In the

Supreme Court of Virginia

At Richmond

Record No. 141195

BIRCHWOOD-MANASSAS ASSOCIATES, L.L.C.,

Appellant,

– v. –

BIRCHWOOD AT OAK KNOLL FARM, L.L.C.;
BIRCHWOOD AT WADING RIVER, L.L.C.,

Appellees.

BRIEF OF APPELLEES

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STATMENT OF THE CASE

This Appeal arises out of litigation between affiliate companies with overlapping familial membership, similar missions of purpose, common management structures and shared financing arrangements. The three companies named in this case are the latest of several affiliated single purpose limited liability companies organized to benefit the family and associates of the original founder of the Birchwood family of business. The Plaintiff/Appellant, Birchwood-Manassas Associates, L.L.C. ("Birchwood-Manassas") was formed as a single purpose L.L.C. to develop and sell homes within a residential subdivision in Manassas, Virginia. Likewise, the Defendant/Appellees Birchwood at Oak Knoll Farm, L.L.C. ("Oak Knoll") and Birchwood at Wading River, L.L.C. ("Wading River")(collectively the "Defendants") are also single purpose entities formed to develop and sell homes in Purcellville, Virginia and Suffolk County, New York, respectively.

In 2011, one of the members of Birchwood-Manassas, who is also a member of both Oak Knoll and Wading River, filed suit in the Circuit Court of Prince William County seeking a judicial dissolution of Birchwood-Manassas (the "Dissolution Action"). The only parties to the Dissolution Action were the complaining family member, Seth Lieberman, and Birchwood-Manassas. Relying primarily upon the Operating Agreement,

which required the dissolution of Birchwood-Manassas by January 2008, the Honorable Mary Grace O'Brien ordered Birchwood-Manassas dissolved and appointed a liquidating trustee to wind up the company. In December 2012 Lawrence Rifken, of the firm Greenberg Traurig, LLP, was appointed Liquidating Trustee of Birchwood-Manassas.

Though he had no personal knowledge of the 68 year history or business of the Birchwood affiliate entities, nor actual authority pursuant to Virginia Code or the Order by which he was appointed, the Liquidating Trustee believed his appointment anointed him with the power of immediately calling loans made between Birchwood-Manassas and its affiliate entities Oak Knoll and Wading River. The managers that actually made these loans, who are also members of all three companies, dispute that the loans are subject to call in the manner demanded by the Liquidating Trustee. Actually, the former Birchwood-Manassas managers aver that the demands of the Liquidating Trustee are not only contrary to the terms of the loans they created, but also to the best interests of all three organizations and their common memberships.

In June of 2013 the Liquidating Trustee filed a Verified Complaint in the Circuit Court of Prince William County against the Defendants asserting that, as a result of the Dissolution Action, he had the authority to

immediately collect upon all loans of Birchwood-Manassas made to the Defendants. The Liquidating Trustee is aware that his characterization of the intercompany loans as demand obligations is contrary to the actual terms of the loans made as testified to by Birchwood-Manassas' managers in the Dissolution Action. As a result of a show cause hearing held in August 2013, Judge O'Brien also confirmed that her final order in the Dissolution Action could not have the effect of ordering the repayment of these loans. Nonetheless, the Trustee has maintained the action against the Defendants by asserting that all intercompany loans are subject to immediate call.

While the Defendants dispute the characterization of the intercompany loans as demand obligations, since the Liquidating Trustee insists on describing them as such, the Defendants have defended that claim accordingly by asserting that the causes of action filed by the Liquidating Trustee on behalf of Birchwood-Manassas are barred by the applicable statute of limitations. Judge O'Brien of the Circuit Court of Prince William County, who was assigned this action in light of her having heard the Dissolution Action, agreed that Birchwood-Manassas' Complaint was time-barred. In asking for leave to amend the original Complaint, counsel for Birchwood-Manassas promised to throw the "kitchen sink" into

an amended complaint that would overcome the deficiencies of the original. Leave to amend was granted by Judge O'Brien and on January 1, 2014, the Liquidating Trustee filed a Verified First Amended Complaint ("Amended Complaint").

In order to breathe life into his time barred claims, the Liquidating Trustee has accused the managers of the Birchwood affiliates of impropriety, loosely utilizing the terms 'misconduct' and 'breach of fiduciary duty' as if these accusations were not only evident from the facts pled, but things decided. However, a close examination of the Amended Complaint reveals that these accusations are not only conclusory without factual support, but are contradicted by other factual allegations within the same pleading. Undeniably, the Amended Complaint presents a paradox. On the one hand, the Liquidating Trustee repeatedly claims that the loans between Birchwood-Manassas and the Defendants were "undocumented" and states that management prevented the pursuit of claims to collect upon past due loans to the benefit Wading River and Oak Knoll to the detriment of Birchwood-Manassas. Yet in the very same pleading the Liquidating Trustee acknowledges significant repayment of principal and interest (in excess of $9.4 million) on these same loans to Birchwood-Manassas, and attaches as an exhibit to the Amended Complaint the meticulous

accounting of the ongoing loan obligations in the general ledgers, financial statements, accounting papers and tax returns of all three companies. The Amended Complaint further alleges that the same managers have taken painstaking steps to account for all loan amounts and reaffirm all ongoing obligations in company records and filings.

After weeding out the purely legal and conclusory allegations of the Amended Complaint as well as those fact having absolutely nothing to do with the underlying claims, Judge O'Brien again agreed with the Defendants, that the causes of action asserted by Birchwood-Manassas in the Amended Complaint are barred by the applicable statute of limitation and dismissed the Amended Complaint with prejudice. In doing so Judge O'Brien considered Birchwood-Manassas' argument that its claims should be equitably tolled, but found insufficient support under Virginia law to support an equitable tolling of the statute of limitations on Birchwood-Manassas' theory despite accepting all of the Liquidating Trustee's factual allegations as true.

While it is clear that by this appeal Birchwood-Manassas seeks review of Judge O'Brien's ruling that the Amended Complaint does not support the equitable tolling of the statute of limitations, the Appellant's Assignments of Error and briefs are not supported by an accurate recitation

of the pleadings or issues properly preserved in the record. Rather the Appellant's Appeal errs by asking that this Court answer manufactured and ethereal questions based on its own conclusions of law, not based on any actual decision of the Circuit Court. This Court should, as it has consistently done before, refuse to answer such questions.

Though the Appellant views this matter as presenting critical questions of first impression, the actual facts and issues of law are fairly mundane. If and only if this Court deems the Appellant's Assignments of error appropriate, there are only two remaining questions that this Court need consider. The first is whether or not the Circuit Court properly refused to toll the three-year statute of limitations to the causes of action pled by Birchwood-Manassas. A review of the record demonstrates that the trial court properly ruled that no support exists under Virginia law to toll the limitation period on Birchwood-Manassas' 'common management' theory for equitable tolling.

The second question is whether or not the factual allegations and causes of action pled by Birchwood-Manassas support the filing of a *lis pendens* pursuant to Virginia Code § 8.01-268. As set forth herein, the Circuit Court erred in ruling that the facts and causes of action pled by Birchwood-Manassas support the maintenance of a *lis pendens* in Virginia.

