THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from the Court of Common Pleas
For Charleston County
Civil Action No.: 2009-CP-10-6746
Appellate Case No.: ***2015-002131***

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;

Defendants,

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

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.; and Essex Engineering Corporation,

Third-Party Defendants,

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

Respondent.

RESPONDENTS' JOINT RETURN TO PETITION FOR A WRIT OF CERTIORARI

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The Respondents respectfully submit the following joint Return to the Petition for Writ of Certiorari previously filed by the Petitioner, the Long Grove Property Owners' Association, Inc. (the "POA"), in this appellate matter.

STATEMENT OF THE CASE

This appeal concerns a condominium property owner association's challenge to the legal effect and enforceability of disclaimers/releases arising from the sale and subsequent conversion of a rental apartment complex to condominiums. The Long Grove Condominiums located in Mount Pleasant, South Carolina were formerly the Long Grove Apartment - a rental apartment complex. Long Grove at Seaside Farms, LLC ("LGSF") owned the apartments. Gulfstream Construction Company, Inc. ("Gulfstream") was the general contractor that constructed the apartments. The Beach Company managed the entity which was LGSF's managing member. James, Harwick & Partners, Inc. ("JHP") was the architect that designed the apartments.

The Long Grove Apartments were designed and constructed around 1999 for use as a rental apartment complex. LGSF owned/operated the property solely as a rental apartment complex, but never as a condominium development. In 2004 LGSF considered selling the complex. From the beginning of the transaction, LGSF made it absolutely clear that if any buyer intended to convert the property to condominiums, LGSF and its affiliates must be released from all such liability.[1]

LGSF received bids for the property from both income investors and converters. Ultimately, the Defendant Vista Realty Partners, LLC ("Vista") was the high bidder. Vista is owned by Eduard de Guardiola, who has a law degree and is an experienced

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1 R. p. 987, line 24-p.989, line 18.

real estate developer and condominium converter.[2] Vista was an independent, arms-length buyer that has no relationship with LGSF. Upon receipt of Vista's high bid, Vista and LGSF initiated negotiation as to the terms of the sale of the apartments. At each step, LGSF set forth the liability release requirement.[3] Vista and LGSF, both represented by legal counsel, began negotiating the terms of a written sales contract and reducing the agreement to writing. Ultimately, LGSF and Vista[4] entered into a Sales Contract which stated, in pertinent part, as follows:

> 14. **Condition of Property.** . . . .The Property shall be sold and conveyed strictly on an "as is", "where is", "without recourse" and "with all defects" basis, as it exists on the last day of the Inspection Period, without representation, warranty or covenant, express, implied or statutory, of any kind whatsoever, including, without limitation, representation, warranty or covenant as to condition (structural, environmental, mechanical or otherwise), past or present use, construction, development, lease performance, investment potential, tax ramifications or consequences, income, compliance with law, habitability, tenancies, merchantability or fitness or suitability for any purpose, all of which are hereby expressly disclaimed except as contained in this Agreement. Without limiting the generality of the foregoing, Purchaser acknowledges that Seller has made no representations, warranties or covenants (except as otherwise provided specifically in this Sales Contract, specifically including but not limited to the representations and warranties contained in paragraph 6 hereof) as to the compliance of the Property with any federal, state, municipal or local statutes, laws, rules, regulations or ordinances, including, without limitation, those pertaining to construction, rent control, building and health codes, land use (or permits issued in connection therewith) . . . .[5]

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[2] R.p.1048, line 3 – R.p.1051, line 3; R.p.1052, line 24 – R.p.1055, line 7.

[3] The parties' initial term sheet stated: "The Property will be sold and purchased "as-is, where-is, and with all faults'; Seller will be released from all liabilities except those arising under the purchase and sale agreement." R.p.1048, line 3 – R.p.1051, line 3; R.p.1052, line 24 –R.p.1055, line 7. *See also* Transmittal Cover Letter sending the initial term sheet. R.p.1064.

[4] Prior to closing Vista Realty Partners, LLC assigned its rights under the Sales Contract to Long Grove Vista, LLC, which is an entity established by Eduard de Guardiola to take title to the property. Vista Realty Partners, LLC and Long Grove Vista, LLC are collectively referred to as "Vista" for brevity and ease of reference.

[5] R.p.60 at pp.70-71.

