THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Unpublished Opinion No. 2015-UP-377 (S.C. Ct. App. filed July 29, 2015)
Appellate Case No.: 2015-002131

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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The Petitioners respectfully submit the following Reply Brief in this appellate matter.

From the beginning, the trial court and the Court of Appeals ("the Court") focused the analysis on the two developers and failed to understand the significance of the public policies of this state that protect homeowners. The Court never properly analyzed the duties and responsibilities of the general contractor and architect as they relate to the Property Owners' Association. When developers LGSF and Vista entered into this real estate sales transaction, LGSF included terms that reached beyond any normal sales transaction between two developers. LGSF disclaimed its warranties as a developer and attempted to disclaim the contractor's implied warranty of good and workmanlike services and the architect's implied warranty of the sufficiency of its plans for the intended purpose, and LGSF required Vista to waive and release the liabilities of the general contractor and architect. This occurred before the final sale to Vista, before claims arose, and before the Property Owners' Association was formed in a ruse to protect Gulf Stream Construction and JHP from their poor construction and design practices and from future construction defect claims by the Property Owners' Association. Ironically, neither Gulf Stream, JHP nor the POA were parties to the agreement yet the agreement transferred the responsibilities, duties and obligations of a general contractor and architect under our building codes to a POA leaving the POA with a rotting, deteriorating, building code violation ridden project with millions of dollars in repair costs.

The Court in its Order and Respondents in their Response ignore the novel questions of law at issue and rely on cases that conflict with prior decisions of the Court. Broadly stated, there are two key questions:

1) **CAN TWO REAL ESTATE DEVELOPERS WAIVE AND DISCLAIM THE LIABILITY OF CONTRACTORS AND ARCHITECTS FOR BUILDING CODE VIOLATIONS?**

2) IS THE SUBSEQUENT OWNER, WHO IS NOT A PARTY TO A CONTRACT, BOUND BY WAIVERS AND A RELEASE OF LIABILITY OF THE GENERAL CONTRACTOR AND ARCHITECT AGREED TO BY A PRIOR OWNER FOR UNKNOWN DEFECTS AND DAMAGES TO THE PROPERTY?

Each of the seven issues raised in the Questions Presented in the Petition for Writ of Certiorari is a different facet of these two broader questions. [1]The last Question Presented, "DID THE COURT ERR BY ADOPTING THE CIRCUIT COURT ORDER WHICH CONTAINED SPECIFIC CONCLUSIONS OF LAW WHICH WERE CONTRARY TO THE EXISTING LAW AND REPUGNANT TO THE PUBLIC POLICY OF THIS STATE," includes nine (9) "Incorrect Conclusions of Law" and specifically addresses how the Court of Appeals decision conflicts with prior decisions of this Supreme Court.[2]

(1) CAN TWO REAL ESTATE DEVELOPERS WAIVE AND DISCLAIM THE LIABILITY OF CONTRACTORS AND ARCHITECTS FOR BUILDING CODE VIOLATIONS?

There is a novel question of law as whether two developers can waive and disclaim the liability of contractors and architects for building code violations which the Supreme Court has not previously addressed. By ignoring the clear language of Kennedy v. Columbia Lumber, the Court avoids analyzing this novel issue of law, ignores the demands of public policy, and reaches a conclusion in conflict with prior caselaw. In Kennedy v. Columbia Lumber, the Supreme Court held that "a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage." Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989). The Supreme Court held:

> The Court of Appeals itself correctly recognized in *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct.App.1986) that a violation of a building code violates a legal

[1] Petitioner refers to and incorporates the seven (7) Questions Presented which are discussed at length in its Petition for Writ of Certiorari.

[2] Petitioner clearly states in Questions Presented that the Order contained conclusions of law which were contrary and conflicted with the existing law and repugnant to the public policy of the state. Petitioner cites Incorrect Conclusions of Law #1-9 with case citations.

> duty for which a builder can be held liable in tort for proximately caused losses. *Terlinde*, 275 S.C. at 399, 271 S.E.2d at 770, imposes a legal duty on builders to undertake construction commensurate with industry standards. Where a building code or industry standard does not apply, public policy further demands the imposition of a legal duty on a builder to refrain from constructing housing that he knows or should know will pose serious risks of physical harm. We recognized such a duty, which should extend to foreseeable parties, in *Rogers*, 251 S.C. at 134, 161 S.E.2d at 84. We are persuaded that building a house which one knows or should know will later be sold by a party to an innocent buyer is an act adequate to constitute placing that house into the stream of commerce . . .

Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989).

Respondents cite 16 Jade Street, LLC v. R. Design Const. Co., LLC, 405 S.C. 384, 747 S.E.2d 770 (2013) for the proposition that violations of the building code do not create a private cause of action which directly contradicts Kennedy v. Columbia Lumber and misconstrues 16 Jade Street. In 16 Jade Street, the Court focused on the liability of the individual as the license holder of the contractor under Section 40-59-410 of the South Carolina Code (2005). While the 16 Jade Street Court found no personal liability for the individual, it did not reverse the finding of liability of the contractor or the judgment against the contractor. It did not analyze Kennedy, the building code or any other aspect of this issue.

Professionals licensed by this state cannot exempt themselves from standards imposed by law. "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 state for such purpose is an obligation owed to the public at large and is not within the power of any private individual to waive.*" Murphy v. North American River Runners, Inc., 412 S.E.2d 504 at 509 (W.Va. 1991) (emphasis added). " . . . A party may not contract away its responsibility to comply with a building code when the person with whom the contract is made is one of those whom the code is designed to protect . . . Florida's comprehensive

regulation of the licensing of building contractors and building construction standards reflect a clear public policy to protect purchasers of residential homes from personal injuries caused by improper construction practices . . ." Loewe v. Seagate Homes, Inc., 987 So.2d. 758 (Fl. App. 5 Distr. 2008). The building codes and regulations create non-delegable duties to the public generally and subsequent purchasers specifically. *See, e.g.,* Green Springs, Inc. v. Calvaro, 239 So.2d 264 (Fl. S. Ct. 1970). Because these are non-delegable duties, the release and assumption of liabilities is unenforceable. If professionals cannot exempt themselves from standards imposed by law, third-party real estate developers cannot exempt those professionals from standards imposed by law.

(2) IS THE SUBSEQUENT OWNER, WHO IS NOT A PARTY TO A CONTRACT, BOUND BY WAIVERS AND A RELEASE OF LIABILITY OF THE GENERAL CONTRACTOR AND ARCHITECT AGREED TO BY A PRIOR OWNER FOR UNKNOWN DEFECTS AND DAMAGES TO THE PROPERTY?

There is another novel question of law as to whether a subsequent owner, who is not a party to a contract, can be bound by waivers and a release of liability agreed to by the prior owner when the defects and damage to the property are unknown. A cause of action for damages to real property accrues when the defendants' acts cause immediate and permanent injury resulting in actual and appreciable harm to the property. Stofer v. Shapell, 233 Cal. App. 4th 176 (2015). Standing in construction defects cases refers to when a cause of action for the design or construction defects accrues and who owns the cause of action at that time. Stofer, 233 Cal. App. 4th 176 (2015). There is no precedent that Vista can enter into a disclaimer and release and bind future Owners for claims and causes of action which are unknown and do not exist at that time. The damages occurred during the POA's ownership, and it is, therefore, the POA's claim to assert.

The Court failed to cite any authority or analyze why a general contractor or architect can be released from their non-delegable duties. As discussed above, Kennedy holds that a contractor's obligation to construct a dwelling in a workmanlike manner is a duty imposed by law and cannot be waived by the owner. Hill holds that an architect who furnishes plans impliedly warrants their sufficiency for the intended purpose. Hill, 219 S.C. 263, 64 S.E.2d 885(1951). Does a real estate developer in South Carolina, as a predecessor in title, now have the authority to aid contractors and architects in waiving legal duties instituted by South Carolina to protect the health and life safety of the public and release contractors and developers from duties imposed by South Carolina law? Do general contractors and architects now have the ability in South Carolina to waive their legal duties imposed by South Carolina in cases like Kennedy and Hill?

THE COURT OF APPEALS ADOPTED AN ORDER WHICH IS CONTRARY TO PIVOTAL AND HISTORICAL CASELAW.

The Court ignored Gulf Stream's warranty of workmanlike service, the duty to construct within industry standards and that the warranty extends to subsequent purchasers of the property. Kennedy, 299 S.C. 335, 384 S.E.2d 730 (1989). The Court of Appeals ignored JHP's implied warranty that the plans furnished are sufficient for the intended purpose and that the professional duty of a design professional arises separate and distinct from any contractual duties. Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885(1951); Beachwalk Villas Condominium Assoc., Inc. v. Martin, 305 S.C. 144, 406 S.E.2d 372 (1991); Tommy L. Griffin Plumbing & Heating Co. v. Jordon, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995).

