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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5588 (S.C. Ct. App. withdrawn, substituted, and refiled February 27, 2019)

Case No. 2010-CP-10-10490

Appellate Case No.: 2015-001590

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

v.

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

PETITIONERS-RESPONDENTS' BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. Do the Court of Appeal's ("COA") pervasive errors in construing evidentiary inferences against the non-moving party, and in favor of the party found to have destroyed evidence, and in ignoring unappealed findings, *e.g.*, unclean hands, require vacating the COA Opinion?
- II. Is the COA's reversal of Walbeck's contract verdict, based upon the prejudice caused by the instruction to the jury on amalgamation, belied by the absence of an amalgamation instruction in the record; and, in the absence of error or prejudice to the contracting party, must this verdict and the I'On Assembly's (the "HOA") contract verdict be reinstated?
- III. Did the HOA's 2014 realignment as a direct plaintiff, and adoption of the derivative claims, moot any purported Rule 23 issues; and, do the adopted claims relate back to the original derivative filing; and, does the Developer's control give rise to equitable tolling?
- IV. Should the breach of fiduciary duty verdict be sustained on the Trial Court's principal holding that that a developer in control of a homeowners' association owes a fiduciary duty to the association not to benefit at the association's expense?
- V. Did the COA err in overturning its original finding that there was ample evidence of bad faith and unfairness resulting from the Respondents' collective, evasive conduct which satisfied the single business enterprise theory adopted by this Court in *Pertuis*, if it is correct to apply *Pertuis* retroactively?
 - a. Do the unappealed "unclean hands" and destruction of evidence holdings, among others, compel a ruling in Petitioner's favor?
 - b. Should it be the fiduciary's burden to prove fairness, not the HOA's burden to prove unfairness?
 - c. Alternatively, does the absence of "taint" or prejudice in the record require the reinstatement of Petitioners' verdicts?
 - d. Alternatively, do Petitioners' direct claims against each Respondent depend on a finding of amalgamation, especially given the jury's express finding that each Respondent's conduct was reckless, willful, and/or wanton?
- VI. Was the COA's holding that the Trial Court erred in submitting the decision of statute of limitations ("SOL") to the jury erroneous, especially given the COA's weighing of alleged constructive notice from a one word change in an annual budget over the evidence of overt "lulling" conduct on the part of Developer? And was the COA's holding that the lulling conduct found by the Trial Court to exist between 2005 and 2008 did not give rise to equitable estoppel in error?
- VII. Did Petitioners adequately plead and show demand and futility under *Patterson versus Whitter* and *Grant versus Gosnell*? Do Petitioners' allegations of Developer control establish futility under *Magnolia North*?

CONCISE STATEMENT OF THE CASE

The current appeal principally concerns four different claims brought in three different capacities by various Petitioners-Respondents (hereinafter “Petitioners”). The four different claims are breach of contract, breach of fiduciary duty, negligence, and ILSA.¹ The three different capacities in which Petitioners sued are individually, derivatively, and corporately, *i.e.*, *direct* claims by the HOA in its own behalf. Petitioners sued the nominal developer, The I’On Company (“the Developer”), and its affiliates (“the Affiliates”).² The Affiliates included the Developer’s (and Club’s) manager, The I’On Group n/k/a Civitas, LLC (“the I’On Group”), the I’On Company’s subsidiaries, I’On Realty and the I’On Club. The Developer was owned by Thomas Graham; the I’On Group was owned by his son, Vince Graham. (The claims against Grahams were dismissed before trial)). The I’On Group was managed by Vince Graham and Chad Bessenfelder.

In 2014, a Charleston County jury returned a verdict on special interrogatories and awarded Petitioners damages for common areas the Developer refused to convey to the HOA. (App. p. 8). These common areas are the “Creekside Park,” “Community Dock,” and the associated access, parking, and boat ramp located at the *only* deep-water access at I’On, fronting 300 feet of Hobcaw Creek (hereinafter referred to as “the Commons”). The Commons are located on two civic lots known as CV-5 and CV-6 (App. pp. 2-3; 458). Developer repeatedly represented to the HOA that the Developer would convey the Commons, free of all encumbrances, between 1998 and 2009. (App. pp. 3-7). However, the Developer contemporaneously worked to increase its return on investment by secretly selling and transferring use rights in the Commons, and then ownership, to third parties, for the Developer’s personal gain, at the expense of the HOA. (App. pp. 27-29). Upon learning of the attempted third-party transfer and a 2008 contract for sale, Petitioners and other

¹ “ISLA” refers to the Interstate Land Sales Act, 15 U.S.C. § 1709 (2012).

² “Developer” and “Affiliates” are collectively referred to as “Respondents.”

HOA members demanded the HOA secure its rights to the Commons. (App. pp. 568-69; 592-93; 2705-07; 2709-11; 2717-19; 2721; 2724; 2726). The HOA failed to secure the Commons, and, after a brief delay, the Developer sold the Commons behind the HOA's back. (App. pp. 7; 28-29).

Walbeck initiated this suit on December 22, 2010; and, filed an Amended Complaint on March 8, 2011. (App. p. 7). Respondents filed an Answer and Motion to Dismiss on May 27, 2011 ("MTD Motion"). Respondents' 2011 Motion sought the dismissal of all claims, including the *derivative* claims asserted by Walbeck – demonstrating the Respondents' clear understanding from the beginning that Walbeck was asserting derivative claims.³ (App. pp. 2229-30); *see also* (App. pp. 577-86 (Respondents admitting in their Answer that HOA members made demands upon the HOA, but the HOA refused to act). On March 15, 2012, the Circuit Court issued an Order denying Respondents' 2011 MTD Motion and ruled the pleadings were "sufficient to state a claim upon which relief can be granted on these three causes of action." ("MTD Order") (App. p. 445) (emphasis added).

Respondents later filed a Motion for Summary Judgment on the derivative claims, which the Circuit Court also denied.⁴ The Trial Court declared a mistrial in the first trial because the HOA's lawyer had not informed the Court and the parties that the HOA had voted to support the Plaintiffs, Walbeck and Adkins. (App. pp. 915). Thereafter, the Circuit Court realigned the HOA as a Plaintiff, and the HOA thereafter adopted and proceeded to jointly prosecute the prior derivative claims. (App. pp. 8; 452-53). The Plaintiffs filed a Fourth Amended Complaint including the HOA as Plaintiff on June 16, 2014, in advance of the second trial. (App. pp. 8; 749-65).

³ The original Complaint pled derivative claims, although Walbeck's status as a representative plaintiff was not separately designated in the caption. (Compl., App. pp. 552-64).

⁴ (App. pp. 447-48).

The case was re-tried from July 29 through August 1, 2014. The jury returned verdicts in Petitioners' favor on numerous interrogatories and awarded damages to Walbeck on these claims: (a) ILSA (\$1.00); (b) Negligent Misrepresentation (\$20,000); and, (c) Breach of Contract (\$10,000). The jury also awarded damages to the HOA on these claims: (a) Breach of Fiduciary Duty (\$1,750,000); (b) Negligent Misrepresentation (\$1,000,000); and, (c) Breach of Contract (\$1,000,000). (App. pp. 7; 2321-26). The jury separately found Developer's conduct was reckless, willful, or wanton (App. pp. 517; 2326); and, that the SOL on all claims commenced on August 5, 2009.⁵ (App. pp. 2321-22). Walbeck elected to recover the \$20,000 awarded for his negligent misrepresentation claim, while the HOA elected to recover the \$1,750,000 awarded for its breach of fiduciary duty claim. (App. pp. 7; 455-56).

Notably, the jury rejected the factual defenses presented by Developer at trial. These defenses included the factual defenses later adopted by the Court of Appeals ("COA") in its 2019 Substituted Opinion, *e.g.*, the factual arguments supporting the SOL defense (*e.g.*, "completion of construction" and the proposed 2005 budget), and that the promised Commons were ambiguous and generic – and had been satisfied by the transfer of a few crab docks and a "Marshwalk" path.

Following the jury's verdict, the Respondents moved for judgment notwithstanding the verdict ("JNOV"), or, in the alternative, a new trial. (App. pp. 2329-34). The Trial Court issued the following post-trial orders in Petitioners' favor:

1. Denying Respondents' JNOV Motion (App. pp. 457-99);
2. Denying I'On Company's Petition for Attorneys' Fees (App. pp. 515-19);
3. Declaring the 2000 Recreational Easement Void (App. pp. 506-14);

⁵ Please note for future reference: the jury expressly found that *all* Respondents' violative conduct was willful, wonton, and reckless. (App. pp. 2326).

4. Awarding \$225,000 for Walbeck’s Attorneys’ Fees and Costs (App. pp. 522-36); and
5. Awarding \$24,337.26 in sanctions against Respondents due to their destruction of evidence (App. pp. 539-51).

On July 20, 2015, Respondents appealed the above orders except the Order Granting Sanctions for Destruction of Evidence. Respondents also appealed Order Denying Developer’s Motion for an Award of Fees Against Atkins. *See* Notice of Appeal.

The COA originally affirmed the Trial Court for the most part in its 2018 Opinion (Opinion No. 5588, Aug. 8, 2018) (hereinafter, “2018 Opinion”); but, later reversed itself in a 2019 Substituted Opinion (Opinion No. 5588, Feb. 27, 2019 (hereinafter “2019 Opinion”). *Compare* (2018 Op., App. pp. 1-34) *with* (2019 Op., App. pp. 87-115). Petitioners and Respondents filed Cross-Petitions for Certiorari on June 21, 2019, and July 11, 2019. This Court granted both Petitions on March 15, 2022.

STATEMENT OF THE FACTS

The 2018 Opinion did a reasonable job setting forth the facts and background of this matter. Petitioners hereby adopt and incorporate the 2018 Opinion section entitled “Facts/Procedural History” in full, as supplemented below. The COA set forth additional facts later in the discussion section of the 2018 Opinion some of which, for clarity, have also been included below.

A.) Additional Findings Contained in the Discussion in the 2018 Opinion

In the discussion section in the 2018 Opinion, the COA supplemented its Facts/Background section with the following additional facts:

1. The Developer and the HOA entered a “2005 Handover Agreement” (App. pp. 2692-93).⁶

⁶ While the 2018 Opinion recognized the existence of the Handover Agreement, the COA inferred that it did not apply to the Commons. (2018 Op., App. p. 14). The 2005 Handover Agreement between the Developer and the HOA formalized the process for handing over common areas to the HOA. (App. pp. 2692-93). This Agreement required the Developer to notify the HOA when

2. The Developer controlled the HOA and owed it fiduciary duties (2018 Op., App. pp. 25-29):
 - a. “Appellants continued to assure the HOA’s members that they intended to convey the Community Dock and boat ramp to the HOA. These assurances led the HOA’s members to ‘repose[] a special confidence in’ Appellants”;
 - b. “...Appellants’ retention of control over the HOA throughout the years preceding the sale of lot CV-6 to Russo created a continuing fiduciary relationship between Appellants and the HOA”;
 - c. “...I’On Company, as Founder, had the authority to ‘appoint, remove[,] and replace the members of [the HOA’s] Board of Trustees’...”;
 - d. I’On Company had a veto power over the Board (Covenants, App. p. 4144, Sec. 9-104(c));
 - e. Thomas Graham testified at trial that the I’On Company still retained these veto rights;⁷
 - f. “The Covenants provided that the I’On Company, as Founder, had the authority to ‘appoint, remove[,] replace the members of [the HOA’s] Board of Trustees’ for a limited period of time not to exceed twenty years after the Covenants’ recording”; and,
 - g. “The I’On Company also had the authority to ‘disapprove any action, policy[,] or program of the [HOA], the Board of Trustees, and any committee [that], in the sole judgment of the [I’On Company], would tend to impair rights of [the I’On Company] or Builder under [the Covenants] or the Bylaws, or interfere with development or construction of any portion of I’On, or diminish the level of services being provided by the [HOA].’”
3. The Developer had veto power over the HOA and the HOA Board President at the time of trial; Deborah Bedell (“Bedell”) testified that this “veto power would have prevented the Board from initiating litigation. . .shows that a demand on the Board to initiate litigation... would have been futile.” (2018 Op., App. p. 21).
4. “...Walbeck and Adkins fairly and adequately represented the interests of the other HOA members because Walbeck and Adkins were represented by highly qualified counsel and were similarly situated to the other HOA members.” (2018 Op., App. p. 21).

common areas were ready for turnover, conduct a formal review and inspection of these areas, and provide an “asset handover forecast” for the HOA’s budget. *Id.*

⁷ Thomas Graham described his veto power as “being like the United States Supreme Court.” (App. pp. 1087:9-1089:5).

- a. Three HOA members testified that the Representatives were advancing the members' interests. (2018 Op., App. p. 22).
5. "... the HOA's realignment as a plaintiff allowed the jury to award damages to the HOA as if Walbeck and Adkins had never brought a derivative action." *Id.* (emphasis added).
6. "...all parties considered the disputed property to be common areas...[h]ence, the HOA was 'exclusively responsible for the control and management' of the disputed property." (2018 Op., App. pp. 27-28).
7. "...the I'On Company's control of the HOA undoubtedly required the I'On Company to preserve the rights of the HOA's members to the unfettered use and enjoyment of these common areas." (2018 Op., App. p. 28).
8. "... on at least two occasions, Appellants placed the HOA's members in a position of having to compete with non-members for access to the disputed property." *Id.*:
 - a. "First, in 1998 and 1999, the I'On Group. . .negotiated with a neighboring subdivision's developer for the sale of access rights to the Community Dock and the boat ramp on lot CV-6, which was owned by the I'On Company at the time. This occurred without knowledge of the HOA's members"; and,
 - b. "Next, the I'On Company relinquished its ownership in lot CV-6 to the I'On Club and then ultimately to Russo. . .this placed the HOA's members in a position of having to compete with non-members for access to the disputed property."
9. There was evidence in the record from which the jury could have reasonably inferred bad faith – that Appellants intended "to profit from the disputed property at the expense of the HOA's members." (2018 Op., App. p. 28).
10. "...[T]he secret sale of access rights to a neighboring subdivision's developer as well as the surprise sale of ownership to Russo benefitted Appellants at the expense of the HOA's members." (2018 Op., App. p. 31).
11. The *I'On Club* owned CV-6 when Bessenfelder represented in 2009 that the *I'On Company* would transfer ownership of CV-6 to the HOA. (2018 Op., App. p. 31).
12. The 2000 Recreational Easement was invalid. (2018 Op., App. pp. 17-18).
13. Defendants failed to appeal the Circuit Court's finding that the Easement was not an arms' length transaction. *Id.*

B.) Additional Details in the Record Regarding the Developer's Course of Conduct

The following additional details are in the Record relating to the Developer's conduct:

1. That Walbeck's purchase contract expressly included the Mandatory Transfer chart listing the "Creeside Park" and "Community Dock" that was set forth in the 1998 Property Report. (App. p. 3661) (hereinafter "the Property Report", App. pp. 3495-3530).
2. CV-6 had the *only* deep-water access on Hobcaw Creek, (App. pp. 1095:7-9 (as opposed to the "at least 300 feet of deep-water access" referred to by COA, (2019 Op. App. p. 90), which is how it is known that this is the location that is referenced in the marketing materials and newsletters. (App. pp. 3002; 3040; 3079; 3521; 3559; 3598).
3. The Olde Park ("neighboring developer") negotiations were taking place concurrently with the Developer's execution of the Walbeck sales agreement in 1999. (App. pp. 2673-76; 2811-17).
4. The Developer sold some of the HOA's access to Olde Park for \$450,000 (App. p. 3391) and changed its plan for the neighborhood and to accommodate the Olde Park deal, and permit Olde Park use of the Commons. (App. pp. 3385-91).
5. The changed plan was implemented without full disclosure to the HOA (then controlled by the Developer). *Id.*
6. Prior to Walbeck's closing, the Developer decided to amend the Property Report to reflect the changed plan; yet, they never informed Walbeck (or other prior purchasers) of the changed plan or the Amended Property Report. (App. p. 1858:1-1859:14).
7. The Developer sent Walbeck three letters after Walbeck closed on his purchase, each of which failed to disclose the Developer's changed plans as to the ownership and use of the deep-water access. (App. pp. 3331-33).
8. The Developer also never disclosed that the amended, grand plan was a mirage because an easement had been substituted for ownership, the alleged "perpetual" easement was cancelable after thirty (30) years, and the easement was invalid, *ab initio*, since the Grantor did not own the property when the Easement was granted. (App. pp. 3627-41).
9. Rather, in the ensuing years, the Developer continued to publish their various "Neighborhood Plans" that "the parks" and "boat ramp" could be "enjoyed by all." (App. pp. 2769-75).⁸
10. There were meeting minutes and other documents admitted into evidence which clarified that the 2005 Handover Agreement addressed the transfer of the Community Dock and boat ramp and showed that the Developer continued the process of transferring these properties to the HOA throughout 2006-2009. For example:

⁸ This constituted in part the "lulling behavior" referred to by the trial judge. (App. p. 1476:11-22).

