THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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S.C. SUPREME COURT

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

Appellate Case No.: 2015-001590

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

PETITIONERS-RESPONDENTS' RETURN TO RESPONDENTS-PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents-Petitioners'[1] ask this Court to review two findings by the Court of Appeals ("COA") that do not warrant review: (1) the COA's finding that a fiduciary relationship exists between Developers and the HOA[2] which requires Developers to act in good faith; and, (2) the COA's application of the two-issue rule to affirm that an easement Developers granted is invalid. (Pet. p. 1). These findings do not conflict with this Court's decisions or involve novel issues; and, both are well-supported by South Carolina law and the record. As such, this Court should deny Developers' Petition.

DEVELOPERS' STATEMENT OF FACTS IS INCORRECT

Developers' statement of facts mischaracterizes the evidence in the record.[3]

A. The 1998 Property Report

The 1998 Property Report that obligated Developers to convey these Commons was not just provided to Walbeck and Adkins. There were 121 more Homeowners who received the 1998 Property Report; and, at least six more Homeowners who received the 1998 Property Report instead of the amended version they should have received based on their contract dates. (App. pp. 4086-93) (collection of 121 1998 Property Report receipts, six of which were received and signed for after the Property Report was amended); (App. pp. 2823-26) (chart showing I'On purchasers who should have received the 1998 Property Report based on their contract date); *see also* (App.

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[1]Respondents-Petitioners or "Developers" are: I'On Company, LLC, I'On Club, LLC, I'On Group, LLC f/k/a Civitas, LLC; and, I'On Realty, LLC.

[2] Petitioners-Respondents or "HOA" are: I'On Assembly, Inc., Brad J. Walbeck, and, Lea Ann Adkins.

[3] The HOA filed its Petition for Certiorari and Appendix on July 11, 2019. The HOA's Petition includes an abbreviated fact summary and the Appendix includes the HOA's Appellate Brief and Petitions to Rehear that discuss the facts in more detail. Rather than repeat the same in this Return, the HOA addresses Developers' factual errors.

pp. 1292:25-1295:21) (Adkins testifying that she received the 1998 Property Report in conjunction with her 2003 purchase contract); (App. pp. 1369:13-1370:8) (Adkins testifying that the collection of 121 Property Report Receipts shows the I'On lot purchasers who received the 1998 Property Report); (App. p. 1404:8-14) (Walbeck testifying he received the 1998 Property Report); (App. pp. 1045:20-1046:5) (Tim Eble testifying he received the 1998 Property Report).

Further, "the promise at issue" is not just the 1998 Property Report. (Pet. p., 2). Rather, Developers obligated themselves to convey the Commons[4] to the HOA multiple times between 1998 and 2009. The "promise" was included in Walbeck's contract, other purchasers' contracts, a Handover Agreement, and multiple community publications over the years.

For example, in 2005, Developers represented the Commons would be conveyed to the HOA in a Handover Agreement as well as in HOA meetings. (App. pp. 2692-93; 3981-82). In 2006, Developers' representative told the HOA the "boat ramp" would be turned over; and, in May 2007, Developers provided a "list of venues being transferred to the [HOA]" which included the "boat ramp." (App. pp. 3408-09; 3414). Developers never disclosed the back-door conversations they were having around this same time about how "to capitalize" on the Commons because they wanted to "keep [this] quiet for now". (App. p. 3341).

In September 2007, Developers' representative told the HOA that Developers "would like to turn over the Community Dock" after "looking into repairs;" but, failed to disclose Developers were, instead, considering options to sell the Commons to a third-party. (App. pp. 1689-90; 4025); *see also* (App. pp. 2714-15) (Developers' representative 2008 e-mail to this third-party indicating: "The docks were promised handover to the homeowners and [Developers] would like to honor that

[4] The "Commons" are the "Creekside Park," "Community Dock," and the Dock's associated parking and boat ramp located on two civic lots known as CV5 and CV6.

someday."). In March 2009, Developers reiterated that they were "preparing to deed the [C]ommunity [D]ock to the [HOA]" even though they had re-contracted to sell the Commons. (App. pp. 2712-13; 3432-35; 3439). When this contract was questioned one month later, Developers described the transaction as only a management change. (App. pp. 1178; 1198-99; 1736-37; 3402-03).[5] Then, despite all their promises and omissions, Developers sold the Commons in August 2009.[6]

The Commons were also not complete by September 1999 as Developers suggest; and, the "completion of construction language" in the Property Report is ambiguous. It is unclear as to whether turnover was to occur upon the completion of the Commons, Phase II, or I'On itself. (App. pp. 1326:3-16; 1424:24-1425:5) (Walbeck and Adkins testifying that there was confusion as to what the Property Report meant in terms of "upon completion of construction"). Further, these Commons were to be built in Phase II, a Phase which was not completed until sometime during or after 2006. (App. pp. 3981-82) (2005 meeting minutes where Developer-appointed Board member indicated to the HOA that Developers were "complet[ing] the turnover for phases 1-7" in 2006).

Developers' statement that they "delivered on the promise made" in the Property Report is ludicrous. The jury found they did not by returning a verdict favoring Walbeck on his ISLA claim (which concerned the Property Report) and breach of contract claim (which the HOA also received a favorable verdict on as a third-party beneficiary). (App. p. 2321-28). More importantly, is what Developers concede in this part of their "fact" discussion – that the Property Report "stated that

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

[6] These representations and non-disclosures by Developers between 2005 and 2009 also support the Circuit Court's finding that Developers are equitably estopped from asserting the SOL as to either Walbeck's or the HOA's claims. (App. p. 478, n. 15).

OTHER [Commons] may be owned by persons other than [the HOA]." (Pet. p. 3) (emphasis added). This proves the point made by the HOA in its Petition – that the Property Report guarantees **THESE** Commons would be owned by, and accessible only to, the HOA. (HOA Pet. pp. 27-34).

