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

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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.

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SUMMARY OF ARGUMENT

Respondents' initial brief wrongly characterizes the issue before the Court as involving the enforcement of an arbitration provision. (Resp. In. Br. 11, 36). Appellants have not moved to compel arbitration. Instead, Appellants have moved to enforce their right to a nonjury trial and to defend unit owner claims on an individual basis rather than as a class action based on a written waiver in the Master Deed ("Waiver").[1]

Respondents executed the Waiver as part of real estate transactions with the assistance of counsel. After filing suit, Respondents acknowledged the validity of the Waiver but attempted to avoid its effect by trying to amend it out of the Master Deed. But when attempting to amend after suing, Respondents failed to follow the requirements of the Master Deed, making the amendment ineffective. However, even if the amendment had been effective, it cannot be applied retroactively to unilaterally un-waive a waiver given at the time Respondents accepted the Master Deed. The Amendment also cannot apply to a Complaint filed some five months before the effective date of the Amendment.

STANDARD OF REVIEW

The issue before this Court is enforcement of a jury trial waiver and class action waiver.[2] As noted by the supreme court in *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014), *reh'g denied* (Apr. 2, 2014), which also addressed the enforceability of written jury trial waivers and other mode of trial issues, the question of

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[1] It is unclear why Respondents continue to object to dismissal of their class allegations given that "in excess of 80%" of the owners have assigned their claims to the Association. (Order of Dismissal as to Settling Defendants; R. p. 1).

[2] Appellants do not and have not sought to enforce the arbitration provision in the Master Deed.

whether a party is entitled to a jury trial is a question of law. *Id.* at 328, 755 S.E.2d at 441 (quoting *Verenes v. Alvanos,* 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010)). Thus, the findings of the trial court are not entitled to any deference. *Id.* (citing *Verenes*, 387 S.C. at 15, 690 S.E.2d at 772–73).

Respondents cite to cases applying an abuse of discretion standard and contend it applies to mode of trial issues. (Resp. In. Br. 12). This is incorrect. In *King v. Shorter*, 291 S.C. 501, 354 S.E.2d 402 (Ct. App. 1987), this Court addressed whether a Plaintiff who did not request a jury trial within the time allowed by S.C. R. Civ. P. 38 may amend his pleading at a later date. *King*, 291 S.C. at 502, 354 S.E.2d at 403. Therefore, the issue was whether the pleading could be amended, which rests on an abuse of discretion standard.

Satcher v. Satcher does not set forth the applicable standard of review either. 351 S.C. 477, 570 S.E.2d 535 (Ct. App. 2002). (Resp. In. Br. 12). Like *King*, *Satcher* involved an untimely request by a Plaintiff for a jury trial under S.C. R. Civ. P. 38 and 39 after the complaint was filed, which this Court reviewed under an abused of discretion standard. *Satcher*, 351 S.C. at 490, 570 S.E.2d at 541–42. *Satcher* did not address the question of whether a party was entitled to a non-jury trial, only the timeliness of Plaintiff's request for a jury trial under Rules 38 and 39.

Therefore, *King* and *Satcher* do not set forth the proper standard of review. Instead, the Supreme Court's recent decision in *Blackburn* sets forth the proper standard. The issue before this Court is whether the Appellants are entitled to a non-jury trial without a class action pursuant to a written waiver. This is substantially the same issue as in *Blackburn*. *See Blackburn*, 407 S.C. at 327, 755 S.E.2d at 440. Therefore, the issue is

a legal one and the findings of the trial court are not subject to any deference.

ARGUMENT

I. The Waiver Is Enforceable.

Respondents do not contest that the scope of the Waiver covers the lawsuit at issue. Instead, Respondents contend that the Waiver is unenforceable because it was included in the Master Deed by the developer when the condominium regime was created. (Resp. In. Br. 30–34). Nonetheless, Respondents knowingly and voluntarily agreed to the Waiver, along with all other terms in the Master Deed at the time of closing. South Carolina law requires such a provision concerning dispute resolution to be in the Master Deed. S.C. Code Ann. § 27-31-10 to -440, Horizontal Property Act ("the Act"). Respondents also attack the Waiver as unconscionable, but this argument also should be rejected.

