THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Judge of the South Carolina Business Court
Case No.: 2017-CP-26-04187

Appellate Case No. 2021-000767

C. Barry Dykes and Barbara Eisenhardt, Individually and Derivatively on Behalf of the Wild Wing Plantation Property Owners' Association, Inc.,

Appellant,

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 RESPONDENTS RALPH R. TEAL, JR.; GRAEME T. BLACK; H. GILFORD EDWARDS; RICK SHULTZ; RICK TAYLOR; AND THOMAS PLANKERS

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II. Did the Circuit Court correctly rule that Appellants' claims were barred by the business judgment rule when the Appellants' are challenging the Individual Respondents' *intra vires* decisions made within the scope of their authority for which they did not receive any personal benefit at the expense of the Association?

III. Did the Circuit Court correctly rule that Appellants' claims were barred by the South Carolina Non-Profit Corporation Act when the Individual Respondents relied upon a certified public accountant and property manager to calculate the declarant funding alternative and extend its duration?

IV. Did the Circuit Court correctly rule that Appellants' claims were barred by the applicable statute of limitations when Appellants had knowledge of the Association's governing documents and finances, and the declarant's yearly decision to fund a shortfall, but did not bring a claim until well beyond three years after they knew of a possible claim?

V. Did the Circuit Court correctly grant summary judgment on Appellants' South Carolina Trade Practices Act claim when the Act prohibits claims in a representative capacity and Appellants cannot show they themselves suffered an injury-in-fact?

STATEMENT OF THE CASE

Appellant adequately sets forth a statement of the case.

STATEMENT OF FACTS

This case involves Appellants, two long-time and involved members of Wild Wing Plantation Owners' Association (the Association), asking that a court review more than a decade of the Association's accounting records and decision making at a live bench trial in an attempt to force former declarants and board members to pay an exorbitant sum to fund non-existent historical shortfalls pursuant to the Appellants' interpretation of the declarant funding obligation in the Association's governing documents. The circuit court, having before it sufficient undisputed material facts and deposition testimony to render a decision, dismissed Appellants' claims on multiple grounds—the same grounds upon which this Court should affirm.

Appellants Barry Dykes and Barbara Eisenhardt are members of the Association, and brought this action as a shareholder derivative lawsuit. Appellants named, among others, Ralph R. Teal, Jr., Graeme T. Black, H. Gilford Edwards, Rick Shultz, Rick Taylor, and Thomas Plankers. This brief will address those respondents and their role in Appellants' fable.

Background and Declarants

Wild Wing Plantation is a residential development located near the border of Conway and Myrtle Beach, South Carolina. The Association was formed on June 14, 2006, as a non-profit corporation. Since its inception, four different entities have served as the Declarant, maintaining Declarant's rights within Wild Wing Plantation pursuant to the Declaration of Protective Covenants, Restrictions, Easements, Charges and Liens for Wild Wing Plantation (Wild Wing Covenants) and other governing documents (collectively "Governing Documents").

The initial declarant, Wild Wing Company, LLC (Declarant One), was organized on or around December 7, 2005. ***See* Am. Compl. at 5, ¶ 28**. Sunstar, LLC was the managing member of Declarant One and held 75% of the voting and financial rights. Ralph Teal managed Sunstar. ***Id.*** In September 2006, Declarant One filed the Wild Wing Covenants. ***See* MSJ, Ex. A.** Pursuant to these Covenants, the Association was to be governed by a Board of Directors. ***Id.*** The Covenants use the term "Declarant" to refer to the developer, and vest in the Declarant certain rights and obligations. ***Id.* at 3, ¶ (e).**

Declarant One remained the declarant from September 2006 through the real estate downturn, until it assigned its rights to SLC IV/SBI Wild Wing Company, LLC (Declarant Two) in December 2010. **Am. Compl., ¶ 47.** Declarant Two was jointly owned by two other entities, SLF IV/SBI Properties and SLF IV/SBI JV, both of which were managed by Stratford Land/SB Investments, LLC. **Am. Compl., ¶ 44-45.** Ralph Teal, in turn, managed Stratford Land. Another

entity, Real Star Management, LLC, assisted managing the assets of SLF IV/SBI IV, including Wild Wing Plantation assets. **Am. Compl. ¶ 52.** Gilford Edwards served as principal of Real Star Management, and served on the Association Board. **Am. Compl. ¶ 54.** Graeme Black is an employee of Real Star Management and also served on the Association Board. **Am. Compl. ¶ 53.** Declarant Two remained the declarant for less than a year. ***See*** **Am. Compl. ¶ 55.**

On November 9, 2011, Declarant Two assigned its rights to Wild Wing Residential Development, LLC (Declarant Three), who served as declarant until April 2015. ***Id.*** According to the Complaint, the sole member of Declarant Three was SLF IV/SBI Development Holdings, an entity managed by SLF IV/SBI Properties (a joint owner of Declarant Two, managed by Ralph Teal through Stratford Land). **Am. Compl. ¶56.** In April 2015, Declarant Three assigned its rights to a fourth declarant, who remains the Declarant to date. **Am. Compl. ¶ 69.** Respondents Ralph Teal, Graeme Black, and Gilford Edwards were members of the Association's Board of Directors until April 2015.

