

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-8512

Appellant Case No. 2015-000180

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SC Court of Appeals

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, OldCastle APG; Headwaters, Inc. d/b/a Best Masonry; and John Doe #1-10, Defendants,

Of Whom DDC Construction, Inc. and Columbia Condos, LP, are the Appellants.

Respondents' Petition for Rehearing

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PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure (“SCACR”), Respondents, The Gates at Williams-Brice Condominium Association and Katharine Swinson, individually, and on behalf of all others similarly situated (“Respondents”), respectfully file this Petition for Rehearing of this Court’s decision filed August 31, 2016 (Opinion No. 5438) (“Opinion”).

Respondents petition for rehearing on the grounds that this Court overlooked and misapprehended points of law and fact in reversing the decision of the Circuit Court. Accordingly, and for the reasons explained fully herein, Respondents respectfully request this Court rehear the questions concerning whether the Circuit Court properly refused to enforce the jury trial and class action waivers in Gates’ Master Deed.

STANDARD OF REVIEW

Rule 221, SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law or fact to petition for rehearing. *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E.2d 234 (1933). “The purpose of such a petition is to aid the court in deciding correctly a case heard by it” and a properly drawn rehearing petition must state “the points . . . overlooked or misapprehended by the court.” *Id.* at 172-73; *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).

SUMMARY OF ARGUMENT

In its Opinion, this Court concluded the Circuit Court erred in five ways, including: (1) finding the Gates’ Homeowners did not waive important legal rights; (2) finding the waiver language in Gates’ Master Deed unenforceable; (3) finding the Developer waived its right to a

non-jury trial by electing not to arbitrate; (4) finding the Developer failed to timely raise the Master Deed’s waiver language; and (5) finding the Association properly amended the Master Deed to remove this language. In reaching each of these conclusions, this Court misapprehended and overlooked many points of law and fact, any and all of which warrant reconsideration and a rehearing of this matter. Particularly, Respondents contend the Court’s conclusions rely on misstated fact and unsupported conjecture; discount fundamental tenets of contract construction and prior appellate court decisions; ignore the legal and factual distinctions between the Association and the Homeowners; disregard factual findings supported by the record; rely upon ambiguous waiver provisions; and, are contradicted by the totality of the circumstances surrounding these conflicting waiver provisions.

ARGUMENT

I. The Court Erred In Concluding Homeowners Accepted “Waivers” Via Deed Execution When No Such Execution Took Place

This Court erred in finding the “. . . Homeowners knowingly, voluntarily, and intelligently waived their rights to a jury trial and to a class action *when they signed the deeds* to their condominiums.” (Opinion, p. 12) (emphasis added). The Homeowners did not sign deeds when they purchased their respective condominiums – the Developer did. Even if this were a reference to the Association (instead of its members), it is still incorrect – the Association did not sign any deeds either. Given the Court’s reference to the Association and its members collectively as “Homeowners,” and the further errors addressed herein, it is difficult to discern what the Court intended here; but this factual error resulted in an erroneous legal conclusion.

II. The Court Erred in: (1) Finding the Homeowners' Purchase Contracts Incorporated Terms of the Complete Master Deed; (2) Finding the Homeowners Signed the Purchase Contracts at Closing; and (3) Using These Erroneous Findings in Support of "Knowing and Voluntary" Waiver

In its Opinion, the Court found the Homeowners "voluntarily relinquished their rights" under the Master Deed by signing purchase contracts at closings expressly incorporating the terms of the Master Deed:

The terms of the Master Deed were expressly incorporated into each unit owner's purchase contract. By signing the purchase contracts at closing, each purchaser was charged with having read the Master Deed's contents.") (Opinion, p. 15).

None of this is correct. The purchase contracts were not signed at closing. Purchase contracts do not get signed at closing, and closings do not get arranged until a purchase contract comes into existence and financing, titles searches, inspections and the like are accomplished.¹ The single purchase contract in the record between a Gates Homeowner and the Developer is dated five (5) weeks before the target closing on the unit. (R. p. 1102) (compare July 15th target closing date to June 12th purchase contract initial date).

Not only was the Master Deed not incorporated into the purchase contracts, it was apparently not even finalized during the initial sales of the condominiums. The purchase contracts, indicating the Master Deed will be filed in the future, even state:

[Homeowners] decide to purchase [unit] which is more fully described in the plans attached to the preliminary master deed. . .

¹ In common real estate vernacular, a person will "contract" to purchase a piece of property, and then, "close on" the property (consummate the transaction) at a "closing" after a month or two of due diligence and financing work. This Developer form contract indicates that closings also awaited the completion of construction. (R. p. 1102).

A recorded Master Deed and Exhibits there to *shall be* posted on the Seller's website. The preliminary master deed may be changed during construction by [Developer] without notice to the [Homeowners] . . . [s]uch changes shall neither effect the validity or enforceability of the contract nor entitle the [Homeowners] to any reduction in purchase price or to terminate the contract.

(Purchase Contract, R. pp. 1102 and 1105) (emphasis added).²

Based upon the foregoing, the only things the Homeowners were “charged with having read” “by signing purchase contracts” are the purchase contracts and an incomplete Master Deed which the Developer could amend at will, without notice, and which the Homeowners did not, and could not, negotiate. Without knowing all terms contained in the completed Master Deed, there is no way the Homeowners could “knowingly” accept these terms. *Willcox v. Stroup*, 358 B.R. 824 (D.S.C. 2006), *aff'd*, 467 F.3d 409 (4th Cir. 2006), *cert. denied*, 2007 WL 579531 (U.S. 2007) (“waiver is voluntary relinquishment of a right with knowledge of all the facts”).³

² The recording date of the Master Deed indicates that it was recorded before the execution of the only purchase contract in the record; however, the Developer's use of this seller-drafted, adhesive contract indicates that units were sold with this form contract before the Master Deed was recorded (this adhesion contract has the same unconscionable liability waivers as found in the Master Deed).

