THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-8512

Appellate Case No. 2015-000180

The Gates at Williams-Brice Condominium Association and Katharine Swinson, individually, and on behalf of all others similarly situated,..... Respondents,

v.

DDC Construction, Inc.; Kapasi Glass Mart, Inc.; DMC Consolidated, Inc.; DMC Builders, Co., Inc., individually and d/b/a The Dinerstein Companies; DC Developers – Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; 31-W Insulation Company, Inc.; Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing Inc.; LTB Construction, Inc.; Martin Morales Jr. Painting & Drywall, LLC; Metal Construction Materials, Inc.; Southwest Ironworks, Inc.; The Clerkley/Watkins Group, LP; Tindall Corporation; Triad Pest Control, Inc.; Wyman Acoustics LLC; Alenco Holding Corporation; Alenco Window GA, LLC; New Alenco Window, Ltd.; AWC Holding Company; Crosby Window, Inc., f/k/a Action WinDoor Technology, Inc.; Geo-Systems Design & Testing, Inc.; HGE Consulting, Inc.; Maintenance Builders Supply, Ltd.; SCA Engineers, Inc.; Sinclair & Associates, Inc.; Faultless Hardware, individually and d/b/a Pamex, Inc.; T&M Concrete, Inc.; Loveless Commercial Contracting, Inc.; Economy Waterproofing, Inc.; BMC West Corporation; Highway One Construction, Inc.; J.I. Windows LLC; Dietrich Industries, Inc. a/k/a Dietrich Metal Framing, Inc. n/k/a

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Clarkwestern Dietrich Building Systems LLC; Best Masonry and its successor in interest, OldCastleAPG; Headwaters, Inc. d/b/a Best Masonry; and John Doe #1-10 ..... Defendants,

Of whom DDC Construction, Inc.; DMC Consolidated, Inc.; DMC Builders, Co., Inc., individually and improperly identified as d/b/a The Dinerstein Companies; DC Developers – Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing Inc.; LTB Construction, Inc.; Martin Morales Jr. Painting & Drywall, LLC; Metal Construction Materials, Inc.; Wyman Acoustics LLC; and Highway One Construction, Inc. are ..... Appellants.

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STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court err in failing to enforce the written jury trial and class action waivers in the Master Deed?**

STATEMENT OF THE CASE

This putative class action lawsuit involves alleged construction defects at the Gates at Williams-Brice Condominiums ("The Gates"). (Third Amended Complaint; R. p. 576). The enforceability of the jury trial and class action waivers found in the Master Deed governing The Gates is the only issue on appeal.

The Gates, located adjacent to the University of South Carolina's Williams-Brice Stadium, were built as "game day" condominiums in 2006-2007, with construction substantially complete as of July 1, 2007. (Order p. 3; R. p. 36). In accordance with the requirements of South Carolina's Horizontal Property Regime Act, S.C. Code Ann. § 27-31-10 to -300 ("the Act"), Respondent Columbia Condos, LP ("Owner") recorded a Master Deed for The Gates. (Master Deed; R. p. 1123). Because South Carolina requires real estate closings to be handled by lawyers, each purchaser of a condominium would have had the real estate documents, including the Master Deed, explained to them and would have had the opportunity to ask their lawyer questions about the provisions therein.

The Master Deed included dispute resolution provisions in Section XXXV, including a jury trial waiver and class action waiver ("Waiver"), which states as follows:

> **D. Waiver of Jury Trial**
>
> **BY ACCEPTANCE OF A DEED TO ANY UNIT OR OTHER PROPERTY HEREUNDER CO-OWNER(S) HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY HEREBY AGREE, THAT:**
>
> **(i) NEITHER CO-OWNER NOR ANY ASSIGNEE, SUCCESSOR, HEIR, OR LEGAL REPRESENTATIVE OF CO-OWNER OR GRANTOR, SHALL SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, OR ANY OTHER**

> **LITIGATION PROCEDURE ARISING FROM OR BASED UPON THE MATTERS SET FORTH HEREUNDER, OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE GRANTOR, ITS AGENTS, CONTRACTORS, SUBCONTRACTORS, ARCHITECTS, ENGINEERS AND THE CO-OWNERS OR THE ASSOCIATION, INCLUDING WITHOUT LIMITATION WAIVER OF ANY TYPE OF CLASS ACTION SUIT.**

(Master Deed § XXXV(D); R. pp. 1162-1163) (all caps and bold in original).

Section XXXV of the Master Deed also defines the parties bound by the Waiver to include all Appellants and all Respondents:

> Bound Party. Includes: Grantor; all co-owners; the Association and its officers, directors, and committee members, including any corporation or other entity formed to serve as the Association; all persons and entities subject to this Master Deed; any person or entity not otherwise subject to this Master Deed who agrees to submit to this Article; any person or entity that now has or hereafter acquires any interest in a Unit; the developer of the Regime; any person or entity that has previously or hereafter supplies (directly or indirectly) labor, materials, design services, equipment or other things of value in connection with the construction or maintenance of any Unit or Common Element in the Regime; any heir, successor, delegatee or assignee of any person or entity listed in this paragraph.

