THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2015-001590

Appeal From Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5588
Heard April 12, 2018 – Filed August 8, 2018

AFFIRMED IN PART AND REVERSED IN PART

Brian C. Duffy, Seth W. Whitaker, and Julie L. Moore, all of Duffy & Young, LLC, of Charleston, for Appellants.

Justin O'Toole Lucey and Joshua F. Evans, both of Justin O'Toole Lucey, P.A., of Mount Pleasant, for Respondents.

Timothy W. Bouch and Yancey Alford McLeod, III, both of Leath Bouch & Seekings of Charleston, for Respondent I'On Assembly, Inc.

GEATHERS, J.: In this action alleging violation of the Interstate Land Sales Full Disclosure Act (ILSA), 42 U.S.C. §§ 1701 to -1720 (1994), Appellants, 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, seek review of the circuit court's orders (1) denying their motion for a judgment notwithstanding the verdict (JNOV) or new trial absolute and new trial nisi remittitur, (2) declaring a recreational easement invalid, (3) denying their motion for attorney's fees against Respondent Lea Ann Adkins, and (4) granting attorney's fees to Respondent Brad J. Walbeck.

Appellants argue (1) Walbeck and Adkins could not pursue this action as a derivative action; (2) Respondents' claims are barred by the statute of limitations; (3) the disputed recreational easement was valid and perpetual; (4) there was no fiduciary duty to convey certain common areas to the homeowners association, Respondent I'On Assembly, Inc.; (5) the directed verdict on Appellants' abuse of process counterclaim was improper because I'On presented ample evidence of an ulterior purpose and a willful act in the use of the process not proper in the regular conduct of the proceedings; (6) I'On was entitled to attorney's fees as the prevailing party on Adkins' breach of contract claim; (7) the attorney's fees award to Walbeck was unreasonable because he was awarded merely nominal damages on his ILSA claim; (8) the circuit court's ruling that Appellants were amalgamated was improper; and (9) Walbeck failed to show he relied on any representation made by I'On and, therefore, he failed to establish a claim under ILSA.

We reverse the denial of Appellants' JNOV motion as to the negligent misrepresentation and ILSA claims because they are barred by the statute of limitations, but we affirm the denial of Appellants' JNOV motion as to all other grounds. We affirm the order declaring the Recreational Easement invalid and the order denying Appellants' request for attorney's fees against Adkins. Finally, we reverse the award of attorney's fees to Walbeck.

FACTS/PROCEDURAL HISTORY

At the heart of this convoluted case is a developer's promise to convey certain recreational facilities in a residential community to a homeowner's association. Specifically, Respondents allege that Appellants promised they would convey the Community Dock and Creekside Park located on lot CV-6 in I'On Village to Respondent I'On Assembly, Inc. (the HOA) but instead sold these facilities to a third party. Appellants, however, allege they promised to convey a "generic" community dock and creekside park to the HOA but not the specific ones located on lot CV-6. Appellants also allege they conveyed the recreational facilities as promised.

I'On Village is located in Mount Pleasant. It was conceived by Thomas Graham and his son, Vince Graham. Thomas Graham's company, Graham Development, was the original majority owner of the I'On Company, LLC (the I'On Company), and Vince Graham was the company's manager. The I'On Company's subsidiary, I'On Realty, LLC (I'On Realty), employed real estate agents to market the lots in the I'On community.

On November 27, 1999, Walbeck entered into a contract to purchase a lot in I'On Village. Walbeck's purchase contract incorporated a property report (the 1998 Property Report) that the I'On Company had filed with the United States Department of Housing and Urban Development (HUD) on November 3, 1998, pursuant to ILSA.[1] The report set forth information deemed necessary to protect prospective purchasers, including the amenities that would be provided to lot owners.

Specifically, the report included a chart listing recreational facilities to be built during the first two phases of the development. Among the facilities to be built in Phase II was a "Creekside Park" and a "Community Dock." Under this listing was the following language:

> The recreational facilities listed in the chart above shall, upon completion of construction, be conveyed to the [HOA] by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to the [HOA] or its members. Upon conveyance of these facilities to the [HOA], it shall assume full responsibility for the costs of ownership, operation, and maintenance of the facilities conveyed to it.

Throughout the years after Walbeck received the 1998 Property Report, Appellants built multiple community docks and parks in I'On Village. Nonetheless, Respondents considered the Community Dock and Creekside Park listed in the 1998 Property Report to be located on the civic lot on which the boat ramp was located (lot CV-6)—this lot had at least 300 feet of deep water access to Hobcaw Creek. The I'On Company also completed construction of a building on lot CV-6 that became known as the "Creek Club." The Creek Club was intended as a venue for wedding receptions and other events and hosted its first event circa 2003.

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[1] *See* 42 U.S.C. § 1707 (setting forth requirements for the contents of a property report, relating to the lots in a subdivision, to be made available to the public).

Appellants vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park. At trial, Thomas Graham admitted that the Creek Club overlooked a park. He also admitted that when the I'On Company was planning its parks in 1999, the plans included "the Creek Club Park." In his deposition, Thomas Graham testified that the "Community Dock" listed in the 1998 Property Report referred to the main dock at the Creek Club that was adjacent to the boat ramp on lot CV-6; the boat ramp was built in 1999 or 2000, and the Creek Club dock was completed in 2000 or 2001.[2] However, at trial, he disputed that the "Community Dock" listed in the 1998 Property Report referred to the Creek Club dock. He explained the reference to a community dock in the 1998 Property Report "was to a generic community dock" and not to a specific property as Respondents contend. He stated, "[T]his was before we had designed anything -- got anything permitted or approved, even bought the land . . . . We didn't know whether -- at that time, . . . we thought sure we'd get one -- at least one community dock, but we didn't know how many, so that was a reference to that community dock."

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.[3] 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 Recreational Easement states that either party can terminate the easement after thirty years upon six months' notice. Thomas Graham described this language as a mistake because the I'On Club intended for the Recreational Easement to be permanent.

Section 3.1 of the Recreational Easement required the HOA to pay assessments "to cover a share of the costs incurred by [the I'On Club] in maintaining, repairing, replacing, operating[,] and insuring the Boating Facilities." The Boating Facilities were identified as "certain recreational facilities, including a boat ramp and dock and a driveway and parking area to serve them."

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[2] Vince Graham testified that the dock was completed in late 2000 or early 2001, before the Certificate of Occupancy was issued for the Creek Club itself on April 10, 2001.

[3] Curiously, the I'On Club did not obtain title to lot CV-6 until six months later.