A. The Waiver is conspicuous and unambiguous.

The Wavier complies with the law, and the trial court erred by finding the provision to be ambiguous and inconspicuous. (Order; R. pp. 49-50). The waiver is conspicuous because it is written in bold and all capitalized letters in a section entitled "Waiver of Jury Trial." *See, e.g., Blackburn*, 407 S.C. at 333 n.8, 755 S.E.2d at 443 n.8 (finding waiver set apart in bold and capital letters to be conspicuous). Respondents cite no authority limiting or contradicting the Supreme Court's recent decision in *Blackburn*.

The only basis in the Order for finding the Waiver to be ambiguous is that it is "embedded under an 'Alternative Dispute Resolution' Heading; they reference jury trial in its caption; and they are written in boilerplate language undecipherable to an unsophisticated party." (Order; R. p. 50). As an initial matter, the Order is factually

incorrect by stating that the Waiver says only "jury trial" in the caption. The Waiver is expressly captioned "**D. Waiver of Jury Trial**." (Master Deed § XXXV(D); R. pp. 1162-1163) (emphasis in original). Further, the Waiver is set apart in a separate section, and plainly states in capital and bolded wording that "**NEITHER CO-OWNER NOR ANY ASSIGNEE, SUCCESSOR, HEIR OR LEGAL REPRESENTATIVE OF CO-OWNER OR GRANTOR, SHALL SEEK A JURY TRIAL...**" (*Id.*, R. p. 1163) (emphasis in original). The Waiver also unambiguously states that the Waiver includes "**WITHOUT LIMITATION WAIVER OF ANY TYPE OF CLASS ACTION SUIT.**" (*Id.*, R. p. 1163) (emphasis in original).

Therefore, the Court should reverse the trial court's conclusion that the waiver is not conspicuous. The wavier is plain on its face and should be enforced under *Blackburn.*

B. The Waiver was voluntary and knowing.

Respondents incorrectly rely on *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), for the proposition that the "[Condominium Owners Association], in its infancy, was controlled by the Dinerstein Appellants, and thus, independently had no way to 'voluntarily' relinquish any rights." (Resp. Init. Br. 31). *Magnolia North* is inapposite to the circumstances of this case however.

In the portion of *Magnolia North* cited by Respondents, the relevant question before this Court was whether the statute of limitations began to run based on information known to the developer-controlled board of a property owners' association. *Magnolia North*, 397 S.C. at 371–72, 725 S.E.2d at 125. Therefore, the issue turned on whether the

POA could be charged under the statute of limitations by actions exclusively within the control of the developer-controlled POA. The homeowners in *Magnolia North* had no notice and no say as to whether claims would be brought during the period of developer control, and so this Court found that the statute of limitations did not begin to run as a matter of equity. *Id.*

The present situation is not analogous. Here, each unit owner received notice of the Waiver prior to purchasing their unit because it was included in the recorded Master Deed and explained to each unit owner by a lawyer at closing. The terms of the Master Deed were expressly incorporated into each unit owners purchase contract, and signed by each unit owner. (Purchase Contract; R. p. 1102). Nonetheless, Respondents suggest that Appellants should have deposed each unit owner to ask them if they had knowledge of the Waiver. (Resp. Init. Br. 32). Such an effort is not required under the law because each unit owner is charged with knowledge of the contents of their contract and the Master Deed as a matter of law, even if they never read the Master Deed. *See Regions Bank v. Schmauch*, 354 S.C. 648, 663–64, 582 S.E.2d 432, 440 (Ct. App. 2003) (citations omitted) ("A person signing a document is responsible for reading the document and making sure of its contents."); *Blackburn*, 407 S.C. at 333, 755 S.E.2d at 443 (Respondents "cannot avoid the effects of the waivers by arguing that they were unaware that such provisions were included in the [contract]"). Therefore, each unit owner, the only members of the Association, had notice of the waiver and without objection knowingly and voluntarily agreed to the Waiver when they purchased their units by the express language in the contracts they signed when being represented by counsel.[3]

