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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Op. No. 5588 (S.C. Ct. App. refiled February 27, 2019)

Case No. 2010-CP-10-10490
Appellate Case No. 2015-001590

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

RETURN TO PETITIONERS-RESPONDENTS' PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Rule 242(f), SCACR, Respondents-Petitioners ("Defendants") submit this Return to Petitioners-Respondents' ("Plaintiffs") Petition for Writ of Certiorari.[1]

COUNTER-STATEMENT OF THE CASE

In Plaintiffs' attempt to make this appeal worthy of certiorari, they argue issues that are of no consequence and attempt to create factual issues that are not grounds for review and would require the Court to ignore the Record.[2] Defendants set forth a statement of the case in Defendants' Petition for Writ of Certiorari filed on June 21, 2019 and incorporate it here. (Def. Pet. at 1-9.)

The primary theme in Plaintiffs' petition is the mischaracterization of what was promised to The Assembly. Plaintiffs' claims are based on a 1998 Property Report ("the Property Report") in which The I'On Company represented that it would convey a "Community Dock" and "Creekside Park" to the homeowners' association once they were built. Plaintiffs use the term "Commons" more than 120 times in their petition to refer to the amenity property that Defendants allegedly promised them. Plaintiffs, however, do not define "Commons" as simply a Community Dock and Creekside Park. Rather, Plaintiffs' expansive definition adds "the Dock's associated parking and boat ramp located along the deep water of Hobcaw Creek on two civic lots known as CV5 and CV6."[3] (Pl. Pet. at 2.) Their use of this term is completely disingenuous.

As one example, Plaintiffs claim, "Developers repeatedly obligated themselves to convey the Commons, free of all encumbrances, between 1998 and 2009." (Pl. Pet. at 3.) This is false.

[1] "Defendants" are The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC, and I'On Realty, LLC. "Plaintiffs" are Brad Walbeck and Lea Ann Adkins, individually and derivatively on behalf of The I'On Assembly, and The I'On Assembly.

[2] Defendants cite to the Appendix and Record submitted with their petition on June 21, 2019.

[3] 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. at 3614-3615.) Plaintiffs claim they are entitled to this facility, too.

Plaintiffs' shameless effort to envelop over a million dollars in additional parcels and improvements into the terms "Creekside Park" and "Community Park" should be flatly rejected. Plaintiffs certainly cannot demonstrate a promise by Defendants to convey anything *more* than a "Creekside Park" or "Community Dock."

On January 13, 2014, Plaintiffs told the trial court that "under no theory of this present case would [The Assembly] have any claim . . . at all" to Lot CV-5. (R. at 415:24-416:16.) It was not until the trial of this case in 2014 that Plaintiffs ever claimed they were promised Lot CV-5 as part of the Property Report's promises. (R. at 861:15-862:13; 890:3-891:1; 894:11-895:5; 896:1-7.) Although it was not until trial that "Commons" expanded to include this additional property, Plaintiffs contend Defendants knew that the additional property had been promised to The Assembly all along.

Plaintiffs seek to push the Court's attention so far away from the Property Report that it is necessary to revisit the plain language of this document. This is the promise that Plaintiffs ask the Court to stretch to include the "Commons":

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. at 3022.)

A second theme of Plaintiffs' petition: Plaintiffs are incredulous that Defendants would have either retained ownership of *any* amenity property or conveyed any of this property to a third party. To do so, according to Plaintiffs, was deceptive or fraudulent and prohibited by what Plaintiffs would have as an ever-present, fiduciary manacle. This theme ignores additional information contained in the Property Report:

- The statement that other recreational facilities would be owned and operated by someone other than The Assembly:

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 I'On Assembly, Inc., including the developer, and their respective guests.

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 I'On Assembly, Inc. The operation and use of, and access to, such facilities is not guaranteed and is subject to such 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 additional 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.

- The following reiteration, in all caps:

> VARIOUS RECREATIONAL FACILITIES IN THE SUBDIVISION MAY BE OWNED AND OPERATED BY PERSONS OTHER THAN THE I'ON ASSEMBLY, INC. 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 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. at 3023-24.)

The Property Report made perfectly clear that there could be amenity property not owned by The Assembly. There is no way around it—the Property Report is fundamental, if not dispositive, to any factual issues about not only what was promised, but also what was *not* promised.

It is undisputed that Defendants conveyed two community docks and a park to The Assembly in 2001. (R. at 811:9-812:12; 1122:1-12; 1130:10-1131:7; 3569; 3571-78.) To support Plaintiffs' theory of the case, this Court would have to conclude that: 1) Defendants promised to convey the "Commons," above and beyond language of the Property Report; and 2) Plaintiffs never knew that the "Commons" had *not* been conveyed to them. These conclusions are not supported by the Record and Plaintiffs' petition should be denied.

ARGUMENT

I. THE COURT OF APPEALS' DECISION DOES NOT WARRANT FURTHER REVIEW PURSUANT TO RULE 242, SCACR.

The South Carolina Appellate Court Rules provide that "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. The grant of certiorari is generally limited to cases that present: 1) a novel question of law; 2) a dissent in the decision of the court of appeals; 3) a decision by the court of appeals that is in conflict with a prior decision of this Court; 4) substantial constitutional issues; or 5) a federal question, and the decision of the court of appeals conflicts with a decision of the Supreme Court of the United States. *Id.* This case does not fit within these categories and no "special and important" reason exists to merit further review.

The categories enumerated in Rule 242(b) are inapplicable here and require little discussion. The court of appeals' decision does not contain a dissenting opinion and does not decide a federal question. Plaintiffs attempt to make significant the fact that the court of appeals withdrew and substituted its original decision with the opinion on appeal. The withdrawn opinion is a nullity and without legal effect—and is of no consequence to the determination of the appropriateness of this Court's review. The court of appeals applied existing law to correct the legal errors of the trial court.

While Rule 242 does not supply the exclusive bases upon which this Court may consider certiorari, no compelling reason exists for the Court to grant Plaintiffs' petition. The bottom-line decision of the court of appeals is correct, and Plaintiffs' arguments for certiorari review both mischaracterize the facts and stretch the law to create issues that simply are not present here.

