

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

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## **I. EVIDENCE OF UNFAIRNESS REQUIRES THIS COURT'S REVIEW**

This Court should grant certiorari on amalgamation as a conflict exists among our appellate courts' amalgamation decisions.

### **A. The *Stoneledge* Facts are Strikingly Similar to the Facts in This Case**

The facts of this case are analogous to the *Stoneledge* facts. 425 S.C. 276, 297-99, 821 S.E.2d 509, 520-21 (Ct. App. 2018), *cert. granted* (Aug. 6, 2019). For example, just like the knowledge the *Stoneledge* principal had of pervasive construction defects, Developers knew that they intended to limit the HOA's rights to the Commons and executed an invalid, temporary Easement amongst themselves to further their own financial gain. (App. pp. 1122:20-1130:10; 3627-41). This invalid Easement operated much like the self-dealing evidence in *Stoneledge*.

### **B. The COA's Amalgamation Conclusion Overlooked the Evidence of Unfairness and Created Bad Precedent**

The evidence proves Developers promised the Commons to the HOA, purposefully blurred its entities to deprive the HOA of what was promised, and took several actions to camouflage their true intentions. For example:

From I'On's inception, Developers promised the Commons would be conveyed "by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to the [HOA]." (App. pp. 3518-9).<sup>1</sup> However, the I'On Company immediately sold rights to the Commons to a neighboring subdivision for \$450,000, allowing non-residents to have "first priority"<sup>2</sup> rights over I'On residents. This resulted in more profits for Developers and a (undisclosed) reduction in the

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<sup>1</sup>Developers testified the Property Report chart accurately referenced the Commons and those were intended to be conveyed to the HOA. (App. pp. 1081:7-1082:8). The promise was also reiterated multiple times to multiple owners and authorities. (App. pp. 1288-1291; 2694-95; 2690-91; 1404:18-1405:12; 1690:4-1691:13; 2696-2704; 3658-68; 2518-26; 2653-72; 4025; 3895; 4140).

<sup>2</sup> (App. p. 2554) (Besenfelder describing Olde Park's priority rights to the Commons).

HOA's rights to the Commons. (App. pp. 1091:2-6; 1101:12-1102:9).

Developers again attempted to modify the HOA's rights, unbeknownst to the HOA, by way of the invalid Easement. (App. pp. 3627-41). Developers knew the Easement conflicted itself; yet, Developers concealed this from the HOA by enlisting a single Developer employee to sign it in three, conflicting capacities.<sup>3</sup> *Id*; *see also* (App. pp. 1122:20-1133:10). This unfairly deprived the HOA of the opportunity to have an unbiased representative involved in, aware of, and representing its interests. Nevertheless, the Easement was invalid *ab initio* because the I'On Club, the grantor, did not own the property rights it purported to give to the HOA – the I'On Company did. (App. pp. 1129:25-1131:1); *see also* (App. pp. 506-14). This tangling of entities once again resulted in unfairness to the homeowners, who were left with no legal right to access property promised to them.<sup>4</sup>

Developer continued blurring its entities to profit at the HOA's expense, secretly conveying CV-6 from the I'On Company to the I'On Club for \$5.00. (App. p. 3642). This transfer was done for the I'On Club to ultimately convey the property to a third-party, maximizing profits for Developers and injuring the HOA. (App. pp. 1129:25-1131:1). Before the sale, however, Developers' entities colluded to make promises on one another's behalf, lulling the HOA into a sense of security, while secretly conspiring to sell what had been promised.<sup>5</sup> One of many examples include I'On Group employee, Chad Besenfelder, telling the HOA's Board in September

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<sup>3</sup> *See also* (App. p. 1529:5-13) (Homeowner Ed Clem testimony describing this easement as unfair and saying that the easement being signed by the same person to represent three entities was like "shaking hands with yourself.")

<sup>4</sup> Ironically, the Olde Park agreement was signed by the correct entity, resulting in the I'On homeowners having less access and fewer rights than their non-resident neighbors.

<sup>5</sup> *Compare* (App. p. 2712) (In March 2009 the General Manager of the I'On Company, Chad Besenfelder, represented to the HOA, on behalf of the I'On Group, that the I'On Company was preparing to deed over the community dock, which was owned by I'On Club) *with* (App. pp. 1198:8-1199:9) (Developers acknowledging they never disclosed their negotiations to sell the Commons in 2009, and, in fact, actively worked to keep the sale quiet).

2007 that the I'On Company would like to turn over the community docks, which were, at that point, owned by I'On Club. (App. pp. 4023-30); *see also* (App. pp. 1694-96). The homeowners had no idea which entity was “the” Developer. (App. p. 2266) (Walbeck testifying he could not tell the difference in Developers’ entities). Ultimately, the Commons were sold to a third-party with the Developers knowing that the invalid Easement endangered the HOA’s rights to the Commons. Once again, Developers placed their personal gain over the HOA’s well-being. (App. pp. 1122:20-1125:25). This comports with *Stoneledge*, not the COA decision.