On April 10, 2000, the I'On Company completed an amended property report for filing with HUD (first amended Property Report). Whereas the 1998 Property Report listed a "Creekside Park" and a "Community Dock" among the facilities to be built in Phase II, the first amended Property Report's list substituted "Marshwalk (park)" for "Creekside Park" and "Community Docks" for "Community Dock." (emphasis added). The first amended Property Report also changed the language regarding transfer of these facilities to the HOA—whereas the 1998 Property Report provided for transfer of the Creekside Park and Community Dock to the HOA, the first amended Property Report stated, "The recreational facilities listed in the chart above, other than the sidewalks and community dock, shall, upon completion of construction, be conveyed to [the HOA] by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to [the HOA] or its members." (emphasis added).

Jo Anne Stubblefield, the I'On Company's attorney for ILSA compliance, explained the amendment to the Property Report this way:

> [I]n early 2000[,] the decision was made to have the I'On Club own and maintain a parking area, boat ramp[,] and dock as part of the Club Facilities and grant an easement to the [HOA] for use of all of these facilities so that property owners would have the same use rights they would have had in the "community dock" referenced in the original Property Report, but in addition would have rights to use the parking area and boat ramp (which had not been mentioned in the original Property Report and which the property owners would otherwise have had no right to use unless they joined the Club). The Recreational Easement was drafted to create that easement and to provide for the [HOA] to contribute to the costs incurred by the Club in maintaining the boat dock, boat ramp, and parking area. Once that was finalized and recorded, we amended the HUD Property Report (effective April 2000) to reflect that . . . .

Thomas Graham testified that the name of the Creekside Park was changed to Marshwalk after the 1998 Property Report was provided to Walbeck to avoid confusion with a nearby neighborhood called "Creekside Park." He also testified that the Marshwalk was not on lot CV-6 or adjacent to Hobcaw Creek but ran for

over two miles along the marsh, which was adjacent to a tributary of Hobcaw Creek. Vince Graham also testified that the "Creekside Park" was actually the Marshwalk.

On August 15, 2000, the I'On Company conveyed ownership of lot CV-6, including the Creek Club and boat ramp, to the I'On Club. Appellants conveyed the Marshwalk park to the HOA on November 21, 2000. Vince Graham testified that the conveyance included "docks two and three."

In late June 2007, in response to homeowner concern over "non-residents cutting bait and cleaning fish off the docks," Thomas Graham asked the I'On Company's then-current manager, Chad Besenfelder, to advise him "what rights" the HOA had "over the docks and boat ramp." Before receiving a response, Thomas Graham sent another e-mail to Besenfelder expressing his desire to keep ownership of the Community Dock. In a later e-mail, he expressed his intent to "capitalize [the] potential value" of the Community Dock.

In July 2008, Mike Russo with 148 Civitas, LLC (Russo) submitted a proposal to buy lot CV-6, together with overflow parking on an 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.

On March 11, 2009, Board President Kinney sent an e-mail to Thomas Graham indicating the Board's discovery of the 1998 Property Report's representation that the Community Dock would be conveyed to the HOA. Kinney expressed the HOA's expectation that the Community Dock would be excluded from the sale to Russo. Kinney's e-mail also inquired about the 1998 Property Report's listing of the Creekside Park as an additional amenity to be conveyed to the HOA.

Later in March 2009, Russo advised Kinney that he was cancelling the purchase agreement, and subsequently, Thomas Graham advised Kinney that

Besenfelder was working out details for transferring ownership of the Community Dock to the HOA. Likewise, Besenfelder advised the HOA's management company that ownership of the Community Dock would be transferred to the HOA. However, by August 1, 2009, the HOA learned that Appellants and Russo had recently entered into a new contract for the sale of CV-6 to Russo, including the Creek Club, the boat ramp, and Community Dock.

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 $225,000.00.[4] The conveyance of lot CV-6 to Russo was expressly subject to the Recreational Easement, and the I'On Club executed a written assignment of its rights and obligations under the Recreational Easement to Russo.

On December 22, 2010, Walbeck filed his Complaint against Appellants and 148 Civitas, LLC, alleging causes of action for violation of ILSA, Breach of Contract, Breach of Fiduciary Duty, Fraud, Negligent Misrepresentation, Civil Conspiracy, violation of the South Carolina Unfair Trade Practices Act (UTPA), Unjust Enrichment, Promissory Estoppel, "Veil Piercing/Alter Ego," and Tortious Interference with Contract. On March 8, 2011, Walbeck filed an Amended Complaint adding Mike Russo (in his individual capacity) and I'On Realty as defendants. Appellants filed a motion to dismiss Walbeck's action on May 27, 2011, asserting, *inter alia*, Walbeck's claims were barred by the statute of limitations.

On February 7, 2012, Walbeck filed a Second Amended Complaint and Lea Ann Adkins joined Walbeck as a plaintiff. Walbeck and Adkins also asserted their claims derivatively on the HOA's behalf pursuant to Rule 23(b)(1), SCRCP (*see infra* Part IV), added the HOA as a defendant, and added an allegation that Appellants were amalgamated. On January 2, 2014, Respondents filed a Third Amended Complaint adding a cause of action for Aiding and Abetting against Russo. On January 13, 2014, Russo entered into a settlement agreement with Respondents. The terms of the settlement included Russo's sale of lot CV-6 to the HOA for $495,000 and the HOA's lease of the building, lawn, and three parking spaces back to Russo. The settlement terms also allowed the HOA access to the Creek Club for 13 dates per year and Russo's future conveyance of lot CV-5 to the HOA.

[4] Geoff is the son of Thomas and brother of Vince.

Subsequently, Respondents' action against Appellants proceeded to trial on January 14, 2014, but the action ended in a mistrial on January 17, 2014. On February 21, 2014, the HOA realigned its party status and adopted the other Respondents' claims set forth in the Third Amended Complaint. On May 12, 2014, Appellants filed a separate action against Respondents, seeking a declaration that the Recreational Easement was perpetual. The circuit court granted Appellants' motion to consolidate their action with the present action.

On June 16, 2014, Respondents filed their Fourth Amended Complaint reflecting the HOA's realignment as a plaintiff, Russo's dismissal from the action, and elimination of the claims for Tortious Interference and Aiding and Abetting. Exactly one year later, the circuit court issued an order declaring the Recreational Easement invalid and void ab initio because the I'On Club lacked title to lot CV-6 at the time it executed the easement. The circuit court also concluded the easement was not perpetual but was limited to a term of thirty years.

The parties re-tried the case from July 28 through August 1, 2014. The jury returned verdicts for Walbeck on his claims for violation of ILSA ($1), Negligent Misrepresentation ($20,000), and Breach of Contract ($10,000) and for the HOA on its claims for Breach of Contract ($1,000,000), Breach of Fiduciary Duty ($1,750,000), and Negligent Misrepresentation ($1,000,000). The HOA elected to recover on its Breach of Fiduciary Duty claim, and Walbeck elected to recover on his Negligent Misrepresentation claim. The circuit court denied Appellants' motion for a JNOV or new trial absolute and new trial nisi remittitur. The circuit court also denied Appellants' motion for an award of attorney's fees against Adkins and awarded attorney's fees to Walbeck pursuant to ILSA. This appeal followed.