B. Walbeck and Adkins

Developers' claim that Adkins is a "long time opponent" of I'On is flat-out wrong. (Pet. p. 4). This is another example of Developers regurgitating the defenses they asserted at trial, such as claiming there was a "free civic lot gang", which did not exist.[7] This defense suffered a directed verdict for lack of evidence. While Adkins and Walbeck are opponents of Developers and their many manipulations and misrepresentations, they are not opponents of the very community they spent the last ten years trying to protect. The HOA also does not believe this is the case as evidenced by the HOA's adoption of Adkin's and Walbeck's derivative claims and realignment as a direct plaintiff in 2014. (App. pp. 452-53).

Developers' claim that post-1999 I'On purchasers were not provided the 1998 Property Report is also wrong as discussed earlier.

C. The Recreational Easement

Developers' description of the "unequivocally perpetual" Recreational Easement is incorrect, and Developers did not preserve the "cost sharing" issue. Section 4.2 of the Easement limits its "Term" to thirty years and supersedes any "perpetual" language referenced in the other provisions. (App. p. 3634). Developers' argument that this limitation "only applies to cost sharing" is not properly before this Court because it was raised, but not ruled upon, by the Circuit Court.

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[7] At trial, when Homeowners were questioned as to their involvement in any such "gang," the response was a resounding no. (App. pp. 1053:4-11; 1305:5-12; 1408:16-20)(Homeowners testifying they were not in any such "Gang" and found the term "insulting" and "contriving.").

Developers also omit that they conceded the Easement's invalidity because the I'On Club did not own the property subject to the Easement at the time it was granted. (App. p. 2382) (Developers conceding: "At the time the [Easement] was executed, the I'On Company still held title. . .and the I'On Club did not become owner of the same until August 15, 2000.").

Further, Developers' admission that the Easement was signed on behalf of Developers and the HOA by the same Developer representative is a concession that this was no arms-length transaction.[8]

D. The HOA

Developers did not "cede control of the [HOA] by 2003". As found by the Circuit Court and the COA, Developers "retained continuing control of the HOA up to and including the date they conveyed [the Commons] to [Buyer in 2009]."[9] Developers exercised one of its many powers, to remove and replace and Board members, in 2012, and again, in 2014.[10] Developers also retain their self-described, "Supreme Court-like" veto power that allows them to overturn any HOA decision to this day. (App. pp. 1086:9-1088:23).

Developers are also wrong that Walbeck should have found a needle in the haystack and discovered "that he had a claim" by late 2004 when he received one proposed budget with one ambiguous line item listing a cost paid for the "Creek Club Dock". (App. pp. 13-14; 106). The

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[8] (Pet. p. 5) ("[T]he same individual served as manager of the I'On Club, manager of the I'On Company, and [HOA Board President] and executed the document [for] each entity.").

[9] (App. p. 100); *see also* (App. p. 24) ("[Developers] retention of control over the HOA throughout the years preceding the sale of [the Commons] created a continuing fiduciary relationship between [Developers] and the HOA"). Further, the evidence shows Developers controlled the HOA through at least 2014 due to their influence over the then-Board and I'On's Covenants that Developers drafted to give them absolute power over the HOA. (App. pp. 4143-44).

[10] (App. p. 1088:11-23) (Developers admitting they exercised their right to appoint and remove Board members in 2012); (App. p. 101) (acknowledging Developers appointed Board members as late as 2014).

totality of the evidence shows Developers implemented a decade-long scheme in which they told the Homeowners one thing, but secretly intended another. Even if Walbeck was able to deduce from the proposed budget that a "usage" fee was charged for the "Creek Club Dock", Developers' failure to disclose that they were never going to convey the Community Dock or the Creekside Park, coupled with their repeated assurances that they were going to convey these Commons, induced a sense of complacency until Developers sold the Commons in 2009.

Furthermore, the proposed budget did not include a I'On Club "rental fee" as Developers suggest. (Pet. p. 6); (App. pp. 3828; 3837) (proposed budget mentioning only the "Creek Club Dock" and not the "Creekside Park" or a "I'On Club Rental Fee"). And, importantly, Developers' insertion of the one line item that they argue indicated the HOA was paying a fee to "maintain use" of the Commons shows Developers continued to lull the HOA into a false sense of security with their words. According to the Property Report, the HOA was to pay for "the costs of ownership, operation and maintenance" of the Commons once conveyed. (App. p. 3518). Thus, this self-described "maintenance" cost in the proposed budget caused the HOA to believe Developers had fulfilled their promises to convey the Commons.

E. Sale of the Commons

Developers' assertion that "no one expressed that the [HOA] was supposed to receive [the Commons] for free pursuant to the 1998 Property Report" in October 2008 is another example of Developers' hide-the-ball tactics. (Pet, p. 7). As previously mentioned, Developers' promises to convey the Commons are not limited to the Property Report. Also, this meeting was with the HOA Board – not the HOA – and, the HOA Board did not know of the 1998 Property Report at this time. (App. pp. 4059-63). As the COA correctly found:

> In July 2008, [Buyer] submitted a proposal to buy the [Commons]. . .Subsequent communications between [Developers] and [Buyer] indicated an intent to

> ultimately convey ownership of [the Commons] to the HOA. However, in November 2008, [Buyer] and [Developers] entered into an agreement that would include [the Commons] in the transfer [to Buyer], which was concerning to HOA members. The then-current [HOA President] contacted [Developers] regarding modifying the [Easement] to protect the HOA members. One of the modifications [Board President] sought was making the [E]asement perpetual. However, on January 5, 2009, [Developers notified their representative that Developers] would not modify the [Easement] while [the Commons] were under contract for sale … **On March 11, 2009, [Board President] sent an e-mail to [Developers] indicating the Board's discovery of the 1998 Property Report's representation that [the Commons] would be conveyed to the HOA**. [Board President] expressed the HOA's expectation that [the Commons] would be excluded from the sale … Later in March 2009, [Buyer] advised [Board President] that he was cancelling the purchase agreement, and subsequently, [Developers] advised [Board President] that [they were] working out details for transferring ownership of [the Commons] to the HOA. Likewise, [Developers' representative] advised the HOA's management company that ownership of [the Commons] would be transferred to the HOA. However, by August 1, 2009, the HOA learned that [Developers] and [Buyers] had recently entered a new contract for the sale of [the Commons].