## II. THE COA’S DERIVATIVE ANALYSIS NEEDS REVIEW BECAUSE IT CONFLICTS WITH SUPREME COURT PRECEDENT, PUBLIC POLICY, AND PRESERVATION PRINCIPLES

Developers’ Return does not negate the many special and important reasons why this Court must review and correct the COA’s reversal of Petitioners’ derivative claims.

### A. The COA Overlooked Procedural Conflicts that Must be Addressed

An appellate court cannot re-evaluate the denial of a motion to dismiss that was not appealed, even on a *de novo* review. *Davis v. Parkview Apartments*, 409 S.C. 266, 280-81, 762 S.E.2d 535, 541-42 (2014).<sup>6</sup> As held by Davis:

As a matter of procedure, we note that Appellants have only appealed the Order awarding sanctions to Respondents, the Dismissal Order. As such, the merits of the underlying discovery Orders [...] are not before us for consideration ... Right or wrong, these [Orders] form the law of the case, and Appellants are bound by them ... While [the Dismissal Order] was a final Order for purposes of appellate review ... the merits of the underlying discovery Orders are not before this Court on appeal. [D]espite Appellants’ vehement objections to [these Orders], the only reviewable question before this Court is whether the sanctions were properly awarded.

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<sup>6</sup> Interlocutory decisions by themselves are not appealable. *See, e.g., State v. Lockhart*, 275 S. C. 160, 161, 267 S. E. 2d 720, 720 (1980); *Wallace v. Interamerican Trust Co.*, 246 S. C. 563, 568, 144 S. E. 2d 813, 816 (1965). *Huntley versus Young*, 319 S.C. 559, 560 462 S.E.2d 860, 861 (1995). *Huntley* does not suggest that an appellate court can consider an unappealed ruling that was never “raised” to the appellate court as implied by Developers.

*Id.* at 280-81, 762 S.E.2d at 542-43 (emphasis added).

The COA's consideration of the unappealed Order resulted in two more errors:

Error #1: Because the COA considered the unappealed Dismissal Denial, it applied the wrong standard of review. (App. pp. 87-115). Here, the derivative ruling appealed is a JNOV ruling which means the JNOV standard applies; and, there is ample evidence Petitioners met both South Carolina's demand and futility requirements.

Error #2: The COA's ruling indicates that it reversed the Dismissal Denial; but the Dismissal Denial did not encompass Petitioners' negligent misrepresentation claims because the Circuit Court did not rule on this claim.

Developers' Return does not address any of these procedural points. Developers do not:

(1) discuss their failure to appeal; (2) address that the Denial excludes Petitioners' negligent misrepresentation claims; (3) provide any legal precedent that a *de novo* review permits the consideration of an unappealed order; or (4) take a position on which order the Circuit Court reversed. Rather, Developers simply assert they "challenged the sufficiency of Plaintiffs' Complaints". Developers, however, did not appeal the ruling that found Plaintiffs' Complaint(s) were sufficient. This Court must review and correct these errors committed by the COA.

**B. The COA's Substituted Opinion, and Developers' Return, Wrongfully Apply the *Whittle* Standard Instead of the *Patterson* Standard**

Certiorari is also necessary as to the derivative questions presented because the COA advances an unsupported derivative pleading standard that conflicts with *Patterson*.

**1. This Court's Decision in *Patterson* Controls**

The COA's Substituted Opinion and Developers' Return, both ignore that *Patterson* controls the derivative standard here. *Patterson v. Whitter*, 425 S.C. 213, 225-26, 821 S.E.2d 677, 684-85 (2018). *Patterson* indicates derivative determinations are a function of the derivative ruling appealed. *Id.* at 226, 821 S.E.2d at 684. ("[W]e find this motion to dismiss was converted into a

motion for summary judgment and we review it as such.") (emphasis added). Second, *Patterson* rejected the approach taken by the COA and recognized that: (1) derivative determinations are not limited to complaint allegations; and (2) courts must consider demands and other evidence "integral" to deciding the derivative issue. *Id.*

Even though *Patterson* is the prevailing authority, the COA does not mention *Patterson* *once*.

## **2. Developers' Attempts to Distinguish *Patterson* are Unavailing**

Developers contend that Petitioners' derivative "complaint allegations" are insufficient per *Whittle*. However, under *Patterson*, Petitioners' allegations are more than sufficient. In *Patterson*, this Court found derivative plaintiffs met Rule 23's pleading requirements based on one paragraph alleged in their complaint:

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

*Id.* at 233-235, 821 S.E.2d at 680 (emphasis added). Here, Petitioners' Complaints allege the efforts and demands they, and other members, made to "the [HOA] Board and its counsel" "to act to secure the Creekside Park and Community Dock," all "to no avail". (Petitioners' demand and futility allegations are set forth at length in the Petition).

*Patterson* noted the complaint allegations at issue in that case, alone, were likely enough to satisfy Rule 23. *Id.* at 234-35, 821 S.E.2d at 688-89 ("Indeed, the allegations concerning the [demand] in [members'] complaint are appreciably more detailed than those in *Whittle*. And certainly, when the [demand] is considered in conjunction with the complaint, there is ample evidence that Rule 23 is satisfied.") (emphasis added). *Patterson* establishes that, even if a 12(b)(6)

standard were applied here, Petitioners “allegations” – which are “appreciably more detailed” than both *Patterson* and *Whittle*, fulfill South Carolina’s demand requirement.