(Master Deed § XXXV(A)(1); R. pp. 1159-1160).

Prior to filing of the Master Deed, Owner incorporated Respondent The Gates at Williams-Brice Condominium Association ("Association" or "HOA") as a non-profit corporation under the laws of South Carolina. Pursuant to the terms of the Master Deed, Owner maintained control of the Association while condominium units were being sold. (Master Deed; R. p. 1123). Owner turned over control of the Association to homeowners

on or about August 24, 2009, after all units owned by Owner had been sold. (Order p. 3; R. p. 36).

Respondents filed their initial Complaint on December 26, 2012, expressly relying on the Master Deed but nonetheless alleging that they were entitled to proceed as a class and before a jury. (Complaint; R. p. 55). Appellants filed their responsive pleadings in response to the initial Complaint on March 7, 2012, denying Respondents' class action allegations and denying Respondents' allegation that they were entitled to a jury trial. (Answer to Complaint; R. p. 71). Appellants further asserted waiver as an affirmative defense. (Answer to Complaint; R. p. 71).

More than five months after filing their Complaint, two months after Appellants filed their initial pleadings, and almost one month after filing their first Amended Complaint, Respondent HOA filed an amendment to the Master Deed on June 5, 2013. (Second Amendment to Master Deed; R. p. 1261). The amendment purported to remove the Waiver and certain warranty exclusions from the Master Deed. (Second Amendment to Master Deed; R. p. 1261). Respondents continued to file multiple Amended Complaints adding new claims and new parties, the last of which was filed on August 7, 2014. (Amended Complaint; R. p. 79; Second Amended Complaint; R. p. 304; Third Amended Complaint; R. p. 576). Appellants filed responsive pleadings to each Amended Complaint, continuing to deny Respondents' right to a class action and a jury trial, raising waiver as a defense, and expressly referencing waivers and defenses provided in the Master Deed in their responsive pleadings. (Answers to Amended Complaint; R. pp. 98-303; Answers to Second Amended Complaint; R. pp. 325-575; Answers to Third Amended Complaint; R. pp. 598-899).

On March 24, 2014, shortly after receiving Plaintiffs' Second Amended Complaint and before Plaintiffs' Third Amended Complaint was filed, Appellants filed the instant Motion for Non-Jury Trial and to Strike Respondents' Class Action Allegations and Jury Trial Demand ("Motion") based on Rules 12(f), 23(d)(1), 38 and 39 of the South Carolina Rules of Civil Procedure. (Motion; R. pp. 900). In the Motion, Appellants relied on the plain language of the waivers to demand a non-jury trial and ask that the class allegations be stricken or dismissed. (Motion pp. 2-3; R. pp. 903-904; Supplement to Record in Further Support of Motion; R. pp. 1073). Respondents opposed the Motion, arguing that (1) the Motion was untimely because it was not filed prior to the Appellants' Answers; (2) the Master Deed was amended after the Complaint was filed to remove the waivers; (3) Respondents did not knowingly and voluntarily waive their rights even though they are bound by the Master Deed; (4) the waivers are not applicable because Appellants elected not to arbitrate; and (5) the waivers are unconscionable. (Respondents' Memorandum in Opposition to Motion pp. 7-23; R. pp. 1053-1069). The trial court denied the Motion by Order filed July 18, 2014 ("Order"). (Order; R. p. 34). Appellants received the Order on July 23, 2014.

On August 1, 2014, Appellants timely moved to reconsider the Order. (Motion to Reconsider; R. p. 1268). The trial court denied Appellants' motion to reconsider by order filed on January 22, 2015, which Appellants received on January 28, 2015. (Order Denying Motion to Reconsider; R. p. 51). Appellants timely filed the instant appeal in connection with the orders below. (Notice of Appeal; R. p. 1347).

ARGUMENT

The trial court committed reversible error by refusing to enforce the jury trial and class waivers contained in the Master Deed. (Order; R. p. 34). This Court should reverse the circuit court's Order and find that this case should be transferred to the non-jury roster for bench trial and that the class action allegations stricken or dismissed.

I. The Waiver Is Enforceable Under South Carolina Law.

South Carolina recognizes that a party may waive its right to a jury trial by contract. *See Wachovia Bank v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014); *see also Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002); *Leasing Service Corp. v. Crane*, 804 F.2d 828, 832-33 (4th Cir. 1986). "Whether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010).

Similarly, it also is well established that written class action waivers such as the one at issue here are enforceable under South Carolina law. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013); *see also Muriithi v. Shuttle Exp., Inc.*, 712 F.3d 173, 180 (4th Cir. 2013); *Patricia Rowe P.A. v. AT&T, Inc.*, CA 6:13-cv-01206-GRA, 2014 U.S. Dist. LEXIS 5102 (D.S.C. Jan. 15, 2014).