II. PLAINTIFFS FAILED TO FILE AND MAINTAIN A PROPER DERIVATIVE ACTION.

The court of appeals determined Plaintiffs' "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." (App. 11.) From the outset, Plaintiffs sought to bring litigation that the individual plaintiffs wanted and that they controlled. They consistently eschewed The Assembly's authority to determine whether and how to address these claims. Over a period of four years, Plaintiffs filed five complaints yet continuously failed to satisfy the demand requirement and thus the associated, specific pleading requirements of Rule 23, SCRCP. The trial court's ruling that Plaintiffs properly filed and maintained a derivative action was legal error and necessarily reversed.

Plaintiffs ignore the important gatekeeping policy underlying Rule 23(b)(1) of the South Carolina Rules of Civil Procedure. A vocal minority of shareholders should not dictate a corporation's actions except in carefully-prescribed circumstances. The strict demand requirements for derivative suits ensure that boards of directors retain control over the acts taken on their corporations' behalves and the law imposes duties on the directors to act appropriately.

An individual's effort to circumvent the corporate structure, therefore, must meet the law's exacting requirements. As the court in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000) explained,

> Rule 23 is a departure from the more liberal pleading requirements of Rule 8, SCRCP, in that it requires particularized allegations. Under Rule 23, the shareholder must either make a demand or plead with particularity the exceptional circumstances that demonstrate why a demand would be futile, i.e., why the Board of Directors should not be allowed to decide whether to institute litigation.

The derivative plaintiff 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.

Plaintiffs contend that certiorari review is warranted because the case was "hotly contested" and the jury ruled in their favor. (Pl. Pet. at 8.) In addition, Plaintiffs stress that their claims are "legitimate"—whether properly pled or not. (Pl. Pet. at 8.) This is not how South Carolina's procedural rules work. Plaintiffs' complaints demonstrate that Plaintiffs failed to plead, with particularity, facts indicating an adequate demand or that a demand on The Assembly Board was futile. (App. 10-12, 17.) The court of appeals properly ruled that Plaintiffs' pleadings fail to meet the explicit requirements of Rule 23, SCRCP. (App. 10.)

A. Defendants have consistently challenged the improperly-filed and maintained derivative action.

Plaintiffs are confused as to whether the court of appeals was reversing the trial court's denial of Defendants' motion for JNOV or motion to dismiss and contend that the court of appeals applied the wrong standard of review to this issue.[4] This contention is incorrect: the court of appeals applied the Rule 23 standard in evaluating the sufficiency of Plaintiffs' pleadings as it engaged in a *de novo* review of the trial court's legal error. (App. 10-12.)

This issue was not addressed *sua sponte*. Defendants have repeatedly contended that Plaintiffs failed to file derivative claims that comply with the requirements of Rule 23. (R. at 1028-39; 1763; 1831-36; 1863-68; 1924-29.) This issue has been raised to and ruled on by the

[4] Plaintiffs misleadingly cite *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 520 n.6, 623 S.E.2d 387, 393 n.6 (2005) in support of their proposition. *Edge* is not helpful to Plaintiffs' argument because the court noted that the claim was not subject to appeal because it was abandoned at oral arguments. *Id.*

trial court at every stage of this litigation.[5] Whether captioned as a motion to dismiss, a motion for directed verdict, or a motion for JNOV, Defendants have consistently challenged the sufficiency of Plaintiffs' complaints. (R. at 1028-39; 1763; 1831-36; 1863-68; 1924-29.) Defendants' argument has not changed: Plaintiffs failed to "allege with particularity" in a verified complaint a demand made on The Assembly Board or the reasons Plaintiffs did not make such a demand. Rule 23's requirements were never satisfied and the court of appeals properly reversed. Further review is not needed.

B. Plaintiffs consistently failed to allege with particularity the efforts, if any, Plaintiffs made to obtain the action desired from The Assembly Board or demonstrate futility of demand.

1. *The complaints' allegations fail to satisfy Rule 23, SCRCP.*

Plaintiffs contend two demands were made on The Assembly Board: the "Templeton Demand" and the "Adkins Demand."[6] (Pl. Pet. at 11-17.) Neither is sufficient to satisfy the requirements of Rule 23, SCRCP.

Plaintiffs point to the "Templeton Demand" to demonstrate that certiorari review is appropriate. (Pl. Pet. at 12-13.) Catherine Templeton, however, is not a named plaintiff. Rule 23 requires Plaintiffs to plead demands "made *by the Plaintiff*." Rule 23, SCRCP. (Emphasis added.) Moreover, the trial court correctly held that Templeton's February 26, 2009 letter is not a derivative demand, and Plaintiffs did not challenge this ruling. (R. at 1031:4-24; 2229-30.) Templeton settled her zoning claims against Defendants, which were separate from this litigation.

[5] As Plaintiffs point out: "The denial of a Rule 12(b)(6) motion does not establish the law of the case nor does it preclude a party from raising the issue at a later point or points in the case." *Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995). (Pl. Pet. at 9 n.19.)

[6] At trial, Walbeck confirmed what the pleadings indicate—he never claimed to have made a demand on The Assembly Board for ownership of any property. (R. pp. 985:19-986:3.) He is concededly not a proper derivative plaintiff. Rule 23(b)(1), SCRCP.

(R. at 725:10-726:15.) Finally, the Templeton letter did not demand that The Assembly Board take the actions Plaintiffs seek here.

Plaintiffs' main effort to satisfy Rule 23(b), SCRCP, is the "Adkins Demand." (Pl. Pet. at 12-14.) In the Second, Third, and Fourth Amended Complaints, Plaintiffs allege that Adkins twice-asked The Assembly's attorney "to investigate the allegations that the I'On Company was contractually obligated to covey Creekside Park and Community Dock to The Assembly."[7] (R. at 156, ¶ 47; 173, ¶ 47; 318, ¶ 46.) This is as close as the pleadings get to demanding legal action be taken. But a request to investigate is a far cry from a demand to initiate litigation. Plaintiffs' complaints do not allege with particularity any demands made on The Assembly Board prior to filing suit, what corrective actions they sought from the Board, or what pre-suit efforts Plaintiffs made to meet their demands.[8] The purported "Adkins demand" simply "fall[s] short[,]" as the court of appeals concluded. (App. 11.)

Plaintiffs urge the Court to ignore *Whittle* and expand the analysis of *Patterson v. Witter*, 425 S.C. 213, 821 S.E.2d 677 (2018) to encompass non-particularized, general allegations purportedly bolstered by equally-deficient documents—not attached to the complaint—as satisfactory of Rule 23's heightened pleading standard. (Pl. Pet. at 10-11.) Neither Rule 23, SCRCP, nor these cases countenance such a requirement.