Second, Developers’ contend that neither the “Templeton Demand” nor the “Adkins Demand” is sufficient under *Whittle* because one was not sent by the named derivative plaintiff and both did not include a post-sale request to “initiate litigation” to “recover” the transferred amenities. However, under *Patterson*, both demands are sufficient because *Patterson* upheld a demand that was sent by “members, their agents, or others on their behalf.” In *Patterson*, the demand was sent to the corporation’s attorney (not directly to the corporation’s Board), and that only listed five requests, none of which included a request to “initiate litigation”. Furthermore, the Templeton Demand clearly demanded that the HOA “immediately seek counsel” and consider “pursuing damages;” and, the Adkins demand clearly requested that the HOA consider its claims against Developers – that’s the entire reason this demand was sent to the HOA’s attorney. (App. 2705-06; 2710-11). Notably, Developers do not address Adkins’ 2009 demands to, and conversations with, HOA Board Member, Matt Walsh, in which Adkins requested that the HOA “to work actively, with diligence, to see that the HOA acquires any and all the properties promised to it.” (App. 2721) (emphasis added).

Third, Developers contend that Walbeck is not a proper derivative plaintiff because “he never claimed to have made a demand on the [HOA’s] Board for ownership of any property.” (Return, p. 8, n. 6). Developers ignore the “pre-suit” letters Walbeck sent Developers, who controlled the Board at that time and thereafter, demanding the conveyance of the Creekside Park and Community Dock; and, Developers’ response indicating these properties had already been conveyed to the HOA. (App. pp. 1407:10-1408:5). This establishes both demand and futility, either of which makes Walbeck a proper derivative plaintiff.

Fourth, Developers suggest that *Patterson* requires demands to be incorporated verbatim

or physically attached to complaints for them to be considered when *Patterson* held the opposite. *Id.* (“[W]e reject an approach that approves of a trial court’s consideration of everything *except* [a] demand letter that was actually sent and received.”).

**C. Developers Cannot Advocate Rule 23’s “Gatekeeping Policy” While Ignoring Their Concession that Any Gatekeeping Function Was Met**

Developers’ claim that Rule 23’s “gatekeeping policy” required Petitioners to make an effort to induce the HOA to act, “and this must be made apparent to the [c]ourt”. (Return, pp. 6-7). Not only did Petitioners make this apparent to the court, Developers made this apparent by admitting in their Answer that the HOA refused demands “to bring suit regarding the issues raised” in Petitioners’ Complaints. (App. p. 580 ¶35)

Developers’ contention that their Answer is “immaterial” because derivative determinations are limited to “only” complaint allegations is wrong and directly contradicts *Patterson*, which acknowledged that a Defendants’ Answer is material to derivative determinations. *Patterson*, 425 S.C. at 235, 821 S.E.2d at 685 *citing L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2<sup>nd</sup> Cir. 2011) (finding a defendant’s answer and exhibits attached or integral to the answer can be considered in making derivative determinations).<sup>7</sup>

**1. Petitioners Satisfied Gatekeeping Requirement**

The record also demonstrates that Petitioners’ derivative claims are legitimate, largely supported by the HOA, and largely beneficial to the HOA. The overarching policy behind Rule 23 is to allow for adjudication of these types of claims – not to bar them. While Developers attempt to discredit the legitimacy and support of Petitioners’ claims, their arguments are not supported by the evidence. Developers just do not want this Court to know and believe that the HOA and all the

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<sup>7</sup> See also *Johnson v. Alexander*, 413 S.C. 196, 201-02, 775 S.E.2d 697, 700 (2015).

homeowners except Tom Graham's tennis partner and Vince Graham's historic preservation friend, with a history of lobbying on his behalf, supported Petitioners' efforts. (App. p. 1559:3-11) (tennis partner); (App. pp. 1378:1-1379:7) (Ms. O'Connor conceding that she had previously testified on Vince Graham's behalf).

**D. This Court Needs to Decide the Novel Question of Law Regarding the Effect of a Realigned Corporation on Rule 23 Requirements**

Both Developers and the COA ignore the novel South Carolina question of how realignment of the HOA as a plaintiff affects any purported deficiencies with the derivative pleadings. As the COA correctly concluded in its Original Opinion: "the HOA's realignment as a plaintiff allowed the jury to award damages to the HOA as if [a derivative action was] never brought." (App. p. 22). The COA's Substituted Opinion inexplicably does not state why or how its previous position warrants abrogation.