Respondents are bound by the Waiver found in the Master Deed. The Waiver expressly defines the "Bound Party" to include all co-owners and the HOA. (Master Deed § XXXV(A)(1); R. pp. 1159-1160). In the context of real estate transactions, South Carolina recognizes that references by incorporation among and between documents make the provisions binding on the parties. *See Klutts Resort Realty, Inc. v. Down'round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977). Here, the HOA's By-Laws incorporate

the Master Deed by reference. (By-Laws §§ 1 and 13; R. pp. 1077 and 1095). The Titles to Real Estate signed by unit owners and recorded with the Register of Deeds of Richland County also expressly incorporate the terms of the Master Deed. (Title to Real Estate p. 1; R. p. 1099). In addition, Purchase Agreements signed by each unit owner incorporate the terms of the Master Deed. (Contract of Sale §§ 11 and 28; R. pp. 1104 and 1107). Again, all of the homeowners would have had the Master Deed explained to them by their closing attorney and would have had the opportunity to ask their attorney about the Waiver. Finally, Katharine Swinson, the named class representative, and William Yarborough, chair of the HOA Board designated to testify on behalf of the HOA pursuant to S.C. R. Civ. P. 30(b)(6), testified in their depositions that they and all other homeowners are bound by terms of the Master Deed. (Swinson Dep. Trans. at 34:10-37:3; R. pp. 1336-1339; Yarborough Dep. Trans. at 25:22-26:17; R. pp. 1341-1342).

In light of the ability to waive the right to a jury trial and to waive class claims, the relevant provision in the Master Deed does not contravene public policy. The law concerning construction of a deed in South Carolina is as follows:

> In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy. The intent of the grantor must be found within the four corners of the deed. The construction of a clear and unambiguous deed is a question of law for the court. The terms of an unambiguous deed may not be varied or contradicted by evidence drawn from sources other than the deed itself. When intention is not expressed accurately in the deed evidence *aliunde* may be admitted to supply or explain it. The instrument is not thereby varied or contradicted but is explained or corrected.

Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987).

In this case, the Master Deed unambiguously provides for a mutual waiver of the right to a jury trial and waiver of the right to proceed as a class action. (Master Deed § XXXV(D); R. pp. 1162-1163). The Waiver is conspicuous because it is written in bold, all capitalized letters in a section entitled "Jury Trial Waiver." (Master Deed § XXXV(D); R. pp. 1162-1163). The language is unambiguous, and covers the claims at issue because it expressly applies to any "lawsuit, proceeding, or any other litigation procedure arising from or based upon the matters set forth hereunder, or to the dealings or relationship between or among the grantor, its agents, contractors, subcontractors, architects, engineers and the co-owners or the Association, including without limitation waiver of any type of class action suit." (Master Deed § XXXV(D); R. pp. 1162-1163). The plain, broad language of the Waiver indicates the Owner's intent that the Waiver applies to construction defect claims like those involved in the instant case. In addition, the inclusion of contractors and design professionals in the scope of parties covered provides additional evidence of the Owner's intent that the Waiver cover construction defect claims like those of Respondents.

Therefore, pursuant to the express terms of the Master Deed, Respondents agreed to waive their rights to a jury trial and to proceed as a class action. (Master Deed § XXXV(D); R. pp. 1162-1163).

II. The Circuit Court Erred In Finding The Appellants' Motion Untimely Because It Was Not Filed Prior to Appellants' Initial Responsive Pleading.

The circuit court's conclusion on when a party must file a motion to strike is unsupportable under the law and/or this Record. S.C. R. Civ. P. 39 states a trial "shall be by jury" when demanded as required by S.C. R. Civ. P. 38, "unless . . . (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues

does not exist.". Rule 39, SCRCP. Under South Carolina law, "issues regarding the mode of trial must be raised in the trial court at the first opportunity." *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 315 S.C. 17, 431 S.E.2d 587 (1993). However, the circuit court's reliance on and interpretation of *Foggie* is misplaced.

As an initial matter, nothing in *Foggie*, other case law or rule of civil procedure requires that issues related to mode of trial or ability to proceed as a class have to be raised by motion initially. In this case, Appellants raised the issues regarding mode of trial and the class action waiver at the first opportunity when they denied Respondents' demand for a jury trial and class action in their Answers to the initial Complaint. (Answer to Complaint; R. p. 71). Appellants also raised this same issue in every responsive pleading to the Respondents' multiple amended complaints. (Answers to Amended Complaint; R. pp. 98-303; Answers to Second Amended Complaint; R. pp. 325-575; Answers to Third Amended Complaint; R. pp. 598-899). Indeed, Appellants filed the Motion **before** Respondents even served their Third Amended Complaint.