³ Regardless of whether the Homeowners actually received the completed Master Deed at their actual closings, the foregoing establishes a question as to what the homeowners knew or did not know when they signed their purchase contracts prior to closing. This question must be resolved in favor of the Homeowners, especially when the entirety of this transaction is viewed with “considerable skepticism” and there is no evidence the Developer supplied either the completed Master Deed or the Bylaws to “all unit owners prior to purchasing their units” contrary to the Court's finding. (Opinion, p.15) (emphasis added). To be clear, the only purchase contract in the record does not establish the Master Deed was provided to any homeowner prior to purchase. If the Court would like Respondents to supplement the record with other purchase contracts, it would see (as the purchase contract in the record also references) that the purchase contracts were not executed at closings, the purchase contracts do not incorporate the terms of a completed Master Deed, the homeowners were not represented by independent counsel in connection with their respective purchases, and the Master Deed was not provided to any Homeowner until after purchase.

Moreover, under South Carolina law, such waiver provisions must be a part of the basis of the bargain between the parties for a transaction to be effective. In this regard, South Carolina Courts adopt the view that “a disclaimer printed on a label or other document and given to the buyer at the time of delivery of the goods is ineffective if a bargain has already arisen.” *Gold Kist v. The Citizens and Southern Nat. Bank. Of S.C.*, 286 S.C. 272, 277, 333 S.E.2d 67, 71 (Ct. App. 1985) (emphasis added).⁴ Just as our courts found Gold Kist’s disclaimers ineffective, so too should this Court find the Master Deed’s waiver provision ineffective given there is no evidence to suggest this specific provision formed a basis of any New Homeowner purchase transaction.

III. Contrary to Incorporating the Terms of the Master Deed, the Purchase Contracts Contradict, Supersede, and/or Supplement the Waiver in the Master Deed; and, this Court Erred by Relying upon the Wrong Provisions in the Master Deed for its Erroneous Holding

As previously mentioned, the purchase contracts and their addenda contain two additional dispute resolution provisions which, while strikingly similar to the Master Deed’s dispute resolution articles, contradict the eventually finalized terms of the Master Deed. The purchase contracts contain an additional provision both providing for, and further explaining, when the Developer intended the “waiver” provisions in these agreements to operate: only after “the arbitration provision ... is invalidated”. (R. p. 1107) (“In the event that the arbitration provision

⁴ *Gold Kist* concerned a dispute between Gold Kist and buyers over an unpaid account. The buyers purchased corn seed from Gold Kist’s representatives based on the representatives’ advice and quality assurances. When the seed failed to meet the quality standards, the buyers refused to pay and claimed that the seed was defective. Gold Kist claimed it had disclaimed implied warranties and limited its liability because it included a disclaimer on a label printed on the seed bags delivered to the buyers. In affirming the jury verdict in favor of the Buyer, this Court found that “the disclaimer [was] invalid because it amount[ed] to a post-contract, unbargained-for unilateral attempt by Gold Kist to limit its obligations under the contract.” *Id.* (emphasis added)

herein is invalidated by a court of competent jurisdiction, the [parties] agree any and all disputes which would have been subject to the said arbitration provision shall be tried non-jury. . . including without limitation waiver of any type of class action suit”);⁵ (R. P. 1113) (stating essentially the same, but containing no “class action” waiver language).⁶

This additional language is important for two reasons. When read in conjunction with the Master Deed (which is how the Homeowners should read it according to this Court), this language either: (a) clarifies the Developers’ “arbitration-first” intent behind all dispute resolution agreements, rendering the jury trial waivers void by virtue of the Developer’s inaction;⁷ or, (b) does not so clarify, leaving these dispute resolution provisions contradictory, and therefore, ambiguous (to be construed against the Developer). Either way, the result remains the same – the Homeowners did not knowingly accept Master Deed terms by way of their purchase contracts executed prior to the finalization of these Master Deed terms, and most certainly, did not knowingly accept waiver language in an uncompleted Master Deed which contradicts their “must read” purchase contracts.⁸

⁵ The now-reversed Circuit Court finding that the arbitration agreement was unconscionable as an additional sustaining ground does not moot this point. The Developer admittedly never intended to enforce the arbitration provision and the Circuit Court recognized the Developer did not seek to enforce arbitration, and the arbitrations provision had not been invalidated at the time the Developer moved for a non-jury trial.

⁶ The waiver language in the two purchase contract dispute resolution provisions conflicts with each other. One includes language purporting to eliminate the right to bring a class action (R. p. 1107) whereas the other does not. (R. p. 1113)

⁷ See Argument X and XIII, *infra*.

⁸ Any “waiver” asserted in a quasi-contractual context, such as the context at issue here, is subject to the tenets of contract construction and must be both “voluntarily” and “knowingly” agreed to in order to be effective. *Jervey v. Martint Environmental, Inc.*, 721 S.E.2d 469 (Ct. App. 2012). The party claiming waiver bears the burden in establishing both the “voluntary” and “knowing” elements, and if either one of these elements is lacking, there is no waiver. *Id.* Similarly, there is

IV. This Court Erred in Relying upon Unsupported, Erroneous Facts Proffered by the Developer in Finding the Homeowners were Represented by their Own Counsel in Their Respective Purchase Transactions. The Undisputable Fact is Developer's Counsel Handled these Transactions

In a misplaced attempt to distinguish this case from other cases involving adhesion contracts, and in apparent reliance upon unsupported factual briefing by the Developer, this Court noted “each unit owner was also represented by counsel at closing so that any questions regarding the meaning or applicability of these waivers could have been addressed prior to closing.” This finding is incorrect for two reasons: (1) it assumes questions regarding the Master Deed could have been addressed prior to closing (when the final Master Deed was not provided prior to early closings, if at all); and (2) it assumes the Homeowners were represented by independent counsel who could fairly address any such questions (to the extent even possible for such questions to be raised). However, as evidenced by Developer’s standard form sales contract, exemplified by the only purchase contract in the record, “each unit owner” did not receive “independent” counsel; rather, Homeowners were represented by counsel selected by the Developer. (Purchase Contract,

no waiver if the waiver is ambiguous and/or otherwise unenforceable under fundamental contracting principles. If, for example, there is any doubt regarding the meaning of a waiver, there is still no waiver because waivers must be strictly construed, ambiguities must be strictly construed, and one cannot “knowingly” waive what one cannot understand. *See, e.g., Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (courts must construe ambiguous provisions “in favor of [the] non-drafting party by resolving any ambiguity in a contract, doubt, or uncertainty as to contractual provisions against the party who drafted the agreement.”); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002) (noting waivers purporting to eliminate substantial rights must be strictly construed); *FDGI, Inc. v. Bombardier Capital Rail, Inc.*, 383 F. Supp. 2d 1350, 1353 (M.D. Fla. 2005) (“[H]aving concluded the jury waiver provision is ambiguous in this instance, the Court does hereby find Plaintiff did not knowingly, voluntarily and intelligently waive its right to a trial by jury.”). As demonstrated herein, the ambiguous waiver at issue was both “unknowing” and “involuntary” – any one of which requires the Court rehear this matter.