When, as here, the derivative corporation adopts the derivative claims as its own, the "derivative" claims brought on behalf of the corporation become duplicative and unnecessary. *See, e.g. Ross v. Patrusky, Mintz & Semel*, No. 90 CIV. 1356 (SWK), 1997 WL 214957, at \*10 (S.D.N.Y. Apr. 29, 1997) ("When a corporation subsequently sues to assert claims on its own behalf, however, derivative claims become unnecessary and duplicative, and should be dismissed."); *see also United Canso Oil & Gas, Ltd. v. Catawba Corp.*, 566 F.Supp. 232, 241 (D.Conn.1983) ("[plaintiffs] no longer have a derivative action because the corporation is now suing on its own behalf"); *Berman v. Thomson*, 403 F.Supp. 695, 698 (N.D.Ill.1975); *In re Penn Cent. Sec. Litig.*, 335 F.Supp. 1026, 1040 (E.D.Pa.1971); *States v. New Silver Palace Restaurant, Inc.*, 810 F.Supp. 440, 443 (E.D.N.Y.1992) ("[w]here the corporation brings a direct action, then

the shareholder is precluded from bringing a derivative action.”).<sup>8</sup>

The Developer’s sole opposing argument is that because Plaintiffs’ counsel did not reference both direct and derivative claims in all arguments, that the direct claims were not brought or prosecuted. One needs to only look at the verdict form to conclude otherwise. (App. p. 2321-26). The direct claimant is listed first in the caption on the verdict form, and all queries thereafter refer to both direct claimant and the derivative claimant collectively and generically by “the I’On Assembly.” While the Developer may have moved for dismissal of the derivative claims as moot after the realignment, it never did so. Further, it was the *Developers* that moved for the realignment and successfully moved the court to deem that [HOA] had adopted [Petitioners’] claims.<sup>9</sup>

Furthermore, the purpose of the demand requirement in Rule 23 is “to give the derivative corporation the right to take over a suit which was brought on its behalf in the first place.” *Brody v. Chem. Bank*, 517 F.2d 932, 934 (2d Cir. 1975). The purpose of the demand requirement is **not** to insulate defendants from liability. *In re Citigroup Inc. S’holder Derivative Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009). When, as here, the defense of failure to make a demand is asserted, the court is required to examine the position of the corporation it seeks to protect. *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 731 (Del. 1988) (“Before a court can apply the traditional standards for determining when demand is excused it must first examine whether the corporation on whose behalf the action is brought has taken a position concerning the propriety of the derivative litigation.”). When a board takes a neutral position or supports the litigation, the demand requirement is excused. *Kaplan*, 540 A.2d at 731 (Del. 1988) (“Since Chase has acquiesced to this

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<sup>8</sup> See also *Pikor v. Cinerama Productions Corp.*, 25 F.R.D. 92 (1960).

<sup>9</sup> (App. pp. 734-8) (Developers’ 2014 Motion to Realign the HOA states: “[I]t is appropriate to realign the [HOA] as a plaintiff [HOA] should be deemed to have adopted [Petitioners’] claims...” (App. pp. 452-3).

derivative action the policy underlying Chancery Court Rule 23.1 of safeguarding the directors' power to manage the affairs of the corporation is not implicated. [...] As such, under these unique facts, we conclude that Chase's current position of neutrality excuses Plaintiffs' failure to make demand as required by Chancery Court Rule 23.1."); *see also In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 811 (Del. Ch. 2009), *aff'd sub nom. Teachers' Ret. Sys. of Louisiana v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011) ("When, however, a corporate board has had the chance to consider what position to take regarding a derivative suit and has decided to take no position, the resulting procedural implications are clear. Demand in such a situation is excused.").

Developer spends six pages analyzing the demand requirement and why it is a necessary pre-requisite to a derivative action but ignores that any requirement is intended to benefit the derivative corporation; here, the derivative corporation realigned as a party plaintiff and adopted the derivative claims as its own. There are no facts in the Record controverting the HOA's position of support of the derivative suit; and, the HOA's realignment as a plaintiff solidifies its "power to manage the affairs of the corporation", and thus any purported demand-related deficiencies must be excused. Developers preposterously assert without evidence that the Assembly consented to realignment to avoid an award of attorney fees resulting from the Russo settlement and not to support Petitioners' altruistic efforts. To the contrary, the trial court documented that the vote to realign preceded the Russo settlement. (App. p. 513).

### **III. THE COA'S SOL ANALYSIS NEEDS REVIEW BECAUSE IT LEAVES NOVEL QUESTIONS OF LAW UNANSWERED AND CONFLICTS WITH EQUITABLE PRINCIPLES, PUBLIC POLICY, AND EVIDENTIARY RULES**

Developers' Return does not negate the important reasons this Court must review and correct the COA's substituted statute of limitations ("SOL") analysis.

**A. Petitioners' Claims Should be Tolled Due to Developers' Control and Conduct**

Developers claim that the "HOA" knew it did not own the Commons based on a 2000-2007 timeline that relies on what Developers told the partisan Board they controlled, without once disclosing that the majority of these board members were affiliated with, and influenced by, the Developers. (Return, pp. 20-26). Of the 24 bullet points Developers mention in their Return, 17 cite such "Board" meeting minutes or Developer testimony as their sole support; and, all mischaracterize the record. (Return, pp. 21-23). For example:

- Developers incorrectly state that "[b]y December 2003, a majority of HOA's Board were I'On homeowners with no association with Developers." (Return, pp. 21, 25, n. 12). In reality, of the seven individuals comprising the "2003 Board", four to five admittedly had an association with Developers. Developers ignore the testimony of Vince Graham, the "Chairman of the Board" who worked for "the I'On Group", that there were two Developers on the Board (himself and Allen Coleman who "worked for him") and "two to three" I'On homeowners who Developers appointed. (App. pp. 1639:17-1640:18; 3926).
- Developers claim that "[f]rom 2003 forward, the HOA's Finance Committee, which reviewed and prepared the budgets, contained no developer representatives." (Return, p. 21). Developers again ignore Vince Graham testimony which indicates that "two to three" of the six individuals on the Finance Committee were "developer-appointees". (App. pp. 1639:17-1640:18; 3927).

