THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper Jr., Circuit Court Judge



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Case No. 2012-CP-40-8512

Appellate Case No. 2015-000180

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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.

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**Return to Petition for Rehearing**

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Pursuant to Rules 221(a) and 240(e), Appellants (referred to collectively as "the Developer") hereby submit their return to the petition for rehearing filed by The Gates at Williams-Brice Condominium Association ("the Association") and Katharine Swinson, individually, and on behalf of all others similarly situated (collectively, "Respondents"). In *The Gates at Williams-Brice Condominium Association v. DDC Construction, Inc.*, Op. No. 5438 (S.C. Ct. App. filed Aug. 31, 2016) (Shearouse Adv. Sh. 35 at 22), this court correctly reversed the circuit court and held Respondents waived their rights to a jury trial and to a class action.

Respondents now seek rehearing on all issues decided by this court. Respondents have not identified any point of law or fact overlooked by this court. Instead, they simply wish for this

court to change its mind. It should not. Its opinion is correct and well-reasoned. This court should deny the petition for rehearing.

## ARGUMENT

Respondents raise numerous legal and factual arguments in their petition for rehearing that they did not raise to the circuit court or in their brief to this court. Although Respondents may be dissatisfied with this court's analysis of the circuit court's rulings, they cannot inject new issues or facts into the case at this late and untimely stage in an effort to change that analysis. "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (quoting *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001)). This court did not overlook or misapprehend any facts or law in this case. Therefore, it should reject Respondents' attempt to recast the facts and issues and should summarily deny the petition for rehearing.

### I. This Court Correctly Found that the Homeowners Waived Their Right to a Jury Trial and to a Class Action

Respondents argue that this court erred in finding the unit owners and the Association "waived their rights to a jury trial and a class action when they signed the deeds to their condominiums." (Pet. 2). This argument fails to warrant rehearing for multiple reasons.

First, the Master Deed containing the waivers defines "Bound Party" to include all unit owners and the Association. (R. 1159-1160). Katharine Swinson, the named class representative, and William Yarborough, chair of the Association's board of directors designated to testify on behalf of the Association pursuant to Rule 30(b)(6), SCRCP, testified in their depositions that they and all other homeowners are bound by the terms of the Master Deed. (R. 1336-1339, 1341-1342).

Thus, Respondents are bound to the Master Deed by their own admission. *Quinn v. Sharon Corp.*, 343 S.C. 411, 414, 540 S.E.2d 474, 475 (Ct. App. 2000) ("The doctrine precludes a party from adopting a position in conflict with one previously taken in the same or related litigation.").

Second, Respondents' petition omits any reference to the Title to Real Estate incorporating the Master Deed signed by unit owners, (R. 1099), or Purchase Contracts incorporating the Master Deed, (R. 1104, 1107). Respondents' petition also omits that the Association's By-Laws, signed by the president of the Association in 2007, incorporate the Master Deed by reference. (R. 1095). Thus, the record contains evidence of multiple signed documents and admissions of Respondents supporting this court's decision, and the petition for rehearing should be denied. Respondents again wish for this court to ignore such evidence to only present one view of the record.

## II. This Court Rightly Found the Waivers to be Knowing and Voluntary

Respondents argue that this court erred in finding the waivers to be knowing and voluntary because the purchase contracts were not signed at closing. (Pet. 3). The argument fails for multiple reasons.

First, Respondents argue this court is obligated to sustain the circuit court's "factual" finding that the Association's waivers of its rights to a jury trial and to proceed as a class were voluntary. (Pet. 11-12). As Respondents conceded in their petition, in this context, voluntariness is a question of law. (Pet. 11). Hence, the circuit court's underlying factual finding that the Association was under the control of the Developer does not change the standard of review for the legal conclusion drawn from that factual finding. *See Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999) ("We acknowledge that determining whether a party waived its right to arbitrate is a legal conclusion subject to de novo review; nevertheless, the circuit judge's factual findings underlying that conclusion will not be overruled if there is any

evidence reasonably supporting them."). Thus, this court properly reviewed the circuit court's legal conclusion that the Association knowingly and voluntarily waived its right to a jury trial using a de novo standard. *See id.*; *see also Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) ("'[W]hether a party is entitled to a jury trial is a question of law.' Appellate courts may decide questions of law with no particular deference to the circuit court's findings." (quoting *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010)).

Second, Respondents again fail to acknowledge that the Association's By-Laws incorporate the Master Deed and that the unit owners signed the Title to Real Estate, both of which specifically reference and are subject to the publicly-filed Master Deed. Finally, it is not required that Respondents sign a purchase contract at closing for a waiver to be binding. Respondents do not contest that they signed the purchase contract or that a lawyer closed these real estate transactions, and they admit they are bound by the Master Deed. (R. 1336-1339, 1341-1342). Therefore, this court correctly found Respondents' waiver was knowing and voluntary, as evidenced by multiple signed documents and Respondents' own admissions.