Birchwood-Manassas is, by its own insistence, an unsecured creditor of a demand obligation or unwritten contract. Virginia Code § 8.01-268 does not permit unsecured loan creditors seeking monetary damages to file *lis pendens*. The reasoning for this restriction is sound and exemplified by what occurred in this action. Here, the Liquidating Trustee filed an action for Unjust Enrichment and utilized that count as the premise for filing a *lis pendens* on <u>the entirety</u> of the Defendants' real estate in Purcellville, Virginia and Wading River, New York. The Liquidating Trustee did this knowing that so long as the *lis pendens* remained on the title to the Defendants' property they could no longer actively operate as residential real estate developers and provide marketable title to their purchasers. The Liquidating Trustee intentionally and wrongfully used the *lis pendens* as a pre-judgment attachment to exact monies from the Defendants. A modification of the Virginia Code made in 1988 not only prevents this activity, but provides for sanction against those who utilize *lis pendens* in such a manner. If this Court endorses what the Plaintiff did in this case, every oral contract or loan, or case in which Unjust Enrichment is alleged could result in the filing of a *lis pendens* in the land records of any county in which the defendant owns real property regardless of the amount claimed or the facts supporting the cause of action.

Material Proceedings

On June 14, 2013, Birchwood-Manassas, by and through its Liquidating Trustee, filed a Verified Complaint in the Circuit Court of Prince William County. JA at 1-41.[1] A memorandum of *lis pendens* was concurrently recorded by the Liquidating Trustee against all Oak Knoll real property in the land records of Loudoun County, Virginia and a Notice of Pendency was also filed in the land records of Suffolk County, New York against Wading River's real property. JA at 504-525.

On June 18, 2013, Birchwood-Manassas filed a Motion for Temporary Restraining Order in this action, as well as a Motion to Issue a Rule to Show Cause in the prior Dissolution Action against the Defendants and their managers. R. at 45-100. On August 19, 2013, Judge O'Brien ruled that the managers had not violated the final order in the Dissolution Action and dismissed the Rule to Show Cause. Birchwood-Manassas did not seek to reset its TRO request at any time.

On September 6, 2013, Judge O'Brien heard Oak Knoll's Motion to Quash *Lis Pendens* and denied the motion. JA at 113-114. On September 27, 2013, Oak Knoll filed a motion for the court to reconsider Oak Knoll's

[1] All citations are made to the Corrected Joint Appendix.

Motion to Quash *Lis Pendens*. JA at 115-126. By letter of October 9, 2013, Judge O'Brien declined reconsideration of the Motion. JA at 127.

On December 17, 2013, the Defendants presented argument on their previously filed Plea in Bar. JA at 239-306. On December 23, 2013, Judge O'Brien sustained the Defendants' Plea in Bar dismissing all counts of the Verified Complaint by letter opinion. JA at 307-310. On January 10, 2014, the Circuit Court entered the order sustaining the Defendants' Plea in Bar without prejudice allowing Birchwood-Manassas twenty-one days to file an amended pleading. JA at 388-390.

On January 31, 2014, Birchwood-Manassas filed a Verified First Amended Complaint. JA 391-540. On February 19, 2014, Defendants filed a Demurrer and Plea in Bar to the Amended Complaint. JA at 541-543. On March 21, 2014, Defendants presented argument on their Demurrer and Plea in Bar. JA 610-656. On April 1, 2014, Judge O'Brien by letter opinion granted Defendants' Demurrer and Plea in Bar and again dismissed all counts of the Amended Complaint, this time with prejudice. JA at 657-658. The Final Order was entered on May 9, 2014 over Oak Knoll's objection that the *lis pendens* also be ordered released in the Circuit Court of Loudoun County land records or not be permitted to remain during

appeal without an appeal bond securing the value of Oak Knoll's real estate. JA at 765-767.

STATEMENT OF THE FACTS

Appellant's Statement of the Facts omits several critical facts that played an important role in the Circuit Court's analysis and likewise will before this Honorable Court. Importantly, every fact stated herein is directly attributable to or quoted from the Verified First Amended Complaint and its exhibits found in the Joint Appendix at pages 391-540.

The Birchwood Family of Affiliate Homebuilding Companies

Birchwood-Manassas was formed on March 13, 1997. JA at 394, ¶ 8. The members of Birchwood-Manassas entered into an operating agreement on April 1, 1998 (the "BMA Operating Agreement"). Id. The BMA Operating Agreement states that Birchwood-Manassas was formed 'for the purpose of owning, developing, and selling certain real estate' in Prince William County, Virginia. Id. The BMA Operating Agreement contains a clause requiring the company to be 'dissolved and its affairs wound up' no later than January 1, 2008. Id.

"Birchwood-Manassas was part of a larger affiliation of Birchwood homebuilding entities around the country, many of which have overlapping ownership and owners with familial relationships as well as common

management." JA at 394, ¶ 9. Pursuant to the BMA Operating Agreement, the company was a 'manager-managed' limited liability company and the initial managers were Morris Sosnow, Burton Haims and Ron J. Horowitz. JA at 434.

In or about 2001, Wading River was formed for the purpose of developing certain real estate located in Suffolk County, New York. JA at 397, ¶ 17. Also in or about 2001, Oak Knoll was formed for the purpose of developing certain residential real estate located in Loudoun County, Virginia. Id. "Mr. Horowitz and Mr. Haims both have ownership interests in Wading River and Oak Knoll, as well as Birchwood-Manassas." JA at 398, ¶ 19.

"In or about 2004, Mr. Horowitz and Mr. Haims began transferring and/or causing the transfer of millions of dollars of Birchwood-Manassas's funds to Wading River and Oak Knoll[.]" JA at 395, ¶ 10. Every transfer of funds has been recorded by the management of the three entities in the ledgers, financial statements, accounting work papers and tax filings of the entities. JA at 444-447, 457-493. The last transfer from a Birchwood-Manassas account to either a Wading River or Oak Knoll account was on June 30, 2009. JA at 446. The total amount of money loaned by Birchwood-Manassas to Oak Knoll and Wading River is $14,650,000. JA at

400. In total, $9,445,000 of principal and interest has been repaid in the form of direct repayments or as payment of Birchwood-Manassas' liabilities over the course of 2004-2012. JA at 402, ¶ 32, and 444-447. "To the extent that a 'demand' for these repayments needed to be made, then Mr. Horowitz and/or Mr. Haims authorizing, directing, and/or causing such repayments constituted an explicit or implicit 'demand' by Birchwood-Manassas." JA at 402, ¶ 32.

The Lieberman Case or The Dissolution Action

"In or about 2009, Birchwood-Manassas sold its last property and thus satisfied the purpose for which it was established." JA at 395, ¶ 11. In 2011, Seth Lieberman, a member of Birchwood-Manassas, filed suit in the Circuit Court of Prince William County seeking a judicial dissolution of Birchwood-Manassas on the basis that the BMA Operating Agreement required dissolution of the organization by January 1, 2008 (the "Dissolution Action"). JA at 395, 434-437. Lieberman also sought the appointment of a liquidating trustee to wind up of Birchwood-Manassas. Id. At the conclusion of a six-day bench trial before Judge O'Brien, the Court ruled that the BMA Operating Agreement's compulsory dissolution date, coupled with Birchwood-Manassas having fully developed and sold its real estate required the dissolution of the company. JA at 434-437. Judge

O'Brien appointed a liquidating trustee to wind up Birchwood-Manassas on the basis that Birchwood-Manassas' sole asset consisted of loans made to affiliates Oak Knoll and Wading River which shared common managers with Birchwood-Manassas. Id. Judge O'Brien did not rule that any misconduct of the managers took place or that misconduct was the basis of the appointment of a liquidating trustee for Birchwood-Manassas. Id.