Developers argue "there is no evidence" they had control over the Board after "it was completely turned over" in 2005. (Return, p. 21). This is false. According to the Covenants they drafted, Developers' control over the HOA "extends until" all I'On lots are sold – which had not occurred as of the date this suit was filed. (App. p. 4143). During this time, the HOA could not oppose Developers, could not make amendments that materially affect Developers, and could not take any action, including this one, without Developers' consent. (App. pp. 4143-44). Developers'

restraint argument misses this point – it has no bearing on their de facto control.<sup>10</sup>

The evidence shows this HOA lacked autonomy until after suit was filed due to, *inter alia*, Developers': (1) appointment of Board members (App. p. 4144); (2) regular participation in HOA and Board meetings;<sup>11</sup> (3) influence over non-developer Board members;<sup>12</sup> (4) self-dealing;<sup>13</sup> (5) "vacillations throughout the years" (App. p. 4); and, (6) repeated assurances and non-disclosures geared towards "keeping the HOA and homeowners quiet".<sup>14</sup>

The record also reflects that no Board member could have induced the HOA to sue Developers during this control period. *See, e.g.*, (App. p. 21, n. 9) ("the Board would not have thought about filing suit because it would be so clear that it would be vetoed [by Developers]").

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<sup>10</sup> Developers cited 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 SOL or breach of duty. (Pet. Return, p. 20).

<sup>11</sup> *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 Graham, 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).

<sup>12</sup> *See, e.g.*, (App. p. 21, n. 9) ("the Board would not have thought about filing suit because it would be so clear that it would be vetoed [by Developers]"); (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); (App. p. 2717) (HOA Board Member, Matt Walsh, 2009 indicating that the Board "was working with the Developers" to turn over the docks to the HOA); (App. p. 2719) (Matt Walsh forwarding Adkins' response to Developers).

<sup>13</sup> *See, e.g.*, (App. 3131-45) (Developers entering into an invalid easement on the HOA's behalf that restricted the HOA's rights) (App. pp. 3385-91) (Developers agreed to allow Olde Park residents to use the Community Dock if Olde Park paid Developers but failed to inform the HOA); (App. pp. 3189-3205; 3419-21) (Developers negotiating the sale of the Commons while simultaneously representing to the HOA that the Commons were in the process of turnover).

<sup>14</sup> *See, e.g.*, (App. p. 1199) (Developers "ke[pt] the [sale] quiet because of all the brew ha. . ."); (App. p. 3341) (Developers discussing on how to "capitalize" on the "potential value" of the Commons and outlining their options in "selling community facilities," all the while keeping their ideas "quiet for now"); *see also* (App. p. 29) (The COA acknowledging that Developers' 2007 "assurances led the HOA's members to 'repose[] a special confidence' in Developers); (App. p. 4025) (Developer representative, Chad Besenfelder ("Besenfelder"), informing the HOA in 2007 that the community docks would be turned over to the HOA").

This fact, coupled with the evidence of Developers' manipulations, misrepresentations, obstruction, and "willfulness, recklessness, or wantonness" justifies the application of equitable tolling here. (App. p. 2321).

**B. Developers Should be Estopped from Relying on the SOL**

This Court should grant cert to review Developers' concealment and their repeated assurances, and Petitioner's equitable estoppel claim. Developers' argue estoppel does not apply because they told "the HOA" that they did not own the Commons; however, that is false. The conversations Developers cite were with the "Board" they controlled, not the HOA. The record includes other exemplars of Developers' mischaracterization of the evidence and the representations they made that misled the HOA and homeowners.<sup>15</sup>

These communications were intended to, and did mislead, the Board that they controlled into believing that Developers were going to convey the Commons to the HOA. (App. pp. 1689-90; 4025); *see also* (App. pp. 2714-15) (Developers' 2008 e-mail indicating: "The docks were promised handover to the homeowners and [Developers] would like to honor that someday."); (App. pp. 2712-13; 3432-35; 3439) (In March 2009, Developers reiterated that they were

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<sup>15</sup> *See, e.g.*, (App. pp. 3928-31) (In February 2004, Vince Graham told the developer-controlled "Board" that the I'On Club owned the dock at the Club without specifying which "dock" at which "Club"); (App. p. 3833) (In November 2004, the same month the COA found Walbeck's claims started to accrue based upon a purported Dock "usage" budget line item, the Developer-controlled HOA sent a letter regarding the HOA's upcoming Annual Meeting. This letter gives examples of the Board's "ad hoc" committees, one of which is a "committee to renegotiate agreement with the I'On Club for the shared dock costs"— **not** "usage fees".) (emphasis added); (App. pp. 2692-93; 4025) (The September 2007 Board Meeting Minutes indicate that the Commons, that is the Community Dock and Creekside Park, were included in the "common areas" referenced in the Handover Agreement.); (App. p. 4025) (Besenfelder indicated, in September 2007, that he would like to turn over the community docks" to the HOA. Besenfelder did not disclose the Developers concealed effort to profit from the Community 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.).