## III. The Purchase Contracts Do Not Contradict the Master Deed and Further Demonstrate the Waivers Were Knowing and Voluntary

Respondents argue the purchase contracts contradict the Master Deed and this Court relied on the "wrong provisions in the Master Deed." (Pet. 5). This argument also fails for multiple reasons.

First, this court applied the correct waiver provisions. Respondents do not contend that the Association should be subject to a different waiver provision and cannot do so given the express provision in the By-Laws that the Master Deed governs in the event that it conflicts with the By-Laws. (R. 1019, 1037). Similarly, the Master Deed supersedes the Contract of Sale, which requires compliance with the Master Deed. (R. 1107).

Second, the arbitration provision in the Contract of Sale is not inconsistent with the arbitration provision in the Master Deed. While the arbitration provision in the Contract of Sale does include additional language referencing invalidation of the arbitration provision, nothing prohibits the parties from deciding against invoking the provision. Here, Respondents filed suit in the circuit court in breach of the Contract of Sale and Master Deed. The Developer elected to proceed with a non-jury trial without a class action, as the Contract of Sale and Master Deed envision should happen if the parties do not choose to arbitrate.

Further, in a footnote, Respondents argue that the arbitration provisions in the Contract of Sale and Master Deed conflict because one expressly waives the right to proceed as a class action and the other does not. This is inaccurate. The Contract of Sale provides that the parties "hereby waive all resort to trial by jury or any and all issues otherwise so triable, including without limitation waiver of any type of class action suit." (R. 1108). The Master Deed also provides that the parties waive the right to seek a jury trial "including without limitation waiver of any type of class action suit." (R. 1162-1163). Therefore, this court rightly found that Respondents knowingly and voluntarily waived their right to a jury trial in the By-Laws, Master Deed and Contract of Sale.

## IV. Respondents Admit the Sales of Units Were Closed by Competent Counsel

Respondents do not dispute that counsel closed the real estate transactions at issue, as this court rightly found. (Pet. 7). Instead, Respondents argue that closing counsel was the Developer's counsel instead of purchaser's counsel. (Pet. 7). In South Carolina, however, lawyers may represent both buyers and sellers at a real estate closing. *See McNair v. Rainsford*, 330 S.C. 332, 345, 499 S.E.2d 488, 495 (Ct. App. 1998) (noting the Ethics Advisory Committee of the South Carolina Bar has "concluded an attorney may represent all three parties to a real estate closing without violation of the [Rules of Professional Conduct] provided, however, no negotiation is

required, no problem has arisen which may jeopardize the closing, no party is relying on the attorney for substantive advice about how or whether to proceed, there has been full disclosure of the potential for conflict to all the parties to the closing, all of the parties understand their right to seek other legal counsel, and all parties agree."). The record contains no allegation that counsel did not fulfill its duty to explain the transaction documents to all parties. Moreover, the Purchase Agreement expressly allows purchasers to utilize their own counsel at their own expense. (R. 1104). The purchasers opted not to utilize their own counsel.

Respondents also argue that the closing occurred prior to filing of the Master Deed. However, the record contains no such evidence of any closing prior to July 2, 2007, when the Master Deed was filed and publicly available. Therefore, the petition for rehearing should be denied on this point too.

## V. This Court Correctly Accounted for any Differences Between the Association and its Members

Respondents argue that the Association could not have knowingly and voluntarily waived its right to a jury trial because it was under the control of the Developer at the time the Master Deed was created. (Pet. 9). Respondents' argument directly contradicts the provisions of South Carolina's Horizontal Property Act, which expressly provides that bylaws that govern administration of the property must be appended to the master deed of a horizontal property regime. *See* S.C. Code Ann. §§ 27-31-150 and -160. The Developer therefore has statutory authority to draft bylaws that comply with the Master Deed, which is what the Developer did in this case.

Further, the record contains no evidence that any unit owner did not have access to the Master Deed or the By-Laws prior to closing. In fact, the only evidence in this regard is an admission under oath by both the Association's corporate representative and the unit owner class

representative that they and all other homeowners are bound by the terms of the Master Deed. (R. 1336-1339, 1341-1342). Therefore, this court correctly found that the Association and its members are bound by the Master Deed and the waivers found in the Master Deed.

## VI. Respondents Did Not Properly Raise Their Fiduciary Duty Arguments in Their Brief

In sections XI and XII of the petition for rehearing, Respondents argue for the first time that the court is required to "zealously scrutinize" the Master Deed due to the fiduciary relationship between the Developer and the Association. (Pet. 16-18). Accordingly, it contends the Developer breached its fiduciary duty and this court was required to "presume that the transactions at issue are neither knowing nor voluntary." (Pet. 17).