ISSUES ON APPEAL

1. Were Respondents' claims barred by the statute of limitations?

2. Did the circuit court err by directing a verdict for Respondents on Appellants' abuse of process counterclaim?

3. Did the circuit court err by declaring the Recreational Easement invalid?

4. Did Respondents properly file and maintain a derivative action on the HOA's behalf?

5. Did the circuit court err by denying Appellants' JNOV motion as to the HOA's breach of fiduciary duty claim?

6. Did the circuit court err by concluding that Appellants were amalgamated?

7. Did the circuit court err by denying Appellants' JNOV motion as to Walbeck's ILSA claim?

8. Did the circuit court err by awarding attorney's fees to Walbeck?

9. Did the circuit court err by denying Appellants' request for attorney's fees against Adkins on her breach of contract claim?

STANDARD OF REVIEW

"In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* The appellate court "will reverse the trial court's rulings on these motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law." *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

"When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (quoting *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Ct. App. 1998), *abrogated on other grounds by Webb v. CSX Transp., Inc.*, 364 S.C. 639, 653, 615 S.E.2d 440, 448 (2005)). A "JNOV should not be granted unless only one reasonable inference can be drawn from the evidence." *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154.

As to questions of law, this court's standard of review is de novo. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

LAW/ANALYSIS

I. Statute of Limitations

Appellants assert that Walbeck's claims "are time-barred because they accrued before December 22, 2007," which was exactly three years before Walbeck filed the initial complaint.[5] Appellants also assert that the HOA's claims "are time-barred because they accrued before February 7, 2009," which was exactly three years before Walbeck and Adkins filed the Second Amended Complaint on the HOA's behalf. Therefore, Appellants argue, the circuit court erred in submitting the issue to the jury and in denying Appellants' JNOV motion on this ground. We agree as to the negligent misrepresentation and ILSA claims because the circuit court committed an error of law in submitting to the jury the question of when these claims accrued. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 (holding the appellate court "will reverse the trial court's rulings on [directed verdict or JNOV] motions only [when] there is no evidence to support the rulings *or [when] the rulings are controlled by an error of law*" (emphasis added)).

The three-year statute of limitations, section 15-3-530(5) of the South Carolina Code (2005),[6] applies to the negligent misrepresentation and breach of fiduciary duty claims. With the exception of medical malpractice actions, "all actions initiated under [s]ection 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence *should have known* that he [or she] had a cause of action." S.C. Code Ann. § 15-3-535 (2005) (emphasis added). The "exercise of reasonable diligence" means "the injured party must act with some promptness [when] the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party *might* exist." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363–64, 468 S.E.2d 645, 647 (1996) (second emphasis added). In other words, the discovery rule does not "require absolute certainty a cause of action exists before the statute of limitations begins to run." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001).

> The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and *when the*

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[5] Appellants do not dispute the applicability of the twenty-year statute of limitations to the breach of contract claim because Walbeck's contract to purchase his lot was a sealed instrument. *See* S.C. Code Ann. § 15-3-520 (2005) (providing for a twenty-year statute of limitations for actions on a sealed instrument).

[6] Subsection 5 provides for a three-year limitation on "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and [medical malpractice actions]."

> *testimony is conflicting upon the question,* it becomes an issue for the jury to decide. However, when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim *becomes a matter of law to be decided by the trial court*.

Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009) (emphases added) (citation omitted), *aff'd in part, rev'd in part on other grounds*, 392 S.C. 116, 708 S.E.2d 766 (2011).

The statute of limitations for the ILSA claim is "three years after discovery of the violation or after discovery should have been made *by the exercise of reasonable diligence*." 15 U.S.C. § 1711(a)(2) (emphasis added). There is a dearth of published case law interpreting this provision, but the opinion in *Streambend Properties III, LLC v. Sexton Lofts, LLC*, 297 F.R.D. 349, 359 (D. Minn.), *aff'd*, 587 F. App'x 350 (8th Cir. 2014), indicates an interpretation similar to *Dean*'s interpretation of the identical standard in section 15-3-535, i.e., "three years after the person knew or *by the exercise of reasonable diligence* should have known that he [or she] had a cause of action." (emphasis added).

In the present case, the jury found the date that Respondents knew or should have known they had a claim against Appellants was August 5, 2009, the date Appellants sold the disputed property to Russo. However, Appellants argue the initial representation on which Respondents claim they relied was that Appellants would convey the disputed property to the HOA free of charge upon completion of construction, and Respondents knew or should have known upon completion of construction in early 2001 that they did not receive such a conveyance.[7] Thus,

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[7] The 1998 Property Report stated,

> The recreational facilities listed in the chart above shall, upon completion of construction, be conveyed to the [HOA] by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to the [HOA] or its members. Upon conveyance of these facilities to the [HOA], it shall assume full responsibility for the costs of ownership, operation, and maintenance of the facilities conveyed to it.

Appellants argue, Respondents knew or should have known they might have a claim against Appellants, and their claims accrued, at that time. The logical extension of this argument is that Walbeck, in his individual capacity and as a representative of the HOA, certainly should have known before December 22, 2007, approximately six years after the completion of construction, that he and the HOA had a claim against Appellants.

Even viewing the evidence in the light most favorable to Respondents, we agree with Appellants that the negligent misrepresentation and ILSA claims accrued well before December 22, 2007. However, the claims did not necessarily accrue upon completion of construction or even immediately thereafter. Further, we 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. We base our determination of each claim's accrual on the particular claim's allegations concerning breach of duty.

Negligent Misrepresentation

In the negligent misrepresentation claim, Respondents alleged:

> 88. The I'On Defendants made oral and written representations that the Community Dock and Creekside Park would be transferred to the [HOA].
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> . . .
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> 90. The Defendants owed a *duty* of care to the Plaintiffs *to communicate truthfully all information regarding [their] purchase in I'On*, without material omission.
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> 91. The Defendants[] breached that duty owed *by misrepresenting facts* [that], in conjunction with other representations, *induced the Plaintiffs and other lot purchasers to enter into contracts for the purchase of lots* in I'On.

It is undisputed that construction of the Community Dock and Creekside Park was completed in early 2001, no later than April 10, 2001.

> 92. The Plaintiffs, the [HOA], and its members have suffered a pecuniary loss as a direct and proximate result of [their] *reliance* on the Defendants' false representations.

(emphases added). Paragraph 88 referred to the representation made in the 1998 Property Report. Paragraph 91 designates the breach of Appellants' duty of care as misrepresenting facts that induced Walbeck to purchase his lot. Thus, as to the negligent misrepresentation claim, the question is when Walbeck, in his individual and representative capacity, knew or should have known of the falsity of the representation that induced him to buy his lot, i.e., the statement in the 1998 Property Report.