The complaint in *Whittle* was plagued by deficiencies similar to those found in Plaintiffs' pleadings: instead of specific demands, the plaintiffs merely requested "certain information" and "certain actions"; the plaintiffs made mere "proposals" and requests to resolve the alleged issues;

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[7] As Adkins confirmed at trial, her alleged demands do not include ownership of the "Commons," as Plaintiffs now contend. (R. at 1307: 11-24.)

[8] Plaintiffs also discuss "demands" made on the I'On Company to convey the "Commons" to The Assembly. This has no relevance to the determination of whether an adequate demand was made on The Assembly Board to initiate litigation. (Pl. Pet. at 14-17.)

the plaintiffs attempted to rely upon alleged demands made by non-parties; and the complaint simply alleged that the defendant "declined to respond" to its alleged demands instead of offering detailed futility allegations. 343 S.C. at 189, 539 S.E.2d at 409. The court found this lack of particularized allegations fatal and determined that, "[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.*, 539 S.E.2d at 409-10.

In *Patterson*, this Court noted that the facts of that case are "distinguishable" from *Whittle* because the complaint's allegations were "appreciably more detailed than those in *Whittle*." 425 S.C. at 234, 821 S.E.2d at 688-89. In *Patterson*, the plaintiff submitted a detailed letter to the defendant's counsel itemizing specific demands and relief sought, which the court considered in its Rule 23 analysis. *Id.* at 222, 821 S.E.2d at 682. Unlike the documents in *Whittle*, the four corners of the written demand contained allegations that were sufficiently particularized to satisfy Rule 23. *Id.* at 234, 821 S.E.2d at 689. Finally, *Patterson* did not state that conclusory allegations satisfy Rule 23 and did not change the "minimum" pleading threshold a plaintiff must meet. *Id.*

Seeking to cure their defective pleadings now, Plaintiffs urge this Court to consider every document in the Record that is even remotely related to their vague pleadings.[9] (Pl. Pet. at 11, 13.) *Patterson* is unavailing to Plaintiffs' argument. There, the court found Rule 23 was satisfied because the plain language of the demand letter, which was incorporated into the complaint on its own and within the four corners of the document, contained particularized allegations and

[9] A review of these documents highlights the weakness of Plaintiffs' argument. Plaintiffs cannot even rely on the plain language of the documents they claim to have referenced in their complaints. Rather, Plaintiffs only claim particular allegations "can be inferred" from such documents—some "indicate[]" adequate demand and that it is "reasonable to infer" futility from others. (Pl. Pet. at 13-14, 16, 17.) Even if this Court were to engage in a full review of the Record, it is clear that they did not make an adequate demand and did not establish futility.

expressly cited Rule 23. *Patterson*, 425 S.C. at 234, 821 S.E.2d at 688. The *Patterson* Court was not required to make inferences as to adequacy—the extra step necessitated by Plaintiffs' argument here.

2. *Plaintiffs failed to properly plead demand futility.*

Plaintiffs also contend that they properly pled that the demand on The Assembly Board was futile and therefore excused. (Pl. Pet. at 18-21.) In their complaints, Plaintiffs alleged 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. at 174, ¶55; 319, ¶52.) To properly allege demand futility, a plaintiff must demonstrate "why the Board of Directors should not be allowed to decide whether to institute litigation." *Whittle*, 343 S.C. at 188, 539 S.E.2d at 409. The court of appeals determined that "there are no allegations that a demand on the Board to initiate litigation to recover these amenities would have been futile" and held that Plaintiffs failed to plead demand futility sufficient to satisfy Rule 23. (App. 11.)

Plaintiffs' reliance on *Grant v. Gosnell*, 266 S.C. 372, 223 S.E.2d 413 (1976) and *Stahn v. Catawba Mills*, 53 S.C. 519, 31 S.E. 498 (1898) is misplaced. First, neither case involved an application of Rule 23 to evaluate the allegations of derivative plaintiffs; both cases were decided prior to the adoption of the South Carolina Rules of Civil Procedure in 1985. *See* Rule 86, SCRCP (expressly providing that the new rules of civil procedure took effect on July 1, 1985). Further, these cases focus on the question of demand futility when "the directors or managing board are *themselves* the wrongdoers in some alleged breach of trust or fraudulent misappropriation of the corporate property, and have control of a majority of the stock, so as to control corporate action." *Id.* at 374, 223 S.E.2d at 414 (quoting *Stahn*, 53 S.C. 519, 31 S.E. 498) (emphasis added).

Those are not the facts before the Court here: Defendants were not on The Assembly Board. In keeping with these cases, the court of appeals properly determined that "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 [Defendants] had veto power over the Board such that they would prevent the Board from initiating litigation against them." (App. 12.)

Plaintiffs next argue that *Grant* allows the Court to disregard Rule 23 and look beyond the pleadings to include a review of all evidence of record to determine futility. (Pl. Pet. at 20.) Even a cursory reading demonstrates that this is simply not what *Grant* holds. In *Grant*, the defendants challenged the trial court's jurisdiction under the pleading requirements as they existed in 1962. *Id.* at 375, 223 S.E.2d at 414. The "other evidence" discussed in the opinion includes affidavits and exhibits filed by the *defendants* to support their motion. *Id.*

Plaintiffs also claim *Grant* "adopted a 'lenient' approach in evaluating demand futility based upon the facts of a given case." (Pl. Pet. at 18.) This is an overstatement, for *Grant* actually limits any appropriate leniency to reviewing the allegations in a complaint: "In evaluating the 'excuse' allegations in a derivative suit, '[c]ourts have generally been lenient in excusing demand.'" *Id.* at 376, 223 S.E.2d at 415 (quoting *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1228 (10th Cir. 1970) (limiting "leniency" to evaluations of the allegations set out in a complaint)). Further, the *Grant* complaint contained allegations as to demand futility that were much more specific than those alleged here:

> Grant's complaint alleged that the failure to make demand on the directors and stockholders of FSNB to bring this action directly was excusable because FSNB's board of directors was controlled by, and a majority of its shares were held by, the alleged wrongdoers.

Id. at 374, 223 S.E.2d at 414.

