

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from the Court of Common Pleas  
For Charleston County  
Civil Action No.: 2009-CP-10-6746  
Appellate Case No.: 2012-213584

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**RECEIVED**  
SEP 03 2015  
SC Court of Appeals

Long Grove at Seaside Farms, LLC; The Beach Company; and 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, Inc. 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.; and Essex Engineering Corporation, Third-Party  
Defendants,

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

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**RESPONDENTS' JOINT RETURN TO  
APPELLANTS' MOTION TO RECONSIDER**

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Respondents Long Grove at Seaside Farms, LLC (“LGSF”), The Beach Company, Gulfstream Construction Company, Inc. (“Gulfstream”), and James, Harwick & Partners, Inc. (“JHP”) submit the following joint return to Appellant Long Grove Property Owners’ Association, Inc. (the “POA’s”) Motion to Reconsider the Court of Appeals Opinion filed on July 29, 2015.

### **Discussion**

A proper petition for rehearing must state with particularity the points supposed to have been overlooked or misapprehended in the prior decision by the court. In fact, in order to prevail on a petition for rehearing, the petitioner must demonstrate that the court actually did overlook or misapprehend relevant or material points in the appeal. *Kennedy v. South Carolina Retirement System and the South Carolina Budget and Control Board*, 349 S.C. 531, 564 S.E.2d 322 (2001). However, a petition for rehearing is not proper, and should not succeed, merely to allow the lawyers for the losing party to reargue or retry their case, or to present points which they – not the court – overlooked or misapprehended in the prior arguments.

In its petition for rehearing, the POA fails to demonstrate any relevant or material points which the trial court, or this court, previously overlooked or misapprehended. The key is that the courts address the relevant and material points of the case, not that the orders and opinions specifically address each and every subpart of an appellant’s repetitive arguments. The trial court’s order at issue in this appeal clearly addresses each relevant and material point of the POA’s claims and arguments, and this court equally addressed the relevant and material points of the case, and the appeal, by adopting the trial court’s order in its entirety. The petition for rehearing merely repeats the same points, and rehashes the same multiple, overlapping, and

repetitive arguments for the fourth time in this case. It simply repackages the same points and arguments presented to and addressed by the trial court and presented in the prior briefs and oral argument to this court. A petition for rehearing does not exist for an appellant to persist until it gets the response it desires to each and every nuanced assertion in its arguments.

All of the points asserted in the POA's motion to reconsider, whether characterized under the heading "statutory obligations," "public policy," "exculpatory contract" or otherwise, all circle back to and rely on the following single underlying argument: A contractor and architect<sup>1</sup> can never, ever disclaim or be released from liability for the condition of improved property even upon its subsequent and remote sale. The POA would have had the trial court, and now would have this court, hold that even after a remote future sale and conversion in use of the property, the architect and contractor should remain virtually strictly liable to future downstream purchasers for any defects in the property, regardless of any notices, disclaimers, and releases agreed to by a buyer.<sup>2</sup> That is not the law or policy in the State of South Carolina and that point was addressed in the prior orders and decisions.

Not only were each of the relevant and material points in the case addressed, the overarching reasoning and logic applied by the courts in rejecting the point which is the cornerstone of the POA's argument is unassailable. Specifically, the real effort of the petition for rehearing is to obtain one more forum for the POA's effort to assert that South Carolina's general system of building codes and licensing statutes for architects and contractors should be

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<sup>1</sup> In its motion to reconsider the POA "abandoned" the portion of its appeal pertaining LGSF and The Beach Company.

<sup>2</sup> That theory is reflected in the POA's arguments to the trial court, in the POA's appellate briefs, was candidly and forcefully presented by the POA's counsel during oral argument before this Court, and is again asserted in its motion to reconsider.

interpreted to give rise to a private right of action based on an assumed “non-delegable” or “non-releasable” duty. This is the POA’s repeated argument or theory to avoid, or undo the notice, disclaimers, and releases of the original apartment developer, contractor, and architect that occurred when the property was sold and subsequently converted to condominiums.