In April 2015, Founders Group International, LLC (Founders) purchased the Declarant's rights and assigned the rights to Founders Wild Wing, LLC, who became the Fourth Declarant. **Id.** Roughly contemporaneously, Founders also purchased nineteen golf courses in the Grand Strand area. Respondents Rick Schultz, Rick Taylor, and Thomas Plankers had all been employed as golf course managers at courses Founders purchased, thereby becoming Founders' employees. In May 2015, Founders appointed Shultz, Taylor, and Plankers to the Association's Board of Directors, with Taylor serving as president, Shultz as vice-president, and Plankers as secretary-treasurer. **Am. Compl. 74.** Plankers and Taylor resigned from the Board after leaving the employment of Founders in 2017.

Teal, Black, Edwards, Schultz, Taylor, and Plankers are referred to below as "Individual Respondents."

Wild Wing Covenants & Declarant's Funding Obligation

This appeal concerns a specific provision in the Covenants that gives the declarant the ability to fund a shortfall rather than paying an annual assessment on a per lot basis—Article VI, Section 2 of the Wild Wing Covenants. ***See*** **MSJ, Ex. A, 17–19**. This section of the Covenants broadly covers the Association's right to levy assessments on property owners within the Wild Wing Plantation to promote the goals of "health, safety and welfare" of all residents. ***Id.*** This includes annual assessments, and as needed, special assessments. Article VI, Section 2, permits the Declarant to pay a single annual assessment instead of paying on a per-lot basis:

> [U]ntil 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.

Id. **at 18 (emphasis added).** Simply stated, the Declarant must fund a shortfall—the difference between the Association's actual operating expenditures and "assessments made" by the Association against all other owners.

Calculation of Funding Obligation

As detailed above, the primary issue in this case is the funding requirements of the Declarants and the calculation of these amounts over the course of several years. An overview of the process through which the annual funding options were calculated and paid by the Declarants

reveals the limited role of these Individual Respondents—and all other members of the Board of Directors—in decisions relative to the annual funding requirement.

At the beginning of each fiscal year, the Association's Finance Committee, with the assistance of the property management group hired by the Association[1], created an annual budget. ***See* G. Black Depo., 59:18-21, Eisenthardt Depo. 27:1-19**; **Skirchak Depo. 45:14-46:5.** The budget projected annual expenses and annual revenues for the Association. The annual budget also projected a shortfall—the deficit potentially owed by the Declarant at the end of the fiscal year. ***See* G. Black Depo., 75:7-24.** The Declarant would make installment payments during the fiscal year to fund the projected shortfall. ***See* G. Black Depo. 76:13-77:2.**

At the end of each fiscal year, the Association hired an accounting firm to audit the Association's financial statements. **Corbett Depo. 20:19-21; Dykes Depo. 72:7-13.** In conjunction with the audit, the accounting firm also prepared a "Developer Assessment" worksheet. **Id.** This worksheet applied certain relevant figures from the audited annual financial statements to the Declarant funding options as set forth in the Declaration. This yielded two options: (1) the Declarant could fund the shortfall (i.e., the difference between the actual amount of actual operating expenditures incurred by the Association . . . less an amount equal to the total assessments made); or (2) the Declarant could pay an assessment for all lots it owned within Wild Wing Plantation. ***See* MSJ, Ex. A, 17–19.** As permitted by the Declaration, the Declarant then selected its funding mechanism, and, when required, paid the identified amount to the Association.

Ultimately, the Board of Directors—and Individual Respondents—only reviewed and approved annual budgets as prepared by the Finance Committee and property management groups.

[1] The Association initially retained Wright Management, Inc., then Waccamaw Management, LLC.

These Individual Respondents were not directly involved in the process of preparing the annual budgets, auditing the annual financial statements, or determining the Declarant's shortfall contribution amount as presented in the Developer Assessment worksheet. Instead, the Board of Directors relied upon the Finance Committee, the property management group, and accounting professionals to prepare budgets, track the Association's finances, perform annual audits, and determine the appropriate Declarant "shortfall" contribution.

