THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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SC Court of Appeals

R. Markley Dennis, Jr., Judge of the South Carolina Business Court

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Appellant Case Number 2021-000767

C. Barry Dykes and Barbara Eisenhardt, Individually and Derivatively On Behalf Of The Wild Wing Plantation Property Owners' Association, Inc.,.....Appellants,

v.

Wild Wing Company, LLC; Sunstar, LLC; Ralph R. Teal, Jr.; SLF IV/SBI Wild Wing, LLC; SLF IV/SBI JV, LLC; SLF IV/SBI Properties MM, LLC; SLF IV/SBI Development Holdings, LLC; Wild Wing Residential Development, LLC; Stratford Land Manager, L.P. d/b/a Stratford Land; Stratford Land Fund IV, L.P.; SB Investments LLC; Realstar Management, LLC; Graeme T. Black; H. Gilford Edwards; Founders Wild Wing, LLC; Founders Group International, LLC; Dan Liu; Xian "Nick" Dou; Rick Schultz; Rick Taylor and Thomas Plankers, ...Respondents,

Wild Wing Plantation Owners' Association, Inc., ... Nominal Defendant.

INITIAL BRIEF OF DECLARANT RESPONDENTS

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Myrtle Beach, South Carolina
March 28, 2022

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This is a dispute over payment of the Wild Wing Plantation Property Owners' Association (hereinafter "POA") dues. Appellants allege the Declarants failed to pay their share based upon Appellants' interpretation of the POA Declaration. Appellants' interpretation would require the Declarants to pay 100% of any dues that the Lot Owner Members of the POA failed to pay themselves, irrespective of need. Ironically, Appellants bring this action in a representative capacity, purporting to represent the very Members who defaulted on their dues. Appellants' claims fail for a variety of non-factual reasons.

The following brief is submitted on behalf of Wild Wing Company, LLC; Sunstar, LLC; SLF IV/SBI Wild Wing, LLC; SLF IV/SBI JV, LLC; SLF IV/SBI Properties MM, LLC; SLF IV/SBI Development Holdings, LLC; Wild Wing Residential Development, LLC; SB Investments, LLC; Realstar Management, LLC; Founders Wild Wing, LLC; Founders Group International, LLC; and Dan Liu (hereinafter "Declarant Respondents"). The remaining Respondents have also filed briefs in response to Appellants' brief. The briefs of the remaining Respondents are incorporated herein by reference.

STATEMENT OF THE ISSUES ON APPEAL

I. The Circuit Court correctly ruled that there exists no fiduciary obligation of the Declarants in this matter.

II. The Circuit Court correctly ruled that Appellants' claims regarding the Math are barred by the Business Judgment Rule as modified by the South Carolina Non-Profit Corporation Act.

III. The Circuit Court correctly ruled that Appellants' claims are barred by the Statute of Limitations.

IV. The Circuit Court correctly ruled that the Appellants may not bring an action for Unfair Trade Practices in a representative capacity.

STATEMENT OF THE CASE

On June 30, 2017, the Appellants brought this action individually and in a representative capacity on behalf of the POA, a nonprofit corporation, claiming that Declarants had not paid the correct amount of dues to the POA. Appellants initially brought causes of action for Breach of Fiduciary Duty, Unjust Enrichment, and Veil Piercing/Alter Ego/Amalgamation. An Answer and Counterclaim was filed on October 3, 2017. Appellants filed an Answer to the Counterclaim on November 16, 2017.

On June 10, 2019, the Appellants filed an Amended Complaint which added nine new Defendants, added unrelated allegations that Amendments to the Declaration were improper, and added an additional cause of action under the South Carolina Unfair Trade Practices Act. Appellants later filed a revised Amended Complaint on March 19, 2020. An Answer and Counterclaim to the Amended Complaint was filed on behalf of Declarant Respondents on April 16, 2020. Appellants filed an Answer to the Counterclaim on May 19, 2020.

On October 29, 2020, Declarant Respondents filed numerous Motions for Summary Judgment on the following grounds:

- The Business Judgment Rule;
- The Statute of Limitations;
- The Validity of the Amendments to the Declaration;
- Inadequate Derivative Capacity of the Plaintiffs;
- Lack of Standing of the POA; and
- South Carolina Unfair Trade Practices Act.

Motions for Summary Judgment were filed by all remaining Respondents as well. On October 30, 2020, Appellants also filed several Motions for Summary Judgment. On May 4, 2021, the Honorable R. Markley Dennis, Jr. heard all Motions for Summary Judgment. At the conclusion of the hearing, the Circuit Court denied all of Appellants' Motions and granted all Respondents'

Motions for Summary Judgment. The written orders were signed on June 17, 2021 and July 12, 2021. Appellants filed and served their Notice of Appeal on July 16, 2021.