Plaintiffs next argue that the opinion "warrants review" because it is inconsistent with *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). In *Magnolia*, the court of appeals equitably tolled the statute of limitations for a property owners' association because the association's board of directors was composed entirely of officers of the developer until just eight months before suit was commenced. (Pl. Pet. at 20.) Plaintiffs argue that the court's decision to toll the statute of limitations in *Magnolia* suggests that futility is automatically established when an HOA is controlled by its developers. (*Id.*)

The facts of the present case are easily distinguishable. First, Defendants did not control The Assembly until just before suit was filed. Second, I'On homeowners gained control over the Board in 2003 and no suit was filed for seven years. (R. at 791:20-21; 3429-31.) Further, unlike *Magnolia*, this action was *not* ultimately brought by The Assembly. Here, long after the I'On homeowners controlled the HOA, The Assembly did not bring claims against Defendants. Plaintiffs' attempt to rely on *Magnolia* to excuse Rule 23's demand requirement fails.

C. Defendants' Answer is immaterial to the Court's Rule 23 analysis.

Plaintiffs contend that the court of appeals ignored a "binding admission" by Defendants that Plaintiffs made a demand. (Pl. Pet. at 18.) Rule 23 requires an analysis of the sufficiency of allegations contained in a *complaint*—statements in an answer are not considered. Rule 23(b)(1), SCRCP. As discussed above, Defendants have contested—at every turn—the adequacy of Plaintiffs' alleged demands and their compliance with Rule 23's requirements. (R. at 1028-39; 1763; 1831-36; 1863-68; 1924-29.) This argument is without merit and provides no basis for certiorari review.

D. Whether The Assembly had "direct claims" does not cure Plaintiffs' defective Rule 23 pleadings.

Plaintiffs also attempt to sidestep the consequences of their failure to satisfy Rule 23's pleading requirements by claiming those requirements are moot in light of the trial court's realignment of The Assembly as a plaintiff. (Pl. Pet. at 21-22.)

Plaintiffs never dismissed or otherwise contended that their claims ceased to be derivative after the trial court's procedural step of realignment. To the contrary, Plaintiffs continued to argue throughout trial and in post-trial motions that they filed and pursued proper derivative claims. Plaintiffs argued in closing that claims were brought derivatively. (R. at 1583.) In opposition to Defendants' JNOV motion, Plaintiffs argued "[g]iven Plaintiffs' satisfaction of Rule 23(b)'s requirements, Plaintiffs' derivative claims are supported by South Carolina law, derivative claims which the jury found were supported by the evidence and derivative claims which resulted in an award of $1,750,000 to the Assembly." (R. at 1988-89.) In declining to grant JNOV, the trial court found Plaintiffs satisfied Rule 23(b)'s requirements and, as a result, "decline[d] to set aside the jury's award of $1,750,000 to the Assembly." (R. at 41.)

Plaintiffs ask the Court to ignore the way they have presented their claims as derivative until now. Plaintiffs also seek to hide the facts that prompted The Assembly to settle and support Plaintiffs' position. Plaintiffs had secured a settlement with a different defendant, raising the spectre for The Assembly that it would be responsible for the substantial legal fees of derivative Plaintiffs' counsel, which were claimed to have been more than $1,000,000 in post-trial motions. *See* S.C. Code Ann. § 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."); *see also Cullen v. McNeal*, 390 S.C. 470, 491, 702 S.E.2d 378, 389 (2010)

(citing official comment to section 33-7-400 as the source of a successful derivative plaintiff's right to recover fees from the entity).

Rule 23 is designed to afford boards of directors the opportunity to weigh competing interests. Here, the trial court's repeated failures to enforce the derivative demand requirements of Rule 23 resulted in coercion of The Assembly Board on the eve of the first trial, when a settlement was reached among the other parties. (R. at 2968-71.) That settlement dictated that The Assembly Board support Plaintiffs and limited what Plaintiffs' counsel could seek from The Assembly for fees. (R. at 2968-71.) The trial court's realignment of The Assembly as a plaintiff was not done as the result of some determination that The Assembly desired to pursue Plaintiffs' derivative claims; it was a purely procedural action that did not affect the composition or adequacy of the pleadings. Plaintiffs cannot point to this realignment now as a cure for their defective derivative pleadings.

III. A DEVELOPER DOES NOT HAVE A FIDUCIARY DUTY TO CONVEY PROPERTY TO A HOMEOWNERS' ASSOCIATION.

The trial court inappropriately expanded the scope of the fiduciary duty owed by a developer to a homeowners' association and 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 substandard condition* is a distinction without a difference." (R. at 49.) This was the basis for the trial court's denial of Defendants' Motion for Judgment Notwithstanding the Verdict. The court of appeals reversed the trial court's ruling as to Plaintiffs' claim for breach of fiduciary duty because the trial court committed legal error "in concluding [Defendants] had a fiduciary duty to convey title to the Creekside Park and Community

Dock on lot CV-6 to the HOA." (App. 12.) This decision was correct and in keeping with South Carolina law.

A. *Goddard* and *Concerned Dunes West* make clear the circumstances in which a developer is a fiduciary to a homeowners' association.

In reversing the trial court, the court of appeals neither departed from the scope of a developer's fiduciary duty previously recognized nor "roll[ed] back legal protections." (Pl. Pet. at 22.) Beyond the circumstances recognized in *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993) or *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002), South Carolina courts have not held that a developer must act, not on its own behalf, but on behalf of the HOA. The court of appeals' decision is in keeping with this precedent.

The parties have extensively briefed both *Goddard* and *Concerned Dunes West* throughout this appeal and Plaintiffs raise no new points that require added elaboration.[10] (*See* App. 160-165; 281-285; Def. Pet. at 9-12.) Defendants satisfied all fiduciary duties that developers owe to a homeowners' association. Defendants satisfied their fiduciary duty as a promoter of The Assembly in bringing about a self-governing HOA that had available reserves totaling $1.3 million by 2014. (R. at 3616-74; 1308: 3-8; 1303: 9-25; 1304:5-9; 346:7-1347:5; 1426:23-1427:3.) *See Goddard*, 310 S.C. at 415, 426 S.E.2d at 832 (holding a developer "should be expected to use good judgment and act in utmost good faith to complete the formation of their organizations"). Further,

[10] Plaintiffs also cite cases from other jurisdictions that concern developers in control of an HOA or circumstances that arose prior to turnover of control to homeowners. (Pl. Pet. at 23.) Those cases remain inapplicable here. *See Maercker Point Villas Condo. Ass'n v. Szymski*, 275 Ill. App. 3d 481, 485 (1995) ("By leaving plaintiff underfunded, [the developer] violated his fiduciary duty to plaintiff."); *see also Orange Grove Terrace Owners Ass'n v. Bryant Properties, Inc.*, 176 Cal. App. 3d 1217, 1223 (Ct. App. 1986) (holding that plaintiff had a cause of action against developer for negligent acts prior to the formation of the homeowners' association).

