis added). The Agreement also provided that "In the event of termination, the remaining funds available in the [Fund], after providing for all outstanding obligations, shall be distributed, through a formula determined by the [Board], to the participating members."

In the fall of 2003, the Board began discussing the idea of winding down the Fund and using the remaining monies on hand to capitalize a mutual insurance company, presumably to be comprised of the members of the Fund. Over the next several years, the Board continued to explore this "conversion" with the Association, the Commission, and the Department of Insurance (DOI); the two biggest challenges were identified as accumulating the $5 million necessary for the mutual insurance company's starting capital reserve and upgrading the Fund's existing computer systems to enable compliance with DOI's regulatory requirements.

In furtherance of the plan to create a mutual insurance company, the Board authorized expenditures from the Fund to purchase a custom computer software program; purchase office space costing $1.6 million; include "operations of the insurance company" in the scope of its directors and officers insurance coverage; and to subscribe to a national workers' compensation insurance-rating and data-collection bureau.

In May 2011, the Board notified the Commission it planned to cease accepting new members into the Fund effective July 1, 2011, and planned to withdraw the Fund from the self-insured program effective January 1, 2012. The Board also sought and received "approval" from the Commission to use $5 million in Fund assets to

capitalize the reserve fund for the mutual insurance company; however, this "approval" included no evaluation of whether this use of Fund monies complied with the terms of the Agreement. Indeed, the director of the self-insurance division of the Commission wrote to the Fund's administrator:

> In response to your request[,] we have approved the release of $5 million in non-pledged assets of the SC Home Builders Self-Insurers Fund to be used solely to capitalize the SC Builders Insurance Group, Inc., in conjunction with the closure of the self-insured [F]und. It is understood that the [F]und will cease accepting new members effective July 1, 2011[,] and will become no longer self-insured for workers' compensation in South Carolina effective January 1, 2012. *The outstanding liabilities of the [F]und at the time of closure, January 1, 2012, will remain the responsibility of the self-insured [F]und and its membership under joint and several liability.* The [F]und is required to provide a final audited financial statement following closure and will continue to provide the Commission[']s Form 11, Fund Quarterly Financial Report, until further notice. The [F]und will also be required to comply with Self-Insurance Tax and Second Injury Fund Assessment requirements following the [F]und[']s closure.

(emphasis added).

Petitioners are members of the Fund who, in February 2012, filed suit against the Fund, the Board, and the individual members of the Board (collectively "Respondents"). Petitioners alleged breach of fiduciary duty; breach of trust; breach of contract; and breach of contract accompanied by a fraudulent act. Petitioners alleged that the Board committed *ultra vires* acts in breach of its fiduciary duties by removing more than $5 million from the Fund to establish the mutual insurance company—monies which should have been returned to the Fund's members under the terms of the Agreement. Petitioners also alleged that in addition to not receiving their share of the $5 million paid-in surplus, they have suffered or will individually suffer additional tax consequences and additional liability exposure to cover the Fund's obligations. Petitioners alleged that all improper expenditures should be reimbursed to the Fund to reduce the amounts for which Fund members might ultimately be jointly and severally liable.

Additionally, Petitioners sought an accounting and a declaration that Fund assets could not be used for the purpose of establishing a mutual insurance company.

Respondents moved to dismiss the complaint, asserting eight separate bases for dismissal, including (1) the circuit court's lack of subject matter jurisdiction because the complaint involved the internal affairs of a trust, which fell within the exclusive jurisdiction of the probate court;[2] and (2) that the action was derivative in nature and did not meet the pleading requirements of Rule 23(b)(1), SCRCP.[3] The Respondents' motions sought protection from responding to Petitioners' discovery requests during the pendency of the motions; incorporated by reference an affidavit of the Fund's administrator, to which twelve separate exhibits were attached; and stated "the Court will be asked, pursuant to Rule 12(b)(6), SCRCP, to consider matters outside of the Complaint and treat the motion as one for summary judgment."

On September 4, 2012, a hearing was held on Respondents' motions to dismiss, during which the circuit court indicated it was inclined to dismiss the complaint based on the probate court's exclusive jurisdiction of the internal affairs of trusts and requested proposed orders. On January 30, 2013, after the hearing but before

---

[2] *See* S.C. Code Ann. § 62-7-201(a) (Supp. 2017) (providing "the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts").

[3] Rule 23(b)(1) provides:

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains . . . . The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and . . . the reasons for his failure to obtain the action or for not making the effort.

the circuit court issued its written order, Petitioners sent a written demand letter to Respondents' counsel itemizing specific requests:

> In particular, our clients believe the following actions are necessary and should be taken on behalf of the [F]und:
>
> 1. The $5,000,000 which was taken out of the [F]und as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Builders Self Insurers Fund.
>
> 2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
>
> 3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of the Trustees.
>
> 4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
>
> 5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

The letter also stated:

> [We] believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. [We]

> believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.
>
> If your clients' position is any different, please let [us] know so we can discuss this matter. If [we] do not hear from you regarding this, [we] will assume your clients refuse to take the actions as requested above, and we will take appropriate action.

Respondents did not immediately respond.

On March 5, 2013, the circuit court issued a written order of dismissal finding "[i]t is clear from the documents submitted to the Court that this dispute concerns a trust" and concluding the circuit court therefore lacked subject matter jurisdiction.

Nevertheless, the dismissal was without prejudice, allowing Plaintiffs to refile their complaint in Probate Court and subsequently remove the re-filed matter back to circuit court.[4]

Still having received no response to their January 30, 2013 letter, Petitioners refiled their lawsuit in probate court on April 9, 2013, alleging the same causes of action and including a new paragraph, which stated:

> 8. To the extent required by South Carolina Rule of Civil Procedure 23, the Plaintiffs allege:

---

[4] *See* S.C. Code Ann. § 62-1-302(d)(4) ("Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo: . . . (4) matters involving the internal or external affairs of trusts . . . .").

a. The Plaintiffs were beneficiaries of the trust at all times relevant including when the transactions complained of were made.

b. The Plaintiffs, 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 Defendants, meetings with counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

The re-filed suit was removed to circuit court.

Respondents moved to dismiss this second complaint, alleging, among other things, that the lawsuit *did not involve a trust* but rather was a shareholder derivative action and that the complaint failed to comply with the pleading requirements of Rule 23(b)(1) and therefore should be dismissed; Respondents submitted an affidavit in support of their motion.[5]

Ultimately, the circuit court dismissed Petitioners' complaint, finding the Fund was an unincorporated association, not a trust, and that the complaint was therefore subject to Rule 23(b)(1). The circuit court held that the complaint failed to comply with Rule 23(b)(1). Petitioners then filed a Rule 59(e) motion arguing the pre-suit demand was properly made and that the trial court's order elevated form over substance. In their motion, Petitioners also sought to supplement or amend their pleadings if more detailed pleadings were required. The circuit court denied this motion.

On appeal, the court of appeals affirmed, finding the circuit court properly concluded (1) the Fund was an unincorporated association and not a trust; (2) Petitioners' claims were derivative in nature; and (3) that Petitioners' complaint

[5] Respondents also alleged Petitioners lacked standing; that the contract claims fail because Petitioners were not parties to the Agreement; and that the complaint failed to meet the heightened pleading standard of Rule 9(b), SCRCP, as to the breach of contract accompanied by a fraudulent act claim.

was properly dismissed as it did not properly allege a pre-suit demand as required by Rule 23(b)(1). *Patterson v. Witter*, 418 S.C. 66, 791 S.E.2d 294 (Ct. App. 2016). This Court issued a writ of certiorari to review the court of appeals' decision.

II.

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citation omitted). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Id.* (citation omitted). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id.* at 395, 645 S.E.2d at 247–48 (quoting *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)). "The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Id.* at 395, 645 S.E.2d at 248 (citation omitted).

In considering a motion for dismissal under Rule 12(b)(6), if "matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Rule 12(b), SCRCP; *see also, e.g., Brown v. James*, 389 S.C. 41, 47 n.5, 697 S.E.2d 604, 607 n.5 (Ct. App. 2010) (citations omitted) (finding that the trial court's consideration of matters beyond the pleadings converted the motion to dismiss into a motion for summary judgment). Because the parties submitted matters outside the pleadings that were not excluded by the court and certain factual findings in the circuit court's order exceeded the scope of the facts alleged in the complaint, we find this motion to dismiss was converted into a motion for summary judgment and we review it as such.

"[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[, then] the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be

viewed in the light most favorable to the nonmoving party." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006) (citations omitted). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (quoting *Middleborough Horizontal Prop. Regime Council of Co–Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995)).

A. Unincorporated Association or Trust

The court of appeals found that although the Agreement, by its terms, purported to create a trust, the Fund possessed many characteristics typically associated with business corporations, and thus, the Fund was properly considered an unincorporated association for the purposes of the pre-suit demand and pleading requirements of Rule 23. Petitioners argue the court of appeals erred in categorizing the Fund as anything other than precisely what it purports to be—a trust—and therefore, Petitioners argue the pre-suit demand and pleading requirements of Rule 23(b)(1) are inapplicable. Petitioners alternatively assert that in any event they satisfied the pleading requirements of Rule 23(b)(1). On this latter point, we agree with Petitioners. Nevertheless, we address the dispute over the proper characterization of the Agreement and its impact on the applicability of Rule 23(b)(1).

In construing a trust agreement, "a court must resort first to the language of the instrument, and if the language is perfectly plain and capable of legal construction, the language determines the form and effect of the instrument." *Germann v. N.Y. Life Ins. Co.*, 286 S.C. 34, 38, 331 S.E.2d 385, 388 (Ct. App. 1985) (citing *Chiles v. Chiles*, 270 S.C. 379, 242 S.E.2d 426 (1978)). "If the intention of the settlor appears on the face of the agreement, then the court will effectuate it, unless it is in conflict with principles of law." *Id.* (citing *Citizens & S. Nat'l Bank of S.C. v. Auman*, 259 S.C. 263, 191 S.E.2d 511 (1972)).

Despite this black-letter law, we acknowledge the truth in the court of appeals' observation that the Fund is, in many ways, dissimilar to a garden-variety trust. *Patterson*, 418 S.C. at 78–80, 791 S.E.2d at 301–02. Nevertheless, that dissimilarity is not dispositive. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462–66 (1980) (rejecting an argument that a business trust should be treated as an

unincorporated association simply because it resembled a business association in several aspects, finding instead that the entity was an express trust, just as it purported to be, and that there was no basis for disregarding the trust's legal form). But many states permit (indeed, one state even requires[6]) workers' compensation self-insured funds to be organized as trusts.[7] Also, it is common in many other

---

[6] *See* 77 Pa. Cons. Stat. § 1036.2(b)(8) (allowing a group of employers to create a workers' compensation self-insured fund if the group "[e]xecutes a trust agreement under which each member agrees to jointly and severally assume and discharge the liabilities arising under this act").

[7] *See, e.g.*, Ala. Admin. Code r. 480-5-3-.08(9) (2018) ("Each Fund shall have a set of Bylaws or shall enter into a trust agreement which shall govern the operation of the Fund."); Ariz. Rev. Stat. Ann. § 23-961.01(A) (2018) ("Two or more employers, each of whom are engaged in similar industries, may enter into contracts to establish a workers' compensation pool to provide for the payment and administration of workers' compensation claims . . . [b]y the execution of a trust agreement . . . ."); 099-00-1 Ark. Code R. § 099.05(III)(A) (requiring a workers compensation self-insured group "to be administered under the direction of an elected board of trustees"); Ill. Admin. Code tit. 50, § 575.110 (2018) (defining the governing body of a workers' compensation self-insured fund as "any member of the pool's Board of Trustees, if the pool is a trust, or any member of the pool's Board of Directors, if the pool is any other type of entity"); 211 Mass. Code Regs. 67.06(2)(b)(2) (2018) (requiring self-insured group applicants to submit " a copy of the articles of association, trust agreement, or articles of organization"); Mich. Admin. Code r. 408.43d (2018) (requiring workers' compensation self-insured funds "to be administered under the direction of an elected board of trustees and to provide workers' compensation coverage for a group of private employers in the same industry or for public employers of the same type of unit"); Mo. Code Regs. Ann. tit. 8, § 50-3.010(1)(A)(13) (2018) (defining a workers compensation self-insured trust as "[a] combination of persons, businesses, firms, or corporations bound together to secure, jointly and severally, workers' compensation liability by holding the individual interests of each subservient to a common authority for the common interests of all. This shall also include the written instrument that creates the trust."); Tenn. Comp. R. & Regs. 0780-01-54-.04(2)(a)(1) (2018) (requiring workers' compensation self-insured fund applicants to submit "[t]he articles of

states for fund participants to be subject to joint and several liability.[8] The

---

incorporation, trust agreement, or any other similar document from which the pool is formed").

[8] *See* Ala. Admin. Code r. 480-5-3-.08(6) (2018) ("All participants shall sign Participation Agreements providing for joint and several liability for claims against the Fund during the coverage periods of their participation."); 099-00-1 Ark. Code R. § 099.05(III)(A)(1)(a) (2018) (requiring all fund participants to execute "[a]n indemnity agreement jointly and severally binding the group and each member thereof to comply with the provisions of the Arkansas Workers' Compensation laws and Rules and Regulations of the Commission"); Cal. Code Regs. tit. 8, § 15479(a)–(b)(1) (2018) (requiring each member of a group self-insurer to execute an "agreement under which each member of a group self-insurer agrees to assume and discharge, jointly and severally, any compensation liability under Labor Code Section 3700-3705 of any and all other employers that are parties to the group self-insurer indemnity agreement"); 3 Colo. Code Regs. § 702-2:2-2-2(7) (2018) (requiring pool agreements to "jointly and severally bind each member to pay claims and comply with all provisions of the workers' compensation laws of the State of Colorado"); Fla. Admin. Code Ann. r. 69O-190.068(1) (2018) ("Each self-insurers fund member shall enter into an indemnity agreement jointly and severally binding the self-insurers fund and each member thereof to comply with the provisions of the Florida Workers' Compensation Law"); Ga. Code Ann. § 34-9-151(9) (2018) (requiring workers' compensation self-insured fund agreements to include a provision "through which each member agrees to assume and discharge, jointly and severally, any and all liability under this article relating to or arising out of the operations of the fund"); 37 La. Admin. Code tit. 37, § 1111(A) (2018) ("Each self-insurance fund member shall enter into an indemnity agreement jointly and severally binding the self-insurance fund and each member thereof to comply with the provisions of the applicable Louisiana Revised Statutes and rules, regulations, and directives of the Department of Insurance."); 02-031-250 Me. Code R. § III(B)(2)(d) (2018) (requiring members of workers' compensation group self-insured plans to submit an executed indemnity agreement); Md. Code Regs. 31.08.09.08(C)(13) (2018) (requiring a workers compensation self-insured fund to submit "[c]opies of executed agreements with each member assuming joint and several liability for obligations of the group in the event of insolvency of the Self-Insurers' Guaranty Fund"); 211 Mass. Code Regs. 67.06(2)(b)(17) (2018)

(requiring that all members of a workers' compensation self-insured group are jointly and severally liable for all workers' compensation obligations); Mich. Admin. Code r. 408.43g(5)(j) (2018) (requiring workers' compensation group self-insured fund records to include "Individual membership applications containing signed indemnity agreements"); Minn. r. 2780.2800(3) (2018) (providing a workers' compensation self-insured group "shall not accept any liability for a new member until a signed indemnity agreement in the form set forth in part 2780.9920 has been completed by that new member and filed with the commissioner"); Code Miss. R. 20-2-1:1.7(B)(2)(b)(9) (conditioning approval of a workers compensation self-insured fund upon the workers compensation commission's receipt of "[a]n indemnity agreement jointly and severally binding the group self-insurer and each member thereof to meet the workers' compensation obligations of each member"); Mo. Code Regs. Ann. tit. 8, § 50-3.010(5)(A)(1) (2018) (requiring that workers' compensation self-insured trusts include in the trust agreement "an indemnity clause which jointly and severally binds the group and each member thereof for payment of benefits to employees of members of the group and all other liability pursuant to Chapter 287, RSMo"); Mont. Admin. R. 24.29.621(1)(c)(i) (2018) (requiring members of a workers compensation self-insured group to execute an "agreement to accept joint and several liability for all workers' compensation benefits and occupational disease obligations incurred by the employer group"); N.J. Admin. Code § 11:15-1.3(b)(5) (2018) (requiring workers' compensation self-insured groups to obtain "[a]n indemnity and trust agreement, in a form satisfactory to the Commissioner, jointly and severally binding the group and each member thereof to meet the workers' compensation obligations of each member, and establishing a trust for the benefit of persons qualifying to receive workers' compensation awards or payments from employers participating in the group"); N.Y. Comp. Codes R. & Regs. tit. 12, § 317.9(b)(7) (2018) (allowing a group self-insurer "to immediately levy an assessment upon the group members or take such other action as may be appropriate in order to make up the deficiency"); Okla. Admin. Code 810:25-11-15(a)(1) (2018) (requiring "[e]very member of a group self-insurance association shall execute an indemnity agreement . . . under which each member agrees to assume and discharge, jointly and severally, liability under the AWCA of any and all employers party to such agreement"); Or. Admin. R. 436-050-0270(1)(g) (2018) (requiring employers applying for certification as a self-insured employer group to submit a "'Group Self-Insured Indemnity Agreement' or another form authorized by the director, that jointly and severally

presence of joint and several liability among Fund members does not necessarily undermine a trust's identity as such; rather it is a function of the overriding policy concern of ensuring injured workers' claims are paid.