The POA argues that “the duties and responsibilities of general contractors and architects are different than that of the developer/seller.” (POA’s Motion to Reconsider at p. 3). The POA had to “abandon” its appeal as to LGSF and The Beach Company in an effort to argue this novel theory. The POA’s “non-delegable and non-releasable” duty argument improperly attempts to fuse (and confuse) the separate concepts of civil liability imposed by common law for defective construction or design, with the distinct concept of professional responsibility arising from the requirements imposed by licensing boards that govern contractors and architects. The predicates argued by the POA, S.C. CODE ANN. §§ 40-3-5 et seq., S.C. Code of Regulations R.11-1 et seq., and the other licensing statutes referenced by the POA, do not contain any language evidencing a legislative intent to create such a non-disclaimable and non-releasable legal duty and civil liability. There is no evidence that the legislature enacted the codes or licensing statutes for the benefit and use of the POA or any other private party. In fact, the South Carolina Supreme Court expressly rejected the POA’s concept of non-delegable liability imposed on contractors and designers based on building codes and professional licensing statutes. *See 16 Jade Street, LLC v. R. Design Const. Co., LLC.*, 405 S.C. 384, 390 747 S.E.2d 770, 773 (2013) (“[W]e disagree with the court's conclusion that professional responsibility is tantamount to civil liability. The only consequences imposed by virtue of an individual's license are to be meted out specifically by the appropriate licensing board, not a civil court.”); *Kirkman v. Parex, Inc.*, 369 S.C. 477, 483, 632

S.E.2d 854, 857 (2006) (holding the implied warranty of habitability, which arises from the sale of a new home, can be disclaimed by the “seller,” which disclaimer logically applies to a contractor when the contractor is the seller).<sup>3</sup>

The POA’s “non-delegable duty, non-releasable, and never-ending liability theory” as to contractor and architect conflicts with the purpose and policy underlying S.C. CODE ANN. § 27-31-430. The General Assembly enacted that specific statute in order to protect condominium buyers from the potential problems inherent when converting “used” and aged rental apartment buildings into new condominiums by requiring the converter of the rental apartment to provide all prospective condominium purchasers with a written report prepared by an independent registered architect or engineer which discloses the “physical condition of the building.”

In short, the building codes and licensing statutes cited by the POA do not create a private right of action, or give rise to “non-delegable and non-releasable” duties on behalf of the contractor and architect. Certainly, those codes and statutes do not vitiate the notice and disclaimers given, and releases obtained by the original apartment developer, contractor, and architect when the property was sold to another developer and subsequently converted to condominiums. In fact, adoption of the POA’s “non-delegable and non-releasable” theory of liability of contractors and architects would logically lead to some very troubling results.

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<sup>3</sup> The problems that grow out of the POA’s “non-delegable and non-releasable” theory liability as to contractors and architects compound even more when considering that quite often the developer, contractor, and seller may be the same entity or a group of closely related entities. Under the POA’s theory, a contractor that develops, builds, and sells a home could be released from some duties and liabilities but can never be released from others duties and liabilities.

- a. **If adopted, the POA's position would mean the only practical or feasible way that an owner can ever avoid future liability, for itself, its contractor and designer, is to refrain from any sale of property that might be used for future residential purposes.**

Under the POA's theory, future liability would be unavoidable upon the sale of improved property that might be used for residential purposes. This means a developer, contractor and designer could only limit exposure to future unknown and unintended buyers by preventing such future sales of the property. Such an alienation on the future use of property is contrary to basic principles of property law and the right to freedom of contract. None of these respondents had any ownership interest, or right of control over the property when Vista converted the property to condominiums and then sold the converted units. At both the trial court level and during recent appellate oral argument before this Court, the POA's counsel could not articulate any feasible or practical way to cut the liability "string" of the original developer, contractor and designer when the property was sold. Instead, during oral argument before this Court, the POA's counsel asserted that the duties imposed on contractors and architects are "non-delegable" and can never be disclaimed or released. Under the POA's "non-delegable and non-releasable duty" theory, the apartment contractor and architect are forever liable to the POA, and, in fact, subsequent unit owners, for any problems that might be linked in some way to original design or construction of the apartments. Under the POA's theory, even if the contractor and architect were to settle and make payment to the POA and unit owners in this case for the alleged defects, the contractor and architect will still have a "non-delegable duty and liability" in the future to subsequent downstream unit owners.