Plaintiffs have never claimed that Defendants 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. *See Concerned Dunes West*, 349 S.C. at 257, 562 S.E.2d at 637 (holding failure to turn over common areas in good repair "subjects the developer to liability for bringing the common areas up to standard").

B. The court of appeals' decision does not conflict with *Island Car Wash*.

Goddard and *Concerned Dunes West* acknowledge that there are circumstances when it is appropriate to recognize that the relationship between a developer and a homeowners' association is fiduciary in nature. In those circumstances, the duty a developer owes is that described in *Island Car Wash v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (1987). The relationship between a developer and an HOA, however, is not always fiduciary in nature—precisely what the court of appeals appreciated in reversing the trial court.

Plaintiffs discuss the notion of "good faith" as part of the accepted definition of fiduciary duty. (Pl. Pet. at 24-25.) That discussion is immaterial; this case does not present a challenge to the *Island Car Wash* standard. *See id.* Rather, the issue in this case is *when* the fiduciary duty is owed, not what the fiduciary duty requires when it is owed.[11]

Plaintiffs also note that the law protects "citizens with unequal bargaining power." (Pl. Pet. at 23-24.) Again, this discussion does not advance their cause. In fact, their reliance on numerous cases demonstrating the many protections the law provides to those with unequal bargaining power and without the burdens of a fiduciary relationship undermines Plaintiffs' wish to create an expansive fiduciary duty for the same end. *See, e.g.*, *Kennedy v. Columbia Lumber & Mfg. Co.*,

[11] The court of appeals also included a discussion, not relevant to its reversal, of Defendants' continuing control of The Assembly. (App. 15-17.) This discussion is the subject of Defendants' petition for certiorari filed June 21, 2019. (Def. Pet. at 9-12.)

299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989) (discussing negligence claims); *Wright v. Craft*, 372 S.C. 1, 26-29, 640 S.E.2d 486, 500-01 (Ct. App. 2006) (discussing UTPA claims); *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 501-02, 473 S.E.2d 52, 53-54 (1996) (discussing bad faith handling of third-party claims by an insurer). Plaintiffs' discussion highlights the plethora of tort causes of action available to Plaintiffs—many of which were pled and prosecuted here along with contract claims. As the Plaintiffs' discussion and pleadings in this case illustrate, the Court's recognition of a fiduciary relationship of indefinite duration is not required to provide Plaintiffs a vehicle to pursue their claims.

C. The court of appeals correctly reviewed the issue as an error of law.

Plaintiffs are misguided in their effort to cite evidence presented to the jury which they contend demonstrates Defendants' bad faith. (Pl. Pet. at 25.) The issue on appeal, and as decided by the court of appeals, was a matter of law: whether the trial court erred in recognizing a fiduciary duty to convey property. The claim itself should never have been presented to the jury because the fiduciary duty as announced by the trial court does not exist under the law: neither the evidence the jury heard nor the conclusion the jury reached is relevant to the Court's analysis. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003) ("Whether there is a fiduciary relationship between two people is an equitable issue.").

Further, Plaintiffs inaccurately recount this evidence in their petition in support of this argument. The evidence in the Record is as follows:

- Defendants reached an agreement with Olde Park to share the costs of constructing some of the recreational facilities in exchange for Olde Park's residents' right to use the facilities. This agreement was reached in 1999, more than a decade before they filed suit. (R. at 2899-2900.) Further, the Property Report notified lot purchasers that recreational facilities could be owned and operated by private entities. (R. at 3023-24.)

- Defendants never promised to convey the "Commons" to The Assembly. Defendants updated the Property Report as the development was underway and honored their promise to convey a "Creekside Park" and a "Community Dock." (R. at 3035-73; 3571.)
- The Assembly considered purchasing the Creek Club and the amenities on Lot CV-5 and Lot CV-6 in 2005 and 2007. (R. at 3451-53; 3464-67; 3482-3502; 3511-16; 3565-68; 3490-97.)
- On March 25, 2009, Chad Besenfelder made representations to Assembly members only as to the conveyance of an additional dock. (R. at 2236-37.)

D. Plaintiffs' attempt to create a "novel question" to warrant further review is meritless.

Plaintiffs contend that "whether developers who promise to convey Commons have a fiduciary duty to do so" is a novel question. (Pl. Pet. at 26.) The I'On Company's promise to convey a "Creekside Park" and a "Community Dock" in the Property Report created legal duties, but not a fiduciary duty. Plaintiffs' argument exemplifies the importance of the limited developer fiduciary duty recognized in *Goddard* and *Concerned Dunes West.* The relationship between a developer and an HOA is not—and should not be—fiduciary in nature at all times and in all respects.

The court of appeals did not misconstrue the Property Report. (Pl. Pet. at 27.) The notification sections that the court of appeals highlighted are significant because they provided notice that: 1) there would be other recreational amenities in I'On besides those identified in the chart; and 2) those other amenities may be conveyed to, owned by, and operated by entities other than The Assembly. (R. at 3023-24.) The Property Report made abundantly clear that The Assembly would not own each and every recreational facility constructed.

To the extent it would be applicable, Plaintiffs' reliance on the *Wilson* case is misplaced. (Pl. Pet. at 28-29.) *See also Wilson v. Wilson*, 117 S.C. 454, 112 S.E. 330, 331 (1920)

(invalidating transfer of property by deed from mentally-incapacitated father to son). In the instant matter, the court of appeals held that Defendants did not have a fiduciary obligation to convey amenity property to The Assembly as a matter of law. A fiduciary relationship between the developer and the HOA did not exist in that context, rendering a burden-shifting analysis discussed in *Wilson* unnecessary.

IV. PLAINTIFFS HAD NOTICE OF POTENTIAL CLAIMS AGAINST DEFENDANTS AND FAILED TO PURSUE THOSE CLAIMS WITHIN THE STATUTE OF LIMITATIONS.

As to the statute of limitations, the court of appeals determined: "Even in the light most favorable to [Plaintiffs], we agree with [Defendants] that the negligent misrepresentation and ILSA claims accrued well before December 22, 2007." (App. 19.) "Because Walbeck failed to file the Complaint until December 22, 2010, [Plaintiffs'] negligent misrepresentation [and ILSA] claims are barred by the statute of limitations." (App. 22.)