To accept Appellants' argument that the negligent misrepresentation claim accrued upon completion of construction would require the conclusion that Walbeck's purported reliance on the 1998 Property Report was accompanied by a duty to inquire about the conveyance immediately after construction was completed. Such a conclusion is unrealistic and unreasonably harsh. Rather, this claim accrued when Walbeck first received information indicating the HOA did not own the Community Dock and Creekside Park.

Walbeck admitted receiving copies of the HOA's proposed annual budgets, which began including a "Creek Club Dock usage Fee" as early as October 10, 2004, for the 2005 budget year, if not earlier. The proposed 2005 budget was mailed to HOA members on November 1, 2004. The listing of a fee being paid by the HOA for use of the Community Dock should have alerted Walbeck to the fact that the HOA did not have title to the Community Dock. Therefore, the only reasonable inference that can be drawn from the evidence is that the negligent misrepresentation claim accrued in early November 2004. *See* § 15-3-535 (stating that with the exception of medical malpractice actions, "all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or *by the exercise of reasonable diligence* should have known that he had a cause of action." (emphasis added)); *Turner*, 381 S.C. at 110, 671 S.E.2d at 641 ("[W]hen there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.").

In its order denying Appellants' JNOV motion, the circuit court concluded that even if the date Respondents should have discovered their claims preceded the three-year limitations period, equitable estoppel would have served to toll the statute of limitations in light of Appellants' misrepresentations and efforts to conceal their

negotiations with Russo. The circuit court did not refer to any exhibits or testimony showing the referenced misrepresentations or concealment, except for a quotation from an April 18, 2007 e-mail written by Chad Besenfelder, the I'On Company's manager. The circuit court also found that Appellants repeated their promise to convey the disputed property "over the course of many years" and included the June 2005 Handover Agreement in the list of exhibits to support this finding. However, this agreement does not reference any specific common areas. The other exhibits cited by the circuit court are e-mails that were written in the years 2006 through 2009.

Yet, there is no evidence that Appellants made any representations that could be construed as an expression of intent to convey the property between the time Walbeck received the 1998 Property Report and early November 2004, when he received the HOA's proposed budget for 2005. Therefore, the doctrine of equitable estoppel is not availing to Respondents as to the representation in the 1998 Property Report.

The circuit court also stated that it was "concerned with the existence of any evidence supporting the jury's findings and ha[d] no authority to resolve conflicts purportedly created by the jury's disregard of other evidence," citing *Curcio* as supporting authority. *See Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 ("When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" (quoting *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154)). However, in the present case, there were no conflicts in the testimony or other evidence as to when Walbeck should have known Respondents might have a claim against Appellants for the representation in the 1998 Property Report. In any event, there was only one reasonable inference from the evidence on this question. Therefore, this question was one of law to be decided by the circuit court. *See Turner*, 381 S.C. at 110, 671 S.E.2d at 641 ("[W]hen there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.").

Based on the foregoing, the negligent misrepresentation claim accrued no later than early November 2004 as a matter of law, and therefore, the circuit court erred in submitting this question to the jury. Because Walbeck failed to file the Complaint until December 22, 2010 and failed to file the Second Amended Complaint on the HOA's behalf until February 7, 2012, the negligent misrepresentation claim is barred

by the statute of limitations. Accordingly, we reverse the corresponding denial of Appellants' JNOV motion as to this claim.

ILSA

In the ILSA claim, Respondents alleged:

> 60. Defendants have violated [ILSA] by: (1) issuing a Property Report that made representations to prospective purchasers of lots that were false; . . . (2) continually distributing copies of the Property Report to potential purchasers, with knowledge that it contained false representations and that these representations would likely be relied upon, and were in fact relied upon by numerous lot purchasers in I'On; [or] (3) failing to honor the representations therein.

Like the negligent misrepresentation claim, the question as to the ILSA claim is when Walbeck knew or should have known of the falsity of the representations in the 1998 Property Report. As we previously explained, the only reasonable inference from the evidence is that Walbeck should have known of the falsity of these representations by early November 2004. Therefore, the circuit court erred in submitting this question to the jury. Accordingly, we reverse the corresponding denial of Appellants' JNOV motion as to this claim.

Breach of Fiduciary Duty

The HOA's breach of fiduciary duty claim included the following allegations:

> 72. Defendants have a fiduciary relationship to the Plaintiffs by virtue of their capacity as the developer and steward of the I'On community amenities and their former capacity controlling the Board of [the HOA].
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> 73. Defendants breached the fiduciary relationship by failing to honor their trust, by failing to disclose their breach of duty, by failure to enforce [the HOA's] rights, and by self-dealing.

Unlike the allegations in Walbeck's negligent misrepresentation claim, the allegations of paragraph 73 cover more than one breach, i.e., failing to honor their trust, failing to disclose their breach of duty, failure to enforce the HOA's rights, and self-dealing. While these breaches include the representation in the 1998 Property Report that induced certain homeowners to purchase their lots, they are not limited to that one act of wrongdoing. Thus, the question is when should the HOA's representatives (Walbeck and Adkins) have known of these other breaches.

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 his 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 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. *See Sabb*, 350 S.C. at 427, 567 S.E.2d at 236 ("In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions."); *id.* ("The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt."). Therefore, we affirm the denial of Appellants' JNOV motion as to the accrual of the HOA's breach of fiduciary duty claim.

II. Abuse of Process

Pursuant to Rule 220(b), SCACR, and the following authorities, we affirm the circuit court's directed verdict on Appellants' counterclaim for abuse of process: *Pallares v. Seinar*, 407 S.C. 359, 370–71, 756 S.E.2d 128, 133 (2014) (holding that the ulterior or improper purpose element of abuse of process "exists if the process is used to secure an objective that is *'not legitimate in the use of the process*'" (emphasis added) (quoting *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2012))); *Swicegood v. Lott*, 379 S.C. 346, 353, 665 S.E.2d

211, 214 (Ct. App. 2008) ("The improper purpose usually takes the form of coercion to obtain a *collateral* advantage, *not properly involved in the proceeding itself*, such as the surrender of property or the payment of money, by the use of the process as a threat or club." (emphases added) (quoting *Huggins v. Winn–Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967))).