[3] Moreover, Respondents brief does not address the fact that the Rule 30(b)(6) witness of

Further, adoption of Respondents' argument would lead to a result contrary both to public policy and to the requirements for a Master Deed found in the Act. Section 37-31-100 of the Act requires and permits developers to include "a full 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." Therefore, the Act specifically contemplates that the developer of a horizontal property regime will set forth the legal rights and obligations of the parties, including dispute resolution mechanisms, to ensure that the regime is administered in a consistent manner as to all owners.

Indeed, any dispute resolution provisions arguably must be included in the Master Deed in order to be enforceable under the Act. Under the Doctrine of Merger, the subsequent deed becomes the contract rather than the purchase agreement. *Wilson v. Landstrom*, 281 S.C. 260, 264, 315 S.E.2d 130, 132–33 (Ct. App. 1984) (quoting *Charleston & Western Carolina Railway Co. v. Joyce*, 231 S.C. 493, 504–05, 99 S.E.2d 187, 183 (1957)). In this case, the Master Deed was incorporated by reference into the deed for individual units provided to unit owners, thereby superseding the purchase agreements. Therefore, any dispute resolution procedures must be included in the Master Deed. *See id.*

Consequently, acceptance of Respondents' argument would preclude a Master Deed from containing alternative dispute resolution procedures or similar provisions that

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the Association and the named class representative both testified in their depositions that both the HOA and the unit owners are bound by the terms of the Master Deed at the time of their purchase, which are enforced now by the homeowner-controlled board. (App. Init. Br. 7).

in any way impacted the rights of the owners' association or the property owners – exactly the opposite of what the Act and common law requires. Such a rendering of the law would be contrary to public policy and should be rejected. *See Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342–43, 713 S.E.2d 278, 283 (2011) (citing *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000)) ("Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention."); *Ross v. Waccamaw Comm. Hosp.*, 404 S.C. 56, 66, 744 S.E.2d 547, 551 (2013) (noting "strong public policy favoring alternative dispute resolution"); *Gissel v. Hart*, 382 S.C. 235, 240–41, 676 S.E.2d 320, 323 (2009) (arbitration favored).

Therefore, the Waiver was knowing and voluntary as a matter of law, and should be enforced.

C. The Waiver Is Not Unconscionable.

The Order incorrectly states and the Respondents argue that "the deleted class action and jury waivers attempt to disclaim the Dinerstein Defendants' liability and unconscionably restrict both the POA and its members' right to bring suit and receive a jury trial." (Order; R. p. 50). The Waiver does not contain any limitation on liability or the right to bring a legal action. (Master Deed § XXXV(D); R. pp. 1162-1163). Instead, it contains only a mutual waiver of the right to a jury trial and class action lawsuit. (*Id.*). Such waivers are routinely enforced by South Carolina courts. *See Blackburn*, 407 S.C. at 333–34, 755 S.E.2d at 443–44; *see also Muriithi v. Shuttle Exp., Inc.*, 712 F.3d 173, 181 (4th Cir. 2013) (reversing the district court's finding that the class action waiver was unconscionable). Respondents' Initial Brief does not argue to the contrary.

Further, even if the Waiver did contain limitations on liability found elsewhere in the Master Deed, these limitations are not unconscionable. The Order wrongly compares the warranty provisions in the Master Deed to those found in *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013), *reh'g denied* (May 23, 2013), in finding the warranty provisions unconscionable. (Order; R. p. 48-49). The warranty provisions in this case are wholly distinguishable from the warranty provisions in *Smith.*

In *Smith*, the warranty provisions contained a "Limitation on Liability" section that provided Horton, the contractor, "could not be liable for monetary damages of any kind." *Smith*, 403 S.C at 15, 742 S.E.2d at 40. Moreover, the limitations on liability were not mutual, permitting Horton to seek monetary damages while simultaneously denying the homeowner the same right. *Id.* In this case, however, the Master Deed nowhere contains any such limitation as to the recovery of monetary damages, and the dispute resolution provisions are mutual. (*See* Master Deed § XXXV(D); R. pp. 1162-1163).