- a. The December 7, 2005 Meeting Minutes reflected that then Board President LeGrand Elebash, the Developer-appointed Board member, in the presence of Besenfelter and Vince Graham, indicated to the HOA members that **“In 2006, the I’On Company is planning on ... complete the turnover for phases 1-7)”** (App. 3981-82) (emphasis added). Walbeck was in attendance (App. p. 3838) (Walbeck Sign-In from December 2005 Meeting); *see also* (App. p. 1426:18-21) (Walbeck at trial confirming he attended the annual HOA meetings from 2004-2007);
 - b. Pl. Ex. 201, a July 18, 2006 email from Besenfelter referencing “HOA Turnover Project,” attaches a list of items he has “been working on to complete the HOA turnover project...Once completed I will be ready to handover Phases 1, 2, 3, 4, 5 and 8.” Under “Phase 2” work items remaining are listed “Boat ramp and boat dock as-builds...dock and ramp construction documents.” (App. pp. 3408-09 (emphasis added). This email was sent from the Developer to the neighborhood property manager and several HOA board members. (App. p. 1143);
 - c. If one reads Tom Graham’s testimony about the Handover Agreement, (App. pp. 2216-17), and the above email, (App. pp. 2922-24), it is absolutely clear that the boat ramp and dock turnover is being turned over under the process established in the Handover Agreement. (App. p. 1142-45); and,
 - d. The boat ramp is again listed as a facility to be turned over to the HOA on Pl. Ex. 203 in May 1, 2007. (App. pp. 2682-84).
11. Tom Graham admitted that Chad Besenfelter’s July 18, 2006 email also indicated that the boat ramp was still in the process of being turned over from Developer to the HOA in 2006:
- Q: And [this July 18, 2006 email, Pl. Ex. 201] still illustrates that your company, as of 2006, intended to turn over the boat ramp, correct?
- A: Well, that’s what this indicates, but it’s -- that e-mail.
- (App. p. 1144:16-20; 3408-10).
12. Yet, by Spring 2007, the Developer was exploring how to “capitalize” on the “potential value” of the Commons and outlining their options in “selling community facilities,” while keeping its ideas “quiet for now.” (App. p. 3341) (emphasis added).
13. In Summer 2007, the Respondents email each other seeking clarification of the HOA’s rights “over the docks and boat ramp” and musing that the “conveyance of Creek Club to Assembly should include the boat ramp, but exclude the dock, which we should keep [because] [w]e have not offered that dock and gazebo ...” (App. pp. 1152-54).

14. The September 2007 Board Meeting Minutes evidence that these Commons were included in the “common areas” referenced by the Handover Agreement: These minutes indicate that, after Besenfelder told the HOA “he would like to turn over the community docks,” HOA members responded that they had inspected the Dock and it needed repair. (App. p. 4025). This is the exact “handover” process for “common areas” described by the 2005 Handover Agreement. (App. p. 2692-93). Besenfelder confirmed the HOA’s belief that the Dock was a “common area” encompassed by the Handover Agreement by acknowledging he would “look into needed repairs” prior to turning over the Dock to the HOA. (App. p. 2692-93; 4025).⁹
15. There are pervasive concessions in the 2007-2008 Developer emails of the Developer’s obligation to convey the dock and ramp to the HOA. *See, e.g.*, (App. pp. 1151-65).
16. Developer emails to third-parties collaborate what they were telling the HOA, that the Developer was in the process of transferring the Commons to the HOA. *See, e.g.*, (April 2008 Besenfelder letter to SCDNR, App. pp. 2776-79).
17. By August 2008, an agreement was maturing to sell the Commons; however, the Developer represented to Petitioners that they had “not sold or initiated the sale of the Creek Club.” (App. pp. 2893-2902; 3419-21).
18. On September 24, 2008, the sale of the Commons to a third-party was first publicly disclosed at board meeting. Immediately, trial witness “Tim Eble ...expressed his concern regarding the potential sale of the Creek Club and the promises made to him regarding community amenities when he purchased his property.” Catherine Templeton also expressed her concern regarding the sale “as it has always been a community entity and should remain as such.” (App. p. 2818).
19. The uproar regarding the sale of the Commons, at least in part, resulted in the Buyer withdrawing in early March 2009. (App. pp. 3328; 3436-37).
20. The Developer reiterated its intention to transfer the Commons to the HOA in March 2009 (App. pp. 3438-39), before discretely resuming negotiations within thirty-six hours. (App p. 3440).
21. The Developer entered another purchase contract in June 2009. (App. pp. 2529-40).
22. On July 27, 2009, the HOA’s Board President called the Developer to discuss a rumored sale. (App. pp. 3402-03). Developer, Tom Graham, testified he received the call but did not disclose the sale; instead, he told the Board President the Commons were undergoing a “management” change. (App. p. 3402).

⁹ The COA acknowledged that “[t]hese [2007] assurances led the HOA’s members to ‘repose[] a special confidence in’ Appellants, binding Appellants to ‘act in good faith and with due regard to the interests of’ the HOA’s members.” (2018 Op., App. p. 29) (emphasis added) (citation omitted).

23. On August 1, 2009, five days after the “management” change representation, the HOA learned the Commons were again under contract. (App. pp. 1196:16-20; 2560).

24. On August 5, 2009, the Developer officially sold the Commons. (App. pp. 1166:20-1167:11; 1174:10-1175:17; 1197:23-1199:25; 2541-50).¹⁰ As eventually admitted at trial by Tom Graham:

Q: You sold them the park?

A: We sold them the entire lot CV-6.

Q: Which included the Park that’s referenced in the December 18, 1998, letter to Olde Park, correct?

A: Yes.

(App. p. 1099:8-12).

25. There were only twenty-one years left on the Recreational Easement when Tom Graham refused to confirm the perpetual nature of Easement when requested to do so by the HOA before transferring to Russo. (App. p. 1125:16-25).

26. Multiple HOA members made demands upon the HOA to secure the commons; these demands are discussed in more detail in Section III regarding Rule 23 issues.

27. The Covenants drafted by the Developer enabled it to retain control over the HOA through 2009. For example, the Covenants provide that the Developer’s powers “extend until” all lots in I’On are sold to someone other than the Developer, and these powers include:

- a. The power to conduct all activities requires to complete the Neighborhood Plan which “[t]he Assembly shall not take any position of opposition against provisions of the Neighborhood Plan in a public setting, nor utilize any of its material or financial resources to oppose development activities of the Founder so long as such activities are consistent with the Neighborhood Plan.”;
- b. The power to control any action, including litigation, against the Developer because “[t]he Assembly shall make no amendments to the Governing Documents that materially affect the Founder’s interest, nor shall the Assembly adopt other measures that materially affect the Founder’s interest without the Founder’s concurrence.”;

¹⁰ This is the same date the jury, on a special interrogatory, decided Walbeck and the HOA discovered their claims. (App. pp. 2322-23).

- c. The power to issue invalid easements which the HOA “shall not take action seeking to alter provisions of easements established by the Founder, nor to prevent establishment of easements necessary to completing the Neighborhood Plan.”; and,
- d. The power, and “full authority,” to “appoint, remove and replace” Board members until 75% of all lots are sold, twenty years after the Covenants are recorded, or when, in the Developer’s discretion, the Developer relinquishes control.

(App. pp. 4143-44).

28. Paragraph 35 of the Developer’s Answer to the Amended Complaint admitted that:

[A] certain member of members of the Assembly has made demands upon the Assembly to bring suit regarding the issue raised in the Amended Complaint and that the Assembly has refused to do so

(App. p. 580).

29. The 2014 Realignment of HOA as party plaintiff, and the resulting HOA adoption of Plaintiffs’ claims as its own, was at the Developer’s request. (App. pp. 1931-36).

30. Additional facts relating more to the Developer’s positions are set forth in those sections of this Brief.

STANDARD OF REVIEW

“When reviewing the trial court’s ruling on a [JNOV Motion], this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party.” *RFT Mgmt. Co. v. Tinsley & Adams*, 399 S.C. 322, 331-332, 732 S.E.2d 166, 171 (2012). “The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt.” *Id.* (emphasis added). JNOV Motions may be granted only if no reasonable jury could have reached the challenged verdict or there is no evidence to support the ruling below. *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992).

“When considering [JNOV Motions], neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” *Welch*

v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000) (citations omitted). The trial court and the appellate court is only concerned with the existence of evidence, not its weight, and will not overturn a jury's verdict if any evidence exists that sustains the factual findings implicit in its decision. *Maybank v. BB&T Corp.*, 416 S.C. 541, 571, 787 S.E.2d 498, 513 (2016), *reh'g denied*, (July 13, 2016) (finding that the trial court correctly refused to grant JNOV because evidence existed that could support the verdict).

Furthermore, for an error of law to warrant reversal of a jury's verdict, the appellant must prove both the error of the trial court's ruling and the resulting prejudice, *i.e.*, that there is a reasonable probability that the verdict was influenced by the error. *See, e.g., Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

While appellate courts are permitted to review questions of law *de novo*, this scope of review does not require an appellate court to disregard the fact that the trial court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 119, 866 S.E.2d 542, 548 (2021) ("Despite this broad standard of review, we are not required to disregard the trial court's findings of fact, and we are mindful the trial court sits in a better position to assess witness credibility."); *see also Jackson v. Jackson*, 432 S.C. 415, 853 S.E.2d 344 (Ct. App. 2020).

ARGUMENT

Initially, there are four global errors committed by the COA that require its 2019 Opinion to be vacated: weighing inferences in favor of the moving party, inferring that the 2005 Handover Agreement was not applicable, ignoring the inferences as to the spoiled evidence, and failing to fully apply the law of the case. Alternatively, each of the additional errors highlighted below

require that the various groups of verdicts be reinstated, until there is nothing left of the 2019 Opinion, and it again must be vacated.

The amalgamation charge asserted by the COA as having tainted Walbeck's breach of contract verdict does not exist, nor does any other evidence of taint or prejudice to the other contracting party, the Developer. Walbeck's breach of contract verdict should be reinstated, as to the Developer, The I'On Company, as Respondents conceded the twenty-year Statute of Limitations ("SOL"). This requires that the HOA's third-party beneficiary verdict to be reinstated (if the COA is correct that the other claims should not have gone to the jury, Petitioners would not have elected away from the verdict on contract). And, the prevailing party provision in Walbeck's contract provides an additional sustaining ground to reinstate Walbeck's attorney fee award.

As the existence of HOA's direct, adopted claims was never challenged in the Trial Court or on appeal, and as the COA originally correctly overruled the SOL challenge to the HOA's direct claims based upon the ten-year continuum of conduct (or as a result of the relation-back rule or equitable tolling), all verdicts in favor of the HOA against the Developer should be reinstated.

Either as Petitioners prosecuted joint, direct claims against all Respondents, and there was no taint or resulting prejudice, or amalgamation was proper, the foregoing verdicts should be reinstated against the Affiliates.

Regardless of whether this Court chooses to address, recognize, or reject a "duty to convey," the fiduciary duty verdict should be sustained on the Trial Court's primary holding that: (1) a developer which maintains control of a homeowners association after it is created owes a fiduciary duty to the association to not make decisions that benefit the developer at the association's expense; and (2) this Developer's self-dealing violated that duty. Reasonable minds can differ as to whether the original promise to convey was made when the parties were at arm's length.

However, the opportunity (and duty) to enforce the promise (protect the HOA rights) occurred while the HOA was developer controlled – and the evidence shows Developer failed to enforce the HOA’s rights.

As the COA erred by weighing evidence, and Petitioners’ individual and derivative claims were properly pled and prosecuted and not barred by the SOL, the entire COA 2019 Opinion should be vacated, leaving all Trial Court rulings in place.

I. THE COA ERRED IN CONSTRUING INFERENCES IN FAVOR OF RESPONDENTS, AND NOT RECOGNIZING OTHER FINDINGS, E.G., “UNCLEAN HANDS”

The COA erred in weighing the evidentiary inferences, and adversely to the Petitioners at that, rather than construing them in the light most favorable to Petitioners as the non-moving party. This error permeated the COA’s Opinions and, along with the other errors discussed herein, resulted in a shocking reversal of the jury’s verdicts, the Trial Court’s rulings, and even the COA’s own opinion. Several examples are set forth below.

A. The COA’s Start Date for the SOL was Based Upon an Inference in the Developer’s Favor

The COA’s inference errors are well illustrated in its interpretation of the phrase “completion of construction.” This error forms the basis of the COA’s holding on the accrual date for the SOL, which resulted in the COA dismissing claims.

The Property Report and Walbeck’s purchase contract provided that the Commons were to be transferred to the HOA upon “the completion of construction.” (App. p. 3519). The Property Report is unclear on its face as to whether “completion of construction” referred to the Commons, Phase II, the 765-lot I’On neighborhood, all its amenities, or something different. (App. pp. 1424:24-1425:5). There are at least six, different potential “completion of construction(s)”:

1. The completion of construction of the Commons (the specific Community Dock and Creekside Park amenities);
2. The completion of the substituted “Marshwalk” and “Crabbing Docks” amenities (“the vacillating amenities”);¹¹
3. The completion of all residences and amenities in Phase II, in which the Commons were allegedly contained;
4. The completion of all phases in which the vacillating “Marshwalk” and “Crabbing Docks” amenities were contained;
5. The completion of construction of all amenities; or,
6. The completion of the construction of the I’On neighborhood.

See, e.g., (App. pp. 1424:24-1425:5) (Walbeck testifying that “upon completion of construction” meant either upon completion of the Commons or upon completion of I’On itself); (App. p. 1326:3-16) (Adkins similarly testifying that there was confusion as to what the Property Report meant in terms of “upon completion of construction”); (App. p. 1586:14-25) (Developer, Vince Graham, testifying that there was confusion as to when construction of each I’On Phase was completed) (discussed further below); *see also* (App. p. 3986) (April 26, 2006 HOA meeting minutes noting the Developer were still improving the Marshwalk); (App. p. 4065) (January 15, 2009 HOA meeting minutes noting the Developer was “working on deeding over the [M]arshwalk docks and marsh area to the [HOA].”). Walbeck specifically testified as follows:

Q: Now, what's your understanding of the obligation in the Property Report, what does the completion of construction reference mean to you? Is that when -- those facilities are complete, or does it mean when the builders finish building everything in I’On?

A: It could be either one.

(App. pp. 1424:24-1425:5) (emphasis added).

Instead of applying the required favorable inferences for the benefit of Petitioners, and to sustain the jury’s special verdict, the COA substituted its view of the evidence by inferring that

¹¹ (2019 Op., App. p. 90) (“Appellants vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park.”).

the phrase “completion of construction” in the 1998 Property Report unequivocally referred to the completion of the construction of the Commons. (2019 Op., App. 104-05, fn. 12). This is legal error. The more favorable inference to Petitioners that the law requires is that this was a reference to the completion of Phase II,¹² or all of I’On, both of which did not occur until after the parties entered the 2005 Handover Agreement. And, as seen below, there is little doubt that the Handover Agreement applied to the transfer of the Commons; inferences were not even necessary.

Additionally, the COA was also required to choose the meaning most favorable to the party that did not draft the Property Report. *See Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981) (“Ambiguous language in a contract, however, should be construed liberally and interpreted strongly in favor of the non-drafting party.”). The COA did not do this either. Thus, it erred again.¹³

These errors formed the cornerstone for the COA’s subsequent error regarding the accrual date for the SOL, which will be discussed further below.

B. The COA Originally, Incorrectly Inferred that the Commons Were Not Subject to the 2005 Handover Agreement, and Then the COA Ignored the Handover Agreement Altogether

The COA’s 2018 conclusion that there was no evidence that the Commons were “common areas” subject to the 2005 Handover Agreement was also based on an inference in the Developer’s

¹² Notably, Phase II was not completed until several years after Walbeck received the proposed budget in 2004. (App. pp. 3981-82) (2005 meeting minutes wherein Developer-appointed Board member indicated to the HOA that Developer was in the process of “complet[ing] the turnover for phases 1-7” in 2006).

¹³ The COA’s two, conflicting opinions illustrate the presence of different inferences. The COA originally found that Petitioners’ “claims did not necessarily accrue upon completion of construction or even immediately thereafter.” (2018 Op., App. p. 12). Yet, its substituted finding was that “[b]y April 10, 2001, [the Developer] completed construction of the Community Dock and Creekside Park. . . Walbeck should have known that [the Developer’s] statement indicating title to these amenities would be conveyed upon completion of construction was unfulfilled” by November 2004. (2019 Op., App. p. 106) (emphasis added).

favor. The COA overrode the jury's findings by removing all references to the Handover Agreement in its 2019 Opinion, implicitly ruling that the Agreement was just not relevant to the matters at hand. This was a profound error, and one that improperly construed inferences in favor of the losing party.

Taking the inferences in the light most favorable to the Petitioners, the 2005 Handover Agreement facially contemplates the Developer's turnover of all common areas, and there is no evidence or inference that these Commons were excluded from this Agreement. In fact, the clear inference of the 2005, 2006, and 2007 Minutes referenced in the facts is that the Commons were being addressed under the terms of the 2005 Handover Agreement. Given there was an agreed upon, orderly process in place for the turnover of the common areas, and in the interim, the Commons were being held by an Affiliate of the Developer, there was no reason for Petitioners to bring suit between 2004 and July, 2008. There was nothing amiss until the first rumor of a third-party sale in late August, 2008. The COA erred in weighing the evidence otherwise.

C. The COA Erred by Failing to Find that the Inferences Arising from Destroyed Evidence Support the Denial of JNOV

Compounding the COA's improper construction of inferences is the COA's failure to properly construe the destruction of evidence by the Developer. A party is entitled to favorable presumptions about the contents of evidence destroyed by the other party. *See, e.g., Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990) (when a party destroys evidence an inference may be drawn that the evidence destroyed is adverse to that party). Here, the Developer deleted over 50,000 files while this case was pending, at least 117 of which expressly related to these Commons. (App. pp. 539-51).¹⁴ All Courts should reasonably infer that

¹⁴ The Trial Court's unappealed Order for Destruction of Evidence concludes that the destroyed evidence was substantially adverse to the Respondents. (App. pp. 539-51).

this destroyed evidence favors Petitioners and casts doubt on the inferences that may be drawn from the evidence that was not destroyed. *See Kershaw*, 302 S.C. at 394, 396 S.E.2d at 362.