2011 & 2016 Amendments of the Covenants

Also relevant to this appeal is the Association's extension of the Declarant's funding obligation, which was set to automatically expire. In November 2011, the Association's Board of Directors, including some Individual Respondents serving as Board members at the time, called a special meeting for the purpose of voting to amend the Covenants to extend the Declarant funding option from December 31, 2010, until December 31, 2016. ***See*** **Nov. 9 Notice of Meeting.** Pursuant to the allocation of voting rights per the Covenants, the Declarant had sufficient votes to pass this amendment. **Edwards Depo. 36:20-21.** Appellant Eisenhardt attended the meeting and voted for the amendment. **Eisenhardt Depo. 34:10, 19-25.** A majority of the members of the Association voted again in 2016 to amend the Covenants and extend the Declarant funding alternative.

Importantly, the entire time the Association has existed, Owner dues have stayed consistent, no special (additional) assessments have been levied, the Association has met its financial obligations, and the Reserve Fund has been fully funded. **Dykes Depo. 29:12-30:16; Atkinson Depo. 50:6-12; Superior Reserve Study(CCS 553-632).**

Appellants eventually decided to file suit on behalf of the Association based on their misinterpretation of the Wild Wing Covenants and the Declarant's funding obligation. With

respect to the Individual Respondents, Appellants asserted claims for (1) breach of fiduciary duty, (2) unjust enrichment, and (3) violation of the South Carolina Unfair Trade Practices Act. ***See*** **Amended Complaint**.

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court under Rule 56, SCRCP." *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003) (quoting Rule 56(c), SCRCP).

An issue is considered "material" if the facts alleged would "constitute a legal defense or are of such a nature as to affect the result of the action." *Nelson v. Piggly Wiggly Cent., Inc*., 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010). Although all *reasonable* inferences from the facts are to be viewed in the light most favorable to the nonmoving party, the nonmoving party cannot create a genuine issue of material fact by speculation, guesswork, or an inferential leap. *Nelson*, 390 S.C. at 390, 701 S.E.2d at 780 (holding one may not create a genuine issue of material fact by speculation or an "inferential leap"); *Saluda Motor Lines, Inc. v. Crouch,* 300 S.C. 43, 45, 386 S.E.2d 290, 292 (Ct. App. 1989). While the standard requires facts to be construed in favor of the non-moving party, the construction of statutes, precedent, and unambiguous contracts are questions of law for the court and are not to be interpreted or construed in the favor of a non-moving party at the summary judgment stage. *See, e.g.*, *I'On, L.L.C. v. Town of Mt. Pleasant*, 338

S.C. 406, 411, 526 S.E.2d 716, 718–19 (2000); *Dep't of Transp. v. M & T Ent.*, 379 S.C. 645, 667 S.E.2d 7, 13 (Ct. App. 2008).

Summary judgment is mandated when a party fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 59, 518 S.E.2d 301, 305 (Ct. App. 1999). In such a situation, the moving party is entitled to judgment as a matter of law because the non-moving party has failed to demonstrate a genuine issue of material fact as to a necessary part of that party's claim. *Id*.

When parties file cross-motions for summary judgment, the parties concede the issues should be decided as a matter of law and further development of the facts is not necessary. *See Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 319, 731 S.E.2d 869, 872 (2012); *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011).

ARGUMENT

I. Appellants' Issue I does not concern the Individual Respondents and, therefore, the Individual Respondents do not need to address the Issue.

In the first issue, Appellants argue the Circuit Court erred in granting summary judgment and dismissing the Appellants' breach of fiduciary duty claim against the Declarants because, pursuant to *Walbeck*, the facts in the light most favorable to Appellants show (1) the Declarants failed to accurately calculate the Declarant funding obligation, and (2) the Declarants amended the Covenants for their sole benefit. ***See* App. Br. at 23-24** ("Taken in the light most favorable to the Appellants, the evidence establishes the Declarants breached their fiduciary obligations to the Association, both with respect to failure to properly calculate the Declarant contributions under the Declarant Funding Alternative and by passing two amendments extending the Declarant

Funding Alternative . . . ."). Appellants' brief distinguishes between the Declarants and the individual Board Members. ***See*** **App. Br. at 3-4**.

Because Appellants' argument in Issue I is tailored to the Declarants and not the individual Board Members, and the Individual Respondents were Board Members, Appellants' Issue I does not concern the Individual Respondents and no response is necessary. However, in the event this Court determines or Appellants argue otherwise, Individual Respondents adopt and incorporate the arguments of Declarant Respondents in their brief in response to Issue I. Further, as explained in Part II below, the Individual Respondents' decisions fall within the business judgment rule and, as such, there is no evidence they breached any fiduciary obligation to the Association.