KEY POINTS

Declarant Respondents request that the Court remain mindful of a few key points while reviewing the below Statement of Facts and Arguments. These key points provide concise reminders of critical facts and issues that underlie this case. Fundamentally, this case asks the question whether the POA has been adequately funded or not; it has.

Appellants' case is simply that Declarants failed to fund the POA in accordance with the Declaration under two theories:

1. Appellants contest the POA's math as to how the Declarant Contribution is calculated (hereinafter the "Math"); and

2. Appellants challenge two Amendments to the Declaration extending Declarants' payment option (hereinafter the "Amendments").

Key Points Regarding the Math

- The Statute of Limitations for Appellants claims on the Math is **two years**. S.C. Code Ann. § 33-31-830(f). (Emphasis added).

- The Declaration provides the Declarant an option to fund the POA by paying the difference between "the actual amount of actual operating expenditures incurred" as compared to revenues.[1] Put another way, if the POA spends more than it takes in, there will be a shortfall and the Declarant has to pay it. Appellants' case is based on their belief that bad debt should be included in this formula as an expense. The bad debt Appellants are talking about is the loss of revenues caused by POA members' failure to pay their dues.[2] Appellants have filed this representative action on behalf of dissimilar members of the POA seeking to charge Declarants with the very dues the POA members themselves failed to pay;

[1] Declaration Article VI, Section 2. Defendants (CCS) 0436-37. Exhibit D of Designation No.7.
[2] Dykes Dec. 5, 2018 42:1-16. Exhibit J of Designation No. 7.

- At the beginning of each year, the POA property manager and the POA Finance Committee set a **budget** for the coming year.[3] The budget included "Developer Contribution" which estimated the Declarant obligation for the coming year. Once the POA approved the budget, the property manager would request the "Developer Contribution" amount from the Declarant, which the Declarant always paid in installments throughout the year.[4] The following year, the POA accountant would conduct an **audit** of the POA's financial statements from the prior year. This audit included a Declarant Contribution Calculation worksheet whereby the POA accountant would apply the formula in the Declaration to confirm the Declarant had made the necessary contributions;[5]

- Appellants allege that Declarants failed to properly calculate the **audit** amount Declarants owed to the POA despite the fact that the Math was calculated by the POA accountant, POA property manager, and POA Finance Committee, *not the Declarant*;

- The POA required a certain **budget** payment amount from the Declarant each year, which the Declarant paid. Appellants now claim that the POA should have asked for more money despite the uncontested facts that:

    - Lot owner dues have stayed consistent from 2006 to date;

    - No special assessments have ever been levied from 2006 to date;

    - No POA bills have ever gone unpaid; and

    - The Reserve Fund of the POA is fully funded;[6]

- Appellants served on the Finance Committee of the POA which assisted in the preparation of the annual budget, inclusive of the requested Declarant contribution to the POA, and is charged with reviewing and making recommendations on all financial matters.[7] Appellant Eisenhardt was one of the initial members in 2012 and Appellant Dykes joined the Finance Committee in 2014;[8]

[3] Eisenhardt June 25, 2020 27:12-19. Exhibit L of Designation No. 7; Black 59:18-21. Exhibit P of Designation No 7.
[4] Skirchak 48:15-18. Exhibit F of Designation No. 7; Atkinson 36:18-22. Exhibit I of Designation No. 7.
[5] Corbett 20:19-21. Exhibit G of Designation No. 7; Dykes June 25, 2020 72:7-13. Exhibit J of Designation No. 7.
[6] Dykes Dec. 5, 2018 29:12 – 30:16. Exhibit J of Designation No. 7; Atkinson 50:6-12. Exhibit I of Designation No. 7; Superior Reserve Study Defendants (CCS) 0553-632. Exhibit K of Designation No. 7.
[7] Finance Committee Charter. BLF-WW-118-20. Exhibit H of Designation No. 7.
[8] January 23, 2012 POA Annual Meeting BLF-WW-20-21. Exhibit V of Designation No. 8. POA Annual Members' Meeting Minutes April 29, 2014 BLF-WW-93-94. Exhibit W of Designation No. 8.

- Article XII, Section 3 of the Declaration specifically provides, "The Declarant herein shall not in any way or manner be liable or responsible for any violation of these restrictions by any person other than itself."[9] The failure of the lot owners to pay their dues (the "bad debt") is a violation of the Declaration for which the Declarant cannot be held liable.[10]

Key Points Regarding the Amendments

- The Statute of Limitations for Appellants claims on the Amendments is **two years**. S.C. Code Ann. § 33-31-830(f). (Emphasis added).