The Sales Contract also stated:

> 15. **Assumption of Liability and Release of Claims.**
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> a) . . . Purchaser assumes all responsibility for identifying and correcting all defects or problems, if any, that may exist, to ensure that the Property is properly constructed and suitable for use as condominiums in accordance with all applicable building regulations, codes, standards, and other applicable laws and requirements.
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> b) . . . Purchaser on behalf of itself and its heirs, representatives, successors, and assigns, agrees to never sue and completely releases Seller, The Beach Co., Gulfstream Construction Company, Seller's other affiliates, agents, officers, directors, employees, insurers, representatives, successors, assigns, and all other companies, partnerships, entities, or persons involved in the design, development and/or construction of the apartment buildings and apartments therein and all other improvements prior to the Closing Date of this sale transaction (collectively, the "Affiliates"), for and from any and all claims of every kind whatsoever arising from or related to the development, design, construction, maintenance, alteration, or repair of the Property, including unknown and unforeseen claims that may now exist or that may arise in the future. [6]

In an effort to ensure that Vista would provide future condominium buyers with notice Respondents had no role in the conversion and would not be responsible for any claimed construction defects, LGSF also required the eventual Master Deed for any condominium regime Vista prepared and recorded after the purchase to include a notice of Vista's complete assumption of liability, disclaimers, and releases of all claims related to the construction and condition of the property.[7]

This provision was a key component of LGSF's and Vista's negotiations regarding the Sales Contract's terms. In fact, for LGSF, those terms were non-negotiable fundamental terms of the contract and LGSF would not have sold the property to Vista if Vista had not agreed to those terms.[8] Vista acknowledged this

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6 R.p.71 (Emphasis added).

7 R.p.72 (Paragraph 16 in the LGSF/Vista Sales Contract).

8 R.p.1000, line 22 –R.p.1001, line 7.

position.[9] Vista accepted LGSF demands and signed the Sales Contract containing those terms.

The Sales Contract gave Vista a due diligence period to inspect the condition of the property prior to closing. Vista hired engineers to inspect the property and the eventual property condition reports identified defects in the buildings, including water damage on the exterior balconies.[10]

The sale closed on March 7, 2005. The duly recorded real estate deed from LGSF to Vista states, in pertinent part as follows:

> . . . the Property is being conveyed strictly on an "as is", "where is" and "with all defects" basis, without representation, warranty or covenant, express, implied or statutory, of any kind whatsoever, including, without limitation, representation, warranty or covenant as to condition (structural, environmental, mechanical or otherwise), past or present use, construction, development, lease performance, investment potential, tax ramifications or consequences, income, compliance with law, habitability, tenancies, merchantability or fitness or suitability for any purpose, all of which are hereby expressly disclaimed. Without limiting the generality of the foregoing, Grantee acknowledges that Grantor and its affiliates (The Beach Co. and Gulfstream Construction Company) have made no representations, warranties or covenants as to the compliance of the Property with any federal, state, municipal or local statutes, laws, rules, regulations or ordinances, ...[11]

After closing on the property, Vista converted the rental apartments to condominiums. Vista's legal counsel also prepared and recorded a Master Deed which created the Long Grove Horizontal Property Regime and the POA.[12]

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9 R.p.1056, line 16 – R.p.1057, line 3; R.p.1097, lines 11-20.

10 R.p.1100; R.p.1178. Prior to closing, Vista required LGSF to escrow $200,000.00 of the sales proceeds to cover Vista's future cost for the balcony repairs. R.p.1187. Afterwards, Vista hired its own contractors to repair the balconies and perform other work on the buildings. R.p.1099, lines 3-16. Vista then received the $200,000.00 escrowed funds.

11 R.pp.143-144 (first paragraph) (Emphasis added).

12 R.p.1098, lines 2-9.

As required by the Sales Contract, the Vista's Master Deed contained a notice, in Paragraph 24, disclosing that LGSF had sold the property on an "as-is" and "with all defects" basis and had disclaimed and been released from all warranties and liabilities associated with the condition of the property.[13]

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[13] The Master Deed for the Long Grove Horizontal Property Regime specifically stated:

24. RELEASE.

Declarant [i.e., Vista] purchased the property comprising the Regime from Long Grove at Seaside Farms, LLC ("Long Grove") on March 7, 2005. In the Sales Contract between Long Grove [i.e., LGSF] and Declarant, dated January 18, 2005, to convey the property comprising the Regime to Declarant, Declarant agreed to include the following provision regarding release in this Master Deed:

> Save and excepting only the limited warranty of title hereinafter set forth and herein contained, the Property comprising the Regime was conveyed to Declarant in the sales on March 7, 2005 noted above strictly on an "as is", "where is" and "with all defects" basis, without representation, warranty or covenant, express, implied or statutory, of any kind whatsoever, including, without limitation, representation, warranty or covenant as to condition (structural, environmental, mechanical or otherwise), past or present use, construction, development, lease performance, investment potential, tax ramifications or consequences, income, compliance with law, habitability, tenancies, merchantability or fitness or suitability for any purpose, all of which are hereby expressly disclaimed. Without limiting the generality of the foregoing, the Owners acknowledge that Declarant's predecessor in title, Long Grove and its Affiliates (as herein defined) have made no representations, warranties or covenants as to the compliance of the property compromising the Regime with any federal, state, municipal or local statutes, laws, rules, regulations or ordinances, including, without limitation, those pertaining to construction, rent control, building and health codes, land use (or permits issued in connection therewith), zoning, lead paint, urea formaldehyde foam insulation, asbestos, hazardous or toxic wastes or substances, pollutants, contaminants or other environmental matters.
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> The Owners acknowledge that the property comprising the Regime was originally developed and constructed by Long Grove and its Affiliates (as herein defined). Declarant purchased the property compromising the Regime for the purpose of converting such property into condominiums which it is or will sell to the public. Declarant assumed all responsibility for identifying and correcting all defects or problems, if any, that existed, to ensure that the property comprising the Regime is properly constructed and suitable for use as condominiums in accordance with all applicable building regulations, codes, standards, and other applicable laws and requirements.

Following its recording of the Master Deed which created the POA, Vista controlled the POA by appointing its board of directors.[14] In addition to the notices in the Master Deed and unit sales contracts, when Vista sold its newly developed condominiums to individual condominium unit buyers, the deeds from Vista to the buyers notified the purchasers that Vista had "converted the rental units at Long Grove Apartments to condominium ownership pursuant to S.C. Code [Ann. §§] 27-31-410, *et seq.*, and has complied with the disclosure, notice and[,] offer requirements, set forth therein, including but not limited to compliance with [S.C. Code Ann. §] 27-31-420(B) . . . .[15]

> Accordingly, as part of the valuable consideration being exchanged in the sale transaction on Marcy 7, 2005 note above, the receipt and sufficiency of which are hereby acknowledged, Declarant on behalf of itself and its heirs, representatives, successors, and assigns (including the Owners and all other successors-in-title to all or a portion of the property comprising the Regime), agreed to never sue and completely released Long Grove, The Beach Company, Gulfstream Construction, its affiliates, agents, officers, directors, employees, insurers, representatives, successors, assigns, and all other companies, partnerships, entities, or Persons (collectively, the "Affiliates") involved in the design, development and/or construction of the apartment buildings and apartments therein and all other improvements prior to March 7, 2005, for and from any and all claims of every kind whatsoever arising from or related to the development, design, construction, maintenance, alteration, or repair of the property comprising the Regime, including unknown and unforeseen claims that may now exist or that may arise in the future.
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> Declarant and Owners acknowledge and agree that the assumption of liability and release of claims above is intended to be binding on all subsequent grantees of the property comprising the Regime, the grantees of any condominiums or other subdivisions of the property compromising the Regime, and the Owners. In order to give effect to this intention, these provisions are included in this Master Deed, and will also be included in any other conveyances outside the coverage of this Master Deed.

R.p.151 at pp.197-198 (Emphasis added).

[14] R.p.1058, line 8 – R.p.1059, line 3.

[15] R p.242 (second "Whereas" paragraph).

