THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2009-CP-10-6746

Long Grove at Seaside Farms, LLC; The Beach Company; Gulfstream Construction Company, Inc., Respondents,
v.

Long Grove Property Owners' Association, Inc.; Vista Realty Partners, LLC; and Long Grove Vista, LLC;

Of Whom Long Grove Property Owners' Association is Appellant.

Long Grove Property Owners' Association, Inc., Third-Party Plaintiffs,
v.

James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C.; Sam Mayo d/b/a SCM Construction, Inc.; Essex Engineering Corporation, Third Party Defendants;

Of Whom James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C., is Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. **THE COURT ERRED BY FAILING TO RECOGNIZE THAT THE CONTRACT AT ISSUE IS AN EXCULPATORY CONTRACT WHICH VIOLATES PUBLIC POLICY AND IS VOID.**

2. **THE COURT ERRED IN ALLOWING PLAINTIFFS TO RELEASE BY CONTRACT NON-DELEGABLE DUTIES IMPOSED BY STATUTORY, REGULATORY AND COMMON LAW.**

3. **THE COURT ERRED IN FINDING THAT THE PROPERTY OWNERS' ASSOCIATION IS BOUND BY CONTRACT TO WHICH IT WAS NOT A PARTY.**

4. **THE COURT ERRED BY FAILNG TO RECOGNIZE THAT THE CONTRACT AT ISSUE IN THE CASE IS UNCONSCIONABLE AND UNENFORCEABLE AND, THEREFORE, IS VOID.**

STATEMENT OF THE CASE

This case arises from an effort by the general contractor and developer to avoid their statutory, regulatory and legal obligations for the development, design, and construction of the Long Grove Apartment Project located in the Seaside Farms subdivision in Mt. Pleasant, South Carolina and its subsequent conversion to the Long Grove Condominiums. Respondents Long Grove at Seaside Farms, LLC, The Beach Company, and Gulfstream Construction Company, Inc. filed a declaratory judgment action pursuant to South Carolina Code Ann. §§15-53-10 and named the Appellant Long Grove Property Owners' Association ("POA") as a party defendant. (Plaintiffs' Summons and Complaint, R. pp. 44-270). Respondents are the original developers and general contractor, and sought to have the Court rule that certain contractual provisions, the notice thereof embedded in the Master Deed, exonerates them from liability for their design and construction defects which have caused extensive damage to the buildings at

Long Grove. (Long Grove POA's Memorandum in Opposition to Plaintiffs Motion to Dismiss and/or Motion for Summary Judgment dated September 23, 2011, R. pp. 606-687).

In response to the Complaint, the Appellant POA filed counterclaims and third-party claims asserting causes of actions for defective development, design and construction against Respondents Long Grove at Seaside Farms, LLC, The Beach Company, Gulfstream Construction Company, Inc. and James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C. and others, for construction and design defects in the project. (Long Grove POA Answer and Counterclaim, R. pp. 271-298). On December 30, 2009, Respondents Long Grove at Seaside Farms, LLC, The Beach Company, and Gulfstream Construction Company, Inc. filed a motion to dismiss the POA's counterclaims pursuant to Rule 12(b)(6), SCRCP , or in the alternative, for a judgment on the pleadings pursuant to Rule 12(c), SCRCP. (Long Grove at Seaside Farms' et. al. Motion to Dismiss, R. pp. 299-301). On February 24, 2010, Respondent James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C. (hereinafter referred to as "JHP"), the original project architect, filed its Motion to Dismiss Third-Party Complaint and For Judgment on the Pleadings. (JHP Motion to Dismiss, R. pp. 302-303). These arguments were based on the same or similar arguments as set forth by Long Grove at Seaside Farms, LLC, The Beach Company, and Gulfstream Construction Company, Inc.

The POA filed its Memorandum in Opposition to Respondents Long Grove at Seaside Farms, LLC, The Beach Company, and Gulfstream Construction Company, Inc. on or about May 20, 2010 and September 23, 2011 and filed its Memorandum in

Opposition to Respondent JHP on September 23, 2011. (Long Grove POA's Memorandum in Opposition dated May 20, 2010, R. pp. 304-342); (Long Grove POA's Memorandum in Opposition dated September 23, 2011 with Exhibits, R. pp. 343-777); (Long Grove POA's Memorandum in Opposition to JHP Motion to Dismiss dated September 23, 2011, R. pp. 778-779).

On September 27, 2011, the Court of Common Pleas heard the motions of Respondents Long Grove at Seaside Farms, LLC, The Beach Company, Gulfstream Construction Company, Inc. and JHP. (Transcript- September 27, 2011, R. pp. 829-899). The presentation of matters outside the pleadings converted those Motions to motions for summary judgment pursuant to Rule 56, SCRCP. On October 14, 2011, the Court issued a decision letter directing counsel for The Beach Company, Long Grove at Seaside Farms, Gulf Stream Construction, and JHP to prepare proposed Orders granting their summary judgment motions.

Due to the complex and novel issues involved and due to substantial disagreement as to the proposed Orders, the Court rescinded the previous decision letter and set the matter for another hearing on April 30, 2012. (Letter dated March 26, 2012, R. pp. 1209-1211). Between October 14, 2011 and April 30, 2012, the POA sent additional letters, information and caselaw to the Court and all counsel of record. (Long Grove POA Motion to Reconsider, Exhibit 1-Letter dated November 29, 2011, R. pp. 787-796) (Long Grove POA Motion to Reconsider-Exhibit 2- Letter dated February 10, 2012, R. pp. 797-801). The motion was reheard on April 30, 2012. (Transcript – April 30, 2012 hearing, R. pp. 900-984). After the hearing, the POA sent another letter with new caselaw to the Court. (Long Grove POA Motion to Reconsider – Exhibit 3- Letter dated May 31, 2012,

R. pp. 802-812). On June 25, 2012 the Court issued a Proposed Order Granting Summary Judgment to The Beach Company, Long Grove at Seaside Farms, Gulf Stream Construction and JHP and requested the parties to comment on the Order. (Long Grove POA Motion to Reconsider – Exhibit 4 Defendant Long Grove Property Owners' Associations' Comments as Requested by the Court-July 12, 2012, R. pp. 813-828). On July 26, 2012, the Court issued the Order granting summary judgment in favor of Long Grove at Seaside Farms, LLC, The Beach Company, Gulfstream Construction Company, Inc. and James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C. (Order July 26, 2012, R. pp. 1-41).

The Appellant POA filed a Motion to Reconsider on August 3, 2012 (Motion to Reconsider, R. pp. 784-828) and the Court issued an Order Denying Long Grove Property Owners' Association, Inc. Motion to Reconsider on November 2, 2012. (Order denying Motion to Reconsider, R. pp. 42-43). The POA then filed and served the Notice of Appeal on November 26, 2012 and now asks the Court to reverse the Order Granting Summary Judgment.

FACTS

Long Grove at Seaside Farms, LLC, through its manager, the Beach Company developed and built the Long Grove Apartments in 1999-2000. The Beach Company was the property manager for the Long Grove Apartments which were used as a multi-family residential property and operated as an apartment complex after original construction was complete. James, Harwick & Partners, Inc. n/k/a JHP Architecture/Urban Design, P.C. was the architect of record for the original construction. Gulf Stream Construction Company, Inc., a wholly-owned subsidiary of The Beach Company, was the general

contractor for the construction of the multi-family residential project. The Project consists of seventeen (17) buildings with two hundred seventy-two units and a clubhouse. The buildings are wood-frame construction and a combination of Hardi-plank and brick exterior cladding.