“preparing to deed the [C]ommunity [D]ock to the [HOA]” even though they had re-contracted to sell the Commons.).

#### **IV. THIS COURT SHOULD REVIEW THE COA’S FIDUCIARY ANALYSIS BECAUSE IT CONFLICTS WITHIN ITSELF AND WITH WELL-SETTLED SOUTH CAROLINA LAW FIDUCIARY PRINCIPLES**

Developers’ Return fails to disturb any of the grounds the HOA set out in its Petition. Consequently, this Court should review the fiduciary law questions set forth by the HOA.

##### **A. The COA’s Fiduciary Findings are Incomplete and Conflict with Precedent**

Developers focus on whether a specific “duty to convey property” has been recognized. This ignores the big picture, the flexibility of fiduciary law,<sup>16</sup> and the COA’s predicate and predominant finding that Developers owe a duty not to profit at the HOA’s expense. (App. pp. 15-16).

According to centuries of fiduciary jurisprudence, a fiduciary has the duty to deal fairly and in good faith on the one hand and the duty of loyalty on the other. *See, e.g., Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987); *see also Laurel Rd. Homeowners Ass’n, Inc. v. Freas*, 191 A.3d 938, 950 (Pa. Commw. Ct. 2018), *reargument denied* (Sept. 6, 2018) (citing *Cohen v. S & S Construction Co.*, 151 Cal. App. 3d 941, 945, 201 Cal. Rptr. 173 (Cal. Ct. App. 1983) (“[A] developer is liable to a homeowner’s association for breach of the basic fiduciary duty to act in good faith, exercise proper management, and avoid conflicts of interest.”) (internal citations omitted)).<sup>17</sup> These obligations encompass attendant prohibitions, for

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<sup>16</sup> South Carolina recognizes that fiduciary relationships and duties are flexible, fact-intensive findings. *See, e.g., Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987)

<sup>17</sup> *See also Blue v. Harrelson*, No. 2004-UP-656, 2004 WL 6339711, at \*4 (S.C. Ct. App. Dec. 22, 2004) (upholding trial court recovery on breach of fiduciary duty claim based on record evidence of construction company’s breach of fiduciary duties of honesty, loyalty, and fair-dealing owed to

example, to not self-deal and to not withhold pertinent information. See, e.g., *Island Car Wash*, 292 S.C. at 599, 358 S.E.2d at 152 (Ct. App. 1987) (“It is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests.”); see also *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004) (“Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material.”).<sup>18</sup>

### 1. A Fiduciary Who Profits From Its Role Violates the Fiduciary Duty of Loyalty

Developers’ arguments do not negate the *Island Car Wash* dictate “not. . . to make use of [a fiduciary] relationship to benefit [their] personal interests”, or the evidence of \$1,400,000 in profits Developers secured from quietly selling the promised properties to a third party while the HOA was under their influence. *Island Car Wash*, 292 S.C. at 599, 358 S.E.2d at 152. The COA

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home owners); *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 338 S.C. 572, 588, 527 S.E.2d 371, 379 (Ct. App. 2000), *aff’d as modified and remanded*, 343 S.C. 587, 541 S.E.2d 257 (2001) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928) (recognizing the fiduciary duty owed by a managing partner/trusted family member to partners/other family members is “[n]ot honesty alone, but the punctilio of an honor the most sensitive”); *Innerimages, Inc. v. Newman*, 579 S.W.3d 29 (Tenn. Ct. App. 2019) (recognizing developer’s fiduciary duty to act in good faith in continuing to develop property and in providing services promised under The Village Restrictions) (emphasis added).

<sup>18</sup> See also *Orange Grove Terrace Owners Assn. v. Bryant Properties, Inc.*, 176 Cal. App. 3d 1217, 1223, 222 Cal. Rptr. 523, 526 (Ct. App. 1986) (“A developer may not make decisions for the Association that benefit its own interest at the expense of the association and its members.”); *King v. Bryant*, 369 N.C. 451, 466–67, 795 S.E.2d 340, 350, *cert. denied*, 138 S. Ct. 314, 199 L. Ed. 2d 233 (2017) (confidential relationship, outside of physician-patient relationship, gave rise to a fiduciary duty owed by surgeon to patient to fully disclose nature and import of arbitration agreement, which affected patient’s legal rights, unlike “routine documents” that require signing); *Brown v. Pearson*, 326 S.C. 409, 423, 483 S.E.2d 477, 484 (Ct. App. 1997) (noting cases in other states where the clergy-parishioner relationship found to be a fiduciary relationship when there was self-dealing or self-interest on part of clergyman, e.g., an abuse by clergyman of his role as counselor and clergyman, or a clergyman enhancing his own financial position at the expense of parishioner) (internal citations omitted). *Orange Grove* was cited favorably by this Court in *Dunes West*.