II. This Court should affirm the circuit court's ruling that Appellants' claims are barred by the business judgment rule because the Individual Respondents actions were *intra vires*, they did not personally benefit from the challenged Board decisions, and the decisions were not at the expense of the Association.

Appellants assert the circuit court erred because (1) the business judgment rule does not apply to Respondents' alleged self-dealing, and (2) *Walbeck v. I'On Co., LLC* bars application of the business judgment rule. **App. Br. at 24**. As it relates to the individual board members (Individual Respondents), Appellants assert the business judgment rule does not apply because the Individual Respondents engaged in *ultra vires* acts—self-dealing. ***See*** **App Br. at 26**. As a failsafe, Appellants argue that the determination of whether the Individual Respondents' actions were *intra* or *ultra vires* was a question of fact requiring trial and not appropriate for summary judgment. **App. Br. at 26, 27**.

The circuit court correctly ruled that Appellants' claims against the Individual Respondents are barred by the business judgment rule. A corporation can only "exercise the powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto." *Lovering v. Seabrook Island Prop. Owners Ass'n*, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct. App. 1986).

When a corporation acts within its scope of authority, such conduct is considered intra vires. "Acts beyond the scope of a corporation's powers as defined by law or its charter are ultra vires." *Id.* In South Carolina, the business judgment rule operates to preclude judicial review of intra vires actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct. *Dockside Ass'n, Inc. v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) (internal citation omitted).

"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). "The burden of proving good faith is not on the governing board; the burden of proving a lack of good faith is borne, rather, by those challenging the board's actions." *Dockside Ass'n*, 294 S.C. at 87, 362 S.E.2d at 874; *see also Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 781 S.E.2d 903 (2016). "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts without corrupt motives and in good faith." *Kuznik v. Bees Ferry Assocs.,* 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct. App. 2000).

Here, the circuit court ruled that the Individual Respondents' actions were *intra vires*. **Order, p.8.** On appeal, Appellants have failed to establish that the actions of the Individual Respondents were *ultra vires*. Appellants' arguments are limited to two general categories: (1) calculating the Declarant funding obligation, and (2) the 2011 Amendment. A plain reading of the Wild Wing governing documents indicates the Board is authorized to prepare and adopt budgets,

establish how to collect assessments, to make rules and regulations, and to employ professionals (including management agents and certified public accountants) to assist in discharging its duties.

The undisputed evidence shows that the Board, and the Individual Respondents, followed their authority under the covenants in relying upon the Finance Committee, the property management group, and accounting professionals to prepare budgets, track the Association's finances, perform annual audits, determine the appropriate Declarant "shortfall" contribution, and in amending the Wild Wing covenants. Thus, the Board and Individual Respondents' actions were unquestionably *intra vires* and subject to the business judgment rule.

Because the Individual Respondents' actions were *intra vires*, Appellants must prove the business judgment rule does not apply because the Individual Respondents' decisions were the product of bad faith, dishonesty, or incompetence. *See Goddard*, 310 S.C. at 414, 426 S.E.2d at 832. Appellants argue the Individual Respondents engaged in self-dealing and this obviates application of the business judgment rule, relying on *Walbeck*'s recognition 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." *Walbeck v. I'On Company, LLC*, 426 S.C. 494, 517, 827 S.E.2d 348, 360 (Ct. App. 2019); **App Br. at 24**. As a threshold matter, *Walbeck* does not apply to the Individual Respondents because the Individual Respondents were not developers. The Individual Respondents were Board Members appointed by the Declarants. Thus, *Walbeck* does not affect the analysis as it relates to Individual Respondents.

Even if *Walbeck* applied, the question would be whether the Individual Respondents personally benefited from the challenged actions at the expense of the Association. There is absolutely no evidence that any of the Individual Respondents personally benefited from relying upon an outside accountant to determine the Declarant's funding obligation, or by extending the

funding alternative through the 2011 and 2016 Amendments. Because there is no such evidence, the Individual Respondents' decisions are protected by the business judgment rule and this Court should affirm the circuit court's ruling.