Respondents also cite to *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), in support of their claim that the warranty provisions in the Master Deed are unconscionable. (Resp. In. Br. 38). It too does not support Respondents' argument. *Simpson* involved a consumer contract for the purchase of an automobile containing an arbitration clause. *Simpson*, 373 S.C. at 19, 644 S.E.2d at 665. Our Supreme Court found the arbitration provision unconscionable primarily because it was one-sided, permitting the dealer to proceed in court while the consumer could not. *Simpson*, 373 S.C. at 32, 644 S.E.2d at 672. That is not the case here, where the Waiver is mutual, requiring both Appellants and Respondents to resolve disputes by bench trial if

arbitration is not used. (*See* Master Deed § XXXV(D); R. pp. 1162-1163).

Further, to the extent relevant to this Court's analysis, the Master Deed is not an adhesion contract in the same manner as a consumer contract to purchase an automobile, as Respondents argue.[4] The trial court did not rule that the Master Deed is an adhesion contract in this case. The Master Deed exists as a matter of statute, and is required to set forth the legal obligations and rights applicable to all parties with an interest in the regime. S.C. Code Ann. § 27-31-100. It is negotiated for in terms of the purchase agreements and unit deeds, which varied in terms of price, unit type, prepayment of regime fees, available amenities and interior characteristics of each unit, and other variables applicable to purchases of real estate. (Purchase Agreement; R. p. 1102). Plainly, the purchase agreements are not adhesion contracts, to the extent relevant here.

Finally, even if the warranty provisions were unconscionable, the Waiver should be severed and enforced. The Master Deed contains a severability provision, indicating the intent of the Parties. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002) (quoting *Columbia Architectural Group, Inc. v. Barker,* 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980)) ("The entirety or severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject.").

As noted in *Smith*, the unconscionable portion of a contract should be severed and the remainder of the contract enforced except where "illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the

[4] Of note, this Court did not find that the contract in *Smith*, which Respondents allege was similar to the contract in the present case, was an adhesion contract. *See generally Smith.*, 403 S.C. 10, 742 S.E.2d 37.

unenforceable parts" such that "the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Smith*, 403 S.C. at 17, 742 S.E.2d at 41 (quoting *Booker v. Robert Half Int'l Inc.*, 413 F.3d 77, 84–85 (D.C.Cir.2005)). Such is not the case here. The Waiver is entirely distinct from the allegedly unconscionable warranty provisions, found in separate sections of the Master Deed. (*Compare* Master Deed § XXXV(D); R. p. 1162 *with id.* at § 4; R. p. 1163). Severing and enforcing the Waiver would in no way leave the Master Deed so that only a "disintegrated fragment remains." *Smith*, 403 S.C. at 17, 742 S.E.2d at 41. The Waiver is a stand alone provision in the contract wholly unrelated to the allegedly unconscionable warranty provisions.

Therefore, the Waiver is not unconscionable and neither are any other provisions of the Master Deed. To the extent there are any unconscionable provisions outside of the Waiver in the Master Deed, then the Waiver should be severed and enforced. Reversal of the Order is necessary.

II. The Amendment to the Master Deed Was Not Effective As to Appellants.

Respondents do not contest that they failed to follow the procedures required to effectively amend the Master Deed when attempting to add the Second Amendment to the Master Deed ("Amendment"), which purported to delete the Waiver. (App. In. Br. 16–17; Resp. In. Br. 49). Instead, Respondents argue that Appellants' lack standing to challenge the Amendment and did not preserve the issue for appeal. Both arguments are wrong.

