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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

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.

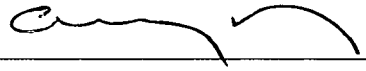
MOTION TO RECONSIDER

Appellants file this Motion for Reconsideration and Memorandum in Support of the Motion for Reconsideration in accordance with SCACR Rules 221 and 240 after the Court filed its Unpublished Opinion on July 29, 2015. This motion is limited to the issues involving Respondents Gulfstream and JHP Architecture. The appeal as to Long Grove at Seaside Farm and the Beach Company is abandoned. The points overlooked or misapprehended by the Court are the following:

1. The duties and warranties provided by general contractors and architects are different and distinct from the duties and warranties of a developer/seller.
2. The Disclaimer and Release is an exculpatory contract in violation of public policy.
3. The Order and Opinion fail to address that the release violates public policy, enabling contractors and architects to dodge their statutory obligations.
4. The Order fails to analyze and apply S.C. Code Ann. §32-2-10 which prohibits exculpatory contracts for contractors and architects.
5. The Order fails to address the issue of whether a general contractor and architect can disclaim or be released from non-delegable duties.
6. There is no law to support the position that the POA is bound by disclaimers and releases entered into by their predecessor in title (Vista).

A Memorandum in Support of this Motion is being filed contemporaneously herewith. Appellants request the Opinion be reconsidered.

Respectfully Submitted,



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MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER

Appellants respectfully submit this Memorandum in Support of its Motion for Reconsideration of the Unpublished Opinion filed on July 29, 2015. Appellants are not seeking reconsideration of the issues involving Respondents Long Grove at Seaside Farms, LLC and The Beach Company, which are the original Developers and Sellers of the Long Grove Project. The Appeal as to these two Responents is abandoned. Appellants motion for reconsideration addresses solely the issues involving Respondents Gulfstream Construction Company, Inc., the General Contractor, and James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C, the Architect (hereinafter referred to as "Gulfstream Construction/General Contractor" and "JHP Architecture/Architect").

This Court's opinion simply adopts the Order of the lower Court without analysis.[1] The Order fails to discuss or analyze the critical issues presented on appeal and fails to cite supporting legal authority. Judge Baxley's Order recognizes this case raises novel questions of whether a developer of real property can: (1) disclaim to current and subsequent buyers any and all warranties; (2) permanently release itself from any liability for the condition of such improvement; and (3) require the buyer to assume any and all related liability therefrom. However, the Order fails to address the novel issues of whether an architect and contractor can also disclaim liability and "opt out" of required building codes and industry standards; disclaim liability for their professional negligence; and disclaim warranties implied by law. The Order fails to provide legal analysis or authority to support the holdings on these "novel" questions presented to the Court.

1. **The duties and warranties provided by general contractors and architects are different and distinct from the duties and warranties of a developer/seller.**

[1] Because the Court adopted the Order of the lower court in full, Appellants are referencing the "Order" to mean both the opinion filed by this Court and the Order from the lower court.

From the beginning, the Court fails to recognize that the duties and responsibilities of general contractors and architects are different from those of the developer/seller. Unlike a seller who may disclaim liability by selling his product "as-is, with all faults," architects and contractors are held to a higher standard in order to protect the public. Gulfstream and JHP were compelled to obtain licenses from the State and be subject to regulations by state and local governments. They were compelled to design and build to the minimum requirements set forth in the various Building Codes and industry standards. *See, e.g.,* Kennedy vs. Columbia Lumber, 299 S.C. 335, 384 S.E.2d 730 (1989) (finding that a builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner . . . This is an implied warranty of workmanlike service, and is distinct from the implied warranty of habitability); 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, supra; 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 Order ignores established law applicable to general contractors and architects and instead comingles them with developers/sellers who do not have the same duties and licensing requirements.

2. **The Disclaimer and Release is an exculpatory contract in violation of public policy.**

The Order fails to address the critical issue that the "release" of Gulfstream Construction and JHP Architecture is an exculpatory contract, other than one conclusory statement at Paragraph 116: "The releases, disclaimers, and assumptions of liability contained within the sales contract and Master Deed are not 'exculpatory contracts' within the meaning of that term.". An exculpatory contract 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). How can the disclaimer and release not be an exculpatory contract? This Appellant deserves an analysis and explanation of this holding.