(App. p. 6-7; 92-93) (emphasis added). Further, there was no need for anyone to express anything because Developers knew that they were supposed to convey the Commons for free before and after 2008. *See, e.g.,* (App. pp. 2692-93; 2712-13; 3182-83; 3439; 4025).

F. Procedural History

The HOA "did not know for nearly ten years" that Developers would not convey the Commons they obligated themselves to convey repeatedly throughout those ten years. (Pet. p. 7); *see also* (App. pp. 2692-93; 2708-09; 2712-13; 2880-2924; 3328; 3341-47; 3396-3406; 3408-18; 3425-26; 3432-63; 4064-67) (Developers' repeated promises to convey the Commons while also negotiating the sale of the Commons). Not only did Developers affirmatively represent that they were going to turn over the Commons to the HOA, Developers schemed to keep their true intention to sell the Commons for their own profit hidden despite their fiduciary duty to disclose the truth. *See, e.g.,* (App. p. 199) (Developers deciding to "keep the transaction quiet because of all the brew ha ha and filings."). Also, there is no way any HOA member "knew or should have known" that

the HOA did not, or would not, own the Commons because Developers "vacillated throughout the years concerning what they designated as the [Commons]".[11]

Additionally, Developers' procedural background omits the HOA's adoption of Walbeck's and Adkins' derivative claims, the Circuit Court's Order realigning the HOA as a direct plaintiff prior to trial, or the jury's verdicts returned on the HOA's direct claims. (App. pp. 452-53) ("[HOA is] deemed to have adopted [Petitioners'] claims, and [Developers'] responses to [Petitioners'] Complaint should be deemed to serve as responses to the [HOA's] adopted claims."); (App. pp. 2321-28).

Developers' procedural background also conveniently omits their procedural errors and admissions including:

- Developers' failure to appeal the Circuit Court's denial of their Motion to Dismiss;
- Developers' failure to request a ruling on Walbeck's and the HOA's negligent misrepresentation claim at the Motion to Dismiss stage;
- Developers' admission in their Answer that derivative demands were made upon, and rejected by, the HOA;
- Developers' waiver of any argument that the jury's verdict was tainted because it was rendered post the amalgamation ruling Developers requested; and,
- Developers' deletion over 50,000 files and folders while this case was pending, at least 117 of which expressly related to these Commons.

(App. pp. 445-49; 539-51; 580 ¶ 35; 1478-80; 2321).

Developers further fail to mention that the jury found that they acted "willfully, recklessly,

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[11] (App. p. 4) (emphasis added); *see also* (App. p. 2726) (Developers 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."); (App. pp. 2761-62)(Developers 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" deeded to the HOA).

and wantonly;" and, that the COA originally agreed with the HOA for the most part; but, completely reversed itself in Substituted Opinion. (App. pp. 1-34; 2321).

REASONS DEVELOPERS' PETITION FOR CERTIORARI SHOULD BE DENIED

I. DEVELOPERS' PETITION DOES NOT MEET THE STANDARDS REQUIRED FOR CERTIORARI UNDER RULE 242, SCACR

This Court should deny Developers' Petition for Certiorari because it fails to satisfy certiorari requirements. Rule 242, SCACR, provides that the following are generally accepted reasons warranting certiorari: (1) where there are novel questions of law; (2) whether there is a dissent in the COA's decision; (3) where the COA's decision is in conflict with this Court's decisions; (4) where constitutional issues are directly involved; and, (5) where a federal question is included and the COA's decision conflicts with the United States Supreme Court's decisions.

Developer's Petition is largely devoid of these reasons warranting certiorari. Reasons 2, 4, and 5 (above) are not applicable to the two issues Developers ask this Court to review. Further, Developers do not argue that the COA's "two-issue rule" ruling conflicts with this Court's decisions or that it presents a novel question of law. In fact, Developers do not cite to one case that supports their cursory claim that the COA's application of this rule was "misplaced." (Pet. p. 13). Rather, Developers admit that they did "not offer argument" as to one of the Circuit Court's rulings; yet, ask this Court to ignore this omission.

Similarly, Developers do not explain how the COA's statement that "developers are fiduciaries who must act in good faith" conflicts with this Court's decisions; and, do not show how this ruling contravenes the well-settled fiduciary principles set forth by the COA in *Island Car Wash*. (Pet. pp. 11-12). Developers' argument is really one question, whether there is evidence of

Developer "control" over the HOA, that the Circuit Court and COA correctly answered in the affirmative based upon the record.[12]

There is simply nothing "special and important" about Developers' Petition that needs this Court's review. Developers admit as much in their Petition by indicating that they would not seek review of this case and only seek review of these two issues "if" this Court grants the HOA's Petition. (Pet. p. 1).[13] Unlike Developers' Petition, the HOA's Petition highlights many "special and important" reasons that necessitate this Court's review. As such, this Court should grant the HOA's Petition and deny the Developers' Petition. Nevertheless, the HOA responds to Developers' arguments below.

II. THE COA CORRECTLY STATED THAT SOUTH CAROLINA LAW REQUIRES FIDICUARIES TO ACT IN GOOD FAITH AND IN THE BEST INTEREST OF THOSE UNDER THEIR INFLUENCE

Developers first argue the COA erred in concluding their control over the HOA created a new fiduciary duty unrecognized by South Carolina law. (Pet. pp. 10-12). Developers are wrong in multiple respects.