III. Recreational Easement

Appellants maintain the circuit court erred in (1) finding that section 4.2 of the Recreational Easement limited the term of the easement to thirty years, superseding previous language stating the easement was perpetual, and (2) concluding that the Recreational Easement was invalid. However, Appellants did not appeal all of the grounds on which the circuit court based its declaration of invalidity. Namely, they failed to challenge the circuit court's conclusion that the Recreational Easement was not an arms-length transaction. Therefore, this court will affirm the circuit court's declaration under the two-issue rule. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the [two-issue] rule, [when] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *id.*, 692 S.E.2d at 903–04 (noting that the two-issue rule can be applied to situations not involving a jury); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (affirming the trial court's decision because the plaintiff did not appeal all grounds for the decision); *see also* Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 214 (3rd ed. 2016) ("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.").

Even if Appellants had challenged the conclusion that the Recreational Easement was not an arms-length transaction, we agree with the circuit court. The evidence shows that the same individual, Joe Barnes, the I'On Company's general manager, signed the Recreational Easement on behalf of all three parties to the transaction, the I'On Company, the I'On Club, and the HOA. Therefore, we may affirm on this basis as well. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

As we affirm the circuit court's declaration of invalidity, we need not address Appellants' challenge to the finding that the Recreational Easement was limited to a term of thirty years. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C.

598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

IV. Derivative Action

Appellants argue the circuit court erred by concluding Walbeck and Adkins properly filed and maintained their derivative claims against Appellants. Appellants request this court to dismiss the derivative claims on the grounds that (1) Walbeck and Adkins neither pleaded nor proved that they made a demand on the HOA to initiate litigation or that such a demand would have been futile, and (2) Walbeck and Adkins did not fairly and adequately represent the interests of other HOA members similarly situated in enforcing the HOA's rights. We disagree.

Rule 23(b)(1), SCRCP, addresses the procedural requirements for individuals seeking to file a derivative action. It states,

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. *The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority* and, if necessary, from the shareholders or members, *and the reasons for his failure to obtain the action or for not making the effort*. The derivative action may not be maintained if it appears that the plaintiff *does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association*.

(emphases added).

The demand requirement referenced in Rule 23 originated in our state's substantive law. *See Grant v. Gosnell*, 266 S.C. 372, 374, 223 S.E.2d 413, 414

(1976) ("Generally, in order for a stockholder to be able to sue for corporate injuries, he must allege that he has exhausted his remedies within the corporation or show a sufficient reason for not doing so." (citing *Latimer v. Richmond & D.R. Co.*, 39 S.C. 44, 17 S.E. 258 (1893) and *Thompson v. Thompson*, 214 S.C. 61, 51 S.E.2d 169 (1948))); *Latimer*, 39 S.C. at 52–53, 17 S.E. at 261 ("[B]efore the shareholder is permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. . . . [H]e must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity . . . ."); Rule 23(b)(1), Note ("This Rule 23(b)(1) is the language of present Federal Rule 23.1. *Existing State practice* permits a class action in these circumstances. The Rule simply provides more specific guidance for the procedure." (emphasis added) (citations omitted)).[8]

In *Grant*, our supreme court held that the question of whether the plaintiff's failure to seek redress within the bank of which he was a stockholder was excusable was "a factual question, the resolution of which . . . should be affirmed unless unsupported by the evidence or influenced by error of law." 266 S.C. at 375, 223 S.E.2d at 414. The court evaluated the circuit court's conclusion that the plaintiff's pursuit of redress within the bank would have been futile and held it was supported by the evidence because "[t]he record reflect[ed] that [the defendant] was chairman of the board of directors, and the owner of a majority of [the bank's] stock" when the plaintiff filed his derivative action alleging the defendants' fraud and mismanagement. *Id.* at 375–77, 223 S.E.2d at 414–15. "Possessed of this control of the stock of the corporation, *it is reasonable to infer* that [the defendant] 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." *Id.* at 376, 223 S.E.2d at 415 (emphasis added).

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[8] This court's opinion in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000), *certiorari granted* August 23, 2001, has been cited in all of the parties' appellate briefs. After our supreme court granted certiorari in *Whittle*, the parties settled the case and the court issued an order on January 10, 2003, stating that this court's opinion would "remain viable in result only." Therefore, we do not view *Whittle* as binding precedent.

In the present case, Walbeck's and Adkins' derivative claims survived Appellants' motion to dismiss and motion for summary judgment. Undoubtedly, "the denial of a motion for summary judgment is not appealable, even after final judgment." *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003). On the other hand, when judicial economy is served, the denial of a motion to dismiss may be considered in an appeal from other appealable rulings in the same action. *See Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) ("Here, an [appealable] order . . . is before the [c]ourt and, in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy), we will consider [the respondent's] cross-appeal."). However, judicial economy would not be served by limiting our review to the record as it existed when the circuit court denied the motion to dismiss. Rather, as a result of surviving the motion to dismiss and the summary judgment motion, Walbeck and Adkins endured the time and expense of a lengthy trial on the derivative claims. Therefore, it would be wasteful, not to mention unfair, to ignore the evidence generated at trial on this issue.

Therefore, we will look to the record before the circuit court at trial. The documentary evidence, namely the Declaration of Covenants, Conditions, and Restrictions (Covenants), as well as the testimony before the circuit court showed that Appellants had a veto power over the decisions of the Board. Section 9-104(c) of the Covenants states, in pertinent part,

> So long as the [the I'On Company] Membership exists, the [the I'On Company] shall have a right to disapprove any action, policy[,] or program of [the HOA, the Board,] and any committee [that], in the sole judgment of [the I'On Company], would tend to impair rights of [the I'On Company] or Builders 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].

Further, one Board member, Debra Bedell, testified regarding her understanding that the veto power would have prevented the Board from initiating litigation.[9] Therefore, the evidence shows that a demand on the Board to initiate litigation against Appellants would have been futile.

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[9] At oral argument, Appellants stated that Bedell "recanted" her testimony. However, we do not view her clarification of her initial testimony as a recantation.

Additionally, the circuit court properly found 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. *See* Rule 23(b)(1) ("The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members *similarly situated* in enforcing the right of the corporation or association." (emphasis added)); *cf. Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983) (interpreting the fourth class action requirement under Rule 23(a), FRCP, and holding, "In determining whether [the plaintiff] would be an adequate class representative, this court should look at two criteria—(1) the representative must have common interests with the unnamed members of the class; and (2) it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel."); *Jordon v. Bowman Apple Prod. Co.*, 728 F. Supp. 409, 412 (W.D. Va. 1990) ("Rule 23.1 places no minimum numerical limits on the number of shareholders who must be 'similarly situated.' In appropriate circumstances a single shareholder may be situated in a unique position and thus constitute a legitimate 'class of one.'" (citation omitted) (quoting *Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177, 180 (N.D. Ill. 1987))); *Halsted*, 115 F.R.D. at 180 ("Rule 23.1[, FRCP] does not require a derivative action plaintiff to represent the interests of shareholders with whom he is not similarly situated.").