This Court “may affirm any ruling, order, decision or judgment upon **any ground(s) appearing in the Record on Appeal.**” Rule 220(c), SCACR (emphasis added); *see also Law v. S. C. Dept. of Corrections*, 368 S.C. 424, 439-40, 629 S.E.2d 642, 651 (2006). This Court should find that the Developer did not, and cannot, meet their burden to prove that the Trial Court’s JNOV findings were without factual support when the Developer destroyed evidence that is presumed to support these findings and therefore necessitates the affirmation the same. *See Kershaw*, 302 S.C. at 394, 396 S.E.2d at 372. The COA again erred in concluding otherwise.

D. The COA Erred by Failing to Recognize that Other, Unappealed Findings Mandated Affirmation

Compounding all errors discussed herein is the COA’s failure to recognize as the law of the case the other, unappealed findings and the inferences therefrom. The COA recognized that the self-dealing nature of the Recreational Easement had not been appealed and recognized that as the law of the case. However, the COA failed to recognize other, unappealed findings in the same Order, *e.g.*, Respondents’ “unclean hands.” (App. p. 512); *Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 151 (2009).¹⁵ Moreover, the COA failed to consider the threshold factual findings in the unappealed Sanctions Order, and the inferences therefrom (this is different from, and in addition to, the failure to recognize the adverse inference from the destroyed evidence), *e.g.*, “unclean hands,” discussed in Sec. VI, Amalgamation, below.

The foregoing four errors, individually or collectively, require that the 2019 Opinion be

¹⁵ “Under the law-of-the-case-doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.” *Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 151 (2009).

vacated in its entirety.

II. ALTERNATIVELY, THIS COURT SHOULD REINSTATE THE BREACH OF CONTRACT VERDICTS AWARDED ON WALBECK'S INDIVIDUAL CLAIM AND THE HOA'S DIRECT CLAIM

After vacating the lion's share of the jury's verdict on various grounds, the COA proceeded to remand Petitioners' last remaining verdict, Walbeck's \$10,000 breach of contract verdict, as having been tainted by the amalgamation instruction to the jury. (2019 Op. p. 26, App. p. 112) ("[W]e remand for a new trial on Walbeck's breach of contract claim. . ."). As the jury was not instructed on amalgamation, and there was no taint or prejudice shown by Respondents,¹⁶ Walbeck's contract verdict against the contracting party, the I'On Company, should be reinstated without the need for a third trial. If Walbeck's contract verdict is reinstated, the HOA's third-party beneficiary verdict on the same, sealed contract must also be reinstated. If this Court agrees with the COA that the other claims should not have been submitted to the jury, then Petitioners would *not* have elected away from the contract verdicts.¹⁷

A. The Contract Verdicts Were Not Tainted and Should Be Reinstated

Regarding the contract verdicts, the sealed nature of the contract and the applicable twenty-year SOL are uncontested by Respondents. (App. p. 77). The only basis for vacating Walbeck's breach of contract award against the Developer stemmed from the Trial Court's ruling on amalgamation and, specifically, from "prejudice" caused by the Trial Court's alleged instruction to the jury that Respondents "were amalgamated." (App. p. 2191:3-4). The jury was neither

¹⁶ That the amalgamation ruling was proper is addressed later in this brief in Section VI.

¹⁷ Additionally, the prevailing party fee provision in the Walbeck purchase contract constitutes an additional, sustaining ground to reinstate the Walbeck fee award. (Walbeck Contract, App. p. 3662); *see also* Section II, D below.

instructed on the law of amalgamation, nor was it told that the Respondents were amalgamated. This ruling by the COA must be set aside as it is clearly erroneous.

Further, the assessment of breach of contract is objective, certainly more so than a tort. It is clear that Walbeck's contract was entered into with the I'On Company and the I'On Company has not proven any prejudice it suffered by *its* request to have the judge (as opposed to the jury) decide amalgamation before the verdict form was submitted.¹⁸ The Developer—as the contracting party – was not prejudiced by the alleged error. The verdict form simply asked the jury whether it found in favor of Walbeck on his breach of contract claim, and separately, whether it found for the HOA on its breach of contract claim – the jury did, and the only I'On Defendant that was expressly a party to these contracts was the I'On Company. Therefore, reinstating Walbeck's verdict as to the I'On Company, alone, is supported by the evidence, even assuming this Court finds (which it should not) prejudice to the other Respondents from the ruling on amalgamation.

B. Election Would Not Have Been Required, and Walbeck Would Not Have Elected, Away From Contract Verdict

If Walbeck's other claims had been directed out, as held by the COA's 2019 Opinion, then Walbeck would have been left with, and the Trial Court would have enrolled, Walbeck's contract verdict. There would have been no need for Walbeck to elect a remedy. South Carolina law supports the election of remedies doctrine to “prevent double recovery for a single wrong.” *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 56, 691 S.E.2d 135, 152–53 (2010); *see also Jones by Robinson v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 175, 456 S.E.2d 429, 431 (Ct. App. 1995) (“Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts.”). For that reason, the doctrine's application “should be confined to cases

¹⁸*See Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) (“Moreover, a party may not complain on appeal of error or object to a trial procedure which his own conduct has induced.”).

where double compensation of the plaintiff is threatened.” *Save Charleston Found. v. Murray*, 286 S.C. 170, 175, 333 S.E.2d 60, 64 (Ct. App. 1985). That is no longer the case here.¹⁹

C. The HOA’s Contract Award Should Be Reinstated Against the Developer

This Court should follow the reinstatement of Walbeck’s contract verdict with the reinstatement of the HOA’s contract verdict.²⁰ Both were based upon the same contract and the same breach; the HOA’s claim only required the consideration of a single additional criteria – that the HOA was an intended, third-party beneficiary. The jury was instructed on the law of third-party beneficiaries and unequivocally found the HOA to qualify. (Verdict Form, App. pp. 2321-28; Jury Instruction, App. p. 2151). The evidence supports this, as the contract expressly provides for the Commons to be transferred to the HOA, and there is no contrary evidence in the record.

Lastly, the HOA’s contract verdict should be reinstated against the Developer in the interest of fairness. When a plaintiff is forced to elect a verdict because of a Trial Court error, a plaintiff should be allowed to revoke his election and/or invoke and satisfy a different jury verdict. The alternative, refusing to reinstate the breach of contract or negligent misrepresentation award, would

¹⁹ See *Lee v. Bunch*, 373 S.C. 654, 660, 647 S.E.2d 197, 200 (2007) (“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”) *citing* Rule 15(b), SCRPC; *Ebner v. Haverty Furniture Co.*, 138 S.C. 74, 136 S.E. 19, 21 (1926) (“The application of the doctrine [of election of remedies] is not a Procrustean rule; whether at common law or equity side of the court, it does not depend upon technical rules, but upon principles of equity and justice.”); *Ex Parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) (“Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible.”).

²⁰ Notably, the HOA’s direct contract claim would have been timely even if it was filed *after* the issuance of 2019 Opinion; *i.e.*, the 20-year SOL on the sealed contract did not expire until November 27, 2019. This point underscores that the COA’s dismissal of the HOA’s direct claim for breach of contract based upon **the COA’s myopic (and incorrect) application of Rule 23—especially doing so after a jury found in the HOA’s favor—was blatantly contrary to law, and logic.**

leave the HOA without any remedy for the jury's finding in its favor on three (3), separate claims. To ensure a just result, this Court should reinstate the HOA's breach of contract verdict.²¹

D. Walbeck's Attorney Fee Award Should be Reinstated

Walbeck's entitlement to attorney fees as the prevailing party in his contract is an additional, sustaining ground to reinstate the prior fee award. (App. pp. 3658-68). Paragraph 12(c) of the Walbeck purchase contract provides that "the prevailing party shall be entitled to collect its reasonable attorney's fees and paralegal's fees actually incurred in the action from the non-prevailing party." (Walbeck Contract, App. p. 3662). This Court should reinstate Walbeck's fee award as the contract provides an additional sustaining ground.

E. As Either Petitioners Proved their Direct Contract Claims Against the Affiliates or Amalgamation was Properly Granted, Both Contract Awards (and Walbeck's Fee Award) Should Be Reinstated Against the Affiliates

As later briefed herein, if this Court agrees either that: (1) Petitioners proved their direct liability contract claims against the Affiliates; or (2) amalgamation was properly granted, or did not taint or prejudice the Affiliates, both contract awards (and Walbeck's fee award) should additionally be reinstated against the Affiliates.

III. THE HOA'S DIRECT CLAIMS MOOTED ANY RULE 23 ISSUES

The COA's 2018 Opinion acknowledged the realigned HOA's direct claims and correctly found that "the HOA's realignment as plaintiff allowed the jury to award to damages to HOA as if Walbeck and Adkins had never brought a derivative action." (2018 Op., App. p. 22) (emphasis added). The COA's 2019 Opinion inexplicably ignores this prior finding.

A. The Developer Caused the HOA's Realignment and Cannot Complain About the Result

²¹ "A jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention." *Johnson v. Parker*, 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983)

It was the Developer who argued that the HOA should be realigned as a plaintiff during the first trial of this case; and, the Trial Court declared a mistrial based on this argument. (App. p. 915). After the Developer secured a mistrial, it was the Developer who moved for the HOA's realignment. On February 26, 2014, the Trial Court granted the Developer's Motion and issued an "Order Realigning I'On Assembly, Inc. as a Party Plaintiff." (App. pp. 452-53). In this Order, the Trial Court ordered:

[HOA] should be deemed to have adopted [Respondents'] claims, and [Appellants'] responses to [Respondents'] Complaint should be deemed to serve as responses to the [HOA's] adopted claims.

(Order Realigning HOA as a Party Plaintiff, App. pp. 452-53). On June 16, 2014, Petitioners filed a Fourth Amended Complaint that conformed to the Developer's request and to the Trial Court's Order by pleading the HOA's realignment as a Plaintiff. (4th Am. Comp., App. p. 750, para. 12).²²

Thereafter, during the second 2014 trial, Developer conceded that the HOA was realigned while arguing its directed verdict motions:

First of all, the [HOA] is now a plaintiff. That's a big issue. The latest complaint isn't a derivative complaint because it's not verified. The claims are different since the settlement. The [HOA] has embraced them in writing – and the [HOA] has embraced the claims. . . The fourth amended [complaint], they even say, demand would have been futile, which is a concession that is no longer, because the [HOA] is there. . .

(Trial Trans., App. pp. 1483:5-10; 1485:14-18) (emphasis added).²³ Similarly, Respondents conceded the existence of the HOA's direct claims in their arguments in favor of dismissal of the derivative claims:

If the derivative claims are dismissed, **the [HOA's] only remaining claims are those it has brought a[s] a Plaintiff in its own right.** The [HOA] was made a Plaintiff in this case and deemed to have adopted the derivative Plaintiffs' claims

²² Respondents answered this Complaint on July 18, 2014, and "admit[ted] that [the HOA] was realigned as a Plaintiff in 2014." (Answer, App. 767, para. 12) (emphasis added).

²³ Note, verifications for Walbeck and Adkins were filed in this matter. (App. pp. 620-21).

by this Court’s order dated February 26, 2014.

(Dev. DV Memo., App. 2288) (emphasis added).

The Developer then agreed to include the HOA as a plaintiff *and* as the claimant on the verdict form which referenced the HOA’s direct claims:

Do you find in favor of The I’On Assembly as to its claim for breach of contract. . .its claim for breach of fiduciary duty. . .its claim for fraud...its claim for negligent misrepresentation. . .If you answered ‘Yes’, write the amount of damages to be awarded to The [HOA].

(App. pp. 2323-24).²⁴ The jury returned a verdict for the HOA on negligence, contract, and breach of fiduciary duty. *Id.*

Post-trial, the Developer filed its JNOV Motion “incorporating all grounds cited in their motions during trial for directed verdict...as grounds [for JNOV].” (App. pp. 2389-90). Developer’s directed verdict grounds as to the HOA was that the HOA’s “own action” was time-barred under the SOL, (App. 2288) (emphasis added), and that “[b]ecause the I’On Assembly is now a Plaintiff in this action, the relief sought has changed fundamentally since the Assembly became a Plaintiff, and the individual Plaintiffs have never properly met the demand requirements of Rule 23(b), the derivative claims should be dismissed.” (App. p. 2297) (emphasis added). In this later argument, Respondents were arguing and conceding that the HOA’s direct claims mooted the derivative issues – and the Respondents never moved to dismiss the HOA’s claims on any basis other than the SOL, an affirmative defense rejected by the jury on a special interrogatory. *See* Rule 8(c), SCRCF; *Rose v. Paddy*, 340 S.C. 428, 532 S.E.2d 612 (Ct. App. 2000) (court reversed reduced verdict for trial court’s failure to charge burden of proof on Affirmative defense); *see also Garrison v. Target Corp.*, 435 S.C. 566, 869 S.E.2d 797 (2022) (“moreover, affirmative defenses

²⁴ Notably, the record is devoid of any Developer request that the claimant on the jury form be “the derivative plaintiffs.”

generally shift the burden of proof to the Defendant...”).

B. The COA Missed the Absence of a Directed Verdict Motion as to the Existence of the HOA’s Direct Claims

The Developer never asked the Trial Court to dismiss the HOA’s direct claims as invalid; the only directed verdict motion the Developer made as to the HOA’s direct claims was that they were time barred. In tandem, Respondents asked that the derivative claims be dismissed as moot given the new presence of the HOA’s direct claims:

The Assembly’s board should be in control of the maintenance of the claims which it has now made its own by becoming a Plaintiff in this action.... There is no need for the individual Plaintiffs, who have unique interests in the maintenance of this suit not shared by the Assembly or its other members, to maintain the same claims on behalf of the Assembly derivatively that it is now pursuing of its own accord...

[T]he Assembly accepted their claims on the eve of the mistrial of this case in January 2014. . .

... The Assembly has now accepted the derivative Plaintiffs’ demand²⁵ by agreeing to support their new, post-settlement claims and consenting to align itself as a Plaintiff in this suit. This Court should therefore implement South Carolina’s sound public policy by giving the Assembly full control of the prosecution of its own lawsuit, rather than making it beholden to the specific interests of the derivative Plaintiffs...

Defendants respectfully pray that the Court exercise such powers to dismiss derivative Plaintiffs’ claims on behalf of the Assembly and permit the Assembly full control of its claims.

(App. pp. 2297-2302) (emphasis added).

Thus, the 2019 Opinion COA errs in its treatment of the HOA’s direct claims in at least three ways. It failed to recognize: (1) the existence of the claims; (2) that Respondents conceded the existence and validity of these claims repeatedly at trial; and (3) that any challenge to the merits of the HOA’s direct claims (other than based upon the SOL) is now procedurally barred.

²⁵ This is another concession by Respondents as to Petitioners’ demands.

C. The Role of a Realigned Corporation is Mandated by Existing Substantive and Procedural Rules and Common Sense; and, Has Been So Found in Other Jurisdictions

This Court should find that when the HOA adopted Petitioners' derivative claims as its own, the corporation joins or steps into the shoes of the prior derivative plaintiffs. As such, any alleged Rule 23 pleading deficiencies become moot as the corporation is additionally, or alternatively, proceeding in its own right. Other courts facing similar issues have concluded the same.²⁶

In *Pikor*, for example, a shareholder of a New York corporation intervened in a derivative action that the original plaintiffs lacked capacity to bring. The court held the original shareholders' standing deficiency did not extinguish the corporation's direct claim because that claim belonged to the corporation:

The extinction of the status of [the] plaintiffs. . . in no way impaired or affected the corporation's [claims] or its right to continue and prosecute the action. In legal effect, it is as if the [original plaintiffs] had never appeared or instituted the action but as if the corporation alone was the plaintiff and alone had brought the suit.

Pikor v. Cinerama Prods. Corp., 25 F.R.D. 92 (S.D.N.Y. 1960) (emphasis added) (internal quotations and citations omitted); *see also Ross v. Patrusky, Mintz & Semel*, No. 90 CIV. 1356 (SWK), 1997 WL 214957, at *10 (S.D.N.Y. Apr. 29, 1997) (after finding minority shareholders' derivative claims "inappropriate," the Court dismissed their action in favor of the corporation, stating "[w]hen a corporation subsequently sues to assert claims on its own behalf...derivative claims become unnecessary and duplicative, and should be dismissed.").²⁷

²⁶ A corporation "own[s] any claims arising out of injury to the corporation and that are asserted in a derivative action, and a corporation thereby has the absolute right to resolve the claims" after the derivative action is filed, thus rendering any remaining derivative claims moot. *Star v. Oldfield*, 962 F.3d 117, 130 (4th Cir. 2020) (applying South Carolina law).

²⁷ *See also United Canso Oil & Gas, Ltd. v. Catawba Corp.*, 566 F.Supp. 232, 241-42 (D. Conn. 1983) (the Court has "no hesitancy" about dismissing the individual plaintiffs because of lack of

D. The Consent Verdict Form Provided for Recovery Directly to the HOA

The verdict form agreed to by the parties substantiates the HOA's direct claims. (App. pp. 2321-26). The direct, HOA claimant is listed first in the caption on the verdict form (unlike the Fourth Amended Complaint), and all queries thereafter on the verdict form refer to "The I'On Assembly," not the derivative plaintiffs. Respondents never objected to the verdict form.