A. The COA Did Not Find Developers' Control Created a New Fiduciary Duty

The COA did not announce a new duty that applied to Developers because they actually or theoretically controlled this HOA. Rather, the COA found Developers' control, along with the trust the HOA instilled in Developers, confirmed the existence of a fiduciary relationship between

[12] The evidence of Developers' control is discussed in more detail in Section II.

[13] (Pet. p. 1) ("[Developers] would not request review of this case if a forthcoming petition for certiorari by [HOA] was not anticipated. . .[I]f the Court grants certiorari on [HOA's petition], Developers request review of two issues. . .).

them[14] which meant Developers had the same "well-settled" duty as other fiduciaries – "to act in good faith and with due regard to the [HOA's interest]." (App. pp. 100-01) (emphasis in original) *citing 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) ("[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.").[15]

The COA's acknowledgment of "the good faith requirement for fiduciaries" is neither new nor erroneous; and, its conclusion that anyone (including Developers) acting in a fiduciary relationship shall not be permitted to make use of said relationship to benefit his own personal interests correctly states South Carolina law. (App. pp. 100-01) *quoting Island Car Wash*, 292 S.C. at 599, 358 S.E.2d at 152 ("[A]nyone 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

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[14] South Carolina courts have repeatedly acknowledged the fiduciary relationship existing between developers and HOAs. *See, e.g., Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002) (acknowledging the fiduciary relationship between developers and HOAs) *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) (same); *Goddard v. Fairways Dev. Gen. P'Ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (same).

[15] *See also RFT Management Co., LLC v. Tinsley & Adams, LLP*, 299 S.C. 322, 335, 732 S.E.2d 166, 174 (2012) (same); *Wogan v. Kunze*, 366 S.C. 583, 605, 623 S.E.2d 107, 119 (Ct. App. 2005) *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008) (same); *Davis v. Greenwood Sch. Dist.* 50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005) (same); *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003) (same); *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992) (same); *Duncan v. Brookview House, Inc.*, 262 S.C. 449, 205 S.E.2d 707 (1974) ("The promoters of a corporation occupy a relation of trust and confidence towards the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries.").

advantage at the expense of the person under his influence.").[16] Developers offer no authority to support their contention that "developer-fiduciaries" are somehow exempt from this duty applicable to all other fiduciaries.

B. Developers' Fiduciary Argument Misunderstands the Law

Developers argue that the COA misapplied South Carolina law by finding developers who "retain" control versus "exercising" control over an HOA owe a fiduciary duty to act in good faith and in the HOA's best interest. *See, e.g.,* (Pet. p. 10) (Developers claiming "theoretical control does not create a fiduciary duty as a matter of law."). This is incorrect.

1. Developers' Argument Contravenes South Carolina Law Including Goddard and Dunes West

Developers claim *Goddard* and *Dunes West* provide that they are duty-bound as fiduciaries "only if they exercise control over financial matters or actions that impose financial obligations on the HOA." (Pet. pp. 11-12) (emphasis added) *citing Dunes West*, 349 S.C. at 257, 562 S.E.2d at 637 (2002); *Goddard*, 310 S.C. at 414, 426 S.E.2d at 832.

However, *Dunes West* and *Goddard* solidify that the mere existence of a fiduciary relationship obligates Developers to act in good faith with an HOA's interests in mind – in fact, *Goddard* (which *Dunes West* expressly relies upon) quotes *Island Car Wash* for this exact

[16] While the COA rightfully found Developers "are governed by [the] standards set forth in *Island Car Wash*," its analysis overlooked the "zealous scrutiny" standard which then necessarily applies here. (App. p. 101) *quoting Island Car Wash*, 292 S.C. at 599, 358 S.E.2d at 50. In other words, South Carolina law presumes bad faith in any transaction occurring within the developer-HOA fiduciary context when, like here, Developers profit from the transaction. *Wilson v. Wilson*, 117 S.C. 454, 117 S.E. 330 (1921) ("[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.") (emphasis added). However, the COA did not presume Developers acted in bad faith; and, its failure to apply this presumption creates a conflict in the law that requires review as further detailed in HOA's Petition for Certiorari.

proposition. *Goddard*, 310 S.C. at 414, 426 S.E.2d at 832; *see also Dunes West*, 349 S.C. at 259, n. 5, 562 S.E.2d at 638, n. 5 ("*Goddard* and two of the Illinois cases hold that a developer is a fiduciary to the [HOA].").[17] Based on these decisions, Developers' good faith duty is not limited