- Appellants seek to invalidate two Amendments to the Wild Wing Declaration which a majority of members (who they presume to represent) voted in favor of. These Amendments were passed in 2011 and 2016. The effect of the Amendments was to prolong the Declarant dues payment option commensurate with years long delays in development caused by the Great Recession;

- The Amendments to the Declaration were adopted by the POA, not the Declarants, by vote of the POA members in accordance with the Declaration;

- One of the Amendments which Appellants seek to overturn was passed in 2011. Appellant Eisenhardt personally attended the Special Meeting and voted in favor of the Amendment;[11]

- Appellant Dykes purchased his property in 2013. At the time of his purchase, the 2011 Amendment was filed of public record, in his chain of title, and referenced in both his Deed and Title Insurance Policy;[12]

- The 2016 Amendment was passed November 4, 2016. Both Appellants Eisenhardt and Dykes voted against the Amendment. The Causes of Action concerning the Amendments were not filed until June 10, 2019, being beyond the applicable **two year** statute of limitations.

All of these points are more fully discussed in the following Statement of Facts and Arguments.

[9] Declaration Art. XII Sec. 3 Defendants (CCS) 0449. Exhibit D of Designation No. 7.
[10] Dykes Dec. 5, 2018 62:23 – 63:4. Exhibit J of Designation No. 7.
[11] Eisenhardt June 25, 2020 34:10, 19-25. Exhibit L of Designation No. 9.
[12] 2011 Amendment to the Declaration Defendants (CCS) 0646 – 49. Exhibit S of Designation No. 8. Plaintiff Dykes Title Insurance Policy and Warranty Deed Plaintiff 002713 – 23. Exhibit T of Designation No. 8; Dykes June 25, 2020 83:5-15, 84:22 – 85:8. Exhibit J of Designation No. 8.

STATEMENT OF FACTS

Wild Wing Plantation is a residential golf community situate within the City of Conway, South Carolina. Wild Wing Company, LLC was the initial Developer and therefore served as the initial Declarant. There have since been three successor Declarants. The Declarant succession is as follows:

Declarant	Dates
Wild Wing Company, LLC	09/26/06 – 12/22/10
SLF IV/SBI Wild Wing, LLC	12/22/10 – 11/09/11
Wild Wing Residential Development, LLC	11/09/11 – 04/13/15
Founders Wild Wing, LLC	04/13/15 – Present

Declarants' rights were transferred by written Assignments. There were no assumptions of Declarant contingent liabilities.

In 2006, the POA was established as a Not-for-Profit Corporation to maintain and administer the Wild Wing community in accordance with the Declaration.[13] The Declaration provides that the affairs of the POA shall be governed by a Board of Directors which was appointed by the Declarant.[14] Once these directors are appointed to the POA Board, they assume a duty to the POA of a Nonprofit entity as Board Members.[15]

Duties of the Board of Directors in administering the POA include levying dues against Lot Owners to defray the Common Expenses and to establish the means and methods of collecting such dues.[16] To assist in carrying out its duties, the Board of Directors hired a property

[13] Declaration Defendants (CCS) 0420. Exhibit D of Designation No. 7.
[14] By-Laws Art. III(A) Sec. 1 Defendants (CCS) 0464. Exhibit D of Designation No. 7.
[15] Courtney 31:6-10. Exhibit E of Designation No. 7.
[16] By-Laws Art. III(C) Sec. 18(b) Defendants (CCS) 0468. Exhibit D of Designation No. 7.

manager, an auditing accountant, and formed a Finance Committee of Members all as permitted by the Declaration. Two of the Members of the Finance Committee were Appellants Dykes and Eisenhardt.

The Declarants were also included in funding the POA. The Declaration provides the Declarant two options. The Declarant could (1) pay regular dues for each lot it owned, or (2) pay what is referred to as "the shortfall". Making up the shortfall is a mechanism to ensure that any deficit of revenues over expenses gets funded and the POA is able to pay its bills. The Declaration provides a formula for the funding of the shortfall at Wild Wing.

> However, until such time as a Lot is conveyed by the Declarant to an Owner other than the Declarant, the Declarant shall be assessed and pay to the Association, in lieu of an assessment thereof, *a sum equal* to the *actual amount of actual operating expenditures incurred* by the Association *for that portion of the calendar year less an amount equal to the total assessments made* by the Association against Owners of Lots other than those owned by the Declarant. The actual operating expenditures for this purpose shall also include any reserve for replacements or operating reserves. (*Emphasis added).*[17]

This formula is common in many community governing documents.[18] The "actual amount of actual operating expenditures incurred" unambiguously refers to the actual payment of an expense. These words do not include "paper expenses" such as depreciation or bad debt.[19] The Declarant Contribution has been calculated the same way since the inception of the POA.

Prior to the start of each year, the property manager presented a proposed budget to the Finance Committee.[20] The Finance Committee and the property manager reviewed the budget line by line.[21] Once the budget was agreed upon, it was presented to the POA Board of Directors

[17] Declaration Article VI, Section 2. Defendants (CCS) 0436-37. Exhibit D of Designation No. 7.
[18] Courtney 17:20 – 18:3. Exhibit E of Designation No. 7.
[19] Corbett 50:4-10. Exhibit G of Designation No. 7. Atkinson 23:4-14. Exhibit I of Designation No. 7.
[20] Skirchak 45:14 – 46:5. Exhibit F of Designation No. 7.
[21] Skirchak 40:24 – 41:2. Exhibit F of Designation No. 7.

for approval.[22] The budget conspicuously includes "Developer Contribution," a specified dollar amount representing the estimated Declarant obligation for the coming year.