Moreover, the deeds from Vista to the individual condominium buyers also contained notice that Vista's conveyance of the units to the buyers was subject to the terms of the Master Deed for the POA.[16]

By 2006 Vista had sold all of the units and turned over control of the POA to a board of directors elected by the condominium unit owners pursuant to the terms of the POA's Master Deed and Bylaws. Respondents had no involvement or communications with the POA until 2009, when the Respondents received letters stating the POA "[wa]s asserting a construction defects claim" against them and demanding a response "in accordance with the *Notice and Opportunity to Cure Construction Dwelling Defects Act*."[17] In turn, Respondents filed this action seeking a declaration concerning the validity of the POA's claims against them in light of LGSF having sold the property to Vista on an "as is", "where is", and "with all defects" basis and having specifically disclaimed and been released from all warranties and liabilities related to the condition of the property behalf of itself and on behalf of its "affiliates." The POA filed counterclaims, cross-claims, and third-party claims against JHP and the other parties in this case alleging joint and several liability for construction defects in the condominium

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[16] The individual deeds from Vista to the condominium unit purchasers stated that the property sold was subject to the following provision:

> Master Deed for Long Grove Horizontal Property Regime, as more specifically identified in the Master Deed and the exhibits thereto (together, the "Master Deed") dated April 13, 2005 and recorded April 18, 2005, in Book H533 at Page 15 et seq., as amended by First Amendment to Master Deed for Long Grove Horizontal Property Regime dated April 26, 2005 and recorded on May 5, 2005 in Book U535 at Page 435 in the RMC Office for Charleston County, South Carolina, and exhibits and further amendments thereto; . . . .

R.p.242 – R.p.244 (Paragraph "1").

[17] R.pp.248, 250, 252.

buildings based on breach of the implied warranties of habitability and workmanlike service, breach of express warranties, and negligence.[18]

Following extensive hearings and extensive consideration of the issues, the Trial Court dismissed the POA's claims against Respondents.[19] On appeal, the Court of Appeal issued a *per curium* decision adopting the Trial Court's order "in full." The POA unsuccessfully sought reconsideration[20] and now asks this Supreme Court to grant certiorari.

ARGUMENT AND CITATION OF AUTHORITY

The POA seeks to have this Supreme Court grant it the extraordinary relief of further review in this case in which:

a. the trial court dismissed the POA's claims on summary judgment in a comprehensive 41 page order;

b. the unanimous panel of the court of appeals affirmed and fully adopted the Trial Court decision; and

c. the court of appeals rejected a subsequent request for rehearing.

It is well established that the discretionary review requested here should be granted only where there are exceptional circumstances and special and important reasons for such further review. Consequently, this Supreme Court should look for such exceptional circumstances, or special and important reasons, in the following factors:

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[18] The defects alleged by the POA include leaks and water damage at the balconies—the same balconies that Vista hired its own contractors to repair after it purchased the property from LGSF and for which Vista received the $200,000 in escrowed funds that were set aside at closing to cover Vista's cost of those repairs. 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).

[19] The POA's claims against Vista and the other third-party defendants were unaffected by the order and are pending in the Circuit Court.

[20] On reconsideration, the POA suddenly "abandoned" its appellate claims as to LGSF and The Beach Company.

1. Are there novel questions of law at issue?
2. Was there a dissent at the court of appeals?
3. Is the court of appeals decision in conflict with a prior decision of this Court?
4. Are there substantial constitutional issues directly involved?
5. Is there a factual question included and does the court of appeals decision conflict with a decision of the United States Supreme Court?

Here no such factors exist. In fact, the POA does not even attempt to qualify this case for review by reference to these factors. The POA's minimal attempt to justify a basis for discretionary review is to simply assert that there are "novel questions" in the case. While the POA even boldly suggests that the trial court "recognized" there were novel questions in this case; the trial court's order reflects it merely acknowledged that after the trial court had announced its initial decision adverse to the POA's position, the POA sought rehearing due to its contention that there were complex and novel issues and substantial disagreement among the parties thereon.[21] As reflected in its order addressing the legal issues, the trial court found no novel questions of law which had not already been addressed by existing South Carolina precedent. The test for discretionary review is the existence of special, important and novel "questions of law," not merely novel factual circumstances or arguments of counsel.

In fact, a careful review of the Trial Court's order, which the Court of Appeals adopted in full, reflects that the questions raised in this case, novel or not, were decided based on well-established legal principles and authorities. The legal principles decisive in this case were found by both the Trial Court and the Court of Appeals to be:

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[21] R. p. 4 (Trial Court Order p. 4) (first paragraph)

1. Existing South Carolina law expressly recognizes that principles of freedom of contract permit implied warranties in connection with the construction and sale of residential property to be waived and disclaimed.[22]

2. A bargained for release or waiver agreement is not contrary to public policy as an exculpatory contract.[23]

3. South Carolina's anti-indemnity statute, S.C. Code Ann. § 32-2-10, does not prohibit "exculpatory contracts in favor of contractors or designers and does not apply in this case which does not even involve a contract for the "design, planning, construction, alteration, repair or maintenance of a building . . ." or a promise "to indemnify" the respondents against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from their sole negligence.