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[17]Every other "developer-fiduciary" case *Goddard* and *Dunes West* reference indicates the same. *Seven Bridges Courts Ass'n v. Seven Bridges Dev., Inc.*, 306 Ill.App.3d 697, 701-02, 714 N.E.2d 601, 602-03 (1990) ("[HOA] maintains that *Maercker*[*'s*] finding of a fiduciary relationship was based on the type of relationship <u>that generally exists</u> between a developer and an [HOA]. We agree with [HOA's] assessment of *Maercker.* In *Maercker,* this court wrote in relevant part: We are convinced by the application of a simple, straightforward definition of a fiduciary relationship to the facts in this case that defendant stood in such a relationship to plaintiff. A fiduciary or confidential relationship exists where, by reason of friendship, agency, or business association and experience, trust and confidence are reposed by one person in another who, as a result, gains an influence and superiority over him. <u>Once such a relationship exists in a corporate setting, a fiduciary has the duty to act with utmost good faith and loyalty in managing the corporation and is prohibited from enhancing his or her own personal interests at the expense of corporate interests</u>. Furthermore, a fiduciary 'may not hinder or defeat the ability of the corporation to continue the business for which it was developed. The trial court properly found that defendant had a fiduciary relationship with plaintiff. . .Moreover, as noted above, *Maercker*[*'s*] conclusion that a fiduciary relationship exists is based upon the general relationship of the developer to the [HOA], not the specific language of the declaration involved. . .In other words, <u>we find that there is a common-law-based fiduciary relationship between a townhome developer and a townhome association</u>.") (emphasis added) *citing Maercker Point Villas Condo. Ass'n v. Szymski*, 275 Ill. App. 3d 481, 484, 655 N.E.2d 1192, 1193–94 (1995); *Board of Managers of Weathersfield Condo. Ass'n v. Schaumburg Ltd. P'ship,* 307 Ill.App.3d 614, 622, 717 N.E.2d 429, 436 (1999) ("A fiduciary relationship exists where there is special confidence in one who, in equity and good conscience, is bound to act in good faith with due regard to the interests of the other. Since the [HOA] officers and board members owe a fiduciary duty to the [HOA] members, they must act in a manner reasonably related to the exercise of that duty, and the failure to do so will result in liability not only for the [HOA] but also for the individuals themselves. Furthermore, a board's proper exercise of its fiduciary duty requires strict compliance with the condominium declaration and bylaws."); *Orange Grove Terrace Owners Assn. v. Bryant Properties, Inc.*, 176 Cal. App. 3d 1217, 1223, 222 Cal. Rptr. 523(Ct. App. 1986) ("a developer. . .may not make decisions for the [HOA] that benefit [its] own interest at the expense of the [HOA] and its members", and noting it was "readily foreseeable" that the HOA would be injured by developer's acts or omissions before the HOA assumed control of common areas); *Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 114 Cal.App.3d 783, 171 Cal.Rptr. 334, 343 (Ct. App. 1981) ("[I]t is well settled that directors of nonprofit corporations are fiduciaries. [D]irectors and officers [of a corporation are required to exercise their powers in good faith, and with a view to the interests of the corporation."); *Richard Gill Co. v. Jackson's Landing Owners' Ass'n*, 758 S.W.2d 921, (Tex. App. 1988) ("Under the Covenants], [Developers] assumed the responsibility for managing the condominium until an [HOA] could be formed. The owners of individual apartments who would later form the [HOA] put their trust in [Developers] and relied upon them to fairly and competently carry out their duties,

to only when they "exercise control over financial matters" because its fiduciary relationship with the HOA is not so limited. The only requirement for this relationship to exist is that the HOA "trusted" Developers or that Developers were in a "superior" position, and during this trust or superiority period, Developers are obligated to act in the HOA's interest in all matters.

2. Developers' "Theoretical Control" Does Not Alter its Fiduciary Status

Additionally, *Dunes West* and *Goddard* both make clear that a developer remains a fiduciary even if it only has "theoretical control" over an HOA via way of Covenants. In *Dunes West*, for example, this Court specifically noted that "the recorded covenants" in that case "grant[ed] developers *de facto* control over the POA. . .". *Dunes West*, 349 S.C. at 255, n. 1, 562 S.E.2d at 635, n. 1. The *Dunes West* Court proceeded to describe the covenants in *Goddard* which similarly provided the developer with "control over the association":

> *Goddard*[*'s*] [facts] are similar to those in [*Dunes West*]. In *Goddard,* [Developer] began developing a PUD, with plans to build approximately 90 units. The PUD was governed by recorded covenants. . .The covenants called for the formation of the Fairway Villas [HOA], with mandatory membership for all unit owners. The [HOA] owned the common areas. . .and was responsible for maintaining these areas. Funding for the [HOA] was accomplished through assessments against each unit. The [HOA] was organized to grant the developer control over the association until nearly all the lots within the PUD had been developed and sold. Further, the developer had the unilateral ability to determine assessments against individual owners while the developer was not required to pay assessments.

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and a fiduciary relationship was thus established between appellants and the owners."); *see also Laurel Road Homeowners' Ass'n, Inc. v. Freas,* 191 A.3d 938, 950-51 (Pa. Cmwlth. 2018) (finding *Goddard* "constitute[s] persuasive authority and conclud[ing] that the [Developers] and the [HOA] were in a confidential relationship in which the [Developers] assumed the role of a fiduciary and its concomitant duties."); *Innermiages, Inc. v. Newman*, 2019 WL 1380096 at *16 (Tenn. App. 2019) (citing *Goddard* and noting "[c]ourts in other jurisdictions have also held that developers owe fiduciary duties to homeowners and [HOAs]. . . Here, the trial court found that the developer was liable for breach of fiduciary duty because the developer "breached her duties under [Covenants]. We interpret the trial court's ruling as a determination that the developer did not act in good faith in continuing to develop the property and in providing the services promised. . .") (emphasis added).

Id. at 256, 562 S.E.2d at 636 (emphasis added).

Similarly, *Goddard* did not hold that a developer's fiduciary duties are contingent upon whether the developer "exercises" control. Rather, the *Goddard* Court held the developers in that case did not use their superior veto power to increase assessments that the HOA wanted to keep low. The *Goddard* Court went onto to hold that, regardless of this restraint, developers breached their fiduciary duty to act in good faith and in the HOA's best interest by "unloading common areas on the HOA in substandard condition without proper funding". *Goddard*, 310 S.C. at 414-15, 426 S.E.2d at 832. Thus, neither *Gooddard* nor *Dunes West* held that Developers had to exercise their *de facto* control before their duty to act in good faith kicked in.

The same is true here –Developers drafted I'On's Covenants to give them *de facto* control and absolute power over the HOA that "extend until" all lots in I'On are sold, power that includes:

- The power to conduct all activities requires to complete [I'On] which "the [HOA] shall not take any position of opposition [to] in a public setting, nor utilize any of its material or financial resources to oppose [Developers]. . ."
- The power to control any action against Developers because "the [HOA] shall make no amendments to the [Covenants] that materially affect the [Developers'] interest, nor shall [the HOA] adopt other measures that materially affect the [Developers'] without [Developers'] concurrence."
- The power to issue invalid easements which the HOA "shall not take action seeking to alter provisions of, nor to prevent establishment of. . ."
- The power, and "full authority", to "appoint, remove and replace" Board members until 75% of all lots are sold, twenty years after the Covenants are recorded, or when, in Developers' discretion, the Developers relinquish control.