E. None of the HOA's Direct Claims Are Time Barred Because the HOA's Breach of Fiduciary Duty Claim was Still Maturing in 2009, the Developer's Decade Long Control, and the Claims Related Back to the Initial Derivative Complaints

There are many reasons to overrule Respondents' sole challenge to the HOA's direct claims, including that the COA found that the evidence led to multiple inferences as to when HOA discovered its direct claims; the COA found that that the HOA was "continually controlled" by the Developer for ten years and therefore implicit in the COA's Opinions is that the SOL should be tolled as to the HOA's direct claims; and, that the HOA's direct claims related back to the initial derivative complaints.

1. The COA Found That Evidence Yields More Than One Inference as to When the HOA's Breach of Fiduciary Duty Claim Accrued

The Trial Court rightfully asked the jury to decide when the HOA's SOL clock started to run because the evidence yields more than one inference as to when the HOA discovered its claims.

The COA originally found the same thing:

[W]e disagree with Appellants as to the HOA's breach of fiduciary duty claim because the allegations in that claim are not limited to the falsity of the representations in the 1998 Property Report. . .

standing, stating "[plaintiffs] no longer have a derivative action because the corporation is now suing on its own behalf"); *Berman v. Thomson*, 403 F.Supp. 695, 698 (N.D.Ill.1975) (dismissing derivative plaintiffs and realigning corporation as plaintiff for further prosecution of claims); *In re Penn Cent. Sec. Litig.*, 335 F.Supp. 1026, 1040 (E.D.Pa.1971) (motion granted for defendant directors who moved to take exclusive control of certain derivative suits due to substantive law favoring actions being brought by the corporation itself).

[T]he allegations of paragraph 73 cover more than one breach, i.e., failing to honor their trust, failing to disclose their breach of duty, failing to enforce the HOA's rights, and self-dealing. While these breaches included the representations in the 1998 Property Report that included certain homeowners to purchase their lots, they are not limited to that one act of wrongdoing. . .

More than one reasonable inference exists as to when Walbeck and Adkins should have known of Appellants' alleged failures and their alleged self-dealing beyond the alleged false promise in the 1998 Property Report. HOA members learned of Russo's November 2008 agreement to purchase lots CV-5 and CV-6, including the Community Dock and boat ramp. However, in March 2009, Russo advised the HOA's president, Bruce Kinney, that he had abandoned this agreement. Appellants then advised Kinney and the HOA's management company that ownership of the Community Dock would be transferred to the HOA. Yet, on August 1, 2009, the HOA's members learned of a new contract of sale between Appellants and Russo when Kinney posted on an "I'On Community Bulletin" advising members of the contract. Appellants and Russo then closed the deal on August 5, 2009.

Based on the foregoing, the circuit court properly submitted to the jury the question of when the HOA's breach of fiduciary duty claim accrued. . . Therefore, we affirm the denial of Appellants' JNOV motion as to the accrual of the HOA's breach of fiduciary duty claim.

(2018 Op., App. pp. 12-17) (internal citations omitted).

While the COA incorrectly reversed the HOA's breach of fiduciary duty verdict in its 2019 Opinion, it did so on entirely different grounds (*i.e.*, Rule 23 and duty to convey title). The COA's 2018 SOL finding remains the same and is the correct finding.

2. Equitable Tolling Applies Because the COA Twice Found That This HOA Was Developer-Controlled Until 2009.

The equitable tolling doctrine requires the extension of the SOL applicable to the HOA's claims while it was under developer control.²⁸

Unlike equitable estoppel, South Carolina courts have not "limited" the application of equitable tolling based upon a defendant's misrepresentation, misconduct, or omission: Equitable tolling is judicially created; it stems from the judiciary's

²⁸ The Developer's other conduct briefed elsewhere herein also supports equitable tolling: (a) the Developer unfairly misled the HOA through multiple misrepresentations and omissions; (b) the Developer committed many "wanton, willful, and reckless" acts at the expense of the HOA; and, (c) the Developer destroyed evidence and obstructed justice in multiple respects.

inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.

Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115-16, 687 S.E.2d 29, 33 (2009) (emphasis added) *citing* *Machules v. Dep't of Admin.*, 523 So.2d 1132, 1134 (Fla. 1988) (“[E]quitable tolling. . .does not require misrepresentation by the defendant; rather, it serves to ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits.”) (emphasis added); *Magnolia North Prop. Owners’ Ass’n v. Heritage Cmty., Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012) (“Unlike equitable estoppel, equitable tolling does not require a showing that the defendant had made a representation to the plaintiff.”) (emphasis added).²⁹

Instead, our Courts recognize that equitable tolling may be applied in any case where “justified under all the circumstances”; and, our Courts have found tolling is justified in circumstances such as those present here. *Magnolia North*, 397 S.C. at 372, 725 S.E.2d at 125.

3. The HOA Was In Fact Controlled by the Developer

Here, the COA twice found that “the [Developer] retained continuing control of the HOA up to and including the day they conveyed lot CV-6 to Russo.” (2018 Op., App. p. 25-26) (emphasis added); *see also* (2019 Op., pp. 148-49) (“[the Developer’s] retention of control over the HOA throughout the years preceding [the sale] created a continuing fiduciary relationship between [the Developer] and the HOA”) (emphasis added); (2018 Op., p. 151) (“[The Developer’s] control of the HOA undoubtedly required the [Developer] to preserve the rights of

²⁹ *See also* 54 C.J.S. *Limitations of Actions* § 85 (“It may be found that the statute of limitations should be tolled where its policies are outweighed by the interests of justice in vindicating the Plaintiffs’ rights) (emphasis added).

the HOA's members to the unfettered use and enjoyment of these common areas.”) (emphasis added). This holding is supported by the facts first set forth above.

Because there is no question that the Developer controlled the HOA from its inception until at least 2009, and that the Developer would not initiate litigation against themselves, the HOA's claims were equitably tolled until at least 2009. *Magnolia North*, 397 S.C. at 372, 725 S.E.2d at 125 (“In the present case, the POA board consisted of Appellants’ officers until the date of “turnover,” September 9, 2002. We find unpersuasive Appellants’ claim that an organization they controlled would have initiated an action against itself during this period.”). The HOA could not sue the Developer due to the Developer’s “Supreme Court-like” veto power. (App. p. 1088:4-10) (the Developer conceding their veto power); (App. p. 1088:11-23) (the Developer admitting they exercised their right to appoint and remove Board members in 2012); (2019 Op., App. p. 101) (acknowledging the Developer appointed Board members as late as 2014).

This evidence of control justifies extending the tolling period all the way through 2014 when the HOA was realigned as a plaintiff which means the HOA's claims are timely under any scenario manufactured by the Developer. As explained in Note 20 above, the HOA's contract claim would have been timely if it was filed the same date the COA issued its 2019 Opinion.

4. The Unfairness Supports the Application of Equitable Tolling

From the beginning, the Developer acted in its own interest, as opposed to the interest of the HOA, by drafting unconscionable Covenants giving the Developer unfettered power over the HOA; issuing admittedly “misleading” marketing materials describing the Commons; granting a flawed Easement instead of ownership of these Commons; and, negotiating side deals with neighboring properties to use the Commons. Thereafter, the unconscionable conduct continued by the Developer, including having closed-door discussions “to keep” and “profit from” these

Commons; concealing the real status of the turn-over of these Commons; and, selling these promised Commons behind the HOA's and hundreds of I'On homeowners' backs. *See, e.g.*, (App. pp. 1152-53; 1574-75; 1665; 1681-82; 1689; 1700-04; 2692; 2697-2704; 2726; 2761-62; 2880-2924; 3341; 3981-83; 4025).

5. The HOA's Claims Related Back to the Derivative Filing

Lastly, the HOA adopted the derivative claims filed by Walbeck and/or Adkins, and therefore, the HOA's direct claims "relate back" to when Walbeck's derivative claims were first asserted in the original, 2010 Complaint. Rule 15, SCRPC ("Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading."). "The central requirement of [Rule 15(c)] is that the party defending against the new claim have sufficient notice of it, *i.e.*, the new claim must be logically related to the *matters originally pleaded* so that the defendant is not prejudiced by the new claim asserted after the statute of limitations has expired." *Whitfield Const. Co. v. Bank of Tokyo Tr. Co.*, 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999) (emphasis in original) (internal quotations omitted).

IV. HOA'S BREACH OF FIDUCIARY DUTY VERDICT WAS BASED UPON EVIDENCE OF CONTROL AND SELF-DEALING, AND A PROPER, CONSENT CHARGE ON FIDUCIARY DUTY – NOT ON A "DUTY TO CONVEY"

The COA got its fiduciary duty and breach analysis right in its 2018 Opinion. Its 2019 Opinion relies upon post-trial dicta to upend a properly tried result. Petitioner proved that the Developer's continuing control of the HOA gave rise to a fiduciary duty to act in the best interest of the HOA, and to not profit at the HOA's expense; and, that the Developer repeatedly breached this duty by self-dealing, violating the law as charged with the consent of the Respondents. The COA should have affirmed the Trial Court's denial of JNOV on this basis alone and regardless of

whether developer owed a separate, fiduciary duty to convey the Commons.

A. Both COA Opinions Found That Developer Owed the HOA a Fiduciary Duty to Act in Its Best Interest as Opposed to Developer's Interest

In both its 2018 and 2019 Opinions, the COA found that:

...[t]he circuit court did not err in concluding 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

(2019 Op., App. pp. 101-02); (2018 Op., App. p. 27) (“[W]e view Appellant’s fiduciary duty as a duty to ‘act in good faith and with due regard to the interest of the’ HOA’s members”) (internal citations omitted).

B. The Evidence Shows Developer Breached This Duty by Failing to Protect the HOA's Rights to Unfettered Use and Enjoyment of the Commons

The record reflects that Developer benefitted by diluting the HOA’s rights to the Commons on at least four occasions, all of which the COA expressly acknowledged in its 2018 Opinion.

1. Developer Sold Access Rights to Non-HOA Members but Never Informed the HOA Members of The Transaction

Developer’s first attempt to alter the usage and access of the Commons came in 1998 and 1999, only a few months after finalizing the Property Report. Unknown to the HOA, Developer submitted a proposal to a neighboring development, Olde Park, which allowed its residents to use “the I’On Club and I’On’s community dock and boat ramp” for a usage fee of \$350,000. (App. pp. 3385-86) (eventually \$450,000). On February 19, 1999, Olde Park accepted the proposal. (App. pp. 3387-90). This transaction shows that Developer *silently* garnered a profit from the Commons and diluted the HOA’s rights to the Commons, all at the same time. The COA confirmed this:

First, in 1998 and 1999, the I’On Group, then known as Civitas, negotiated with a neighboring subdivision’s (Olde Park) developer for the sale of access rights to the Community Dock and the boat ramp on lot CV-6, which was owned by the I’On Company at the time. This occurred without knowledge of the HOA’s members.

(2018 Op., App. pp. 28-29) (emphasis added); *see also* (App. pp. 2962; 3385-91; 3428).

2. Developer Altered the Plan Internally and Granted an Easement on the Commons to Accommodate the Olde Park Deal; but Never Informed the HOA of the Reduction of Rights Occurring in the Move From a Deed to An Easement; That the Easement was Contrary to the Property Report's and Covenants' Terms; Or That the Alleged Perpetual Easement was Cancelable Upon the Expiration of Thirty Years, and That it was Void *Ab Initio* as the Grantor Did Not Own the Property

Developer's second attempt to alter the usage and access of the Commons occurred in 2000. Unknown to the HOA, Developer altered the plan internally and, on February 9, 2000, Developer had I'On Club LLC grant a Recreational Easement on the Commons to accommodate the Olde Park deal. (App. pp. 3627-41). Developer never informed the HOA that the purpose of the Easement was to allow non-members to access and use the Commons or that the Easement conflicted with the Property Report's and Covenants' language indicating: (1) that only HOA members (and their guests) would have access to the Commons and (2) that the HOA would hold "title" to the Commons that "shall" be conveyed to the HOA. *See* Sections E and F, below.

In addition to these facts is the fact that the first operative paragraph of the Easement purported to grant the HOA "perpetual" use and access of the Commons, but a later section limited the Easement's term to thirty years, thereby superseding any "perpetual" language referenced in the other provisions. (App. p. 3630). As noted by the COA:

On February 9, 2000, the I'On Club, LLC (the I'On Club) executed a "Recreational Easement and Agreement to Share Costs" (Recreational Easement) purporting to "provide access to the [HOA] members for them to use the docks and the boating ramp" off lot CV-6. The Recreational Easement also included language purporting to grant an easement to the I'On Club for use and access to other common areas within I'On Village. On page three of the document, the easement is described as perpetual. However, section 4.2 of the Recreation Easement states that either party can terminate the easement after thirty years upon six months' notice.

(2018 Op., App. p. 4) (emphasis added).

Moreover, the Recreational Easement was invalid because the I'On Club did not actually own the subject property at the time the Easement was granted. At the time the easement was granted, CV-6 was still owned by The I'On Company. The I'On Club acquired title to CV-6 on August 15, 2000 from the I'On Company for five dollars. (App. pp. 3642-47). Therefore, the Recreational Easement was null and void. (2018 Op., App. p. 2; 2019 Op. App. p. 110). Nevertheless, this transaction again evidences the very, early actions of the Developer to disregard its obligations relating to the Commons while continuing to make representations to the contrary.

3. Developer Entered a Contract to Sell the Commons in 2008 and Refused to Modify the Easement to Protect the HOA's Interest

Developer's third attempt to alter the usage and access of the Commons occurred in 2008. As observed by the COA:

In July 2008, Mike Russo with 148 Civitas, LLC (Russo) submitted a proposal to buy lot CV-6, together with overflow parking on adjacent lot (CV-5). The proposal included a provision for transfer of the "boat docks" to the HOA. Subsequent communications between Appellants and Russo indicated an intent to ultimately convey ownership of the boat ramp and dock off lot CV-6 to the HOA. However, in November 2008, Russo and Appellants entered into an agreement that would include the boat ramp and Community Dock in the transfer of lot CV-6 to Russo, which was concerning to HOA members. The then-current president of the HOA's Board of Trustees (Board), Bruce Kinney, contacted Thomas Graham regarding modifying the Recreational Easement to protect the HOA members. One of the modifications Kinney sought was making the easement perpetual. However, on January 5, 2009, Thomas Graham notified Chad Besenfelder that Appellants would not modify the Recreational Easement while the Creek Club was under contract for sale to Russo.

(2018 Op., p. 130, App. pp. 92-93) (emphasis added).

4. Developer Sold the Commons in August 2009, Resulting in Further Damage to the Members' Rights

Developer's fourth attempt to alter the usage and access of the Commons occurred in 2009. As noted by the COA:

On August 5, 2009, the I'On Club conveyed ownership of lot CV-6 to Russo in consideration of \$1,400,000. On this same day, Thomas Graham, Vince Graham, and Geoff Graham conveyed ownership of lot CV-5 to Russo in consideration of \$225,000. . . While the I'On Club made the conveyance of lot CV-6 to Russo expressly subject to the Recreational Easement when its validity was not being questioned, this easement was “nonexclusive.” Again, this placed the HOA’s members in a position of having to compete with non-members for access to the disputed property.

(2018 Op., App. pp. 28) (emphasis added); *see also* (App. pp. 3385-91).³⁰

C. The COA’s 2018 Opinion Confirmed the Breach

Based on this evidence, the COA concluded in its 2018 Opinion that:

[T]here is evidence in the record from which the jury could have reasonably inferred Appellants bad faith. In the light most favorable to Respondents, the evidence shows Appellants’ intent to profit from the disputed property at the expense of the HOA’s members. . . In sum, there is sufficient evidence of Appellant’s breach of their fiduciary duty to the HOA’s members to affirm the denial of Appellant’s JNOV as to this claim.

(2018 Op., App. p. 29) (emphasis added).

D. The COA’s 2019 Focus on the Trial Court’s Duty to Convey Ignored the More Basic Breach

While the Trial Court considered the analogy between the duty to convey Commons in good repair and the duty to convey Commons at all, the jury was never presented this issue, and it did not form the basis of their verdict. The jury was charged (with consent) as follows:

A developer ... owes fiduciary duties to the [HOA and [Homeowners]]. The developer’s fiduciary duties include the duties to hand over common elements ... in good condition, or with the funds to effectuate any needed repairs; and **to act in the best interests of [Homeowners] while controlling the [HOA].**

³⁰ Notably, the COA also found that the evidence showed that Developer failed to disclose some of these transactions which, in and of itself, constitutes another breach of a fiduciary duty it owed to the HOA as a matter of South Carolina law. *Turpin v. Lowther*, 404 S.C. 581, 584, 745 S.E.2d 397, 398 (Ct. App. 2013) (personal representative breached a fiduciary duty to his beneficiaries when “he did not disclose to them that he was negotiating with third parties to sell properties belonging to the estate while he was simultaneously negotiating with the beneficiaries to purchase from them those same properties.”).

Whenever a fiduciary relationship exist[s] between two parties, and a transaction occurs between them, and the superior party obtains an advantage or a possible benefit, a presumption arises against the transaction's validity, and shifts the burden of proving the good faith [of the] transaction upon the superior party.

Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material....Furthermore, a fiduciary relationship is one of mutual trust and confidences, imposing upon the party the requirements of loyalty, good faith, and fair dealing. One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relationship ...