confirmed the existence of the duty not to self-deal<sup>19</sup> but it failed to comply with the JNOV review standard. Its Opinion ignored the evidence in support of the jury's finding that Developers violated the *Island Car Wash* dictate. *See, e.g., Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004) (application of facts to determine breach of fiduciary relationship for jury). The COA's analysis and Developers' position demonstrate the reason certiorari is appropriate: a sophisticated developer has a fiduciary duty not to secure a profit or advantage at the expense of an HOA under their influence.<sup>20</sup>

**2. The Circumstances Surrounding Entrustment and the Parties' Relative Autonomy and Sophistication Must be Reviewed in Examining What Duties Arise in a Fiduciary Relationship**

The COA's examination ignored critical components of the Developer-HOA relationship, and Developers encourage these oversights. For instance, the HOA entrusted Developers with community property/amenities, including the community's only dock with deep water access, much like a beneficiary entrusts a personal representative with an estate's real property. *See, e.g., Turpin v. Lowther*, 404 S.C. 581, 586–87, 745 S.E.2d 397, 400 (Ct. App. 2013) (rejecting appellant-personal representative's argument that he had no fiduciary duty to beneficiaries for transactions and finding his fiduciary obligation required he disclose his negotiations and contracts with a third party). And Developers accepted the Board's trust, advising the Board on the condition

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<sup>19</sup> The COA Opinion expressly concluded that “a developer in control of a homeowners association may not make decisions that benefit the developer's own interest at the expense of the association and its members” (App. pp. 15-16), but went on to substitute its view of the fact for that of the jury.

<sup>20</sup> The COA's Opinion also fails to recognize a fiduciary's duty to disclose, in conflict with South Carolina law. *See Kiriakides*, 338 S.C. at 587, 527 S.E.2d at 379 (quoting *Jacobson v. Yaschik*, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967)). This failure also warrants this Court's review. *See, e.g., JNOV Order*, p. 29 (“Moreover, the record reflects the developers were in the process of repairing the community dock in preparation for transfer, per the request of the Assembly, while simultaneously, negotiating the sale of this very property to a third-party for profit.”).

of the disputed properties, setting out a repair and transfer protocol, and participating in HOA Board decisions. *See Island Car Wash*, 292 S.C. at 600, 358 S.E.2d at 152 (general manager's actions indicate he accepted the trust placed in him to "get together whatever was necessary to establish the car wash operation" such that he was the dominant party and occupied a fiduciary relationship to the business).

The relation of a developer to its HOA is unique. It is the community's first organizer and who forms the association of homeowners. From the HOA's infancy, the developer's actions concerning community amenities/property are critical, particularly when this property exist for the shared benefit of the community's residents. Neighborhood amenities/ property – their construction, maintenance, repair, condition –are a central piece of business of the ensuing HOA. While a developer is typically an experienced business enterprise run by sophisticated executives, homeowners are a collection of nurses, teachers, artists, and the like.<sup>21</sup> A developer's importance in a community, and its responsibilities to the HOA entrusting it, depends on that developer's involvement and continued guidance. It follows, based on the foregoing, that Judge McDonald was right; under these circumstances, that Developers breached their fiduciary duty by conveying the disputed amenities to outsiders.

**B. Defendants Otherwise Fail to Refute the Reasons This Court Should Accept Certiorari on the HOA's Fiduciary Questions**

Developers' other arguments do not bear on the gravamen of this fiduciary dispute, the HOA's lack of complete autonomy. For instance, Developers describe a fiduciary relationship that extends to infinity, in an attempt to misdirect this Court's attention. But the fiduciary relationship

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<sup>21</sup> *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016) ("We have [ ] taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.") (internal quotation and citations omitted)

between Developers and the HOA has never been alleged to continue on for all time, or to any point beyond Developers' retained control. Developers argue the breach of fiduciary duty claim "should never have been presented to the jury". But in doing so, Developers conflate the existence of a fiduciary *relationship* with that of a fiduciary *duty* and ignore the effect of the applicable standards, which make clear the evidence considered by the jury is relevant, if not essential, to this Court's review.

The COA also ignored the HOA's lack of autonomy: that Developers possessed critical information, construction updates, cost estimates and maintenance expenditures, condition reports, about the Community Dock and Creekside Park which the HOA had no way of otherwise obtaining; that Developers' employees participated in closed door HOA Board meetings; that Developers set out an amenity turnover process that included a repair protocol; that Developers later represented transfer was forthcoming; and that this appeared in keeping with Developers' role as manager, information steward, and responsible party for the disputed properties.

Left uncorrected, this decision will allow developers to self-deal with impunity and strip developer-created organizations of community assets.