(App. pp. 4143-44)(emphasis added). Even more like *Goddard*, the Covenants here also "grant superior voting rights" to the Developers via way of a "Supreme Court like" veto power that remains in effect to this day:

> So long as [Developers'] Membership exists, the [Developers] shall have a right to disapprove any, policy[,] or program of [the HOA, the Board,] and any committee

> [that], **<u>in the sole judgment of [Developers] would tend to impair rights of [Developers]</u>** under [the Covenants]. . .or interfere with the development or construction or I'On, or diminish the level of services being provided by [the HOA].

(App. pp. 4143-44) (Covenants, Section 9.104(c) (emphasis added); (App. pp. 1086:9-1088:23) (Developer Tom Graham admitting Developers had a "Supreme Court-like" veto power over the HOA); (App. pp. 1791:21-1792:25) (Bedell testifying that the Developers retained the absolute power to veto any Board action which the Board is why decided not to file suit previously); *see also Goddard*, 310 S.C. at 410, 426 S.E.2d at 830 ("The PUD is governed by [Covenants] which grant superior voting rights to Developer until virtual completion of the PUD.").[18]

Thus, applying *Goddard* and *Dunes West*, the Circuit Court and COA correctly determined Developers "**<u>retained</u>** continuing control" over the HOA; Developers' purported restraint in exercising control did not negate the existence of a fiduciary relationship; and, as a result, Developers could not make decisions that benefitted themselves as the expense of the HOA. (App. pp. 100-01) (emphasis added);[19] *see also* (App. pp. 484; 1912) ("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, Developers have a fiduciary obligation to act in good faith and with the interests of the [HOA] in mind when a conflict of interest exists that would be detrimental to the developers own financial interests."). While these conclusions are correct, the COA's ultimate conclusion,

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[18]In fact, Developers' "superior veto power" provides Developer's more control than *Goddards*' "superior voting rights" because it affords Developers the power to eviscerate <u>any</u> HOA vote at their sole discretion.

[19] Furthermore, this conclusion, and the COA's discussion leading up to it, is not "dicta". A *de novo* standard applied to the COA's fiduciary analysis; and, the COA decided, <u>as a matter of law</u>, that developers who retain control over an HOA must act in good faith. (App. p. 98) ("As both challenged conclusions concern questions of law, this court reviews them *de novo*.").

that Developers did not breach their fiduciary duty by acting against this HOA's interest, is not because it ignores the ample evidence of this repeatedly occurring:

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

These facts support the COA's original findings that:

- "[O]n at least two particular occasions, [Developers] placed the HOA's members in a position of having to compete with non-members for access to the [Commons]";
- "There is evidence in the record from which the jury could have reasonably inferred Developers' bad faith"; and,
- There is evidence that "shows [Developers]' intent to profit from the [Commons] at the expense of HOA's members".

(App. pp. 27-29). The COA should not have struck these findings from its Substituted Opinion and should have upheld the Circuit Court's findings that Developers acted against the HOA's interest as it did in its Original Opinion.

3. There is Also Evidence of Developers' Actual Control and Influence

Even if "actual" control or influence was a requirement for breach of duty determinations, there is evidence of Developers' actual control as well as Developers' representations and omissions that caused the HOA to "trust" Developers to act in good faith. Developer, Tom Graham, admitted Developers <u>exercised</u> their power to appoint Board members:

> Q: [A]s the [D]evelopers. . .ya'll had person named Legrand [Elebash], who you would appointed to serve as [HOA President] for five years?
> A: Legrand. . .was a manager for the I'On Company. [Developer], Vince [Graham], had selected and appointed him. . .
> Q: Are you aware that Legrand was on the [HOA Board]?
> A: I understand that Legrand was the [HOA President], as I recall he was, while he was the manager of I'On Company.
> Q: And you just told the jury that he worked for I'On Company, correct?
> A: Yes.
> Q: But he was the [HOA President]?
> A: Yes.
> Q: Until [late] 2005, does that sound approximately right?
> A: That's what I recall.
>
> ***
>
> Q: And in fact [Developers] recently reappointed a [HOA Board] member unilaterally by [Developers'] decision, correct?
> A: Yes.
> Q: Without a vote of the homeowners?
> A: Yes.
> Q: And in or around January [2014], Developers put Chad Besenfelder back on the [HOA] Board, correct?
> A: Yes.
> Q: And the homeowners had no say in that, did they?
> A: No.

(App. pp. 1086:9-1088:23); *see also* (App. p. 26, n. 13) ("[Developers] admit in 2014, [they] appointed a board member.").[20] Board President, Deborah Bedell, also testified that Developers

[20] Comparing Tom Graham's admission that Developers appointed a Board member in 2014 to the Covenants' provision that provides Developers this power can be interpreted to mean that Developers did, and still, control the HOA. (App. pp. 4143-44) (stating Developers power to appoint Board members lasts until 75% of all lots are sold, twenty years after the Covenants are recorded, or when, in Developers' discretion, the Developers relinquish control).

exercised their power to reinstate their own agents as HOA Board members; and, Developers' influence over the HOA continues through today. (App. pp. 1794:10-1796:4) (Bedell testifying that, in 2014, Developers were still turning over common areas to the HOA and still refused to turn over I'On's Design Committee to the HOA due to Developers' belief that the HOA would go "all brown shirt" on residents).

The evidence presented at trial also shows there was a Developer representative on the board or at most Board meetings from 2005 through 2015. *See, e.g.,* (App. pp. 1086:9-1088:23) (Tom Graham conceding Developer-appointed members served on the Board through 2005 and, again, in 2012 through 2015) (App. pp. 3970-73; 3981) (LeGrand Elebash ("Elebash") and Chad Besenfelder ("Besenfelder") attending 2005 meetings); (App. p. 3984) (Besenfelder attending 2006 meeting); (App. pp. 3988; 3996; 4004; 4009; 4017; 4023; 4031) (Vince Graham, Tom Grand, Elebash, and/or Besenfelder attending 2007 meetings); (App. pp. 4051) (Tom Graham and Besenfelder attending 2008 meeting); (App. p. 4064-67) (Besenfelder attending 2009 meeting).