Furthermore, regardless of the Individual Respondents' actions, there is no evidence that any benefit received from calculating the funding alternative or extending the alternative was at the *expense* of the Association. The Association was never underfunded and was able to meet all of its financial obligations. Appellants' arguments challenging the method of calculating the funding alternative are therefore tantamount to asserting the Association could have received a more favorable calculation—entirely different from arguing one party benefited at the *expense* of another, which is required to avoid the business judgment rule. At a basic level, the purpose of the funding alternative was to give the Declarant the opportunity to pay less to the Association than it would if it paid on a per-lot basis, but to pay enough to ensure the Association did not fall short of its financial obligations. The Association is, after all, a not for profit entity. Further, extending the funding alternative through the 2011 and 2016 Amendments benefited the Association. It permitted the Declarant to sell its lots more cheaply, encouraging sales and creating activity which would bring in more activity.

In sum, the Individual Respondents' actions in relying upon outside consultants (property managers and accountants) to determine the Declarant's funding obligation and to extend the funding alternative were *intra vires* acts because the Board had the authority to act accordingly. Further, there is no evidence that the Individual Respondent's actions were the product of bad faith, dishonesty, or incompetence. Additionally, even if *Walbeck* applied to the Individual Respondents, because the Individual Respondents did not personally benefit from their *intra vires* acts while Board members, and the decisions were not at the expense of the Association, the circuit

court did not err in finding Appellants' causes of action were barred by the business judgment rule. Accordingly, this Court should affirm.

III. This Court should affirm the circuit court's ruling that Appellants' claims are barred by the S.C. Nonprofit Corporation Act because the Individual Respondents relied upon a certified public accountant and property manager to determine the declarant funding alternative and extend its duration.

Appellants argue the Declarant (which appears to include the Individual Respondents in this Issue) is not insulated from liability under the S.C. Nonprofit Corporation Act (the Act) because the Act does not apply in light of the alleged self-dealing. **App. Br. at 29**. Appellants cite no specific law in support of their position, and instead rely on similar theories as their arguments for obviating the business judgment rule. **App. Br. at 29**. The circuit court correctly granted summary judgment because the plain language of the Act protects individual directors from liability for relying on outside consultants in discharging their duties.

Under the Act, directors must discharge their duties in good faith and in a manner the director believes is in the best interests of the corporation. *See* S.C. Code Ann. § 33-31-830(a). In discharging their duties directors may, however, rely on public accountants or other persons as to matters that are within that person's competence. *See id.* § 830(b)(2). Directors are not liable to anyone if they discharge their duties in accordance with section 830. *Id.* § 830(d) ("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.").

Official comments to the statute demonstrate the legislature intended to give considerable deference to informed decisions of directors: "The directors need not be right, but they must act with common sense and informed judgment. The duty of care recognizes that directors are not guarantors of the success of investments, activities, programs, or grants. It allows leeway and discretion in exercising judgment." S.C. Code Ann. § 33-31-830, cmt. 2. The comments likewise

caution courts against second guessing directors' decisions. *Id.* ("A court should not be harsh in second guessing directors who in good faith make a judgment that proves incorrect. Although some decisions turn out to be unwise or the result of a mistake in judgment, it is unreasonable to reexamine these decisions with the benefit of hindsight.").

There are no reported decisions on the application of this statute, but on at least one occasion the court of appeals affirmed summary judgment based on this statute when a board of directors of a homeowner's association relied upon various professionals, including accountants and CPAs, when it was confronted with financial issues related to the association. *Smith v. Dockside Ass'n, Inc.*, 2005 WL 7083482, at *3-4 (S.C. Ct. App. Feb. 28, 2005) ("By relying upon the advice of various individuals with particular professional competence and expertise, *as a matter of law*, the individual directors discharged their duties in good faith . . . ."(emphasis added)).

Here, the undisputed evidence establishes the Individual Respondents' actions fall within the statute and, accordingly, they are shielded from liability. Each year following the preparation of annual audits by the Association's accounting firm, the Declarant was presented with certain funding options as defined by the clear language of the Declaration. The testimony in the record is that the Individual Respondent's only involvement in the calculation of the Declarant's funding obligation involved reviewing and approving the figures that were provided to them by the joint work of the Association's finance committee, Waccamaw Property, and the accountants retained by Waccamaw Property. As it relates to the decision to extend the Declarant's Funding Option, the testimony in the record is that the Individual Respondents, having made a judgment call that extending the option was the best way to safeguard the survival of the development, sought the advice of legal counsel as to whether that could be done in accord with the regime's governing documents. For each decision Appellants challenge, the Individual Respondents relied upon

various individuals—their property manager, accountant, or lawyer—with particular professional competence and expertise. Accordingly, as a matter of law, the Individual Respondents discharged their duties in good faith and the circuit court appropriately granted summary judgment. Because the circuit court's decision was based on undisputed evidence, this court should affirm.