4. Professional licensing statutes and requirements, for designers and builders, do not create non-delegable and non-releasable duties, or establish any basis for the claim of civil liability.[24]

This is not a case in which a designer and builder attempted to obtain waivers or releases of potential liability prior to the time they even performed their design and construction services. In short, this is not a fact situation akin to those where a court is concerned about a designer or builder attempting to exculpate themselves from the performance standard of due care. Instead, this is a situation wherein about 1999, the Respondents were involved in the design and construction of a commercial project, an apartment complex, for a private developer. Years later, that developer sold the apartment complex to an out-of-state developer (Vista) who wanted to purchase the apartment complex, convert it to condominiums, and then sell the newly established condominiums.

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22 *See* Kirkman v. Parex, 369 S.C. 477, 632 S.E.2d 854 (2006).

23 *See* Kirkman v. Parex, Inc., 369 S.C. 477, 485, 632 S.E.2d 854, 858; Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67 (2008); Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47 (2009); Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008).

24 *See* 16 Jade Street, LLC v. R. Design Const. Co., LLC, 405 S.C. 384, 390, 747 S.E.2d 770, 773 (2013).

Vista created the POA after Vista purchased the apartment complex and converted it to condominiums using other designers and contractors to do the conversion work. The POA, and all of its members, dealt solely with Vista - the condominium converter. The POA acquired all of their rights, titles, and interests from and through their transactions with Vista. Consequently, the POA and its members could acquire no greater rights and interests than those Vista had to convey.[25]

In the intervening arms-length, commercial transaction between the original apartment developer and the subsequent condominium converter, the terms of the sale of the apartment complex were clearly established to include the following:

a. The converter purchased the apartment complex "as-is," "where is," "without recourse," and "with all defects."

b. The converter waived all warranties, express or implied, including any warranty as to condition (structural, environmental, mechanical or otherwise), past or present use, construction, development, habitability, merchantability, or fitness or suitability for any purpose.

c. The original apartment developer, for itself, and its affiliates (with "affiliates being defined to include the Respondents here) clearly and expressly disclaimed any and all warranties, express or implied.

d. The apartment developer, for itself and these Respondents, expressly disclaimed any compliance of the property with any federal, state, municipal or local statutes, laws, rules, regulations or ordinances, including those pertaining to construction and building and health codes.

e. The converter expressly agreed to assume the risk of all such matters and represented that it assumed and would undertake responsibility for identifying and correcting all

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25 *See e.g.* W.M. Kirland, Inc. v. Providence Washington Ins. Co., 264 S.C. 573, 216 S.E.2d 518 (1975); Standard Oil Co. of N.J. v. Powell Paving & Contracting Co., 139 S.C. 411 138 S.E. 194 (1926) (the general rule is that an assignee has no greater rights than the assignor had at the time of the assignment); Hoogenboom v. City of Beaufort, 315 S.C. 306, 433 S.E.2d 875 (1992) (one claiming title by deed has no greater title than the original grantor in the chain of title upon which he relies); Belva v. Fedner, 251 S.C. 600, 164 S.E.2d 753 (1968) (a deed cannot convey an interest which the grantor does not have).

defects or problems, if any, that may exist in the property and would ensure that the property was properly constructed and suitable for use as condominiums in accordance with the applicable building regulations, codes, standards, and other applicable laws and requirements attending at the time.

f. The converter agreed, for itself, its heirs, representatives, successors and assigns, that it would never sue and that it completely released the apartment developer and the Respondents for and from any and all claims of every kind whatsoever arising from or related to the development, design, construction, maintenance, alteration, or repair of the property, including unknown and unforeseen claims that may now exist or that may arise in the future.

g. The converter agreed specifically to disclose and describe to subsequent condominium purchasers the terms of the sale from the apartment developer to the converter, including the waivers, and disclaimers of warranties and the release of claims.

h. The converter engaged its own contractors and consultants to inspect the construction of the apartment complex as a part of the due diligence required in connection with the apartment sales transaction.

i. The consultants engaged by the converter reported issues regarding existing conditions in the apartment complex and, as a part of the sales transaction, the converter received $200,000 from the apartment developer to cover the cost of repairs to the original construction of the apartment complex.