The "Developer Contribution" is included in the budget to help keep dues of the Members constant while lots are being developed and sold. This practice has kept Lot Owners dues consistent since 2006. Dues and Developer Contribution offset expenses to create a net zero budget, as is usual practice and consistent with all associations managed by the POA's property management company.[23] Upon POA approval of the budget, the property manager would inform the Declarant of its requested contribution and the Declarant paid in monthly or quarterly installments.[24] This practice has been in place throughout the life of Wild Wing Plantation.

At the beginning of the following year, the POA hired an accounting firm to audit the POA's prior year financial statements. In addition to the audit, the accounting firm annually prepared a Declarant Contribution Calculation worksheet as a check of the estimated budget amount.[25] In recent years, this Declarant Contribution Calculation has been completed by the in house accountant for the property management company, which was also hired by the POA.[26] This worksheet applied the audited annual financial statements to the two Declarant funding options. Beginning in 2014 and continuing to date, these Declarant Contribution Calculations reflect that rather than owing money to the POA, the POA actually owes money to the Declarants.[27] No Declarant has ever sought repayment of its overpayments.

[22] Skirchak 40:24 – 41:2. Exhibit F of Designation No. 7.
[23] Atkinson 35:14-21. Exhibit I of Designation No. 7.
[24] Skirchak 48:15-18. Exhibit F of Designation No. 7. Atkinson 36:18-22. Exhibit I of Designation No. 7.
[25] Corbett 20:19-21. Exhibit G of Designation No. 7. Dykes June 25, 2020 72:7-13. Exhibit J of Designation No. 7.
[26] Dykes June 25, 2020 74:12-15. Exhibit J of Designation No. 7.
[27] Corbett 37:3-17. Exhibit G of Designation No. 7. Developer Contribution Calculation Plaintiff 000333. Exhibit V of Designation No. 7.

Appellants' Claims

The Math

Appellants are two lot owners within Wild Wing Plantation. Appellant Eisenhardt purchased her lot in 2007 and was one of the initial members of the Finance Committee upon its inception in 2012.[28] Appellant Dykes purchased his lot in 2013 and was appointed to the Finance Committee in mid-2014.[29] Appellants' case centers on their belief that bad debt should be included in the formula as an "actual amount of actual operating expenditure incurred". The issue over bad debt originated from a dispute between Appellant Dykes and the POA auditing accountant, Jim Corbett.

On April 28, 2015, Appellant Dykes met with members of the POA property management company, Waccamaw Management, and the POA auditing accountant, Jim Corbett, to review the draft of the 2014 Annual Audit. During this meeting, Appellant Dykes raised concerns about the Declarant Contribution Calculation. Appellant Dykes took issue with the CPA's treatment of the bad debt.[30] Following deliberation and discussion, the Finance Committee commissioned Mr. Corbett to further review, investigate, and advise as to this decision. Mr. Corbett testified that he reviewed the Declaration and Generally Accepted Accounting Principles ("GAAP") along with the other CPAs in his office.[31] He also met with Jane Atkinson, the Chief Financial Officer of Waccamaw Management.[32] Ms. Atkinson had never seen bad debt included as an "actual operating expenditure incurred" in her many years of

[28] Eisenhardt Dec. 5, 2018 10:7-8. Exhibit L of Designation No. 8. January 23, 2012 POA Annual Meeting BLF-WW-20-21. Exhibit V of Designation No. 8.
[29] Dykes Dec. 5, 2018 14:8-9. Exhibit J of Designation No. 8. POA Annual Members' Meeting Minutes April 29, 2014 BLF-WW-93-94. Exhibit W of Designation No. 8.
[30] Finance Committee Minutes May 12, 2015. Plaintiff 000251-53. Exhibit M of Designation No. 7.
[31] Corbett 31:20 – 32:18, 36:7-25. Exhibit G of Designation No. 7.
[32] Corbett 31:20 – 32:18, 36:7-25. Exhibit G of Designation No. 7.

Association accounting.[33] Mr. Corbett took his conclusions back to the Finance Committee explaining that the Declarant cannot be held responsible for the unpaid dues of members of the POA.[34] Despite Appellant Dykes' objection, the Finance Committee and the Board of Directors relied on its accountant, and its property manager, and continued to calculate Declarant dues as it had since 2007.