The undisputed evidence supports only one inference: Plaintiffs knew or should have known of claims regarding ownership of the "Commons" many, many years before they filed suit. Plaintiffs, however, continue to ask the 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). This issue does not require further review.

A. Plaintiffs ignore the significant evidence that provided notice of potential claims against Defendants.

Plaintiffs knew and repeatedly received notice that The Assembly did not own the "Commons" and that Defendants did not intend to convey this property to The Assembly. The Record is replete with evidence that supports the court of appeals' reversal:

2000:

- On February 15, 2000, the Recreational Easement was recorded and indexed to I'On's Covenants rendering it a matter of public record that The Assembly did not own Lot CV-6 or its amenities. (R. at 3131-45.)

2001:

- The I'On Company conveyed two community docks and the Marshwalk park to The Assembly upon completion of construction of amenities in Phase II. (R. at 3571.)

- The Creek Club opened for business on April 10, 2001. Plaintiffs knew that this facility was operated as a private, event rental space that was neither owned nor operated by The Assembly. (R. at 3190; 615:8-25; 1132:12-14.)

2003:

- By December of 2003, a majority of The Assembly's Board of Directors were I'On homeowners with no association with Defendants. Three homeowners on the Board were recipients of the Property Report. (R. at 791:20-21; 3429-31.)

- From 2003 forward, The Assembly's Finance Committee, which had primary responsibility for reviewing and preparing The Assembly's annual budget, contained no developer representatives. (R. at 1185:6-17; 3429-31.)

2004:

- Beginning in 2004, The Assembly annually budgeted and paid fees to rent the Creek Club and to use the Creek Club docks. (R. at 3175.)

- 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. at 3432-3535.)

- In May of 2004, The Assembly, led by a recipient of the Property Report, engaged legal counsel to study its rights under the 2000 Recreational Easement. (R. at 3436-40.) This document plainly states that the I'On Club and not The Assembly owned the disputed property.

- 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. at 3444-47.)

- The Assembly mailed the budget to every homeowner each year and approved it at annual meetings. (R. at 3325-41; 3343-52; 3355-73.)

- Walbeck attended The Assembly's annual meeting where it approved the budget. (R. at 980:18-21.)

<u>2005</u>:

- 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. at 3456-61; 3475-77.)

- The Assembly Board Minutes dated July 27, 2005 state: "the Creek Club is the property of the I'On Club." (R. at 3464-67.)

- The Assembly discussed purchasing the Creek Club. (R. at 3451-53; 3464-67.)

- In 2005, The Assembly annually budgeted and paid fees to rent the Creek Club and to use the Creek Club docks. (R. at 3177.)

- Walbeck and Adkins received the budgets and attended The Assembly's annual meeting where it approved the budget. (R. at 979:14-980:20; 3342.)

<u>2006</u>:

- In 2006, The Assembly annually budgeted and paid fees to rent the Creek Club and to use the Creek Club docks. (R. at 3179.)

- Walbeck and Adkins received the budgets and attended The Assembly's annual meeting where it approved the budget. (R. at 979:14-980:20; 3353-54.)

<u>2007</u>:

- 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 parking lot down the street. (R. at 3490-97.)

- The Assembly decided not to purchase the Creek Club at that time because of potential liability. (R. at 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. at 3567; 3612-13.)

- In the fall of 2007, The Assembly solicited and received feedback from more than one hundred I'On homeowners as to whether it should purchase the property. (R. at 3451-53; 3464-67; 3482-3502; 3511-16; 3565-68.)

- Walbeck attended The Assembly's annual meeting where it approved the budget. (R. at 980:18-21.)

- On September 19, 2007, Adkins admitted that The Assembly was not promised the Creek Club:

> *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. . . . 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. at 3606.) (Emphases added.)

Quite clearly, Plaintiffs did not need to "f[ind] a needle in a haystack" to appreciate there may have been a dispute over what they contend constituted the "Creekside Park" and "Community Dock." (Pl. Pet. at 32.) The only reasonable inference that can be drawn from the Record is that Plaintiffs knew or had notice that The Assembly did not own the "Commons" and failed to act to protect their alleged rights. *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). Significantly,

Plaintiffs do not dispute any of this evidence; they simply try to ignore it. The court of appeals correctly decided this issue as a matter of law.

B. The doctrine of equitable estoppel does not apply to the facts of this case.

The court of appeals concluded that the doctrine of equitable estoppel did not excuse Plaintiffs' failure to exercise due diligence to investigate potential claims within the limitations period. (App. 21-22.) This decision was correct.

As the party claiming estoppel, Plaintiffs "must prove that [they] (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). Plaintiffs did not lack the means to obtain the truth regarding the ownership of the "Commons" and Defendants never concealed this information. To the contrary, Plaintiffs were explicitly told The Assembly did not own it, they paid to use it, and they 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).").

Plaintiffs point to representations made by an employee of Defendants, Chad Besenfelder, to The Assembly. The Assembly Board Minutes dated September 26, 2007 state: "Chad Besenfelder advised he would like to turn over the community docks." (R. at 3517-24.) On March 25, 2009, Besenfelder emailed The Assembly and stated, "The 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. at 2236-37.) These representations do not change the analysis: they pertained only to the conveyance of an additional dock and do not demonstrate that Plaintiffs were led to believe Defendants intended to convey the "Commons" to The Assembly.

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, these representations were made more than three years after Plaintiffs knew or reasonably should have known they had a potential claim regarding the ownership of the "Commons" and could not have induced Plaintiffs to delay taking legal action. The statute of limitations expired as to all claims prior to any of Besenfelder's representations. Plaintiffs' claims are time-barred as a matter of law and the Court of appeals correctly decided this issue.

C. The doctrine of equitable tolling does not apply to the "HOA's direct claims."

In their petition, Plaintiffs state: "the HOA's claims are not barred by the SOL because the HOA is a separate, legal entity created by the Developer that remained under the control of the Developer until 2014." (Pl. Pet. at 37.) Plaintiffs then suggest three "elements" for determining when equitable tolling of the statute of limitations is appropriate. None are present here.