R. p. 1103) (“The following Seller’s designated attorney shall be the Settlement Agent at Closing . . .) (emphasis added). The attorney’s name is pre-typed into the form agreement and forms part of the agreement, itself. Not only was the Homeowners’ counsel Developer-designated, it was Developer-employed:

As long as the Seller’s designated Closing Attorneys are acting as the Settlement Agents for the Closing, the fee of the Seller’s Attorney for closing the sale and/or loan from the Purchaser’s lender shall be paid by the Seller.

(Purchase Contract, R. p. 1104) (emphasis added).

Additionally, Developer reserved the right to change the closing attorney at will: “Seller reserves the right at any time and without the consent of the Purchaser to change the above stated Closing Attorney at its sole discretion to any attorney licensed in the state of South Carolina. . . .” (Purchase Contract, R. p. 1103-1104) (emphasis added). Clearly, there is no evidence in the record that the Homeowners had “independent” counsel at any closing, and certainly, not at the Yarborough closing.

To suggest that the Homeowners somehow “knew” unknown terms because they had “legal representation” and further, ignore the fact this representation was selected and employed by the Developer, amounts to clear error. The bottom line is the Developer controlled the Association, controlled the Master Deed, and controlled all circumstances surrounding the Homeowners’ purchase of their units.

V. The Court Fails to Account for the Legal and Factual Differences Existing Between the Association, a Corporate Entity, and the Later Gates Homeowners

In its Opinion, the Court defines “Homeowners” as a collective reference to both the Association and the class of Gates Homeowners and then proceeds to treat these two, different

plaintiffs as the same throughout the entirety of its analysis. This is an error of immeasurable magnitude given these are different parties with different factual circumstances and different legal rights.

The Association, as rightfully found by the Circuit Court, is a separate, legal entity created by the Developer which remained under the control of the Developer at the time the Master Deed was created. (Order, R. p. 36). At this time, the Association either: (a) had no board of directors through which to operate; or, (b) had a board which operated according to the Developer's directives. This means there is no way the Association had the capacity to "voluntarily" accept anything on its own behalf given it did not have the capacity to act independently in the first place.

Also at this time, Gates Homeowners did not exist – no closings had occurred and no deeds were executed. This means there is no way the Homeowners "accepted" anything on behalf of the Association even if they could so "accept".

The bottom line is there is no way the Association acted on its own behalf, there was no knowing, voluntary waiver by the Association, and there is nothing in the record that indicates to the contrary. The Circuit Court correctly realized this point whereas this Court did not. (Order, R. p. 46) (finding the Association "waived none of its rights because the [Association], as it was being formed, was controlled by the [Developer], and thus, independently had no way to 'voluntarily' relinquish any rights.").

VI. The Court Erred by Completely Failing to Consider Whether the Association, Itself, Knowingly and Voluntarily Waived its Right to a Jury Trial

Once the Court's error in referencing the Association and the Homeowners collectively as "Homeowners" is realized, a re-examination the Court's Opinion evidences absolutely no

consideration of the question of whether the Association waived its right to a jury trial, let alone knowingly and voluntarily waived this right. Every fact referenced by this Court to support its waiver findings can only apply to the Homeowners – not to the Association.

If this Court examined the Association’s waiver (or lack thereof) separately, it would observe and conclude the Association is NOT listed as a party in the “waiver provision” relied upon by this Court and the Developer in the Circuit Court (Article XXXV(D)).⁹ This error is discussed in more detail further below.

VII. The Court Erred by Failing to Provide the Circuit Court Proper Deference and By Misconstruing the Circuit Court’s Findings

Additionally, this Court’s Association waiver conclusion ignores the fact-specific nature of any “voluntary” determination. In other words, while “voluntariness” is a question of law, the answer to this question is fact-driven. Here, the Circuit Court found the Association could not act independently because it was under the control of the Developer. This factual finding is supported by the record which means the Circuit Court could not have committed a legal error – the law indicates the presence of “independence” is what makes a decision “voluntary” and the Circuit Court found any decision made by the Association through 2009 was controlled by the Developer.

⁹ As a matter of contractual interpretation, it is apparent the Developer knew how to specifically list the Association as a waiving party if it wanted to because it did so in other Master Deed provisions it drafted. So, while the Association is a “Bound Party” to the dispute resolution provisions set forth in the Alternative Dispute Resolution Section, the agreement the Association is “bound to” does not include a waiver of the Association’s right to a jury trial. As explained during oral argument, the Developer set forth separate, and different, provisions in the Alternative Dispute Resolution Section for the Association (Subsection C) and for the homeowners (Subsection D) so as to keep the various claimant parties from consolidating their claims – frustrating the pursuit of any claim where the ownership interest in the claim was divided between the Association and one or more homeowners, e.g., balconies. (Master Deed, R. p. 1162-1163).

(Order, R. p. 36). This Court is obligated to sustain this factual finding made by the Circuit Court. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (noting, irrespective of the *de novo* standard, “a circuit court’s factual findings will not be reversed on appeal if *any* evidence reasonably supports the findings.”). More importantly, the Circuit Court’s finding is a correct observation and analysis of the parties’ factual and legal positions at the time that matters.