Additionally, the evidence shows Developers' "controlled" the HOA through their acts and omissions. For example:

- In 2005, Developers and the HOA formalized the process for handing over common areas to the HOA in a Handover Agreement. (App. pp. 2692-93). Developers never informed the Homeowners that the common areas referenced in this Agreement excluded these Commons.

- In 2007, Besenfelder informs the HOA that "he would like to turn over the community docks" to the HOA. (App. p. 4025). Besenfelder did not disclose the Developers did not intend to convey the Community Dock to the HOA or that there was any debate concerning the HOA's rights to the Dock. Rather, he assured the HOA that "turn over" was in process and needed repairs would be investigated, letting the HOA believe that everything was okay. Even the COA acknowledged that "**[t]hese [2007] assurances led the HOA's members to "repose[] a special confidence" in Developers,** binding Developers to act in good faith and with due regard to the interest of the HOA's members." (App. p. 29) (emphasis added) (citation omitted).

- By August 2008, a contract was in place to sell the Commons; however, Developers represented to the HOA and Homeowners that they had "not sold or initiated the sale of the Creek Club." (App. pp. 2893-2902; 3419-21). Developers' assurances continued through 2009 even though Developers were also continuing their efforts to sale the Commons. (App. pp. 2712-13; 3439) (Developers reiterating their intention to transfer the Commons to the HOA in March 2009); (App. pp. 2529-40) (Developers entering another purchase contract in June 2009).

- On July 27, 2009, the HOA's Board President called Developers to discuss a rumored sale (App. pp. 3402-03). Developer, Tom Graham, testified he received the call, but did not disclose the sale; instead, he told the Board President the Commons were undergoing a "management" change. (App. p. 3402).

- Two weeks later, Developers sold the Commons areas behind the HOA's back which, in turn, financially obligated the HOA to incur thousands in litigation expenses.

These few examples of Developers' "control", although not required, satisfy Developers' theory.[21]

4. Developers' Reliance on Three Banking Cases is Misplaced

Finally, Developers cite to three banking cases in support of their "Developers must actually control an HOA to breach the fiduciary duties they owe the HOA" theory; however, none of these cases involve <u>breach</u> of duty. Rather, they involve the initial question of <u>whether a fiduciary relationship exists</u>. *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (2003) (finding "no fiduciary relationship existed in this case"); *Burwell v. S.C. Nat. Bank*, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986) (finding "no fiduciary relationship exists between [Customer] and [Bank] of this transaction"); *Nat'l Loan & Exchange Bank v. N.Y. Life Ins. Co.*, 149 S.C. 378, 147 S.E. 322, 323 (1929) ("There was no peculiar or confidential relationship between [Customer] and [Bank]."). Because our Courts recognize that a fiduciary relationship exists in the Developer-HOA context, these cases are unavailing. *See,* Footnote 14, *supra.*[22]

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[21] Additional examples are discussed in more detail in the HOA's Petitions.

[22]The bank-customer relationship typically "creates a creditor-debtor relationship rather than a fiduciary one" because it's a "casual" relationship. This is why a bank only obtains "fiduciary"

III. THE COA CORRECTLY APPLIED THE TWO-ISSUE RULE IN AFFIRMING THE INVALIDITY OF THE 2000 RECREATIONAL EASEMENT

The COA did not err in applying the two-issue rule to affirm the Circuit Court's ruling that the Recreational Easement is invalid; and, even it did, it's a moot point considering Developers admit the Easement was not an arms-length transaction and the Grantor of the Easement did not hold title. Developers Easement-related arguments further fail on the merits because: (a) the Circuit Court's Easement Ruling is sufficiently supported by the record; (b) the after-acquired title doctrine is not recognized in South Carolina and would not apply to this circumstance anyway; and, (c) Developers' failed to preserve the "perpetual" issue for appellate consideration.

A. The COA Correctly Applied the Two-Issue Rule

The COA rightfully affirmed the Circuit Court's ruling that the Easement was invalid because Developers failed to appeal all grounds supporting this ruling. (App. p. 110) (affirming the Easement ruling because Developers "did not appeal all of the grounds specifically listed by the Circuit Court to support its declaration of invalidity."). Under the two-issue rule, "[w]hen a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground becomes the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010); *see also 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; *First Union Nat. Bank of S.C. v. Soden,* 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998), *cert. denied* (June 18, 1998) (an unchallenged ruling "precludes

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status when it accepts a customer's request to provide financial advice. In this instance, the bank has knowledge "superior" to that of the customer. This is entirely different from the Developer-HOA relationship which our Courts rightfully recognize is more than casual because of Developers' superiority over an HOA in general and the inherent trust an HOA instills as a result.

consideration on appeal."). Here, the Circuit Court found the Easement was "invalid for several reasons" (App. p. 509); yet, on appeal, Developers only properly challenged one of those reasons – that the Easement's grantor, I'On Club, did not own the property subject to the Easement. (App. pp. 246-48). Developers did not challenge the Circuit Court's rulings that the Easement was invalid because it: (1) was not an arm's-length transaction; or, (2) was later terminated. (Pet. p. 13) (Developers admittedly "offered no argument" as to whether the Easement was "an arms-length transaction"). As such, the COA properly applied the two-issue rule in affirming the Circuit Court.

B. Developers Admit the Easement Was Not an Arms-Length Transaction

In their Petition, Developers concede that the Easement was not an arms-length transaction because they admit the Easement was signed on behalf of Developers and the HOA by the same Developer representative. (Pet. p. 5) ("[T]he same individual served as manager of the I'On Club, manager of the I'On Company, and [HOA Board President] and executed the document on behalf of each entity."). This means any error the COA purportedly made in applying the two-issue rule to uphold the Circuit Court's declaration of the Easement's invalidity is harmless because Developers concede the very point ("no arms-length transaction") that made the two-issue rule applicable. (App. p. 110) (finding "[Developers] failed to challenge [the Circuit Court's] conclusion that the [Easement] was not an arms-length transaction.").