A. The Nonprofit Act does not preclude Appellants from challenging the effectiveness of the Second Amendment.

Section XIII(4) of the Master Deed requires that mortgage holders of units approve the Amendment. Respondents do not contest that such permission is required, or

that they failed to obtain it. Instead, Respondents contend that Appellants are barred from challenging the effectiveness of the Amendment under South Carolina's Nonprofit Corporation Act ("Nonprofit Act"), S.C. Code. Ann. 33-31-101 et seq. (Resp. In. Br. 17). Respondents argue that Appellants' challenge to the Amendment is an *ultra vires* challenge to a corporate act by the Association pursuant to Section 33-31-104 of the South Carolina Code, which only applies to corporate acts. (*Id.*). However, amending the Master Deed is not a corporate act, and arguments otherwise ignore the nature and terms of the Master Deed, which does not require or permit the Association to act in any way to amend the Master Deed.

The Master Deed is not a corporate record or document of the Association. In sections XIII and XXVII, the Master Deed contains express provisions outlining the requirements for amending it. (Master Deed; R. pp. 1138 and 1155). Importantly, none of these provisions require any act by the Association in order to amend the Master Deed. The only parties required or allowed to act by any of these sections are the Grantor, the unit owners and the mortgage holders. Therefore, amending the Master Deed is not a corporate act of the Association and the Nonprofit Act does not apply.

B. The Horizontal Property Act does not preclude Appellants from challenging the effectiveness of the Second Amendment.

Respondents also argue that Appellants "lack standing" to challenge the Second Amendment under the Horizontal Property Act. (Resp. In. Br. 38). Respondents do not cite any provisions of the Act to this effect, however. (Id.) Instead, Respondents cite *Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 494 S.E.2d 465 (Ct. App. 1997), which only addressed whether a developer can unilaterally divest ownership of common elements from the homeowner's association. That issue has

no bearing on the case at hand.

Further, the question of "standing" is not at issue in this case. Standing involves whether a party has a "personal stake in the subject matter of the lawsuit." *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S. Carolina Dep't of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). Appellants have asserted no counterclaims in this matter and seek only to defend themselves against the untrue allegations of Respondents. They plainly have standing to do so.

Moreover, it is beyond reasonable disagreement that Appellants maintain an interest in the Master Deed with regard to dispute resolution provisions. Indeed, Appellants are expressly named in the Waiver and derive valuable rights from the enforcement of the Waiver. (Master Deed XXXV(D), R. pp. 1162-1163). The Waiver states that it applies to any litigation "arising from or based upon...the dealings or relationship between or among the grantor, its agents, contractors, subcontractors, architects, engineers and the co-owners of the Association." (*Id.*). As such, any effort to change these rights requires both notice of the change, which the Respondents failed to provide, and the ability to object to the change.

Therefore, despite Respondents' unsupported assertion, Appellants are permitted to challenge changes to the dispute resolution procedures in the Master Deed, including the Waiver.

C. The Amendment was not reasonable as to Appellants.

As set forth above, the provisions of the Master Deed are not unconscionable and the question of construction deficiencies remains to be determined – the question before this Court is the mode of trial to be used to determine whether those deficiencies exist.

Pursuant to the Horizontal Property Act, the Master Deed contains the dispute resolution procedures to be used to resolve Respondents construction defect claim: a bench trial without a class action. At no time have Appellants argued a trial is unwarranted. As such, it is unreasonable to allow Respondents to unilaterally delete this provision from the Master Deed after they accepted their deeds and the lawsuit was filed. It also is unreasonable to allow Respondents to unilaterally delete the warranty provisions from the Master Deed after accepting the benefits of the express warranties prior to their expiration. Therefore, the Amendment should not be permitted to be enforced as to Appellants.

D. The Issue Of Whether Appellants Can Challenge The Second Amendment Is Preserved For Appellate Review.

In its initial brief, Respondent makes the following inaccurate statement: "The first time Appellants attempted to challenge the validity of the Second Amendment was in its Motion to Reconsider – *after* the Circuit Court ruled that the issue was precluded. (Resp. In. Br. 15). This is not true. The issue was expressly addressed at, among other places, the hearing below, in which counsel for Appellants stated, "...the opposition spent some time talking about whether we have the right to challenge the amendment or not. At this point, we're not challenging the amendment as it might apply prospectively to other people. We're simply challenging it as it applies to our client." (Transcript; R. p. 1294). Moreover, the issue was directly submitted for the trial court's consideration in the Appellants' Proposed Order requested by the trial court. (Proposed Order ¶ 30(c) and (d), R. p. 28).