This error is compounded by the missing fact of any subsequent act by the Association supposedly constituting some sort of “acceptance” by the Association as to the eradication of its substantial rights. To the contrary, after the Association became independent and aware of the waivers and their significance in the circumstances that evolved, the Association moved decisively to indicate its lack of consent to the waivers by amending the Master Deed. Thus, this Court patently misconstrued the Circuit Court when it said:

The circuit court found Homeowners should not be bound by the waivers in the Master Deed because the POA was controlled by the Developer at its creation, and thus, Homeowners had no way to voluntarily relinquish their rights. We disagree.

(Opinion, R. p. 15).

It is the Association that cannot voluntarily relinquish its rights because of the Developer’s control of the Association – not the Homeowners. The issue of alleged Homeowner waiver is factually, and legally, different. As such, it cannot be substituted for an analysis of any Association waiver. The question of whether the Homeowners individually waived their rights to jury trials and class actions is wholly independent of whether the Association “knowingly” and “voluntarily” waived its rights.

VIII. This Court Erred in Failing to Observe the Association was NOT Included in the Jury Trial Waiver

This Court erred by failing to consider the patent language of the sole waiver provision it relied on and finding that this one provision, consisting of the “Waiver of Jury Trial” sentences located on “the last two pages of the deed,” is the only “provision” that matters to its analysis.

These “Waiver of Jury Trial” sentences are an integral part of the Article entitled “XXXV: Alternative Dispute Resolution” which includes four subsections, drafted by the Developer, articulating exactly how the Developer intended the overall dispute resolution scheme to operate. (Master Deed, R. pp. 1159-1163). The first subsection, XXXV(A) (“Subsection A”), provides definitions for certain terms of art to be subsequently utilized (Bound Party, Claim, Claimant, and Respondent). (R. p. 1160). The second subsection, XXXV(B) (“Subsection B”), then sets out the arbitration requirements, utilizing the defined terms in Subsection A. (R. pp. 1161-1162). The third subsection, XXXV(C) (“Subsection C”), then sets out additional limitations on claims by the Association, **without** using any defined terms.¹⁰ The fourth subsection, XXXV(D) (“Subsection D”), then sets forth a Jury Trial waiver, **without** using any defined terms. Rather, each subparagraph within Subsection D begins “Neither Co-Owner or/nor . . . Grantor:”

D. Waiver of Jury Trial

- (i) Neither co-owner nor any assignee, successor, heir or legal representative of co-owner or grantor shall seek a jury trial. . .including, without limitation, waiver of any type of class action suit;

¹⁰ “C. Association Claims: In addition to compliance with the foregoing arbitration procedures outlined in this Article, the Board shall not be authorized or obligated to, and the Association shall not initiate ANY judicial proceeding unless first approved by 75% of the entire Association membership. . .” (R. p. 1162) (emphasis added).

(ii) Neither co-owner nor grantor will seek to consolidate any such action in which a jury trial has been waived with any other action in which a jury trial has not been waived;

(iii) Neither owner nor grantor has in any way agreed. . .

(R. p. 1163) (emphasis added).

Even this Court similarly interpreted this provision in finding, albeit incorrectly for other reasons, “the Master Deed contemplated litigation outside of the arbitration context by prohibiting either an owner or grantor from seeking a jury trial” (Opinion, p. 17) (emphasis added).

Simply put, while the Association may be a “bound party” to XXXV, it could not be clearer that Subsection (C) does not include a jury trial waiver by the Association. While the Developer utilized a broad net in its “bound party” definition for purposes of arbitration, it intentionally limited the jury trial waiver to the co-owners and the grantor. There is no Association jury trial waiver.

Moreover, as asserted at oral argument, this analysis makes absolute sense. The Association’s claims were separately addressed and impeded in Subsection C; and, the provisions of Subsection D(ii) make clear the Developer purposely separated the prosecution of claims under Subsection D(i) from those prosecuted pursuant to Subsection C. Of course, this is completely contradicted by the provisions of Subsection B, discussed below, which renders all of the provisions ambiguous, and therefore, unenforceable (and/or construed against the Developer). However, if relying upon Subsection D in a vacuum, as this Court did, there is no Association jury trial waiver in the “two pages” this Court relies upon.

IX. This Court Erred in Failing to Find the Dispute Resolution Provisions are Inherently Contradictory, and Therefore, Ambiguous to be Construed in the Respondents' Favor

In relying solely on Subsection D, this Court further erred because, when rightfully read with the entirety of the Alternative Dispute Resolution Section, this subsection is: (a) internally inconsistent; (b) patently ambiguous; and (c) lacking in mutuality. For example, Subsection D purports to eliminate the important rights to a jury trial and to proceed as a class action; yet, the other provisions in Alternative Dispute Resolution Section indicate: (1) ALL claims SHALL be asserted in a single arbitration proceeding (which, by the way, the Developer failed to enforce); (2) multiple parties, WITHOUT LIMITATION, may be joined in the arbitration proceeding;¹¹ and (3) the Association CANNOT immediately take any sort of legal action, enforcement of the arbitration provision or otherwise, while the Developer CAN.¹²

¹¹ The Arbitration clause expressly orders that all claims be addressed together in a single proceeding:

B. Arbitration

2. . . . Each and every claim and cause of action arising out of or related in any way to the design, construction, sale, maintenance, habitability of, or condition of any unit or common area that is asserted by Claimant shall be resolved by final and binding arbitration. . . . ALL claims and causes of action of all persons and entities entitled to enforce (or bound by) this arbitration provision SHALL BE ASSERTED IN A SINGLE ARBITRATION PROCEEDING and multiple parties MAY be joined in THE ARBITRATON PROCEEDING so that all disputes may be resolved in one forum.

(Master Deed , R. p. 1161) (emphasis added).

¹² See Footnote 8, *supra* 10.

X. The Waiver in the Master Deed, Upon Which This Court Relies, Is Inconsistent with the Purchase Contract Upon Which This Court Also Relies, Which Contains Two Waiver Provisions Not Considered by the Court

When compared to the Gates purchase contract(s) even more conflicts arise – the Purchase contracts, in two sections, make it expressly clear the “waiver” provision this Court found matters does not apply UNLESS arbitration is enforced FIRST:

In the event the arbitration clause herein is invalidated by a court of competent jurisdiction, the seller, the development’s general contractor and its subcontractors, and the development’s architect, and Purchaser, his, its or their heirs, successors and assigns hereby expressly agree that any and all disputes which would have been subject to the said arbitration provision shall be tried non-jury and further expressly agree that they hereby waive all resort to trial-by-jury of any and all issues otherwise so triable.