(App. p. 2165-67) (emphasis added); *see also* (App. p. 1959) (Developer's counsel indicating that he had "nothing else about the language [of this charge], it's just the principle [fi]d[u]ciary duty.").

There is no reference to a "duty to convey" included in this charge and no error of law. Rather, the jury's verdict was based on applying this charge to the overwhelming evidence that showed: (1) Developer was duty-bound to protect the HOA due to its continuing control and representations; and (2) Developer failed to protect the HOA's interest for over a decade. (2018 Op., App. pp. 31). The jury's verdict therefore must be sustained as a matter of South Carolina law. *Welch*, 342 S.C. at 300, 536 S.E.2d at 418-19 ("The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision.") (emphasis added).

E. The COA's *Cedar Cove* Discussion Analyzes the Wrong Issue and the COA Misread these Covenants

The COA pointed to *Cedar Cove* to resolve whether a fiduciary duty to convey title to common areas exists in this case. (App. p. 92). Critically, there was no Developer or Developer control involved in *Cedar Cove*, no fiduciary relationship between the parties, and simply nothing in common between the two cases. 368 S.C. 254, 628 S.E.2d 284 (Ct. App. 2006). *Cedar Cove* has no applicability to the *I'On* case – and the COA's reliance on it is shocking and troubling.³¹

³¹ Obviously, the Respondents did not think *Cedar Cove* applied as they did not cite to it in any of their COA briefs or motions.

Cedar Cove concerned a dispute between a HOA and a member regarding his violation of the covenants. 368 S.C. at 259, 628 S.E.2d at 286.³² Here, the dispute does not emanate from or resolve upon rights or obligations set forth in the Covenants. The dispute emanates from, *inter alia*, the Developer's common law duties and conduct, including a decade of omissions and assurances made by the Developer to the HOA. *See, e.g.*, (App. p. 590); *see also* (App. pp. 3518-29). The COA therefore drifted far afield when it relied on *Cedar Cove*. (2019 Op., p. 16, App. p. 102).

Even if the Developer's fiduciary duty is dictated by language in the Covenants indicating that common areas are to be owned by an HOA, Section 6-101 of the Covenants state that this HOA is to hold "title" to "the Commons":

The Assembly shall assume full responsibility for the control and maintenance of the Commons **as conveyed to the Assembly by the Founder** unless contrary provisions are made through contract or in the instrument of conveyance. Upon a vote of two-thirds (2/3) or more of outstanding Titleholder votes, the Assembly may transfer title to some or all of the Commons to another entity.

(Covenants, Art. VI, App. p. 4140) (emphasis added).

F. The COA Misapplied the Property Report's "Notification" Regarding Non-Mandatory Transfers to Mandatory Transfers, Which Included the Commons

The COA also erred in relying on a "notification" from the Property Report.³³ Its finding, that the Property Report "emphasized that there was no guarantee a homeowner would have

³² The *Cedar Cove* complaint cited "no source to support its claim for relief [from the patio that encroached three feet onto the common areas] other than the restrictive covenants," and the HOA's charge of trespass "was pled and tried on the theory that the [resident] violated the restrictive covenants". *Id.* (emphasis added). As a result, the *Cedar Cove* Court stated: "resolution of this appeal ... turns ... on the application of largely undisputed facts to unambiguous [covenants]." *Id.*

³³ Notably, the COA originally found that it "disagreed with [Respondents] as to the HOA's breach of fiduciary claim because the allegations in that claim are not limited to the falsity of the representations in the 1998 Property Report"; yet, in its substituted analysis, the COA improperly relies on the purported "critical import" of the Report to erroneously disregard the Respondents' subsequent promises to convey the Commons. *Compare* (2018 Op., App. p. 12) (emphasis added) *with* (2019 Op., App. p. 102).

access” to “certain amenities in I’On Village” because “these amenities could be operated as a private club for its members and guests” and “may be owned or operated by persons other than the [HOA],” (App. p. 3519), is erroneous because the “notification” does not apply to the Community Dock and Creekside Park – which was set forth in the *mandatory transfer* chart referenced by the COA in its 2018 Opinion.

There were two different types of amenities disclosed in the Property Report: mandatory transfers and non-mandatory transfers. The Commons were clearly included in the mandatory transfer chart; the notification clearly applied to the non-mandatory “additional recreational facilities.” This is another example of the COA improperly assessing the facts of this case.

1. The Developer’s Express Grant of Unimpeded Access and Use of the Commons

The Developer listed the Community Dock and Creekside Park in the Report’s recreational facilities chart, and expressly provided that the facilities listed in the Report’s chart “**shall**” be conveyed to the HOA and “**will**” be available for use by HOA members and their guests:

Transfer of the Facilities

The recreational **facilities listed in the chart above shall**, upon completion of construction, **be conveyed to the I’On Assembly, Inc.** by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to the I’On Assembly or its members. Upon conveyance of these facilities to the I’On Assembly, it shall assume full responsibility for the costs of ownership, operation, and maintenance of the facilities conveyed to it. Such costs will increase the responsibilities of the I’On Assembly, Inc. and its board of trustees and could result in an increase in future assessments or special assessments payable by lot owners to the I’On Assembly, Inc.

Who May Use the Facilities

The recreational **facilities listed in the chart above will be available for use by lot owners and other members of the I’On Assembly, Inc.,** including the developer, and their respective guests.

(App. pp. 3518-19) (emphasis added). In doing so, the Developer promised the HOA and its members ownership and unfettered access to and use of these Commons. (App. p. 3519).³⁴

2. The Notification Addressed the Non-Mandatory Transfers

The Developer separately described potential instances where transfers to the HOA were not mandatory:

There **may be additional recreational facilities in the subdivision which are not listed in the above chart** and which will be privately owned and operated by a person or entity other than the I'On Assembly, Inc. The operation and use of, and access to, **such facilities** is not guaranteed and is subject to the terms and conditions and payment of such fees as the owner and operator of such facilities may establish from time to time. Any or all of **such additional facilities** may be operated as a private club for members and their guests. Membership in any **such club** may be subject to application, approval and availability, and payment of such initiation fees, dues and other charges as the owner/operator of the facility may establish and change in its sole discretion.

Id. (emphasis added). The purported “notification” language, cited by the COA in its 2019 Opinion, followed the description of the non-mandatory transfers and described potential limitations in access to “various” facilities not owned by the HOA:

VARIOUS RECREATIONAL FACILITIES IN THE SUBDIVISION MAY BE OWNED OR OPERATED BY PERSONS OTHER THAN THE I'ON ASSEMBLY, INC. THERE IS NO GUARANTEE THAT ANY **SUCH FACILITIES** WILL BE AVAILABLE FOR USE BY LOT OWNERS. ANY OR ALL OF **SUCH FACILITIES** MAY BE OPERATED AS A PRIVATE CLUB FOR MEMBERS AND THEIR GUESTS. THERE IS NO ASSURANCE THAT YOU WILL BE ACCEPTED FOR MEMBERSHIP IN ANY **SUCH PRIVATE CLUB** IF YOU APPLY. IF ACCEPTED, THE COSTS OF SUCH A MEMBERSHIP MAY BE SUBSTANTIAL AND ARE IN ADDITION TO THE PURCHASE PRICE OF YOUR LOT. NO REFUND OF THE PURCHASE PRICE OF YOUR LOT WILL BE MADE IF YOU CANNOT OBTAIN A

³⁴ As one HOA member, Catherine Templeton, reasonably understood, the Report:

[P]rovide[d] that there will be other facilities not listed in the chart and that the “use of, and access to, such (not listed) facilities is not guaranteed.” By implication, this indicates that use of and access to all charted recreational facilities is **guaranteed**.

(App. p. 2706) (emphasis added).

MEMBERSHIP. SINCE THE VALUE OF YOUR LOT MAY BE ADVERSELY AFFECTED BY YOUR INABILITY OR FAILURE TO OBTAIN A MEMBERSHIP, YOU SHOULD CAREFULLY CONSIDER YOUR PURCHASE OF A LOT IF IT IS BASED UPON YOUR PRESUMED ABILITY TO OBTAIN A MEMBERSHIP IN ANY PRIVATE CLUB AND TO USE ITS RECREATIONAL FACILITIES.

(App. p. 3520) (emphasis added).

By the plain language of the Report, the “notification” quoted by the COA does not apply to the HOA’s rights to the Community Dock and Creekside Park.³⁵ The “notification” provision therefore does not change the Developer’s express grant of unimpeded access to, ownership of, use of the facilities in the chart to the HOA. *See Stevens Aviation, Inc. v. DynCorp Int’l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) (“[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.”); *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015) (“[I]n the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and, where possible, all the language used should be given a reasonable meaning.”).³⁶

³⁵ These different provisions and the non-applicability of the latter “notification” was reviewed at length with the Graham witnesses. (App. pp. 1081:7-1082:14; 1567:20-1568:18; 1664:3-1665:17) (Respondents admitting that Property Report included a promise to convey a Community Dock and Creekside Park to the HOA and that Respondents changed their plan to fulfill this promise); *see also* (App. pp. 1409:4-1410:10) (Walbeck testifying that the language of the Property Report indicated that the Creekside Park and Community Dock was to be conveyed to the HOA).

³⁶ To the extent it was unclear which facilities the Developer intended to include within the “various recreational facilities,” the provision should be read in favor of the non-drafting parties, the HOA and its members. *See S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) (“Ambiguous language in a contract... should be construed liberally and interpreted strongly in favor of the non-drafting party. After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings.”).

G. The Developer Controlling the HOA Had a Duty to Enforce the HOA's Rights, Which Included Enforcing the Developer's Obligation to Convey

As the COA also acknowledged in its 2018 Opinion, the Developer's owed a fiduciary duty to "enforce the HOA's rights." (2018 Op., p. 140). A fiduciary is a fiduciary; and the duty of a "developer" fiduciary to "enforce the HOA's rights" is no different from a duty to convey Commons that Developer represented should rightfully belong to the HOA. Even if this Court disagrees, this Court has the authority to affirm the Trial Court's decision if it reached the right result for the wrong reason. Whether one calls it a duty to act in the HOA's best interest, a duty to protect the member's "unfettered access" or the HOA's third-party beneficiary rights,³⁷ or a *duty to enforce* the Developer's obligation to convey pursuant to its string of contracts, promises, and representations, there is evidence in the record that supports the verdict and the Trial Court's denial of JNOV. Reasonable minds can differ as to whether the original promise to convey was made when the parties were at arm's length.³⁸ However, the opportunity (and duty) to enforce the promise (protect the HOA rights) occurred while the HOA was developer controlled – and the evidence shows Developer failed to enforce the HOA's rights.

³⁷ The HOA was a third-party beneficiary of many member's purchase contracts providing for the transfer of the Commons. (App. p. 3661).

³⁸ All the Developer's activities in the planning, formation, and implementation of I'On generate the responsibilities contemplated by Duncan, cited by *Goddard* and *Concerned Citizens*, except the negotiation of the sales price of each lot. However, as Petitioner has shown breach of the predicate or more generalized fiduciary duty, this Court does not have to reach this issue.

V. THE COA ERRED IN ITS TWO, SUBSTITUTED AMALGAMATION RULINGS.³⁹

The 2018 Opinion originally recognized the Developer's and Affiliates' collective bad faith and found that "the evidence shows that Appellants' common employees and principals acted in concert to profit at the expense of the HOA's members." (App. p. 31). In its 2019 Opinion, the COA reversed itself (and the jury and trial court) without explanation, finding instead that "there is no evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." (2019 Op., p. 25, App. p. 112) (internal citations omitted).

A. The COA Ignored Trial Evidence Which Retroactively Satisfies the Second Prong of the *Pertuis*⁴⁰ Test

If this Court agrees with the COA's decision to apply the *Pertuis* test retroactively,⁴¹ then this Court must recognize that the second prong of the *Pertuis* test was satisfied during trial.⁴²

In *Pertuis*, this Court formally recognized that, in order to treat separate corporate entities as a single business enterprise, there must be "evidence of bad faith, abuse, fraud, wrongdoing, or

³⁹ Respondents never moved for a directed verdict on "amalgamation"; rather, Developer moved for directed verdict on "alter ego" and "veil piercing," contending that "[t]here is thus no basis for believing that 'amalgamation' is a separate legal theory from veil-piercing or alter ego under South Carolina law." (App. pp. 2317-2318). During oral argument, Respondents largely relied on its memorandum. (App. pp. 1475-1522). Respondents' failure to move for directed verdict on amalgamation renders the issue unpreserved. Additionally, Respondents did not appeal "amalgamation"; rather, Respondents appealed "the circuit court failed to consider the factors required by *Sturkie* [...] for 'piercing the corporate veil' to hold a corporation's principals personally liable for the corporation's wrongdoing." (2019 Op., p. 25, App. p. 111).

⁴⁰ *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 817 S.E.2d 273 (2018).

⁴¹ The general rule for retroactive application of judicial decisions, discussed later in this brief, is that only decisions creating new remedies to vindicate existing rights are applied retrospectively. Decisions creating new substantive rights have prospective effect only. *See Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989).

⁴² "An action to amalgamate parties lies in equity. Therefore, our standard of review on this issue is de novo and allows us to find facts in accordance with our own view of the preponderance of the evidence. Despite this broad standard of review, we are not required to disregard the trial court's findings of fact, and we are mindful the trial court sits in a better position to assess witness credibility." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 119, 866 S.E.2d 542, 548 (2021).

injustice resulting from the blurring of the entities' legal distinctions.” 423 S.C. 640, 654-655, 817 S.E.2d 273, 280 (2018). Unfairness in this context is a “reference [to] the kinds of abuse. . .that [the corporate form] should not shield.” *Id.* Evidence of “fraud, eva[ding] obligations, circumvention of statutes, monopolization, criminal conduct, and the like” satisfy the unfairness requirement. *Id.* Resulting unfairness would also include “evasion of existing obligations.” 423 S.C. at 654-55, 817 S.E.2d at 280 *quoting SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008) (emphasis added).

Because the COA correctly concluded that the first prong of the *Pertuis* test is satisfied,⁴³ the only remaining question is whether there is any evidence in the record to show that allowing Developer and its Affiliates to maintain the fiction of separate corporate entities would defeat justice.

1. There is Ample Evidence of Resulting Unfairness as a Result of Respondents Exploitive and Evasive Conduct

Prior to submitting the case to the jury on special interrogatories agreed to by the parties, the Trial Court held that Developer and its Affiliates were amalgamated. (App. pp. 1936:12 – 1937:21; App. p. 495). The Trial Court based this ruling on the testimony as well as the manner in which witnesses testified, and evaluating all evidence, which revealed numerous exemplars of the kinds of exploitive and evasive conduct “that the corporate structure should not shield.” *Pertuis*, 423 S.C. at 654, 817 S.E.2d at 280.

In its Order denying Appellants' JNOV Motion, the Trial Court found that Petitioners proved the distinction between the Developer and Affiliates were blurred, and further **highlighted** examples of bad faith and the “misuse of collective control” which resulted in unfairness to the Petitioners. (App. p. 495) (“Plaintiffs sufficiently demonstrated both ‘fundamental unfairness’ and

⁴³ (App. p. 112) (“[E]vidence shows the various entities' operations are intertwined. . .”).

many ‘wrongs’ committed by the Defendants.”). One such example specified by the Trial Court was the transaction which is the very crux of this case: the sale of the Community Dock and Creekside Park on August 5, 2009, to a third party, Civitas. (App. pp. 495-97). Before this sale, the Developer and Affiliates transferred the Commons amongst themselves, for little or no consideration. (App. pp. 495-97) (“For example, CV5 and CV6 were first transferred by the I’On Company to the I’On Club on August 15, 2000, for nominal consideration the amount of \$5.00. Two years later, the I’On Club transferred CV5 to the Graham’s for the same inadequate consideration”).

The sale which substantively wronged the homeowners – the sale to Civitas—was only accomplished by virtue of the Developer’s collective control of all entities:

As evidenced by the Settlement Statement in connection with the closing of these three properties, the I’On Group, under the direction of the Grahams, executed the closing documents on behalf of both the I’On Club and I’On Company, further reflecting the amalgamation of the Defendants’ business operations.

(App. pp. 495-97) (emphasis added). The Trial Court then pointed to the June 18, 2009, Purchase Agreement for the sale of the Creek Club/CV-6. (*Id.* at 497). While the Purchase Agreement was entered into by the I’On Club, it was the I’On Company that actually executed the Agreement.⁴⁴ (App. p. 497 *citing* App. pp. 3189-3205). The sale was only accomplished because the I’On Group executed the closing documents on behalf of both the I’On Club and I’On Company, all while Chad Besenfelder, for I’On Group, and Tom Graham, for I’On Company, told the HOA I’On Company would turnover the Commons to the HOA when, in fact, I’On Club owned the Commons and the principals of all three companies were working to sell the Commons. (App. pp. 2712; 3432-35; 3439). This is an astonishing example of the resulting unfairness from Developer’s

⁴⁴ The Trial Court noted on the record when ruling on amalgamation that the Grahams didn’t even know who worked for which company. (App. p. 1936:24 – 1937:1).

collective control, and the Trial Court cited it in its JNOV Order. (App. pp. 495-97).