Therefore, the issue is preserved for review, and the Amendment should be found to be inapplicable to Appellants because the Amendment was not made in accordance with procedures for amending the Master Deed and because it was not reasonable.

Accordingly, the Order must be reversed.

III. Even If The Amendment Was Effective, The Amendment To The Master Deed Can Not Apply Retroactively.

Respondents argue that they un-waived their right to a jury trial and to proceed as a class action by amending the Master Deed ("Amendment") after they filed their Complaint and after Defendants denied their request to proceed by jury and as a class action.[5] This argument is wholly unsupported by law, logic, or fairness.

Respondents cite no authority from South Carolina to support its incorrect argument that they can un-waive its waiver of the right to a jury trial and class action after the deed has been accepted and litigation has been filed. Further, none of the non-binding cases cited by either party permit an Amendment to the Master Deed to apply retroactively to undo actions already taken in the past, as Respondents urge here. (Resp. In. Br. 26).

For example, in *Apple II Condo. Ass'n v. Worth Bank & Trust Co.*, 659 N.E.2d 93 (Ill. App. Ct. 1995), the amendment at issue only applied to future leases entered into by condominium owners, and the amendment therefore was prospective in nature. *See id.* at 95–96. The amendment did not apply to leases previously executed, as Respondents suggest. *See id.* Similarly, in *Queens Grant II Horizontal Prop. Regime v. Greenwoods Dev. Corp.*, 368 S.C. 342, 365, 628 S.E.2d 902, 915 (S.C. Ct. App. 2006), the court permitted an amendment to a restrictive covenant requiring that unit owners be assessed

[5] Respondents complain that Appellants did not address the First Amendment to the Master Deed in its initial brief. (Resp. In. Br. 26). That is because the First Amendment deals with amendments to the Master Deed to conform to lending requirements for certain federal programs, and does not address any issue on appeal. Respondents contend that "Appellants also fail to offer why the First Amendment would apply retroactively, but the Second Amendment allegedly would not." (Resp. In. Br. 26). However, the retroactivity of the First Amendment was not before the trial court.

an increased maintenance fee prospectively. *See id.* at 370–71, 628 S.E.2d at 918. The court did not allow the increased maintenance fee to be imposed retroactively to prior owners or years. Likewise, in *Crest Builders, Inc. v. Willow Falls Imp. Ass'n*, 393 N.E.2d 107 (Ill. App. Ct. 1979), the court permitted a prospective amendment to the condominium association's declaration to curtail future advertising by the developer. *See id.* at 109–10. Again, past advertising was not affected.

Respondents cast the holding in *Frantz v. Piccadilly Place Condo. Ass'n, Inc.*, 597 S.E.2d 354 (Ga. 2004), as permitting retroactive application of an amendment to a condominium declaration. (Resp. In. Br. 27). However, in *Frantz*, the court enforced an amendment to a condominium association's declaration because a Georgia statute, O.C.G.A. § 44-3-76, specifically allowed the condominium association to amend the declaration after it obtained a final judgment against a unit owner. *See Frantz*, 597 S.E.2d at 357. This section is neither applicable here or relevant to these arguments.

None of the cases cited by Respondents support the position they proffer. Similarly, the other cases cited by Respondents and the trial court fail to address declarations or master deeds, and have no application to the instant case. *See Wayburn v. Smith*, 270 S.C. 38, 42, 239 S.E.2d 890, 892 (1977) (no discussion of amendments to condominium declarations or master deed); *Easterby-Thackston, Inc. v. Chrysler Corp.*, 477 F. Supp. 954, 956 (D.S.C. 1979) (same); *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1331–32 (4th Cir. 1995) (same).