The Court ignored caselaw finding the liability of a general contractor is derived from the performance of the construction duties and not from placing it into the stream of commerce. Kennedy, 299 S.C. 335, 384 S.E.2d 730 (1989). It ignored caselaw holding that when JHP

undertook the furnishing of plans and specifications for Long Grove, JHP impliedly warranted the sufficiency of those plans for intended purpose which also does not spring from a sale. Hill, 219 S.C. 263, 64 S.E.2d 885(1951). The Court did not understand that placing the property into the stream of commerce is not required to trigger general contractor and architect's liability for implied warranties and negligence. Kennedy, 299 S.C. 335, 384 S.E.2d 730 (1989); Terlinde, 275 S.C. 395, 271 S.E.2d 768 (1980); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885(1951); Beachwalk, 305 S.C. 144, 406 S.E.2d 372 (1991).

The Court ignored the plain language of S.C. Code Ann. §32-2-10 and the fact that the general contractor and architect made warranties and owed duties in connection with the construction of this project that cannot be waived. The Court's Order allows contractors and architects to disclaim their negligence and allows them to ignore building codes instituted to maintain reasonable standards of construction in buildings ... consistent with the public health, safety and welfare of its citizens." *S.C. Code Ann. §6-9-5*, Kennedy, 299 S.C. 335, 384 S.E.2d 730 (1989). The Court allowed non-delegable professional duties imposed upon a general contractor and architect to be delegated to a purchaser but gave no legal basis for the conclusion. The Court found the contract enforceable against the POA, yet found the POA has no standing to challenge the contract as against public policy. How is that possible?

CONCLUSION

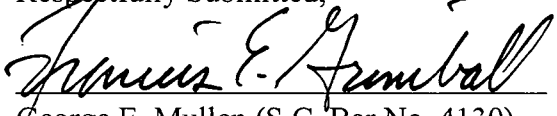
By treating the duties of the contractor and the architect the same as the duties of the two developers, Respondents attempt to avoid their responsibilities for the millions of dollars in damages caused by the breaches of their duties which is the exact same mistake made by the trial court and Court of Appeals. For example, Respondents cite cases analyzing the implied warranty of habitability and then incorrectly apply that same analysis to Gulfstream's implied

warranty of workmanlike services and to JHP's implied warranty of the sufficiency of the plans for the intended purpose. These are three separate and very distinct warranties.

The implied warranty of habitability arises out of a real estate transaction when a building is put into the stream of commerce after the work of the architect and contractor are completed. Lane v. Trenholm Bldg. Co., 267 S.C. 497, 229 S.E.2d 728 (1976). The implied warranty of workmanlike services arises from the work of the contractor. Kennedy, 299 S.C. 335, 384 S.E.2d 730 (1989); Terlinde, 275 S.C. 395, 271 S.E.2d 768 (1980). When an architect furnishes plans and specifications for a design, it impliedly warrants the sufficiency of those plans for the intended purpose. Hill, 219 S.C. 263, 64 S.E.2d 885(1951). These non-delegable duties arise from the duties owed by the general contractor, Gulfstream, and the architect, JHP, and not from the real estate contract.

To attempt to lump all of these warranties together and analyze them as one using only the caselaw concerning the implied warranty of habitability is to make the exact same mistake made by the trial court and the Court of Appeals. As with each issue discussed above, the Court analyzed this case focusing only on the developers. Petitioners deserve the more thoughtful detailed analysis of the Supreme Court.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that I have served the Petitioner's Reply Brief to all Respondents via email and United States Mail, postage prepaid on November 23, 2015, and addressed to their attorney of record, David J. Parrish, Nexsen Pruet, LLC, Post Office Box 486, Charleston, South Carolina 29402 and that I have served James Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design,

P.C. by depositing a copy of it in the United States Mail, postage prepaid on November 23, 2015, addressed to its attorney of record, Laura F. Locklair, Parker Poe Adams & Bernstein, LLP, 200 Meeting Street, Suite 301, Charleston, South Carolina 29401 and James Lynn Werner, Parker Poe Adams & Bernstein, LLP, 1201 Main Street, Suite 1450, Columbia, South Carolina 29201.

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