The Liquidating Trustee

In December 2012, Lawrence Rifken of the law firm Greenberg Traurig, LLP, was appointed Liquidating Trustee of Birchwood-Manassas. JA at 439-442. In May of 2013 the Liquidating Trustee began issuing demands to Oak Knoll and Wading River declaring that Judge O'Brien's final order in the Dissolution Action required the immediate repayment of all loans or, in the alternative, that the loans between the affiliate organizations were demand loans immediately due. JA at 452-454. The Liquidating Trustee additionally demanded that any monies from the sale of Oak Knoll or Wading River properties be immediately turned over to him. Id. Oak Knoll and Wading River, through counsel, rejected the Liquidating Trustee's contention that the final order in the Dissolution Action required the immediate repayment of any loans made by Birchwood-Manassas, or that the terms of the loans made were demand loans requiring immediate

repayment, or that the Liquidating Trustee had any authority to dictated the business of Defendants. JA at 408, ¶ 50.

The Lis Pendens

On June 14, 2013, the Liquidating Trustee filed a Verified Complaint asserting that the final order in the Dissolution Action required the immediate payment of any loans made between the affiliate entities or, in the alternative that the loans were demand obligations immediately due. JA at 1-41; 408 at ¶ 50. The Verified Complaint claims four causes of action: a claim of Unjust Enrichment, two claims for 'Constructive Trust', and a claim of Breach of Contract. Id. The Liquidating Trustee also recorded a Memorandum of *Lis Pendens* in the land records of Loudoun County, Virginia, and a Notice of Pendency in Suffolk County, New York attaching all real property owned by Oak Knoll and Wading River. JA at 504-525. Since the filing of the *lis pendens* the Liquidating Trustee has repeatedly threatened that unless he receives the proceeds from the sale of each property under contract for sale by the Defendants he would not release the *lis pendens*, knowing that without the *lis pendens'* release the Defendants could not provide clear title and thus be in default to their purchasers. JA at 416-417 ¶81-83; JA at 527-532. This has resulted in Millions of Dollars of exactions from Oak Knoll to the Liquidating Trustee,

threatening the ability of Oak Knoll to continue development. Id. The Liquidating Trustee has additionally used this leverage in demanding company records and information from Defendants. Id.[2]

APPELLANT'S ASSIGNMENTS OF ERROR

1. The Circuit Court erred in holding that the existence of an irreconcilable conflict of interest by the former managers of Plaintiff-Appellant Birchwood-Manassas Associates, L.L.C. ("Birchwood-Manassas"), which prevented Birchwood-Manassas from asserting its claims within the statute of limitations, did not equitably toll the statute of limitations under Virginia law.

2. The Circuit Court erred in holding that multiple breaches of the fiduciary duties of undivided loyalty and care by the former managers of Birchwood-Manassas, which prevented Birchwood-Manassas from asserting its claims within the applicable statute of limitations, did not equitably toll the statute of limitations under Virginia law.

STANDARD OF REVIEW

Appeal of a decision on a plea in bar on the statute of limitations involves a question of law that is reviewed *de novo*. Hilton v. Martin, 275

[2] Though outside of the Amended Complaint, the Notice of Pendency filed in New York was released by the Liquidating Trustee subsequent to the issuance of an Order to Show Cause filed by the Supreme Court of the State of New York for the County of Suffolk on April 7, 2014. Lastly, with respect to the New York Notice of Pendency, it is outrageous that Appellant includes within his brief to this Court any allegations related to affirmative misrepresentations made by Mr. Horowitz to a purchaser in Wading River, New York. Counsel at Greenberg Traurig knows this to be completely untrue having deposed the title examiner referenced in paragraphs 90-92 in the Amended Complaint.

Va. 176, 180 (2008). When no evidence is presented on the plea in bar, the Court is limited to the facts set forth in the complaint and the defendant has the burden of proof on the issue that the limitation period had run when the complaint was filed. Schmidt v. Household Fin. Corp., II, 276 Va. 108, 112 (2008). Here, Birchwood-Manassas now concedes that the three-year statute of limitations is applicable to its claims. Birchwood-Manassas appeals, though, the Circuit Court's decision that the statute of limitations should not be equitably tolled. The burden is on the plaintiff to demonstrate that the statute of limitation should be equitably tolled. Finnerty v. Thornton Hall, Inc., 42 Va. App. 628, 640-641 (2004). Because no evidence was presented in the Plea in Bar, Birchwood-Manassas must overcome that burden solely upon the facts pled. Schmidt, 279 Va. at 217.

Birchwood-Manassas argues that, while no reported Virginia case supports the application of equitable tolling under the circumstances set forth in this action, the Circuit Court nonetheless erred in failing to recognize that a tolling of the limitations period should have been applied here. In so arguing, Birchwood-Manassas fails to recognize the Virginia judiciary's longstanding practice of deferring to the legislature as the source of both limitation periods and their exceptions. These statutory exceptions do not recognize the mere existence of 'common management' or 'breach

of fiduciary duty' as a basis to trigger a tolling of the limitations statute. Accordingly, what Birchwood-Manassas truly prays for is a change in the law to recognize a judicial exception not otherwise provided for. A change in the common law is appropriate only when the "circumstances of our country render [the common law] inapplicable... or must be so modified in their application as to adapt them to our condition." Shirley v. Shirley, 259 Va. 513, 518-519 (2000)("E.g., Weishaupt v. Commonwealth, 227 Va. 389, 404 (1984) abolishing husband's immunity from prosecution for rape of wife that occurred when husband and wife were separated but not yet divorced"). This Court has refrained from changing the law where "a decision whether to abrogate such a fundamental rule as the one under consideration is the function of the legislative, not judicial, branch of government. Shirley 259 Va. at 519.

ARGUMENT AND AUTHORITY

After the Circuit Court sustained the Defendants' Plea in Bar to the original Complaint, counsel for Birchwood-Manassas promised to "rip out the kitchen sink" and put it into an amended complaint in order to maintain an action against Defendants. JA at 364. The result is a 150 page (including exhibits) jumble of allegations that simultaneously accuses the Defendants of failing to document intercompany loans, and documenting

them so well that the accountings ought be considered brand new written loans. JA at 391-540. Other allegations assert that the Defendants' managers' causing the repayment of millions of dollars on these same loans and causing millions in distributions to company members self-evidences a scheme to maintain improper control of a family run affiliate company. JA at 403. The Defendants rightfully defended these unmerited claims dispatching them upon a Plea in Bar.

Prince William Circuit Court Judge O'Brien, who appointed the Liquidating Trustee after sitting through a six-day trial related to the business of Birchwood-Manassas in the Dissolution Action, agreed with the Defendants that the claims asserted by Birchwood-Manassas are time barred. In so ruling, Judge O'Brien found that Birchwood-Manassas failed to allege any misconduct that would permit the equitable tolling of Plaintiff's claims despite Birchwood-Manassas' counsel's promise to put in his Amended Complaint all facts at his disposal.