The Agreement resembles a trust in some respects, and it does not resemble a trust in other respects. However, the question of whether the Fund is a trust need not be resolved, for we elect to follow the precedent from other jurisdictions applying Rule 23(b)(1) to all actions which are derivative in nature, even if the entity in

---

binds each member for the payment of any compensation and moneys due to the director by the group or any member of the group"); 34 Pa. Code § 125.133(c)(8)(i) (2018) (requiring workers' compensation group self-insured applicants to submit to the workers compensation bureau the group's "proposed trust agreement and bylaws, which shall include: (i) A pledge that each member will be jointly and severally liable for the expenses and other obligations of the fund and for each other member's workers' compensation liability which is incurred while it is a member, including liability for assessments on claims incurred during a member's membership but not issued until after it has terminated membership"); Tenn. Comp. R. & Regs. 0780-01-54-.04(2)(e)(2) (2018) (requiring workers' compensation self-insured pool applicants to submit for approval "[i]ndemnity agreements between the pool and each member establishing each member's joint and several liability to the pool for all expenses, liabilities, and claims asserted against the pool by any person or entity"); Tex. Lab. Code Ann. § 407A.056(a) (requiring applicants for a certificate of approval to operate a workers' compensation self-insured fund to submit an indemnity agreement that "jointly and severally bind[s] the group and each employer who is a member of the group to meet the workers' compensation obligations of each member"); 14 Va. Admin. Code § 5-370-40(A)(1) (2018) (providing "[a]n application submitted by a group self-insurance association shall be accompanied by the following items . . . 1. A copy of the members' indemnity agreement and power of attorney required by 14 VAC 5-370-120 binding the association and each member of the association, jointly and severally, to comply with the provisions of the Act and copies of any other governing instruments of the proposed group self-insurance association"); Wash. Admin. Code § 296-15-024(3)(a)(v) (2018) (requiring members of a workers' compensation group self-insurance fund to submit "[a]n indemnity agreement jointly and severally binding the group and each member to comply with the provisions of Title 51 RCW").

question is a trust. *See, e.g., Accredited Aides Plus, Inc. v. Program Risk Mgmt., Inc.*, 46 N.Y.S.3d 246, 255 (App. Div. 2017) (finding the "analysis applicable to derivative actions against corporations has been held to apply to trusts" and finding that the joint and several liability of workers' compensation group self-insured trust members "does not require us to set aside the legal distinction [] between derivative and direct claims"); *see also In re Mortg. & Realty Tr. Sec. Litig.*, 787 F. Supp. 84, 86 (E.D. Pa. 1991) (applying the Rule 23 demand requirement to a derivative action against the board of trustees of a real estate investment trust). The key inquiry is whether the underlying challenge is properly characterized as derivative in nature. Accordingly, the applicability of the pre-suit demand and pleading requirements of Rule 23(b)(1) are to be determined not on the basis of whether the entity involved is or is not a trust, but rather, whether the claims at issue are direct or derivative. We turn now to that issue.

B. Direct or Derivative

Petitioners argue that the court of appeals erred in finding all of their claims were derivative in nature. Specifically, Petitioners allege that based on the joint and several liability the Act imposes upon members of the Fund, "the injury is to each beneficiary who must, individually, make up for any shortfall in trust assets." Based on this individual liability exposure, Petitioners argue their actions are direct rather than derivative. We agree in part and disagree in part, and we find Petitioners' complaint includes both direct and derivative claims.

"An action seeking to remedy a loss to the corporation is generally a derivative one." *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (citation omitted). An action regarding the fiduciary obligation of a director is ordinarily enforceable through a derivative action. *Id.* (citation omitted). "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation." *Id.* (citation omitted).

"If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder." *Id.* (quoting *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 703–04 (Ct. App. 1988)). "Of course, a suit based on the misconduct can be brought by the individual stockholder." *Id.* at 49, 557 S.E2d at 684–85 (quoting *Ward*, 295 S.C at 221, 367 S.E.2d at 703–04). "It becomes material,

therefore, to inquire whether the acts of mismanagement charged to the directors affected the plaintiffs *directly*, or as their interests were submerged in the corporation whose assets were thus dissipated." *Id.* at 49, 557 S.E.2d at 685 (quoting *Stewart v. Ficken*, 151 S.C. 424, 427, 149 S.E. 164, 165 (1929)).

"Specifically, to distinguish a derivative claim from a direct one, the court considers: (1) who suffered the alleged harm, the corporation or the suing stockholders, individually, and (2) who would receive the benefit of any recovery or other remedy, the corporation or the stockholders individually." 19 Am. Jur. 2d *Corporations* § 1923. Direct and derivative claims may be brought simultaneously. 19 Am. Jur. 2d *Corporations* § 1922. "When determining whether a claim is derivative or direct, some injuries affect both the corporation and the stockholders; if this dual aspect is present, a plaintiff can choose to sue individually." *Id.* (citing *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618 (Del. Ch. 2013)); *see also Horizon House-Microwave, Inc. v. Bazzy*, 486 N.E.2d 70, 74 (Mass. App. Ct. 1985) (observing a shareholder may pursue both direct and derivative claims in a single action).

In evaluating Petitioners' claims in the underlying complaint, the court of appeals found:

> In the instant case, [Petitioners] allege the Board's decision to remove $5 million from the Fund harmed the Fund's ability to adequately cover its risks. Thus, the action is premised on the alleged harm to the overall Fund, not to individual members. Accordingly, we find the circuit court correctly held [Petitioners'] claims were derivative and subject to the pleading requirements of Rule 23(b)(1).

Patterson, 418 S.C. at 81, 791 S.E.2d at 302 (citations omitted).

While we agree with the court of appeals that Petitioners' claim that the removal of the $5 million impacted the Fund's ability to cover its risk is derivative in nature, this claim is by no means the *only* claim asserted in the complaint. Indeed, the court of appeals overlooked various other causes of action and forms of relief requested in the complaint.

Though discovery has not been conducted, one or more of Petitioners' additional claims may be direct in nature. We thus find the court of appeals erred in concluding that the complaint alleged *only* derivative claims. *See Accredited Aides Plus*, 46 N.Y.S.3d at 255 (finding certain claims by members of a workers' compensation group self-insured trust were direct, not derivative, in nature and observing that "just as the trust's deficits are eventually passed through to employer members as assessments by the Board, any recovery by the Board upon its claims on behalf of the trust will benefit the employer members by reducing the trust's deficit and the employer members' corresponding liabilities"). To the extent the court of appeals affirmed the dismissal of Petitioners' direct claims based on Rule 23, this was error.

Although we believe Petitioners' complaint may involve some direct claims, we nevertheless believe the court of appeals correctly found that certain claims were derivative in nature. Accordingly we turn now to what we view as the critical question before the Court—whether Petitioners' complaint met the pleading requirements of Rule 23 (b)(1).

C. Compliance with Rule 23(b)(1)

Lastly, Petitioners argue that even assuming Rule 23(b)(1) applies to their claims, the court of appeals erred in finding the requirements of that rule were not satisfied. We agree, for even if all claims are derivative and Rule 23(b)(1) applies, the demand and pleading requirements of Rule 23(b)(1) have been met.

Both the trial court and the court of appeals found evaluation of whether Petitioners' complaint complied with Rule 23(b)(1) was governed by the court of appeals decision in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000). In *Whittle*, three shareholders of Carolina First Corporation brought a derivative action seeking to recover disproportionate stock bonuses paid to three executives. *Id.* at 180, 539 S.E.2d at 405. The complaint included general allegations that the plaintiffs made pre-suit demands upon the Board of Directors; however, the complaint stated "merely that the plaintiffs demanded 'certain information' and 'certain actions.'" *Id.* at 189, 539 S.E.2d at 409. The court of appeals concluded these allegations were not sufficiently particularized to satisfy the requirements of Rule 23(b)(1), holding "[a]t a minimum, a demand must

identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." *Id.* (citation omitted). The court of appeals noted that although the plaintiffs submitted copies of letters purporting to meet the pre-suit demand requirement, the letters could not be considered because they were not attached to the complaint; and in any event, the letters did not satisfy the pleading requirements of Rule 23(b)(1). Therefore, the court of appeals concluded the trial court did not err in refusing to consider them. *Id.* at 190, 539 S.E.2d at 410.

The facts of this case are distinguishable from those in *Whittle*. Here, although the January 30, 2013 pre-suit demand letter was not expressly incorporated by reference into the complaint, unlike in *Whittle*, the January 30, 2013 letter *does* constitute an adequate demand in this case. Another issue here is Petitioners' failure to include the magic phrase "which is incorporated herein by reference" in their discussion of the letter in paragraph 8 of their complaint. Indeed, the allegations concerning the pre-suit demand in Petitioners' complaint are appreciably more detailed than those in *Whittle*. And certainly, when the January 30, 2013 letter is considered in conjunction with the complaint, there is ample evidence that Rule 23 is satisfied. The trial court simply found it was precluded from looking at the January 30, 2013 letter, which was error.

Moreover, in light of the parties' submission and the trial court's willingness to consider multiple affidavits and documents outside the four corners of the complaint, we reject an approach that approves of a trial court's consideration of everything *except* the pre-suit 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" (quoting *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004))); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 155 (2d Cir. 2002) (explaining that "when a district court considers certain extra-pleading materials and excludes others, it risks depriving the parties of a fair adjudication of the claims by examining an incomplete record"). Accordingly, we reverse the dismissal of Petitioners' complaint on the basis that it failed to comply with Rule 23(b)(1), SCRCP.

III.

For the foregoing reasons, we reverse the decision of the court of appeals and remand this case for further proceedings.

REVERSED AND REMANDED.

BEATTY, C.J., HEARN, FEW and JAMES, JJ., concur.

DUFFY & YOUNG LLC
96 BROAD STREET, CHARLESTON SC 29401
telephone 843-720-2044 facsimile 843-720-2047
ATTORNEYS AT LAW

September 21, 2018

RECEIVED
SEP 21 2018
SC Court of Appeals

VIA FACSIMILE AND USPS

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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

Madam Clerk:

On September 5, 2018, the South Carolina Supreme Court issued Opinion No. 27841 in the case of *Patterson v. Witter*. Pursuant to Rule 208(b)(7), SCACR, Appellant notifies the Court of this supplemental authority, which addresses and is relevant to the Court's decision on the issue of whether Respondents proved a proper demand and refusal was made on the Assembly Board pursuant to Rule 23(b) of the South Carolina Rules of Civil Procedure.

In its Opinion, the Supreme Court compares the alleged demand made by the plaintiffs in *Patterson* to the alleged demand made in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000). In support of the finding that a proper demand was made in *Patterson*, the Court notes that the demand not only itemized specific requests but also stated "[w]e are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken." This analysis in *Patterson* supports the arguments found on pages 21-23 of Appellants' Final Brief, pages 2-5 of Appellants' Reply Brief, and pages 12-14 of Appellants' Petition for Rehearing that the "Adkins Demand" fails to satisfy the demand requirements of Rule 23(b).

Very truly yours,

Julie L. Moore

Enclosure

cc: Justin O'Toole Lucey, Esquire and Joshua Fletcher Evans, Esquire
Timothy W. Bouch, Esquire and Yancey Alford McLeod, III, Esquire

jmoore@duffyandyoung.com
WWW.DUFFYANDYOUNG.COM

DUFFY & YOUNG LLC
96 BROAD STREET, CHARLESTON SC 29401
telephone 843-720-2044 facsimile 843-720-2047
ATTORNEYS AT LAW

TO: The Honorable Jenny Abbott Kitchings

FAX: (803) 734-1839

FROM: Pamela Jones, Paralegal

RE: *Brad Walecka v. The I'On Company*, Appellate Case No. 2015-001590

DATE: September 21, 2018

There are 39 pages including this one to be faxed. Should you not receive any pages, or if there is an error in transmission, please contact the receptionist at (843) 720-2044.

Thank you.

Additional Message:

RECEIVED
SEP 21 2018
SC Court of Appeals

****
THIS FACSIMILE MESSAGE MAY CONTAIN PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.
****

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 23 2016
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

Respondents,

v.

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

Appellants.

RECORD ON APPEAL
VOL. 1
R. pp. 1-500

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

Justin O. Lucey, Esq.
Joshua F. Evans, Esq.
415 Mill Street
PO Box 806
Mount Pleasant, SC 29465
Phone: 843-849-8400
Attorneys for Respondents Brad J. Walbeck, and Lea Ann Adkins, individually and derivatively on behalf of I'On Assembly, Inc.

Timothy W. Bouch, Esq.
Yancey A. McLeod, III, Esq.
Leath Bouch & Seekings
92 Broad Street
Charleston, SC 29401
Phone: 843-937-8811
Attorneys for Respondent I'On Assembly, Inc.

INDEX

March 15, 2012 Order. 9
November 6, 2012 Order. 11
February 11, 2014 Order. 13
February 26, 2014 Order. 16
June 20, 2014 Order. 18
August 11, 2014 Order. 19
June 15, 2015 Order Denying JNOV and Motion for New Trial. 21
June 15, 2015 Order Denying Adkins Petition for Unjust Enrichment. 64
June 16, 2015 Order Declaring the Invalidity of The 2000 Recreational Easement. 70
July 13, 2015 Order Denying The I'On Company's Petition for Fees. 79
July 13, 2015 Order Awarding Walbeck Attorney's Fees and Costs. 84
July 16, 2015 Order Finding Defendants in Contempt for Destruction of Evidence. 101
December 22, 2010 Summons and Complaint. 116
March 8, 2011 Amended Complaint. 129
May 27, 2011 Answer. 141
February 7, 2012 Second Amended Complaint. 151
January 2, 2014 Third Amended Complaint. 168
January 9, 2014 Verifications to Third Amended Complaint by Plaintiffs. 184
January 14, 2014 Answer to Third Amended Complaint and Counterclaim. 186
May 12, 2014 Complaint – The I'On Company, LLC v. Walbeck. 199
June 16, 2014 Fourth Amended Complaint. 313
July 18, 2014 Answer to Fourth Amended Complaint and Amended Counterclaims. 330
January 13, 2014 Hearing Transcript. 391
July 24, 2014 Hearing Transcript. 432
January 13 – January 17, 2014 Trial Transcript Excerpts. 467
July 28, 2014 – August 1, 2014 Trial Transcript. 480
i. Direct Examination of Tim Eble by Ms. Lynn 590
ii. Cross-Examination of Tim Eble by Mr. Duffy 608
iii. Redirect Examination of Tim Eble by Ms. Lynn 622
iv. Direct Examination of Thomas Graham by Mr. Lucey 624
v. Cross-Examination of Thomas Graham by Mr. Young 760
vi. Redirect Examination of Thomas Graham by Mr. Lucey 817
vii. Recross Examination of Thomas Graham by Mr. Young 837
viii. Direct Examination of Lee Ann Adkins by Mr. Evans 841
ix. Cross-Examination of Lee Ann Adkins by Mr. Duffy 870
x. Redirect Examination of Lee Ann Adkins by Mr. Evans 923
xi. Recross Examination of Lee Ann Adkins by Mr. Duffy 926
xii. Direct Examination of Julie O'Connor by Mr. Duffy 928
xiii. Cross-Examination of Julie O'Connor by Mr. Lucey 931
xiv. Direct Examination of Stuart Whiteside by Mr. Young 935
xv. Cross-Examination of Stuart Whiteside by Mr. Lucey 943