IV. This Court should affirm the circuit court's decision because Appellants did not assert claims against the Individual Respondents within the applicable statute of repose and after Appellants knew or should have known they had a claim.[2]

Appellants argue the circuit court erred in finding their claims were barred by the statute of limitations because (1) the statute of limitations was tolled while the Declarants controlled the Association, and (2) the circuit court did not correctly analyze the application of the discovery rule. **App. Br. at 34**. This court should affirm the circuit court because the statute of limitations should not be equitably tolled and the circuit court correctly applied the discovery rule.

A. The statute of repose and limitations should not be equitably tolled because Appellants did not preserve that argument and, even if they did, the requirements for equitable tolling are not met.

Preservation

As a threshold matter, Appellants failed to preserve this issue for appeal. In order to preserve an issue for appellate review, the appellant must have raised it to the circuit court. *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 598 S.E.2d 712 (2004). The party need not use the exact name of the legal doctrine, but it must be clear the argument was presented on that ground. *State v. Brannon*, 388 S.C. 498, 697 S.E.2d 593 (2010). Furthermore, the circuit court must rule upon the issue. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). If the circuit court fails to rule on an issue it was presented, the party must file a motion to alter or amend the judgment in

[2] This issue and argument applies only to Respondents Teal, Black, and Edwards. Respondents Schultz, Taylor, and Plankers did not move for summary judgment on the statute of limitations.

order to preserve the issue for appellate review. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

Appellants did not preserve this argument for appeal because the circuit court did not rule on equitable tolling. In Appellants' memorandum in opposition to the Individual Respondent's motion for summary judgment, Appellants asserted the statute of limitations should be equitably tolled because the Association was controlled by the declarant. **Plfs' MIO Def. MSJ, at 21**. On appeal, Appellants argue equitable tolling, but also use it as an opportunity to present a theory that was not presented to the circuit court at all: an adverse domination doctrine that results in a rebuttable presumption that the statute of limitations does not begin to run on an action against directors if the wrongdoers control the board. **App. Br. at 31**. Appellants never argued the adverse domination doctrine to the circuit court and, accordingly, it is not preserved for appeal. As it relates to equitable tolling, the circuit court did not rule on the Appellants' argument. ***See* Order on MSJ**. Because the Appellants did not argue the adverse domination doctrine before the circuit court, it is unquestionably not preserved for appeal. Because the circuit court did not rule on Appellants' equitable tolling argument, it was Appellants' responsibility to file a motion to alter or amend the judgment to preserve the issue. Appellants did not file a Rule 59(e), SCRCP, motion to alter or amend. Because the circuit court did not rule on the equitable tolling issue, it is not preserved for review and this court should decline to consider it.

Merits

The statute of limitations should not be equitably tolled. "'Tolling' refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (quoting 51 Am. Jur. 2d *Limitation of Actions* § 169 (2000)). The Court may invoke the doctrine of

equitable tolling to suspend the statute of limitations. *Hooper*, 386 S.C. at 115, 687 S.E.2d at 32. "Equitable tolling . . . is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine." 51 Am. Jur. 2d *Limitation of Actions* § 153.

The party asserting the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. *Hooper*, 386 S.C. at 115, 687 S.E.2d at 32 "[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Id.* 386 S.C. at 116, 687 S.E.2d at 33. The doctrine may be applied when it is justified under all the circumstances. *Id.* "Any inequitable circumstances preventing a party from initiating a timely lawsuit suit must be truly beyond the control of the plaintiff." 51 Am. Jur. 2d *Limitation of Actions* § 153.

Here, Appellants advocate for tolling the statute of limitations purely based on the identity of board members at various instances throughout the Association's existence. Appellants cite *Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). Examining the particular exigencies of this case as it relates to the Individual Respondents, *Magnolia* is distinguishable. In *Magnolia*, the court of appeals affirmed the circuit court's decision to equitably toll the statute of limitations because the association's board members consisted of the appellants' officers until the Association was turned over to the members. *Id.* at 372, 725 S.E.2d at 125. *Magnolia* involved potential construction defect claims that the association had against a developer, a developer whose officers made up the association's board. The court reasoned the construction defect claims were tolled because it could not envision an entity effectively suing itself.

Appellants' claims stand in stark contrast to those in *Magnolia* and the case is procedurally different. First, Appellants assert they are acting on behalf of the Association in a derivative fashion. Appellants could have brought a derivative suit regardless of whether the Board was controlled by employees of the declarants. Appellants claim the Association would not have sued the declarants because the declarants also controlled the Association. But Appellants have not offered any evidence showing they were prevented from bringing a derivative suit earlier, which is their burden. Additionally, this case does not involve construction defects. Instead, it involves the declarant funding alternative and claims against the Individual Respondents in their capacity as former board members. Thus, *Magnolia* is inapplicable and, in the event the issue is preserved, this Court should not toll the statute of limitations and should affirm the circuit court's ruling.