The Amendments

The Great Recession was in full swing by 2009 which substantially slowed development in Wild Wing Plantation. Virtually no homes were being constructed upon sold lots, and many of those lot owners stopped paying dues. The predicted time-lines contained within the Declaration quickly became obsolete and it was necessary for the continued viability of the community that they be reset.[35] The alternative was financial ruin for the Developer and, consequently, the community.[36]

The initial Declarant, Wild Wing Company, LLC held on as long as it could before The National Bank of South Carolina ("NBSC") threatened foreclosure proceedings in 2010.[37] As a result, the individuals involved in Wild Wing Company, LLC along with a group of other developers banded together with new investors to form the SLF IV/SBI entities.[38] This group bought the note from NBSC and accepted a Deed in Lieu of Foreclosure to save Wild Wing Plantation and other projects throughout the Grand Strand.[39] For each community this group bought, ownership and management entities were organized.

[33] Atkinson 23:8-20. Exhibit I of Designation No. 7.
[34] Corbett Email April 30, 2015 Plaintiff 000144-45. Exhibit N of Designation No. 7.
[35] Black 48:9-13. Exhibit P of Designation No. 9. Black 48:14-17. Exhibit P of Designation No. 9.
[36] Black 48:14-17. Exhibit P of Designation No. 9.
[37] Teal 13:4-12. Exhibit B of Designation No. 9.
[38] Teal 13:4-12. Exhibit B of Designation No. 9.
[39] Teal 13:21 – 14:9. Exhibit B of Designation No. 9.

In 2011 and 2016, the Declaration was amended to extend the period of time for the payment option. The Amendments were passed by vote of the POA pursuant to and in strict accordance with the procedures required by the Declaration.

On November 9, 2011, the Board of Directors of the POA sent out official Notice to all Members of the POA, including Appellant Eisenhardt, giving notice that a Special Meeting of the Members had been called for November 21, 2011 to amend the Declaration.[40] The Notice attached the proposed Amendment to the Declaration for each Member's review. Pursuant to the Notice, a special meeting was held and there was a vote of the membership.[41] Appellant Eisenhardt was in personal attendance at the special meeting, and voted in favor of the Amendment.[42] In fact, the membership voted unanimously in favor of the Amendment.[43]

Appellant Dykes purchased his property in Wild Wing Plantation in 2013, after the 2011 Amendment had been filed of public record.[44] Mr. Dykes' deed and title insurance policy, which he received in his closing documents, specifically provided that the property was subject to the Declaration and all amendments thereto.[45]

The Great Recession drug on far beyond anyone's expectations. On October 21, 2016, the POA again gave Notice to all Members including Appellant Dykes and Appellant Eisenhardt that a Special Meeting would be held for the purpose of amending the Declaration.[46] The Notice again included the proposed Amendment for review by the Members. Additionally, this Notice included a letter from the Declarant clearly stating the purpose and effect of the Amendment. On

[40] Nov. 9, 2011 Notice of Special Meeting BLF-WW-28. Exhibit R of Designation No. 9.
[41] Eisenhardt June 25, 2020 34:10, 17-18. Exhibit L of Designation No. 9.
[42] Eisenhardt June 25, 2020 34:10, 19-25. Exhibit L of Designation No. 9.
[43] Edwards 36:20-21. Exhibit O of Designation No. 9.
[44] 2011 Amendment to the Declaration Defendants (CCS) 0646 – 49. Exhibit S of Designation No. 8.
[45] Plaintiff Dykes Title Insurance Policy and Warranty Deed Plaintiff 002713 – 23. Exhibit T of Designation No. 8; Dykes June 25, 2020 83:5-15, 84:22 – 85:8. Exhibit J of Designation No. 8.
[46] Oct. 21, 2016 Notice of Special Meeting BLF-WW-2838-45. Exhibit U of Designation No. 9.

November 4, 2016, the meeting was called, Noticed, and conducted in accordance with the Declaration.[47] The votes were then tallied and the accuracy of the tallies was ensured by the property manager.[48] Once again, the vote passed with the two-thirds majority required by the Declaration.[49] Appellants Dykes and Eisenhardt both participated in the vote and voted against the Amendment.

STANDARD OF REVIEW

"Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 56, SCRCP; South Carolina Prop. & Cas. Guar. Ass'n. v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). "In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial." NationsBank v. Scott Farm, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995) (citing Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991)). "Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings." Id.

ARGUMENT

I. The Circuit Court correctly ruled that there exists no fiduciary obligation of the Declarants in this matter.

Appellants incorrectly contend that the Court of Appeals Opinion in Walbeck v. I'On Co., LLC, 426 S.C. 494, 827 S.E.2d 348 (Ct. App. 2018) is controlling in this matter. Walbeck specifically addresses whether a developer owes a fiduciary duty when conveying title to

[47] Skirchak 53:11-19. Exhibit F of Designation No. 9.
[48] Skirchak 55:11-13. Exhibit F of Designation No. 9.
[49] Nov. 4, 2016 Minutes of Special Meeting BLF-WW-365. Exhibit V of Designation No. 9.

subdivision amenities to a homeowners association. As discussed in Walbeck, there are instances when affirmative acts of Declarants carry with them a duty to the homeowners association. Conversely, Walbeck identifies instances in which no duty exists. Examples in which the actions of a Declarant involve duties to a homeowners association include ensuring the common areas are properly constructed, that the common areas are in good repair when they are conveyed to a homeowners association, and that the homeowners association is adequately funded at the time of turnover of control. None of these Declarant actions or obligations are at issue in this case.