Despite Birchwood-Manassas' attempt to characterize this case as a matter of first impression for Virginia, it is not. Virginia law on equitable tolling requires plaintiff's to prove extraordinary circumstances so as to permit the court to circumvent the sound discretion of the General Assembly. Not only does the Amended Complaint fail to allege such

extraordinary circumstances, but Judge O'Brien explained as a matter of fact and law why Birchwood-Manassas' equitable tolling argument must fail by pointing to the very action that lead to the appointment of the Liquidating Trustee as an example of how Birchwood-Manassas could have filed a timely cause of action.

The Appellant's Assignments of Error do not accurately cite the rulings made by the Circuit Court, ignore the Court's findings related to whether Birchwood-Manassas was actually prevented from filing a timely action, and are premised instead on assumed findings that did not actually occur. Hence, Birchwood-Manassas' appeal does not properly assign error to the final order from which it appeals and is manufactured to answer questions that were not decided by the lower court. For these reasons, the decision of the Circuit Court to sustain the defendants' demurrer and plea in bar should be sustained.

The Circuit Court did err, however, by failing to quash the *lis pendens* recorded in the land records of Loudoun County against Oak Knoll property. Virginia Code § 8.01-268(B) permits the filing of a *lis pendens* only where the plaintiff seeks to establish an interest in the real property attached. Here, Birchwood-Manassas has absolutely no claim to nor interest in Oak Knoll's real property whatsoever. The Circuit Court, though,

permitted the Plaintiff to maintain a *lis pendens* on the basis that the plaintiff sought a constructive trust as a possible remedy to its Unjust Enrichment count. If litigants could obtain such powerful leverage over a defendant's property by simply pleading Unjust Enrichment and seeking a constructive trust as a remedy, such suits would be commonplace, bogging down the local courts, vexing the land records and jeopardizing closings and innocent purchaser loans all over the Commonwealth. One could conceivably file a *lis pendens* associated with a warrant in debt related to any loan given to a homeowner for any purpose. It is precisely this reason that the General Assembly amended the *lis pendens* statute in 1988 to prevent this occurrence. This Court should clarify that the *lis pendens* statute does not permit such a tenuous basis to suffice as an 'interest' in real property.

For the reasons set forth herein, the appeal of Appellant Birchwood-Manassas should be denied.

I. THE APPELLANT'S ASSIGNMENTS OF ERROR ARE DEFICIENT AND ASK THIS COURT TO REVERSE RULINGS THAT WERE NEVER MADE BY THE TRIAL COURT.

Appellant's two assignments of error are not accurately premised by a ruling of the Trial Court and, therefore, error has not been properly assigned or preserved as required by Rules 5:17 and 5:25.

> [A]ssignments of error serve several distinct and important functions. Their chief function is to identify those errors made by a circuit court with reasonable certainty so that this Court and opposing counsel can consider the points on which an appellant seeks a reversal of a judgment.
>
> In addition, assignments of error also enable an appellee to prepare an effective brief in opposition to the granting of an appeal, to determine which portions of the trial record should be included in the parties' joint appendix, and to determine whether any cross-error should be assigned.
>
> Therefore, in presenting an assignment of error to this Court, appellant's counsel must "lay his finger on the error" in the trial record.

Friedline v. Commonwealth, 265 Va. 273, 278 (2003) (internal citations omitted). Where an appellant cannot 'lay a finger' on actual rulings of the lower court and timely objections thereto, the assignments of error lack legal efficacy and the appeal should be dismissed. See Heinrich Schepers GmbH & Co., KG v. Whitaker, 280 Va. 507, 514 (2010).

A. The Appellants' Assignments of Error are Unsupported by the Record and Must be Dismissed.

Both of Appellant's Assignments of Error rely on rulings of the Circuit Court that were never made. Consequently, the questions that the Appellant asks that this Court address are not tied to the rulings of the trial court and not properly preserved in the record. The disconnect between Appellant's Assignments of Error and the actual rulings below are best

highlighted by Birchwood-Manassas' own summation of its case in pages 19 and 21 of its Petition for Appeal:

> [T]he Circuit Court . . . accepted as true Birchwood-Manassas's allegations that an irreconcilable conflict of interest prevented it from asserting its claims against the Defendants while it remained under the control of Mr. Horowitz and Mr. Haims. . . .
>
> and
>
> The Circuit Court acknowledged and accepted as true Birchwood-Manassas's allegations that no suit could have been filed on its behalf during this three-year period, because at the time of the creation of the demand obligations and for more than three years afterwards, Mr. Horowitz and Mr. Haims alone simultaneously managed Birchwood-Manassas and the Defendants "and could not be relied upon to assert [Birchwood-Manassas's] interests."

Birchwood-Manassas Pet. for Appeal at 19, 21. These statements are slightly rephrased on pages 20 and 23 of the Appellant's Brief as:

> [T]he Circuit Court... accepted as true all of Birchwood-Manassas' allegations that an irreconcilable conflict of interest prevented Birchwood-Manassas from asserting its claims against the Defendants while it remained under the control of Mr. Horowitz and Mr. Haims.
>
> and
>
> Because the Defendant submitted their pleas in bar on the pleadings and without an evidentiary hearing, the Circuit Court was required to accept and did accept as true Birchwood-Manassas' allegations that no suit could have been filed on its behalf during this three year period because... Mr. Horowitz and Mr. Haims alone simultaneously managed both Birchwood-Manassas and the Defendants "and could not be relied upon to assert [Birchwood-Manassas's] interests.

Appellant's Br. at 20, 23.

A review of Judge O'Brien's letter opinions of December 23, 2013 and April 1, 2014, which together are incorporated into the Final Order of May 9, 2014, makes clear that the Court did not accept that a conflict of interest prevented the filing of any cause of action, or that no suit could have been brought on behalf of Birchwood-Manassas until the Liquidating Trustee was appointed. In fact, Judge O'Brien expressly found that the alleged conflicts of interest did not prevent Birchwood-Manassas from asserting its claims against Defendants.

> This Court finds, however, that a conflict of interest, even irreconcilable, does not, of itself give rise to the type of misconduct which would preclude the Plaintiff from timely filing suit.

JA at 657-658 (emphasis added). The trial court then specifically identified as a matter of fact and law why that was not true by finding that a shareholder derivative action could have been brought in addition to the very Dissolution Action filed by Lieberman that led to the appointment of the Liquidating Trustee. Id. at n. 1. That Mr. Lieberman, one of the members of Birchwood-Manassas (who is also a member of Oak Knoll and Wading River) did bring suit to require action on behalf of Birchwood-

Manassas belies the entire premise of Appellant's theory on appeal.[3] Accordingly, the underlying premise for its Assignments of Error—that the trial court agreed that the conflict of interest prevented the timely filing of claims by Birchwood-Manassas—is undeniably false.