B. The undisputed evidence shows Appellants' claims are barred by the statute of repose and the statute of limitations because they knew or should have known through the exercise of reasonable diligence that they had claims more than two years before they filed suit.

Appellants argue the circuit court "failed to do the correct analysis to determine whether" the statute of limitations had run, and that the court should have taken Appellants' evidence as true, which would precluded application of the statute of limitations. **App. Br. at 34**. Appellants cite the wrong standard at summary judgment, and the circuit court ruled based on the undisputed evidence.

A two-year statute of limitations and three-year statute of repose applies to Appellants' claims against the Individual Respondents, pursuant to S.C. Code Ann. § 33-31-830(f) which states, "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) reduces the three-year statute of limitations. *See*

S.C. Code Ann. § 15-3-530 (1) and (5) (providing for a three-year statute of limitations for actions arising "upon a contract, obligation, or liability, express or implied" and actions for "any injury. . . not arising on contract and not enumerated by law").

Pursuant to the discovery rule, the statute of limitations begins to run when the injured "person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code. Ann. § 15-3-535; *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 519, 827 S.E.2d 348, 361 (Ct. App. 2019); *Dean v. Ruscon Corp*., 321 S.C. 360, 363–64, 468 S.E.2d 645, 647 (1996). The test is objective. *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994). The relevant inquiry is not what a party subjectively knew at specific points in time, but rather, at what point a party objectively had "enough information such that [they] should have acted promptly to determine whether a cause of action might exist against [Defendants] 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). South Carolina's statute of limitations requires "very little to start the clock." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir.1994) (applying South Carolina law).

"A cause of action should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist." *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).

"The statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" *Id.* (quoting *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981)). Further, the fact an injured party may not comprehend the full extent of the damage is immaterial. *Dean*, 321 S.C. at 364, 468 S.E.2d at 647. In other words, the discovery rule does

not "require absolute certainty [that] a cause of action exists before the statute of limitations begins to run." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001).

Appellants filed this case on June 30, 2017. Pursuant to the three year statute of repose under section 33-31-830(f), all claims based on the Individual Respondent's actions occurring before June 30, 2014, are barred.

Appellants knew or should have known of the basis for their claims against these Individual Respondents prior to June 30, 2015, and, accordingly, the two year statute of limitations has run. The Individual Respondents to whom the statute of limitations applies—Teal, Black, and Edwards—were no longer Board members after April 13, 2015. Regarding Appellants' knowledge, Appellant Eisenhardt has been a property owner in Wild Wing Plantation since 2007, and she was one of the three founding members of the Association's finance committee in 2012. ***See* B. Eisenhardt Dep., 10: 19-25**. Appellant Dykes has been a homeowner since 2013 and was appointed to the Association's Finance Committee at the 2014 Annual Meeting. ***See* B. Dykes Depo., 14: 16-17**. Association auditor Jim Corbett testified in his deposition that both Appellants were privy to the annual audits and were familiar with the manner in which the Declarant's annual contribution was calculated. ***See* Corbett Dep., 27: 4-14**. All Association members, including the Appellants, had access to the published audited financial statements each year, including the calculation of the declarant assessment exposure for those years. The audited financial statements for the year ending December 31, 2008 were published on July 6, 2009. The audited financial statements for the year ending December 31, 2009 were published on May 31, 2011. The audited financial statements for the years ending December 31, 2010 and December 31, 2011 were published on September 4, 2012. The audited financial statements for the years 2012 and 2013 were published on March 20, 2014. ***See* MSJ, Ex. C.** Each of these audited financial statements

included a clear explanation of how the auditor calculated the declarant contribution. Appellants knew how Declarant contributions were calculated well before June 30, 2014, but nevertheless did not file suit registering their objection to the same until 2017.

Furthermore, Appellant Eisenhardt was a homeowner at the time of the November 2011 vote to amend the Covenants to extend the declarancy period. Eisenhardt received written notice of the proposed amendment from Wright Management on November 9, 2011. A vote was held on this amendment on November 21, 2011 and the minutes reflect that Eisenhardt was present at this vote. ***See*** **B. Eisenhardt Dep. 19: 11-18.** The votes were unanimous in favor of amendment. Appellant Eisenhardt had sufficient information as early as November 2011 such that she knew or should have known of the basis of the claims against the Individual Respondents related to the 2011 vote to amend the Covenants. Despite knowing the purpose of the 2011 amendment and having an opportunity to vote on the adoption of the same, Eisenhardt waited until 2017, almost six years after the fact, to object.