In 2004, The Beach Company hired L.J. Melody, Inc. to market the Long Grove Apartment project to prospective purchasers as a "272-Unit Condominium Conversion Opportunity." (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss, September 23, 2011 - Exhibit 2- "Marketing Brochure-Condominium Conversion Opportunity", R. pp. 385-438); (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss, September 23, 2011- Exhibit 3-Depo. Kent Johnson, 30(b)(6) Designee of The Beach Company, p. 23, l. 24 - p.24, l. 5, R. p. 443, l. 24 – p. 444, l.5). The Beach Company specifically marketed the property to be converted from apartments to condominiums and marketed the property as "an exceptional condominium conversion opportunity." (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss, September 23, 2011 - Exhibit 2- Marketing Brochure - Condominium Conversion Opportunity, R. p. 387); (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss – September 23, 2011- Exhibit 4 -Depo. Hudson Hooks, p. 29, l. 25- p. 30, l.24, R. p. 450, l.25 – p. 451, l.24). In the brochure, "Long Grove present[ed] converters the ability to 'beat the clock' by being able to sell quality apartments immediately with ***no construction risk*** involved." (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss September 23, 2011 - Exhibit 2- Marketing Brochure - Condominium Conversion Opportunity, R. p. 399)(emphasis added). In both the Executive Summary portion and in the Condominium Market Overview portion of the Marketing Brochure, the materials represent that "Long

Grove was developed by The Beach Company, one of the Southeast's most prestigious developers. The quality of construction and attention to detail is unmatched." (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss September 23, 2011 - Exhibit 2- Marketing Brochure - Condominium Conversion Opportunity, R. pp. 397-402 and R. pp. 424-428).

In the Financial Analysis section of the Marketing Brochure, the Replacement Reserves section represents: "The quality of the construction and continued detailed management of the grounds and buildings will limit further capital expenditures at the property. Therefore, our team has conservatively forecast capital reserve requirements of $150 per unit." (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss September 23, 2011- Exhibit 2- Marketing Brochure – Condominium Conversion Opportunity, R. pp. 413-419).

On December 28, 2004, The Beach Company and Vista Realty, Inc., signed the Term Sheet. (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss September 23, 2011, Exhibit 11 [sic also Ex. 8 to Johnson Depo.], R. pp. 575-578). That contract did not contain a requirement that the future owners or the yet to be created property owners association release The Beach Company or any other party from their duties established by our courts and the Legislature through the adoption of building codes, licensing regulations and other statutes. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 688-766).

After the initial term sheet was signed, The Beach Company and Long Grove at Seaside Farms demanded that Vista, as the converting developer, assume all liabilities for the property and its condition and that Vista release not just The Beach Company and

Long Grove at Seaside Farms, but also numerous unnamed parties to the original design and construction. They also required that a notice of this release be part of the Master Deed.

On January 27, 2005, The Beach Company and Vista Realty Partners, L.L.C. signed the Sales Contract. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 688-766). On March 1, 2005, Long Grove Vista, LLC was incorporated. On April 13, 2005, Long Grove Vista executed the Master Deed. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed, R. pp. 606-687). The Long Grove Property Owners Association did not exist and did not sign the Master Deed. The POA was not incorporated until April 21, 2005.

The purported notice of "release" itself is found on at Paragraph 24 on Page 43 of the Master Deed and By-Laws which total over 100 pages in length. It states:

> 24. <u>RELEASE.</u>
>
> Declarant purchased the property comprising the Regime from Long Grove at Seaside Farms, LLC ("Long Grove") on March 7, 2005. In the Sales Contract between Long Grove and Declarant, dated January 18, 2005, to convey the property comprising the Regime to Declarant, Declarant agreed to include the following provision regarding release in this Master Deed:
>
> Save and excepting only the limited warranty of title hereinafter set forth and herein contained, the property comprising the Regime was conveyed to Declarant in the sale on March 7, 2005 noted above strictly on an "as is", "where is" and "with all defects" basis, without representation, warranty or covenant, express, implied or statutory, of any kind whatsoever, including, without limitation, representation, warranty or covenant as to condition (structural, environmental, mechanical or otherwise), past or present use, construction, development, lease performance, investment potential, tax ramifications or consequences,

income, compliance with law, habitability, tenancies, merchantability, or fitness or suitability for any purpose, all of which are hereby expressly disclaimed. Without limiting the generality of the foregoing, the Owners acknowledge that Declarant's predecessor in title, Long Grove and its Affiliates (as herein defined) have made no representation, warranties or covenants as to the compliance of the property comprising the Regime with any federal, state, or local statutes, laws, rules, or regulations or ordinances, including, without limitation, those pertaining to construction, rent control, building and health codes, land use (or permits issued in connection therewith), zoning, lead paint, urea formaldehyde foam insulation, asbestos, hazardous or toxic wastes or substances, pollutants, contaminants or other environmental matters.

The Owners acknowledge that the property comprising the Regime was originally developed and constructed by Long Grove and its Affiliates (as herein defined). Declarant purchased the property comprising the Regime for the purpose of converting such property into condominiums which it is or will be selling to the public. Declarant assumed all responsibility for identifying an correcting all defects or problems, if any, that existed, to ensure that the property comprising the Regime is properly constructed and suitable for use as condominiums in accordance with all applicable building regulations, codes, standards, and other applicable laws and requirements.

Accordingly, as part of the valuable consideration exchanged in the sale transaction on March 7, 2005 noted above, the receipt and sufficiency of which are hereby acknowledged, Declarant on behalf of itself and its heirs, representatives, successors, and assigns (including the Owners and all other successors-in-title to all or a portion of the property comprising the Regime), agreed to never sue and completely release Long Grove, The Beach Co., Gulfstream Construction Company, its affiliates, agents, officers, directors, employees, insurers, representatives, successors, assigns, and all other companies, partnerships, entities, or Persons 9 (collectively, the "Affiliates") involved in the design, development and/or construction of the apartment buildings and apartments therein and all other improvements prior to March 7, 2005, for an from any and all claims of every kind whatsoever arising from or related to the development, design, construction, maintenance, alteration, or repair of the property comprising the Regime, including unknown and unforeseen claims that may now exist or that may arise in the future.

> Declarant and the Owners acknowledge and agree that the assumption of liability and release of claims above is intended to be binding on all subsequent grantees of the property comprising the Regime, the grantees of any condominiums or other subdivisions of the property comprising the Regime, and the Owners. In order to give effect to this intention, these provisions are included in this Master Deed, and will also be included in any other conveyances outside the coverage of this Master Deed.

(Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed, p. 43, R. pp. 654-655). This is the same language in the Sales Contract. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. p. 763).

The "release" language found on Page 43 of the Master Deed is inconspicuous, and has the same heading and same font as every other paragraph. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed, R. pp. 606-687). This notice language is not accentuated or emphasized in any way. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed, R. pp. 654-655). The release does not appear in the sales contracts between Vista and the individual purchasers. (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss September 23, 2011, Exhibit 11 [sic also Ex. 8 to Johnson Depo.], R. pp. 575-578).