B. Developers Also Admit the Easement's Grantor Did Not Have Title

Developers also admit that I'On Club, the grantor of the Easement, did not own the property subject to the Easement at the time it was granted: "At the time the [Easement] was executed, the I'On Company still held title to [the property], and the I'On Club did not become owner of the same until August 15, 2000."). (App. p. 2382) (emphasis added); *see also* (App. pp.

3635-38) (signed February 9, 2000, six months before August 15, 2000 when the I'On Club took title to the property).

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 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.[23] Consequently, the Easement is invalid as a matter of South Carolina law and the Circuit Court did not err in recognizing this invalidity. (App. p. 510).

C. Developers Do Not Challenge Their Unclean Hands

Developers also do not challenge the Circuit Court's conclusion that they are precluded from relying on the after-acquired title doctrine due to their unclean hands:

> [Developers] cannot rely on equitable principles when the evidence, and the jury's verdict, demonstrate [Developers] acted inequitably. [Developers] were aware that [I'On Club] did not hold title. . .and thus, [Developers] are barred from using an equitable doctrine to 'ratify' a defective, ineffective easement.

(App. pp. 511-12). Because Developers failed to challenge this finding, it is now the law of the case. *See, e.g., ML–Lee,* 327 S.C. at 241, 489 S.E.2d at 472.

D. The After-Acquired Title Doctrine Does Not Apply in South Carolina and Does Not Apply to the Facts of this Case

Even assuming otherwise, the "after-acquired title doctrine" cannot operate to validate the invalid Easement for numerous reasons: (1) the doctrine has never be recognized as applying to

[23] 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). Also, in its Order, the Circuit 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. (App. pp. 506-14).

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.

No case law supports Developers' proposition that South Carolina courts apply the after-acquired title doctrine to transactions involving easements. 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). Developers admit this did not happen here because the Easement was executed to benefit the grantor, I'On Club. (App. pp. 506-14). Further, the doctrine does not apply to protect a party who has notice or knowledge that the other party does not have what they purport to convey. *Id.* Here, Developers' employee signed for all three of the entities involved in the Easement transaction. (App. pp. 3635-39). Thus, the Circuit Court found all parties to the transaction were on notice and knew that the I'On Club was granting an Easement over land it did not own. (App. p. 512). Accordingly, the Circuit Court's ruling that the Easement cannot be ratified by the after-acquired title doctrine is legally and factually supported. *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) (appellate courts do not have to ignore the findings of a trial judge who is better able to gauge the evidence and credibility).

E. The "Perpetual" Nature of the Easement is Unpreserved and, Even if Preserved, Developers Intended to Limit the Easement to a 30-Year Term

Developers' 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 Circuit Court. (App. pp. 506-14). Developers did not file a Rule 59(e) Motion following the Easement Order; and, in this Order, the Circuit Court never affirmatively addressed the perpetual

or non-perpetual nature of the easement. *Id.* As such, this issue is precluded from appellate consideration. *Staubes v. City of Folly Beach*, 339 S.C 406, 412, 529 S.E.2d 543, 546 (2000) (an issue must be raised, and ruled upon, by the Circuit Court to be preserved for appeal).

Even if this issue was properly before this Court, the record reflects Developers never intended the Easement to be perpetual. Tom Graham testified he was aware the Easement was limited to 30 years when the Commons were sold. (App. p. 1125:4-25). Vince Graham also acknowledged the Easement was "flawed" and admitted to representing the Easement only had 18 years left on it, he did not know whether it would be extended, and he had no "opinion one way or the other". (App. pp. 1680:2-1682:15); *see also 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 grantor's intention must be ascertained and effectuated, unless that intention contravenes the law).

While Developers attempt to subdivide a single document to benefit their own interests, this Court cannot ignore Developers' testimony or the Easement's "General" terms. *Millvale Plantation, LLC*, 401 S.C. at 174, 736 S.E.2d at 290 (A deed must be construed as a whole). Article Four, the article containing the language limiting the "Term" to 30 years, makes multiple references to the Easement, not just the cost sharing terms. (App. p. 3635) (In addition to limiting its term to 30 years, Article Four limits the liability of the Easement's parties and contains language that tries to make the Easement binding upon all successors). When considered as a whole, and in conjunction with Developers' testimony, it is clear Developers intended to limit the Easement – just as Developers intended to later limit the HOA's ownership of the Commons.

CONCLUSION

Based upon the foregoing, this Court should deny Developers' Petition because it does not meet certiorari standards and the COA correctly decided the two issues Developers raise.

JUSTIN O'TOOLE LUCEY, P.A.

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July 22, 2019
Mount Pleasant, SC

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.

PROOF OF SERVICE

I, Justin O'Toole Lucey, hereby certify that on July 22, 2019 I served a copy of the ***Petitioners-Respondents' Return To Respondents-Petitioners' Petition For Writ Of Certiorari*** on the following counsel, via United States Mail, postage pre-paid, and addressed as follows:

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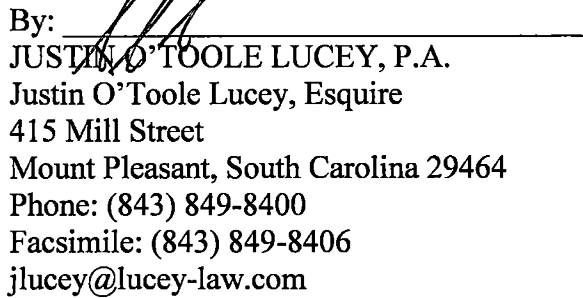

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Mt. Pleasant, South Carolina