The unfairness to Petitioners which would result from allowing the Developer to hide behind the fiction of separate corporate entities is also borne out by the Developer's arguments regarding SOL— (e.g., that Petitioners should have been on 'constructive notice' that they did not own and would not (ever) own the amenities because of the HOA's budget). Because the Developer and Affiliates operated as a single enterprise, it was not until this sale to an unaffiliated entity that the homeowners were on notice that the promises made to them were broken. The Trial Court noted that the distinction between "Developer" or "developer's agent"—would not pique their interest because the Grahams controlled each owner *until* Russo took possession in 2009.

In ruling on JNOV, the Trial Court pointed to the 2000 Recreational Easement as additional evidence of misuse of collective control. (App. pp. 496-97). The Trial Court ruled that the Recreational Easement was not an "arms-length transaction," and Respondents did not appeal that holding and it is, therefore, the law of the case. (App. p. 17-18, 110). In so holding, the Trial Court made the following, unappealed findings, which constitute evidence of unfairness *resulting from* the blurred corporate entities:

On February 9, 2000, the I'On Club, LLC, the I'On Company, LLC, and the I'On Assembly (then controlled by Defendants) executed a document entitled "recreational Easement and Agreement to Share Costs" [...]

[...] one individual, Joe Barnes, a general agent for the I'On Defendants, executed the 2000 Recreational Easement on behalf of all three interested parties. [...]

Simply put, the Defendants cannot rely on equitable principles when the evidence, and the jury's verdict, demonstrate that Defendants acted inequitably. The record reflects that Defendants were aware that the I'On Club did not hold title to the amenity property when the 2000 Recreational Easement was executed... Defendants' employee signed the 2000 Recreational Easement on behalf of all parties while on notice that the I'On Club was not the legal title holder.

(Order Declaring the Invalidity of the Easement, App. pp. 507-508, 511-512).⁴⁵

The Recreational Easement is clear evidence of self-dealing that resulted in harm to the HOA because the Easement was limited in term and invalid, while simultaneously being facially represented as “perpetual” (App. pp. 1122:20-11:30:10; 3627-41).⁴⁶ By executing the Recreational Easement, the I’On agent purported to bind the HOA to a document of lesser rights and limited duration, which did not comply with the Developer’s original representations and sales contracts, and which eventually proved invalid anyway.⁴⁷ The execution of the Easement on behalf of all three parties by Developer’s employee, Joe Barnes, is clear evidence of “bad faith”, “injustice”, and “wrongdoing,” which was *only possible* because the various entities’ operations were intertwined.⁴⁸

⁴⁵ The Trial Court’s Order regarding the 2000 Easement *also found that the Developer had acted with unclean hands* and was therefore unable to take advantage of the equitable remedy of “after-acquired property.” (Order at 7, App. p. 510). Although Developer appealed the application of the after-acquired property doctrine, it did not appeal the Court’s finding of unclean hands. As application of the “single business enterprise” / “amalgamation” doctrine sounds in equity, Developer should not be permitted to take advantage of a retroactively applied defense to an equitable doctrine when the Trial Court found that Developer acted inequitably, and evidence exists to sustain the Trial Court’s ruling. *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 756 (Ct. App. 2005) (“... if a party has unclean hands, the party is precluded from recovering in equity.”).

⁴⁶ Perhaps if an unconflicted, HOA representative had signed the easement, he/she would have noticed the inconsistency in terms or asked to see proof of ownership.

⁴⁷ Now, Respondents concede unilateral control when arguing in support of the after-acquired title doctrine:

This case presents the unusual situation where, although the grantor of the easement (the I’On Club) did not obtain title to the servient property until six months after execution of the easement, the owner of the servient property (the “I’On Company) *was a signatory to the document creating the easement and was controlled by the same person as the grantor of the easement.*

Id. at 15 (emphasis in original).

⁴⁸ There are many more examples in the record, all of which are cited in Petitioner’s Statement of the Facts. *See, e.g.* (App. pp. 1274; 2811; 3385-91) (Olde Park Deal); (App. pp. 2692-93, 4025) (Between 2005 and 2007, Developer represented through I’On Company’s manager, the I’On

It is now obvious that original alteration of the Grand Plan, from HOA ownership of the Commons (as represented by I'On Realty in the distributed Property Report), to Club Ownership with HOA use rights, was the discrete, initial effort by the Respondents to “capitalize” on the asset and begin separating it from the HOA. The move went unnoticed because the access remained undisturbed, and it was owned by a subsidiary of the Developer.

This initial separation was discretely augmented by limiting the easement to thirty years, another complication which was discretely obscured by the “perpetual” language earlier in the easement. While Tom Graham tried to label this a mistake, his claim is belied by his failure to correct it at the Board’s request prior to the third-party sale; and, Vince Graham’s refusal to take a position on the propriety of the cancellation term in his deposition, repeated at trial. (App. p. 1126:5-13; pp. 1680:2-1682:15). The failure to correct tilts the inference towards self-serving motives, either originally or later, to take advantage of the HOA.

Each of the Respondents was aware of the HOA’s claim to the Commons prior to the sale—this has been briefed exhaustively by Petitioners. To perfect its self-dealing, the I'On Club accomplished its surreptitious sale of the Commons through the efforts of its manager, the I'On Group, while the Developer, the I'On Company, through its manager, the I'On Group, was representing to the HOA that they were in the process of transferring the Commons to the HOA. This is the ultimate misuse of the corporate form, and resulted in the neighborhood’s loss of their sole, deep-water access. Respondents should not be permitted to hide behind the fiction of distinct, corporate entities when: (1) they were collectively aware of the HOA’s claims to the Commons;

Group that the Commons were going to be turned over but “for now” the Commons would be operated by I'On Club until certain details could be worked out).

and (2) used their collective control to mislead the HOA into believing one thing, while using their collective control to secretly do the exact opposite.

2. It Should be The Developer's Burden to Prove Fairness, not the HOA's Burden to Prove Unfairness

Unlike this case, *Peritus* also did not involve parties in a fiduciary relationship. *See* (App. p. 112, 2019 Op., p. 26, n. 19) (finding Developer owed a fiduciary duty to the HOA and its members). The fiduciary nature of the relationship here requires that the burden of proving the propriety of the transactions involved rests with the superior, corporate entities when those entities owed a fiduciary duty to the inferior party and the inferior party alleged that the superior parties were amalgamated.⁴⁹ Under *Hodge*, the Developer bears the burden of proving the good faith behind their transactions because of the fiduciary relationship between the Developer and an HOA.⁵⁰ The same should be true in the amalgamation context.

3. *Petrus* Should Not be Applied Retroactively

Petitioners have illustrated that the *Petrus* test for amalgamation was satisfied; however, to the extent this Court disagrees, this Court should examine whether it is fair to apply retroactively a newly clarified, equitable doctrine to the detriment of Petitioners and to the benefit of Developer. Prospective application is required when liability is created where none formally existed. *Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989).

⁴⁹ *See Hodge v. Sovereign Camp, W.O.W.*, 148 S.C. 369, 146 S.E. 220, 224 (1929) (“Where there is a fiduciary relation between parties, and a business transaction occurs between them, and the superior party obtains the advantage, or a possible benefit, equity will closely scrutinize the transaction and raise a presumption against the validity of the same and throw the burden on him to prove good faith.”).

⁵⁰ Moreover, under *Wilson* and *Hodge*, it was also the Developer's burden to prove it was not self-dealing when it four times diluted the HOA's rights in the Commons. *Wilson v. Gandis*, 430 S.C. 282, 844 S.E.2d 631 (2020).

The Trial Court did not have the benefit of *Pertuis* when the case was originally heard and when the Trial Court ruled on JNOV in June of 2015. *See* App p. 112, 2019 Op., p. 26, n. 19 (expressly acknowledging “the circuit court did not have the benefit of the *Pertuis* decision when it ruled on [amalgamation]”). Respondents should not be held to a standard that did not exist at the time of trial or the Trial Court’s JNOV determination. *Toth*, 298 S.C. at 9, 377 S.E.2d at 585-86 (where a decision “effect[s] more than remedial or procedural change,” *e.g.*, when it creates “liability where none had previously existed,” retroactive application is “unfair and inappropriate.”).

B. The COA Erred in Granting Developer and Affiliates a New Trial on Walbeck’s Breach of Contract Claim; Amalgamation Did Not Taint This (Or Any Other) Recovery

As briefly discussed in Section II, the COA’s holding granting Developer a new trial on Walbeck’s breach of contract claim requires reversal by this Court on procedural grounds because:

- (1) The Trial Court did not instruct the jury on amalgamation (contrary to the COA’s stated basis for its ruling);
- (2) The Developer consented to the special interrogatory verdict form and never appealed this issue. It is therefore not preserved for review; and,
- (3) Neither the structure of the verdict form nor the amalgamation ruling caused any prejudice to the Developer or Affiliates, especially as to the breach of contract claim.

1. The Court of Appeals Erroneously Held that the Circuit Court Instructed the Jury on Amalgamation

The COA at least partially based its decision to grant a new trial on Walbeck’s breach of contract claim on an erroneous belief that the Trial Court mentioned and/or charged amalgamation to the jury.⁵¹ The record demonstrates **this is untrue**. There was no amalgamation, or any similar

⁵¹ “Appellants also assert that the circuit court’s instruction to the jury that Appellants were amalgamated suggested that Appellants had engaged in misconduct and the resulting prejudice requires a new trial.” (App. p. 112, 2019 Op., at 26).

such charge given to the jury, and there was no mention of amalgamation of corporate entities during the charge. (App. pp. 2321-28). Additionally, Respondents did not except to the charge, nor did they move for a new trial or JNOV as to amalgamation based on the Trial Court's *charge*, because there was no such charge. The only aspect of the amalgamation ruling challenged by Respondents on appeal is the Trial Court's ruling, as a matter of law, that Respondents were amalgamated, which ruling was made outside the presence of the jury. (App. p. 270).

2. Errors Related to the Verdict Form and the Jury's Verdict are Unappealable Because They Were Not Preserved

In addition to basing its holding on non-existent jury instructions, the COA overlooked that Developer and Affiliates induced any error relating to the jury's verdict and, as a result, they are precluded from challenging the jury's verdict on appeal. Because the COA missed this, it erred when it wrote:

[T]he circuit court's ruling relieved Respondents of the burden of establishing liability as to each [Developer] and likewise relieved the jury members from their responsibility to evaluate the liability of each [Developer] [...]

(2019 Op., p. 26). Respondents did not object to the form or content of the verdict form, and even consented to the Trial Court ruling on the issue of amalgamation. (App. p. 1935:2-7).

Respondents proposed, and Petitioners agreed to, a special interrogatory verdict form that had a finding as to each Respondent. (App. pp. 1936-37). During the jury charge conference, Respondents submitted a charge regarding "distinct corporate entities," (*i.e.*, "there are four separate and distinct corporate entities that have been named as defendants in this action") but would not agree to Petitioners' proposed charge on how to treat corporations "that get confused amongst each other." (App. pp. 1932-36) ("[T]hey are just told that they are entitled to treat several corporations as one if they act that way, if they demonstrate certain characteristics"). The Trial Court indicated that the proposed interrogatory verdict form could go to the jury, but there would

need to be not only a charge on distinct corporate entities, but also a charge on the law of when to treat various entities as one if certain facts were found to exist. (*Id.*). Alternatively, the Trial Court indicated that it could rule on amalgamation before the correct verdict form was submitted, alleviating the need for the charges discussed above. (*Id.*).⁵²

Respondents repeatedly indicated that the issue of amalgamation was an issue for the Trial Court to decide. (App. pp. 1916; 1934-35). After several colloquies, Petitioners agreed for the Court to rule, and the Trial Court decided the issue. (App. p. 1936). Respondents consented to the Court ruling on amalgamation knowing that the decision could be favorable or unfavorable. If Respondents were concerned about whether the Trial Court's ultimate decision might prejudice the jury, they should have expressed this concern to the Trial Court— they did not. *See, e.g., Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002) (“This Court has repeatedly held that a party should not be permitted to sit idly by while a verdict, erroneous in form, is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence.”). While Respondents indicated their understanding that the ruling would be made after the verdict, they never objected to, or excepted from, the Court's stated intention to rule before the case was submitted to the jury. Consequently, Respondents waived any argument that the jury's verdict was tainted because it was rendered after the amalgamation ruling Respondents specifically requested.

⁵² This is a classic situation of having one's cake and eating it too: the Parties agreed to list out each Defendant separately; Respondents wanted a charge on the law of distinct corporate entities but would not agree to a charge on how to treat multiple corporations whose identities were blurred. (*e.g.*, instructions on how the jury is to assign liability to a corporation for the actions of Vince Graham when Mr. Graham told the jury that he could not remember who he was working for) (App. pp. 1936-37). Respondents' rationale was that the issue was one for the Trial Court to decide, which prompted the Trial Court to rule on the issue pre-verdict. Respondents requested the very ruling they now say caused them prejudice.

3. Developer/Affiliates Did not Demonstrate Any Resulting Prejudice; COA Made a *Sua Sponte* Determination

Even if Respondents had been listed out separately on the verdict form, and the issue of amalgamation was left to the Trial Court to decide after the verdict, the result would have been the same—clearly, the jury believed that the Developer and/or Affiliates was liable to the HOA and to Walbeck for breach of contract and other duties. If the jury had found only one Respondent liable for one or more breaches, and the Court amalgamated afterwards, the result would have been the same. Developer cannot (and did not) show that it suffered any prejudice.

4. Additional Sustaining Ground: Two Issue Rule/Direct Liability

Petitioners had direct claims against each of the Respondents, and none of those claims depended on a finding of amalgamation. The jury in this case found that the Petitioners prevailed on its claims against all Respondents on favorable verdicts when it answered the agreed upon conduct question in the affirmative:

If you found in favor of one or more of the Plaintiffs as to any cause of action set forth above, please address the following question:

Was **Defendants'** conduct reckless, willful and/or wanton?

(Verdict Form, App. at 2326) (emphasis added). Note this query, unlike any of the others on the verdict form, was as to *all Respondents*; if the jury did not believe that all four Respondents had been reckless and willful in their violations of Petitioners' rights, they could not have answered this affirmatively.

In fact, Developer never argued (at the DV stage) that Petitioners failed to demonstrate liability specifically as to certain Respondents and not to others; instead, it argued that Petitioners had failed to establish liability as to the *Respondents* collectively. Therefore, the Respondents cannot be heard to attempt to separate their ranks now at this late date.

VI. THE QUESTION OF WHEN THE PETITIONERS' DISCOVERED THEIR INDIVIDUAL AND DERIVATIVE CLAIMS WAS PROPERLY SUBMITTED TO JURY

The Trial Court did not err in asking the jury to decide the factual question of when Petitioners discovered their individual and derivative claims⁵³ and this Court should vacate the COA's finding otherwise for three, principal reasons.

A. Multiple, Evidentiary Inferences Exist For All Petitioners

As briefed at length above, the evidence (as well as Developer's destruction of evidence) yields multiple inferences as to when all Petitioners discovered their respective claims:

- The evidence shows that the Commons were used and possessed by all Petitioners until sold by the Developer in 2009; that Developer failed to disclose to all Petitioners many, material matters related to the Commons; and thus, infers that all Petitioners had no reason to litigate until 2009;
- The evidence shows that there was confusion as to what "upon completion of construction" meant; confusion as to which commons were to be built in which phases; confusion as to what phases were completed when;⁵⁴ and thus infers that all Petitioners did not "notice" anything "unreasonably" amiss until 2008-2009 when rumors surfaced that CV-5 and CV-6 may be sold to a third-party⁵⁵ (and were then assured that was not the case); and,
- The evidence shows, and the COA agreed, that the Developer vacillated for years as to "what" made up these Commons⁵⁶ and thus infers that all Petitioners did not understand that their rights had been violated because of these vacillations.⁵⁷

⁵³ These claims appear to be the focus of the COA's 2019 SOL analysis. (2019 Op., App. p. 109).

⁵⁴ Notably, Respondents, themselves, admitted that they did not know, *i.e.*, [App. pp. 1586:14-25]. How the COA found that these Petitioners "knew" otherwise is inexplicable.

⁵⁵ *Turner v. Milliman*, 381 S.C. 101, 671 S.E.2d 636 (2009), *rev'd on other grounds*, 392 S.C. 116, 708 S.E.2d 766 (2011).

⁵⁶ The COA twice found that the Developer "vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park", (2018 Op., p. 128, 2019 Op., p. 4). The Developer testified that the "Creekside Park" was actually the "Marshwalk" and the "Community Dock" were the "Crabbing Docks," both of which were already conveyed to the HOA. (App. p. 1016). In other words, the Developer affirmatively represented that they fulfilled the representation made to Walbeck in his Property Report when they deeded the "Marshwalk" and these "Crabbing Docks" to the HOA.

⁵⁷ *Turner, supra*.

Based on these multiple inferences, the Trial Court properly asked the jury to decide when each Petitioner's claims accrued, and the jury found all Petitioners discovered their claims on August 5, 2009. (App. pp. 2321-28). The evidence in the record (and the evidence not in the record because Developer's destroyed it) supports the jury's verdict. At minimum, it cannot be said there is no evidence that supports this verdict and the COA erred in concluding otherwise.

B. The COA's Reliance on the 2005 Budget was Unreasonable

The COA incorrectly found that the only inference that can be drawn from ALL the foregoing evidence is that Walbeck should have found a needle in the haystack and discovered "that he had a claim" by late 2004 when he received a proposed budget with one new word in small typeface, changing the dock expense description from a dock maintenance fee to a dock usage fee – that he never saw. (App, pp. 13-14); (App. p. 106). This singular, budget inference by the COA is unreasonable considering the totality of the evidence that shows the Developer implemented a decade-long, "hide the ball scheme" in which they told the Homeowners one thing, but secretly intended another (or deliberately abandoned prior representations and maintained silence on the change when there was a duty to disclose).