Contrary to Appellant's argument, Judge O'Brien was not required to accept as true the premise that the Appellant suggests. As Appellant's own Opening Brief recognizes, the trial court was required to accept as true all facts stated in the pleadings for the purposes of the Plea in Bar, but like a demurrer, was not required to accept Plaintiff's conclusions of law. Appellant's. Op. Br. at 22. Stripping away the legal conclusions, characterizations, objections and argument, there are scant few facts in the Amended Complaint that relate to loans made prior to the Liquidating Trustee's appointment in 2012. The Trial Court's analysis is consistent with the requirements that once the Defendant has met its burden of

[3] As the Appellant continually relies upon the findings and final order from the prior Dissolution Action in their brief and appendix, it is fair to point out that Judge O'Brien was also well aware of the inner workings and relationships between the three companies as well as Lieberman's true intent in bringing the first lawsuit and his failure to show impropriety of the Birchwood-Manassas management then. See, JA 190-192; Portions of post-trial briefings from the Lieberman action attached to Birchwood-Manassas' Opposition to the first plea in bar make clear that the case filed by Lieberman that led to the appointment of the Liquidating Trustee was filed by Lieberman "to force Mr. Horowitz into agreeing to Plaintiff's demands or buying out the 'the entire Sosnow, Nagler and Lieberman families'."

showing that the claim is time barred, the burden shifts to the Plaintiff to prove equitable tolling. As made evident by Judge O'Brien's opinion, Birchwood-Manassas did not plead sufficient facts to get over that hurdle. Consequently, the Assignments of Error incorrectly rely upon conclusions that were not a basis for the ruling of the Trial Court. The questions that Appellant asks this Court to review misrepresent the Court's actual opinion, and thus as a threshold issue, are not based upon the facts and rulings made by the lower court and must be dismissed.

II. THE CIRCUIT COURT PROPERLY APPLIED WELL ESTABLISHED VIRGINIA LAW IN DENYING BIRCHWOOD-MANASSAS' EFFORT TO CIRCUMVENT THE STATUTE OF LIMITATION WITH EQUITABLE TOLLING.

Appellant's Opening Brief concedes both that the three year statute of limitations applies to its claims and that the Court correctly applied the limitations statute to the facts of the case. Appellant's Brief is confusing as it continually refers to 'all its claims' as being subject to equitable tolling despite no assignment of error by it being made to the Court's decisions to sustain demurrer to Counts II and III, the 'Constructive Trust' counts. It also fails to assign error or properly appeal Count IV, which was dismissed for not sufficiently alleging a reaffirmed debt pursuant to Virginia Code § 8.01-229(G). JA at 657-658. The Appellant assigns error only to the Trial Court's ruling that Birchwood-Manassas did not meet its burden in proving

that the statute of limitation on demand obligations should be equitably tolled. In doing so, the Appellant argues both that the Circuit Court erred in its application of established Virginia law, but also asserts that this is a case of first impression for the Court. Logic prevents this from being the case. In reality, Virginia has a long recognized doctrine upholding the General Assembly's inherent authority to determine both limitations and exceptions thereto to causes of action based on Virginia law.

A. There is no Virginia Law to Support Tolling Based on a Conflict of Interest or Common Management or Breach of Fiduciary Duty.

This Court has found that "[s]tatutes of limitation serve an important and salutary purpose." Westminster Investing Corp. v. Lamps Unl., 237 Va. 543, 547 (1989)(quoting Burns v. Stafford Cty., 227 Va. 354, 359 (1984)).

> It is well-established that statutes of limitations are strictly enforced and must be applied unless the General Assembly has clearly created an exception to their application. A statute of limitation my not be tolled, or an exception applied, in the absence of a clear statutory enactment to that effect. Any doubt must be resolved in favor of the enforcement of the statute.

Casey v. Merck & Co., 283 Va. 411, 416 (2012). In recognition of this axiom, this Court has been reluctant to provide equitable relief from statutes of limitation, as the General Assembly not only codified the law on

limitations of actions but already provides exceptions to those limitations as well. See generally, Va. Code § 8.01-299. The Trustee has made no effort to rely upon any codified exception and neither party has been able to find any Virginia case in which the application of a Virginia statute of limitation has been 'equitably tolled' by this Court where a statutory exception is otherwise unavailable. Even those cases suggesting that equitable tolling of a Virginia statute of limitations may be possible where no statutory exception is available, have declined to do so. See, Casey, 283 Va. at 416 (plaintiffs suffering from osteonecrosis ('bone death') of the jaw who mistakenly relied on a putative class action filed in federal court were not provided relief under the statutory exemption provided by § 8.01-229(E)(1) and were not permitted to be equitably tolled); see also, Brunswick Land Corp. v. Perkinson, 153 Va. 603, 608 (1930); and Finnerty v. Thornton Hall, Inc., 42 Va. App. at 641.

In this case the applicable statute of limitation is Virginia Code § 8.01-246(4). The statute limits all "actions upon any unwritten contract, express or implied", which is the allegation in this action, to suits brought within three years of breach. See, Va. Code § 8.01-246(4). Appellant alleges, in a conclusory fashion, that Mr. Horowitz's and Mr. Haims' 'conflict of interest' in their sole, simultaneous management of Birchwood-Manassas

and the Defendants, or breaches of fiduciary duty, prevented Birchwood-Manassas from asserting its claims. Appellant's Op. Br. at 20. On this basis the Appellant prays that § 8.01-246(4) be tolled.

Here, as in Casey, no statutory exception has been approved by the General Assembly that covers the theory argued by Appellant. See, 283 Va. 411, 416. Thus, it must be presumed that none was intended. Id. From that foundation, the court considered Birchwood-Manassas' prayer for equitable relief and correctly denied it. The Court found both insufficient equitable grounds, but also pointed out why Plaintiff's theory fails as a practical matter, specifically identifying the prior action that led to the appointment of the Trustee and the method by which a derivative action could have been timely brought by any member of Birchwood Manassas that received the numerous accountings and filings evidencing the loans and amounts due. JA at 658. Dissatisfied with that ruling, Appellant seeks a change in the common law to create a judicial exception, that whenever two affiliate companies share common management, any and all claims between those companies should be tolled for the entire period that those entities share common management. Such an exception is not only unnecessary, as demonstrated by Judge O'Brien's opinion, but this analysis would additionally create uncertainty in the affairs of any small

business—where it is common to have interlocking directorates and members on both sides of the transaction. For the reasons set forth above, such an approach affronts the sound reasoning for statutes of limitation relied upon by this Court and business persons and should be rejected.

B. The Facts of This Case do not Support Equitable Tolling.

As recognized by Judge O'Brien in her April 1, 2014, opinion, courts considering equitable relief from the statute of limitations have made that relief "available only when a defendant misled or deceived a plaintiff in order to prevent the plaintiff from either discovering the existence of a cause of action or filing a timely claim. Schmidt v. Household Finance Corp., 276 Va. 108, 120 (2008)(citations omitted). In Schmidt this Court applied the following test to the Plaintiff's prayer for the equitable tolling of the statutes of limitations: in order "to receive the benefit of equitable tolling, a plaintiff has to establish that (1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim; (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." Schmidt, 276 Va. at 120 (quoting Barnes v. West, Inc., 243 F. Supp. 2d 559, 563 (E.D. Va. 2003).

Appellant's Brief concedes that "Birchwood-Manassas does not claim equitable tolling on the basis of fraud..." Appellant's Op. Br. at 29.

The Amended Complaint explains in detail the accounting of all loans by financial statements and tax filings, all of which were available to the members of Birchwood-Manassas and reported to government agencies. JA at 481-494. Accordingly, applying the standard this Court applied to the Federal statutes in Schmidt, the Appellant's prayer for equitable tolling must fail. For this reason, Appellant prays that a new standard of equitable tolling be devised by this Court.