According to the circuit court, the testimony of three HOA members, Julie Hussey, Tim Eble, and Deborah Bedell, indicated that Walbeck's and Adkins' assertion of the derivative claims advanced the interests of the HOA's members. The testimony of these witnesses supports the circuit court's finding. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 (holding an appellate court may reverse the circuit

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Counsel for the HOA had initially asked Bedell if there was anything in the HOA's controlling documents preventing the Board from filing suit against Appellants. Bedell responded that any attempt by the Board to file suit against Appellants would have been subject to Appellants' veto power. Later in the trial, Appellants' counsel recalled Bedell to the witness stand, outside the jury's presence, to question her regarding Appellants' veto power. At this time, Bedell clarified that she did not serve on the Board until after Walbeck and Adkins had already filed suit against Appellants on the HOA's behalf. Bedell explained that she was not a Board member when a decision on filing suit would have first presented itself to the Board. She added that even if such a decision had been an issue while she was on the Board, the Board members "would not have thought about filing a suit, because it would be so clear that it would be vetoed."

court's rulings on JNOV motions only when there is no evidence to support the rulings or when the rulings are controlled by an error of law).

Appellants also allege that Walbeck and Adkins were required to make another demand following the settlement of their claims against Russo. Appellants argue the settlement resulted in the HOA gaining ownership of the disputed property and realigning its party status to join Walbeck and Adkins as plaintiffs.[10] Appellants further argue, "[t]he nature of the relief sought against Appellants thus changed substantially . . . enough that Respondents' claims are new claims." Appellants refer to damages claimed "based on the cash price of the settlement, the alleged leasehold value of the Creek Club building, and the alleged price of the buyout of years 21-30 of that lease." We disagree.

A new demand was unnecessary following the settlement because the resulting change to the damages sought did not change the nature of the original claims. Moreover, 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.

Based on the foregoing, we affirm the circuit court's ruling that Walbeck and Adkins properly maintained a derivative action on the HOA's behalf.

V. Fiduciary Duty

Appellants argue the circuit court erred in concluding they owed a fiduciary duty to convey title to the disputed property to the HOA. We agree, but we conclude that Appellants owed a fiduciary duty to protect the rights of the HOA's members to the unfettered use and enjoyment of the disputed property and there was evidence showing Appellants breached this duty. Therefore, we affirm the circuit court's denial of the JNOV motion as to the fiduciary duty claim. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

In its order denying Appellants' JNOV motion, the circuit court stated, "When considering facts similar to those presented here, South Carolina courts have found

[10] The order realigning the HOA as a party plaintiff was made upon Appellants' motion.

a fiduciary relationship exists between developers and property owners."[11] The circuit court further stated,

> [A] developer's failure to convey community properties in their entirety is at least the equivalent of conveying them in "substandard condition" (if not worse), and thus, any distinction between properties which *should have been conveyed* and *properties which were actually conveyed in a substandard condition* is a distinction without a difference. . . . In other words, by failing to convey the community properties *as promised* to the [HOA, Appellants] failed to act in the best interest of the [HOA], and therefore, breached at least one of the fiduciary duties it owed the [HOA].

(circuit court's emphases). As the circuit court's ruling concerns a question of law, this court reviews the ruling de novo. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) ("Whether the law recognizes a particular duty is an issue of law to be decided by the [c]ourt."); *Fesmire*, 385 S.C. at 302, 683 S.E.2d at 807 ("This [c]ourt reviews all questions of law de novo.").

Appellants maintain the circuit court confused the contractual duty allegedly created by the 1998 Property Report with a fiduciary duty to the HOA. "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Hendricks*, 353 S.C. at 456, 578 S.E.2d at 714. "Ordinarily, the common law imposes no duty on a person to act. [When] an act is *voluntarily undertaken*, however, the actor assumes the duty to use due care." *Id.* at 456–57, 578 S.E.2d at 714 (emphasis added). Consistent with this proposition is this court's explanation of the foundation for a fiduciary duty: "A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence."

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[11] The circuit court was referring to *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 562 S.E.2d 633 (2002) and *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993). Both cases involved a developer conveying to a homeowners association title to common areas that were in substandard condition. We will discuss these two opinions further below.

Goddard, 310 S.C. at 414, 426 S.E.2d at 832 (quoting *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987)). "Courts of equity have been careful to define fiduciary relationships so as not to exclude new cases that may give rise to the relationship." *Id.*

In *Goddard,* this court compared the duty of a developer of a planned unit development (PUD) to its villa owners, prior to the formation of the villa owners association, to the duty of the promoters of a corporation: "Both are entrusted by interested investors to bring about a viable organization to serve a specific function. Both should be expected to use good judgment and act in utmost good faith to complete the formation of their organizations." 310 S.C. at 415, 426 S.E.2d at 832. The court found merit in the appellants' argument that the developer had a responsibility to ensure the common areas were in good repair when they were conveyed to the villa owners' association. *Id.* The court also recognized the evidence showing that the common areas were substandard when the developer turned them over to the association. *Id.*

The court highlighted evidence that the developer "seized the opportunity . . . to 'unload' the common areas on the [a]ssociation without a plan to establish a reserve or a plan to fund the [a]ssociation until such time as assessments were adequate to cover maintenance expenses." *Id.* The court stated, "It seems unfair to the villa owners for the [d]eveloper to burden them with substandard or deteriorated common areas that required an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures." *Id.* In *Concerned Dunes West*, our supreme court adopted this court's analysis in *Goddard* and held, "The developer of a PUD owes a duty to [a homeowners association] to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for bringing the common areas up to standard." 349 S.C. at 256–57, 562 S.E.2d at 637.

Here, the evidence shows Appellants met their promoter-like duty to bring about a viable homeowners association, complete with a funding mechanism and guidance for self-governance through the Covenants. We do not view the failure to honor the contractual commitment allegedly created by the 1998 Property Report as a violation of Appellants' promoter-like fiduciary duty. Rather, as we explain below, 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.

Prior to recognizing the fiduciary duty a developer owes to homeowners as the development's promoter, the *Goddard* court addressed the appellants' argument that a fiduciary duty arose from the developer's control of the villa owners' association. 310 S.C. at 413, 426 S.E.2d at 831. Specifically, the villa owners asserted that the superior voting strength of the developer and its president created "a fiduciary obligation to assess the villa owners at a level necessary to maintain sufficient reserves to adequately maintain the common areas." *Id.* The court stated, "*Assuming a fiduciary relationship exists* between the appellants and respondents because of their superior voting power, it is clear that the respondents have refrained from exercising their superior voting strength to effectuate higher assessments in deference to the wishes of the appellants to keep the assessments low." *Id.* at 414, 426 S.E.2d at 832 (emphasis added). Rather than rejecting the existence of a fiduciary duty at this stage in the relationship, the court declined to hold that this particular conduct of the developer violated a fiduciary duty to the villa owners. *Id.*

Again, the court recognized, "Courts of equity have been careful to define fiduciary relationships so as not to exclude new cases that may give rise to the relationship." *Id.* Instead, the court invoked the business judgment rule *as to the developer's determination of assessments only*.[12] When the court turned to the developer's transfer of the common areas to the association, it detected a fundamental unfairness in the developer's seizing of the opportunity "to 'unload' the common areas" on the association in substandard condition and without adequate funding. *Id.* at 415, 426 S.E.2d at 832. The court indicated that this particular conduct triggered the rule set forth in *Island Car Wash*: "A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Id.* at 414, 426 S.E.2d at 832 (quoting *Island Car Wash*, 292 S.C. at 599, 358 S.E.2d at 152).