1. *Turner v. Milliman*

In *Turner*, the COA addressed the question of whether plaintiffs' negligent misrepresentation claim against their insurance agent was barred by the SOL due to multiple, smaller premium increases that occurred between 1996 and 2000 as opposed to one, large premium increase that occurred in 2001. 381 S.C. 101, 671 S.E.2d 636. The Trial Court found that the smaller, premium increases "standing alone were sufficient to put [plaintiffs] on notice that [their agent's] statements about premium increases were wrong" and reasoned that "[plaintiffs] should have been on notice beginning with the premium increase in 1998 but not later than. . .2000." *Id.*

at 110-11, 671 S.E.2d at 641. The COA disagreed, finding that:

Viewing the evidence in the light most favorable to the Turners, there is more than one reasonable inference as to when the Turners knew or should have known they had a claim against Respondents. Although the dates and amounts of the premium increases are undisputed, we believe a genuine issue of material fact exists as to when the Turners were on notice that Milliman's prior representations were inconsistent with the premium increases. The premiums increased significantly between 1998 and 2000, but the Turners argue that it was not until May 30, 2001, when they received notification that the premium would increase to \$799.61, that they were on notice of a potential claim. While Turner conceded he expected the premiums to increase, he stated that by the end of June 2001, he was aware the premium increases were unreasonable. . . While Respondents allege only one reasonable inference can be drawn from the evidence, based on the varying amounts of the premium increases and the timing of those premium increases, we believe reasonable minds could differ on this issue. . . As such, the trial court improperly granted Respondents' motions for summary judgment based on the expiration of the statute of limitations.

Id.

2. The COA's Extreme, New Notice Standard Should Not Be Affirmed

Here, like in *Turner*, it is unlikely that the HOA's 2005 proposed budget "alerted" Petitioners that there was anything amiss just because it included the word "usage" as it relates to the \$4,044 dock fee. (App. p. 3821). For starters, the HOA's proposed 2003 and 2004 budgets (preceding the 2005 budget) included a "dock maintenance" fee for this same amount, not a "usage fee." (App. p. 3781; 3798). The 2005 budget erroneously described the 2004 proposed budget as containing a "usage" fee of \$4,044⁵⁸ when, in reality, it was a "dock maintenance" fee of \$4,044. Compare (App. p. 3828) (2005 proposed budget describing 2004 proposed budget) with (App. p. 3797) (listing "dock maintenance" fee of \$4,044); see also (App. p. 3781) (2003 proposed budget

⁵⁸ Instead of creating a new line item for the new fee description in 2005, which would have shown a zero in the next column for the prior year's budget, possibly alerting readers to the insertion of a new item, the 2005 budget altered the description of the 2004 budget item, and thereby implicitly misrepresented that nothing had changed from the prior year.

listing \$4,044 dock maintenance fee). Clearly, an ambiguity exists and as a matter of South Carolina law this ambiguity must be construed against the Developer – the budget’s drafter – and in favor of Petitioners. *Chan v. Thompson*, 302 S.C. 285, 290, 395 S.E.2d 731, 734 (Ct. App. 1990) (any ambiguity will be construed against author of the documents). Construed properly in favor of Walbeck, the “usage” fee is a “maintenance” fee.

This did not alert Walbeck that he needed to run out and file suit for at least three reasons. First, the Developer’s miniscule, discrete change from “maintenance fee” to “usage fee” in the fine print of financial statements is not a dramatic enough alteration that a homeowner could or should be expected to take notice. Second, the Property Report expressly provides the HOA is to pay for, among other things, dock maintenance. (App. pp. 3518-19). Having the Developer assess residents for the expense of operating the facility, until the HOA took over operations, is not such an outlandish proposal that it should have caused Walbeck to sue. Third, the proposed budget mentions only the “Creek Club Dock,” not the “Creekside Park.” (App. pp. 3828; 3837). Fourth, as described above, the budget is ambiguous, and its inferences are muddled at best. Fifth, the COA holding relies upon constructive knowledge of a minute financial detail in a complex financial document; there is no evidence in the record that any Petitioner saw the new syntax. Lastly, the totality of the evidence was that the use was akin to ownership, and all common areas were being transferred under the 2005 Transfer Agreement.

C. Respondents are Equitably Estopped from Relying on the SOL

Even if the proposed budget was clear and Walbeck was able to deduce from it that a “usage” fee was charged for the “Creek Club Dock,” Developer’s continued representations and omissions induced a sense of complacency until at least 2008-2009.

1. The Developer’s Assurances Estop Them from Relying on the SOL

The COA incorrectly determined that equitable estoppel was unavailing to Petitioners in part because the COA weighed evidence and made an incorrect determination that there was no activity or conduct after the SOL allegedly began to run in November of 2004 that would support estoppel. In so concluding, the COA wrongly inferred constructive notice of a one word change in the 2005 annual budget in the Respondents' favor *and* that the 2005 Handover Agreement did not include the Commons, (App. pp. 2692-93), despite the 2005, 2006, and 2007 minutes described above that clearly show otherwise.

2. The Developer' Omissions Estop Them from Relying on the SOL

Equitable estoppel also applies because the evidence shows the Developer failed to disclose facts material to the Petitioners' claims between 2000 and 2009.⁵⁹ For example, the evidence shows:

- The Developer never told Petitioners it changed its mind between 1998 and 2000 and no longer intended to provide the HOA the Commons promised in their Property Reports.⁶⁰
- The Developer never told Walbeck, specifically, that Developer no longer intended to convey the Commons during any of the meetings he and Developer personally attended **between 2004 and 2007**.⁶¹ Rather, the Developer "kept things quiet" for their benefit

⁵⁹ Equitable estoppel does not only apply where a party can show he reasonably relied on the words or conduct of another. Rather, it also applies where failed to disclose facts material to prospective claims. *See, e.g., Maher v. Tietex Corp.*, 331 S.C. 371, 382, 500 S.E.2d 204, 210 (1998) *citing Berkeley Elec. Coop., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992) ("Certainly, silence which amounts to misrepresentation or concealment of facts can satisfy the 'conduct' element of the test for equitable estoppel); *Metromont Materials Corp. v. Pennell*, 270 S.C. 9, 22, 239 S.E.2d 753, 760 (1977) ("[E]quity requires that if a party is silent when he should speak, or supine when he should act, he will not afterwards be permitted to either speak when he should be silent, or to act when he failed to do so at the first proper and opportune moment.") (citations and internal quotations omitted).

⁶⁰ (App. p. 1665) (Vince Graham agreeing the change from deeding the Commons to the HOA occurred between 1998 and 2000); (App. p. 1233) (Vince Graham indicating Walbeck should rely on his Property Report although The Developer decided not to abide by it and failed to disclose this to Walbeck).

⁶¹ (App. p. 3838; 3849; 3870) (Walbeck Sign-In from December 2005, 2006, and 2007 Meetings); *see also* (App. p. 1426:18-21) (Walbeck at trial confirming he attended the annual HOA meetings

at the expense of the HOA⁶² instead of being honest that Developer's plans for the Creekside Park and Community Dock "changed depending on the circumstances." As Vince Graham testified:

I remember talking about that ... we were going to have community docks. They were going to be made available to the neighborhood. And at some point, we intended to deed them -- at some point we intended on making them part of the I'On Club; at some point we intended to deed them again. Plans changed depending on the circumstances, depending on what the other parties wanted to do... I can just tell you I don't know whether it was the Developer's plan to convey the Commons to the HOA because sometimes Chad would say things in his earnestness to try to keep a deal going without consulting me or my father ... but these two documents in evidence say that is the plan.

(App. pp. 1700-03).

- The Developer never disclosed to Petitioners in 2004-2009 that the Easement they unilaterally granted which allowed the Homeowners to use the Commons was "flawed" and "should be fixed" as they attempted to contritely testify at trial;⁶³ nor that it could not be fixed as it was void *ab initio*.

As the sole steward of information pertaining to the Commons, the real facts about the status of the Commons were exclusively within The Developer's knowledge. The Developer knew or should have known that the perpetual Easement was not perpetual and otherwise flawed; the crabbing docks were not the Community Dock; the Marshwalk was not the Creekside Park; and, the Developer was not going to convey the Community Dock and Creekside Park to the HOA, but the Developer "willfully, recklessly, or wantonly" concealed these facts. (App. p. 2321).

from 2004-2007); (App. p. 3981) (December 2005 Meeting Minutes indicating Chad Besenfelder "who oversees the property owned by the [the Developer]" was in attendance, along with Vince Graham); (App. pp. 3982) (December 2005 Meeting Minutes: "In 2006, the I'On Company is planning on ... complete the turnover for phases 1-7") .

⁶² (App. p. 1199) (the Developer "ke[pt] the [sale] quiet because of all the brew ha ha. . .").

⁶³ (App. pp. 1681-82) (Vince Graham conceding the Easement is "flawed" and "should be fixed"); (App. p. 91) ("[Tom] Graham described this language as a mistake. . .");

VII. PETITIONERS' DERIVATIVE CLAIMS COMPLIED WITH RULE 23 AND THE RESULTING VERDICTS SHOULD BE REINSTATED

As an additional sustaining ground for the verdicts in favor of the Assembly, Walbeck's and Adkins' derivative claims complied with Rule 23 and should be reinstated. Petitioners adequately pled efforts made by homeowners, Petitioners included, to seek redress; and the futility of further efforts to seek redress. It should be noted that the Developer's Answer concedes Petitioners' allegation in Paragraph 35 of the Amended Complaint that demands were made upon the HOA and the HOA refused to act:

35. Responding to Paragraph 35, the I'On Defendants admit upon information and belief that a certain member or members of the Assembly has **made demands upon the Assembly to bring suit regarding the issue raised in the Amended Complaint and that the Assembly refused to do so.**

(Dev. Answer to Am. Compl., App. p. 580). The Developer is judicially bound by its pleading admissions. *See, e.g., Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) ("The allegations, statements or admissions contained in a pleading are conclusive as against the pleader ...").⁶⁴ *Patterson* held that a defendant's Answer may be considered in derivative determinations. *Patterson*, 425 S.C. at 235, 821 S.E.2d at 685.

A. The COA Appears to have Applied *Whittle's* Vacated Standard as Opposed to *Patterson* and *Grant* in its Substituted Derivative Analysis

In its 2018 Opinion, the COA relied on this Court's decision in *Grant* which adopted a *lenient* approach in evaluating demand futility based upon the facts of a given case.

[*Grant*] held the question of whether [stockholder's] failure to [make a demand] was excusable was "a factual question, the resolution of which. . .should be affirmed unless unsupported by the evidence or influenced by an error of law."

⁶⁴ The Developer cannot now "take a position contradictory of, or inconsistent with, [their] pleadings and the facts which are admitted by the pleadings are taken as true against [Developer]." *Skull Creek Club Ltd. P'ship v. Cook and Book, Inc.*, 313 S.C. 283, 437 S.E.2d 163 (Ct. App. 1993) (emphasis added).

(App. pp. 19-20), *citing Grant v. Gosnell*, 266 S.C.372, 375-77, 223 S.E.2d 413, 414-15 (1976). (Emphasis added). The COA originally found the facts here established demand futility, and agreed that Petitioners “properly maintained a derivative action on the HOA’s behalf:”

[We] look at the record before the circuit court at trial. [This] showed that Appellants had a veto power over decisions of the Board. . .

. . . the evidence shows that a demand on the Board to initiate litigation against Appellants would have been futile. . .[W]e affirm the circuit court’s ruling that Walbeck and Adkins properly maintained a derivative action on the HOA’s behalf.

(App. pp. 20-22) (emphasis added).

The COA’s 2019 Opinion removes all references to *Grant*, ignores *Patterson* altogether, and applies an *allegation-only* standard to dismiss Petitioners’ derivative claims:

[T]here are no allegations that a demand on the Board to initiate litigation to *recover* these amenities would have been futile. Further, there are no allegations that the non-developer members of the Board were guilty of some wrongdoing that would give them an incentive to automatically reject such a demand or that Appellants had veto power over the Board such that they would prevent the Board from initiating litigation against them.

(App. p. 98) (emphasis in original). This is inconsistent with *Grant* and *Patterson*, which do not require our courts to limit their Rule 23 review to *allegations*.

1. *Grant v. Gosnell* Supports Petitioners’ Derivative Claims

In *Grant*, a plaintiff-stockholder brought a derivative action against a bank and directors based on allegations of fraud and mismanagement. 266 S.C. at 374, 223 S.E.2d at 413. Two defendants moved to dismiss the complaint stating plaintiff-stockholder failed to sufficiently allege demand futility. *Id.* The trial court held “an application for redress was unnecessary” given the factual context. *Id.* This Court affirmed and, in doing so, did not limit its review solely to the plaintiff-stockholder’s complaint. Rather, it considered the record, including an affidavit and

exhibits submitted by defendants, and held:

Possessed of this control of the stock of the corporation, it is reasonable to infer that Gosnell would not voluntarily permit corporate action designed to grant relief for the grievances alleged in the complaint` in which he is named as a wrongdoer.

In evaluating the ‘excuse’ allegations in a derivative suit, ‘Courts have generally been lenient in excusing demand’. . .

Id. at 374-76, 223 S.E.2d at 414-16 (emphasis added).⁶⁵ *Grant* vindicates the consideration of more than the *complaint* when assessing demand futility.

2. Patterson v. Witter further Supports Petitioners’ Derivative Claims

Patterson involved a misappropriation action brought by members of a corporation/trust fund. 425 S.C. 213, 218, 821 S.E.2d 677, 680 (2018). A dispute arose after the Board announced plans to wind down the fund and use its \$5M to establish a separate insurance company in lieu of returning the monies to the members pursuant to the trust agreement. *Id.* at 219-20, 821 S.E.2d at 680-81. The members sued seeking their share of the \$5M. *Id.* at 222, 821 S.E.2d at 682. The fund and Board moved to dismiss the members’ complaint asserting it was derivative in nature and did not meet Rule 23. *Id.* At a hearing on the motion to dismiss, the court indicated it was inclined to dismiss the complaint for other reasons. *Id.* After the hearing but before the trial court issued its

⁶⁵ Notably, the defendants in *Grant* contended, much like the COA, “that it cannot be assumed that demand for redress within the bank would have been useless simply because Gosnell owned a majority of the bank’s stock when the other directors were not charged with any wrongdoing and constituted a majority of the Board.” This Court disagreed, and citing *Stahn*, explained:

Stahn. . .alleged that because [defendants] were charged with mismanagement of the corporation and either owned or controlled by proxy a majority of the corporation’s stock, the plaintiff was powerless to obtain redress within the corporation. The court held that such facts were sufficient to excuse the plaintiff from a prior pursuit of intracorporate action. The [*Stahn*] Court attach[ed] importance to allegations of majority [control] and breach of trust, both of which factors are alleged in the present suit. . .

266 S.C. at 374-76, 233 S.E.2d at 414-15 (citing *Stahn v. Mills*, 53 S.C. 519, 31 S.E. 48 (1898)).

written order, the members sent a demand letter to the attorneys for the fund and Board itemizing specific requests, none of which included a request to “initiate litigation.” *Id.* at 222-23, 821 S.E.2d at 682-8 (emphasis added). Thereafter, the trial court issued an order dismissing the action without prejudice for other reasons. *Id.*

Having received no response to their written demand, the members refiled their action in probate court. The probate complaint alleged the same causes of action and included a new paragraph, stating:

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

Id. at 224, 821 S.E.2d at 683 (emphasis added). Upon removal, the defendant moved to dismiss the probate complaint on similar grounds as the first complaint; and the circuit court held that the complaint failed to comply with Rule 23. *Id.* at 225, 821 S.E.2d at 683. On appeal, the COA affirmed. *Id.*, 821 S.E.2d at 684.

This Court reversed the COA’s decision because it found members satisfied Rule 23 and that the COA erred in multiple respects, each of which the COA repeated in the 2019 Opinion.

a. Consideration of Motions to Dismiss Based Upon Rule 23(b)(1) Are Not Limited to the Consideration of the Pleadings Only

First, the Supreme Court held in *Patterson* that a court’s review of motions based on Rule 23(b)(1) is not necessarily limited to the pleadings:

If matters outside the pleading are presented to and not excluded by the Court, a [Rule 12(b)(6)] motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . Because the parties submitted matters outside the pleadings that were not excluded by the court and certain factual findings in the circuit court’s order exceeded the scope of the facts alleged in the complaint, we

find this motion to dismiss was converted into a motion for summary judgment **and we review it as such.**

Id. at 226, 821 S.E.2d at 684 (emphasis added). *Patterson* therefore establishes that the standard applicable to the review of Rule 23(b)(1) compliance is a function of the context of the derivative ruling appealed. Here, the only derivative ruling appealed is a JNOV ruling, and consequently, the JNOV standard should apply. An appellate court's review of a JNOV ruling is not limited to the pleadings; rather, the court must consider all the evidence. *See, e.g., Welch, supra*. This is exactly what the COA did in its 2018 Opinion (at least in reviewing demand futility); but, failed to do in its 2019 Opinion. This was error. Compounding this error is that the COA substituted analysis appears to apply a 12(b)(6) standard when there is no 12(b)(6) ruling on appeal. This is discussed in more detail below in Section D(3).

b. Derivative Demands Do Not Have to be Expressly Incorporated by Reference

Second, the *Patterson* Court disagreed with the COA's reliance on (now vacated) *Whittle*⁶⁶ and found *Patterson* clearly distinguishable:

The facts of this case are distinguishable from those in *Whittle*. Here, although the [January 2013 demand] was not expressly incorporated by reference into the complaint, unlike in *Whittle*, the [January 2013] letter does constitute an adequate demand in this case. Another issue here is [members] failure to include the magic phrase "which is incorporated herein by reference" [when describing the demand in their complaint]. Indeed, the allegations concerning the [demand] in [members'] complaint are appreciably more detailed than those in *Whittle*. And certainly, when the [January 2013 demand] is considered in conjunction with the complaint, there is ample evidence that Rule 23 is satisfied.