Further, *Foggie* is inapposite to the circumstances of this case. *Foggie* involved a situation where the issue of improper jurisdiction, which the *Foggie* court construed as a mode of trial issue, was not raised until appeal. 315 S.C. at 23, 431 S.E.2d at 590. Here, Appellants raised the issue of mode of trial in all of its responsive pleadings as well as by motion made to the Court before the Third Amended Complaint was even filed. *Foggie* also is wholly unrelated to motions to dismiss class action allegations under S.C. R. Civ. P. 23.

In addition, the circuit court's ruling on this issue is inconsistent with the Rules of Civil Procedure. Rule 12, SCRCP, does not list motions regarding the mode of trial or

under Rule 39 as one of the motions that must be made prior to filing a responsive pleading in order to avoid waiver. Moreover, the circuit court's requirement for a motion seeking a non-jury trial to be filed prior to the **initial** responsive pleading would be inconsistent with Rule 38(d), which allows a party to demand a jury trial within ten days of its **last** pleading. Rule 38(d), SCRCP.

It also should be noted that the circuit court's ruling that a motion for a non-jury trial must be filed before the initial pleading is contrary to the great weight of authority from other jurisdictions on this issue.[1] *Mowbray v. Zumot*, 536 F. Supp. 2d 617, 621 (D. Md. 2008) (citing James William Moore et al., *Moore's Federal Practice* § 39.13) (interpreting Rule 39 of the Federal Rules of Civil Procedure); *see also RCSH Operations, L.L.C. v. Third Crystal Park Associates L.P.*, 115 Fed. Appx. 621, 633, 2004 WL 2596032, 10 (4th Cir. 2004) (affirming the enforcement of a jury waiver provision where the motion to strike the jury demand was made approximately four weeks before trial); *Tracinda Corp. v. DaimlerChrysler, AG*, 502 F.3d 212, 227 (3rd Cir. 2007) ("Because a party may file a motion to strike a jury demand at any time under Rule 39(a), we conclude that DaimlerChrysler did not commit inexcusable delay by filing its motion to strike after the close of discovery."); *Kramer v. Banc of Am. Secs., LLC*, 355 F.3d 961, 968 (7th Cir. 2004) (affirming decision granting motion to strike jury demand made two weeks prior to trial); *U.S. v. Schoenborn*, 860 F.2d 1448 (8th Cir. 1988) (holding no abuse of discretion when request for jury trial was stricken one day prior to trial); *Armco, Inc. v. Armco Burglar Alarm Co.*, 693 F.2d 1155, 1158 (5th Cir. 1982) (noting the trial

[1] *See Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865-66 (Ct. App. 2002) (noting that South Carolina courts may rely on federal law interpreting a Federal Rule of Civil Procedure to interpret the same South Carolina Rule of Civil Procedure).

judge's grant of a motion to strike jury demand filed on the eve of trial); *CPI Plastics, Inc. v. USX Corp.*, 22 F. Supp. 2d 1373 (N.D. Ga. 1988), *aff'd* 212 F.3d 599 (11th Cir. 2000) (granting a motion to strike jury demand filed two weeks before trial); *Jones-Hailey v. Corporation of Tennessee Valley Authority*, 660 F. Supp. 551, 553 (E.D. Tenn. 1987) (granting a motion to strike made one month before the scheduled trial date); *Bear, Stearns Funding, Inc. v. Interface Group-Nev., Inc.*, 03-Civ-8259, 2007 U.S. Dist. Lexis 82557, *9-16 (S.D.N.Y. Nov. 7, 2007) (striking request for jury trial after the end of discovery and coupled with a summary judgment brief).

Finally, to the extent *Foggie* requires a factual analysis of when the "first opportunity" to raise a mode of trial issue arises, Appellants acted at the first opportunity in this case—early in fact since the Third Amended Complaint had yet to be filed and Respondents would have had 10 days thereafter to demand a jury trial. In addition to raising these issues in their responsive pleadings, Appellants also filed the Motion within approximately three weeks of conducting the depositions of the board chair and named class representative, which was necessary prior to filing the Motion in order to understand the circumstances under which the HOA attempted to amend the Master Deed to remove the Waiver. (Swinson Dep. Trans. at 24:13-25:13; R. pp. 1134-1135; Yarborough Dep. Trans. at 235:6-238:8; R. pp. 1343-1346).

Therefore, the circuit court erred by finding Appellants' motion untimely, and the Order should be reversed.

III. The Circuit Court Erred By Finding That Respondents Could Retroactively Amend The Master Deed To Remove The Waiver After This Action Commenced.

More than six months after the initial Complaint was filed, two months after Appellants raised the issue of the Waiver in their responsive pleadings, and just after Respondents filed

their first Amended Complaint, Respondents attempted to amend the Master Deed to remove the Waiver. (Second Amendment to Master Deed; R. p. 1261). This is an obvious attempt to avoid the clearly binding nature of the Waiver. The circuit court erroneously held that this amendment allowed Respondents to avoid the effect of the Waiver, and should be reversed. (Order pp. 9-11; R. pp. 42-44).