(Purchase Contract, R. pp. 1107, 1113).¹³

These conflicting “agreements” were prepared by the Developer, drafted intentionally so as to benefit the Developer and, in such a way no ordinary person could possibly comprehend. This is important because one cannot “knowingly” and “voluntarily” accept ambiguous terms one cannot comprehend. *See, e.g., FDGI, Inc. v. Bombardier Capital Rail, Inc.*, 383 F. Supp. 2d 1350, 1353 (M.D. Fla. 2005) (“[H]aving concluded the jury waiver provision is ambiguous in this instance, the Court does hereby find Plaintiff did not knowingly, voluntarily and intelligently waive its right to a trial by jury.”). This is why ambiguous terms are construed against the drafter and in favor of those incapable of comprehending what the drafter meant when confronted with such ambiguous terms. *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d

¹³ Because the purchase contracts the Court relies on in support of its “waiver” analysis indicate there is no “waiver” analysis without first enforcing the arbitration provision, the Court’s “non-election of arbitration” finding is incorrect. *See* Argument XIII, *infra*.

423, 426 (1981) (quoting 17A C.J.S. *Contracts* § 324) (courts must construe ambiguous provisions “in favor of [the] non-drafting party by resolving any ambiguity in a contract, doubt, or uncertainty as to contractual provisions against the party who drafted the agreement.”). This Court failed to recognize the ambiguities present here, and also, failed to properly construe these ambiguities in favor of the Association and the Homeowners. Because of these failures, nothing allegedly supporting this Court’s ultimate conclusion regarding the “enforceability” of the waiver provision is correct. This is the case because, when all ambiguities are properly considered and construed, there is neither a class action waiver nor a jury trial waiver to enforce.¹⁴ Different or misleading actual notice cannot be trumped by constructive notice, especially when the actual notice was provided by entity with a duty to disclose.

XI. This Court’s Conclusion Regarding the Supposed “Voluntary” and “Knowing” Nature of the Waivers at Issue is Incorrect Based upon the Totality of the Circumstances

Although the foregoing should prove dispositive of the issue, the Court’s conclusion that the Homeowners “knowingly and voluntarily” relinquished their rights is an error for additional reasons. First, the Court reached this conclusion by relying on purchase contracts which, contrary to the Court’s holding do not incorporate, but rather contradict, the finalized terms of the Master Deed. Second, the Court reached this conclusion by relying upon misconstrued facts surrounding these purchase transactions, including that Purchasers had their own counsel. Third, the Court

¹⁴ At minimum, the Court’s contention of how the waiver language in Subsection D should operate does not rectify the fact that this language conflicts with itself, the other provisions of the Alternative Dispute Resolution Section, and the waiver language in purchase contracts. As such, this language is ambiguous and this ambiguity must be resolved in favor of Respondents which, ignoring all the foregoing points, independently warrants a rehearing of this matter.

reached this conclusion by ignoring the fiduciary relationship existing between the Developer and the Association and by failing to zealously scrutinize the Master Deed transaction occurring within this fiduciary context. Properly considering the totality of these circumstances, it is clear the Homeowners did not knowingly and voluntarily relinquish anything because: (1) the Homeowners did not sign purchase contracts at closing; (2) the Homeowners did not have independent legal representation when they did sign their purchase contracts; (3) the purchase contracts do not incorporate the finalized terms of the Master Deed; and (4) even if they did, the Homeowners did not understand any waiver-related terms because they all conflict with each other. Moreover, the Developer obviously did not act in the Associations' best interest by inserting confusing waivers in take-it-or-leave-it contracts which purport to deprive the Association of significant legal remedies.

XII. The Court Erred in Failing to Consider the Fiduciary Relationship Existing Between the Developer and the Association

The Court erred in finding the Association “knowingly” and “voluntarily” relinquished its rights for another reason. The entirety of the Court’s Opinion is premised on crucial misconceptions regarding the relationship between the Developer and Association – it fails to recognize that the relationship here is one which is fiduciary in nature, and consequently, fails to presume that the transactions at issue are neither knowing nor voluntary.

South Carolina law recognizes the fiduciary relationship between a Developer and a property owners association and South Carolina law recognizes the Developer cannot take advantage of such “special” relationships by failing to act in good faith and with the interests of the association in mind. *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C.

251, 257, 562 S.E.2d 633, 637 (2002) (acknowledging the fiduciary relationship existing between Developers and Homeowners Associations); *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 375, 725 S.E.2d 112, 127 (Ct. App. 2012) (same); *Wogan v. Kunze*, 366 S.C. 583, 605, 623 S.E.2d 107, 119 (Ct. App. 2005) (“A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.”) *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (finding Developers are considered fiduciaries of the regimes they create and are expected to use good judgment and act in utmost good faith). As noted by this Court in *Island Car Wash, Incorporated versus Norris*:

[I]t is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of said relationship to benefit his own personal interests. It is a doctrine repeatedly announced by the courts of this nation that courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.

292 S.C. 595, 599 358 S.E.2d 150, 152 (Ct. App. 1987) (emphasis added) *cf. Simpson* (finding a purchase contract for an automobile must be “viewed with ‘considerable skepticism’” because automobiles are necessities in modern society.”) (emphasis added). Here the “zealous scrutiny” standard which applies in the fiduciary context runs parallel with the “considerable skepticism” standard which applies in the contractual context. Given the clear applicability of both of these standards, this Court must “zealously scrutinize” with “considerable skepticism” the waiver provision and surrounding circumstances at issue. However, this Court did neither.