xvi. Redirect Examination of Stuart Whiteside by Mr. Young 951
xvii. Direct Examination of Brad Walbeck by Ms. Lynn 952
xviii. Cross-Examination of Bradley Walbeck by Mr. Duffy 972
xix. Direct Examination of Julie Hussey by Mr. Evans 986
xx. Cross-Examination of Julie Hussey by Mr. Duffy 1009
xxi. Direct Examination of Edward Clem by Mr. Young 1067
xxii. Cross-Examination of Edward Clem by Mr. Evans 1087
xxiii. Redirect Examination of Edward Clem by Mr. Young 1091
xxiv. Direct Examination of David Thompson by Mr. Duffy 1098
xxv. Cross-Examination of David Thompson by Mr. Lucey 1102
xxvi. Direct Examination of Vincent Graham by Mr. Duffy 1106
xxvii. Cross-Examination of Vincent Graham by Mr. Lucey 1200
xxviii. Redirect Examination of Vincent Graham by Mr. Duffy 1286
xxix. Recross Examination of Vincent Graham by Mr. Lucey 1296
xxx. Redirect Examination of Vincent Graham by Mr. Duffy 1297
xxxi. Recross Examination of Vincent Graham by Mr. Lucey 1298
xxxii. Direct Examination of Debra Bedell by Mr. Duffy 1300
xxxiii. Cross-Examination of Debra Bedell by Mr. Bouch 1335
xxxiv. Cross-Examination of Debra Bedell by Mr. Evans 1337
xxxv. Redirect Examination of Debra Bedell by Mr. Duffy 1341
xxxvi. Direct Examination of Michael Robinson by Mr. Young 1369
xxxvii. Cross-Examination of Michael Robinson by Mr. Evans 1401
xxxviii. Redirect Examination of Michael Robinson by Mr. Young 1418
May 27, 2011 Motion to Dismiss. 1763
May 31, 2012 Motion for Summary Judgment. 1765
October 22, 2012 I'On Memorandum in Support of Motion for Summary Judgment, Ex. A: Walbeck Deposition Excerpts. 1768
January 8, 2014 Motion for Summary Judgment. 1808
June 6, 2014 Defendants' Motion to Amend Answer to Third Amend Complaint and Counterclaims. 1813
July 10, 2014 Defendants' Motion *in Limine* to Exclude Evidence of Settlement. 1816
July 31, 2014 Memorandum in Support of Directed Verdict. 1820
Verdict Form. 1855
August 11, 2014 Motion for Judgment Notwithstanding the Verdict. 1863
August 11, 2014 Walbeck Petition for Attorneys' Fees with Exhibits and Supplemental Memorandum in Support. 1869
August 11, 2014 Adkins' Petition for Unjust Enrichment. 1899
August 11, 2014 Plaintiffs' Motion Regarding Easement and Brief in Support of Judgment. 1903
August 12, 2014 I'On Company, LLC's Petition for Attorneys' Fees. 1910
August 25, 2014 Defendants' Memorandum in Opposition to Plaintiffs' Motion in Support of Judgment on the Validity of the 2000 Recreational Easement. 1915
August 25, 2014 Defendants' Memorandum in Support of Motion for JNOV. 1923
September 4, 2014 Plaintiffs' Memorandum in Opposition to Defendants'

Motion for JNOV. 1968
Court's Exhibits
1 Affidavit of Non-Service as to Russo 2016
2 Stipulation re Settlement Agreement 2017
5 Verification of Lea Ann Adkins 2018
Plaintiffs' Trial Exhibits
3 1997 I'On Impact Assessment 2019
4 August 10, 1999 I'On Plan View Dock No. 1 2040
5 August 10, 1999 I'On Plan View Dock No. 1 2041
6 Notice from Office of Ocean and Coastal 9.9.1999 Resource Management 2042
7 Newkirk Response to Comments 2049
8 Bruce Kinney Letter to Thomas Graham 2051
12 Purchase and Sale Agreement – Creek Club 2053
13 Deed from I'On Club to 148 Civitas 2065
14 Email Chain with Jo Ann Stubblefield 2075
15 Email Chain with Chad and Russo 2078
16 148 Civitas Settlement Statement 2081
26 Emails re Creek Club Under Contract 2084
28 Easement for Use of Boating 2085
29 Creek Club Purchase and Sale Agreement 2100
30 I'On Ordinance 2117
31 *Civitas – The I'On Journal*, Inaugural Issue 2120
32 I'On Ponsbury Neighborhood Plan 2128
33 SC DHEC Critical Area Permit 2132
34 1999 Department of the Army Permit 2151
36 Joint Federal and State Application Form for Activities Affecting Waters 2169
36(a) Office of Ocean and Coastal Resource Management Permit 2173
37 Joint Public Notice for Permit to Construct 6 Community Docks 2177
38 Agreement Between The I'On Company and GR 2197
40 DHEC Permit Approval Letter to Kenneth Hance 2201
41 I'Onsborough Neighborhood Plan 2202
43 Recreational Easement 2206
44(a) Quitclaim Deed from Club to Grahams 2209
46 Fact Sheet for I'On 2214
47 Handover Agreement 2216
48 Fact Sheet for I'On 2218
49 I'On Media Kit Fact Sheet 2220
51 I'On *Celebration 10 Years* Community Brochure 2221
53 Property Report Transmittal Letter 2229
55 Response Letter from Bouch to Adkins 2231
56 Letter from Kinney to Tom Graham 2232
57 Letter from Adkins to Bouch 2234
58 Update Memo/Email from Besenfelder to Gottshalk 2236
58(a) Besenfelder to Russo Email 2238

59 Emails Between Walsh and Adkins 2241
60 Emails among Walsh, Graham, Kinney and Adkins 2243
61 Letter from Tidsdale to The I'On Company 2248
62 Letter from Vincent Graham to Tisdale 2250
62(a) Graham Email Attached to Ex. 62 2251
63 Letter from Adkins to Vincent Graham 2256
64 Interstate Land Sales Subdivisions by Name Search Results 2258
65 Response Letter from Vincent Graham to Adkins 2259
65(a) Resolution Authorizing Sale 2260
66 CV5 Deed by Grahams to 148 Civitas 2263
67 Lot 275 Deed by I'On Company to 148 Civitas 2271
68 Assignment of Certain Club Owner's Rights and Obligations 2280
71 Letter from Walbeck to Vince Graham 2285
72 Letter from Vince Graham to Walbeck 2286
75 Signage at Dock 2287
76 I'On Website Printouts 2291
77 I'On Neighborhood Plan Brochure 2293
85 Newkirk and I'ON emails re Community Dock 2300
86 Permit Application from Newkirk to US Army COE 2304
88 Letter from COE to I'On Requesting a Response to Comments 2329
90 Post and Courier Affidavit of Publication 2330
102 HUD Letter to Vince Graham 2331
103 Request for Voluntary Suspension of Effectiveness 2333
108 Email from Thomas Graham to Martin 2334
109 Agreement Between I'On Company and GR, LLC 2335
111(a) Board Meeting Minutes 2342
115 Email from Russo to Besenfelder 2346
115(a) Chart of Pre-Amendment Lot Purchase Agreement 2347
116 Email from Russo to Besenfelder 2351
116(a) Chart of Lots Contracted of Closed 2353
117 Griffith to Graham re Proposal 2356
118 Barnes to Walbeck re Congratulations 2403
119 Russo to Besenfelder re Outline 2404
120 July 13, 2008 Russo to Besenfelder re Prior Proposal 2406
121 July 17, 2008 Russo to Besenfelder re Prior Proposal 2407
122 July 25, 2008 Russo to Besenfelder re Confidentiality Agreement 2410
123 July 28, 2008 Russo to Besenfelder re Confidentiality Agreement 2411
124 Russo to Besenfelder re Purchase Offer 2413
125 Russo to Besenfelder re Proposal 2414
126 Russo to Besenfelder re Confirming Revisions 2415
127 Purchase Agreement 2417
128 Russo to Besenfelder re Contracts 2427
129 Russo to Besenfelder re Besenfelder Prior Email 2428
130 Russo to Besenfelder re Meeting 2433
131 Russo to Besenfelder re Lease 2435
132 Russo to Besenfelder re Numbers 2438

133 Russo to Besenfelder re Meeting 2439
134 Russo to Besenfelder re Creek Club Purchase Agreement 2440
135 Russo to Besenfelder Forwarding Walsh Email 2441
136 Russo to Besenfelder re Amended Recreational Agreement 2445
137 December 11, 2008 Russo to Besenfelder re Creek Club Agreements 2460
139 April 14, 2009 Russo to Besenfelder re Creek Club Agreements 2461
140 Besenfelder to Russo re Due Diligence 2462
143 Graham Letter Suspending ISLA Registration 2606
145 I'On Grand Plan 2607
146 Russo Production 2608
147 Amended and Restated Purchase Agreement for CV6 2690
148 Final Purchase Agreement for CV6 2703
150 Property Report Receipts 2720
154 Russo to Besenfelder re Creek Club Sale 2842
156 Steve Speer Message Board Posting 2843
167 Developer Letters to Walbeck 2845
168 Dock 2 Photos 2848
179 Besenfelder to Martin re I'On Common Areas 2852
180 Besenfelder to Grahams re Creek Club Options 2855
181 Tom Graham to Besenfelder re Alternate to Sale of Creek Club 2857
182 Tom Graham to Besenfelder re Kinney and Easement 2862
183 Tom Graham to Vince Graham re Kinney Letter 2875
184 Tom Graham to Vince Graham re Recreational Easement 2879
185 Dock 3 Photos 2882
186 Dock 4 Photos 2891
187 Ariel Photo of Hobcaw 2897
188 Ariel Photo of Wando 2898
189 December 8, 1998 Vince Graham to Joe and Lewis Griffith 2899
190 Joe and Lewis Griffith to Vince Graham 2901
191 March 24, 1999 Vince Graham to Joe and Lewis Griffith 2905
192 Ariel Photos of Hobcaw 2906
193 Email from Besenfelder to Grahams re Creek Club Options 2910
194 Email from Tom Graham to Kinney re Creek Club 2913
195 Email from Tom Graham to Besenfelder et al re Creek Club Transaction 2916
196 Email from Quinn to Besenfelder re I'On Creek Club 2918
200 Plat of HOA Open Space 2921
201 Email from Besenfelder re Final To-Do List for HOA Turnover 2922
202 Besenfelder to Grahams re Creek Club Options 2925
203 Gabriel to Besenfelder re I'On Facilities 2928
204 Besenfelder to Tom Graham re Thoughts on PD Amendment 2929
205 Besenfelder to Vince Graham re Communication with Russo 2932
208 Besenfelder to Vince Graham re Mundy Email 2933
209 Besenfelder to Grahams re Creek Club Sale 2936
210 Tom Graham to Besenfelder re Creek Club Easement and HOA 2937
212 Tom Graham to Vince Graham re Creek Club Issues 2939

213 Besenfelder to Tom Graham re Olde Park Agreement 2941
214 Vince Graham to Tom Graham re Creekside Park 2946
215 Besenfelder to Vince Graham re I'On Update 2949
216 Besenfelder to Grahams re Russo Letter 2950
217 Tom Graham to Kinney re Creek Club Sale 2953
218 Besenfelder to Grahams re Docks 2954
220 Vince Graham to Tom Graham re Impact Statement 2958
221 Tom Graham to Besenfelder re Creek Club Sale 2960
222 Tom Graham to Russo re Creek Club Transaction 2961
223 Vince Graham to Tom Graham and Russo re I'On Message Board 2962
224 Tom Graham to Kinney et al. re HUD Document 2964
225 Russo Settlement Agreement 2968
227 Plat 2972
228 Plat 2985

Defendants' Trial Exhibits

3 Creekside Park Plats 2986
4 I'On Dock Master Plan Plat 2991
5B Image of Community Dock 2 2992
8 1997 Aerial Photo 2993
14 Photo of School Under Construction Spring 2007 2994
15 Photo of East Cooper Charter Montessori School 2995
17 Photo of Pouring Foundation Slab at Holy Ascension, October 2006 2996
18 Photo of Completed Exterior, Holy Ascension, June 2008 2997
19 Google Earth Image 2998
22 1998 Property Report 2999
23 April 2000 Property Report 3035
24 December 2000 Property Report 3074
25 Akins Lot Purchase Agreement 3113
27 Recreational Easement and Agreement to Share Costs 3131
28 August 16, 2000 to I'On Club 3146
32 March 5, 2009 Letter from Adkins to Tim Bouch 3152
33 February 23, 2009 BOZA Meeting Minutes 3154
34 Walbeck Lot Purchase Agreement 3162
38 I'On Assembly Proposed 2004 Budget Summary 3173
39 Draft I'On Assembly 2005 Budget Summary 3175
40 I'On Assembly Draft 2006 Budget Summary 3177
41 I'On Assembly Draft 2007 Budget Summary 3179
42 I'On 2008 Budget 3181
43 I'On 2009 Budget 3184
44 I'On 2010 Proposed Budget 3187
49 Certificate of Occupancy for Creek Club 3190
54 First Amended and Restated Operating Agreement of The I'On Company, LLC 3191
55 Fifth Amended and Restated Operating Agreement of The I'On Company, LLC 3210
56 Second Amended and Restated Operating Agreement of The

I'On Club, LLC....3251
59 Certificate of Existence of I'On Club, LLC....3268
60 Certificate of Existence of I'On Company, LLC....3269
62 Andy Gowder I'On Lot Purchase Agreement....3270
63 Andy Gowder Purchaser Receipt....3280
70 Notice of January 7, 2003 Assembly Annual Meeting....3281
71 Proof of Mailing of January 7, 2003 Annual Meeting Notice....3293
72 Walbeck Sign-in Page from January 7, 2003 Annual Meeting....3294
73 Notice of December 3, 2003 Assembly Annual Meeting with Proof of Mailing....3295
74 Mailing List for December 3, 2003 Annual Meeting Notice....3306
75 Walbeck Sign-in Page from December 3, 2003 Annual Meeting....3324
76 Notice of December 2, 2004 Assembly Annual Meeting....3325
77 Notice of December 7, 2005 Assembly Annual Meeting....3334
78 Walbeck Sign-in Page from December 7, 2005 Assembly Annual Meeting....3342
79 Notice of December 6, 2006 Assembly Annual Meeting....3343
80 Adkins and Walbeck Sign-in Page from December 6, 2006 Assembly Annual Meeting....3353
81 Notice of December 12, 2007 Assembly Annual Meeting....3355
82 Adkins and Walbeck Sign-in Page from December 12, 2007 Assembly Annual Meeting....3374
83 Notice of December 11, 2008 Assembly Annual Meeting....3376
84 Walbeck Sign-in Page from December 11, 2008 Assembly Annual Meeting....3395
87 Letter from Alan Barbieri re PUD Amendment....3396
98 "Inspiration for a Neighborhood" advertisements....3399
105 February 24, 2009 Email to Ward Mundy....3401
106 Brock Correspondence Opposing I'On 1995-1997....3403
107 December 3, 2003 Assembly Meeting Minutes....3429
108 February 12, 2004 Assembly Meeting Minutes....3432
109 August 5, 2004 Assembly Meeting Minutes....3436
110 October 21, 2004 Assembly Meeting Minutes....3441
111 November 11, 2004 Assembly Meeting Minutes....3444
112 January 27, 2005 Assembly Meeting Minutes....3448
113 February 9, 2005 Assembly Meeting Minutes....3451
114 February 23, 2005 Assembly Meeting Minutes....3454
115 March 23, 2005 Assembly Meeting Minutes....3456
116 April 27, 2005 Assembly Meeting Minutes....3459
117 July 27, 2005 Assembly Meeting Minutes....3462
118 July 27, 2005 Assembly Meeting Minutes....3464
119 August 24, 2005 Assembly Meeting Minutes....3468
120 September 28, 2005 Assembly Meeting Minutes....3472
121 December 7, 2005 Assembly Meeting Minutes....3475
122 April 26, 2006 Assembly Meeting Minutes....3478
123 February 28, 2007 Assembly Meeting Minutes....3482

124 April 25, 2007 Assembly Meeting Minutes....3490
125 May 18, 2007 Assembly Meeting Minutes....3498
126 July 25, 2007 Assembly Meeting Minutes....3503
127 August 22, 2007 Assembly Meeting Minutes....3511
128 September 26, 2007 Assembly Meeting Minutes....3517
129 October 24, 2007 Assembly Meeting Minutes....3525
130 January 16, 2007 Assembly Meeting Minutes....3545
131 October 30, 2008 Assembly Meeting Minutes....3553
132 January 15, 2009 Assembly Meeting Minutes....3558
133 February 26, 2009 Assembly Meeting Minutes....3562
137 August 27, 2007 Proposal to Amend I'On Planned Development Zoning Ordinance....3565
140 GIS of Marshwalk....3569
141 November 21, 2000 Deed to Marshwalk....3571
142 Staging Dock Photo....3579
150 March 23, 2010 Chad Besenfelder Response to Emails from Kent Prause....3580
151 Photo of Avant Garden....3588
152 Mt. Pleasant Board of Zoning Appeals Order....3589
153 Zoning Appeal Petition....3598
155 2004 Ed Clem Emails....3600
157 June 23, 2004 Email from Brad Walbeck re Landscaping....3602
164A Photo of Dock 3....3604
167 Photo of Boat Ramp and Creek Club....3605
173 September 19, 2007 Adkins Email....3606
174 March 22, 2007 Minutes....3607
180 Email re Vote on PD Amendment....3612
182 Creek Club Building Costs....3614
139 Declaration of Covenants, Conditions and Restrictions....3616

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2010-CP-10-10490

BRAD J. WALBECK,

Plaintiff,

v.