A. The Waiver Was In Effect When This Action Was Commenced and May Not Be Un-Waived Without Consent Of The Other Bound Parties.

First, the Waiver was in effect at the time this action was commenced and, therefore, the Second Amendment to the Master Deed has no bearing on this action. Respondents waived their right to a jury trial and to proceed in a class action at the time they accepted title to the property. (Master Deed § XXXV(D); R. pp. 1162-1163). The Master Deed expressly states that the Owner relied on the Waiver as a material inducement to creating the Horizontal Property Regime. (Master Deed § XXXV(D)(iv); R. p. 1163). Therefore, the Waiver was effective at the time Respondents accepted title to the Property. Furthermore, the Association is a "Bound Party" to the Waiver and its members were aware of the Waiver when they purchased their units and at the time of turnover of the Property on August 24, 2009, more than four years before the attempt to amend the Master Deed. Respondents may not un-waive their voluntary and knowing waiver by an amendment to the Master Deed without the consent of the other bound parties, such as Appellants.

B. There Is No Support For The Retroactive Application of the Amendment.

Second, the Order's finding that the amendment to the Master Deed applies retroactively is wholly without support. (Order pp. 9-11; R. pp. 42-44). The amendment

itself states that it is effective only upon its recording, and contains no reference to retroactive application. (Second Amendment to Master Deed p. 1; R. p. 1261). Moreover, the cases cited in the Order for the novel proposition that an amendment to a Master Deed can retroactively apply to restrict the rights of a grantor do not, in fact, support such a departure from the law. (Order pp. 9-11; R. pp. 42-44).

For example, the circuit court cited the case of *Apple II Condo. Ass'n v. Worth Bank & Trust Co.*, 659 N.E.2d 93, 98 (Ill. App. Ct. 1995). (Order pp. 9-10; R. pp. 42-43). As an initial matter, this Illinois case, which is not binding on our courts, deals with applying amendments to a Declaration of Covenants to **owners** of a condominium unit rather than applying amendments to a Master Deed to the **developer** of the condominium project. *Apple II*, 659 N.E.2d 93. More importantly, although the *Apple II* court dealt with an amendment to a condominium association's Declaration, the amendment was not applied retroactively in the sense that Respondents request here. *Id.*

The facts of the *Apple II* are instructive on why it is wholly inapposite. In *Apple II*, Mr. and Mrs. Harmon leased their condominium unit to three women for one year. *Id.* at 95. During that year, the association amended the Declaration to add a provision which allowed unit owners to lease their unit only once and prohibited any **subsequent** lease. *Id.* Nevertheless, the Harmons renewed their lease to the three women at the end of the year. *Id.* at 96. The Association then sought to evict the Harmons' tenants, and the Harmons argued that the amendment could not be given "retroactive application" to members who had purchased their units before the amendments were enacted. *Id.*

The court in *Apple II* held that Illinois' Condominium Property Act specifically provided that such amendments are "deemed effective upon recordation unless the

amendment sets forth a different effective date" and unit owners had notice that such amendments could take place. *Id.* at 97. Therefore, the Harmons were bound by the amendment and were not allowed to enter into the subsequent lease despite the fact that they purchased their unit prior to the amendment. *Id.* at 97-99. In this sense, the amendment was "retroactively applied" to those who purchased their units before the amendments. However, the amendment itself only applied prospectively—namely, to future leases—and the amendment only became effective once it was recorded.

The circuit court also cited *Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 365, 628 S.E.2d 902, 915 (S.C. Ct. App. 2006), which similarly fails to provide any support for the Court's ruling. (Order p. 10; R. p. 43). Like *Apple II*, *Queens Grant II* deals with applying amendments to a Declaration of Covenants to **owners** of a condominium unit rather than applying amendments to a Master Deed to the **developer** of a condominium project. 368 S.C. 342, 628 S.E.2d 902. *Queens Grant II* only deals with a forward-looking amendment increasing maintenance assessments from which unit owners sought prospective relief. *Id.* In fact, the *Queens Grant II* court specifically noted that this claim sought only prospective relief. *Id.* at 354, 628 S.E.2d at 910. Like in *Apple II*, the issue was whether the assessments applied to purchasers who bought prior to the amendment, not application of the amendment prior to its stated effective date.

Next, the circuit court cited another non-binding case, *Frantz v. Piccadilly Place Condominium Ass'n*, 597 S.E.2d 354, 357 (Ga. 2004), claiming that it holds "an amendment to condominium declaration applied retroactively to condominium association's claims against a unit owner." (Order p. 10; R. p. 43). However, the *Frantz*

court did not accept the argument that the amendment was being retroactively applied as suggested in the Order. 597 S.E.2d 354.