Here, Appellants retained continuing control of the HOA up to and including the date they conveyed lot CV-6 to Russo. The Covenants provided that the I'On Company, as Founder, had the authority to "appoint, remove[,] and replace the members of [the HOA's] Board of Trustees" for a limited period of time not to

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[12] The business judgment rule states, "In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." *Id.*

exceed twenty years after the Covenants' recording. 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 Builders 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].

At trial, Thomas Graham testified that the I'On Company still retained these veto rights.

Appellants contend there were no developer-appointed directors serving on the HOA's Board after December 2005 and Appellants have never exercised any of the I'On Company's veto rights.[13] However, as in *Goddard*, Appellants' asserted restraint does not speak to the *existence* of a duty arising from their veto power but rather to the manner in which they carried out such a duty. *See id.* (assuming arguendo the existence of a fiduciary duty and declining to find a violation of any such duty by invoking the business judgment rule). Therefore, we reject Appellants' argument that their restraint from exercising the veto power precludes the existence of a fiduciary duty.

Nonetheless, the circuit court's denial of Appellants' JNOV motion was based on its extrapolation of a duty *to convey title* to all common areas from the duty pronounced in *Goddard* and *Dunes West*, i.e., the duty to turn over common areas that are not substandard and that are in good repair. Current South Carolina case law does not recognize the precise duty to convey title to all common areas, and thus, the denial of Appellants' JNOV motion was based on an error of law. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 ("[The appellate court] will reverse the [circuit] court's rulings on [directed verdict and JNOV] motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law.").

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[13] Appellants admit that in 2014, the I'On Company appointed a Board member, Chad Besenfelder, but he was excluded from participating in "Board decisions that would potentially be adverse to the I'On Company."

Rather, we view Appellants' fiduciary duty as a duty to "act in good faith and with due regard to the interests of the" HOA's members. *See Goddard*, 310 S.C. at 414, 426 S.E.2d at 832 ("A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." (quoting *Island Car Wash*, 292 S.C. at 599, 358 S.E.2d at 152)). Because of Appellants' retention of continuing control of the HOA and their representations in 2008 and 2009 that they would convey the disputed property to the HOA, they are governed by standards set forth in *Island Car Wash*:

> [A]nyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. . . . [C]ourts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage *at the expense of the person under his influence*.

292 S.C. at 599, 358 S.E.2d at 152 (emphasis added).

In the present case, all parties considered the disputed property to be common areas, designated by the Covenants as "Commons," because the HOA purportedly held "use rights," via the Recreational Easement,[14] "for the common use and enjoyment of Titleholders." Hence, the HOA was "exclusively responsible for the control and management" of the disputed property, and 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.

Yet 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. First, in 1998 and 1999, the I'On Group, then known as Civitas, 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 the knowledge of the HOA's members. While the

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[14] Before the present action was filed, the parties believed the Recreational Easement was valid. Therefore, the instrument's invalidity did not affect the parties' actual treatment of the disputed property as common areas for purposes of the fiduciary duty analysis.

Covenants allow the HOA to grant easements over common areas, the purpose of such an easement must be "consistent with the interests of the [HOA]."[15]

Next, the I'On Company relinquished its ownership interest in lot CV-6 to the I'On Club and ultimately to Russo. 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. Further, there 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. *See Sabb*, 350 S.C. at 427, 567 S.E.2d at 236 ("In ruling on directed verdict or JNOV motions, the [circuit] court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions."); *id.* ("The [circuit] court must deny the motions when the evidence yields more than one inference or its inference is in doubt.").

In late June and early July 2007, Thomas Graham asked Chad Besenfelder to advise him "what rights" the HOA had "over the docks and boat ramp." Before receiving a response, Thomas Graham sent another e-mail to Besenfelder expressing his desire to keep ownership of the Community Dock. In a later e-mail, he expressed his intent to "capitalize [the] potential value" of the Community Dock. Yet, 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, binding Appellants to "act in good faith and with due regard to the interests of" the HOA's members. *See Goddard*, 310 S.C. at 414, 426 S.E.2d at 832 ("A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." (quoting *Island Car Wash*, 292 S.C. at 599, 358 S.E.2d at 152)).

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[15] On April 8, 2000, Appellants amended the Covenants to state that the I'On Company had an easement over the common areas for the purpose of conducting parades, sporting events, and "other activities of general community interest." We do not interpret this provision as encompassing the regular, continuing access of non-members to the amenities on lot CV-6.

In the light most favorable to Respondents, the foregoing evidence shows Appellants acted in bad faith and profited at the expense of the HOA's members. In sum, there is sufficient evidence of Appellants' breach of their fiduciary duty to the HOA's members to affirm the denial of Appellants' JNOV motion as to this claim.

VI. Amalgamation

Appellants next argue the circuit court's ruling that Appellants were amalgamated was improper because the circuit court failed to consider the factors required by *Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984) for "piercing the corporate veil" to hold a corporation's principals personally liable for the corporation's wrongdoing. We disagree.

Our supreme court recently examined the "amalgamation of interests theory" in *Pertuis v. Front Roe Restaurants, Inc.*[16] The court recognized this court's previous applications of the theory in *Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc.*[17] and *Kincaid v. Landing Development Corp.*[18] as well as its own reference to the theory in *Kennedy v. Columbia Lumber & Manufacturing Co.*[19] In *Magnolia*, this court analyzed the relationship of the defendant corporations to their officers, directors, headquarters, employees, functions, written representations, and admissions of liability to determine whether there existed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." 397 S.C. at 358–60, 725 S.E.2d at 117–18 (quoting *Kincaid*, 289 S.C. at 96, 344 S.E.2d at 874). We concluded the evidence supported the trial court's ruling that the corporations were amalgamated. *Id.* at 360, 725 S.E.2d at 118.

In *Pertuis*, the court formally recognized the amalgamation of interests theory for the first time and indicated a preference for the term "single business enterprise theory." *Id.* at 33–34. Notably, the court held, "the single business enterprise theory requires a showing of more than the various entities' operations are intertwined," as the theory had previously been applied by our courts. *Id.* at 34. Rather, "[c]ombining multiple corporate entities into a single business enterprise requires

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[16] Op. No. 27823 (S.C. Sup. Ct. filed July 5, 2018) (Shearouse Adv. Sh. No. 27 at 22). A petition for rehearing in this case is currently pending before the supreme court.