THE I'ON COMPANY, LLC; THE I'ON CLUB, LLC; THE I'ON GROUP, LLC F/K/A CIVITAS, LLC; VINCE GRAHAM; TOM GRAHAM; 148 CIVITAS, LLC; I'ON REAL ESTATE, LLC; MIKE RUSSO,

Defendants.

ORDER

FILED
2012 MAR 15 AM 9:26
JULIE J. ARMSTRONG
CLERK OF COURT
BY

THIS CAUSE comes before this Court on the motion of the Defendants The I'On Company, LLC; The I'On Club, LLC; The I'On Group, LLC f/k/a Civitas, LLC; Vince Graham; Tom Graham; and I'On Realty, LLC (collectively, the "I'On Defendants") to dismiss certain of Plaintiff's claims for breach of contract, breach of fiduciary duty, and fraud/constructive fraud for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), SCRCP. Upon consideration of the I'On Defendants' memorandum in support of its motion and the arguments of counsel at a hearing before me on February 8, 2012, I find that Plaintiff's Amended Complaint in this action is sufficient to state a claim upon which relief can be granted on these three causes of action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the I'On Defendants' motion to dismiss is **DENIED.**

This 13 day of March, 2012 at Charleston, South Carolina.

J.C. Nicholson, Jr.
Circuit Court Judge Presiding
Ninth Judicial Circuit, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-10490

BRAD J. WALBECK
PLAINTIFF(S)

ION COMPANY LLC, THE ETC, ET AL
DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
2012 NOV 16 PM 4:30
JULIE J. ARMSTRONG
CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Motion for Summary Judgment by Defendant (Defendant-ION; atty-Seth Warren Whitaker) was denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
n/a	n/a	$n/a
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge | 2060 **Judge Code** | 11/06/2012 **Date**

SCRCP Form 4C (12/2011)

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**
	CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
		CASE NO. 2010-CP-10-10490
BRAD J. WALBECK, et al.,	)	
Plaintiff,	)	
v.	)	
THE I'ON COMPANY, LLC, et al.,	)	
Defendants.	)	

FILED
2014 FEB 20 AM 9:29
JULIE J. ARMSTRONG
CLERK OF COURT
BY

ORDER

THIS MATTER CAME BEFORE THE COURT on January 14, 2014, pursuant to requests made on the record and Defendants Mike Russo and 148 Civitas, LLC's Motion for an Order Sealing the "Confidential Term Sheet" entered as Court's Exhibit 1 on January 13, 2014, and those portions of the record pertaining to and outlining the terms and conditions of the settlement. Based upon the factors set forth in Rule 41.1(c), SCRCP, the statements made before the Court, and the written motion of Defendants Mike Russo and 148 Civitas, LLC, filed on January 14, 2014, I find as follows:

1. On January 13, 2014, Defendants Mike Russo ("Russo"), 148 Civitas, LLC, and I'On Assembly, Inc. ("HOA"), and Plaintiffs Brad Walbeck and Lee Ann Adkins, individually and derivatively on behalf of the HOA ("Plaintiffs"), entered into a settlement agreement resolving the issues as to and between those parties, (hereinafter, the "Settling Parties").
2. The settlement agreement neither included nor resolved any claims alleged against the remaining Defendants.

QPNO
1

3. The terms of the agreement were set forth in a document drafted by Plaintiffs' counsel and entitled "Confidential Term Sheet." Counsel for each of the Settling Parties initialed the term sheet and confirmed acceptance of the terms. Additionally, Lee Ann Adkins, Brad Walbeck, Mike Russo, on behalf of himself and 148 Civitas, LLC, and Deborah Bedell, President of the I'On Assembly on behalf of the Board of Trustees, consented to the terms set forth therein.
4. This Court admitted the "Confidential Term Sheet" as Court's Exhibit 1.
5. On January 13, 2014, and on the morning of January 14, 2014, the Settling Parties, including necessary non-parties to the suit, additionally made statements on the record setting forth the terms of the settlement.
6. The "Confidential Term Sheet" and the record relating to settlement contains confidential and proprietary business information of both 148 Civitas, LLC, and the HOA, as well as other parties.
7. The trial in this case is ongoing.
8. The complex issues in this lawsuit have been passionately contested. The issues, allegations, and legal theories involved in this lawsuit and settlement have been discussed, debated, and published in various forms, to include neighborhood message boards, email and verbal communications, and newspaper articles, culminating in incendiary and improper comments made in a newspaper article published by The Post and Courier on January 14, 2014.
9. Less drastic alternatives to sealing the requested documents will not afford adequate protection to the Settling Defendants.

10. There is no overwhelming public interest to be served by the publication of the terms of settlement.

11. The potential harm to the Settling Parties far outweighs any public significance.

IT IS THEREFORE ORDERED that the "Confidential Term Sheet" entered as Court's Exhibit 1 on January 13, 2014, as well as that portion of the transcript, including any audio recordings, pertaining to and outlining the terms and conditions of the settlement made on the record by the parties and their counsel on January 13-14, 2014, are hereby **SEALED.**

AND IT IS SO ORDERED on this 11th day of February, 2014.

Stephanie P. McDonald
Presiding Judge, 9th Judicial Circuit

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2010-CP-10-10490

FILED
2014 FEB 26 AM 9:03
JULIE J. ARMSTRONG
CLERK OF COURT
BY

I'ON ASSEMBLY, INC., and BRAD J. WALBECK and LEA ANN ADKINS, individually and derivatively on behalf of I'ON ASSEMBLY, INC.,

Plaintiffs,

v.

THE I'ON COMPANY, LLC, THE I'ON CLUB, LLC, THE I'ON GROUP, LLC F/K/A CIVITAS, LLC, VINCE GRAHAM, TOM GRAHAM, and I'ON REALTY, LLC,

Defendants.

ORDER REALIGNING I'ON ASSEMBLY, INC. AS A PARTY PLAINTIFF

THIS CAUSE comes before this Court on the motion of Defendants The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC, I'On Realty, LLC, Vince Graham, and Tom Graham (the "I'On Defendants"), for an Order realigning the I'On Assembly, Inc. as a party plaintiff in this matter, pursuant to Rule 21, SCRCP. The Court finds as follows:

1. This Court has authority, in its sound discretion, to realign a party "at any stage of the action" on such terms as are just. Rule 21, SCRCP; Branham v. Ford Motor Co., 390 S.C. 203, 241-24, 701 S.E.2d 5, 25-26 (2010).

2. In light of developments in this matter in January 2014, including without limitation the representations of counsel for the I'On Assembly, Inc. to the Court, it is appropriate to realign the I'On Assembly, Inc. as a plaintiff.

3. I'On Assembly, Inc. should be deemed to have adopted Plaintiffs' claims, and Defendants' responses to Plaintiffs' Complaint should be deemed to serve as responses to the Assembly's adopted claims.

4. Plaintiffs Walbeck and Adkins and the I'On Assembly have no opposition to the relief requested.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The I'On Assembly, Inc. is hereby realigned as a party plaintiff in this matter;

2. The I'On Assembly, Inc. is hereby deemed to have adopted Plaintiffs' claims as stated in Plaintiffs' Third Amended Complaint; and

3. The I'On Defendants' responses to the Third Amended Complaint are hereby deemed to serve as responses to the Assembly's thereby adopted claims.

Stephanie P. McDonald
Chief Administrative Judge
Ninth Judicial Circuit

February 21, 2014
Charleston, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-10-10490

Brad J. Walbeck and Lea Ann Adkins, Individually and Derivatively on Behalf of I'On Assembly, Inc.	The I'On Company, LLC; The I'On Club, LLC; The I'On Group, LLC F/K/A Civitas, LLC; Vince Graham; Tom Graham; I'On Real Estate, LLC
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Motion to Consolidate this Case with 2014-CP-10-2984 is hereby GRANTED.

FILED
2014 JUN 20 PM 12:5
JULIE J. ARMSTRONG
CLERK OF COURT
BY

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	2163 **Judge Code**	6/19/14 **Date**

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010- CP-10-10490

I'ON ASSEMBLY, INC., AND BRAD J. WALBECK AND LEA ANN ADKINS, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF I'ON ASSEMBLY, INC.	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
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☒ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
2014 AUG 11 PM 4:25
JULIE J. ARMSTRONG
CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: As to the cause of action for

- Interstate Land Sales Act (ILSA): judgment in favor of Brad J. Walbeck in the amount of $1.00; for the defendants on Lea Ann Adkins' ILSA claim;
- Breach of Contract: Judgment in favor of the I'On Assembly in the amount of $1,000,000.00; judgment in favor of Walbeck in the amount of $10,000.00; for the defendants on Adkins' contract claim;
- Breach of Fiduciary Duty: Judgment in favor of the I'On Assembly in the amount of $1,750,000.00;
- Fraud: For the defendants;
- Negligent Misrepresentation: Judgment in favor of the I'On Assembly in the amount of $1,000,000.00; judgment in favor of Walbeck in the amount of $20,000.00; for the defendants on Adkins' claim; and
- South Carolina Unfair Trade Practices Act: For the defendants.

The jury further found that the defendants' conduct was reckless, willful and/or wanton, but declined to award punitive damages. Plaintiff I'On Assembly elected to recover on the cause of action for breach of fiduciary duty. Plaintiff Brad Walbeck elected to recover on the cause of action for negligent misrepresentation.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : See attached Verdict Forms

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
The I'On Assembly	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	$1,750,000.00
Brad J. Walbeck	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	$20,000.00

If applicable, describe the property, including tax map information and address, referenced in the order:

SCRCP Form 4C (10/2011)

N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge | 2163 Judge Code | 8/11/2014 Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Justin Lucey; Joshua Evans; Dabny Lynn; Timothy Bouch; Yancey McLeod

ATTORNEY(S) FOR THE PLAINTIFF(S)

Brian Duffy; J. Rutledge Young; Seth Whitaker

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Sharon Vizer

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2010-CP-10-10490
BRAD J. WALBECK, AND LEA ANN ADKINS, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF THE I'ON ASSEMBLY, INC., I'ON ASSEMBLY, INC., Plaintiffs, vs. 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, Defendants.	**ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR A NEW TRIAL ABSOLUTE, AND FOR A NEW TRIAL NISI REMITTITUR**

Defendants' Motion for Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial Absolute or a New Trial Nisi Remittitur (hereinafter "Defendants' JNOV Motion" or "Defendants New Trial Motion"), came before the Court for a hearing on September 4, 2014. As the jury weighed the evidence presented at trial and reached a reasonable conclusion as to the value of Plaintiffs' damages suffered as a proximate result of Defendants' conduct, these motions are now denied.

BACKGROUND

The present case concerns the I'On neighborhood's community amenities, Defendants' representations regarding the amenities during the lot sales, marketing, and development process, and the Defendants' alleged obligations to convey said amenities to the I'On Assembly (the

homeowners' association) and its members (I'On homeowners). Specifically, the amenities at issue included the "Creekside Park," "Community Dock," and the Community Dock's associated parking and boat ramp, all of which are located along the deep waters of Hobcaw Creek on a specific civic lot within I'On known as CV6.[1] According to the testimony of four witnesses at trial, the amenities at issue also included an overflow parking facility which was located on another civic lot within I'On known as CV5.[2] Evidence was presented at trial that during the I'On development and sale process, Defendants obligated themselves to convey these amenities to the I'On Assembly and its members, free and clear of all encumbrances. However, the Defendants entered into talks in mid-2008 to sell the Deep Water Amenities to an unaffiliated, third-party "for profit" entity (the third-party is hereinafter referred to as "Buyers" or "Civitas").[3] Upon learning of the potential sale, several I'On Assembly members, including Plaintiffs, made demands upon the I'On Assembly to secure the rights to the amenity property. (*See, e.g.*, March 11, 2009 Bruce Kinney e-mail, Pl. Ex. 56; February 26, 2009 Templeton letter, Pl. Ex. 53).

As a result of the I'On Assembly members' demands, the Assembly eventually demanded the transfer of the docks and made inquiry regarding the Creekside Park (Pl. Ex. 56). Board members also privately met with Buyers to negotiate modifications to the use limitations on the Creek Club and the HOA amenities.[4] Thereafter, Buyers allegedly withdrew their offer to purchase the Creek Club.

---

[1] Defendants also constructed a neighborhood clubhouse, known as the Creek Club, on CV6.

[2] CV5 and CV6 are hereinafter collectively referred to as the "amenity property" or the "community property" or the "Deep Water Amenities".

[3] Notably, documents produced by the I'On Defendants late in this litigation reveal they appeared to be in the process of transferring the Community Dock and boat ramp to the Assembly in 2008. (*See* 2008 Newkirk Environmental E-Mail, Pl. Ex. 85).

[4] Believing the Board had an agreement with Buyers on future use limitations, one Board member supported the commercial use of the Creek Club at a Town hearing on the civic use challenge by several neighbors. After Mount Pleasant denied the use appeal, Buyers refused to negotiate the use limitations further.

APPX 2

In the interim, it was represented to the I'On Assembly members that the Defendants were finalizing the paperwork, and "preparing to deed the Community Dock to the I'On Assembly." (*See* March 25, 2009 Chad Besenfelder e-mail, Pl. Ex. 58). The deed was to include the waterfront portion of the CV6 parcel, providing access to the amenities. Unknown to the residents or the Assembly Board, the Defendants and Buyers immediately resumed negotiations amongst themselves, reached a contract, and prepared for transfer of the very amenities that the Defendants represented they were in the process of deeding to the Assembly.

The existence of the pending sale came to light on August 1, 2009, and the sale took place four days later. The I'On Defendants sold the property to Buyers on August 5, 2009.[5] Again, following (a) an unsuccessful demand made by Walbeck to the Defendants requesting that Defendants fulfill their promise to convey the property to the I'On community (Pl. Ex. 71); and (b) continued failure to act by the Assembly, Plaintiffs initiated this action, individually and derivatively on behalf of the Assembly, on December 22, 2010.

Following the filing of Plaintiff's initial Complaint, Plaintiffs twice amended their Complaint on March 8, 2011, and February 7, 2012, respectively.[6] After the filing of Plaintiffs' Second Amended Complaint, Defendants moved for the dismissal of certain claims and/or parties. However, the Defendants' Motion to Dismiss was denied. Thereafter, Defendants filed a Motion for Summary Judgment, which, in turn, was followed by a Motion to Dismiss filed by the Assembly, as well as a Motion to Intervene filed by Tidelands Bank.

At a motion hearing held on October 23, 2012, Defendants' Motion for Summary Judgment, the Assembly's Motion to Dismiss, and Tidelands Bank's Motion to Intervene were

[5] Buyers substantially increased the number of wedding events, prior to and following the Assembly's repurchase of the property, again adversely affecting I'On residents' access to the property.

[6] Plaintiffs' Second Amended Complaint asserted claims of violation of the Interstate Land Sales Act, breach of contract, breach of fiduciary duty, fraud, negligent misrepresentation, unfair trade practices, civil conspiracy, unjust enrichment, promissory estoppel, and amalgamation against the Defendants

all denied. During this same hearing, Plaintiffs' dismissed their veil-piercing claims against the individual defendants, but maintained their direct causes of action against the individual Defendants as well as their veil-piercing/amalgamation claims against the corporate Defendants.

Approximately one year later, at a motion hearing on January 8, 2013, Plaintiffs were granted leave to file a Third Amended Complaint alleging an additional cause of action of "aiding and abetting." The case was scheduled for a date certain trial for February 18, 2013; however, immediately prior to trial, all parties settled in two separate agreements. Given the then-pending negotiations, mediation, and trial preparations, the Third Amended Complaint was not filed. Buyers later abdicated their settlement agreement, which eventually led to the collapse of the parallel I'On Defendants' settlement agreement. Therefore, the case was reinstated and the Third Amended Complaint was filed on January 2, 2014.

Shortly thereafter, the first trial of this case commenced, but ultimately, ended in a mistrial late on the third full day of trial. Following the January mistrial, Plaintiffs filed a Fourth Amended Complaint, and the case was re-tried before this Court beginning Tuesday, July 29, 2014 and ending Saturday, August 2, 2014. The jury returned verdicts for the Plaintiffs on several causes of action. Specifically, the jury returned a verdict and awarded damages in favor of Walbeck on the following causes of action: (a) Violation of the Interstate Land Sales Full Disclosure Act ("ILSA" or "the Act"); (b) Negligent Misrepresentation; and (c) Breach of Contract. In addition, the jury returned a verdict and awarded damages in favor of the Assembly on the following causes of action: (a) Breach of Fiduciary Duty; (b) Negligent Misrepresentation; and (c) Breach of Contract. As to Adkins' individual claims, the jury returned defense verdicts. Subsequently, Walbeck elected to recover the $20,000 in actual damages awarded to him on the negligent misrepresentation claim while the Assembly elected to recover

the $1,750,000 in actual damages awarded to it under the breach of fiduciary duty claim. Defendants' post-trial motions followed.