In *Frantz*, the condominium association amended its declaration to allow it to suspend utilities to any unit that had total final judgments of more than $750 after it had obtained a judgment against Frantz for unpaid assessments of more than $9,000 for his unit. *Id.* at 356. The trial court refused Frantz's request for a temporary restraining order to prevent the suspension of his utilities, and Frantz argued that this inappropriately gave retroactive application to the amendment. *Id.* at 356-57. The appellate court did not agree that the amendment applied retroactively, noting that it was merely an "alleged retroactivity." *Id.* The opinion does note that, under Georgia law, contracting parties may agree for terms to apply retroactively, but in this case the amendment was specifically made effective after the Complaint was filed and, in any event, Appellants certainly did not agree to it.[2]

Finally, the circuit court cited *Crest Builders, Inc. v. Willow Falls Improvement Ass'n*, 393 N.E.2d 107, 109-10 (Ill. Ct. App. 1979), to support its retroactive application of the Second Amendment. (Order p. 10; R. p. 43). In *Crest Builders*, the association amended the declaration to terminate the developer's rights to advertise and promote units in the condominium complex—a totally prospective amendment. 393 N.E.2d at 108. In discussing the developer's request to enjoin the association from implementing the amendment, the court noted that the developer would "no longer" be able to advertise

[2] The circuit court cited several cases for the proposition that parties to a contract may give retroactive effect to their contractual provision. (Order pp. 10-11; R. pp. 43-44). However, the circuit court ignored that the parties specifically chose to do the opposite in this instance. The Second Amendment explicitly states that it "shall not be effective until recorded in the RMC Office for Richland County." (Second Amendment to Master Deed; R. p. 1261).

or show the units. *Id.* at 109. There was simply no discussion of the amendment being effective prior to its enactment and, therefore, it provides no support for the circuit court's ruling.

Other cases cited by the circuit court in support of its retroactive application of the Second Amendment are not related to amendments to condominium Declarations or Master Deeds whatsoever and, therefore, provide no support for the circuit court's ruling. (Order pp. 9-11; R. pp. 42-44) (*citing Wayburn v. Smith*, 270 S.C. 38, 42, 239 S.E.2d 890, 892 (1977) (construing a deed as a whole by ascertaining the grantor's intent where the granting clause indicates the conveyance of only a life estate of the property but the habendum clause indicates conveyance in fee simple); *Easterby-Thackston, Inc. v. Chrysler Corp.*, 477 F. Supp. 954, 956 (D.S.C. 1979) (determining that South Carolina's Regulation of Manufacturers, Distributors and Dealers Act did not apply retroactively to a particular dealership contract); *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1331-32 (4th Cir. 1995) (addressing the validity of a contractual provision allowing for the readjustment of franchise fees which was found not to be a modification of the contract)).

Therefore, the Order is wholly without support for its ruling that the Master Deed could be amended to eliminate the Owner's rights retroactively without the Owner's consent.

C. The Amendment Is Ineffective Because Respondents Did Not Obtain The Required Permission of The Mortgage Holders.

Third, the Amendment is not effective because Respondents did not secure the permission of mortgage holders as required by Section XIII(4) of the Master Deed. (Master Deed § XIII(4); R. p. 1140). Therefore, the Amendment is not effective. Respondents did not dispute below that they failed to secure the required permission of

mortgage holders to amend the Master Deed, but the Order wrongly finds that the Amendment was effective anyway. Specifically, the Order incorrectly finds that Appellants can not challenge the validity of the Second Amendment to the Master Deed under South Carolina's Uniform Non-Profit Corporation Act, S.C. Code Ann. § 33-31-403. (Order pp. 11-12; R. pp. 44-45). However, the Non-Profit Act does not apply to amendments to the Master Deed, which is accomplished by votes of the property owners and not by an act of the HOA. (Master Deed §§ XIII(4) and XXVII; R. pp. 1140 and 1155). Therefore, amendment of the Master Deed is not a corporate act governed by the Non-Profit Act. Because Respondents' effort to amend the Master Deed was tardy and ineffective, the Order should be reversed.

D. The Amendment Is Ineffective Because It Is Unreasonable.

Fourth, even if the amendment could be applied retroactively, the amendment to the Master Deed is ineffective because it is entirely unreasonable in the context of this case. To permit retroactive application would lead to absurd results never contemplated to be part of the basis of the bargain. For example, if the law were as the Order wrongly finds, then unit owners could retroactively amend the Master Deed to **add** warranty terms and protections to which the Owner never agreed.