After the sale of the Long Grove Project to Vista and the conversion of the apartments to condominiums, The Beach Company marketed and sold the individual units for Vista under a separate contract. (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss dated September 23, 2011- Exhibit 17 – Marketing Contract between Vista and The Beach Company, R. pp. 767-777); (Long Grove POA

Memorandum in Opposition to Plaintiffs Motion to Dismiss dated September 23, 2011- Exhibit 5-Depo. de Guardiola, p.58, l.8 - p.60, l.7., R. p. 490, l. 8 – p. 492, l.7). Pursuant to this arrangement, The Beach Company undertook the responsibility for the content of the sales contract and deeds. The Beach Company served as the broker and agent for the seller, and, frequently, as the agent for the purchaser. It directed purchasers to a closing attorney. The Beach Company clearly had the ability to make sure that each prospective purchaser was completely and fully aware of the notice of release. It did not.

In 2009, the POA discovered that these buildings suffer from severe defects including but not limited to the following: (1) Failure of balcony waterproofing; (2) Lack of proper waterproofing system at balconies; (3) Lack of proper window flashing; (4) Lack of proper chimney flashing; (5) Lack of proper roof flashing; (6) improper repairs and failure of repairs to balconies; (7) Lack of proper fire protection at the HVAC system; (8) Leaks at windows; (9) Leaks at balconies; (10) Leaks at chimneys; (11) Decay of structural building components; (12) Mold infestation; (13) improper brick installation; (14) Lack of code compliant fire protection; (15) Defects that have caused decay of building components; (16) improper architectural details at balconies and doors; (17) Lack of proper details at balconies, roof, chimneys, attics, brick, and windows; (18) Lack of proper flashing details; (19) Defects in plans causing water intrusion and decay of building components. (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss dated September 23, 2011- Exhibit 1 - Affidavit of Peter Sherratt, AIA, R. pp. 383-384). Due to the negligence and breach of warranties of the Plaintiffs and other entities, the Long Grove POA and the individual unit owners now face millions of dollars in repairs.

ARGUMENT

"We have made it clear that it would be ***intolerable*** to allow builders to place defective and inferior construction into the stream of commerce."

Kennedy v. Columbia Lumber[1]

The ramifications of the Court's Order are extreme. The effect of the Order is not just to transfer a risk between the parties to the contract, Long Grove at Seaside Farms, LLC, the original developer, and Vista Realty, the conversion developer, but also to allow non-parties to the contract, Gulf Stream Construction, the general contractor, and unnamed subcontractors and designers, to avoid the statutory, regulatory, and common law duties established by the State of South Carolina. The ultimate effect of the Order is to burden a complete stranger to the contract, the Long Grove Property Owners' Association with the cost of correcting the breaches of the duties by the original architect, general contractor, subcontractors, and developers. The Court does this by incorrectly ruling that The Beach Company, Long Grove at Seaside Farms, LLC, Gulfstream Construction, and unnamed parties, such as JHP and subcontractors, (1) could, through a clause in a sales contract, all avoid their statutory, regulatory and common law obligations established by South Carolina's three branches of government; (2) could burden a yet to be created property owners' association with millions of dollars in costs to repair damages caused by defective design and defective construction; (3) could all disclaim any and all warranties as to the condition of the property to the current and subsequent buyers; (4) could be permanently released from any liability for their breaches of these duties and for the condition of the property; and (5) could require the buyer, Vista Realty, to assume all responsibility for the

[1] Kennedy v. Columbia Lumber & Manufacturing, Co., Inc., 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989) (emphasis added).

statutory, regulatory, and common law duties and liability for breaching these duties. (Order Granting Summary Judgment issued July 26, 2012, R. pp. 1-41).

1. THE COURT ERRED BY FAILING TO RECOGNIZE THAT THE CONTRACT AT ISSUE IS AN EXCULPATORY CONTRACT WHICH VIOLATES PUBLIC POLICY AND IS VOID.

The Beach Company, Long Grove at Seaside Farms, Gulf Stream Construction and JHP are attempting to use an exculpatory clause in a sales contract to avoid liability and duties owed to the public, specifically subsequent purchasers of the property they develop. Developers, general contractors and architects all have statutory, regulatory and common law duties with which they must comply to protect the health, safety and welfare of the public, and they cannot by contract avoid their responsibility for violating those duties. By enforcing the exculpatory agreement, the Court erred because that agreement allows Respondents to have violated those duties with impunity in violation of this State's public policies.

A. Contracts that contravene public policy are void and unenforceable.

If a contract contravenes public policy, it is void. Fisher v. Sterns, 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003). That this State has overriding public policies in effect that govern and control the development, design, and construction of buildings is obvious from the tremendous amount of work undertaken by our state and local legislative branches in enacting laws and regulations and by our executive branches in enforcing those laws and regulations to protect people like those at Long Grove from the consequences of defective design, development and construction.[2]

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[2] Our Legislature has passed the following statutes to protect the public from defective buildings and other structures: S.C. Code Ann.§§ 27-31-10 (Horizontal Property Act); S.C. Code Ann. §§ 27-40-10 (Residential Landlord and Tenant Act); S.C. Code Ann. §§ 27-50-10 (The Residential Property Condition Disclosure Act); S.C. Code Ann. §§ 31-15-

Statutory and regulatory laws have been enacted to regulate professionals and further protect the public from poor design and construction practices.[3] *See, e.g.*, S.C. Code Ann. §§40-1-10 (Professions and Occupations); S.C. Code Ann. §§40-11-5 (Contractors); S.C. Code Reg. 29-1 - 29-110 (Department of Labor, Licensing and Regulation – State Licensing Board for Contractors); S.C. Code Ann. §§40-3-5 (Architects); S.C. Code Reg. 11-1 – 11-14 (Department of Labor, Licensing and Regulation –State Board of Architectural Examiners); S.C. Code Reg. 8-100 – 8-701 (Buildings Codes Council). The State, counties, and municipalities have established building departments and have adopted and then periodically updated numerous building codes as laws.[4] The Standard Building Code (the code in effect when Respondents

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10 (Dwelling Unfit for Human Habitation); S.C. Code Ann. §§ 40-1-10 (Professions and Occupations); S.C. Code Ann. §§ 40-3-5 (Architects); S.C. Code Ann. §§ 40-10-5 (Fire Protection Sprinkler Systems Act); S.C. Code Ann. §§40-11-5 (Contractors); S.C. Code Ann. §§40-22-2 (Engineers and Surveyors); S.C. Code Ann. §§ 40-26-10 (Commercial Inspectors); S.C. Code Ann. §§ 40-28-10 (Landscape Architects); S.C. Code Ann. §§ 40-49-10 (Plumbers and Plumbing); S.C. Code Ann. §§ 40-57-5 (Real Estate Brokers, Salesmen, and Property Managers); S.C. Code Ann. §§ 40-59-10 (Residential Home Builders); S.C. Code Ann. §§ 40-60-2 (South Carolina Real Estate Appraiser License, and Certification Act); S.C. Code Ann. §§ 45-5-10 (Hotels, Motels, Restaurants and Boarding Houses); S.C. Code Ann. §§ 57-1-10 (Highways, Bridges and Ferries).

[3] The Legislature has created the following departments and boards to regulate and protect the public from defective buildings and other structures: Department of Transportation, Department of Labor, Licensing and Regulation; Board of Architectural Examiners; Board of Professional Engineers and Land Surveyors; State Fire Marshall, Contractors Licensing Board, Residential Builders Commission; Landscape Architectural Examiners; Real Estate Commission, Real Estate Appraisers Board.