In short, the POA proposes a theory that results in the imposition of unending, virtual strict liability on contractor and architects. That is not the law in South Carolina and the trial court clearly addressed this point in its order, which this court adopted.

- b. The POA’s position would effectively nullify the disclaimers and releases of future claims that are a material point in every settlement of every construction defects lawsuit in South Carolina.**

The POA argues that the duties imposed on contractors and architects are “non-delegable” and can never be disclaimed or released. If adopted, the POA’s argument would effectively nullify and void the disclaimers and releases that are contained in every settlement of every past and future construction defects lawsuit in South Carolina.

In this case, the defects alleged by the POA include construction defects and water damage at the balconies—the same balconies that Vista (the condo converter) hired its own contractors to repair after it purchased the property from LGSF and for which Vista received \$200,000 in escrowed funds paid by the apartment seller at closing to cover Vista’s cost of those repairs.<sup>4</sup> Under the POA’s theory, even if Vista had sued the defendants and settled with the original contractor/architect regarding the condition of the balconies, the disclaimer and release of the contractor/architect from future liability which would have been expressed in that settlement agreement would be void. Despite having been sued on the claims and having paid to resolve those defect claims, and to receive a release, as a “non-delegable and non-releasable” obligation of the contractor/architect agreement under the POA’s theory, the defendants would nonetheless be, and remain, liable to other future purchasers or owners. Such results must be

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<sup>4</sup> R. p. 271 at p. 281 (POA’s Counterclaim at ¶¶ 59(a), (b), (f), and (i)). See also R. p. 346 (POA’s Memorandum in Opposition to LGSF’s Motion to Dismiss, which lists the alleged defects in the buildings).

recognized as absurd – just as the trial court clearly concluded in a detailed and well-reasoned order, which this this court affirmed by adoption of the trial court’s order.

Moreover, taken to its next logical step, the POA’s “non-delegable and non-releasable” theory, if adopted, would equally apply to subcontractors, engineers, surveyors, plumbers, residential builders, and all other construction-related occupations and professions subject to licensing requirements under Title 40 (*Professions and Occupations*) of the South Carolina Code. Under the POA’s theory, any release by a present owner of claims applicable to such persons or entity would be an improper release of “non-delegable and non-releasable” obligations and leave them fully liable to future purchasers or owners. In orders words, the POA’s theory would effectively nullify and void disclaimers and releases contained in every settlement of every past and future lawsuit involving parties that are subject to Title 40 of the South Carolina Code.

### **Conclusion**

The POA abandoned its appeal as to the developer and seller in an attempt to recast this case now as an attack solely on the contractor and architect under the same theory of non-delegable and non-releasable duties which the trial court and this court previously rejected. Merely because the POA seeks to redefine and refocus its case, it is not entitled to a rehearing. In fact, the POA merely seeks to distract attention away from the following undisputed facts and legal issues that have existed, and have been addressed, from the very beginning of this case:

Here, used rental apartment property was clearly and unequivocally sold to Vista on an “as-is” and “with all defects” basis and with a disclaimer and release of all warranties and liabilities associated with the condition of the property. The apartment owner (LGSF), on behalf

of itself and its contractor and architect, took the extraordinary step of requiring that Vista provide notice of those disclaimers and releases to future buyers if Vista converted the property to condominiums. Any warranties, duties, or liabilities that arose during the construction of the rental apartments were clearly and unequivocally extinguished (“cut”) with the express consent of the buyer (Vista) under the terms of the contract by which Vista purchased the property from LGSF.

The point of this case, and this appeal, was and is: In light of the notices, disclaimers, and releases contained in the sales contract between LGSF and Vista (and which are also recited in the POA’s Master Deed), may the POA or subsequent unit buyers avoid the bargained for and unequivocal releases, and assert that the contractors and architect are, and remain, liable on the theory that their duties are “non-delegable” and “non-releasable.” As astutely noted by the trial judge in the order adopted by this Court on appeal:

“[I]t would be inappropriate to allow the purchaser of Long Grove (Vista) to waive all warranties and rights of action as part of a purchase bargain, but then create an entity (the POA) that would somehow revive those rights and warranties.”