The undersigned is aware of no reported South Carolina case specifically addressing this issue on similar facts, but cases from other jurisdictions are instructive as to the HOA's **limited power** to amend to avoid such unfair and unreasonable results. For example, the North Carolina Supreme Court has held, after collecting cases from across the country holding similarly, that "a provision authorizing a homeowners' association to amend a declaration of covenants does not permit amendments of unlimited scope; rather,

every amendment must be *reasonable* in light of the contracting parties' original intent." *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 633 S.E.2d 78, 87 (N.C. 2006) (emphasis in original). The *Armstrong* court went on to hold that reasonableness is an objective standard to be determined by the court, stating "[r]easonableness may be ascertained from the language of the declaration, deeds, and plats, together with other **objective** circumstances surrounding the parties' bargain, including the nature and character of the community." *Id.* (emphasis added).

The amendment at issue in *Armstrong* authorized broad general-purpose assessments for the common benefit of the community. *Id.* at 88. However, the small neighborhood had no common elements, no private roads, and no amenities, and the original declaration didn't reveal any intention to confer such broad powers to the association. *Id.* at 88-89. "This Court will not permit the Association to use the Declaration's amendment provision as a vehicle for imposing a new and different set of covenants, thereby substituting a new obligation for the original bargain of the covenanting parties." *Id.* at 89. Based on this, the *Armstrong* court found that the amendment was unreasonable and, therefore, invalid and unenforceable. *Id.* at 88-89.

The North Carolina Court of Appeals has recently relied on the *Armstrong* decision to invalidate unreasonable amendments to an association's declaration. *Wallach v. Linville Owners Ass'n, Inc.*, 2014 WL 2937071, Slip Op. No. COA13-1116 (N.C. Ct. App. July 1, 2014). The amendment at issue in *Wallach* terminated benefits afforded to builders in the original declaration including reduced assessments and deferred payment of assessments until the sale or rental of their lot. *Id.* at *5-6. The *Wallach* court found the amendment was unreasonable because it "eliminates benefits . . . that likely persuaded

builders to purchase lots in the first place and were essential to the original bargain." *Id.* at *9. The court refused to enforce the unreasonable amendment, ruling that the association should not be permitted to "amend the Declaration to the detriment of the builders who purchased lots with the expectation that they would be afforded the benefits." *Id.*

As set forth above, the Waiver here is not enforceable because it cannot apply retroactively. Even if it did, this Court should apply a reasonableness standard to determine whether the Second Amendment is enforceable against the Appellants in this case like other courts. When applying the reasonableness test to the facts of this case, the inescapable conclusion is that the HOA's unilateral amendment of the dispute resolution provisions after the lawsuit was filed is unreasonable and invalid as to the Appellants. Consequently, the jury trial and class action waivers remain valid and should be enforced.

IV. The Circuit Court Erred in Finding That The Waiver Was Not Knowing And Voluntary.

Section 27-31-100 of the Act requires that the Master Deed include "[a] description of the full legal rights and obligations, both currently existing and which may occur, of the apartment owner, the co-owners, and the person establishing the regime." S.C. Code § 27-31-100. Accordingly, the Waiver was included in the Master Deed, which was publicly filed prior to the purchase of any units by the unit owners. (Master Deed § XXXV(D)(i); R. 1163). The Master Deed also was incorporated into the By-Laws of the HOA, which were available to all unit owners prior to their purchase of the units. (By-Laws ¶¶ 1 and 13; R. pp. 1077 and 1095). Indeed, because South Carolina requires real estate closings to be handled by lawyers, each purchaser would have had the

real estate documents explained and would have had the opportunity to ask their lawyer questions about the Waiver.

In addition, because every unit owner had notice of the Waiver when they bought the unit, developer control of the unit is of no moment here. Therefore, the Order incorrectly relied on *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, which involved the question of whether the statute of limitations began to run during the period of developer control. 397 S.C. 348, 372, 785 S.E.2d 112, 125 (Ct. App. 2012). The present situation involving the Waiver available to homeowners at the time of purchase in publicly filed documents explained to them by their lawyer at a real estate closing is entirely inapposite to the situation presented in *Magnolia North*.

Finally, even if developer control of the HOA did matter in this case, the HOA ratified the Master Deed and its contents over and over again. HOA control was turned over to the unit owners on or about August 24, 2009, and no action was taken to amend the Master Deed until more than four years later, after the instant lawsuit was filed.

Therefore, Respondents knowingly and voluntarily waived their right to a jury trial and to proceed as a class, and the Order should be reversed.

V. The Circuit Court Erroneously Concluded That Appellants Waived Their Rights To Seek A Non-Jury Trial Without A Class Action By Electing Not To Arbitrate.

The Order cites case law related to waiver of the right to arbitrate in support of its holding that Respondents' waived their right to a non-jury trial and to proceed without a class. (Order p. 14; R. p. 47). However, in this case, Respondents' decision not to arbitrate is wholly unrelated to its right to enforce the Waiver.