[17] 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012).

[18] 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986).

[19] 299 S.C. 335, 340–41, 384 S.E.2d 730, 734 (1989).

further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* In comparison, the *Sturkie* requirements for holding a corporation's principals personally liable for the corporation's wrongdoing are (1) the failure to observe corporate formalities and (2) "an element of injustice or fundamental unfairness if the" corporation's acts are "not regarded as the acts of" its principals. *See Mid-S. Mgt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597–98, 649 S.E.2d 135, 140–41 (Ct. App. 2007) (explaining *Sturkie*'s "two-prong[ed] test to determine whether a corporate veil should be pierced").

Therefore, the requirements for the single business enterprise theory as adopted by our supreme court overlap with the *Sturkie* requirements for piercing the corporate veil. The single business enterprise theory does not require a showing of the corporate defendants' failure to observe corporate formalities. However, the theory dovetails with the second prong of the *Sturkie* test, i.e., an element of injustice or fundamental unfairness, to place accountability where it belongs.

Here, in its order denying Appellants' JNOV motion, the trial court discussed in detail the fundamental unfairness inherent in Appellants' "misuse of [their] collective control" of the amenities promised to the HOA. Further, there is evidence of both an intertwining of the entities' operations and Appellants' bad faith. In particular, there was evidence of Appellants' common employees, principals, and activities as well as the confusion displayed by those who dealt with Appellants as to which entity they were dealing with. *Cf. Mid-S.*, 374 S.C. at 605, 649 S.E.2d at 145 (rejecting the appellants' amalgamation argument and noting, *inter alia*, there was no evidence that the plaintiffs could confuse a corporate defendant with its parent companies).

Further, the evidence shows that Appellants' common employees and principals acted in concert to profit at the expense of the HOA's members. The intertwining of the operations of Appellants' entities undoubtedly facilitated this behavior, making it fundamentally unfair to assign liability to any one or more of these entities to the exclusion of the others. For example, in 1998 and 1999, the I'On *Group*, then known as Civitas, 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, although the rights were owned by the I'On *Company* at the time. This occurred without the knowledge of the HOA's members. In 2000, the I'On Company transferred lot CV-6 to the I'On Club, LLC, for inadequate consideration ($5.00) before it was ultimately sold to Russo.

This intertwining also played a role in Besenfelder's March 2009 representation to the HOA's management company that the I'On Company would deed the Community Dock on lot CV-6 to the HOA when, in fact, the I'On *Club* owned lot CV-6. Besenfelder's other communications likewise show that he referred to the various entities interchangeably. Also preceding the sale of lot CV-6 to Russo was Thomas Graham's secret expression of a desire to "capitalize [the] potential value" of the Community Dock. The realization of Graham's intent through the sale to Russo, in addition to the 1999 sale of access rights, placed the HOA's members in a position of having to compete with non-members for access to the disputed property. In other words, the 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.

Based on the foregoing, we affirm the circuit court's conclusion that Appellants were amalgamated.

VII. ILSA Claim

Appellants maintain that Walbeck's ILSA claim fails because Walbeck did not rely on any representations made in the 1998 Property Report. We need not address this argument because the ILSA claim is barred by the statute of limitations. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

VIII. Attorney's Fees for Walbeck

We need not address Appellants' challenge to the amount of fees awarded to Walbeck pursuant to 15 U.S.C. § 1709(c) because his ILSA claim is barred by the statute of limitations and, thus, he may not recover attorney's fees under § 1709(c). We reverse the circuit court's award under this statute.

IX. Attorney's Fees against Adkins

Appellants claim they were entitled to an award of attorney's fees against Adkins on her breach of contract claim because they were the prevailing party pursuant to the fee-shifting provision in Adkins' lot purchase agreement. We affirm the circuit court's order denying attorney's fees against Adkins.

Appellants sought an award of attorney's fees against Adkins pursuant to the following provision in her lot purchase agreement: "If either party requires services

of an attorney to enforce obligations under this Agreement, the prevailing party shall be due from the non-prevailing party reasonable attorneys' fees, costs[,] and expenses actually incurred." The circuit court denied the requested award because Adkins prevailed on three of her derivative claims against Appellants and there was "no practical or legal way to separate the derivative verdicts from Adkins or to attribute them more to Walbeck[] just because he prevailed on his claim for personal damages and Adkins did not." The circuit court also noted that while Adkins did not prevail on her breach of contract claim, she prevailed as to Appellants' counterclaim for abuse of process, "resulting in a draw on the individual claims."

In *Heath v. County of Aiken*, our supreme court interpreted the term "prevailing party" within the context of section 15-77-300 of the South Carolina Code (Supp. 1989), which authorizes the recovery of attorney's fees and costs by a party contesting state action. 302 S.C. 178, 182–83, 394 S.E.2d 709, 711–12 (1990). The determination of whether the movant was a prevailing party was one of the factors under the statute examined by the court, which reviewed the circuit court's award under an abuse of discretion standard of review. *Id.* at 182, 394 S.E.2d at 711. The court stated, "A prevailing party has been defined as:

> [t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.

Id. at 182–83, 394 S.E.2d at 711 (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (Alaska 1964)).

The "prevailing party" analysis in *Heath* lends support to the circuit court's analysis of Appellants' request for attorney's fees pursuant to the fee-shifting provision in Adkins' lot purchase agreement, even considering that one of the three derivative claims (negligent misrepresentation) is barred by the statute of limitations. Further, this court may affirm for any ground appearing in the record. Rule 220(c), SCACR. Here, Appellants' petition for attorney's fees does not indicate that the addition of Adkins as a plaintiff required any significant increase in the efforts of counsel to defend this case. While the petition requests one-half of the total fees and expenses incurred from the date of the Second Amended Complaint's filing through the end of trial, it does not state that Adkins' presence in the case actually generated a corresponding amount of time or money expended. Moreover, counsel's attorney's fee affidavit is not in the record.

Based on the foregoing, we affirm the denial of Appellants' request for attorney's fees against Adkins.

CONCLUSION

We reverse the denial of Appellants' JNOV motion as to the negligent misrepresentation and ILSA claims because they are barred by the statute of limitations, but we affirm the denial of Appellants' JNOV motion as to all other grounds. We affirm the order declaring the Recreational Easement invalid and the order denying Appellants' request for attorney's fees against Adkins. Finally, we reverse the award of attorney's fees to Walbeck.

AFFIRMED IN PART and REVERSED IN PART.

LOCKEMY, C.J., and HUFF, J., concur.