SUMMARY OF EVIDENCE PRESENTED AT TRIAL

A.) The Evidence Presented Regarding Defendants' Collective Development of the I'On Neighborhood

Plaintiffs presented evidence at trial demonstrating the Defendants' "grand plan" to develop and market the I'On neighborhood as an upscale, residential neighborhood which featured many public common areas as opposed to private individual home sites. (*See* Grand Plan, Pl. Ex. 145). I'On was developed and operated by The I'On Company, a family owned business owned by Tom Graham (75% owner) and his son, Vince Graham, (25% owner).[7] During the initial planning phase of I'On, the I'On Company, under the direct control of the Grahams, also established several other "I'On" entities. I'On Realty was established as the listing and sales agent for the I'On home sites on behalf of the I'On Company. The I'On Club was established to own and operate certain neighborhood amenities, including the pool and tennis club, as a private, members-only club. The I'On Club was a wholly owned subsidiary of The I'On Company. The I'On Company originally served as the Manager for both I'On Realty and the I'On Club. Subsequently, The I'On Group became the Manager of the various I'On LLCs. As evidenced by the record, each of the foregoing I'On entities, along with the Grahams, were involved in many aspects of the development of I'On including planning, financing, marketing, and execution.

[7] Tom Graham holds his interest in The I'On Company through Graham Holdings. Original development work was done in the name of The Graham Company, which appears to have transferred the developmental aspect to the I'On Company. Sometime subsequent to the formation of The I'On Company, Tom Graham sold a 5% interest to his other son, Geoff Graham.

B.) Evidence Regarding Defendants' Collective Representations and Contractual Obligations

Plaintiffs also presented evidence at trial demonstrating the many promises, representations and contractual obligations made by the Defendants in connection with providing amenity property, free and clear of all encumbrances, to the Assembly and its members.

First, Plaintiffs evidenced the promotional campaign launched by the Defendants regarding the development of I'On during its conceptual planning. Specifically, Defendants: (a) filed an Impact Assessment with the Town of Mount Pleasant; (b) prepared a Property Report as required by the Interstate Land Sales Act; (c) submitted applications to the Town of Mount Pleasant, DHEC and the Army Corp of Engineers; (d) directed the plans and plats drawn for the neighborhood; and (e) made presentations at town hall meetings and adjacent neighborhood homeowners' association meetings. Inclusive within each of the foregoing were material representations made by the Defendants as to the Deep Water Amenities planned for the I'On development, property which the I'On Defendants represented would belong to the Assembly and its members:

1.) The Impact Assessment

For example, the Impact Assessment filed by "The Graham Company" with the Town of Mount Pleasant in January of 1997, provides:

> There will be no private docks in the neighborhood. Instead, I'On residents will be able to use seven community docks which will provide access to the marsh and waters of Hobcaw Creek of fishing and boating. These docks will range from small crabbing docks to a larger community dock reminiscent of the dock pavilion at Newpoint or at the Sea Island Yacht Club in Rockville.

(*See* Impact Assessment, Pl. Ex. 3 *cf.* Aerial Photos, Pl. Ex. 187, 188, 192).[8]

Notably, the Impact Assessment includes a depiction of the Community Dock at Newpoint, a Beaufort County project developed by Vince Graham, and this dock contains a boat landing and gazebo similar to what was represented by Defendants to be constructed on the I'On amenity property (CV6).

2.) The Property Report

Similarly, the November 3, 1998 Property Report, required by the Interstate Land Sales Act, was drafted by the Defendants to inform potential purchasers of the development plan for the I'On neighborhood. (*See* Property Report Receipts, Pl. Ex. 150). The 1998 Property Report was provided to numerous I'On lot purchasers prior to the execution of their respective purchase contracts. Among other representations regarding the neighborhood, the Property Report includes a "Recreational Facilities" chart representing that the "Community Dock" and "Creekside Park" will be conveyed to the I'On Assembly at no cost during Phase Two of the I'On development process. (*See* Property Report, Pl. Ex. 1). The Property Report's list of "Recreational Facilities" also separates the Creekside Park" from "sidewalks, paths, and trails", indicating a distinction between these various amenities. Moreover, as described in the 1998 Property Report, the "major" characteristic of I'On includes "300 feet of deep water frontage along Hobcaw Creek" which "rather than subdividing into lots. . .is planned as parks" to serve ". . .as an amenity for residents."

As evidenced by the testimony of Walbeck, Eble, and Hussey, the Defendants and/or their agents represented that the "Community Dock" and "Creekside Park" were located on CV6.

[8] Upon Mount Pleasant's subsequent approval of I'On's developmental plans, the Impact Assessment, as a part of said plans, was incorporated by the Ordinance permitting development of the neighborhood.

Moreover, the Defendants and/or their agents represented that the "300 feet of deep water" on Hobcaw Creek would remain unencumbered, and thus, be easily accessible to all I'On residents. The record further reflects Plaintiff Walbeck relied on the representations made in the 1998 Property Report when entering his lot purchase agreement.

3.) The Dock Application

The evidence also reveals plans, applications, and letters submitted between June and October, 1999 to DHEC by Newkirk Environmental, Inc., on behalf of the Defendants. Certain of these documents submitted in support of the dock application similarly represent that the Creekside Park and Community Dock will be owned by the I'On Assembly for the common, recreational use of Assembly members, and that no docks in I'On will be private. In fact, the application touts that the plan, as submitted, preserves the entire waterfront for community access and "the purpose of the proposed structures (the docks) is for the common, recreational use of residents within the I'On community." (*See* Dock Application and Dock Plan, Pl. Ex. 6, 37). In a letter to the Corps of Engineers dated October 28, 1999, the Defendants' agent stated as follows:

> It is important to note that I'On's master plan does not provide for individual docks. The six docks requested by The I'On Company are for the use and enjoyment of the I'On community and are proposed in lieu of private docks along approximately 2,600 linear feet of waterfront.

(*See* October 28, 1999 Corp. of Engineers letter, Pl. Ex. 7).

The dock plan submitted by Defendants and later approved by DHEC, the Army Corp. of Engineers, and a host of other governmental authorities, reveals that the principal I'On dock, the only dock with a both ramp which sits on 300 ft. of deep water frontage along Hobcaw Creek

DPM 8

and is adjacent to a "creekside park",[9] to be located on CV6. Moreover, the dock plan sets forth this amenity as being owned by the "HOA," i.e., the Assembly. (*See* Dock Plan, Pl. Ex. 37).

4.) Plans and Plats

The location of the "Creekside Park", "Community Dock", and boat ramp are also shown on plats and plans of I'On submitted as evidence at trial. Specifically, surveys prepared on behalf of Defendants by Thomas & Hutton Engineering and Palmetto Land Surveying, as well as hand-drawn plats prepared by Defendant's employee, Chad Besenfelder, depict a Creek Club, Community Dock & Boat Ramp, and "HOA Open Space" located on CV6 which, in turn, is located on Hobcaw Creek. (Pl. Ex. 196; Pl. Ex. 200, Pl. Ex. 218).

5.) Marketing Materials and Agent Representations

Plaintiffs presented evidence that, in furtherance of the I'On plan, Defendants reiterated their promises regarding amenity properties directly to I'On lot purchasers via various marketing materials, agent representations, and the lot purchase agreements themselves. Indeed, Plaintiffs showed, through witness testimony and other evidence, that the Developers issued "updated" marketing materials to potential purchasers, including Plaintiff Walbeck, as construction of I'On progressed; however, none of these materials ever disclosed the substitution of an easement, let alone a thirty (30) year easement in lieu of ownership. Notably, *Civitas*, the I'On newsletter and marketing magazine, repeated the representation in the Impact Statement that the waterfront would be accessed through the Parks. (Pl. Ex. 31).

[9] The Creekside Park referred to herein was referred to as "Shelmore Park" in the I'On Park Design, Pl. Ex. 227, Sheet P-7

APM 9

Plaintiffs also demonstrated, by way of an advertising document created by the Defendants entitled "I'On Neighborhood Plan", that Defendants continued to promote the representations included in the pre-amended 1998 Property Report. Specifically, the amenity descriptions within the "Living at I'On" section of the I'On Neighborhood Plan separately advertised "miles of marshfront paths" and "the parks", showing a distinction between the two. In the same advertisement, it promotes that "a boat ramp along Hobcaw Creek" can be "enjoyed by all." (Pl. Ex. 77 at "Recreational Facilities" section). In another piece of promotional material published and created by the Defendants, the amenities are promoted as follows: "Community Dock & Boat Ramp", "3 Crab Docks", "12 Neighborhood Parks", and "2.5 Miles of Marsh-Front Paths". (Pl. Ex. 51).

Moreover, the I'On Defendants promulgated and distributed several brochures, plans, and fact sheets, which represented the: (a) Creek Club; (b) Community Dock; (c) Creekside Park; and (d) 300 feet of deep water frontage along Hobcaw Creek as exclusive amenities for the use and benefit of I'On Residents. For example, in neighborhood plans spanning from pre-development through at least 2008, the Creek Club, Creekside Park, and Community Dock are touted as "recreational facilities" and "amenities" to be "enjoyed by all" I'On residents. (*See* Ponsbury Neighborhood Plan, Pl. Ex. 32; I'Onsborough Neighborhood Plan, Pl. Ex. 41; I'On Neighborhood Plan, Pl. Ex. 77). Similarly, I'On's 2005, 2006, and 2007 neighborhood fact sheets provide "[t]he boat landing and community docks on Hobcaw Creek and Shelmore Creek are available to all I'On Residents." (*See* I'On Fact Sheets, Pl. Ex. 48). In the inaugural issue of *Civitas*, the I'On Journal represents that neighborhood "parks provide access to the neighborhoods' lakes and community docks along Hobcaw Creek, [enabling] all the residents to enjoy its beauty." (*See Civitas*, The I'On Journal, Inaugural Issue, Pl. Ex. 31).

RPN 10

The testimonies of Brad Walbeck and Tim Eble demonstrated that Defendants' agent, Bill Orange, provided guided tours of the neighborhood, all the while representing the amenities to be constructed by the Defendants. According to Walbeck's testimony, for example, Mr. Orange represented that a park, a dock and boat ramp, as well as the "deepest porches in the Lowcountry" would be "located right around the bend" from his lot. Walbeck further testified that the lot "right around the bend" from his lot was CV6 and CV6 was the "only place" in I'On with a dock and boat ramp located on the deep water of Hobcaw Creek. According to Walbeck, Mr. Orange represented that a community clubhouse would be located on this same lot, CV6, and that overflow parking for the clubhouse and dock/boat ramp would be available on another, nearby lot, CV5. Hussey corroborated this testimony. Just as Walbeck relied on the 1998 Property Report, Walbeck also testified that he relied on the aforementioned representations made by Defendants' agent when he entered his purchase contract.

6.) Purchase Contracts

Walbeck testified that his decision to purchase a lot within I'On was based upon the marketing materials distributed and the many representations made by the Defendants as to the I'On amenities, including the Community Clubhouse, Creekside Park, Community Dock, and Associated Parking. After visiting the I'On Sales Center, taking a guided tour of I'On courtesy of Defendants' agent, and reviewing the 1998 Property Report, maps, and other marketing materials depicting I'On's development plan, Plaintiff Walbeck entered into his purchase contract on November 27, 1999. (*See* Walbeck Purchase Agreement, Pl. Ex. 2). Notably, the Walbeck purchase contract expressly referenced the 1998 Property Report which set forth that: (a) the Community Dock and Creekside Park would be conveyed to the I'On Assembly at no cost

during the I'On development process; and (b) the "300 feet of deep water frontage along Hobcaw Creek" would serve "as an amenity" for I'On residents. *Id.* Additionally, the Walbeck contract separately included a version of the "Recreational Chart" contained in the 1998 Property Report and specifically provided that Walbeck could "rely" on the representations included in both the contract and the 1998 Property Report. *Id.* Moreover, the signature page of Walbeck's contract contains an attestation clause, as well as two other "signed, *sealed* and delivered" references, evidencing an intent by both parties that the contract be considered a "sealed instrument." *Id.*[10]

7.) Defendants' Internal Communications

Defendants own internal communications further reveal that Defendants were aware of their promises, and their obligations in connection with same.

For example, in a November 15, 2006 e-mail between Defendant's employee, Chad Besenfelder, and the Grahams, Defendants recognized they still owned "common areas" including the "Creek Club Boat Ramp and Dock" which belonged to the "HOA". (Pl. Ex. 179). A few months later, between April and July of 2007, the Defendants outline their options in connection with several of the I'On amenities, one of which includes giving the HOA "the infamous boat ramp and docks" because "the docks are too controversial and taking away even part of this community amenity would cause trouble." (Pl. Ex. 180, Pl. Ex. 181). Perhaps most significant is the Besenfelder e-mail noting "the docks were promised handover to the homeowners and Vince would like to honor their promise one day" (Pl. Ex. 15), a promise

[10] By special interrogatory, the Jury found this to be a sealed instrument. Plaintiff, Lea Ann Adkins, signed a purchase contract with the Defendants on February 1, 2003. The Adkins' purchase contract differed from the Walbeck purchase contract in that it did not specifically incorporate the 1998 Property Report. (*See* Adkins Purchase Contract, Pl. Ex. 45); however, Adkins testified she was provided with the Property Report at the time of contracting to purchase her lot.

repeated in 2009 when Defendants represented they were "preparing to deed the [C]ommunity [D]ock to the I'On Assembly." (*See also* Pl. Ex. 58; Pl. Ex. 214; Pl. Ex. 215; Pl. Ex. 217).

C.) Evidence Presented at Trial Regarding Defendants' Creation, Control and Management of the I'On Assembly

On or about February 5, 1998, the I'On Company incorporated the Assembly for purposes of serving as the I'On homeowners association, as set forth in the Declaration of Covenants, Conditions, and Restrictions of I'On filed February 9, 1998. As set forth therein, all property owners in I'On are members of the Assembly; however, the Assembly Board was not completely "turned over" to the I'On homeowners until December, 2005. Prior to this transition, the Defendants, by and through the I'On Company, remained in control of the I'On Assembly and directed all aspects of the development of the I'On community, including entering into negotiations regarding various real estate transactions. The record reflects one such transaction involving the Defendants' recording of an invalid Recreational Easement on February 9, 2000. (Pl. Ex. 42). Executed by the same Defendant employee on behalf of three Defendant entities, the Recreational Easement purportedly provided for "perpetual" access and usage of CV6, yet the easement's term was expressly limited to thirty years. The record reflects another, similar transaction involving the Defendants' internal conveyance of CV6 on August 15, 2000, for nominal consideration in the amount of five dollars. (Pl. Ex. 11). As this internal transfer of CV6 among the Defendants occurred *after* the Defendants granted the Recreational Easement, Defendants did not have the right to grant the Easement, rendering the Easement null and void.

Not only did Defendants direct, manage, and control all aspects of I'On through 2005, the record further reflects the Defendants still influenced and controlled the day-to-day operations of the Assembly, even after the Assembly was transferred to the I'On homeowners. (See Pl. Ex.

74). In fact, as evidenced by the testimony of Deborah Bedell: (a) the transfer of control and community property from Defendants to the Assembly continued through the time of trial; (b) the Defendants retain and exercise their power to reinstate their own agents as members of the Assembly's Board; and (c) the Defendants retain the absolute power to veto any Board action. Defendants absolute "veto power" is perhaps highlighted best by the testimony of Tom Graham who conceded that the Developer had unilaterally placed Besenfelder back on the Assembly Board in January of 2014, and who compared the Defendants' power to veto any action taken by the Assembly Board to that of the United States Supreme Court.

D.) The Evidence Presented Regarding Defendants' Broken Promises and Failure to Act in Assembly's Best Interest

One month after finalizing the 1998 Property Report, and following many representations that the amenity property would be solely for the use of I'On residents, the Defendants submitted a proposal to a neighboring development, Olde Park, allowing Olde Park residents to use "the I'On Club and I'On's community dock and boat ramp" so long as Olde Park paid a usage fee to the tune of $350,000. (Pl. Ex. 189, 191). Olde Park accepted Defendants' proposal on February 19, 1999, *nine months before* Walbeck entered his purchase contract, yet neither the Defendants nor Defendants' agent informed Walbeck of this material change to his use and enjoyment of the amenity property. (Pl. Ex. 190). Vince Graham conceded this on the witness stand.