**V. THE EVIDENCE DESTROYED BY DEVELOPERS CREATES INFERENCES THAT SUPPORT THE CIRCUIT COURT'S JNOV DENIAL AND MUST BE CONSIDERED BY THIS COURT**

Developers are incorrect in their assertion that Petitioners did not raise the issues of destruction of evidence and an adverse inference therefrom to the Court of Appeals. Petitioners did so in *both* Petitions for Rehearing. (App. p. 75) ("The Circuit Court was also aware that the developers destroyed evidence when it denied their JNOV Motion.") *citing to Kershaw Cty. Bd. Of Educ. V. U.S. Gypsum Co.*, 302, S.C. 390, 394, 396 S.E.2d 369, 372 (1990) (noting when evidence is lost or destroyed by a party, an inference may be drawn that the evidence which was

lost or destroyed by that party would have been adverse to that party.); *see also* (App. pp. 184-5) (noting same). Petitioners also called this issue “dispositive.” (App. p. 75). Petitioners (as Respondents in the COA), explicitly raised these issues as an additional sustaining ground for the COA to affirm the Circuit Court’s grant of JNOV. *See, e.g. South Carolina Dept. of Revenue v. Anonymous Co. A*, 678 S.E.2d 255 (S.C. 2009) (“The successful party in the lower court may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling.”). The Supreme Court “may affirm the trial court based on any ground found in the record.” *See* Appellate Court Rule 220(c) (emphasis added); *see also Law v. South Carolina Dept. of Corrections*, 629 S.E.2d 642 (S.C. 2006).<sup>22</sup> The Order finding Developers in contempt for destruction of evidence is in the Record on Appeal (App. P. 437; 537 *et. seq.*), was raised in the Court of Appeals as an additional sustaining ground in support of the Circuit Court’s denial of JNOV, and is therefore properly before this Court. Developers’ destruction of evidence which expressly related to the Commons at issue in this case creates an adverse inference and should have been considered as such by the COA in considering the Circuit Court’s denial of JNOV.

## **VI. DEVELOPERS RETURN IS RIDDLED WITH MISSTATEMENTS AND IS UNRELIABLE**

There is not enough permitted briefing space to expose all of the Developer’s misstatements; a few exemplars will need to suffice. Developer falsely represents that:

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.

(App. pp. 851:24-852:16). The referenced statement is by trial counsel for the Defendant

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<sup>22</sup> Developers’ argument that SCACR 242(d)(2) precludes this Court’s review of this issue is without merit. The additional sustaining ground described above in support of the Circuit Court’s denial of JNOV was explicitly raised in the Court of Appeals *and* “will be deemed to include every subsidiary question fairly comprised therein.” *See id.*; *see also State v. Davis*, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006)

Assembly, Mr. Bouch, in support of the Russo settlement, the day before the first trial, and five weeks before the Assembly was realigned as a Party Plaintiff on February 21, 2014. (i p. 453).<sup>23</sup>

Developers' representation that "the trial court held that Templeton's February 26, 2209 letter is not a derivative demand, and Plaintiffs did not challenge this ruling" (App. at 1487:4-24; 2705-6) is false. (Return. p. 8). The judge was addressing the Templeton zoning appeal settlement/release, not the Templeton demand. Moreover, even if otherwise, as the prevailing party in the trial Court, Plaintiffs were not obligated to challenge any ruling. Lastly, the Templeton letter did demand that the Board secure the amenities from the Developer.

Ironically, Developers assert: "The primary theme in Plaintiff's petition is the mischaracterization of what was promised to the Assembly...." while in the face of the overwhelming evidence, and their own admissions, Developers still argue that "the Community Dock" was a "crabbing dock."

Developer falsely asserts that "Plaintiffs claim they are entitled to [the Creek Club] too." (Reply p. 1, FN 3). However, Plaintiffs did not claim entitlement to this clubhouse, and reduced their damages by the value of the Creek Club building, estimated to be one million dollars. (App. pp. 474; 1306-8; 1784:2-11; 2055:17-2056:11).

### CONCLUSION

This Court should grant certiorari for all the foregoing reasons, and so that justice can be done.

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<sup>23</sup> (App. p. 513) (June 16, 2005 Order: "Prior to the first trial of the case, Assembly's counsel sat with the I'On and Civitas Defendants' during the striking of the jury. It was only late in the day on the third day of trial, during the testimony of the Assembly President, Ms. Bedell, that the Court and Defendants learned that the Assembly Board had met the weekend prior to trial and voted to "realign" itself with the Plaintiffs in support of their claims against the I'On Defendants regarding the breach of their obligations to convey the promised amenities to the Assembly.")

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September 20, 2019  
Mount Pleasant, SC

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

**RECEIVED**  
SEP 23 2019

The Honorable Stephanie P. McDonald, Circuit Court Judge S.C. SUPREME COURT

Case No. 2010-CP-10-10490

Appellate Case No.: 2015-001590

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

Petitioners,

v.

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

Respondents.

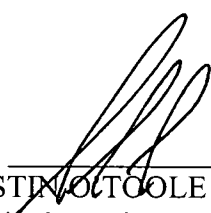
**PROOF OF SERVICE**

I, Justin O'Toole Lucey, hereby certify that on 9/30/19 I served a copy of the *Petitioners-Respondents' Reply to Respondents-Petitioners' Return to Petitioners-Respondents' Petition for Writ of Certiorari* on the following counsel, via United States Mail, postage pre-paid, and addressed as follows:

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September 20, 2019  
Mount Pleasant, SC