[4] *See e.g.,* SOUTH CAROLINA BUILDING CODE (2006 International Code Council, Inc.); COUNTY OF CHARLESTON, S.C. ORDINANCES FOR BUILDINGS AND BUILDING REGULATIONS, ch.4, Sect. 101 – 118(2008); TOWN OF MOUNT PLEASANT, S.C. ORDINANCE FOR BUILDING REGULATIONS, Ch. 150, Sect. 150.001 – 150.054; 2006 INTERNATIONAL BUILDING CODE; SOUTH CAROLINA MECHANICAL CODE (2006 International Code Council); SOUTH CAROLINA PROPERTY MAINTENANCE CODE (2006 International Code Council); 2006 SOUTH CAROLINA PERFORMANCE CODE (2006 International Code Council); SOUTH CAROLINA BUILDING CODE (2006 International Code Council); SOUTH CAROLINA FIRE CODE (2006 International Code Council); SOUTH CAROLINA RESIDENTIAL CODE (2006 International Code Council); SOUTH CAROLINA EXISTING BUILDING CODE

developed and constructed Long Grove) was created and adopted to "protect the public's life, health and welfare in the built environment." Preface, 1997 STANDARD BUILDING CODE. Charleston County and the Town of Mt. Pleasant adopted as law the Standard Building Code which has now been replaced by the International Building Code and town ordinances to provide minimum standards to be followed by all design and construction professionals to protect the public. The county and municipal building departments review the designs, issue permits, inspect construction as it is done, and enforce these building codes.

These statutes, regulations and codes create duties that are independent of contracts. Two parties cannot agree to submit a design and construct a building that violates these laws. The establishment of the agencies and departments and enactment of these laws creates and sets forth the public policy of this State that the construction industry is to be regulated to protect the public, including the owners of Long Grove.

In S.C. Code Ann. §§ 40-1-10, the Legislature outlines the professions and occupations which are regulated to protect the health, safety and welfare of the public. These professions and occupations have "inherent qualities peculiar to it that distinguish it from ordinary work or labor" and "require specialized skill or training and the public needs and will benefit by assurances of initial and continuing professional and occupational ability." S.C. Code Ann. §40-1-10(B). These professions and occupations, including contractors and architects, owe a higher standard of care because they hold licenses in these specialized areas. The Legislature enacted statutory law and regulatory law specific to both contractors and architects to protect the health, safety and welfare of the public.

(2006 International Code Council); and 2006 SOUTH CAROLINA PLUMBING CODE (2006 International Code Council).

These statutory and regulatory laws mandate that general contractors and architects build and design in accordance with the applicable building codes to protect the health, safety and welfare of the public. *See* S.C. Code Ann. §§40-1-10 (Professions and Occupations); S.C. Code Ann. §§40-11-5 (Contractors); S.C. Code Reg. 29-1 - 29-110 (Department of Labor, Licensing and Regulation – State Licensing Board for Contractors); S.C. Code §§40-3-5 (Architects); S.C. Code Reg. 11-1 – 11-14 (Department of Labor, Licensing and Regulation –State Board of Architectural Examiners); S.C. Code Reg. 8-100 – 8-701 (Buildings Codes Council).

These laws and regulations control the licensing, certification, occupational requirements, examinations, fees, finances, investigations, disciplinary actions, and penalties for these professions. All of this was done to protect the public. S.C. Code Ann. §§40-11-5; S.C. Code Ann. §§40-11-10 (The South Carolina Contractor's Board was created to "protect the health, safety and welfare of the public through the regulation of businesses and individuals who . . . provide contract work to individual or other legal entities...");[5] S.C. Code Reg. 8-100 – 8-701.

The original design, development and construction team at Long Grove failed to comply with these minimum standards, yet under the Court's Order, none remain accountable. This private contract eviscerates the laws and regulations adopted and enforced by the Legislative and Executive Branches of state and local governments and effectively destroys the public policies of this state. The contract is void and unenforceable for that reason.

[5] The regulations of the Contractor's Licensing Board within the Department of Labor, Licensing and Regulation has established 28 classifications of contractors. S.C. Code Reg. 29-1.

The Respondents all had duties to ensure that these buildings were constructed and designed in accordance with the applicable building codes and industry standards. They cannot be relieved of those duties which were instituted to protect the health and safety of the public. A corporation cannot by contract relieve itself from a duty which it owes the public under state law. Murray v. Texas Co., 172 S.C. 399, 402, 174 S.E. 231, 232 (1934) (stating "[I]t is, of course, clear that a person cannot by contract relieve himself from a duty which he owes the public independently of the contract . . . "); *See* S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct. App. 1984); *See* Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336 at 347 (Md. Ct. App. 1986). In S.C. Code Ann. §32-2-10, the Legislature, in furtherance of these public policies[6] requiring that the developers, architects, and contractors remain responsible for their work, prohibited the enforcement of the assumption of liability and releases in agreements made in connection with the design and construction of buildings. Not only did the Court err in failing to hold that this statute rendered the exculpatory contract unenforceable, but it also erred in failing to recognize the public policy reason for the statute: parties such as these Respondents cannot avoid their responsibility for their defective design and construction.

In summary, the state and local legislature and executive branches have through laws, and agencies established a public policy to protect people from defective design and construction. Our Supreme Court recognizes this as the law in South Carolina:

> A violation of a building code violates a legal duty for which a builder can be held liable in tort for proximately caused losses. Terlinde,[7] imposes a legal duty on builders to undertake construction commensurate with industry standards. Where a building code or industry standard does not apply, public policy further

[6] The Title of the Statute is, "Contracts Against Public Policy."
[7] Terlinde, 275 S.C. at 399, 271 S.E.2d at 770

demands the imposition of a legal duty on a builder to refrain from constructing housing that he knows or should know will pose serious risks of physical harm. We recognized such a duty, which should extend to foreseeable parties, in Rogers[8], . . . Any builder who violates such a duty should justly be held accountable for the losses that his breach caused, whether they be physical harm or the diminution in the value of the house.

Kennedy v. Columbia Lumber & Manufacturing, Co., Inc., 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989). To allow the Respondents to escape from their responsibility for their defective design and construction is to defeat the public policy of our state.

B. The Respondents are professionals who cannot exempt themselves from statutory and regulatory standards.

To design and construct buildings, professionals, such as Gulf Stream and JHP, must obtain a license and are subject to regulation by state and local governments. S.C. Code Ann. §§40-1-10; S.C. Code Ann. §§40-11-5; S.C. Reg. 29-1 - 29-110; S.C. Code Ann. §§40-3-5; S.C. Reg. 11-1 – 11-14; S.C. Reg. 8-100 – 8-701. These licensing requirements enacted by the Legislature and enforced by the South Carolina Department of Labor, Licensing and Regulation establish the public interest that Respondents seek to avoid. The interest of the public is to be able to purchase a home such as a Long Grove condominium without fear of it having latent defects causing rot and deterioration and costing millions of dollars to repair. The interest of the public is to be secure in one's home, and an interest that has existed for thousands of years. The Beach Company holds itself and its wholly owned subsidiary, Gulf Stream Construction, out as one of the best developers and contractors in the Southeast. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 2- Marketing Brochure-Condominium Conversion Opportunity, R. pp. 385-438). The public interest is for such a developer and

[8] Rogers, 251 S.C. at 134, 161 S.E.2d at 84

its general contractor, subcontractors, and architect to stand behind this work and not run away from it.

Courts have consistently refused to enforce exculpatory contracts contrary to the public interests. Professionals licensed by this state cannot exempt themselves from standards imposed by law by the mere execution of exculpatory contracts. As the Tennessee Supreme Court understands:

> A professional person should not be permitted to hide behind the protective shield of an exculpatory contract and insist that he is not answerable for his own negligence. We do not approve the procurement of a license to commit negligence in professional practice.