In 2000, the Defendants, unbeknownst to I'On purchasers such as Walbeck, amended the 1998 Property Report to remove their obligation to convey a "Creekside Park" and "Community Dock". Notably, this amendment was made within days of Walbeck's closing, yet again, Defendants never informed Walbeck of any change as to the amenities specifically referenced in Walbeck's purchase contract, amenities Walbeck testified that he relied upon in entering the

contract. The record reflects Defendants sent three letters to Walbeck around the amendment time frame, none of which informed Walbeck that the Defendants were no longer going to fulfill their contractual obligations. (Pl. Ex. 167).

Moreover, realizing they still owned the amenity property in 2006, and despite their promises to convey these amenities to the Assembly at no cost, the Defendants entered discussions on how to "capitalize" on the "potential value" of the Community Dock and outlining their options in "selling community facilities", all the while keeping their ideas "quiet for now." (Pl. Ex. 180, 181, 201). Additionally, Defendants tried to capitalize by selling the Creek Club to the HOA, a sale which was contingent on "additional lot entitlement to enable 5 or 6 lots on CV5", despite the Defendants' knowledge that the Creek Club could not be "functional without the parking lot" already located on CV5. (Pl. Ex. 193).[11]

In mid-2008, Defendants entered talks with Civitas regarding the sale of the amenity property, and in August 2008, Civitas contracted to purchase CV6. Although clearly a contract was on the table, Defendants represented to Assembly members that they had "not sold or initiated the sale of the Creek Club." (Pl. Ex. 208).

In response to a demand by I'On resident Catherine Templeton, the Assembly Board wrote Tom Graham and requested that the Docks be deeded to the Assembly on March 11, 2009. The Board further queried Graham as to the location and existence of the "Creekside Park". Concurrently, in a process that began on March 2, 2009, and ended sometime later in March, Civitas' offer/contract to purchase the amenity property was allegedly withdrawn.

Several times in March of 2009, the Defendants reiterated to the Assembly its intention to transfer the amenity property to the Assembly; however, unbeknownst to the I'On homeowners

[11] There was another attempt to sell the Deep Water Amenity to the Assembly in conjunction with the permitting of forty more lots in Phase 11.

and the Assembly, the Defendants and Civitas immediately resumed negotiating the sale of CV6 and CV5, reaching a contract in June of 2009. (*See* Pl. Ex. 58; Pl. Ex. 214; Pl. Ex. 215; Pl. Ex. 217). The contract specifically referenced and acknowledged the existence of the Homeowners' claims relating to the deep water amenities. Pl. Ex. 148 (June 18, 2009 Contract).

On August 1, 2009, the Assembly learned the amenity property was again under contract and, between August 1 and August 5, 2009, the Assembly orally demanded the docks be excluded from the sale and/or that the modifications to the use agreement be consummated. Defendants ignored the Assembly's demand, and on August 5, 2009, Defendants sold and transferred the amenity property to Civitas. The transfer from Defendants to Civitas was at a price of nearly one million dollars less than the then-appraised value of the parcel, and included the overflow parking lot (CV5) that had been previously represented to be available for parking.

Due to the sale of the amenity property to Civitas, which used the amenity property for commercial purposes, Plaintiff Walbeck and Adkins, as well as other Assembly members, were restricted in their use of the amenity property. Specifically, Plaintiffs faced repeated dock closures, increased traffic, drunken parties, and rowdy visitors, all taking place on the very amenity property they were promised to own free and clear of all such encumbrances. (Pl. Ex. 167).

E.) The Evidence Presented as to Plaintiffs' Demands Concerning the Defendants' Failure to Fulfill its Promise and the Assembly's Need to Take Action

Upon learning of the 2008 potential sale of the amenity property, several Assembly members, including Plaintiffs, made oral demands at Assembly meetings and written demands upon the Assembly to secure the rights to the Creekside Park and Community Dock property. (*See, e.g.*, I'On Board Meeting Minutes, Pl. Ex. 52; Templeton Letter, Pl. Ex. 53; Adkins Letter,

Pl. Ex. 54; Bruce Kinney letter, Pl. Ex. 56; Adkins Letter, Pl. Ex. 57). Plaintiffs also demanded that Defendants fulfill their obligations to convey the Creekside Park and Community Dock to the I'On Assembly. (*See, e.g.,* Pl. Ex. 63). Thereafter, the proposed sale of the amenity property was cancelled, and in the interim, it was represented to the Assembly and its members that the Defendants were finalizing the paperwork for the transfer of this common property to the Assembly. (*See* March 25, 2009 Chad Besenfelder e-mail, Pl. Ex. 58). However, this never occurred, and instead, the Defendants sold the property to Civitas on August 5, 2009.[12]

F.) The Evidence Presented Regarding Plaintiffs' Repurchase of the Amenity Property

Plaintiffs settled with Civitas at the commencement of the first trial, and pre-trial hearings were held prior to the commencement of the second trial (Trial II). One of the issues to be addressed was how and whether to reference the Civitas settlement agreement in Trial II. Another issued involved Defendants' motion to assert a counterclaim regarding the validity of the easement. Defendants also filed a new, nearly identical action regarding the validity of the easement and moved to consolidate the new action with pending matter. In both the proposed counterclaim and the new action, Defendants pled the transfer of title of CV6 to the Assembly, thereby further putting into issue what the Assembly had paid for title to CV6. Still, Defendants objected to the amount of consideration paid coming into evidence. Defendants sought to show that the Assembly was not damaged since it had gotten the Deep Water Amenities back; but they

17

[12] Civitas purchased the property in order to enhance Civitas' profitable bed and breakfast business located in the commercial section of I'On.

objected to the evidence of the amount of consideration paid by the Assembly for these same Deep Water Amenities. The Court ruled that the consideration paid would be admissible.[13]

As a result, Plaintiffs introduced evidence that the Assembly paid $495,000 for the title, while granting Civitas a twenty (20) year free lease, with two additional five-year options, to get the property back. Plaintiffs calculated the damage at $3.5M; but reduced their request to the jury to $2.5M to allow for any offsetting benefit gained by eventual unencumbered title to CV5, eventual possession of the Creek Club, etc., which the Defendants argued were enhancements to which Plaintiffs were not entitled. On the other hand, Defendants discounted the value of the twenty (20) year lease granted by the Assembly and argued to the jury that the enhancements exceeded the Assembly's cost; therefore, the Assembly had not suffered any damage (in Defendants' assessment). The resulting $1.75M verdict in favor of the Assembly HOA demonstrates that the jury weighed the evidence and reached a reasonable conclusion as to the value of Plaintiffs' damages suffered as a proximate result of the Defendants' conduct.

STANDARD OF REVIEW

A.) Judgment Notwithstanding the Verdict

In ruling on a motion for directed verdict, and similarly on a motion for JNOV, the trial court cannot disturb the factual findings of a jury unless a review of the record shows no evidence which reasonably supports them. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Force v. Richland Mem'l Hosp.*, 322 S.C. 283, 471 S.E.2d 714 (Ct. App. 1996). In making this determination, the trial court must view the evidence, and the inferences reasonably drawn therefrom, in the light most favorable to the plaintiff. *Gilliiand v. Doe*, 357 S.C. 197, 592

[13] Defendants later stipulated to the admission of the settlement in consideration of Plaintiffs' agreement that the Defendants rights to appeal the threshold ruling would be preserved.

S.E.2d 626 (2004); *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 494 S.E.2d 835 (Ct.App.1997). Specifically, the trial court is concerned with the existence of evidence, not its weight, and the trial court does not have authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320 585 S.E.2d 272, 274 (2003); *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998). Thus, the trial court must deny a motion for JNOV when the evidence leads to more than one inference or its inferences are in doubt. *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). Similarly stated, the trial court should uphold a jury's verdict if there is any evidence to sustain it. *Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-33, 603 S.E.2d 605, 611 (Ct. App. 2004); *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994). Moreover, issues not raised or presented to the trial court or not decided by the trial judge may not be later raised in a post-trial motion for JNOV or otherwise. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (noting a party may not use a post-trial motion to raise an issue that could have been raised at trial); *Skinner v. Elrod*, 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1992).

B.) <u>New Trial Absolute and New Trial Nisi Remittitur</u>

Unlike motions for JNOV, new trial motions assume the existing evidence presents questions reserved for the jury's determination, but ask whether, in light of all the evidence, the jury reached the appropriate result. Thus, in ruling on new trial motions, the trial court, as the "thirteenth juror", has the discretionary power to deny a new trial absolute or *nisi remittitur* if the court agrees with the jury's verdict based upon the law and the facts, evidence and testimony presented at trial. Rule 59, SCRCP; *South Carolina State Hwy. Dep't v. Townsend*, 265 S.C. 253,

dpm 19

217 S.E.2d 778 (1975); *Fallon v. Rucks*, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950) (noting the trial court's discretion is "founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them. . . .").[14]

A trial court may grant new trial *nisi* motions only when the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some influence outside of the evidence. *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). However, the jury's determination of damages is entitled to substantial deference, and therefore, a jury's verdict should be upheld when it is possible to do so in order to effectuate the jury's express intentions. *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996).

LEGAL DISCUSSION

I. Defendants' Motion for JNOV is Denied

Plaintiffs Properly Maintained a Derivative Action on Behalf of the I'On Assembly

As evidenced by the jury's verdict in favor of the Assembly, Plaintiffs' derivative action, brought by Adkins and Walbeck on behalf of the Assembly, fairly and adequately represents the interests of the other I'On Assembly members in accordance with Rule 23(b)(1) of the South Carolina Rules of Civil Procedure ("SCRCP").

Rule 23(b)(1), SCRCP, governs derivative actions and sets forth the requirements necessary to maintain derivative claims. Specifically, Rule 23(b)(1), SCRCP, requires: (a) the verification of a derivative complaint; (b) particular allegations of the plaintiff's efforts to "obtain action he desires from the directors or comparable authority;" and (c) "the reason for the

[14] In other words, the grant or denial of new trial motions rests within the trial court's discretion, and the court's decision will not be disturbed on appeal unless the court's findings are wholly unsupported by the evidence or its conclusions are controlled by an error of law. *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct.App. 1996).

plaintiff's failure to obtain the action or for not making the effort." Rule 23(b)(1) further provides that a plaintiff maintaining a derivative action must "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." In determining whether an individual plaintiff is an adequate representative, South Carolina Courts consider: (1) the common interests between the plaintiff and the members he represents; and (2) the plaintiff's ability and commitment to prosecute said common interests.

Here, the record reflects that Plaintiffs satisfied Rule 23's verification, demand and futility requirements as well as the aforementioned adequacy considerations. (*See* Plaintiffs' Complaints). First, there is a common interest between the named Plaintiffs and the Assembly members, as all Assembly members suffered due to Defendants' sale of amenity property promised to the Assembly. Moreover, Plaintiffs testified they were not part of any "Civic Lot Gang" and had no interests adverse to other members of the I'On Assembly – in fact, Plaintiffs advanced these members' interests according to the testimony of Julie Hussey, Tim Eble, and Deborah Bedell. Second, by virtue of the verdict and monetary awards rendered in favor of the Assembly, it is clear that the representative Plaintiffs prosecuted this action in an effort to preserve *all* I'On lot purchasers' common interest in the amenity property. Third, any challenge by the Defendants as to the "demands" made upon the Assembly is unavailing as demands were repeatedly made upon the Assembly, an Assembly controlled by the Defendants, thus evidencing the futility of any demand in the first place. Given Plaintiff's satisfaction of Rule 23(b)'s requirements, Plaintiffs' derivative claims are supported by South Carolina law. Thus, the Court declines to set aside the jury's award of $1,750,000 to the Assembly.

DRM 21

Plaintiffs' Claims are Not Barred by the Statute of Limitations

1.) Based Upon the Evidence Presented, the Jury Determined Each Plaintiff "Discovered" their Respective Claims on August 5, 2009

Contrary to Defendants contentions, Plaintiffs' claims are not barred by the Statute of Limitations as evidenced by the jury's verdict specifically finding August 5, 2009, as the date upon which Plaintiffs "discovered" their claims against Defendants. Thus, Plaintiffs claims were brought well within the three-year statute of limitations.[15]

In South Carolina, a party must commence an action within three years of the date the cause of action arises. S.C. Code § 15-3-530 (2005). The three-year statute of limitations "begins to run when the underlying cause of action reasonably ought to have been discovered." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 SC. 172, 183 (2001) *quoting Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004). According to the discovery rule, "the three year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Id.* "The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective." *Holly Woods*, 392 S.C. at 183 *citing Martin*, 357 S.C. at 576, 593 S.E.2d at 627. Consequently, the question becomes "whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his had been invaded, or that some claim against another party might exist." *Holly Woods*, 392 S.C. at 183-84 *quoting Young v. S.C. Dep't of Corrs.*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

APM 22

[15]Moreover, even assuming the jury concluded Plaintiffs "discovered" their claims on an earlier date which would result in Plaintiffs' Complaint falling outside of the Statute of Limitations, the doctrine of equitable estoppel would have served to toll the Statute of Limitations in light of Defendant's misrepresentations and efforts to keep their negotiations with Civitas "quiet for now".

Here, the jury considered the circumstances of this case and concluded that August 5, 2009 was the date Plaintiffs knew or should have known of their claims against Defendants. The jury's conclusion is supported by the evidence presented at trial demonstrating that Defendants sold amenity property promised to the Plaintiffs, including the Creekside Park, Creek Club, Community Dock *and* Boat Ramp, to an unaffiliated, for-profit entity on August 5, 2009. *See* CV5 Deed, Pl. Ex. 66; Lot 275 Deed, Pl. Ex. 67; Assignment of Club Owners' Rights and Obligations, Pl. Ex. 68; CV6 Purchase Agreement, Pl. Ex. 148).

While Defendants maintain the jury ignored other evidence in reaching its conclusion, this argument is without merit – the Court is concerned with the existence of any evidence supporting the jury's findings and has no authority to resolve conflicts purportedly created by the jury's disregard of other evidence. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320 585 S.E.2d 272, 274 (2003); *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998).

The evidence documenting the August 5, 2009 conveyance of the community property to a "for profit" business (Civitas) as well as the evidence reflecting the Defendants' promise to convey this property to the Assembly, a promise Defendants repeated over the course of many years and even reiterated on the very day they negotiated the sale of the community property, sustains the jury's findings. (*See* Handover Agreement, Pl. Ex. 47; January 15, 2009 Board Meeting Minutes, Pl. Ex. 52; March 11, 2009 Bruce Kinney letter, Pl. Ex. 56; March 25, 2009 Besenfelder E-mail, Pl. Ex. 58; Russo/ Besenfelder E-mails, Pl. Ex. 119-137, 139, 140, 154; Graham/Besenfelder E-mails Pl. Ex. 180-181, 193-196, 201-205, 212, 214-218, 220-224).

Moreover, the public notice and constructive notice doctrines are inapplicable here in light of the Defendants' misrepresentations concerning the conveyance of the community

property. *See Moseley v. All Things Possible*, 395 S.C. 492, 497, 719 S.E.2d 656, 659 (2011) (noting "while Buyers could have ascertained the existence of the easement through investigation of public records, their failure to do so does not preclude them from asserting a tort claim for fraud or negligent misrepresentation.") (internal citations omitted); *Tucker v. Weathersbee*, 98 S.C. 402, 402, 82 S.E.2d 638, 640 (1914) (noting the "mere act of recording" does not establish constructive notice). Accordingly, the Defendants bore the burden of demonstrating that the Plaintiffs had knowledge of the 2009 conveyance of the community property prior to 2009 – a burden the jury found Defendants failed to satisfy after considering the evidence presented by Defendants.[16] *See Richardson v. Mounce*, 19 S.C. 477, 447 (1883) (holding "statute of limitations does not run in favor of fraud until the discovery of the facts which constitute the fraud; and such knowledge being denied [by Plaintiff] in the complaint, the defendant must prove [Plaintiff's] knowledge").

2.) Based Upon the Evidence Presented, the Jury Determined the Purchase Contracts at Issue Were "Sealed Instruments"; thus, a 20 Year Statute of Limitations Applies to Plaintiffs' Breach of Contract Claims

The signature page of Walbeck's purchase agreement includes an attestation clause referencing a "seal" and twice references the agreement was "signed, *sealed* and delivered" - once in connection with Walbeck's signature and once in connection Defendants' signature. (*See* Walbeck Purchase Agreement, Pl. Ex. 2). Thus, Walbeck's purchase agreement contains a

[16]Thus, even though the Defendants attempted to record a Recreational Easement, transferred the community property amongst themselves, and amended the Property Report to delete references involving the Creekside Park and Community Dock prior to 2009, such discrete, unpublished acts cannot be deemed to have put Plaintiffs on notice of the Defendants' actual transfer of community property in 2009.

minimum of three references to a "sealed" instrument, the combination of which supports the jury's findings that the agreement was sealed.[17]

Testimony from a party revealing a special intent to create a sealed instrument is not necessarily required as a factfinder looks to the instrument to determine the intent to seal the same. Section 19-1-160 of the South Carolina Code specifically provides:

> *Whenever it shall appear from the attestation clause or from any other part of any instrument in writing* that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.