The Order sanctions the disclaimer and release of gross negligence of a general contractor and an architect; allows the release and transfer of non-delegable duties of a general contractor and an architect; while ignoring that the release violates public policy. The Order fails to provide any analysis whatsoever or cite any legal authority for its conclusion. By enforcing the exculpatory contract, the Court has allowed professionals licensed by this state to be exempt from standards imposed by statutory and regulatory law, designed to protect the public safety and welfare.

3. **The Order and Opinion fail to address that the release violates public policy, enabling general contractors and architects to dodge their statutory obligations.**

The Order ignores that this "release" violates public policy and enables Gulfstream and JHP to evade codes and regulations adopted by the Legislature to protect purchasers from defective design and construction by general contractors and architects. The Legislature has declared "the

public policy of South Carolina is to maintain reasonable standards of construction in building" (SC Code §6-9-5); and to that end requires all local governments to adopt applicable building codes. (SC Code §6-9-10). Violation of these building codes violates a legal duty owed to the public. Kennedy, supra. The Legislature further enacted S.C. Code Ann. §32-2-10 which reinforces the public policy of South Carolina that individuals who design and construct buildings may not contractually avoid their responsibility for defective construction. *See* Loewe v. Seagate Homes, Inc. 987 So.2d 758 (FLA 5th DCA 2008) ("...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 where the code is designed to protect.").

In Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882 (2013), Justice Beatty writing for the dissent recognized the paramount concern for protecting the public in the construction arena:

> The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Simpson [v. MSA of Myrtle Beach, Inc.], 373 S.C. at 29-30, 644 S.E.2d at 671; *see also* Pride v. S. Bell Tel. & Tel. Co., 244 S.C. 615, 619, 138 S.E.2d 155, 156-57 (1964) ("[A] contractual provision seeking to relieve a party to a contract from liability for his own negligence may or may not be enforceable, depending upon whether it is violative of public policy."). "Since such provisions 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, 244 S.C. at 619, 138 S.E.2d at 157; s*ee also* McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 247-51, 612 S.E.2d 462, 464-67 (Ct. App. 2005) (same).
>
> "[O]ur decisions recognize the general principle that considerations of public policy prohibit a party from protecting himself by contract against liability for negligence in the performance of a duty of public service, or *where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty, or when the parties are not on roughly equal bargaining terms.*" Pride, 244 S.C. at 619-20, 138 S.E.2d at 157 (emphasis added). Expressions of public policy may be found in constitutional or statutory authority or in judicial decisions. White v. J.M. Brown Amusement Co., 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004).

Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882 (2013) (Beatty, J., dissenting).

The Court's Order allows Gulfstream Construction and JHP Architecture to avoid their statutory obligations, contravene the statutes, and violate the public policy of this state, but provides no case law, analysis or authority to support such novel position. Our Legislature has declared the public policy for South Carolina to require minimum standards of construction to protect the general public. General contractors and architects are bound by the building codes imposed to regulate the construction industry and these standards and obligations cannot be waived by private contract.

4. **The Order fails to analyze and apply S.C. Code Ann. § 32-2-10 which prohibits exculpatory contracts for contractors and architects.**

The Order does not address whether our law will allow a general contractor and architect to avoid obligations created by law to protect the health and safety of the public at large. The Order provides two paragraphs finding the contract was for the "sale" of the property, not a construction contract; thus reliance on §32-2-10- is "misplaced." (Paragraphs 97 and 98).

Title 32, Chapter 2 of the SC Code of Laws is entitled "Contracts Against Public Policy." Our legislature has enacted only one Section under this Chapter, Section 32-2-10, which prohibits an exculpatory contract in favor of contractors and architects. The statute states:

> Notwithstanding any other provision of law,...[an] agreement in connection with the design...[or] construction of a building,... purporting to indemnify the promisee [or] its independent contractors against liability for damages arising out of...property damage proximately caused by or resulting from the sole negligence of the promisee [or] its independent contractors...is against public policy and unenforceable.

S.C. Code Ann.§32-2-10 (1976 revised 2007). The manifest purpose of Section 32-2-10 is to prevent architects or contractors from shifting ultimate responsibility for its negligence to another. The Court again allows a general contractor and architect to skirt its responsibilities in violation of the public policy of the State.