1. *Defendants did not exercise control over The Assembly after the HOA was turned over to the I'On homeowners.*

Plaintiffs concede and the trial court found that control of The Assembly was entirely turned over to the homeowners by December of 2005. (App. 199; R. at 33; 791:20-792:8; 3429-31, 3475-77.) There is no evidence that Defendants exercised control over The Assembly Board after it was completely turned over to the homeowners in 2005.[12] (R. at 79:201-21; 3429-31.) Instead, Plaintiffs identify several provisions in I'On's Covenants that retained limited rights for

[12] By the end of 2003, the majority of The Assembly Board was comprised of I'On homeowners unaffiliated with Defendants. (R. at 791:20-21; 3429-31.)

Defendants. (Pl. Pet. at 38-39.) Since 2005, the *only* provision that Defendants utilized was the appointment of a developer representative to The Assembly Board in 2014. Highlighting just how much "control" Defendants had, The Assembly prevented the representative from participating in any Board decisions concerning the developer. (App. 15 n.7.) Defendants have not exercised any retained rights to control the actions, decisions, or operations of The Assembly. This is not control.[13]

2. *Plaintiffs' claim that it was "impossible" for The Assembly to file suit against Defendants is not supported by the Record.*

The Record does not support the conclusion that "it was impossible for the HOA to sue the Developers . . . ." (Pl. Pet. at 39.) Plaintiffs only point to the testimony of Tom Graham about the *existence* of the limited veto provision in support of this baseless statement. Deborah Bedell, the President of The Assembly Board at the time of trial, testified that she spoke with many former Board members and did not personally believe that Defendants controlled the Board. Bedell conceded that she was aware of no decision of the Board that Defendants' "veto power" impacted. (R. at 1303:9-25; 1304:5-9; 1346:17-1347:5; 1426:23-1427:3.)

3. *The facts here are distinguishable from those in Magnolia.*

As discussed above, the facts of this case are entirely different from the facts present in *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). The *Magnolia* Court was persuaded by the *diligence* of the property owners' association in filing suit just eight months after the property owners gained control. *Id.* Here, no action was filed for more than seven years after I'On homeowners controlled The

[13] *See* Def. Pet. at 9-12 for further discussion of theoretical control.

Assembly's Board. Additionally, unlike *Magnolia*, this action was not brought by The Assembly, but was brought derivatively.

Plaintiffs further request that the Court grant certiorari to "formally adopt" the adverse domination doctrine. (Pl. Pet. at 40.) However, Plaintiffs concede that this doctrine is the rule of law set forth in *Magnolia*. (Pl. Pet. at 40-41.) The court of appeals appropriately considered *Magnolia;* no further review on this basis is warranted.

V. THE COURT OF APPEALS' APPLICATION OF THE SINGLE BUSINESS ENTERPRISE THEORY HAS BEEN CONSISTENT, PROPER, AND DOES NOT WARRANT REVIEW.

The court of appeals correctly applied the single business enterprise theory as set forth in *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 655, 817 S.E.2d 273, 280 (2018). Plaintiffs fail to present a "novel question" as to whether Defendants have the burden of proving the prima-facie elements of their claim, one of which is proving unfairness resulting from blurring of entities' legal distinctions. Finally, Defendants did not waive any argument regarding the trial court's ruling on amalgamation. Plaintiffs' distortion of this case's procedural history, though requiring clarification, does not necessitate the Court's review of this issue.

A. The court of appeals correctly applied *Pertuis*.

In *Pertuis*, this Court thoroughly examined the amalgamation of interests theory, officially recognized the theory, and aptly rebranded it the "Single Business Enterprise" theory. 423 S.C. at 655, 817 S.E.2d at 280. This theory requires a showing "of more than the various entities' operations are intertwined." *Id.* Instead, it requires a demonstration of bad faith, abuse, fraud, wrongdoing, or injustice *resulting from* the blurring of entities' legal distinctions. *Id.*, 817 S.E.2d at 281. Despite Plaintiffs' contention, alleged misconduct resulting in "harm to the HOA and Homeowners" is not the standard. (Pl. Pet. at 42.)

Although the Court recently decided *Pertuis*, this decision comports with long-standing precedent: disregarding the corporate form requires a showing of resulting unfairness. *See Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 102, 668 S.E.2d 798, 800 (2000) ("The second prong [of the *Sturkie* test] requires the plaintiff to demonstrate that 'fundamental unfairness' would result from recognition of the corporate entity.").

The court of appeals properly held that there was "no evidence of bad faith, abuse, fraud, wrongdoing, or injustice *resulting from* the blurring of the entities' legal distinctions." (App. 26.) Incorporating several companies to accomplish different components of a planned development is not evidence of nefarious conduct. Involving several companies in a transaction is not evidence of wrongdoing. Sharing employees and managers amongst companies, by itself, is not evidence of an illegitimate purpose. This is especially true where, as here, each I'On entity had unique responsibilities. Plaintiffs cannot point to any evidence that demonstrates wrongdoing, fraud, or abuse resulting from any overlap in the I'On entities. The court of appeals correctly decided this issue.

Plaintiffs argue that the court of appeals' application of *Pertuis* here is at odds with *Stoneledge at Lake Keowee Owners' Association, Inc. v. IMK Development Co., LLC*, 425 S.C. 276, 821 S.E.2d 509 (2018), but that argument is unavailing. In *Stoneledge*, the court of appeals applied *Pertuis'* two-step approach and first found evidence of a unified operation between the defendants. 425 S.C. at 298-99, 821 S.E.2d at 520-21. After reaching this threshold issue, it then found evidence of self-dealing *resulting from* a blending of the defendants' business enterprises. *Id.* at 300, 821 S.E.2d at 521. Specifically, the defendants' principal in *Stoneledge* had knowledge of pervasive construction defects throughout the development, yet still marketed and sold units

through the defendant companies to maximize profitability at the expense of the plaintiffs. *Id.* The wrongdoing resulted from the blurring of the entities' legal distinctions.

The court of appeals also properly applied *Pertuis'* two-step approach here. (App. 26.) First, the court found there was evidence showing the I'On entities' operations were intertwined. *Id.* Moving to the second prong, the court found there was no evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions. *Id.*

Stoneledge and the present case present different factual issues and claims. Here, the claims focus on allegations that The I'On Company failed to convey properties to The Assembly that were promised. Defendants maintain they fulfilled promises. It is not material to Plaintiffs' claims which I'On entity owned the disputed property. Unlike in *Stoneledge,* Plaintiffs have failed to demonstrate that their allegations against Defendants arose out of the blurring of the I'On entities' legal distinctions. The court of appeals' conclusions here and in *Stoneledge* are not in conflict with *Pertuis* or each other.