S.C. Code § 19-1-160 (1976) (emphasis added).

A.) Plaintiff Walbeck's Standing to Maintain His Individual Claims as Evidenced by Walbeck's Recovery of Individual Damages

Defendants' argument as to Walbeck's purported lack of standing lacks merit. Walbeck testified regarding his individual damages, and ultimately, he recovered individual damages on three separate claims. Defendants simply cannot, one the one hand, aver "Walbeck has no damages as an individual plaintiff" while, on the other, admit "Walbeck testified he wanted $50,000 in individual damages." (*See* Def. JNOV Motion, p. 14). The testimony Walbeck proffered at trial regarding his individual damages, damages suffered irrespective of his membership in the I'On Assembly, is sufficient to both (a) establish Walbeck's standing to bring his individual claims; and (b) sustain the jury's findings as to Walbeck's individual claims.

Moreover, as a party to his purchase contract, Walbeck is unquestionably a "real party in interest" in connection with the same, and therefore, has standing to personally bring claims

[17] The Walbeck purchase agreement, including its signature page, was prominently displayed repeatedly before the jury, and Walbeck also testified as to the "signed, sealed and delivered" language included on the agreement's signature page.

APM 25

against Defendants for their failure to fulfill their contractual obligations referenced therein. (*See* Walbeck Purchase Agreement, Pl. Ex. 2); *see also Ex parte Morris,* 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006) ("As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation. . .One must be a real party in interest, *i.e.,* a party who has a real, material, or substantial interest in the subject matter of the action . . .").

B.) Plaintiffs' Breach of Fiduciary Duty Claim

"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." *Wogan v. Kunze,* 366 S.C. 583, 605, 623 S.E.2d 107, 119 (Ct. App. 2005); *see also Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003); *O'Shea v. Lesser,* 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); *Island Car Wash, Inc. v. Norris,* 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). South Carolina Courts carefully define fiduciary relationships so as to not exclude new cases which may give rise to the relationship. *Goddard v. Fairways Dev. Gen. P'ship.*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) *citing Island Car Wash,* 292 S.C. at 599, 358 S.E.2d at 152. Generally, a fiduciary relationship may be presumed from the relationship between the parties, such as the attorney-client relationship, or it may be found to exist by the facts of the particular situation, such as a relationship where trust is reposed on one side and there is resulting superiority and influence on the other side.

When considering facts similar to those presented here, South Carolina courts have found a fiduciary relationship exists between developers and property owners. In *Goddard,* for example, the Court of Appeals expressly recognized a fiduciary relationship between the

developer of multiple villas and the owners of said villas by virtue of the organization of homeowners' association and the conveyance of the common areas to the association. *Goddard,* 310 S.C. at 415, 426 S.E.2d at 832-33. By virtue of these very facts - the developers' obligation to create a homeowners' association as well as the developers' obligation to ultimately transfer common elements to the same - the villa owners reposed a special confidence in the developer, "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 [villa owners] imposing the confidence." *Id.* at 414, 426 S.E.2d at 832.[18] Accordingly, Defendants' emphasis on *Hansen* and *Dunes West* is misplaced as case law makes clear there is no limitation to establishing the existence of a fiduciary relationship so long as "trust" is reposed on one hand and "influence" or "superiority" results on the other.

Here, the record reveals Plaintiffs trusted --and the Defendants promised--to: (a) *construct*, *repair* and *transfer* common amenities to the I'On Community; and (b) form a property owners' association for purposes of, among other things, protecting homeowners' investments. The record further reflects Defendants (a) controlled the Assembly as evidenced by their veto power; (b) managed the Assembly as evidenced by the testimony of Tom and Vince

[18]The *Goddard* Court further referenced the case of *Duncan versus Brookview House, Incorporated* in which the South Carolina Supreme Court found a fiduciary relationship existed between a corporation's promoters and the corporation they were creating. *Id.* at 414-15, 426 S.E.2d at 832. Finding a "corollary" between *promoters* and *developers*, the *Goddard* Court noted: [b]oth [developers and promoters] are *entrusted by interested investors* to bring about a viable organization to serve a specific function." *Goddard's* holding confirms the fiduciary relationship which exists between developers and property owners, a holding which correlates with other South Carolina decisions recognizing a fiduciary relationship between a promoter and the ensuing project. Notably, most associations are organized as nonprofit corporations, and thus, the developer often assumes a dual role as (1) developer-promoter of the development; and (2) director-officer of the developments' property owners' association until the association is self-sufficient. The effect of this dual role is that the developer, during this period, has two separate and distinct loyalties: (1) the operation of the association; and (2) the development and marketing of the project. Such inherent conflict of interest creates a high threshold for the developer to act in the best interests of both his company and the ward (the promoted, new, neighborhood). This conflict of interest often manifests itself adversely in situations where the developer fails to manage the association adequately or where the developer engages in self-dealing. Indeed, a developer in control of an association assumes management and supervision responsibilities similar to those of a corporate director or officer. Therefore, the developer may be held liable if such control results in mismanagement.

Graham; and (c) influenced both the Assembly and its members by making promises (regarding both the repair and conveyance of community amenities) which they failed to keep.

Simply stated, a developer in control of an association may not make decisions which benefit its own interest at the expense of the association and its members. The dual role of developer and officer or director of an association presents an inherent conflict of interest because decisions the director makes for the benefit of the association may in fact be detrimental to the developer's own economic interests. The developer's interest in self-preservation combined with its drive to make a profit often draw judicial scrutiny on conflict situations having the appearance of self-dealing. As noted by our Court of Appeals in *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599 358 S.E.2d 150, 152 (Ct. App. 1987):

> [I]t is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of said relationship to benefit his own personal interests. It is a doctrine repeatedly announced by the courts of this nation that courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.

In *Dunes West*, for example, the developer served as the original director of the property owners' association, and in this capacity, it failed to properly maintain the property's common areas and failed to create a sufficient reserve fund for maintenance of said common areas. *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002). Due to the developer's collective failures, the South Carolina Supreme Court found the developer breached the fiduciary duties it owed to the association holding as follows:

> The developer of a PUD owes a duty to the POA ***to turn over common areas that are not substandard*** and that are in good repair. ***Failure to do so*** subjects the developer to liability for bringing the common areas ***up to standard***.

Id. (emphasis added).

Here, a developer's failure to convey community properties in their entirety is at least the equivalent of conveying them in "substandard condition" (if not worse), and thus, any distinction between properties which *should have been conveyed* and *properties which were actually conveyed in a substandard condition* is a distinction without a difference.[19] Moreover, the record reflects the developers were in the process of repairing the community dock in preparation for transfer, per the request of the Assembly, while simultaneously, negotiating the sale of this very property to a third-party for profit. In other words, by failing to convey the community properties *as promised* to the Assembly, the Developers failed to act in the best interest of the Assembly, and therefore, breached at least one of the fiduciary duties it owed the Assembly. Thus, Defendants' Motion for JNOV as to the claim for breach of fiduciary duty is denied.

C.) Plaintiffs' Remaining Claims - Breach of Contract, ILSA, and Negligent Misrepresentation

The record reflects that Defendants deliberately failed to fulfill certain promises by selling the very amenity property they promised would belong to the Assembly and its members to an unaffiliated, for-profit entity in 2009. As further demonstrated below, the evidence presented at trial indicates (a) Defendants breached a contract which was intended to directly benefit the Assembly; (b) Plaintiff Walbeck relied on misrepresentations promulgated by the Defendants to his detriment; and (c) Defendants, through various marketing materials and their agents' oral representations, deceived Plaintiff Walbeck as to the purchase of his lot. Accordingly, the jury's findings as to Plaintiffs breach of contract, ILSA, and negligent misrepresentation claims are not untenable, and the motion for JNOV is denied.

[19] Contrary to Defendants' assertion, no South Carolina Court has ever held that "restrictive recognition of fiduciary duties" advances the public policy of this State. (Def. JNOV Motion, p. 17).

Breach of Contract

In South Carolina, a contract between two persons for the benefit of a third person can be enforced by the third person, even if he or she is not named in the contract. *Svenningsen v. Knight*, 286 S.C. 299, 333 S.E.2d 78 (Ct. App. 1985). The third person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to the third person. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005) (noting a third-party may enforce a contract which is made for the third-party's benefit); *Bob Hammond Const. Co. v. Banks Const. Co.*, 312 S.C. 422, 440 S.E.2d 890, 891 (Ct. App. 1994) ("[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct. . .benefit to such third person.").

Here, the record reflects the Assembly is a third-party beneficiary of the developer's contractual obligation, as stated in Walbeck's purchase contract, and again, in the 1998 Property Report, to convey the amenity property directly to the Assembly and its members. (*See* 1998 Property Report, Pl. Ex. 1, Walbeck Purchase Agreement, Pl. Ex. 2). Accordingly, Defendants argument must fail – the language of both Walbeck's purchase contract as well as the 1998 Property Report confer a direct benefit upon the Assembly and its members, and thus, the evidence supports the jury's finding that the Assembly qualified as a third-party beneficiary to the same.[20]

Not only do Walbeck's purchase contract and the incorporated 1998 Property Report provide that the amenity property will be conveyed to the Assembly and its members; the I'On Declaration of Covenants, Conditions, and Restrictions ("I'On CCRs"), drafted by the

[20]Defendants maintain a similar argument as to Plaintiff Walbeck's individual breach of contract claim; however, as a party to his own purchase contract, Walbeck clearly has a right to bring an individual breach of contract claim. The jury's award of $10,000 in actual damages on Walbeck's individual breach of contract claim, following the jury's deliberation as to the representations made by Defendants contained therein, is evidence of this fact. In any event, Plaintiff did not elect to recover actual damages under his breach of contract claim.

Defendants, specifically provide that *the I'On Assembly* owns the "Commons" and grants a "non-exclusive easement of use and enjoyment of the Commons" to *all titleholders*. (*See* I'On CCRs, Pl. Ex. 84) (emphasis added). The I'On CCRs further describe the "Commons" as "real property and interests therein which the *Assembly* owns or otherwise holds possessory or use rights in *for the common use and enjoyment of Titleholders*" which necessarily includes the Creekside Park and Community Dock property. (*See* I'On CCRs, Ex. A, Pl. Ex. 84) (emphasis added).

Similarly, the many agreements entered into between the Defendants and governmental authorities, such as HUD, DHEC, and the Town of Mount Pleasant, during the development of the I'On community also directly benefit, by reference, the Assembly and its members. Indeed, the 1997 Impact Assessment, 1998 Property Report, and 1999 Dock Permitting Application prepared and submitted by the Defendants all indicate the amenity property will be owned by the Assembly for the common, recreational use of I'On residents. Each of the foregoing submissions constitutes proposed developmental plans which, once approved by the applicable governing authority, create an obligation, on behalf of the developers, to fulfill said plans.[21]

Finally, Defendants' own representations evidence they intended to directly benefit the Assembly by transferring the amenity property to Assembly on multiple occasions and in reference to the Assembly's and homeowner's concerns regarding the very contracts which also contained these representations.

RPA 31

[21] In fact, most if not all of the government permits require the successful applicant to sign the permit, indicating the Applicant's acceptance of and *agreement to* the conditions of the permit before the permit becomes valid. The permits typically incorporate the Applicant's representations as a condition of the actual permit, which the Applicant must, thereafter, agree to as a condition of the permit being finalized. All of the DHEC and Army Corps of Engineers permits in this case appear to follow this exact process.

Interstate Land Sales Act (ILSA)

Plaintiff (a) repeatedly established the applicability of ILSA to I'On; (b) repeatedly referenced the applicability of ILSA's anti-fraud provisions to Plaintiff Walbeck's claim; and (c) repeatedly presented evidence demonstrating Walbeck's reliance on Defendants' misrepresentations.

(a) Plaintiff Walbeck Qualifies as a Purchaser and the I'On Defendants Qualify as Developers

To warrant protection under the Act, Plaintiffs must show they purchased lots within I'On from a defendant who qualifies as a "developer" or "developer's agent". *Id.* The Act defines a developer as any person who, directly or indirectly, sells, or offers to sell, or advertises for sale any lots in a subdivision. 15 U.S.C. § 1701(5). The Act further defines an agent as a person who represents, or acts for or on behalf of a developer in selling, or offering to sell, any lot or lots in a subdivision. 15 U.S.C. §1701(6).

As evidenced by the record, the I'On Defendants qualify as "developers" or "developer's agents" under ILSA. Indeed, I'On was originally developed by The I'On Company, an entity owned by Tom and Vince Graham. Throughout several developmental stages, the I'On Company managed I'On Realty and The I'On Club, both of which promoted I'On home sites or I'On community amenities.[22] The I'On Group was formed to manage the other I'On entities, and all of these entities, along with the Grahams, participated in the development of I'On. Accordingly, each I'On Defendant qualifies as a "developer" or "developer's agent" as defined by ILSA. (*See* Pl. Ex. 78).

Per ILSA, a "purchaser" is an actual or prospective purchaser of any lot in a subdivision. 15 U.S.C. §1701(10). As evidenced by their respective purchase contracts, Plaintiffs actually

APPN 32

[22] I'On Realty and I'On Club are owned by the same individuals who own the I'On Company.

purchased lots within I'On. Moreover, Plaintiffs directly purchased their lots from the I'On Company (a/k/a the developer) or its representatives. The other named I'On Defendants are agents or controllers of the I'On Company which promulgated and/or failed to correct the misrepresentations made to Plaintiffs during the I'On sale process. As such, Plaintiffs may maintain their cause of action under ILSA against the I'On Defendants. *See Kemp,* 940 F.2d at 113 ("[O]fficers, directors, and participating planners may be held individually liable for violations of the Act. . ."); *Gibbes*, 794 F. Supp. at 1333 ("[T]he determining factor is whether each defendant participated in sales or could be considered as a controlling person in an organization that participated in sales.").[23]

Notably, Defendants themselves repeatedly represented to the public and prospective purchasers, Walbeck included, that they were subject to ILSA.

(b) The I'On Defendants Violated ILSA's Anti-Fraud Provisions By Deceiving Plaintiffs in the Purchase of Their Respective I'On Lots.

Per ILSA's anti-fraud provisions, it is unlawful for a developer or agent to: (1) employ any device, scheme, or artifice to defraud potential purchasers with respect to the sale or lease of property. 15 U.S.C §1703(a)(2)(A); (2) obtain money or property by means of any untrue statement of a material fact, or *any* omission to state a material fact, with respect to any information pertinent to the lot or subdivision. 15 U.S.C. §1703(a)(2)(B); or (3) engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser. 15 U.S.C. §1703(a)(2)(C).[24]

---

[23] Defendants' assertion that Plaintiff failed to satisfy ILSA's 100 lot requirement is untenable given that the 1998 Property Report received by Walbeck, and repeatedly referenced in Walbeck's testimony, provides: "this report covers ***two hundred and forty-four lots (244)*** in Charleston County, South Carolina. . .It is estimated that this subdivision will eventually contain approximately ***seven hundred and eighty (780) lots.***" (Pl. Ex. 1)(emphasis added).

[24] In bringing claims based upon the foregoing anti-fraud provisions, a plaintiff need not demonstrate reliance on defendant's statements in order to prove a violation of § 1703(a)(2)(A) or (C). Under § 1703(a)(2)(B), plaintiff need not demonstrate reliance based on an omission; however, plaintiff may be required to show reliance to maintain a

The record indicates Defendants promulgated an ongoing, interrelated scheme involving multiple representations and omissions made to the Plaintiffs concerning the amenity property that Defendants promised to transfer to the I'On Community. The evidence also shows Defendants knew and should have known of the falsity and materiality of these representations and nondisclosures, and the Defendants, through lot sales, annual homeowner dues, and amenity usage fees, profited from said misrepresentations and non-disclosures. As such, the Defendants are liable to Plaintiff Walbeck under each of the above-described ILSA anti-fraud provisions. Simply stated, a single material misstatement or nondisclosure made by the Defendants in dealing with Plaintiff Walbeck constitutes a violation of ILSA's anti-fraud provisions. Here, the record is riddled with such material misrepresentations and omissions, each of which distinctly establishes the Defendants' liability under the Act, and thus, sustains the jury's verdict in favor of Walbeck on his ILSA claim. (*See, e.g.,* Pl. Ex. 1;[25] Pl. Ex. 2; Pl. Ex. 3; Pl. Ex. 7; Pl. Ex. 37; Pl. Ex. 167).