Appellants' case relies upon the fundamental misstatement that the Declarants ARE the Board of Directors of the POA. The Declarants are not the Board of Directors of the POA and the actions of the POA are not the actions of the Declarants. Appellants misuse these terms interchangeably. This case involves the actions of the POA, not the Declarants. Appellants seek to use the Court's Opinion in Walbeck to impose a vicarious fiduciary obligation on the Declarants through the actions of appointed Board members. There exists no rule of law that an appointing Declarant is somehow vicariously liable for the actions of its appointee Board members. As discussed below, these actions must be reviewed under the Business Judgment Rule and S.C. Code Ann. § 33-31-830 of the South Carolina Nonprofit Corporation Act.

The Math was calculated by the joint efforts of the POA Accountant, Property Manager, and Finance Committee.

Appellants have misrepresented the responsible parties for the calculation of the Math. The Math was not calculated by the Declarant or Gilford Edwards. The reality that neither the Declarants nor Gilford Edwards were involved in the calculation of the Math is fatal to the Appellants' claims. Appellants are therefore put to creating and advancing unreasonable inferences of fact and misinterpretations of law.

Appellants misconstrue a single statement from Mr. Edwards' testimony to fabricate the false theory that Mr. Edwards orchestrated the Math. During Mr. Edwards' deposition, Appellants' counsel questioned him regarding his understanding of Appellant Dykes' claims in this lawsuit. Mr. Edwards testified that he understood what Appellants are contending in this lawsuit, but that he disagreed. Continuing that line of questioning, Appellants' counsel inquired:

> Q. Okay. And did you – what did you do as a board member to ensure that the declarant was making the proper contributions under the regime documents?
>
> A. I read the documents and did what they said.
>
> Q. You didn't rely on any accountants for that?
>
> A. No.[50]

This is the full extent of the questions and answers relied upon by Appellants. This exchange dealt with Mr. Edwards' view of the Math <u>after the lawsuit had been filed</u>, it did not refer to the time at which the Math was calculated. From the above exchange, Appellants have fabricated the following unreasonable inferences in their effort to escape Summary Judgment:

- Gil Edwards, a member of the Board of Directors from 2011 until 2015, testified that he determined that bad debt was not to be considered a POA expense for purposes of calculating the Declarant contribution. – *He did not*;

- Mr. Edwards' testimony is that he is the one who made the determination about not including the bad debt as an "expenditure incurred" relative to the Declarant Funding Alternative. – *It was not*;

- The Respondents who were or are members of the Board of Directors were complicit in the underfunding and, at least in the case of Mr. Edwards, was responsible for it. – *They were not*; and

- The accounting was at the direction of Mr. Black's boss, Mr. Edwards. – *It was not*.

[50] Edwards 32:13-19. Exhibit D of Designation No. 16.

None of these statements are true as Mr. Edwards never made any of the above claims. Respondents were not aware that Mr. Edwards' testimony had been misconstrued in this way until these misrepresentations appeared in Appellants' Memorandum in Opposition to Summary Judgment. In response, Mr. Edwards executed an Affidavit to remove all doubt. Mr. Edwards' Affidavit confirmed that he did not participate in the calculation of the Math, but that it was instead a joint effort of the POA accountant, POA property manager, and POA Finance Committee.[51]

The Amendments were validly passed by the POA in accordance with the Declaration and South Carolina law.

Appellants allege the Declaration was unilaterally amended by the Declarants. It was not. The Amendments were passed by two-thirds majority vote of the POA in accordance with the Declaration.

Declarants acknowledge that their voting power could be determinative. Assuming arguendo that Declarants had unilaterally amended the Declaration, Appellants have asked the Court to review these Amendments under the wrong standard. Appellants claim the Amendments should be governed by a fiduciary standard and seek to shift the burden to the Respondents to show the benefits of the Amendments. This is not the standard. Appellants again incorrectly argue that the Amendments should also be reviewed under Walbeck despite the fact that there is a South Carolina case directly on point. The Amendments must be reviewed by the five factors set forth in Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006). See AJG Holdings LLC v. Dunn, 392 S.C. 160, 165, 708 S.E.2d 218, 221 (Ct. App. 2011), aff'd 410 S.C. 346, 764 S.E.2d 912 (2014). A developer

[51] Affidavit of Gilford Edwards 3:17-18. Exhibit E of Designation No. 16.

may reserve to himself, in his sole discretion, the right to amend restrictive covenants running with the land provided five conditions are met:

1. The right to amend the covenants must be unambiguously set forth in the original declaration of covenants;

2. The developer, at the time of the amended covenants, must possess a sufficient property interest in the development;

3. The developer must strictly comply with the amendment procedure as set forth in the declaration of covenants;

4. The developer must provide notice of amended covenants in strict accordance with the declaration of covenants and as otherwise may be provided by law; and

5. The amended covenants must not be unreasonable, indefinite, or contravene public policy. Queen's Grant II Horizontal Prop. Regime, 368 S.C. at 350, 628 S.E. 2d at 907.