This is important for two reasons. First, the Court ignores the fact a fiduciary relationship exists here according to the law, and as such, each and every transaction between Developer and Gates is subject to zealous scrutiny. The “zealous scrutiny” standard presumes a lack of knowledge and voluntariness in transactions occurring within the fiduciary context such as the “acceptance” of the “waiver provision” at issue here. *See Wilson v. Wilson*, 117 S.C. 454, 117 S.E. 330 (1921) (“[W]herever a fiduciary relation exists between two persons and a business transaction occurs between them, as a result of which the superior party obtains a possible benefit, equity raises a presumption against its validity, throwing the burden upon him to prove his good faith.”). The Court failed to employ the presumption here and this failure impacts all of the Court’s findings related to the alleged “enforceability” of waivers which are presumed to be unenforceable. Second, the Court ignores the law requiring a Developer fiduciary act in the best interest of its regime and overlooks the fact this Developer failed to so act by inserting conflicting waivers purporting to deprive the Association a host of important legal remedies.

Simply put, even if the quasi-contract at issue (the Master Deed) was not conflicting and the circumstances surrounding this quasi-contract were fair, the law presumes the quasi-contract is invalid until shown otherwise. Here, however, the quasi-contract is conflicting, the circumstances surrounding this quasi-contract are unfair, and the record is entirely void of any evidence indicating the Developer acted in any way other than furthering its own interest. At minimum, this means the Court’s “voluntarily and knowingly” findings are incorrect and its failure to address any of these blatantly obvious contradictions is contrary to the law requiring “zealous scrutiny” of transactions occurring within the fiduciary relationship context.

XIII. The Developer Waived its Right to a Non-Jury Trial by Electing Not to Arbitrate and This Court Erred in Concluding Otherwise

In its “election not to arbitrate” analysis, this Court appears to insert its own logic over that of the Developer. This analysis, limited only to the Court’s review of the Master Deed, does not consider the very purchase contracts this Court charged the Homeowners with considering. The language of these purchase contracts makes it clear the Developer did not intend to afford any “option to either arbitrate or seek a nonjury trial” as this Court suggests. Rather, this language demonstrates the Developer intended only to seek a non-jury trial if the arbitration clause was enforced, then invalidated. The Developer truly intended for all claims to be handled in a single arbitration proceeding; yet, the Developer failed to enforce this arbitration proceeding. Thus, the Developer failed to exercise the only option which, if exercised, only then led to another option. In other words, the Developer cannot “logically pursue” its right to a nonjury trial with no class action without first exercising its right to arbitrate and this Court erred in otherwise. (Opinion, p. 17).

XIV. This Court Erred by Combining the Issues of a Challenge to the Reasonableness of the Amendment with the Issue of the Amendment’s Application to the Developer

In its opinion, this Court merged the issue of a challenge to the Amendment’s reasonableness with the issue of the application of the Amendment to the Developer. This distinction is fundamental because, as discussed below, the Developer cannot challenge the Amendment’s substantive validity — reasonableness. Additionally, the error of merging these two, separate and distinct issues resulted in this Court paying lip-service to, and dismissing, the Circuit Court’s finding that the Amendment applied to the Developer — the only issue the Developer potentially has standing to challenge.

XV. This Court Erred by Ruling on a Statutorily-Prohibited Challenge to the Master Deed Amendment

By reviewing the reasonableness of the Amendment to the Master Deed, this Court permitted an illegal challenge to the action of the Association. The Gates at Williams-Brice Condominium Association, a non-profit South Carolina corporation, recorded the instant Amendment to the Master Deed, which was voted on, and approved by, a super-majority of the corporation's members. (R. pp. 1261-62). The adoption and recording of the Amendment was a valid corporate act, well within the Association's authority. In considering the reasonableness of the Amendment, this Court effectively permitted the Developer to illegally challenge the substantive validity of an act performed by the Association. *See* S.C. Code § 33-31-304(a) (1994) ("Except as provided in subsection (b), the validity of a [nonprofit corporation's] action may not be challenged on the ground that the corporation lacks or lacked power to act."); *see also* S.C. Code § 33-31-304(b) (1994) (where a third party has not already acquired rights, a proceeding may be brought to challenge the nonprofit corporation's power to act, but only (1) the Attorney General, (2) a director, or (3) a member or members in a derivative proceeding may bring the challenge) (emphasis added). Here, the Developer has neither the power nor the authority to challenge the Association's action, and as such, a ruling on the Developer's challenge to the substantive validity or reasonableness of the Amendment is a clear violation of South Carolina law.

XVI. This Court Erred in Blindly Relying Upon the *Armstrong* Holding as its Sole Support for Invalidating the Amendment to the Master Deed While Failing to Recognize the Justification for the *Armstrong* Holding Does Not Apply to the Instant Case

This Court's reliance upon the North Carolina *Armstrong* case to: (1) invalidate the Circuit Court's holding that the amendment was valid; and (2) implicitly adopt and establish a reasonableness standard for condominium master deed amendments in South Carolina was an error because the *Armstrong* decision is inapplicable to the facts of this case. *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 633 S.E.2d 78, (2006).

Armstrong, like many condo cases, concerned an internal conflict of interests between the members of the Association. Courts have struggled to find a balance between these interests; and yes, some Courts have established a reasonableness standard in evaluating Association activities often driven by a majority of members to the dismay of a minority of members. “[D]eclarations . . . are intended to govern communities over long periods of time. . . .” *Armstrong* at 86. When an amendment occurs, there may be “a conflict between the legitimate desire of a homeowners’ association to respond to new and unanticipated circumstances and the need to protect minority or dissenting homeowners by preserving the original nature of their bargain.” *Armstrong* at 87. “In all such cases, a court reviewing the disputed declaration amendment must consider both the legitimate needs of the homeowners’ association and the legitimate expectation of the lot owners.” *Armstrong* at 88. (discussing the courts need to determine the effect of an amendment on the rights of existing or subsequent owners while they have an active interest in the affected property) (emphasis added).

Obviously, the rationale and facts supporting the *Armstrong* Court's adoption of the reasonable amendment test for disputes between active owners are not present here. Instead,

several of the below cases¹⁵ relied upon by the Circuit Court to find that the Master Deed Amendment applied to the Developer were more in line with the instant case between a unified Association and a divested developer, than *Armstrong*.

XVII. This Court Erred in Finding the Developer had a Continuing Interest in the Regime which Prohibited Amendments by the Association.

