

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY S.C. SUPREME COURT  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

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Unpublished Opinion No. 2015-UP-377 (S.C. Ct. App. filed July 29, 2015)

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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 Petitioner.

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.

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**APPENDIX**

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The 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.; Essex Engineering Corporation,  
Third-Party Defendants,

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

Appellate Case No. 2012-213584

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Appeal From Charleston County  
J. Michael Baxley, Circuit Court Judge

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**AFFIRMED**

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Francis E. Grimball, of Mullen Wylie, LLC, of Charleston, and George E. Mullen, of Mullen Wylie, LLC, of Hilton Head Island, for Appellant.

David Jay Parrish and Stephen Peterson Groves, Sr., both of Nexsen Pruet, LLC, of Charleston, for Respondents Long Grove at Seaside Farms, LLC, The Beach Company, and Gulfstream Construction Company, Inc. James Lynn Werner, of Parker Poe Adams & Bernstein, LLP, of Columbia, and Laura Figueroa Locklair, of Parker Poe Adams & Bernstein, LLP, of Charleston, for Respondent James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C.

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**PER CURIAM:** Long Grove Property Owners' Association (the POA) appeals from the trial court's order granting summary judgment in favor of Long Grove at Seaside Farms, LLC; The Beach Company; and Gulfstream Construction Company, Inc. (collectively, Long Grove), as well as James, Harwick & Partners, Inc. n/k/a JHP Architecture/Urban Design, P.C. (JHP) (all collectively, Respondents). The POA argues the trial court erred in (1) not finding the contract at issue is an exculpatory contract and void because it violates public policy; (2) allowing Long Grove and JHP to avoid non-delegable duties; (3) finding the POA is bound by a contract to which it was not a party; and (4) not finding the contract at issue is unconscionable and therefore void and unenforceable.

We affirm and adopt the trial court's order in full. *See Byrd v. Livingston*, 398 S.C. 237, 245, 727 S.E.2d 620, 624 (Ct. App. 2012) (adopting the trial court's order as to some issues); *Grosshuesch v. Cramer*, 367 S.C. 1, 6, 623 S.E.2d 833, 835 (2005) (adopting the reasoning set forth in the trial court's order as to some of the issues on appeal).

**AFFIRMED.**

**HUFF, SHORT and LOCKEMY, JJ., concur.**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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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.

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MOTION TO RECONSIDER

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SC Court of Appeals

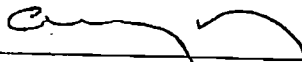
Appellants file this Motion for Reconsideration and Memorandum in Support of the Motion for Reconsideration in accordance with SCACR Rules 221 and 240 after the Court filed its Unpublished Opinion on July 29, 2015. This motion is limited to the issues involving Respondents Gulfstream and JHP Architecture. 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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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

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Appellate Case No. 2012-213584

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

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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.

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**MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER**

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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 Respondents 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.<sup>1</sup> 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.**

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<sup>1</sup> 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 5<sup>th</sup> 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; see 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 or how furnishes plans and impliedly warrants their sufficiency for the intended purpose can 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 4<sup>th</sup> 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 4<sup>th</sup> 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<sup>2</sup> 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"***

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<sup>2</sup> 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 statute 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."**

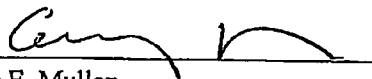
The Court makes a blanket legal conclusion, but fails to explain why the release is not an exculpatory contract. The Court upholds the release of potential latent construction defects at a time when no damages had manifested within the property, and further bound subsequent

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.

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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.

---

**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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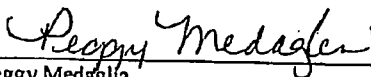
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Peggy Medaglia

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

---

**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.

---

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

---

NPCHAR1:1616562.12

Jointly submitted by:

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NPCHAR1:1616562.12

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)5

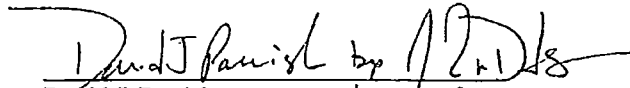
Contrary to the POA’s arguments, the laws and statutes of the State of South Carolina do not impose non-disclaimable and non-releasable never-ending liability on contractors and architects. South Carolina has never gone so far as to state or suggest that contractors or designers can never disclaim or 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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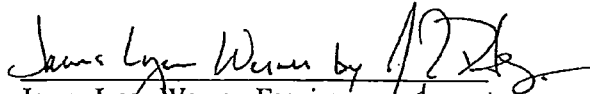
5 R. p. 1 at p. 27

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

<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.

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

NPCHAR1:1616562.12

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

---

**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 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.  
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---

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

---

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NPCHAR1:1617355.1

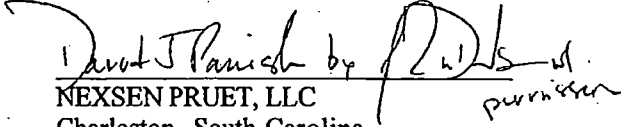
I, hereby certify that on September 3, 2015, I served a copy of the Respondents' Return to Appellant's Motion to Reconsider on counsel for the parties of record in this case via electronic mail and/or United States Mail, postage pre-paid, as addressed shown below.

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NPCHAR1:1617355.1

# The South Carolina 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,

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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.

Appellate Case No. 2012-213584

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## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

*Thomas C. Hoff*

J.

*Paul E. Short, Jr.*

J.

*James E. Lockyer*

J.

Columbia, South Carolina

cc:

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Stephen Peterson Groves, Sr., Esquire  
James Lynn Werner, Esquire

**FILED**

September 18, 2015