B. Plaintiffs' burden of proving their prima-facie case does not present a novel question.

The burden of proving bad faith resulting from intertwined entities is on the party seeking amalgamation. This is not a novel question in this state. *See Drury*, 380 S.C. at 101, 668 S.E.2d at 800 (citing *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984) ("The party seeking to pierce the corporate veil has the burden of proving that the doctrine should be applied."). Rather, this principle has been in place for roughly twenty-five years, and this Court reaffirmed it in *Pertuis*. *See Pertuis*, 423 S.C. at 281, 668 817 S.E.2d at 656 (finding error in the trial court's failure to assign the burden of proof to Pertuis, as the party seeking amalgamation). Plaintiffs undeniably bear the burden of proving bad faith here—it is an element of their prima-facie amalgamation claim.

Plaintiffs' claim that *Wilson v. Wilson*, 117 S.C. 454, 112 S.E. 330 (1920) conflicts with the court of appeals' decision is unfounded. *Wilson* states the principle that if 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." *Id.*, 112 S.E. at 331. That analysis is not the same as proving that the blurring of legal distinctions resulted in bad faith, abuse, fraud, wrongdoing or injustice. To accept Plaintiffs' argument would improperly shift the burden of proving their claim to Defendants. This issue does not require further review.

C. Defendants did not waive amalgamation arguments.

The court of appeals correctly held that the trial court's pre-verdict amalgamation ruling prejudiced Defendants. (App. 26.) Defendants did not "induce" this error, nor did they waive any argument relating to it. During the charge conference, Defendants only consented to the trial court deciding the amalgamation issue as opposed to the jury, as it was a question of law for the court. (R. at 1479.) Defendants proposed a verdict form that allowed for a finding of liability against each individual defendant. Defendants also proposed that the trial court's finding of amalgamation should come after a finding against each entity; they did not consent to trial court deciding the issue ahead of the verdict. *Id.* The following excerpt supports this fact:

> [DEFENDANTS' COUNSEL]: What we are fine with and what makes sense, is for there to be under each cause of action, each entity is listed separately, and they can check. We think that the I'On Company or I'On Club, but not the Realty, or whichever else, is liable for that. And that's what the plaintiffs propose and we're fine with that. But what I'm saying is, the jury doesn't rule on or decide whether a company and a club are amalgamated for these purposes. Your Honor does that in considering the equitable issues after their verdict comes back, is my understanding. And that's what I meant to argue earlier, if that's not how it came out, I apologize.

> THE COURT: Okay. No problem. No, I agree. It's an issue for the court. The question that I've got if I rule is – if I find them amalgamated, do we send the verdict form with the four of them on there, or do we do it like Cliff Newman did on it, and send one entity that's been amalgamated, or call defendants, the defendants. And they either need an instruction not just that the corporate entities are distinct, or we need to rule on it before we get to the verdict form. I mean, I can rule on it after. I mean, that's fine, too. But I'm trying to look at the charges in the context of the verdict form that will be sent back. So Mr. Lucey?
>
> [PLAINTIFFS' COUNSEL]: The Plaintiffs consent to the court ruling on it before the verdict form is submitted. We think it would be too confusing to try to do that after the verdict form.
>
> THE COURT: Okay. I'm ready to rule on it if y'all are ready.
>
> [DEFENDANTS' COUNSEL]: Your Honor, we would have it, as we discussed before, which is it goes to the jury. And if Your Honor has a different decision, then that's –
>
> THE COURT: Okay. I respectfully -- and I will tell y'all, that Pope is on -- cert has been granted. . . . These company are amalgamated here.

(R. at 1479-80.)

The court of appeals properly found that a new trial was necessary on Walbeck's breach of contract claim because he was not required to establish liability as to each Defendant. (App. 26.) Further review of this issue is unnecessary.

VI. THE OTHER EVIDENCE REFERENCED BY PLAINTIFFS IS IRRELEVANT TO THE ISSUES ON APPEAL.

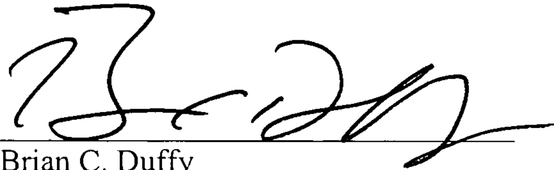
For the very first time in their petition, Plaintiffs raise as "dispositive" the inference to be drawn from the trial court's ruling on the destruction of evidence. (Pl. Pet. at 44.) Defendants did not appeal the trial court's order and Plaintiffs did not raise it to the court of appeals—either in responsive briefing or in Plaintiffs' petition for rehearing. Rule 242(d)(2) provides: "Only those questions raised in the court of appeals and in the petition for rehearing shall be included in the

petition for writ of certiorari as a question presented to the Supreme Court." Plaintiffs never asked the court of appeals to consider this issue which they now purport "automatically satisfies the JNOV standard[,]" and it is not properly before this Court now. *Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011).

CONCLUSION

For the reasons and under the circumstances discussed above, this Court should deny certiorari.

Respectfully submitted,



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August 29, 2019
Charleston, South Carolina

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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

Op. No. 5588 (S.C. Ct. App. refiled February 27, 2019)

Case No. 2010-CP-10-10490
Appellate Case No. 2015-001590

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

CERTIFICATE OF SERVICE

I, Pamela Jones, Paralegal at Duffy & Young, LLC, certify that I have served the **RETURN TO PETITIONERS-RESPONDENTS' PETITION FOR WRIT OF CERTIORARI** on Petitioners-Respondents' on August 29, 2019 by U.S. First Class mail to their attorneys of record as shown below:

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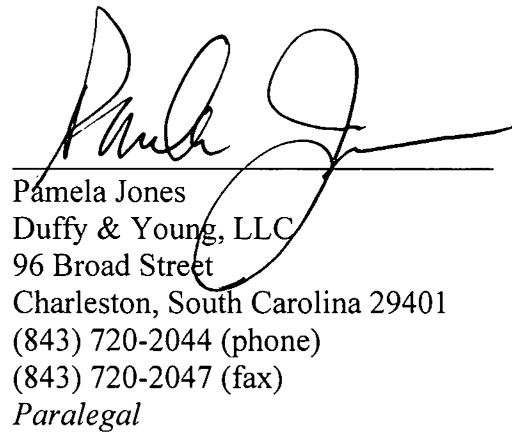

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August 29, 2019
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