Both the 2011 and the 2016 Amendments meet these five conditions. Contravention of public policy refers to violations of public policy as expressed in constitutional provisions, statutory law, or judicial decisions. White v. J.M. Brown Amusement Co., 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004). These amendments do not violate state law or decisions of the courts. The provisions which were amended were included in the Declaration. The Amendments did not seek to change the substance of the provisions in the Declaration, but rather extended the time period of the Declarant's payment option so that development could continue. As a result, almost all lots in Wild Wing have now been sold. These Amendments did not produce harm, but rather led to more homeowners in the community, benefitting the Declarant, the POA, and each individual lot owner.[52] The Amendments to the Declaration were proper in accordance with the correct standard by which they are to be reviewed under South Carolina law.

[52] Edwards 31:5-13. Exhibit O of Designation No. 9; Black 47:23 – 48:17, 50:3-24. Exhibit P of Designation No. 9; Plankers 23:1-14. Exhibit Q of Designation No. 9; Teal 33:12 – 34:6. Exhibit B of Designation No. 9.

II. The Circuit Court correctly ruled that Appellants' claims regarding the Math are barred by the Business Judgment Rule as modified by the South Carolina Non-Profit Corporation Act.

In South Carolina, the actions of the directors of a nonprofit POA are governed by the Business Judgment Rule as modified by the subsequently passed South Carolina Nonprofit Corporation Act.

> In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule,' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action. Goddard v. Fairways Dev. Gen. P'ship, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993).
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> In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by… legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence… or a committee of the board of which the director is not a member… S.C. Code Ann. § 33-31-830(b).
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> **A director is not liable to the corporation, a member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section.** S.C. Code Ann. § 33-31-830(d). (Emphasis added).

The estimation and confirmation of the Declarant contribution amount has always been a POA function. The Declarants have never played any role in determining the amount to be paid. When Appellant Dykes raised his concerns with the audit calculation, the POA accountant was tasked to review whether bad debt should be included and after reviewing the Declaration and GAAP, consulting with other CPAs in his office, and consulting with the CFO of Waccamaw Management, advised the POA bad debt was properly excluded. Despite Appellant Dykes' objection, the POA Finance Committee and the POA Board of Directors chose to rely upon their POA accountant and property manager and continued to calculate Declarant dues accordingly. The decisions regarding the Math fall squarely within the Business Judgment Rule as modified by the South Carolina Nonprofit Corporation Act and are not subject to judicial review.

III. The Circuit Court correctly ruled that Appellants' claims are barred by the Statute of Limitations.

Appellants' claims on both the Math and the Amendments are barred by the Statute of Limitations.

> An action against a director asserting the director's failure to act in compliance with this section and consequent liability must be commenced before the sooner of (i) three years after the failure complained of or (ii) **two years** after the harm complained of is, or reasonably should have been, discovered.
> S.C. Code Ann. § 33-31-830(f). (Emphasis added).

The discovery rule does not require absolute certainty a cause of action exists before the statute of limitations begins to run. Bayle v. South Carolina DOT, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001). The relevant inquiry is not what Appellants subjectively knew at specific points in time, but rather, at what point Appellants objectively had "enough information such that [they] should have acted promptly to determine whether a cause of action might exist against [Respondents] for the injuries claimed in this case." Ashley River Indus., Inc. v. Mobil Oil Corp., 135 F. Supp. 2d 733, 742 (D.S.C. 2000), aff'd 245 F.3d 849 (4th Cir. 2001).

The Math

Appellants first filed their claims on the Math on June 30, 2017 seeking to recover damages dating back to 2008. Applying the discovery rule, Appellants' claims are absolutely barred.

Appellant Eisenhardt became a member of the POA in 2007. As a member of the POA, Appellant Eisenhardt was afforded the right and opportunity to inspect all books of account at any time.[53] On January 23, 2012, the Finance Committee was established and Appellant Eisenhardt was appointed as one of the initial members.

[53] By-Laws Art. VI, Section 4(a) Defendants (CCS) 0474. Exhibit D of Designation No. 8.

Appellant Dykes became a member of the POA in 2013. On April 29, 2014 Appellant Dykes was appointed to the Finance Committee. One year later, on April 28, 2015, Appellant Dykes raised his concerns regarding the Math to Waccamaw Management and the POA accountant.[54] Two days later, the POA accountant reported his findings that bad debt was properly excluded.[55] Minutes of the Finance Committee meeting are in the Record on Appeal and confirm these dates.