5. **The Order fails to address the issue of whether a general contractor and architect can disclaim or be released from non-delegable duties.**

The contract between the Developer/Seller and Vista provided at Paragraph 15, Assumption of Liability and Release of Claims:

> [Vista] assumes all responsibility for identifying and correcting all defects or problems . . . to ensure that the property is properly constructed...in accordance with all applicable building regulations, codes, standards and other applicable laws and requirements.

This provision attempts to delegate to Vista the obligations owed by the contractor, Gulfstream Construction, and the architect, JHP Architecture, to assure compliance with building codes and further assure the property is properly constructed, while attempting to relieve the contractor and architect of their statutorily mandated duty to protect the public from defective and dangerous construction. *See* Murphy v. North American River Runners, Inc., 412 S.E.2d 504 at 509 (W.Va. 1991) (holding that 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."); Loewe v. Seagate Homes, Inc., supra, (stating that "a party may not contract away its responsibility to comply with a building code. 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.").

The Order fails to cite any authority or analyze why a general contractor or architect should be released from their non-delegable duties. The Order fails to analyze and affirm that a contractor's obligation to construct a dwelling in a workmanlike manner is a duty imposed by laws and therefore cannot be waived by the owner. The Order fails to analyze why an architect

who furnishes plans and impliedly warrants their sufficiency for the intended purpose should be released from this duty imposed by law. See Kennedy vs. Columbia Lumber, supra; Hill v. Polar Pantries, supra; Beachwalk Villas Condominium Assoc., Inc. vs. Martin, supra.

6. **There is no law to support the position that the POA is bound by disclaimers and releases entered into by their predecessor in title (Vista).**

The only parties to the contract were Long Grove at Seaside Farms, LLC and Vista Realty. There is no legal authority to support the ruling by the Court that the POA bears the burden of a contract to which it was not a party. There is no authority that Vista Realty can enter into a disclaimer and release that bounds future Owners for claims and causes of action which did not presently exist. A cause of action for damages to real property accrues when the defendants' acts cause immediate and permanent injury resulting in actual and appreciable harm to the property. Stofer v. Shapell, 233 Cal App 4th 176 (2015). The cause of action for defective construction belongs to the owners who first discovered the property damage. Standard Fire Ins. V. Spectrum, 141 Cal App 4th 1117 (2006). Until the damages accrue and manifest themselves, there was no claim or cause of action for Vista to release. The damages at Long Grove occurred during the ownership of the POA, and it is the POA's claim to assert. Gulfstream Construction and JHP Architecture's obligations to construct and to design Long Grove in compliance with building codes and industry standards is a duty owed to subsequent owners. Kennedy, supra; Terlinde, supra. These obligations, therefore, are owed to the current Long Grove owners, and could not be waived by their predecessor in title.

7. **Specific conclusions of law in Judge Baxley's Order and adopted by this Court are simply wrong; contrary to the existing law; and repugnant to the public policy of this State.**

Incorrect Conclusion of Law #1

Order, Conclusions of Law Section I. The Court Finds Gulfstream[2] And JHP Did Not Extend Any Warranties To The POA And Owes No Duty Of Care To The POA.

- The Court is wrong. Gulfstream Construction extended warranties and owed a duty of care to the POA. When General Contractor Gulfstream Construction undertook the construction of Long Grove, it extended the warranty of workmanlike service and impliedly warranted that the work undertaken would be performed in a careful, diligent, workmanlike manner. This warranty extends to subsequent purchasers of the property. Kennedy v. Columbia Lumber, supra.
- Gulfstream owed a duty of care to construct within industry standards. Terlinde v. Neely, supra.
- The Court is wrong as to JHP Architecture which extended warranties and owed a duty of care to the POA. When JHP undertook the furnishing of plans and specifications for the design of Long Grove, it impliedly warranted the sufficiency of those plans for the intended purpose. Hill v. Polar Pantries, supra; Beachwalk v. Martin, supra.
- A design professional owes a professional duty which arises separate and distinct from any contractual duties. Tommy L. Griffin Plumbing & Heating Co. vs. Jordon, Jones & Goulding, Inc., supra.