This *Armstrong* distinction, addressed above, was recognized by an Illinois court in *Crest Builders, Inc. v. Willow Falls Improvement Association*, 74 Ill. App. 3d 420, 423, 393 N.E.2d 107, 110 (1979), where the Court was called upon to resolve a dispute between the ensuing Association and its members, on the one hand, and the Developer, on the other. The Association's covenants provided advertising rights to the Developer, and further provided that the covenants could be amended upon a 75% vote of the homeowners. Following the transfer of the Association from the Developer, the homeowner-controlled board voted to end the Developer's rights to advertise units in the community. The Developer achieved an injunction against the amendment in the trial court. On appeal, the Court found the Developer no longer had a vested interest in the original agreement with the association such as would authorize issuance of a temporary injunction, and ruled against the Developer.¹⁶

¹⁵ *Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 368–69, 628 S.E.2d 902, 915, 917 (Ct. App. 2006); *Frantz v. Piccadilly Place Condo. Ass'n*, 597 S.E.2d 354, 356–57 (Ga. 2004); *Apple II Condo. Ass'n v. Worth Bank & Tr. Co.*, 659 N.E.2d 93, 99 (Ill. Ct. App. 1995); *Crest Builders, Inc. v. Willow Falls Improvement Ass'n*, 393 N.E.2d 107, 110 (Ill. Ct. App. 1979).

¹⁶ Note that in considering the Developer condominium amendment cases, the Court should not be further misled by the case of *Wallach v. Linville Owners Ass'n, Inc.*, 760 S.E.2d 23 (N.C. Ct. App. 2014). While this case invalidated an amendment aimed at Builders (implementing a regime fee on unbuilt lots), these Builders were not a divested Developer; rather, they were third parties

The *Crest* holding is in accord with existing South Carolina law as pronounced by this Court in *AJG Holdings, LLC, v. Dunn*. 392 SC 160, 167, 708 S.E.2d 218, 222 (Ct. App. 2011). In *AJG*, this court held: “Because [Developer] did not retain any property interest in the development, [Developer] did not retain Developer’s rights.” *Id.* at 222 (affirming that at the time a Developer amends or adds new covenants, a developer must possess a sufficient property interest) (emphasis added); *see also Queen’s Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006) (noting that the Supreme Court of Georgia held that when a Developer is divested of all property interest he is also divested of his right to amend the covenants).

XVIII. This Court Erred in Finding the Amendment Could Not Bind the Developer

This Court erred when it summarily dismissed the Circuit Court’s decision to rely on several cases standing for the proposition that an amendment to a master deed can modify existing vested rights. Indeed, this Court’s own decision in *Queens Grant II* noted that declaration amendments may retroactively extinguish existing legal rights. 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006) (citing *McElveen-Hunter v. Fountain Manor Assoc., Inc.*, 96 N.C. App. 627, 386 S.E.2d 435, 436 (Ct. App. 1989) *aff’d*, 328 N.C. 84, 399 S.E.2d 112 (1991) (holding that amendments to a condominium declaration retroactively altering or extinguishing legal rights are proper when the individual whose rights are being affected had notice the declaration was amendable); *see also Seagate Condominium Association, Inc. v. Duffy*, 330 So.2d 484 (Fla. App. 1976); *Hill v. Fontaine Condominium Association, Inc.*, 255 Ga. 24, 334 S.E.2d 690 (1985). As

that purchased vacant lots in the community, allegedly, in part, based upon the waiver of regime fees on unbuild lots).

applied, the Respondents' decision to amend the Master Deed and remove the arbitration provision and included jury and class action waivers is binding upon the Developer. (R. at 1261-62). Indeed, the Developer-drafted Master Deed expressly included language that permitted amendments to the Master Deed by a two-thirds majority vote of the Association's members. (R. at 1155). There can be no clearer notice of the ability to amend than to actually draft and record the provision that grants that ability. *Black's Law Dictionary* 1062 (6th ed. 1990) (defining express notice as "embrac[ing] not only knowledge, but also that which is communicated by direct information, either written or oral, from those who are cognizant of the fact communicated.") The Developer knew the power to amend it gave the Association at the time it drafted the Master Deed; it cannot now in its divested status attempt to unilaterally limit or take it away. Furthermore, the removal of these sections does nothing but protect and benefit the Association and its members' substantial right to a jury trial. As evidenced by this Court's note in *Queen's Grant II*, the Developer's grant of the unrestricted power to amend, combined with the overwhelming good of the Amendment to the Association, binds the Developer to the amended terms.

XIX. To the Extent the Master Deed Constitutes a Contract, the Court Erred in Finding that a Contract Expressly Providing for Unilateral Modification Cannot Be Unilaterally Modified

In South Carolina, a contract that expressly permits unilateral amendment may be unilaterally amended. *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1332 (D.S.C. 1995) (finding that an action, including a unilateral amendment, that is permitted by the terms of the contract itself and was contemplated by the parties at the time of execution of the document is

permitted).¹⁷ As discussed earlier, the Master Deed expressly provided for unilateral modification by Developer during Developer control, and unilateral modification by a two-thirds majority of Homeowners thereafter. (R. p. 1155). Additionally, the ability to unilaterally amend the Master Deed was most certainly contemplated by the Developer at the time the document was drafted and recorded because, in addition to including the express language permitting unilateral amendment, the Developer actually exercised the right to unilaterally amend. Following the turn-over of the Association, the Homeowners also exercised this Developer-given right and unilaterally amended the Master Deed to remove the sections at issue. (R. pp. 1261-1267) (Second Amendment to Master Deed). The Developer cannot now challenge the unilateral nature of the Amendment it expressly permitted to occur.¹⁸

XX. The Court Erred in: (1) Basing its Timeliness Conclusion Solely within the Appeal Context and Not on the Totality of Circumstances; and (2) Ignoring the Many Reasons Supporting the Circuit Court’s Finding of Untimeliness

¹⁷ It is unfathomable how this Court treated the Master Deed provisions as akin to a contract and then erred by completely ignoring *Fort Sumter Tours* because it was a contract case, and not a Master Deed case.