Respondents also argue that all parties were "on notice" that an amendment to the Master Deed may apply retroactively. (Resp. In. Br. 29). Even if notice[6] of the

[6] Respondents did not provide Appellant any notice of the proposed amendment.

amendment somehow would change the analysis, Respondents cite no South Carolina law supporting the alleged rule that knowledge of a provision for amendment effectively constitutes notice of retroactive application of an amendment. Neither the Amendment nor the Master Deed itself contain any provisions permitting retroactive application. This Court should therefore disregard Respondents' unsupported, conclusory argument.

Respondents lack any authority to support a finding that the Master Deed could be amended to delete the Waiver retroactively, without consent and without any limitation as to reasonableness, after the deeds were accepted and this litigation was filed. The Order must be reversed.

IV. Appellants' Other Procedural Arguments Are Without Merit.

Appellants also attempt to evade compliance with the Waiver by advancing two other procedural arguments. Neither avoids the effect of the binding waiver.

A. Appellants raised the issues regarding mode of trial in their initial answer.

Respondents misstate the conclusion of the Order when they claim that the Order "nowhere includes a ruling that 'a motion for non-jury trial must be filed before the initial pleading." (Resp. In. Br. 23). The Order specifically states "Defendant's obligation to file either a Motion to Dismiss pursuant to Rule 12(b) *SCRCP*, or a Motion to Strike pursuant to Rule 12(f), *SCRCP*, prior to answering Plaintiffs' Complaint/Amended Complaint was the 'first opportunity' to raise these issues." (Order; R. p. 41). The Order further states in the Conclusion that the motion was denied because, *inter alia*, Appellants "failed to timely challenge the mode of trial at their first opportunity prior to submitting an answer (by way of a Rule 12(b) or Rule 39 motion or otherwise)." (Order; R. p. 41). Therefore, the trial court held that Appellants were required to file a motion regarding the

Waiver prior to submitting an answer, which is error for the reasons set forth in Appellants' initial brief at pages 8–11.

Respondents offer no legal support for the proposition that a mode of trial issue must be raised by motion prior to, and instead of, being raised in the responsive pleading, which put Respondents on notice that Appellants were contesting their right to a jury trial and class action. *Langston v. Niles*, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975) ("The purpose of pleadings is to place the adversary on notice as to what the issues are."). Respondents undeniably were on notice of Appellants' position because they attempted to amend the Waiver out of the Master Deed only after receiving Appellant DDC Construction's Answer to the initial Complaint. (March 7, 2013 Answer of DDC Construction, Inc. ¶ 15; R. p. 72; June 5, 2013 Second Amendment to Master Deed; R. p. 1261).

Respondents also misstate the Record by stating Appellants did not "challenge Respondents right to a jury trial and right to bring a class action at the first opportunity in their March 2013 Answer or in the multiple Answers they subsequently filed in July and August 2013." (Resp. In. Br. 22). The only Appellant that was party to the initial 2012 Complaint in this action was DDC Construction, Inc. In its March 2013 Answer, DDC Construction stated the following with regard to the class action allegations: "Defendant denies the allegations in Paragraphs 28 through 37 and opposes the certification of a class in this matter." (March 7, 2013 Answer of DDC Construction, Inc. ¶ 15; R. p. 72). The Answer also denies the WHEREFORE paragraph of the Complaint, which is the only place the Plaintiff requests a jury trial. (Id. ¶ 27; R. p. 74). Further, the Answer asserts waiver as an affirmative defense. (*Id.* ¶ 32; R. p. 75).

It should also be noted that Respondents continued to add parties to the case until August 7, 2014, more than four months **after** Appellants filed their motion seeking a non-jury trial without a class action. The last Appellant to be added to this case, Highway One Construction, was not added until February 19, 2014. (Second Amended Complaint; R. p. 304). Appellants filed their motion demanding a non-jury trial without a class action less than thirty days later, on March 24, 2014. (Motion; R. p. 900). Moreover, in its initial Answer filed on March 21, 2014, Highway One Construction denied the request for a class action and jury trial, and included a specific statement that Respondents waived their right to a jury trial and class action. (March 21, 2014 Answer of Highway One Construction, ¶¶ 21,51; R. pp. 489 and 495). All other Appellants included similar language denying Respondents right to a class action and jury trial in their response to the Second Amended Complaint as well. (Answers of Appellants; R. pp. 325-575).