The POA now seeks to ignore the distinction between (1) the 1999 events and transactions whereby LGSF (the apartment developer) constructed the apartment complex and (2) the subsequent sale transaction of the apartment complex by LGSF (the first developer) to Vista (the converter developer) and the converter's independent conversion of the apartments to condominiums for subsequent resale to purchasers, including members of the POA. By ignoring this clear separation and distinction, the POA seeks to conflate the separate roles, duties and rights of the participants in the two transactions, as well as the application of the law or public policy concerns to each.

1. South Carolina recognizes that, even in connection with a true sale of residential property, the implied warranties may be waived and disclaimed.

The rationale of this Supreme Court's rejection of the doctrine of *caveat emptor* (buyer beware) was its concern with the unequal bargaining power between the new home buyer and seller, the new home buyer's reliance on the skills of the builder, and the inability of the new home buyer to inspect a new house for latent defects prior to purchase.[26] Here, however, the property at issue was used and not new, the arms-length transaction took place between two sophisticated parties represented by counsel, and Vista inspected the property for defects prior to purchase.

South Carolina has never stated nor suggested builders, sellers, and designers cannot disclaim liability for construction defects and, in turn, must remain strictly liable under all circumstances. To the contrary, this Supreme Court has recognized limits on the liability imposed on builders and sellers. For example, in Kirkman v. Parex, this Supreme Court stated "the principle of freedom of contract permits a party to effectively disclaim the implied warranty of habitability" in a contract for the sale of a new home.[27] Later on, in Smith v. Breedlove, this Supreme Court concluded that the implied warranty of workmanlike service, which arises from the construction of home, did not apply to an owner who sold the home he built (while acting as his own general contractor) and, in turn, that he did not owe owed any duty of care in the construction of the house to the

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[26] *See* Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335. 343, 384 S.E.2d 730, 735-736; Lane v. Trenholm Bldg. Co., 267 S.C. 497, 500, 229 S.E.2d 728, 729 (1976) (*citing* Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970)); Sapp v. Ford Motor Co., 386 S.C. 143, 147-48, 687 S.E.2d 47, 49 (2009).

[27] Kirkman v. Parex, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2008).

subsequent purchaser, despite the argument that he placed the home in the stream of commerce when he sold it.[28]

Arguably, the implied warranty of habitability, which springs from the sale of a new home, is the strongest or most important of the three theories of liability for construction defects claims,[29] because that warranty arises when new construction is knowingly placed into the stream of commerce and directly into the hands of a buyer. If, under South Carolina law, the implied warranty of habitability, which arises from the sale of a new home, can be disclaimed by the seller as stated in *Kirkman v. Parex*, then it must logically follow that liability based on negligence and on the implied warranty of workmanlike service, which arise from the construction (as opposed to the sale) of a new home, can also be disclaimed. Under the POA's argument, the supposed non-delegable duties imposed by the building and design codes would prohibit the right of disclaimer recognized in *Kirkman v. Parex* and would have required imposition of liability on the builder-seller in *Smith v. Breedlove*.

The Respondents did not design, build, or sell condominiums and they did not place any condominiums into the "stream of commerce." To the contrary, the notice contained in the POA's Master Deed ***clearly indicates*** that the Respondents had disclaimed that the property was suitable for condominium use and had disavowed and been released from liability for any such use.

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[28] Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67. *Cf.* Gladden v. Boykin, 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013) ("It is one thing to impose greater demands on the builder of a new home, who is in a position to know of the home's defects . . . ." (Emphasis added).

[29] The other two theories are (a) the implied warranty of workmanlike service and (b) negligence.

2. There is no "exculpatory contract" which contravenes South Carolina "public policy" at issue in this case.

Proper reference to an exculpatory contract involves a situation where a party obtains a waiver or release from potential liability before it has even undertaken performance of its duties under the contract. Public policy disfavors such an agreement because it might tend to promote a lack of due care by the party in its performance – since it has already been released of any potential liability regardless of its due care or lack thereof. If you will, an agreement might be referred to as exculpatory when it involves a release before-the-fact of performance.