(Judge Baxley’s Order ¶ 86)<sup>5</sup>

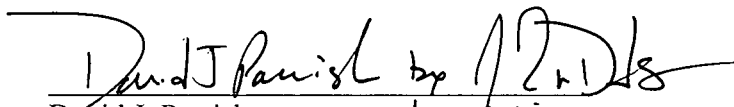
Contrary to the POA’s arguments, the laws and statutes of the State of South Carolina do not impose non-disclaimable and non-releasable never-ending liability on contractors and architects. South Carolina has never gone so far as to state or suggest that contractors or designers can never disclaim or be released from liability for construction defects and instead they must remain strictly liable under all circumstances. The trial court and this court addressed this point and did not overlook or misapprehend any of the arguments presented by the POA. By

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<sup>5</sup> R. p. 1 at p. 27

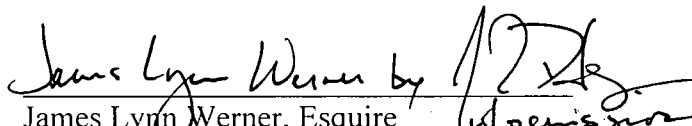
claiming non-delegable and non-releasable duties, the POA is seeking a fundamental change and expansion of the law in South Carolina. It must pursue that remedy by a petition for writ of certiorari, not by a motion to reconsider. The POA's petition for rehearing should be denied.<sup>6</sup>

Respectfully submitted,



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September 3, 2015

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<sup>6</sup> Any arguments raised in the POA's Motion to Reconsider that are not encompassed in the scope of the above discussion in this Return are addressed in detail in Respondents' Appellate Brief and in turn the trial court order that was adopted in full by this Court in its Opinion. For purposes of brevity and in an effort to avoid duplication, Respondents adopt and incorporate by reference their appellate brief and the trial court's order as part of their return in opposition to the POA's motion to reconsider.

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Appeal from the Court of Common Pleas  
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Long Grove at Seaside Farms, LLC; The Beach Company; and  
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v.

Long Grove Property Owners' Association, Inc.;  
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Of Whom Long Grove Property Owners' Association, Inc. is Appellant.

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

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.

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**PROOF OF SERVICE FOR RESPONDENTS' RETURN TO  
APPELLANT'S MOTION TO RECONSIDER**

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SC Court of Appeals

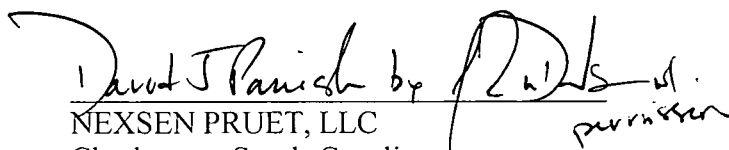
I, hereby certify that on September 3, 2015, I served a copy of the Respondents' Return to Appellant's Motion to Reconsider on counsel for the parties of record in this case via electronic mail and/or United States Mail, postage pre-paid, as addressed shown below.

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September 3, 2015

David J. Parrish  
Member  
Admitted in SC

**VIA HAND DELIVERY**

The Honorable Jenny A. Kitchings  
Clerk of Court, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29211

**Re: Long Grove Property Owners Association, Inc., et al. v. The Beach Company, et al.**  
**Case No.: 2011-CP-10-8315/Appeal No.: 2012-213584**

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Respondents' Return to Appellant's Motion to Reconsider along with the Proof of Service in the above-referenced matter. I am serving a copy of this letter and enclosures upon all counsel of record in this matter.

If you need anything else or I otherwise may be of any assistance to you regarding this matter, please feel free to contact me at your convenience.

With kind regards,

*David J. Parrish by [Signature]*  
David J. Parrish  
*w/ permission*

DJP/cll  
Enclosures

cc: George E. Mullen, Esquire  
Francis E. Grimbball, Esquire  
James Lynn Werner, Esquire  
Laura Locklair, Esquire  
Stephen P. Groves, Esquire

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