While the Waiver is found in the section of the Master Deed entitled "Alternative Dispute Resolution," the Waiver, found in subsection "D" is entirely separate from the arbitration provision, found in subsection "B." (Master Deed §§ XXXV(B) and (D); R. pp. 1161-1163). The Waiver expressly contemplates litigation outside of the arbitration context by referencing "any lawsuit, proceeding, or any other litigation procedure." (Master Deed § XXXV(D)(i); R. p. 1163). Further, reading the jury trial waiver to be intertwined with the arbitration provision would make the jury trial waiver superfluous since all arbitrations are non-jury. *Stevens Aviation, Inc. v. DynCorp Int'l. LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) ("[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.") (internal citations omitted).

The Order cites no authority to suggest that declining to arbitrate should invalidate a wholly distinct jury trial waiver and class action waiver such as that in the Master Deed. Therefore, the Order should be reversed.

VI. The Circuit Court Incorrectly Found That the Waiver Is Unconscionable.

In order for the Waiver to be unconscionable, Respondents must show that it has oppressive and one-sided terms such that they had no meaningful choice. *See Toler's Cove Homeowners Ass'n v. Trident Constr. Co.,* 355 S.C. 605, 586 S.E.2d 581, 585 (2003). The Order relies on *Smith v. D.R. Horton, Inc.,* 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013), for the proposition that the "cumulative effect" of one-sided provisions in the Master Deed renders the Waiver unenforceable. (Order p. 15; R. p. 48). However, the circumstances of this case are entirely distinguishable from *D.R. Horton.*

In *D.R. Horton*, the purchase contract at issue contained disclaimers of implied warranties and a section entitled "Limitations of Liability" that the trial court found unconscionable. 403 S.C. at 15, 742 S.E.2d at 40. In this case, the Master Deed does not contain any such limitations on liability. Instead, it contains disclaimers of warranty found in virtually every Master Deed, as well as an express one-year limited warranty related to defective materials or workmanship. (Master Deed § IV; R. p. 1125).

Here, the Waiver contains a mutual jury trial waiver and class action waiver with language similar to that previously enforced by South Carolina courts, even in adhesion contracts. *See York*, 406 S.C. at 94, 749 S.E.2d at 139 (holding that a class action waiver contained in an automobile retail installment contract was "valid and must be enforced according to its terms"); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 543, 542 S.E.2d 360 (2001) (holding that a jury trial waiver contained in a home improvement installment contract was valid and enforceable). Moreover, the Waiver appears in the Master Deed, which was drafted by a South Carolina licensed attorney. (Master Deed p. 1; R. p. 1123). The Master Deed was provided to Respondents and explained to them at a loan closing supervised by a South Carolina licensed attorney selected by Respondents. Under these circumstances, the Waiver is not unconscionable and is enforceable.

CONCLUSION

Based on the foregoing, the Order should be reversed, the case transferred to the non-jury docket, and the class action allegations stricken.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-8512
Appellate Case No. 2015-000180

The Gates at Williams-Brice Condominium Association and Katharine Swinson, individually, and on behalf of all others similarly situated ,..... Respondents,

v.

DDC Construction, Inc.; Kapasi Glass Mart, Inc.; DMC Consolidated, Inc.; DMC Builders, Co., Inc., individually and d/b/a The Dinerstein Companies; DC Developers – Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; 31-W Insulation Company, Inc.; Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing Inc.; LTB Construction, Inc.; Martin Morales Jr. Painting & Drywall, LLC; Metal Construction Materials, Inc.; Southwest Ironworks, Inc.; The Clerkley/Watkins Group, LP; Tindall Corporation; Triad Pest Control, Inc.; Wyman Acoustics LLC; Alenco Holding Corporation; Alenco Window GA, LLC; New Alenco Window, Ltd.; AWC Holding Company; Crosby Window, Inc., f/k/a Action WinDoor Technology, Inc.; Geo-Systems Design & Testing, Inc.; HGE Consulting, Inc.; Maintenance Builders Supply, Ltd.; SCA Engineers, Inc.; Sinclair & Associates, Inc.; Faultless Hardware, individually and d/b/a Pamex, Inc.; T&M Concrete, Inc.; Loveless Commercial Contracting, Inc.; Economy Waterproofing, Inc.; BMC West Corporation; Highway One Construction, Inc.; J.I. Windows LLC; Dietrich Industries, Inc. a/k/a Dietrich Metal Framing, Inc. n/k/a Clarkwestern Dietrich Building Systems LLC; Best Masonry and its successor in interest, OldCastleAPG; Headwaters, Inc. d/b/a Best Masonry; and John Doe #1-10 ..... Defendants,

Of whom DDC Construction, Inc.; DMC Consolidated, Inc.;

DMC Builders, Co., Inc., individually and improperly identified as d/b/a The Dinerstein Companies; DC Developers – Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing Inc.; LTB Construction, Inc.; Martin Morales Jr. Painting & Drywall, LLC; Metal Construction Materials, Inc.; Wyman Acoustics LLC; and Highway One Construction, Inc. are..... Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the document(s) hereinbelow specified by mailing a copy of the same, as indicated below to the following address(es):

Document(s): Appellants' Final Brief

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