In the current situation, the Respondents (as designer and builder of an apartment complex years earlier) did not seek and were not given a waiver or release of their duty of due care or liability prior to the time they provided their services. At issue herein is a negotiated release of those Respondents years after they had completed their services, which release was given by a sophisticated condominium real estate developer and converter (Vista and its owner, de Guardiola) in a transaction wherein both he investigated the Respondents' work and intended to modify/alter that work and convert it to a separate subsequent use. The Sales Agreement executed by Vista containing the negotiated release and waiver terms, cannot be fairly characterized as an exculpatory contract in any legitimate sense. The release granted to Respondents had no potential to induce a want of care which is the potential vice of a true exculpatory contract. The Respondents did not have any role in the conversion of the complex from apartments to condominiums. Their work had been performed and completed years earlier with no waiver or release protection, and their work had already withstood the test of years.

Moreover, even if the Master Deed's notice is improperly viewed as an exculpatory contract, this Supreme Court routinely upholds exculpatory contracts in recognition of private parties' freedom to contract as they choose.[30] As recently observed by this Supreme Court, "[l]imitation of liability and exculpation clauses are routinely entered into."[31]

None of the cases from other states cited in the POA's Petition for Writ of Certiorari contain the detailed and explicit notice of disclaimers and release like the notice contained in the POA's Master Deed. The Trial Court carefully considered the issue and properly concluded the Master Deed's notice of disclaimers and release were not unconscionable and do not violate public policy. As stated by the trial judge: "[T]his Court does not perceive that it is the public policy of this state that no selling party can enter into a contract as to real property that would disclaim responsibility when the purchasing party intends to alter the use and legal nature of the property."[32]

3. *S.C. Code Ann.* § 32-2-10 does not apply in this case and does not prohibit the waivers and releases made in this case in the Respondents' favor.

The POA argues that *S.C. Code Ann.* § 32-2-10 (Thomson Reuters West 2010) prohibits the enforcement of the waiver and release terms contained in the real estate Sales Contract between LGSF and Vista and admittedly executed by Vista. The statute in question does no such thing.

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[30] *See* Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 281 S.E.2d 223 (1981); Pride v. So. Bell Tel. & Tel. Co., 244 S.C. 615, 138 S.E.2d 155 (1964); S.C.E.&G. Co. v. Combustion Engineering, Inc., 283 S.C. 182, 322 S.E.2d 453, 349 (Ct. App. 1984).

[31] Gladden v. Boykin, 402 S.C. 140, 145 739 S.E.2d 882, 884 (2013).

[32] R.p.37 at ¶ 112 (Trial court order p. 37 at ¶ 112).

Section 32-2-10 is an "anti-indemnity statute." Such statutes, now adopted in one form or another in most states, are intended to prevent one party from requiring another party essentially to be its insurer. The statute, which only applies to contracts for the "design, planning, construction, alteration, repair or maintenance of a building . . . " and to promises "purporting to indemnify" the promisee . . . against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promise . . . ," ***does not bar or restrict*** waiver or release agreements by a purchaser of improved real estate.

By restricting promises to "indemnify," *S.C. Code Ann.* § 32-2-10 is intended to and does restrict certain promises whereby one party will reimburse, or pay, or compensate the other for loss or damage which it might incur on account of its own liability. No such provision or issue is present in this case, as both the Trial Court and Court of Appeals plainly and correctly observed.

4. There is no basis for the POA's contention the Respondents were bound by non-delegable and non-releasable duties which can form the basis for liability to the POA in this case.

The real effort of the Petition for Writ of Certiorari is to obtain still another forum for the POA's continuing effort to assert South Carolina's general system of building codes and licensing statutes for architects and contractors should be 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 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."[33] 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[34] 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 the South Carolina Legislature enacted the codes or licensing statutes for the benefit and use of the POA or any other private party. In fact, this Supreme Court expressly rejected the POA's concept of non-delegable liability imposed on contractors and designers based on building codes and professional licensing statues.[35]

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33 The POA had to "abandon" its appeal as to LGSF and The Beach Company in an effort to argue this theory.

34 *See* S.C. Code Ann. §§ 40-3-5 *et seq.* (Thomson Reuters West 2013), S.C. Code Ann. Regs. ll-1 *et seq.*, and the other licensing statutes referenced.

35 *See* 16 Jade Street, LLC v. R. Design Const. Co., LLC., 405 S.C. 384, 390 747 S.E.2d 770, 773 ("[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 (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). 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.

The POA's "non-delegable duty, non-releasable, and never-ending liability theory" as to contractors and architects clearly conflicts with the purpose and policy underlying S.C Code Ann. § 27-31-430. Our Legislature enacted that specific statute 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/or the 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 converter 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.