(c) The I'On Defendants' Misrepresentations and Nondisclosures Were Material

As evidenced by the record, it is precisely this information concerning amenity availability, accessibility, and operation to which Plaintiff Walbeck was entitled before he entered into his purchase agreement. Consequently, any facts related to said amenity availability, accessibility, and operation is undoubtedly "material," particularly, since Walbeck testified that he considered the amenity property and Defendants' representations regarding such in deciding to buy within the I'On Community. As facts related to the amenities are material, and the

---

cause of action for an affirmative misrepresentation. Here, Plaintiff satisfies any reliance requirement as detailed in the discussion of the negligent misrepresentation section set forth below.

[25] Also of note is that Plaintiff Walbeck received a copy of the 1998 Property Report before he entered his I'On lot purchase agreement. Moreover, the Walbeck purchase contract expressly referenced the 1998 Property Report which set forth that the community property would be conveyed to the I'On Assembly at no cost during the I'On development process. *Id.*, para. 10. Additionally, the Walbeck contract specifically copied and set forth a version of the *amenity chart* set forth in the Property Report. *Id.*

Defendants misrepresented amenity-related facts in their dealings with Plaintiff Walbeck, the I'On Defendants are in violation of ILSA's anti-fraud provisions.[26] In other words, the evidence presented demonstrates that Plaintiff Walbeck was induced, by the Defendants' sales campaign, to purchase the lot within a subdivision consisting of a number of promised amenities about which he knew little. In the view of Congress, purchasers such as Walbeck are entitled to information, and the developers selling said property are, by Congress's direction, obligated to *truthfully* and *accurately* provide it. By failing to include material information, concealing significant facts, and otherwise misrepresenting community amenities, Defendants deceived Plaintiff Walbeck through various acts, instruments, and communications in connection with his I'On lot purchase.

(d) Defendants' Arguments to the Contrary are Without Merit

Plaintiffs' fraud-based ILSA claims are not barred by the Statute of Limitations. According to the Act, any claim brought under Sections 1703 (a)(2)(A)-(a)(2)(C) is governed by the discovery rule, and Plaintiffs brought this action within three years of discovering the I'On Defendants' material misrepresentations and nondisclosures.[27]

[26] The Fourth Circuit has made clear that the fact itself must be material, *not* the misrepresentation or omission. *See Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 656 (4th Cir. 2004). Thus, assuming other requirements are met, as is the case here, any omission of a material fact is *prohibited. Id.* In addition, the materiality inquiry is objective and examines the significance of the omitted fact to a hypothetical reasonable investor or purchaser, not to the specific plaintiff. *See Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 315 (4th Cir. 2004). Further, materiality "does not require proof that an investor would not have invested had he known the truth; rather, the reasonable investor standard requires a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable [investor]."*Dunn v. Borta,* 369 F.3d 421, 427 (4th Cir. 2004) (internal citation omitted) (alteration in original). Moreover, in the analogous context, the fact that omitted information is publicly available does not defeat materiality as to a seller's omission. *See, e.g., Dunn,* 369 F.3d at 429. "[I]nvestors are not generally required to look beyond a given document to discover what is true and what is not." *Dunn,* 369 F.3d at 429.

[27] The discovery rule and its implications as to the timing-based affirmative defenses maintained by the I'On Defendants are discussed in detail above.

Further, any argument offered by the Defendants in attempting to disclaim their collective liability for their acts or their agent's acts is baseless in light of the following language noted by the Fourth Circuit in *In Re Total Realty Management, LLC*, 706 F.3d 245, 253 (2013):

> Given the Interstate Land Sales Act's plain language, Congress's intent to address fraudulent promotion in enacting the statute, and our precedent stating that the Interstate Land Sales Act should be read broadly, we agree with the district courts and hold that the Interstate Land Sales Act's fraud provision encompasses entities that participated in the advertising and promotional efforts leading to a challenged real estate transaction, even if they ultimately were not party to the transaction.

Defendants also attempt to disguise their wrong-doing by claiming they conveyed *different* amenity property to the Assembly which they now describe as the "Creekside Park" and the "Community Dock". Contrary to the Defendants' claims, the evidence leads but one logical conclusion – in 2009, the I'On Defendants conveyed *the* Creekside Park and *the* Community Dock listed in the 1998 Property Report and promoted in other marketing materials to Buyers. A "*Marsh*walk" and "*Crabbing* Docks" are simply not the equivalent of the "*Creek*side Park" and deep-water "*Community* Dock" promised to Plaintiffs as they are not located on the 300 feet of deep water frontage along Hobcaw Creek, and neither has a boat ramp or gazebo, as originally depicted, for the use of I'On residents. The Defendants' argument in this regard illustrates the very "bait and switch" type scheme Congress sought to protect innocent purchasers against in enacting ILSA's anti-fraud provisions.

Negligent Misrepresentation

Like Plaintiffs' breach of contract and ILSA claims, Plaintiffs' negligent misrepresentation claims are supported by South Carolina law and the evidence presented at trial. A plaintiff must establish the following elements to recover for negligent misrepresentation: (1) a false representation made by the defendant to the plaintiff; (2) a pecuniary interest by the

DRW 36

defendant in making the statement; (3) a duty of care owed by the defendant to communicate truthful information to the plaintiff; (4) the defendant's breach of said duty by failing to exercise due care; (5) the plaintiff's justifiable reliance on the defendant's representation; and (6) the plaintiff's direct and proximate damage resulting from his reliance on the representation. *Sauner v. Public Serv. Auth. of South Carolina,* 354 S.C. 397, 581 S.E.2d 161, 166 (2003).[28]

Here, the I'On Defendants misrepresented the availability, accessibility, and future ownership of community amenities to Plaintiffs on multiple occasions by varied means of communication for one primary purpose – profit. As the developers of the I'On Community, the Defendants' owed duties, including duties fiduciary in nature, to convey truthful information to Plaintiffs. The record demonstrates the Defendants breached these duties by failing to transfer the very amenities they represented would be transferred to the community for the use and enjoyment of Plaintiffs. Rather, the I'On Defendants sold said amenities for profit on August 5, 2009, and in so doing, continued to transmit to Plaintiffs misrepresentations regarding the Community amenities in an attempt to conceal their own self-dealings. *See Redwend Ltd. P'ship v. Edwards,* 354 S.C. 459, 474, 581 S.E.2d 496, 504 (Ct. App. 2003) ("A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction.").

Plaintiffs may rely on Defendants' representations without making further inquiry in cases such as this when a fiduciary relationship exists between the parties. *Epstein v. Howell,* 308 S.C. 528, 530-31, 419 S.E.2d 379, 380-82 (Ct. App. 1992). Thus, by the very nature of their relationship, Plaintiffs had a right to justifiably rely upon the I'On Defendants' representations, and did rely on those representations to their pecuniary detriment. Simply stated, the instant case

ORNO 37

[28] The key distinction between fraud and negligent misrepresentation is that "fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated *upon transmission of a negligently made false statement.*" *May v. Hopkinson,* 289 S.C. 549, 557, 347 S.E.2d 508, 513 (Ct. App. 1986) (emphasis added).

involves developers, the Defendants, who owed fiduciary duties to the Assembly and its members, the Plaintiffs, to disclose all relevant facts concerning the conveyance of the amenity property to the I'On community and to refrain from taking advantage of the Plaintiffs by the slightest misrepresentation or concealment. *Goodard,* 310 S.C. at 415, 426 S.E.2d. at 832-33. Under these circumstances, Plaintiffs were justified in relying upon the truth of the I'On Defendants' repeated representations that said amenities would be ultimately transferred to the I'On community, regardless of whether Plaintiffs might have ascertained the falsity of the representation had they further investigated.[29]

Even if a showing of his "actual" reliance is required, as Defendants suggest, Plaintiff Walbeck specifically testified he "relied" on (a) the representations made by Defendants' agent, Mr. Orange, that the Defendants promised to convey the amenity property to the community, and this amenity property was located "around the bend" from Walbeck's lot; (b) the representations contained in his purchase contract wherein Developers promised to convey the same amenity property to the community; (c) the representations contained in the 1998 Property Report, a report which was specifically referenced in his purchase contract and wherein Developers again promised to convey the amenity property to the community; and (d) the graphic representations depicting amenity property "located around the bend" from his lot on maps provided by

[29] *See, e.g., Epstein,* 308 S.C. at 530-31, 419 S.E.2d at 380-82 *citing Halsell v. First Nat'l. Bank,* 48 Okla. 535, 150 P. 489 (1915) (an often-cited case holding a director cannot practice fraud upon a co-director by making false statements concerning corporate affairs to induce the purchase of his stock by the co-director and then successfully defend on the ground that the co-director is charged with the knowledge of corporate affairs and a duty to keep informed of corporate business); 37 Am.Jur.2d *Fraud and Deceit* § 254, at 342 (1968) ("It is well settled that a representee has a right to rely upon representations where a. . .fiduciary relationship exists between the parties [and] in such a case, the buyer generally has the right to rely upon the seller's representations with reference to the property sold, even though the buyer has the opportunity to investigate the matter and ascertain the truth with respect thereto."); *see also Reid v. Harbison Development Corp.,* 285 S.C. 557, 330 S.E.2d 532 (Ct.App.1985), *aff'd in part and remanded,* 289 S.C. 319, 345 S.E.2d 492 (1986) (holding a recipient of a fraudulent representation of fact is justified in relying on its truth, although the recipient might have ascertained the falsity of the representation had the recipient investigated); 37 Am.Jur.2d *supra* § 252, at 337 ("[T]he rule is widely followed. . .that one to whom a positive, distinct, and definite representation has been made is entitled to rely on such representation and need not make further inquiry concerning the particular facts involved. . .").

DLM 38

Defendants throughout the progression of I'On's development. Moreover, Plaintiff Walbeck's testimony also established that Defendants never informed him that they did not intend to fulfill their promises to Walbeck at any time prior to his closing, nor any other time thereafter.

Amalgamation

Prior to submission of the case to the jury, the Court held Defendants are amalgamated as a matter of South Carolina law. At the trial of this case, Plaintiffs demonstrated that any legal distinctions among the Defendant entities are blurred, all are controlled, managed, and owned by the same individuals, and all collectively functioned as one in the day-to-day operations of all aspects of I'On's development, including promulgating deceptive and misleading representations. As noted by the Court, even the Grahams were unsure about which person worked for which entity at which time during which activity. Although not necessary for purposes of warranting this Court's amalgamation ruling, Plaintiffs sufficiently demonstrated both "fundamental unfairness" and many "wrongs" committed by the Defendants.

Specifically, under South Carolina jurisprudence, the "amalgamation" theory provides an avenue for relief when a "piercing the corporate veil" analysis is inapplicable. Unlike the "veil-piercing" theories, amalgamation does not require a showing of a parent company's "domination" of its subsidiary. Rather, under the amalgamation theory, a demonstration of the comingling of corporate interests, entities, and activities which blurs the legal distinction between the corporations and their activities is all that is required in order to hold each Defendant liable for the acts of the others. *See Kincaid v. Landing Development Corp.*, 289 S.C. 89, 91, 344 S.E.2d 869, 871 (Ct. App. 1986). [30]

[30] In *Kincaid*, three related corporations (a development corporation, a management corporation, and a construction corporation) were sued for negligent construction and breach of warranty. The management corporation argued the court should have directed a verdict in its favor because it was merely the marketing and sales company. *Id.* at 96,

DPM 39

Although not required for purposes of establishing amalgamation under *Kincaid*, the record in the present case reflects that the I'On Company and I'On Group did, in fact, dictate the day-to-day operations of the other Defendants and controlled all business decisions related to the I'On development. For example, according to the testimony of Tom Graham, he had direct control over the Defendants "through companies [he] owns or [has]" such as the I'On Company. Additionally, Tom Graham repeatedly testified to the "major" degree in which both he and Vince Graham controlled the conceptual planning of the I'On neighborhood, negotiated business deals in connection with the I'On Development, and directed the managers of the other Defendant entities when making business decisions.

Not only do the I'On Companies employ the same general managers, including themselves, both the owners and managers simultaneously engaged in business dealings acting on behalf of the separate entities. For instance, the invalid Recreational Easement entered into between the I'On Company, I'On Club, and I'On Assembly during February of 2000 in connection with the Community Dock was executed on behalf of *all three entities* by the then general manager for the I'On Company, Joe Barnes. (*See* Recreational Easement, Pl. Ex. 10). Subsequently, another General Manager of the *I'On Company*, Chad Besenfelder, represented to the I'On Assembly, on behalf of the *I'On Group*, that the "I'On Company [was] preparing to deed the [C]ommunity [D]ock to the I'On Assembly" in March of 2009 and the "*I'On Club* will continue to operate the facility." (*See* March 25, 2009 Besenfelder e-mail, Pl. Ex. 58) (emphasis added). At the time this statement was made, the docks were owned by the I'On Club, not the

344 S.E.2d at 874. In addition to sharing owners, the three companies shared a location. *Id.* Furthermore, the management company was the corporation called to remedy problems. *Id.* Finally, the company's letterhead identified the management company as "A Development, Construction, Sales, and Property Management Company." *Id.* On appeal, the *Kincaid* court affirmed the trial court's finding that this evidence revealed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." *Id.* (emphasis added). As a result, the three related corporations were held liable for the negligent acts of each other.

I'On Company – thus, by virtue of his own statement, General Manager Besenfelder blended all I'On companies into one interchangeable company.

The misuse of this collective control is further evidenced by the various real estate transactions involving the amenity property. For example, CV5 and CV6 were first transferred by the I'On Company to the I'On Club on August 15, 2000, for nominal consideration in the amount of $5.00. (*See* August 15, 2000 Deed, Pl. Ex. 11). Two years later, CV5 was transferred by the I'On Club to the Grahams for the same inadequate consideration and, not surprisingly, no evidence presented to date indicates the Grahams actually paid said consideration to the I'On Club. *Id.* Subsequently, CV5 was sold by the Grahams to Civitas for a discounted purchase price of $225,000 on August 5, 2009. (*See* Settlement Statement, Pl. Ex. 16).

Notably, during the same closing, CV5 was sold to Civitas by the Grahams, CV6 was sold to Civitas by the I'On Club for a discounted purchase price, and a residential lot was also sold by the I'On Company to Civitas for a discounted purchase price. *Id.* As evidenced by the Settlement Statement in connection with the closing of these three properties, the I'On Group, under the direction of the Grahams, executed the closing documents on behalf of both the I'On Club and I'On Company, further reflecting the amalgamation of the Defendants' business operations. *Id.* Similarly, the June 18, 2009 Purchase Agreement for the Creek Club located on CV6 indicates the collective function of the I'On Defendants. (*See* Creek Club Purchase Contract, Pl. Ex. 148). Specifically, the Creek Club Purchase Agreement was entered into between Civitas and the I'On Club, but was executed on the I'On Club's behalf by the I'On Group, and specifically, the I'On Group's Manager, Vince Graham, who is also the manager for both the I'On Company and the I'On Club. *Id.*

Directed Verdict on Defendants' Claim for Abuse of Process

Finally, this Court granted a directed verdict on Defendant's claim for abuse of process. as Defendants failed to establish a question of fact as to all necessary elements of an abuse of process claim. Defendants' motions as to their abuse of process claim are denied.

First, for an ulterior purpose to exist, there must be an illegitimate use of process. Food Lion Inc. v. United. Food & Commercial Workers Intern. Union, 351 S.C. 65, 71 (Ct. App. 2002). Regardless of the exclusion of Defendants' Exhibit 106, Defendants did not present any evidence that the Plaintiffs used the judicial process for anything other than a legitimate purpose. The record reflects Plaintiffs' initiated and prosecuted this action for the sole purpose of righting a wrong – a wrong which affected not only Plaintiffs, but also, community and public interests. Furthermore, Defendants did not produce any evidence of a willful act in the use of the process that was improper because it was unauthorized or aimed at an illegitimate collateral objective. *Id.*

II. Defendants' New Trial Motions are Denied as the Jury's Verdict is Consistent with the Evidence Presented and Supported by the Record

A trial court must grant new trial motions *nisi* only when the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some influence outside of the evidence. *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993) (noting "the denial of a motion for a new trial *nisi* is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion . . . If the amount of the verdict is *grossly* inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute.") (emphasis added) (internal citations omitted).

Here, the verdict is not grossly excessive,[31] and the jury's determination of damages is entitled to substantial deference. Accordingly, this Court denies Defendants' New Trial Motions. *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996).

CONCLUSION

Based upon the foregoing, this Court denies Defendants' Motion for Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial Absolute or New Trial Nisi Remittitur.

AND IT IS SO ORDERED.

Stephanie P. McDonald
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina
Dated: June 15, 2015

[31] In fact, the jury awarded less than the amount the Plaintiffs requested at trial and declined to award punitive damages despite finding that Defendants acted recklessly and without the slightest care.