⁶⁶ Between *Grant* and *Patterson*, the COA issued the now vacated *Whittle* opinion. 343 S.C. at 188, 539 S.E.2d at 409. However, the COA's substituted derivative analysis appears similar to *Whittle*, and, like *Whittle*, wrongfully limited the "lenient standard" the *Grant* Court adopted for futility determinations. (App. pp. 96-97). *Whittle* was relying at least on a decision which has since been abrogated for ignoring state law. *Gabor v. Lego*, 11 F.3d 1197, 1206 (3d Cir. 1993), *abrogating Lewis v. Curtis*, 671 F.2d 779, 784 (3d Cir. 1982).

Id. at 234, 821 S.E.2d at 688 (emphasis added).

c. Evidence of Efforts to Obtain Redress Should be Considered

Third, the *Patterson* Court expressly rejected the tunnel vision approach that the COA has taken here in its 2019 Opinion:

[W]e reject an approach that approves of a trial court’s consideration of everything except [a] demand letter that was actually sent and received. See *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (explaining a complaint may be “deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are ‘integral’ to the complaint.”) quoting *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004). . . .

Id. at 235, 821 S.E.2d at 689 (emphasis added).

B. This Court Should Find That Petitioners’ Satisfied Rule 23

Like *Patterson*, Plaintiffs’ complaints allege Walbeck and Adkins’ member status and the efforts they, and other members, made to “obtain the action desired” – securing or “recovering” the Commons. Like *Grant*, these complaints also reference Developer’s control, Board wrongdoing, and futility. For example, the Amended Complaint provides:

11. Defendants, Vince Graham and Tom Graham, own, manage, and/or control, in whole or part, I’On Company, I’On Group, I’On Club and I’On Real Estate.
12. I’On Defendants served as the developer of the subdivision known as I’On.
18. Plaintiff brings this action on behalf of himself, and derivatively on behalf of the I’On Assembly and its members, the other property owners in I’On, because the homeowners association known as the I’On Assembly (“Assembly”) has failed to protect and enforce the rights of the Assembly and its members with respect to the matters alleged herein.
35. Several [H]omeowners made repeated demands upon the Assembly and its Board to secure the Assembly and its members rights to the Creekside Park and Community Dock; and, provided the Board with the . . . information to

do so. However, the Board failed to secure the rights and acquiesced to the sale of these amenities.

48. The I'On Defendants have a fiduciary relationship to the Plaintiff as a result of their capacity as the developer and steward of the I'On community amenities and their former capacity controlling the Board of the Assembly.

(App. pp. 568-69) (emphasis added). This is similar to, but more extensive than, the “efforts” pleading in *Patterson* (quoted three pages above). The Second Amended Complaint provides more detail and references “correspondence” and “meetings” where *several I'On homeowners* “made efforts to obtain the action they desire,” *all* “to no avail”:

45. On February 26, 2009, the Assembly member and I'On property owner Catherine Templeton made a demand upon the Assembly. . .to secure the Assembly and its members' unencumbered title, access, and use of the Creekside Park and Community Dock. . .

46. [Plaintiffs] were contemporaneously aware of the Templeton Demand [which] was made. . .by letter and . . . publicly at an Assembly meeting.

47. [On] March 5, 2009 and March 11, 2009, Adkins made a request to the Assembly's attorney. . .to investigate the allegations that the I'On Company was contractually obligated to convey the Creekside Park and Community Dock to the Assembly.

49. [On] March 10, 2009, the Assembly attorney. . .informed Adkins, and copied the Assembly's Board President. . .that the Assembly was working to secure formal title to properties represented to be the property of the Assembly...

50. [On] March 11, 2009, the Assembly Board President demanded that I'On Company convey the Community Dock to the Assembly but failed to demand conveyance of the Creekside Park.

52. [In] April 2009, Adkins and the Assembly Board Member Matt Walsh. . .discussed the I'On Defendants obligation to convey the Creekside Park and Community Dock to the Assembly. Concurrently, Walsh relayed Adkins demands to I'On Defendants. . .

53. [During] June and July 2009, Walbeck and Adkins made demands upon the

I'On Defendants to convey the Creekside Park and Community Dock to the Assembly. The Assembly was aware of the demands and subsequent refusal from the I'On Defendants.

54. Despite repeated demands to the I'On Defendants and the Assembly Board, the Board has failed to take the necessary action to secure unencumbered title, access and use of Creekside Park and Community Dock.

55. Additional demands upon the Assembly would now be futile as the Assembly has failed to protect the rights of the Assembly and its members, despite being provided with both the information necessary and the opportunity to do so. The I'On Defendants conveyance of the amenities to a third-party evidenced the Board's failure to secure the rights to the Property, and the futility of further demand on the Assembly and its Board.

(App. pp. 592-93) (emphasis added).

Also, like *Patterson*, Petitioners clearly satisfy Rule 23 after considering the demands and communications referenced in their Complaints that are *integral* to the deciding the derivative issue. For example, the Templeton Demand to the HOA board president constitutes an “adequate demand” under Rule 23:

Provided to you and the Board is copy of the property report. . .On [page 22] is the clear requirement that these properties be deeded to the HOA upon completion. The Board of the I'On Assembly is on notice action must be taken immediately to secure these properties. . .

If the Board has taken any action that has served to limit rights of use by Titleholders or otherwise release. . .those rights or ownership or control. . . such actions must be unambiguously and immediately reversed. That specifically applies to the Community Dock at the Creek Club. It has been reported that the Board declined to accept ownership of the Community Dock at the Creek Club. If this is an accurate account, the Board did not have the authority to deprive the individual Titleholders of the ownership of property. . .Given that ownership of the Community Dock, as well as other specified properties, must come without encumbrance, the Board should remind the I'On Company of this circumstance before accepting ownership.

If timely property transfer has not occurred, the Board should immediately seek

legal counsel. . .determine under which Board the failure occurred since it could be alleged that this Board, and perhaps previous Boards, failed in their fiduciary responsibility to the Assembly. The. . .Board must consider, not simply ownership, but pursuit of damages from the I’On Company on the presumption the Assembly has met its obligations under any and all agreements without enjoyment of benefit of ownership.

(App. pp. 2705-06) (emphasis added).

The letters Adkins exchanged with the HOA’s then-attorney in March 2009 are also referenced in the pleadings. (App. pp. 2707; 2710-11). In responding to Adkins’ first letter, the HOA’s attorney stated: “it is the understanding of the Board that the sale will not include items which were intended to be or are the property of the I’On Assembly” and the Board was making “efforts to fulfill its responsibilities set forth in the declarations and covenants.” (App. p. 2707). It can be inferred that the HOA’s attorney understood Adkins’ letter to be a demand that the Board secure the amenities.

In fact, a week after he received Adkins’ letter, the HOA’s attorney wrote the Developer “about turning the docks over to the Assembly.” (App. p. 2709). This letter failed to demand the “turnover” of the Creekside Park. *Id.* Adkins made another good faith effort by following up with the HOA’s attorney to “provide [him] with all information currently available in determining eventual rights to the subject properties—Civic Site 6 and Creekside Park.” (App. pp. 2710-11) (emphasis added). Subsequently, in an April 2009 e-mail, Walsh writes:

There is no sale that we are aware of. . .[R]ight now, I am not aware of anything and have been told by the Grahams that it is going to be run by the I’On Club (aka I’On Company.) . . . As for Creekside [P]ark, I assume you are not satisfied with Vince’s definition, though I am not sure where there is [an] alternative. The docks should be deeded to the HOA soon, and we are working with TIC to make sure that is done properly.

(App. pp. 592-93) (emphasis added). A few hours later, Adkins responds:

I was astounded that not one person on the Board had a question for Chad] in the meeting regarding the linear park explanation. . . Did you not expect he would offer objection to the contention that Creekside Park is home to the Creek Club?

(App. pp. 2717-18) (emphasis added).

After Walsh received Adkin's e-mail, he sent portions to Developer so they "could clear up some confusion." (App. p. 2719). Adkins responds with a letter to Walsh, stating:

[T]he Board has shown little initiative or interest in representing the Assembly and ensuring its best interest are protected. . .

. . . Having been presented with the 1998 HUD Property Report, which promised the Assembly ownership of certain recreational facilities in I'On, the Board took no action to secure them . . . The subject has not been on the Board's meeting agenda for months. . . [F]rom all appearances, it is now a non-issue for the Board.

. . . The Board's failure to secure the properties promised to the Assembly is beyond understanding, and in my opinion, quite risky. . . I have attended and spoken at meetings of the Board, and met with you individually. It is increasingly obvious to me that my interests, as a titleholder, are not being represented by the Board, which seems focused on the interests of the I'On Company.

As I wrote to you previously, I object to the conveyance of the Community Dock to the Assembly's ownership with any type of easement or other agreement of any kind attached to it. . .

(App. p. 2721) (emphasis in original and added).

Clearly, the foregoing exchange establishes that: (a) the then-Board was at least partially in alignment with Developer; (b) Adkins and other Homeowners made efforts made to "seek redress within the HOA"; (c) the Board continually failed to act in response to its members' efforts to seek redress; and (d) any further demands on the Board would serve no purpose.

Additionally, the pleadings also reference another demand made by Walbeck's and Adkins' then-attorneys on June 25, 2009. (App. pp. 592-93). This demand to Developer indicated that Walbeck and Adkins intended to commence litigation on their and the HOA's behalf to

recover the Commons:

The crux of their complaint against the I'On Company is they were assured by various means that Creekside Park and Community Dock] would be conveyed to the Assembly which, as you are aware, is the homeowners' association of I'On property owners.

At the request of Mrs. Adkins and Mr. Walbeck, we have drafted a preliminary Complaint . . .

(App. p. 2724) (emphasis added).

Although this demand was originally sent to the Developer, the Developer sent it on to the HOA. On July 3, 2009, Vince Graham (I'On Group)) as manager of the I'On Company responded in a letter, copied to HOA Board President, Kinney, and Board Member, Walsh, evidencing the Developer passed on Walbeck's and Adkins' demands and draft complaint to the HOA Board. And, the letter from the Developer "attempted to clarify" the Commons were *already* conveyed:

I am in receipt of your letter of June 25, 2009 and draft complaint. . .

In summary, the "Creekside Park" is the +/- 2-mile linear park adjacent to the marshes of Hobcaw Creek. With regard to the "Community Dock", The I'On Company conveyed two Phase 2 community docks to the I'On Assembly years ago. A third dock in Phase 2 is owned by the I'On Club. The Club enables members of the I'On Assembly use of this dock for recreational activities such as fishing and boating. I hope this clarifies matters for you and your clients.

(App. p. 2726) (emphasis added); *see also* (App. pp. 2727-30).

Rule 23 is not written to bar derivative suits. *Surowitz v. Hilton Head Corp.*, 383 U.S. 363, 371 (1966). Rather, the rule's purpose is to prevent "strike suits," meritless claims brought by persons trying to get rich quick and make the case go away. *Id.* The U.S. Supreme Court makes clear that Rule 23 should not prevent the adjudication of legitimate cases such as this one:

[Rule 23's purpose] is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-

law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil rules, was written to further, not defeat the ends of justice.

Id. at 373; 21 Harv. L. Rev. 195 (1907) (“It is difficult to suggest any. . . theory whereby a stockholder suing [on a corporation’s behalf], and whose litigation is successful [and] benefit[s] stockholders, should have an arbitrary limitation placed upon his right to sue.”). This Court should correct the COA’s error and restate the Petitioners’ derivative claims.

C. Developer’s Control Over the HOA Establishes Futility Because Our Courts Already Recognize that a Developer-Controlled Board Will Not Sue Itself

In *Magnolia North*, the Court recognized that the developers would not initiate litigation against themselves while they controlled the development. 397 S.C. at 272, 725 S.E.2d at 125. Because our substantive law recognizes that a developer-controlled HOA will not sue itself, it follows that any demand made upon a developer-controlled HOA to sue the Developer is futile. There is no need for the Court to look behind the Developer’s “Supreme Court” like control of the HOA. The Developer’s extensive control is discussed at greater length in Section III.

D. Regardless, Petitioners’ Pleadings Satisfy a *Pleading Only* Standard

Even if the determination of Rule 23 compliance is limited to the pleadings despite *Patterson*, the COA erred in its finding that Petitioners’ derivative claims were not properly pled.

1. Petitioners’ Pleadings Satisfy Rule 23

Petitioners’ demand and futility allegations are more extensive than those in *Patterson* and *Grant*. (App. pp. 568-69). Further, here Petitioners alleged “developer” control and wrongdoing, and separately, wrongdoing (failure to act) by disinterested board members. (App. pp. 568-69; 592-93). Either allegation satisfies the pleading of the “futility” of further attempts at redress,

according to this Court's Pre-*Patterson* decisions.⁶⁷

2. There is No Demand Requirement to “Initiate Litigation”

The COA repeated ruled that the member must specify in its demand that the board “initiate litigation.” (2019 Op., pp. 11-12) (dismissing Respondents’ derivative claims because “the pleadings do not allege that either Walbeck or Adkins directed a demand to the Board to initiate litigation against the Appellants to enforce the HOA’s alleged rights;” “there are no allegations that a demand on the Board to initiate litigation to recover these amenities would have been futile;” “there are no allegations that Appellants had veto power over the Board that they would prevent the board from initiating litigation against them.”) (emphasis added).⁶⁸ Rule 23 is devoid of any language requiring a demand that the entity “initiate litigation,” and *Patterson* implicitly found otherwise. 425 S.C. at 688-89, 821 S.E.2d at 233-35.

3. The COA Reversed an Unappealed 12(b)(6) Ruling

While the COA is not clear about which Trial Court ruling it is reversing in its 2019 Opinion, the *pleadings only* approach suggests that the COA may have thought it was reversing the Trial Court’s denial of Developer’s Motion to Dismiss (the “2012 Ruling”).⁶⁹ This is error because Developer did not, and still does not, appeal the 2012 Ruling. *Compare* (App. p. 98) *with* (Developers’ filed Notice of Appeal omitting the 2012 Ruling from those on appeal).

Our caselaw is clear that appellate courts cannot consider unappealed rulings. In *Davis v.*

⁶⁷ Pre-*Patterson* decisions hold so long as there was an allegation “that a demand has been made and refused” or “an effort to have grievances redressed” or “that such effort would have been useless” or “[HOA] wrongdoing or control” then “there was enough alleged.” *See, e.g., Thompson*, 214 S.C. at 68, 51 S.E.2d at 173; *Kickbusch*, 105 S.C. at 525, 90 S.E. at 166; *Stahn*, 53 S.C. at 519, 31 S.E. at 498-99; *Latimer*, 39 S.C. at 44, 17 S.E. at 260.

⁶⁸ Each of these findings also failed to construe inferences in favor of the non-moving party.

⁶⁹ While the COA failed to specify the “ruling” it reversed, it appears the COA’s derivative analysis is a reversal of the Circuit Court’s denial of the Motion to Dismiss because the COA: (1) applied a Motion to Dismiss standard; and (2) considered only the Motion to Dismiss record.

Parkview Apartments, for example, this Court held an appellate court could not reevaluate the denial of an interlocutory order that was not appealed, even on a *de novo* review:

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

409 S.C. 266, 280-81, 762 S.E.2d 535, 541-42 (2014) (emphasis added); *see also Edge v. State Farm*, 366 S.C. 511, 520, n. 6, 523 S.E.2d 387, 392, n. 6 (2005) (finding that this Court was precluded from reviewing a ruling that granted a motion to dismiss because, although immediately appealable, the ruling was not appealed).⁷⁰

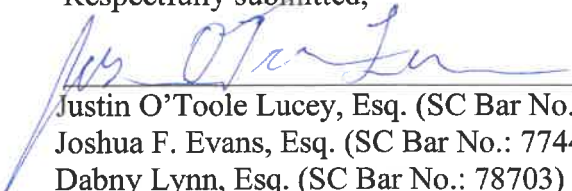
CONCLUSION

This Court should vacate the COA's 2019 Opinion based on all the foregoing showing the evidence, law, and equity supports the verdicts reached by the jury and the Trial Court's decision to sustain these verdicts. Alternatively, this Court should at least reinstate the contract verdicts and the HOA's direct verdicts, as elected or to be re-elected on remand, and any other verdict or award to which Petitioners have shown themselves entitled.

[Signature on following page]

⁷⁰ In its 2018 Opinion, the COA cited to *Edge* for the proposition that "the denial of a motion to dismiss may be considered in an appeal from other appealable rulings in the same action." (App. p. 20) *citing Edge*, 366 S.C. 511, 523 S.E.2d 387 (2005). *Edge* is distinguishable from this case because it involved a dismissal denial that was immediately appealed to this Court. *Id.* at 517, 523 S.E.2d at 390. Here, Developers did not appeal, immediately or otherwise, the 2012 Ruling.

Respectfully submitted,



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