The limitation period in the statute does not reset with every new lot purchase. As Members of the POA, Appellants and the Members they presume to represent have complete access to all books and records of the POA.[56] Moreover, Appellants and other Members of the POA were members of the Finance Committee more than two or even three years prior to the initiation of this action. The Finance Committee is intimately familiar with the financials of the POA especially considering its role in setting the budget, inclusive of the requested Declarant Contribution. Furthermore, Appellant Dykes raised the issues now complained of more than two years prior to the commencement of this action. Appellants and the members of the POA they presume to represent knew or should have known of any alleged underfunding of the Declarants more than two or even three years prior to filing this lawsuit.

The Amendments

Appellants first filed their claims on the Amendments on June 10, 2019 seeking to recover damages from Amendments passed in 2011 and 2016. On November 21, 2011, Plaintiff Eisenhardt was in personal attendance at the special meeting for the Amendment, and voted in

[54] Finance Committee Minutes May 12, 2015. Plaintiff 000251-53. Exhibit M of Designation No. 8.
[55] Corbett Email April 30, 2015 Plaintiff 000144-45. Exhibit N of Designation No. 8.
[56] By-Laws Art. VI Sec. 4(a) Defendants (CCS) 0474. Exhibit D of Designation No. 8.

favor of the Amendment. The 2011 Amendment passed with a unanimous vote of the membership.

Appellant Dykes purchased his property in Wild Wing in 2013 with record notice of the 2011 Amendment. Property Owners are charged with constructive notice of instruments recorded in their chain of title. S.C. DOT v. Horry County, 391 S.C. 76, 84, 705 S.E.2d 21, (2011) (quoting Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001)). A party has constructive notice if the party knows of "facts and circumstances of an injury [that] would put a person of common knowledge and experience on notice that some right… has been invaded or that some claim against another party might exist." Barr v. City of Rock Hill, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (1998). Failure of the injured party to comprehend the full extent of damages is immaterial. Id. "The date on which discovery should have been made is an objective, not subjective, question." Id.

In 2016, both Appellant Dykes and Appellant Eisenhardt received Notice of the Special Meeting to vote on the proposed Amendment and on November 4, 2016, cast their votes against the Amendment. At that point in time, Appellants had knowledge of the harm complained of and their claims are barred by the two year statute of limitations in S.C. Code Ann. § 33-31-830(f).

All of Appellants' claims are time barred. In acknowledging this, Appellants seek to avoid the Statute of Limitations through equitable tolling. "[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." Hooper v. Ebenezer Senior Services and Rehabilitations Center, 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009). "[E]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." Id. at 32. "The party claiming

the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use." Id.

Appellants have always enjoyed the ability to bring a derivative action just as they have done here. At no time has any financial matter been withheld or concealed from the Appellants or any other Lot Owner. In fact, the opposite is true. Appellants were not misled or prevented from filing their case at any time. Appellants have failed to establish a compelling reason to justify the use of equitable tolling under all the circumstances.

Appellants also face preservation issues in presenting their equitable tolling argument to this Court. Appellants' Brief acknowledges that the Circuit Court ignored their equitable tolling argument and that it is not mentioned in any of the Orders. "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Appellants have not filed a motion to alter or amend the judgment to preserve the equitable tolling issue for appellate review.

Additionally, Appellants' new arguments for the Adverse Domination Doctrine and the four part Statute of Limitations analysis have not been preserved for review. "It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). These arguments have been raised for the first time on appeal and therefore are not preserved for appellate review.

IV. The Circuit Court correctly ruled that Appellants may not bring an action for Unfair Trade Practices in a representative capacity.

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, *but not in a representative capacity*, to recover actual damages. S.C. Code Ann. § 39-5-140(a) (Emphasis added).

"An unfair trade practices claim may not be brought in a representative capacity." Wogan v. Kunze, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (Ct. App. 2005).

Appellants presume to bring this lawsuit as representatives of the POA and its dissimilar members who have joined the POA at different times, paid different amounts of dues, and may or may not have been involved in the vote on each Amendment.[57] Appellants brought a Cause of Action under the South Carolina Unfair Trade Practices Act in this representative capacity. South Carolina law makes clear that Appellants may not bring an action for unfair trade practices in a representative capacity.

Appellants' argument as to the Unfair Trade Practices Act has not been preserved for appellate review. Appellants' argument that these are not representative claims was not raised to the Circuit Court and is being raised for the first time on appeal. "It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." Staubes, 339 S.C. at 412, 529 S.E.2d at 546.

CONCLUSION

Based on the foregoing, the Circuit Court Orders granting Summary Judgment in favor of Respondents should be affirmed.

[57] Dykes June 25, 2020 86:5-7. Exhibit J of Designation No. 10.