¹⁸ This Court noted it had not reached the Developer’s argument that the Amendment was invalid, as Mortgage holders had not been notified. Should the Court decide to reach this issue upon reconsideration, the argument should be rejected out of hand, as the Master Deed only requires notice to mortgage holders for amendments “of a material nature” and then goes on to provide a list of twelve changes that would be considered material. (R. p. 1140). First, the amended sections do not fit into one of the twelve areas the Master Deed expressly outlines as requiring notice to the mortgage holders. Second, no argument has been, or can be, proffered as to how this amendment would do anything but further benefit mortgage holders as it permits members to maintain the value of the collateral by collecting construction defect repair monies from at-fault parties.

Despite acknowledging the “requirement to timely raise” waiver and mode of trial issues, this Court concluded the Circuit Court erred in finding the Developer did not timely raise the waiver issue below because the Developer timely filed this appeal. These are two separate issues and, by focusing on only the “appeal” context and on only one of the many reasons why the Circuit Court found the Developer’s action untimely, this Court erred. (Opinion, p. 8) (“The Circuit Court decided Developer’s motion based, in part, upon its conclusion that Developer failed to timely raise [the issues] at the ‘first opportunity’ as required by [*Foggie*]. Although we do not disagree with the requirement to timely raise these issues, we find the Circuit Court misconstrued [*Foggie*].”) (emphasis added).

Whether the Circuit Court “misconstrued” *Foggie* does not change: (a) the fact the Developer failed to raise these issues more than one year after being named in this action (and more than ten months after the Master Deed was amended) despite ample opportunity to do so; (b) the Circuit Court’s finding that the Developer’s actions were untimely based upon this fact and the totality of the circumstances; and (c) the evidence in the record sustains the Circuit Court’s factual finding. This Court ignored all of this, choosing instead to elaborate on its understanding of the *Foggie* decision and the Circuit Court’s purported error in referencing this decision. Yet, all the while, this Court agrees the law requires the timely raising of these issues. In other words, the Circuit Court did not err in its ultimate conclusion - the Circuit Court found that the Developer failed to timely raise waiver and the law required the Developer timely raise waiver. There is simply no error of law here. Rather, this Court erred by failing to sustain the factual findings of the Circuit Court and ignoring the bigger picture.

This error is compounded by the double standard upon which the entirety of the Court's "timeliness" conclusion relies – on one hand, the Court attempts to justify its conclusion by assuming the Association amended the Master Deed only after receiving the Developer's initial Answer (an Answer which the Court agrees neither referenced the waiver provision nor the Master Deed and only opposed class action certification);¹⁹ yet, on the other, fails to mention the Developer referenced the waiver provision only after another Defendant referenced the waiver provision in its Answer filed over ten months after this waiver provision was amended out of the Master Deed. The Court cannot have it both ways and neither can the Developer, especially considering the Developer drafted the Master Deed to allow for amendments, knew the Association amended the Master Deed,²⁰ yet, waited almost a year to improperly challenge this Amendment. The bottom line is that the question before the Court is one of "reasonable" timing and nothing about the Developer's timing was reasonable as the Circuit Court correctly found and as other Courts have found in a similar contexts.²¹ (Order, R. pp.41-42); *see also Davis v. KB Homes of SC, Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (Ct. App. 2011) (finding a party waived its right to compel arbitration when a substantial length of time had passed since

¹⁹ Respondents note the clear distinction between a pleading opposing a class action because the ability to bring a class action is purportedly waived (which in this case did not happen given the ambiguous waiver provisions at issue) versus opposing the properness of any class action certification within the confines of Rule 23.

²⁰ The Developer had actual notice of the Master Deed Amendment as it was provided to the Developer during the discovery process.

²¹ Indeed, it is troubling how the Court seems to rely on the existence of the Highway One responsive pleading to justify or mitigate the Developer's late actions. Highway One was a settled party at the time of oral argument. While the Motion to Dismiss Highway One was filed before oral argument, the dismissal was not granted by this Court until after its Opinion was recently issued, a lapse of three to four months.

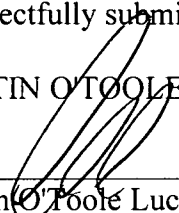
commencement of action and motion to compel arbitration, the parties had engaged in extensive discovery, and the parties had availed themselves of the Circuit Court's assistance on several occasions).

CONCLUSION

For each foregoing reason/exception, and certainly in light of the collective errors, this Court should either grant a rehearing in this matter or simply vacate its decision and affirm the circuit court.

Respectfully submitted,

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September 14, 2016

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-8512

Appellant Case No. 2015-000180

RECEIVED

SEP 15 2016

SC Court of Appeals

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, OldCastle APG; Headwaters, Inc. d/b/a Best Masonry; and John Doe #1-10, Defendants,

Of Whom DDC Construction, Inc. and Columbia Condos, LP, are the Appellants.

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I, Justin O'Toole Lucey, Esquire, hereby certify that on **September 14, 2016**, I served a copy of the ***Petition for Rehearing*** submitted by the Respondents on the following counsel, via the United States Mail, postage pre-paid, and addressed as follows:

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September 14, 2016

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September 14, 2016

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SC Court of Appeals

BY OVERNIGHT MAIL

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court Of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *The Gates at Williams-Brice Condominium Association and Katharine Swinson, individually, and on behalf of all others similarly situated, v DDC Construction, Inc., et al*

Appeal from the Richland County, Court of Common Pleas

Case Action No.: 2012-CP-40-8512

Appellate Case Tracking No.: 2015-000180

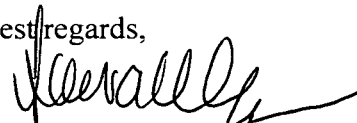
Dear Ms. Kitchings:

Enclosed please find the original and one copy of *Respondents' Petition for Rehearing*. I also enclose a *Proof of Service* indicating service of the *Petition for Rehearing*. Finally, I enclose our firm check in the amount of \$25.00 as payment for the filing fee.

I would greatly appreciate you filing these documents and returning a file stamped copy of each to my attention in the enclosed self-addressed, stamped envelope.

If you need anything else or I otherwise may be of any assistance to you or to the Court of Appeals regarding this matter, please feel free to contact me.

Best regards,



Laura W. Knight