Olson v. Molzen, 558 S.W. 2d. 429 (Tenn. 1977); (Long Grove POA Motion to Reconsider, R. pp. 784-828). Likewise, in a case recognized by the South Carolina Court of Appeals, the Supreme Court of Appeals of West Virginia stated:

> A plaintiff's express agreement to assume the risk of defendant's violation of a safety statute enacted for the purpose of protecting the public will not be enforced; *the safety obligation created by the statute for such purpose is an obligation owed to the public at large and is not within the power of any private individual to waive.*

Murphy v. North American River Runners, Inc., 412 S.E. 2d. 504 at 509 (W.Va. 1991) (emphasis added). (Long Grove POA Motion to Reconsider, R. pp. 784-828).

The Florida Court of Appeals directly addressed the issue before us, holding that an exculpatory clause relieving a contractor from building code violations is void as against public policy. The court stated:

> ...a party may not contract away its responsibility to comply with a building code when the person with whom the contract is made is one of those whom the code is designed to protect. ..Florida's comprehensive regulation of the licensing of building contractors and building construction standards reflect a clear public policy to protect purchasers of residential homes from personal injuries caused by improper construction practices...

Loewe v. Seagate Homes, Inc., 987 So. 2d. 758 (Fla. App. 5 Dist. 2008); VoiceStream Wireless Corp. v. U.S. Communications, Inc., 912 So.2d 34, 38 (Fla. 4th DCA 2005) (" a party cannot waive liability imposed by statutory provisions that are intended to protect both an individual and the public because to do so would be contrary to public policy"); Holt v. O'Brien Imports of Fort Myers, Inc., 862 So.2d 87, 89 (Fla. 2d DCA 2003) (" [A]n individual cannot waive the protection of a statute that is designed to protect both the public and the individual.") (quoting Coastal Caisson Drill Co. v. Am. Cas. Co., 523 So.2d 791, 793 (Fla. 2d DCA 1988), approved, 542 So.2d 957 (Fla.1989)).

The Ohio Supreme Court held that a contractor's obligation to construct a house in a workmanlike manner is a duty imposed by law, *and as such cannot be waived by the owner:*

> We conclude that the duty to construct a house in a workmanlike manner using ordinary care is the baseline standard that Ohio home buyers can expect builders to meet. The duty does not require builders to be perfect, but it does establish a standard of care below which builders may not fall without being subject to liability, even if a contract with the home buyer purports to relieve the builder of that duty. Accordingly, we conclude that a home buyer's duty to construct a house in a workmanlike manner using ordinary care is a duty imposed by law, and a home buyers' right to enforce that duty cannot be waived.

Jones v. Centex Homes, 967 N.E.2d 1199 (Ohio 2012). Vista could not agree to the waiver of the duties of the Respondents. The public interests and public policy require that the exculpatory agreements be found void. The public interest of this State is frustrated if these Respondents, developers, general contractor and architect, are immunized from liability from their having breached their positive statutory duties to protect the well-being of others.

C. The Exculpatory Contract at Issue is Unenforceable Against the POA.

The agreement between Vista Realty and Long Grove at Seaside Farms found in Paragraph 15 is an exculpatory contract. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 699-700). An exculpatory clause is one that purports to deny an injured party the right to recover damages from a person negligently causing his or her injury. Cain v. Banka, 932 So.2d 575, 31 Fla. L. Weekly D1780 (Fla.App. 5 Distr. 2006)(Exculpatory clauses are by public policy disfavored because they relieve one party of the obligation to use due care, and shift the risk of injury to the party who is probably least equipped to take the necessary precautions to avoid injury and bear the risk of loss); Kitchens of the Oceans, Inc. v. McGladrey & Pullen, LLP, 832 So.2d 270 (Fla. 4th DCA 2002); Loewe v. Seagate Homes, Inc., 987 So.2d 758, 760 (Fla. 5th DCA 2008).

Exculpatory contracts are not favored at law. Because exculpatory contracts "tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon." Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 619, 138 S.E.2d 155, 157 (1964); Dobratz vs. Thomson, 468 N.E.2d 654, 161 Wis.2d 502 (Wis. 1991) (finding exculpatory contracts tend to allow conduct in the given area of activity or pursuit which conduct is below the acceptable standard of ordinary and reasonable care applicable to that activity or pursuit). For the Court to approve Respondents' scheme in this case is to invite developers and contractors, in converting apartments to condominiums, to avoid their responsibility to design and construct buildings that comply with the minimum standards and to sell defective condominiums to an unsuspecting public.

In addition, exculpatory contracts are enforceable only where and to the extent that the intention to be relieved from liability is made clear and unequivocal. Neither the Sales

Contract nor the Master Deed directly states that Respondents are exempt from liability for their own "negligence," which is a word not used in either document. An exculpatory clause will be void when the provisions are too broad and do not inform a party that he/she would be waiving all claims to a defendants' negligence. Fisher, 584 S.E.2d 149; *See* Yauger v. Skiing Enters., Inc., 206 Wis.2d 76, 557 N.W.2d 60 (1996) (finding an exculpatory contract void as against public policy because it did not clearly inform the plaintiff he was waiving all claims due to defendants' negligence); *See also* S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct. App. 1984)(stating that exculpatory clause will never be construed to exempt a party from liability for his own negligence 'in the absence of explicit language clearly indicating that such was the intent of the parties') The modern approach to examining contracts of adhesion and exculpatory clauses is to treat them differently from other contracts. "The trend is justified based on three considerations: (1) there was not true assent to a particular term; (2) even if there was assent, the term is to be excised from the contract because it contravenes public policy; or (3) the term is unconscionable and should be stricken." Gladden v. Boykin, et. al., 739 S.E.2d 882 (2013) (quoting 7 Joseph M. Perillo, Corbin on Contracts §29.10, at 415-16 (rev. ed. 2002)).

The exculpatory clause in the Sales Contract at Paragraph 15 and as quoted in Paragraph 24 of the Master Deed fails to comply with these requirements. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 699-700); (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed and ByLaws, R. pp. 654-655). The POA is a corporation and obligated by the Master Deed to maintain the common elements of the POA. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed and

ByLaws, R. pp. 606-687). With these obligations, comes the right and fiduciary duty to bring litigation against developers and contractors responsible for defective construction and design of buildings for which they are responsible. Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel Int'l Corp., 286 S.C. 555, 335 S.E.2d 365 (1985). The exculpatory clause of the Sales Contract, as found in the Master Deed, fails to mention the POA and fails to disclose the release of the rights of the POA. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 688-766). The common elements of these buildings suffer from significant defects and damages. The exculpatory language of the contract fails to disclose the intent to contract away the right of the Association to seek damages for defects in the common elements. An ordinary and knowledgeable person would not know that Vista Realty, The Beach Company and Long Grove at Seaside Farms, LLC had contracted away the right to recover for damages to the common elements against the parties who originally developed, designed, and constructed the common elements. It never clearly and specifically states, "Neither this Association nor any Owner may ever file a lawsuit against the original developer, general contractor, architect and subcontractors named herein to recover damages to the common elements for defective design or defective construction." The Court failed to recognize that the contract at issue in this case is such an exculpatory contract that violates public policy, is drafted broadly, and is void.