Incorrect Conclusion of Law #2

Order, Paragraph 63- "...the Court finds that Gulfstream and JHP did not place the condominiums into the stream of commerce ... thus the POA claims are barred as a matter of law"

[2] Judge Baxley's Order refers to LGSF to collectively include Gulfstream and the Developer entities. Since the Developers are no longer involved in this appeal, Gulfstream will be substituted for LGSF in citing the Order.

- The General Contractor's and Architect's liability is derived from their performance of their construction duties, not from placing the condominiums into the stream of commerce; both still owe implied warranties and duties of care that do not spring from the sale. The General Contractor impliedly warranted the work undertaken would be performed in a careful, diligent workmanlike manner which does not spring from a sale. Privity of contract as a defense to an implied warranty action has been abolished in this State. Kennedy v. Columbia Lumber, supra.
- When JHP undertook the furnishing of plans and specifications for the design of Long Grove, it impliedly warranted the sufficiency of those plans for the intended purpose which does not spring from a sale. Hill v. Polar Pantries, supra. Lack of privity is not a defense when one undertakes the design and impliedly warrants the design. Tommy L. Griffin Plumbing & Heating Co. vs. Jordon, Jones & Goulding, Inc., supra.

Incorrect Conclusion of Law #3

Order, Paragraph 85 - "...as a matter of law the POA cannot now claim that Gulfstream placed the property in the stream of commerce as is required to trigger liability for construction defects in the property based on theories of implied warranties and negligence."

- This conclusion is absurd and has no legal basis. Placing the property into the stream of commerce is not required to trigger general contractor and architect's liability for implied warranties and negligence. Gulfstream Construction impliedly warranted the work undertaken would be performed in a careful, diligent, workmanlike manner. This is distinct from the implied warranty of habitability which springs from the sale. Kennedy v. Columbia Lumber, supra; Terlinde v. Neely, supra.

- When JHP undertook the furnishing of plans and specifications for the design of Long Grove, it impliedly warranted the sufficiency of those plans for the intended purpose which again does not spring from a sale. Hill v. Polar Pantries, supra; Beachwalk v. Martin, supra.

Incorrect Conclusion of Law #4

Order, Paragraph 87 - "Gulfstream did not extend any warranties to the POA and owes no duty of care to the POA."

- See Incorrect Conclusion of Law #1

Incorrect Conclusion of Law # 5

Order, Section IV. - The Court finds the Release is not Contrary to Public Policy Under S.C. Code Ann.§ 32-2-10.

Order, Paragraph 97 - "This Court finds the POA's reliance on §32-2-10 is misplaced because . . . that statute pertains to hold harmless clauses in "construction contracts" . . ." and

Order, Paragraph 98 - " . . . There was no construction contract between Gulfstream and Vista. The terms of 32-2-10...do not apply here."

- The Court ignores the full text in the body of §32-2-10 and takes a narrow view that §32-2-10 does not apply because there was no "construction contract" between Gulfstream and Vista, relying on the heading of the Section "Hold harmless clauses in certain construction contracts." Titles and headings may not be construed to limit the plain meaning of the text of the law. Garner v. Houck, 435 SE 2d 847 (1993). The statue applies to promises or agreements in connection with the design or construction of a building. Clearly the promise to release and not sue Gulfstream and JHP are agreements in connection with such construction.

- The Court incorrectly finds S.C. Code Ann. §32-2-10 is not applicable based on the heading of the statute and ignores the language of the statute itself. Title 32, Chapter 2 is entitled "Contracts Against Public Policy. The topics in §32-2-10 include "promises or agreements in connection with the design, planning, construction, alternation, repair or maintenance of a building, structure."
- The General Contractor made implied warranties and owed duties *in connection with the construction* of this project that cannot be waived. The Architect made implied warranties and owed *duties in connection with the design* of this project that cannot be waived. The General Contractor and Architect cannot enter into a hold harmless agreement to indemnify against liability for damages arising out of bodily injury or property damage caused by the negligence of the general contractor or architect. It is against public policy and unenforceable, in clear violation of §32-2-10.

Incorrect Conclusion of Law #6

Order, Paragraph 111 - "The Court finds no violation of law or public policy here"

The Court ignores S.C. Code Ann. §6-9-5 setting forth that the public policy of South Carolina is to maintain reasonable standards of construction in buildings . . consistent with the public health, safety and welfare of its citizens." S.C. Code §6-9-5 et. seq. requires local governments adopt the applicable building codes. If contractors and architects can disclaim their negligence and can ignore building codes, the public policy of South Carolina is absolutely at issue. Kennedy v. Columbia Lumber, supra.