Therefore, these mode of trial issues were raised at the first opportunity – in the initial responsive pleading by the first Appellant added to the case and in each pleading thereafter. (Answers of Appellants; R. pp. 71, 98-303, 325-575). Despite being on notice that Appellants were contesting their right to a jury trial and a class action, Respondents took absolutely no action to address the issue with the Court or with Appellants, instead electing to surreptitiously attempt to amend the Master Deed with no notice to Appellants either before or after the attempted amendment was recorded. The wavier issue was timely raised, and the Order should be reversed.

B. Appellants did not waive their right to enforce the Waiver.

In a single paragraph, Respondents argue that Appellants waived their right to a non-jury trial without a class action by not seeking arbitration. (Resp. In. Br. 36). This

argument is wholly without merit. The Waiver is set apart as a distinct section of the Master Deed, separate and apart from the arbitration provision located under the general heading "Alternative Dispute Resolution." (Master Deed XXXV; R. p. 1159). Plainly, the Waiver, set out as part D under the ADR section, is meant to be separate from the arbitration provision, set out as part B under the ADR section. Indeed, waiver of a jury trial would be redundant and unnecessary to a requirement to arbitrate. Thus, it was clearly intended that either arbitration or a non-jury trial could be sought. Appellants therefore did not give up their right to assert the Waiver by electing not to arbitrate. An arbitration and a bench trial are separate venues and separate considerations available under the Master Deed. Appellants elected not to utilize the arbitration provision as Respondents commenced this action in court.

C. The alleged failure to provide a copy of the Motion to Reconsider to the trial judge has no bearing on this appeal.

Respondents' also argue that the trial court correctly denied the Motion to Reconsider on the basis that Appellants did not provide a copy of the motion to reconsider to the trial court. In *Cleveland Ridge Homeowner's Ass'n, Inc. v. State Farm Fire & Cas. Co.*, Op. No. 2006- UP-295, 2006 WL 7286092, at *1 (S.C. Ct. App. Filed June 26, 2006) (unpublished opinion), cited by Respondents in support of this argument, this Court ruled that the movant who failed to comply with the Rule 59 requirements to provide a copy of the motion to the trial court judge was "not prejudiced" because the trial court nevertheless ruled on the merits of the motion. *Id.* at *1. In other words, the procedural defect with the Rule 59 motion had no bearing on the appeal. Similarly, in *Gallagher v. Evert*, 353 S.C. 59, 577 S.E.2d 217 (Ct. App. 2002), cited by Respondents, and in *Coon v. Coon*, 356 S.C. 342, 588 S.E.2d 624 (Ct. App. 2003) *aff'd as modified*,

364 S.C. 563, 614 S.E.2d 616 (2005), this Court found that the failure to comply with Rule 59's requirement to provide the trial court judge a copy of the motion to reconsider had no bearing on the appeal. *Gallagher*, 353 S.C. at 63–64, 577 S.E.2d at 219; *Coon*, 356 S.C. at 346, 588 S.E.2d at 626.

In this case, like in *Cleveland Ridge*, the trial court addressed the merits of the motion to reconsider. (Order; R. p. 51). Therefore, even to the extent that the trial court's order denying the motion to reconsider is factually accurate with regard to whether a copy was provided to the trial court judge, it has absolutely no bearing on this appeal.

Respondents' argument, like their other arguments in this case, is incorrect and superfluous to the question of whether Respondents can get away with un-waiving their waiver of a right to trial by jury and class action without notice to the Appellants, without following the requirements to amend the Master Deed, and after they filed their Complaint and their Amended Complaint. This Court should not permit it, and the Order should be reversed.

CONCLUSION

Based on the foregoing and the reasons set forth in Appellants' initial brief, 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 Reply Brief

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