Finally, this exculpatory contract is unenforceable because it contravenes the Statutes of Limitations (S.C. Code Ann. §15-3-530) and of Repose (S.C. Code Ann. § 15-3-640); *See* Barringer v. Fidelity & Deposit Co. of Maryland, 161 S.C. 4, 159 S.E. 373 (1931). In Barringer v. Fidelity & Deposit Co. of Maryland, 161 S.C. 4, 159 S.E. 373 (1931), the Supreme Court affirmed the Order of the Circuit Court refusing to enforce a

contract that required that a lawsuit be brought by a date certain before the expiration of the statute of limitations. The Supreme Court held that a private contract between two parties that contravene a statute was ineffective. Barringer v Fidelity & Deposit Co. of Maryland, 161 S.C. 4, 159 S.E. 375 (1931).

In this case, the POA was not a party to the contract. The two parties to the contract, Vista and Long Grove at Seaside Farms, entered into the agreement that contravened the Statute of Limitations and Statute of Repose of a third party, the POA. If the parties to a contract cannot contravene the Statute of Limitations and Repose as between themselves then certainly the parties to a contract cannot contravene the Statute of Limitations and Repose as to a third party.

Vista Realty and Long Grove at Seaside Farms could not agree to contravene the Statute of Repose. Barringer v Fidelity & Deposit Co. of Maryland, 161 S.C. 4, 159 S.E. 375 (1931).

2. THE COURT ERRED IN ALLOWING PLAINTIFFS TO RELEASE BY CONTRACT NON-DELEGABLE DUTIES IMPOSED BY STATUTORY, REGULATORY AND COMMON LAW.

In an effort to escape from their liability, Long Grove at Seaside Farms and The Beach Company improperly attempt to delegate to Vista Realty all duties to ensure the buildings were built to Code and constructed in a good and workmanlike manner. Paragraph 15(a) of the Sales Contract mandates the Purchaser, Vista, assume all legal responsibilities of the developer, the general contractor, the architect and the subcontractors.

15. Assumption of Liability and Release of Claims.

> a) . . . Purchaser assumes all responsibility for identifying and correcting all defects or problems, if any, that may exist, to ensure that the Property is properly constructed and suitable for use as condominiums in accordance with all

applicable building regulations, codes, standards, and other applicable laws and requirements.

(Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, p.10, R. pp. 699-700). The agreement delegates to Vista Realty duties that Gulf Stream Construction, JHP, the subcontractors, The Beach Company, and Long Grove at Seaside Farms owe to the public and failed to exercise during the design and construction of the Long Grove apartments.

Once they began the development, design, and construction of Long Grove, the Respondents, regardless of their contracts, were obligated to comply with the duties created by building codes, laws, and regulations. The developer is the builder of the project even though he may delegate the physical acts of construction to others. Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336, 347 (Md. Ct. App. 1986). These provisions enacted by the Legislature are non-delegable duties owed to the public. Obligations and duties created by statute are non-delegable. *See,* McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005); Loewe v. Seagate Homes, Inc., 987 So.2d 758, 760 (Fla. 5th DCA 2008); Olson v. Molzen, 558 S.W. 2d. 429 (Tenn. 1977).

"The real effect of finding a duty to be non-delegable is to render not the duty, but the liability, non-delegable; the person subject to a non-delegable duty is certainly free to delegate the duty, but will be liable to third parties for any negligence of the delegatee, regardless of any fault on the part of the delegator." Nedrow v. Pruitt, 336 S.C. 668, 521 S.E. 2d. 755 (SC 1999). The Court erred by finding that these four entities could be released from their liabilities for these non-delegable duties.

Because these are non-delegable duties, the release and assumption of liabilities is unenforceable against the POA. *See* Green Springs, Inc. v. Calvera, 239 So. 2d. 264 (Fl. 1970); *See* Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 517 S.2d 336, 347 (Md. Ct. App. 1986) ("The developer is, in a sense, the builder of the project, even though he may delegate to others the physical acts of construction.").

These non-delegable duties are critical. The Building Codes adopted by counties and towns as laws establish minimum requirements to safeguard the public health, safety and general welfare.[9] Designers and contractors must abide by the applicable building codes and industry standards. *See e.g.,* South Carolina Building Code (2006 International Code Council, Inc.).

Pursuant to S.C. Reg. 11-12 Code of Professional Ethics,

> An architect or firm shall not engage in dishonest practice, unprofessional conduct, or incompetent practice . . . An architect or firm shall not violate any state or federal criminal or civil law, rule, or regulation . . . An architect or firm shall act with reasonable care and competence and shall apply the technical knowledge and skill which is ordinarily applied by architects and firms in good standing in South Carolina . . . An architect or firm shall take into account all applicable state and municipal building laws and regulations . . [A]n architect or firm shall not design a project in violation of such laws and regulations...

S.C. Code Reg. 11-12. A licensed architect shall not, in the conduct of his professional practice, knowingly violate the law. 2007 Code of Ethics & Professional Conduct, Canon II – Obligations to the Public, Rule 2.101. Vista Realty and Long Grove at Seaside Farms could not agree to the delegation of these duties to Vista and the waiver of these duties on behalf of JHP, Gulf Stream Construction, or any other person or corporation involved in

[9] *See e.g.*, COUNTY OF CHARLESTON, S.C. ORDINANCES FOR BUILDINGS AND BUILDING REGULATIONS, ch.4, Sect. 101.3 Intent.

the design and construction of the Long Grove Apartments. JHP and Gulf Stream are not absolved of their responsibilities for the violations of the building codes.

JHP is liable for designing a project that violates S.C. Reg. 11-12 and the applicable building codes. JHP violated its duty not to engage in incompetent practice and not to design a project in violation of applicable building codes and regulations. Gulfstream, as the general contractor violated its duties in constructing buildings that do not adhere to the building code. These duties cannot be delegated by Vista Realty and Long Grove at Seaside Farms to Vista Realty. They cannot waive the duty to build structures according to code so that the public is protected by those minimum building standards. They cannot ignore the county and town building codes and ordinances.

These duties and responsibilities also exist in our common law. *See, e.g.,* Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (A design professional undertaking to furnish plans and specifications impliedly warrants their sufficiency for the intended purpose); Beachwalk Villas Condominium Assoc., Inc. vs. Martin, 305 S.C. 144; 406 S.E.2d 372 (1991) (An architect can be held liable to an owner for negligence and breach of the implied warranty even though there was no contract between the architect and the homebuyer); Tommy L. Griffin Plumbing & Heating Co. vs. Jordon, Jones & Goulding, Inc., 320 S.C. 49; 463 S.E.2d 85 (1995) (a design professional owes a professional duty to the plaintiff which arises separate and distinct from any contractual duties between the parties or with third parties). Violations of building codes are negligence per se and are evidence of recklessness and willfulness supporting punitive damages. Kennedy vs. Columbia Lumber, 299 S.C. 335, 384 S.E.2d 730 (1989). Terlinde vs. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980) (a general contractor has a duty of care to construct within industry standards).

The agreement delegates to Vista Realty duties that must remain with Respondents. Those duties are, in part, to design and construct the buildings in accordance with building codes and industry standards in a good and workmanlike manner; to inspect the work as it is done; and to correct deficiencies during construction. They are further liable for any latent defects that are discovered within the Statute of Repose. The defects at Long Grove are so severe and extensive that these parties obviously failed to comply with those duties.