Instead of focusing on an objective inquiry as to what information was available such that Appellants were on notice of a potential claim, Appellants ask this court to engage in a highly specific four part inquiry that includes analyzing Rule 23, SCRCP. **App. Br. at 31-32**. This is not how the discovery rule is analyzed. Instead, just as the circuit court did, the focus is on whether the Appellants knew or should have known that a claim existed. The undisputed evidence shows, and the circuit court found, Appellants knew or should have known by virtue of their long-standing involvement with the Association, their access to the financial information, and notice of the declarant's funding alternative, that a claim existed more than three years before they filed suit. Appellants' claims are therefore barred by the statute of limitations and this court should affirm.

V. Appellants' Issue V is tailored to Stratford Land Manager and Stratford Land Fund and, accordingly, Individual Respondents do not need to address the Issue.

Appellants' arguments in section V of their brief relate to the circuit court's dismissal of Stratford Land Manager, LP, and Stratford Land Fund, IV, LP (collectively "Stratford"). **App. Br. at 34-39**. For purposes of clarity, Appellants list only five issues on appeal in their "Statement of the Issues." **App. Br. at 1**. Although Appellants' arguments as to Stratford are labeled as Issue V in the brief itself, this issue is not listed in the Statement of Issues and, instead, Appellants' Issue V relates to the South Carolina Unfair Trade Practices Act (SCUTPA). **App. Br. at 1**. Individual Respondents address the SCUPTA claim below.

VI. This Court should affirm the circuit court's ruling dismissing Appellants' SCUTPA claim because Appellants are asserting the claim in a representative capacity and Appellants have not suffered an injury-in-fact.

Appellants argue the circuit court erred in dismissing their SCUTPA claim because the Association suffered an injury-in-fact and, although not entirely clear, because the claims are not in a representative capacity. **App. Br. at 40**.

First, Appellants cite no law in support of their arguments and, instead, rely on conclusory allegations that the circuit court erred. **App. Br. at 40**. Accordingly, the issue is abandoned on appeal. *See Glasscock, Inc. v. U.S. Fidelity and Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). Thus, this Court should decline to address the merits of Appellants' arguments the circuit court erred in dismissing their SCUTPA claim.

Overlooking abandonment, Appellants' arguments on appeal are without merit. Under SCUTPA,

> (a) 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). Our courts have held this language unquestionably prohibits any claims brought in a representative capacity, including under Rule 23, SCRCP. *See Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 122-23, 678 S.E.2d 430, 434 (2009) (upholding dismissal of SCUTPA claims because the plaintiffs brought suit as a class action, explaining class actions are suits in which a single individual represents the interests of a larger group); *see also In re TD Bank, N.A.*, 150 F. Supp. 3d 593, 634-35 (D.S.C. 2015) (dismissing SCUTPA claims brought under Rule 23 of the Federal Rules of Civil Procedure, but permitting individual SCUTPA claims).

Here, Appellants are expressly attempting to assert claims in a representative capacity. Appellants claim, through Rule 23, SCRCP, they stand in the shoes of the Association and the SCUTPA claim is that of the Association. This case does not involve the Association itself. However it is described, Appellants are attempting to act on behalf of the Association. Because the clear language of SCUTPA prohibits a party bringing the claim in any representative capacity, Appellants cannot assert a SCUTPA claim and the circuit court correctly granted summary judgment on that issue.

Furthermore, with respect to the Appellants' individual SCUTPA claims, they cannot show that they have suffered an injury-in-fact and, instead, are relying on the Association's alleged injury to meet the requirement. Appellants offered no evidence that they themselves were injured, separate and distinct from the Association. Thus, the circuit court appropriately dismissed Appellants' SCUTPA claims in total. Accordingly, this Court should affirm the circuit court's ruling.

CONCLUSION

Individual Respondents request this Court affirm the circuit court's grant of summary judgment because Appellants are barred by the business judgment rule and the South Carolina Nonprofit Corporation Act from challenging the Individual Respondents *intra vires* decisions while members of the Association's Board, which were taken in good faith and in reliance upon opinions within outside professionals' expertise. In addition, Appellants claims are barred by the statute of repose and statute of limitations because the undisputed facts show Appellants knew or should have known of the alleged errors in calculating the declarant funding alternative and amending the covenants more than two years before they filed suit. Finally, this Court should affirm the circuit court's dismissal of the SCUTPA claim because Appellants cannot assert that claim in a representative capacity and have otherwise failed to show they individually have suffered an injury-in-fact.

This 5th day of April, 2022.

Respectfully submitted,

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