Boiled down to its essence, Birchwood-Manassas contends that the statute of limitations should be equitably tolled because 1) there was common management between the Plaintiff and the Defendants at the time the loans were made (JA 404-405, at ¶¶ 36, 37, 39, 40 and 41), 2) that the loans were "made without loan documents and repayment terms or interest provisions, such as repayment dates, interest rates, and repayment amounts"[4] (JA at 405-407, ¶¶ 38, 47 and 48), 3) that somehow this was a breach of management's duty of loyalty to the Plaintiff[5] (JA at 405, ¶¶ 42-

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[4] Managers of family or related businesses all over the Commonwealth would be very surprised to hear that making a loan to an affiliate entity and taking a salary may be considered improper self-dealing as argued by the Appellant. Appellant's Op. Br. at 37.

[5] It should be noted that at no time did either Lieberman or Birchwood-Manassas actually bring any breach of fiduciary duty or loyalty claims, rather they were thrown in the Amended Complaint by the Trustee to make it "twice the size of the original Complaint". Appellant's Op. Br. at 9.

43), 4) that management did not obtain repayment or file suit on these amounts and that the Trustee did after their removal (JA at 406-407, ¶¶ 45 and 50), 5) that management paid themselves a salary from Oak Knoll (Id.) and finally, 6) that by asserting the statute of limitations in this action, Wading River and Oak Knoll have prejudiced Birchwood-Manassas (Id. ¶46). Assuming all of these facts but not legal conclusions are true, these allegations fail to support equitable tolling under any standard. None of these facts involve a misrepresentation of any kind. All of these allegations, and Appellant's own brief, are belied by the Amended Complaint's additional allegations that the loans were "repeatedly memorialized, reflected, acknowledged and reaffirmed in various LLC documents, books, and records of BMA, Wading River and Oak Knoll". JA at 408. These facts combined with the undisputed repayment of more than $9 million to the members of Birchwood-Manassas and the use of the balance of the loan to finish the development, construction and sale of the final homes and lots at Oak Knoll and Wading River certainly supported the Circuit Court conclusion that these actions do not comprise the fundamental hurdles necessary for equitable tolling. JA at 658.

C. Members of Birchwood-Manassas Could Have Brought a Claim at to Enforce the Rights of the Company.

In support of her decision, Judge O'Brien found that a "derivative action could have been brought in addition to the action for dissolution of [Birchwood-Manassas]" brought by Lieberman in the prior action. JA at 658 n.1. While the Liquidating Trustee often refers the prior Dissolution Action as the basis for all of its actions and as support for its claims of 'misconduct' by Birchwood-Manassas prior managers, because Judge O'Brien's consideration of the ramifications of that case completely upends the Appellant's argument on appeal, the Appellant now summarily disclaims Judge O'Brien's analysis of her own decision. However, counsel for the Liquidating Trustee acknowledged after the Defendants' first plea in bar that such a suit could have been filed. JA at 363. After the plea in bar to the original Complaint, Defendants argued that the only cure to allow a tolling of the statute of limitations would be to allege fraud, which, if such supporting facts had existed, surely should have been borne out as a result of in the Dissolution Action and pled in the original Complaint in this action. JA at 352. In response to the Defendants' argument, counsel for the Liquidating Trustee stated:

> Counsel for the Defendant repeatedly suggests that because we've had the evidence for a while, because no one pled fraud initially, or no one pled some other kind of misconduct initially, that somehow that means it doesn't exist. He's just speculating.
>
> I mean, I certainly have an understanding of why tactically in the very first case, counsel for [Lieberman] did not make any allegations, other than seeking to have [Birchwood-Manassas] dissolved and Mr. Horowitz removed conflict of interest. <u>It doesn't mean there weren't other potential causes of action that were considered</u>.

JA at 363. As made plain by materials added to the record by counsel for the Liquidating Trustee in this case, Lieberman was hoping to obtain more than just the dissolution of Birchwood-Manassas in the Dissolution Action. JA 190-192. But more importantly, counsel for the Liquidating Trustee statement reflects that the reason for Lieberman not seeking any other causes of action at that time was 'tactical', not because dissolution of the company was the <u>only</u> cause of action that Lieberman could have pled. Stated differently, the Appellant's argument that Birchwood-Manassas was powerless to pursue the collection of its loans because of the existence of common managers with a conflict of interest fails because the very history of these parties confirms that at least one member of Birchwood-Manassas did bring an action to protect his rights and for "tactical reasons" did not bring other actions. This situation hardly cries out for equitable relief.

D. The Law of Foreign Jurisdictions is Inapplicable and do not Support the Tolling of the Limitations Period in this Case.

Birchwood-Manassas acknowledges that its theory of conflict of interest is not a recognized exception tolling a Virginia statute of limitations by calling it a question of first impression. Even if this Court were inclined to consider the foreign authority provided by Appellant, the cases cited in the Appellant's Opening Brief are easily distinguishable from the case at bar as they all involve specific allegations of overt wrongful action taken by the defendants, involve the application of the Federal tolling doctrine to Federal statutes, or involve state specific estates and trust litigation from a hundred years ago.

The cases of Holland v. Florida, Pace v. DiGuglielmo and McQuiggin v. Perkins all involve review of the Federal doctrine of equitable tolling, as applied to Habeas Corpus claims and relief from the death penalty. 560 U.S. 631 (2010), 544 U.S. 408 (2005), 133 S.Ct. 1924 (2013). Those cases actually involve presumptions of equitable tolling based on "substantive habeas law" where "the evils of archaic rigidity" may result in an innocent person's wrongful execution and have absolutely no bearing or relation at all to the law of Virginia or our facts involving unsecured intercompany loans between affiliated parties. Holland, 560 U.S. at 650.

Both Hazel-Atlas Glass Co. v. Hartford-Empire Co., and Glus v. Brooklyn E. Dist. Terminal involve Federal causes of action in which the plaintiffs asserted fraudulent action by the Defendants that prevented the timely assertion of their claims. 322 U.S. 238 (1944), 359 U.S. 231 (1959). These matters are distinguishable not only in that they involve actions arising under Federal law and the application of the Federal doctrine of equitable tolling, but the Plaintiffs therein also asserted affirmative misrepresentations against the Defendants that are like the test used by this Court in Schmidt. No such fraudulent concealment has ever been alleged by Birchwood-Manassas and the Appellant's 'common management' theory would not pass the tests utilized by the Supreme Court in these cases. The cases of CTS Corp. v. Waldburger involves an environmental disaster covered up by the defendant, and in Lozano v. Alvarez a child was kidnapped by a parent and taken to a different country. 134 S. Ct. 2175 (2014), 134 S. Ct. 1224 (2014). Both involve affirmative actions taken by the defendants to conceal their affirmative crimes.

In Peyton v. Chase Cty Nat'l Bank, the complainant alleged that bank officers "conniv[ed] or conspir[ed] with the executor of the estate, [and] wrongfully used money of the estate for the benefit of the bank." 124 Kan. 763, 765 (1928). The court in Peyton coined the allegations as the

‘fraudulent use of money”. Id. at 766. There are no allegations of conspiracy or ‘conniving’ or fraud at all in this action, as conceded by the Appellant.