The practical reasons why these duties and the responsibility for failing to comply with those non-delegable duties should remain with Respondents include:

1. The only real time to properly exercise those duties is during the design stages and the construction stages. To delegate those duties five years after the design and construction are complete assures the defects are hidden by the work.
2. The out-of-state conversion developer who has no ties to this local community or even this State is motivated not to find defects but to do as little work as possible to maximize profits.
3. The best people to comply with the duties are the people who know the most about the buildings. Those are the people who are there day in and day out observing the work as it is done; working out design and construction difficulties; and taking the steps to fix problems as they occur and not years later.

These four entities constructed a multi-family project with numerous code violations and did not adhere to the minimum requirements necessary to protect the public. These entities remain liable for breaching these non-delegable duties. The exculpatory agreement is unenforceable.

3. THE COURT ERRED IN FINDING THAT THE PROPERTY OWNERS' ASSOCIATION IS BOUND BY CONTRACT TO WHICH IT WAS NOT A PARTY.

The Sales Contract was executed on January 27, 2005. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 688-766). The Master Deed was filed on April 15, 2005. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed and ByLaws, R. pp. 606-687). The Property Owners' Association was incorporated on April 21, 2005. As a corporation, the POA is a separate and distinct entity. Its rights and obligations are established by statute, case law, and the Master Deed. It does not own the common elements at Long Grove. It has the duty to maintain the common elements and the Queen's Grant fiduciary duty to file a lawsuit to recover damages for defective design and construction. *See* Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel Int'l Corp., 286 S.C. 555, 335 S.E.2d 365 (1985); (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed and ByLaws, R. pp. 606-687).

The only parties to the contract, and exculpatory clause are Long Grove at Seaside Farms, LLC and Vista Realty. The only named third-party beneficiaries are The Beach Company and Gulfstream Construction. JHP was not specifically identified. When the contract was signed the POA did not exist. More importantly, the POA is not identified in the agreement or the Master Deed as being bound by the agreement. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 688-766); (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed and ByLaws, R. pp. 606-687).

There is no legal authority to support the contention by Respondents and the ruling by the Court that a corporation (the POA) bears the burden of a contract to which it was not a party and in which it is not identified as being bound. There is also no authority that Vista

Realty can enter into a contract that detrimentally burdens the Owners who were not a party to that contract.

The Property Owners' Association and the individual owners were not parties to the contract, had no knowledge of the elimination of their rights, no bargaining power and no ability to negotiate any of the terms and provisions of the contract. Neither received a benefit. Neither is bound by the contract.

The Respondents' obligations to construct Long Grove in compliance with building codes and industry standards extend to foreseeable parties.[10] These obligations, owed to the current Long Grove owners, could not be waived by their predecessor in title.

4. THE COURT ERRED BY FAILNG TO RECOGNIZE THAT THE CONTRACT AT ISSUE IN THE CASE IS UNCONSCIONABLE AND UNENFORCEABLE AND, THEREFORE, IS VOID.

When applied to the POA, the terms of this release are unconscionable. In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Smith v. D.R. Horton, Inc., Appellate Case No. 2011-204347 (Op. No. 5118 Ct. App. April 17, 2013); Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544. 554, 606 S.E.2d 752, 757 (2004); Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct. App. 1998); *See also* S.C. Code Ann. § 36-2-302(1) (2003); Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663

[10] Kennedy v. Columbia Lumber, 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980)

(2007) (stating that legislation permits this Court to "refuse to enforce" any unconscionable clause in a contract or to "limit its application so as to avoid an unconscionable result."); *See also* Munoz v. Green Tree Fin. Corp, 343 S.C. 531, 539, 542 S.E.2d 360,364 (2001) (holding that general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause).

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *See* Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir. 1989). In determining whether a contract was "tainted by an absence of meaningful choice," (Id. at 295), courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id. at 293. *See also* Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case."(quoting 17A Am.Jur.2d Contracts § 279 (2004))). The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. Carolina Care Plan, 361 S.C. at 555, 606 S.E.2d at 758.

In this case, because the POA was not in existence at the time of the execution of the sales contract, it had no meaningful choice. The rights of the POA were extinguished, and it could not completely fulfill its fiduciary obligations under Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel Int'l Corp. from the moment of its incorporation. Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel Int'l Corp., 286 S.C. 555, 335 S.E.2d 365 (1985).

No POA would ever choose to enter into a contract that prevented it from filing a lawsuit to recover damages without obtaining any benefit. The terms of that agreement as they relate to the POA, therefore, are completely one-sided. Long Grove at Seaside Farms, LLC sold the property for $37 million dollars, yet incredibly was relieved of its liability as developer. The POA was left with having to pay millions of dollars to repair rotten and deteriorating buildings.

The effect of this contract is to deprive the POA of the fundamental fairness necessary for a contract to be valid. The Court's Order ignored this by examining the contract too narrowly by focusing on the two parties to the contract, Long Grove at Seaside Farms, LLC and Vista Realty. (Order Granting Summary Judgment issued July 26, 2012, R. pp. 1-41). The Court failed to take into account all of the facts and circumstances of this case and failed to take into account the effect of its ruling on the efficacy of the public policies of the State. (Order Granting Summary Judgment issued July 26, 2012, R. pp. 1-41). Viewing this matter fully and keeping in mind the public policies of the State leads to the inescapable conclusion that the contract is fundamentally unfair and unconscionable. The Order should, therefore, be reversed.

Further, Vista, with the knowledge of The Beach Company through its role as broker in charge and real estate sales agent, buried the notice of this release of all liabilities in the Master Deed. (Long Grove Property Owners' Association Memorandum in Opposition filed September 23, 2011- Exhibit 15 Master Deed and ByLaws, R. pp. 606-687). A broad release waiving all claims due to Respondents' negligence, including waiver of any and all statutory, regulatory and building code violations by the developer, general contractor and architect is not expected to be found buried in the middle of a Master Deed for the formation of the Horizontal Property Regime. *See* Gladden v. Boykin,

et. al., 739 S.E.2d 882 (2013) (dissent finding that the limitation of liability provision in the contract did not stand out any more than other provisions and was not any more noticeable than the other provisions). With the "Release" hidden in the middle of one hundred (100) pages of technical jargon, the Owners did not have notice and were not informed by that paragraph of the extinguishment of their rights against these parties. The individual sales contracts and the individual deeds referred to the Master Deed, but did not bring to the attention of the purchasers the Notice of Release buried within. (Long Grove POA Memorandum in Opposition to Motion for Summary Judgment- September 23, 2011 - Exhibit 6, R. pp.500-543). In paragraph 16 of the Sales Contract, The Beach Company and Long Grove Vista specifically agreed that the conveyances of condominium units by Long Grove Vista would not contain the disclosures found in the Master Deed. (Long Grove POA Memorandum in Opposition to Motion for Summary Judgment – September 23, 2011 – Exhibit 16 Sales Contract, R. pp. 688-766). No reasonable person would purchase a condominium unit for full price knowing that he/she would then owe thousands of dollars more that could not be collected from the responsible parties through the POA. Prospective purchasers had no meaningful choice concerning the "release" and the release was not brought to their attention in any conspicuous manner. The POA had no ability to protect itself from the effect of the release and disclaimer. Under an analysis similar to that set forth in the case of Myrtle Beach Pipeline Com, v. Emerson Elec. Co., 843 F. Supp. 1027 (D.S.C. 1993), the release and disclaimer are unconscionable.

Factors that may be used in assessing unconscionability include: (1) the nature of the injuries suffered by the plaintiff, (2) whether plaintiffs a substantial business concern, (3) disparity in parties' bargaining powers,(4) parties' relative sophistication,(5) whether there is an element of surprise in the exclusion,(6) and the conspicuousness of the clause.