Incorrect Conclusion of Law #7

Order, Section VIII. The Sales Contract is not an impermissible exculpatory contract and does not transfer non-delegable duties.

The contract between Beach Co. and Vista provided at Paragraph 15. Assumption of Liability and Release of Claims states:

> [Vista] assumes all responsibility for identifying and correcting all defects or problems . . . to ensure that the property is properly constructed...in accordance with all applicable building regulations, codes, standards and other applicable laws and requirements.

This language is a clear delegation of duties, specifically to assure the building is code compliant. The Court clearly allowed the non-delegable duties imposed upon general contractor Gulfstream and architect JHP to be delegated to Vista. The Court gives no legal basis for this conclusion.

Incorrect Conclusion of Law #8

Order, Paragraph 114 - "...the Court finds ...the POA...lacks standing to raise a contractual argument as to the enforceability of the provisions contained within the contract."

The Court finds the POA lacks standing yet burdens the POA by its decision. The Court finds the contract is enforceable against the POA but then finds that the POA has no standing to challenge the contract as against public policy. How can this contract be enforced against the POA but then mandate that the POA has no ability to challenge the contract?

Incorrect Conclusion of Law #9

Order, Paragraph 116 - "The releases, disclaimers, and assumptions of liability contained within the Sales Contract and Master Deed are not "exculpatory contracts."

The Court makes a blanket legal conclusion, but fails to explain why the release is not an exculpatory contract. The Court upholds the release of potential latent construction defects at a time when no damages had manifested within the property, and further bound subsequent

homeowners who ultimately suffered the damages. The Court gives no legal basis for such decision.

CONCLUSION

The night before oral arguments in this matter, six college students in Los Angeles, California, tragically fell to their deaths when an apartment balcony collapsed. The cause of the collapse was the failure of the waterproofing system resulting in rot and decay of the untreated joist supporting the deck. This failure was the result of the negligent design and construction of the building. If that same accident occurred at Long Grove and the Order stands as the law of this case, then those students and their families would have no recourse or remedy against the architect and general contractor who violated numerous building codes and industry standards in designing and constructing the project. The architect and general contractor would completely avoid responsibility for their gross negligence resulting in death of innocent members of the public. If the Order and Opinion stand, this Court will give general contractors and architects the ability to contractually avoid any liability for failing to comply with mandated building codes and regulations; to nullify their non-delegable duties; and to endanger the public at large. This is a radical and dangerous decision for the homeowners of South Carolina, with devastating consequences. This Opinion is clearly against the public policy and established law of this State.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on August 12, 2015, I served a true and correct copy of the foregoing Motion to Reconsider and Memorandum in Support of Motion to Reconsider via U.S. Mail only upon the following:

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August 12, 2015

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Long Grove at Seaside v. Long Grove Property Owners (James, Harwick & Partners)
Appellate Case No. 2012-213584

Dear Ms. Kitchings:

Enclosed please find for filing are the following documents:

(1) An Original and six(6) copies of the Motion to Reconsider

(2) An Original and six(6) copies of the Memorandum in Support of Motion to Reconsider

(3) An Original and six (6) copies of the Certificate of Service for the Motion for Reconsider and Memorandum in Support on the Respondents and all other counsel of record and Office of Court Administration

(4) An extra copy of the Motion for Reconsider, Memorandum in Support and Certificate of Service to be file-stamped and returned in the enclosed pre-postage paid self-addressed envelope.

(5) A check in the amount of $25.00 for the Motion Filing Fee.

Thank you in advance for your help with this matter

Sincerely,

George E. Mullen

GEM/pm

George E. Mullen

Robert L. Wylie, IV

Francis E. Grimball

James E. Lady

Amy W. Wates

Allison B. Thompson

Andrew J. Toney

Enclosures

cc: David J. Parrish, Esquire
Laura Locklair, Esquire
L. Dean Best, Esquire
Jesse A. Kirchner, Esquire
Morgan S. Templeton, Esquire
Taylor H. Stair, Esquire
Elizabeth Jowers, Esquire
Office of Court Administration (VIA Hand Delivery)