In Yager v. Liberty Royalties Corp., the 10th Circuit Court of Appeals tolled the limitation statute because a prior manager of the Plaintiff "could not reasonably be expected to assert in good faith a claim against a corporation which he had controlled and in which he had a large financial interest, based upon a fraudulent scheme which he had devised and effectuated." 123 F.2d 44, 47 (10th Cir. 1941) (emphasis added). Again, there are no similar allegations of fraud or unfair dealing in the Amended Complaint. Similarly, in Bremer v. Williams, also involved a “fraudulent use of money” and embezzlement disguised by the trustee of an estate to mask the actual use of funds. 210 Mass. 256, 258 (1911).

In Sheffield Steel, a bankruptcy case from Delaware, it was alleged that the directors violated a Delaware law which imposed strict liability upon them for paying millions of dollars of dividends to some shareholders, including themselves, at the expense of others, while the company was insolvent. Sheffield Steel Corp. v. HMK Enters., 320 Br. 405, 413 (N.D. Oka. 2004). Applying Federal law, and relying upon Delaware precedent that required allegations of “fraudulent self-dealing”, the Court found

sufficient allegations alluding to not dismiss the cause of action based on Federal Rule 12(b)(6). Id. at 419. As noted by Appellant's Opening Brief, the cases relied upon by the Bankruptcy Court in Sheffield Steel involve fraud or misrepresentations to the principal by the fiduciary.

The only cases cited by Appellant's that don't involve fraudulent activity, the death penalty, or some clear misrepresentation, involve probate actions in other states, where a trustee failed to bring action against an estate he administered. See, Appellant's Op. Br. at 33. While the duties of a probate trustee are not analogous to those of a manager of an LLC, there is no evidence in those decisions that those jurisdictions share the Commonwealth's standard of explicit statutory exemption and it isn't clear that fraud was not underlying basis for the failure to bring suit in these cases, which date from 1887 to 1930. Assuming, arguendo, that this analysis were applicable, the Appellant's case still must fail, as Virginia law provided the possibility for a member, just like Mr. Lieberman in the earlier dissolution case, exercising due diligence to enforce Birchwood-Manassas' rights. There is no indication in these cases that such similar rights were available to the beneficiaries of the estates involved.

While Appellant would like for this Court to create a *per se* rule that, where there are co-managers of related entities, the statute of limitations

for intercompany obligations are equitably tolled until there are no longer co-managers, no case in any jurisdiction has held as much. Such a rule would invite members of LLCs who were fully aware of their organizations right to bring a cause of action-- to not pursue them-- creating a perverse incentive under the law. "Equity aids the vigilant, not those who sleep on their rights." Chesapeake & Ohio Rwy. Co. v. Willis, 200 Va. 299, 306 (1958).

For these reasons, this Honorable Court should affirm the decision of the Circuit Court of Prince William County and sustain its finding on the Plea in Bar of Defendants.

ASSIGNMENT OF CROSS ERROR

1. The Circuit Court erred in not quashing the *lis pendens* when the Plaintiff did not claim an interest in the underlying property and used the *lis pendens* as a collection instrument contrary to Code § 8.01-268.

Error preserved in Joint Appendix pages 52-59, 112-127, 731-767.

STANDARD OF REVIEW

Issues of statutory interpretation are pure questions of law that are reviewed de novo. PKO Ventures, LLC v. Norfolk Redevelopment & Hous. Auth., 286 Va. 174, 182 (2013).

SUMMARY OF THE ARGUMENT

Contemporaneously with the filing of Birchwood-Manassas' Complaint in June 2013, the Liquidating Trustee filed a *lis pendens* attaching all of Oak Knoll's real property. As Birchwood-Manassas does not allege any or seek for any actual interest in the real property attached by the *lis pendens*, pursuant to Virginia Code § 8.01-269 the *lis pendens* is improper and should have been quashed by the Circuit Court. An unsecured loan creditor to an oral contract is not permitted by the *lis pendens* statute to attach all real property of an alleged debtor.

STANDARD

Code § 8.01-268(B) sets forth the requirements for filing *lis pendens* and states:

> No memorandum of *lis pendens* shall be filed unless the action on which the *lis pendens* is based seeks to establish an interest by the filing party in the real property described in the memorandum, or unless the action on which the *lis pendens* is based seeks to enforce a zoning ordinance.

This section was amended in 1988 to clarify exactly when a *lis pendens* may attach, as there were conflicting cases concerning the conditions under which a *lis pendens* properly could be filed. The amendment sought to clarify the confusion created when an overly expansive reading of the statute was made by the U.S. Bankruptcy Court in Hart v. United Va. Bank,

24 B.R. 821 (Bankr. E.D. Va. 1982). See, Wike v. Variety Mobile Home Servs., 29 Va. Cir. 225 (1992) (ruling that Code§ 8.01-268(B) "evinces a legislative intent to limit the application of a memorandum of *lis pendens*" (emphasis added)). As a result of the amendment, in order to properly file a *lis pendens*, the party filing the attachment must have an action pending that seeks to "establish an interest . . . in the real property described in the memorandum" by the filing party. Code § 8.01-268(B)

ARGUMENT AND AUTHORITY

I. ACTIONS BY UNSECURED CREDITORS TO ENFORCE UNWRITTEN LOANS DO NOT SEEK TO ESTABLISH AN INTEREST IN REAL ESTATE AND CANNOT JUSTIFY THE FILING OF A *LIS PENDENS*.

In 1988, the Virginia General Assembly sought to clarify conflicting cases from the Federal courts concerning the conditions under which a *lis pendens* properly could be filed. See Palm Harbor Homes, Inc. v. Leader Funding, Inc., 70 Va. Cir. 31 (2005); see also 22 U. Rich. L. Rev. 503, 544–45 (1988). As set forth above, Code § 8.01-268(B) clarifies that the use of *lis pendens* is not for matters merely in which a judgment is sought that may affect title to real property. Republic Servs. of Va., LLC v. Am Timberland LLC, 2006 U.S. Dist. LEXIS 86899 (W.D. Va. Nov. 28, 2006). Rather, the action upon which the *lis pendens* is tied must seek an actual interest in the real property attached.

A. Birchwood-Manassas Has Never had an Interest in the Property attached.

Birchwood-Manassas has never had an interest in Oak Knoll's real property. While it is acknowledged that the parties have a debtor/creditor relationship, no *lis pendens* can lie on an action for money damages and the Liquidating Trustee's use of the *lis pendens* as a pre-judgment attachment is specifically prohibited by the *lis pendens* statute and governing case law. As stated in Republic,

> What Plaintiff seeks is not an interest in land. Even if Plaintiff prevails on the merits and receives exactly the remedy it seeks, it will not take title, a mortgage, remainder, or any legal interest in Parcel B . . . An injunction is not an interest in land. Plaintiff, therefore, does not seek to establish an interest in land.

Id. at 8; see also O'Bryan v. O'Bryan, 28 Va. Cir. 30 (1992) and Hellberg v. Valley Hardware Co., 46 Va. Cir. 112 (1998). Here, Birchwood-Manassas has not brought a suit that arises out of a dispute related to an "interest" in real property. Rather, this action arises solely out of an unsecured loan between the parties. The mere fact that Birchwood-Manassas has identified a specific source (the Defendants' real property) for repayment is insufficient for filing a memorandum of *lis pendens*. To accept their argument is to allow any plaintiff seeking money damages to plead Unjust Enrichment simply file a *lis pendens* with their warrant in debt or Complaint against any defendant that owns real property. As in Republic, even if

Birchwood-Manassas prevails, it will not, "take title, a mortgage, remainder or any legal interest," in the Oak Knoll Property. As a result, a *lis pendens* is inappropriate.