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

Under the POA's theory, future liability ***would be unavoidable*** upon the sale of improved property which might ultimately be used for residential purposes. This means a developer, contractor, and/or designer could only limit their respective exposure to future unknown and unintended buyers by totally preventing such future sales of the property. Such an alienation on the future use of property is contrary to

the basic principles of property law and the right to freedom of contract. None of the Respondents had any ownership interest, or right of control over the property when Vista converted the property from apartments to condominiums and then sold the converted units.[36]

In short, the POA proposes a theory which results in the imposition of eternal, unending, and virtually absolute strict liability on contractors and architects. That is not the law in South Carolina and the trial court addressed this point in its order, which the court of appeals adopted.

b. The POA's position effectively nullifies the disclaimers and releases of future claims which are a material point in every settlement of all construction defect litigation 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 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 units' balconies. These are the very same balconies which Vista (the converter) hired its own contractors to repair after Vista purchased the property from LGSF and for which Vista received $200,000.00 in

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[36] Under the POA's "non-delegable and non-releasable duty" theory, the apartment contractor and the architect are forever liable to the POA, and, in fact, to subsequent unit owners, for any problems which might be linked in some way to the original design and/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 the present unit owners in this case for the alleged defects, the contractor and architect would still have a "non-delegable duty and liability" into the future to subsequent downstream unit owners.

escrowed funds paid by the apartment seller at closing to cover converter's cost of those repairs.[37] Under the POA's theory, even if converter had sued the Respondents 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 Respondents would nonetheless be, and remain, liable to other future purchasers or owners. Such results must be recognized as absurd – just as the trial court clearly concluded in a detailed and well-reasoned order, which the Court of Appeals affirmed by adoption of the Trial Court's order.

CONCLUSION

The POA abandoned its appeal as to the developer and seller in an attempt to recast this case 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 the Court of Appeals rejected. The POA attempts 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 a third-party (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

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[37] *See* R.p.271 - R.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 – listing the alleged defects in the buildings).

apartment owner (LGSF), on behalf of itself and its contractor and architect, took the extraordinary step of requiring Vista to provide notice of those disclaimers/releases to future buyers if Vista converted the property to condominiums. Any warranties, duties, or liabilities which arose during the construction of the rental apartments were clearly and unequivocally extinguished with Vista's express consent under the terms of Vista's and LGSF's property purchase contract.

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 (also recited in the POA's Master Deed), may the POA or subsequent unit buyers avoid the bargained for and unequivocal releases, and assert the contractors and architect remain liable on the theory that their duties are "non-delegable" and "non-releasable." As astutely noted by the Trial Judge and adopted by the Court of Appeals:

> [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.[38]

Contrary to the POA's arguments, South Carolina law does 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 cannot disclaim or be released from liability for construction defects or that they must remain strictly liable under all circumstances. By claiming non-delegable and non-releasable duties, the POA is seeking a fundamental change and expansion of the law in South Carolina, the effect of which would be to nullify and void the similar disclaimers and releases which are contained in every settlement of every past and

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[38] R.p.1 at p. 27.

future construction defects and/or faulty workmanship lawsuit filed in the State of South Carolina. For these reasons, the Petition for Writ of Certiorari filed by the Petitioner, Long Grove Property Owners' Association, Inc., should be denied in all respects.

Respectfully submitted,

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13 November 2015
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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from the Court of Common Pleas
For Charleston County
Civil Action No.: 2009-CP-10-6746
South Carolina Supreme Court Appellate Case No.: 2015-002131

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;

Defendants,

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

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.;
and Essex Engineering Corporation,

Third-Party Defendants,

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

Respondent.

PROOF OF SERVICE OF RESPONDENTS' JOINT RETURN TO PETITION FOR A WRIT OF CERTIORARI

I (we) hereby certify that on November 13, 2015, a copy of the ***Respondents' Joint Return to Petition for a Writ of Certiorari*** was served on counsel for all parties of record in this case via electronic mail and United States Mail, postage pre-paid, as addressed shown below.

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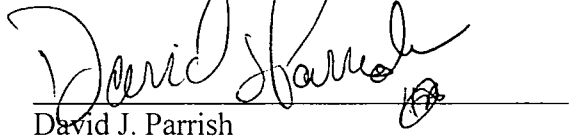

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