Myrtle Beach Pipeline Com. v. Emerson Elec. Co., 843 F. Supp. 1027 (D.S.C. 1993). In this case, all of these factors favor the POA and require reversal of the Order: (1) The POA has suffered and will suffer significant damages; (2) The POA is an eleemosynary corporation and not a substantial business concern; (3) The POA was created AFTER the Master Deed was signed by the Declarant Long Grove Vista. It had no ability to bargain; (4) The POA is unsophisticated relative to Mr. de Guardiola and Vista and Mr. Darby and the Beach Company; (5) The POA, because it was formed after the Master Deed was executed, could not help but be surprised; (6) The release and disclaimer is not conspicuous.

Not only are these provisions one-sided, but as previously discussed, they also nullify the legal and statutory duties of all parties in derogation of public policy. If these provisions are upheld and are used to bar the POA claims against Respondents, then the Sales Contract benefits these third-parties such as Gulf Stream Construction and JHP by excluding them from their legal and statutory duties. At the same time, however, this provision creates a tremendous detriment to separate third parties such as purchasers and the POA who are damaged by their inability to bring suit against these contractors and architects who have violated their legal and statutory duties by constructing buildings which do not meet minimum construction standards and violate statutory, regulatory and municipal laws and ordinances. The Court erred by allowing Gulf Stream and JHP, alleged third-party beneficiaries, to use the unconscionable terms in a Sales Contract (to which neither was a party) as a defense to their professional duties and obligations. This Order should be reversed.

CONCLUSION

If building codes and regulations are not followed, the consequences can be devastating: the pedestrian bridge that collapsed in North Carolina injuring over one hundred people; the fire in North Myrtle Beach killing college students on spring break; the factory that collapsed in Bangladesh killing over 600 persons; a building at River Oaks in Myrtle Beach being completely engulfed in flames in thirty minutes; numerous projects of rot and disintegration causing hundreds of millions of dollars in damages to homeowners. Bad construction has the capacity to inflict a heavy toll on life, limb and property, and the financial consequences can be devastating.

Through the passage of the laws and the adoption of regulation and building codes, our three branches of government have created public policies to prevent the severe consequences that can result from poor design and construction practices. South Carolina statutory, regulatory and common law have been instituted to protect the public from entities like The Beach Company, Long Grove at Seaside Farms, Gulf Stream Construction and JHP who try to avoid the consequences of their inferior and sub-standard development, design and construction practices.

The Long Grove property suffers from the consequences of defective construction and defective design. In addition to the million dollars that the Long Grove property owners have already spent to repair damages caused by the Respondents, the owners are faced with having to spend millions of dollars more to repair the damages caused by the defective development, design, and construction of these condominiums. Many of the parties who committed these wrongful acts have been sued in other cases, because of these same types of problems. That there are three of these similar cases against some of these same parties is further reason why the public policies examined above must be enforced and not ignored.

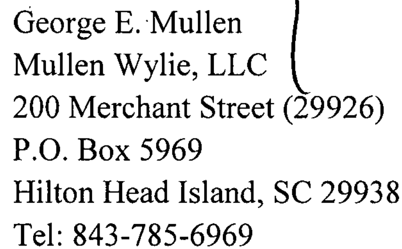
The South Carolina Supreme Court has been in the vanguard of protecting people like the residents of Long Grove from companies like The Beach Company, Gulfstream and JHP who develop, construct and design buildings such as the ones at Long Grove that are infected with code violations, rot, and defective construction. Kennedy v. Columbia Lumber, 299 S.C. 335, 384 S.E.2d 730 (1989); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980); Wise v. Broadway, 315 S.C. 273, 433 S.E.2d 857 (1993); Tommy L. Griffin Plumbing & Heating Co. v. Jordon, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951); Beachwalk Villas Condominium Assoc., Inc. v. Martin, 305 S.C. 144, 406 S.E.2d 372 (1991); Lane v. Trenholm Bldg. Co., 267 S.C. 497, 229 S.E.2d 728; Concerned Dunes West Residents, Inc., v. Georgia-Pacific Corp., 349 S.C. 251, 562 S.E.2d 633 (2002). These cases, like the statutes, regulations and building codes, have furthered the public policy promoting development, design and construction of residences that meet minimum building code standards and provide safe places to live and buildings and residences that are not ridden with latent defects and rot. All three branches of government, our courts, our Legislature, and our executive branch are fully committed to protecting an unsuspecting public.

In this case, the Beach Company, Long Grove at Seaside Farms, and Gulfstream Construction, have attempted to create a clever way to avoid these responsibilities on behalf of themselves and on behalf of the architect and subcontractors: Build an apartment complex, sell it before the latent defects become apparent and before they have to repair them, sell the project to an out of state developer at a huge profit, and skip out on their statutory, regulatory and common law responsibilities. In furtherance of the firmly established public policy of this State, this Court should not allow this mechanism to stand. The public policy of this State is that developers, design professionals, general contractors,

and subcontractors doing business in South Carolina must comply with Building Codes, ordinances, statutory law, and regulatory law. Approving this mechanism eviscerates this crucial public policy.

The Court erred by finding that The Beach Company, Long Grove at Seaside Farms, Gulf Stream Construction and JHP could waive their duties to the public, endanger the public by developing, designing and constructing buildings with serious code violations, and could use such broad language in an exculpatory clause that would absolve all liability for anything in the future. This clause is violative of public policy, is unconscionable, is void and unenforceable. The Court's findings should be reversed.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2012-213584

Circuit Court Case No. 2009-CP-10-6746

Long Grove at Seaside Farms, LLC; The Beach Company; Gulfstream Construction Company, Inc., Respondents,

v.

Long Grove Property Owners' Association, Inc.; Vista Realty Partners, LLC; and Long Grove Vista, LLC;

Of Whom Long Grove Property Owners' Association is Appellant.

Long Grove Property Owners' Association, Inc., Third-Party Plaintiffs,

v.

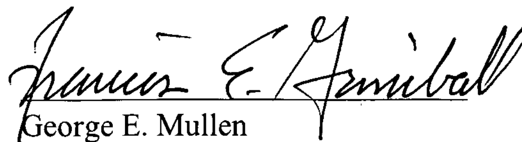
James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C; Sam Mayo d/b/a SCM Construction, Inc.; Essex Engineering Corporation, Third Party Defendants;

Of Whom James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C is Respondent.

CERTIFICATE OF COMPLIANCE

I certify that I have complied with the South Carolina Appellate Court Rule 211(b) in the submission of the Brief of the Appellant and the Reply Brief of the Appellant.

December 27, 2013



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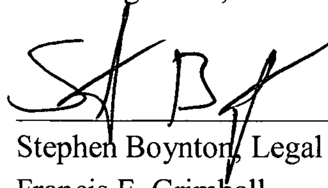
PROOF OF SERVICE

I certify that I have served the Brief of the Appellant and the Reply Brief of the Appellant on

Long Grove at Seaside Farms, LLC; The Beach Company; Gulfstream Construction Company,

Inc. by hand delivery on December 30, 2013, to their attorney of record, David J. Parrish, at his office, Nexsen Pruet, LLC, located at 205 King St, Suite #400, Charleston, SC 29401 and that I have served James Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C. by hand delivery on December 30, 2013, to its attorney of record, Laura F. Locklair, at her office, Parker Poe Adams & Bernstein, LLP, located at 200 Meeting Street, Suite 301, Charleston, SC 29401.

April 24, 2014



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