Though originally attached to Defendants' Plea in Bar for a different purpose, a portion of the transcript from the August 19, 2013 hearing on the Liquidating Trustee's Rule to Show cause related to the Circuit Court's order in the Dissolution Action is telling. JA at 101-112. During that hearing, counsel for the Liquidating Trustee stated:

> Our shorthand view is, that money that they have received – not their real estate; the money from the sale of those properties, the proceeds, the net proceeds – are due to Birchwood-Manassas.

JA at 102. This statement is telling, and confirms that the Liquidating Trustee identified a source of money that could be attached and has no interest in the actual property itself.

In each of the cases cited by the Appellant in support of the *lis pendens* the action arises from and has a specific nexus to a parcel of real property. Even in Lee v. Garrett Homes of Virginia and DRHI v. L'Ambiance Assocs., where the ultimate goal of the plaintiff may have been money damages, the actions arise out of a specific contract for the construction and/or purchase of a previously identified parcel. See, 60 Va. Cir. 235 and 39 Va. Cir. 434. These cases do not support a *lis pendens*

just because money damages are a greater possibility as Appellant suggests.

B. A Constructive Trust is Not a Property 'Interest' that one can Establish but is a Remedy that Arises by Operation of Law when Property is Wrongfully Transferred.

The sole basis offered by Birchwood-Manassas to support the filing of its *lis pendens* is that Birchwood-Manassas, by its suit, seeks "to establish a constructive trust in favor of Birchwood-Manassas" upon Defendants' real property.

> Constructive trusts arise, independently of the intention of the parties, by construction of law; being fastened upon the conscience of him who has the legal estate, in order to prevent what otherwise would be a fraud. They occur not only where property has been acquired by fraud or improper means, but also where it has been fairly and properly acquired, but it is contrary to the principles of equity that it should be retained, at least for the acquirer's own benefit.

Leonard v. Counts, 221 Va. 582, 588-89 (1980). A constructive trust does not arise just because money is loaned to a person who owns real property. "Mere failure to pay a debt does not give rise to a constructive trust." In re Cardian Mortgage Corp., 122 B.R. at 261 (citing McKee v. Paradise. 299 U.S. 119, 122 (1936)).

Appellant's Brief improperly relies on its having made improper causes of action for Constructive Trust in Counts II and III of its Amended Complaint. Appellant's Op. Br. at 43, 45. As these counts were demurred

to by Defendants and the demurrer was sustained by the Circuit Court without appeal by Appellant, these causes of action cannot possibly support Appellant's continuation of a *lis pendens* under any theory.

Lending money to a developer, builder or homeowner to develop property or build a home, without more, does not give the lender a right to file a *lis pendens* on the property just as any other creditor to an unsecured loan does not have right to seize property based on the mere existence of debt.[6] Otherwise, every defaulted loan in Virginia would result in a lawsuit and a *lis pendens*. *Lis pendens* are typically filed in specific performance actions where parties contest title. Simply asking for the remedy of a constructive trust does not trigger an "interest" allowing a *lis pendens*.

With respect to Appellants argument that the money was used specifically for the purpose of developing real property, that argument both ignores the plain language of § 8.01-268, but if sustained would also create a prime example of "good facts making bad law". Again, the terms of the loan, as alleged, are a demand loan obligation. JA 391-540. Pursuant to the Amended Complaint there are no promises to use the money for any particular purpose or that it be repaid from any source. Id. Accordingly the

[6] A notable exception is the pretrial levy procedure pursuant to Code §8.01-534 et seq. which requires both a judicial review of a petition for attachment as well as a bond.

Defendants were free to utilize the money how they saw fit. That they actually used the money for investment in real estate is completely detached from the loan itself and, therefore, should be completely detached from any claim of interest in the property by the creditor. This is no different than when one neighbor loans another money and that money is used to by the latter for the purchase of a new roof. The creditor is not entitled to a *lis pendens* on his neighbor's property because the money was used to the benefit of the property.

Virginia law provides mechanisms to securitize loans and statutory protections for persons whose labor and materials are used for the improvement of real property. The law affords lenders the ability to protect their loans with collateral and to seek recoupment from specific sources of real and personal property where labor and service and directly incorporated therein. Virginia Code § 8.01-268 simply does not permit an unsecured creditor without any other claim to or cause of action arising from the identified real property to file *lis pendens*. Our understanding of this maxim is paramount in our day-to-day jurisprudence. If this Court fails to right the ship on this matter will lead to an abuse of the *lis pendens* far greater than seen in this case.

C. Appellant Knowingly Utilized the *Lis Pendens* as Prejudicial Leverage in this Case.

Defendants are single purpose entities created for the purpose of developing lots and building homes for sale. The proceeds from home sales are used to build the next home and loan repayments are made to the members when cash flow allows. The practical effect of the *lis pendens* is to shut down Oak Knoll's business pending the litigation as it cannot provide insurable title to any of its purchasers. The Liquidating Trustee knows what the practical effect of the *lis pendens* is and has used it to wrongfully exert leverage over the Defendant's in this case, exacting not only money from the Defendants, but utilizing the *lis pendens* in an attempt to force the Defendants to provide information that he could not obtain through discovery. JA at 225[7], 527-532. Virginia Code § 8.01-269 provides sanction for filing of improper *lis pendens* because the General Assembly recognized the powerful effect of a *lis pendens* on a property owner. Here, where the Defendants are in the business of constructing and selling residential property, the effect has been nearly catostrophic.

[7] In one of only two accountings provided by the Liquidating Trustee to the members of Birchwood-Manassas (including Horowitz and Haims) since his appointment in December 2012, the Liquidating Trustee acknowledged, "In essence, a Memorandum of Lis Pendens acts as an encumbrance against and a cloud on title on the real property that is the subject of the Memorandum of Lis Pendens."

This Court must make it clear that the use of a *lis pendens* solely for collection purposes is contrary to language and intent of the statute.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

The Circuit Court did not err in its decision to dismiss the Appellant's case. The Circuit Court properly considered the allegations of the Amended Complaint and the high bar required of parties seeking equitable tolling of their claims to meet. The Circuit Court did err, however, in permitting the *lis pendens* filed by the Appellant in this case to remain. For the reasons stated herein, Appellees Birchwood at Oak Knoll Farm, L.L.C. and Birchwood at Wading River, L.L.C. pray that this Honorable Court affirm the Circuit Court's dismissal of the Plaintiff's Amended Complaint, and clarify that the filing of the *lis pendens* in this action was improper and should have been quashed pursuant to Virginia Code § 8.01-269 by overruling the decision of the Circuit Court with respect to Oak Knolls Motion to Quash *Lis Pendens*.

Birchwood at Oak Knoll Farm, L.L.C.
Birchwood at Wading River, L.L.C.

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(h),The undersigned hereby certifies that on this the 9th day of Feburary, 2015, three copies of the brief, and a copy on CD, were sent via third party commercial carrier to:

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This same date, fifteen copies of the same, and a copy on CD, were hand delivered to the clerk's office.

Counsel for appellee does request oral argument.

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