Respondents did not properly raise this issue in their briefing to the court. "Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. "When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from an appellant's arguments." *Herron*, 395 S.C. at 466, 719 S.E.2d at 642. Although a party is not required to use the exact name of a legal doctrine in order to preserve an issue, "the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Id.*

First, Respondents did not set out a fiduciary duty or presumption of invalidity argument in their statement of issues on appeal. (Resp. Br. 1). Further, Respondents did not argue anywhere in their brief that such a breach changed the standard by which this court must review the jury trial and class action waivers. Respondents now assert that the court was required to "zealously scrutinize" the waivers with "considerable skepticism" and to presume that the waivers were invalid. This is the type of situation our supreme court described in *Herron*. Respondents did not

raise this argument in a "sufficiently clear" manner in their brief, and this court could not have addressed the argument without having to "grope in the dark" to ascertain that Respondents were asserting that the fiduciary duty changed the lens through which this court must view this case. *See id.* at 466, 719 S.E.2d at 642.

Second, any fiduciary duty that the Developer may owe to Respondents does not change the standard by which this court must view the jury trial and class action waivers. The cases cited by the Respondents provide only that a developer has a fiduciary duty to a homeowners association to transfer common areas that are in good repair. *See Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 260, 562 S.E.2d 633, 638 (2002); *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 374, 725 S.E.2d 112, 126 (Ct. App. 2012); *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 415, 426 S.E.2d 828, 832 (Ct. App. 1993). Those cases do not support Respondents' argument that a court must "zealously scrutinize" the master deed or "presume" that the jury trial and class action waivers were at "neither knowing nor voluntary." Moreover, the issue before this court is whether Respondents waived their rights to a jury trial and a class action. The issue of whether the Developer breached any fiduciary duty to turn the common areas over to Respondents in good repair is not currently before this court.

Third, Respondents attempt to shift the duty the closing lawyer would owe to them onto the Developer. Our supreme court has recently reiterated the duty owed by a closing lawyer to clients. *Johnson v. Alexander*, 413 S.C. 196, 201, 204, 775 S.E.2d 697, 700, 701 (2015) (providing a closing lawyer has a duty to "render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession," and he cannot avoid liability by delegating that duty). Accordingly, this court should deny the petition on this point as well.

## VII. The Association Was Included in the Jury Trial Waiver

Respondents argue this court erred in failing to observe that the jury trial waiver provision does not explicitly reference the Association. (Pet. 12-13). First, the jury trial waiver provides that no co-owner or "legal representative" of the co-owners may seek a jury trial. (R. 948). The Association plainly is a legal representative of the co-owners in the context of these proceedings in which the Association seeks money for alleged damages to common areas owned by the co-owners. Indeed, the Association does not hold any interest in the horizontal property regime at all and can act only as the legal representative of the co-owners with regard to asserting claims as to the physical condition of the property. *See generally* (R. 1123-63). The Association otherwise has no independent standing to sue with regard to property that it does not own.

Second, Respondents have abandoned any such argument. They did not raise it in their briefing to this court. A party cannot raise an issue for the first time in its petition for rehearing and, therefore, the court should not consider this argument. *Id.* at 469, 719 S.E.2d at 644 ("[A]lthough the issue . . . was raised in Appellant's rehearing petition, such an attempt was untimely and improper as a party may not raise an issue for the first time in a petition for rehearing."). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Id.* at 466, 719 S.E.2d at 643 (quoting *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322). This court correctly found the Association was bound by the waiver provisions.

## VIII. This Court Properly Held the Amendment to the Master Deed Does Not Apply Retroactively Against the Developer

Respondents raise numerous arguments in their brief as to the retroactive application of the Second Amendment to the Master Deed. *See* (Pet. 20-29). This court should not grant rehearing as to any of Respondents' arguments.

This court properly held the Developer raised its argument against the validity of the Second Amendment to the circuit court. Moreover, this court was correct in noting that none of the cases cited by Respondents support their argument that the Second Amendment can be enforced retroactively against the Developer. *See The Gates at Williams-Brice*, Op. No. 5438, at 35-36 (rejecting Respondents' and the circuit court's reliance on *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); *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); *Frantz v. Piccadilly Place Condo. Ass'n*, 597 S.E.2d 354, 356–57 (Ga. 2004)). Finally, the Second Amendment does not apply to the Developer because it is unreasonable. *See Armstrong v. Ledges Homeowners Ass'n, Inc.*, 633 S.E.2d 78, 89 (2006) ("This Court will not permit the Association to use the Declaration's amendment provision as a vehicle for imposing a new and different set of covenants, thereby substituting a new obligation for the original bargain of the covenanting parties."). Accordingly, this court should reject Respondents' arguments as to the Second Amendment to the Master Deed.

## IX. The Developer Raised the Waivers in a Timely Manner

Respondents attempt to re-hash whether the Developer timely raised the jury trial and class action waivers. The Association is incorrect that timeliness is a question of fact. Instead, timeliness is a question of *law*, as is the question of whether the Developer properly raised an issue.

The actions the Developer took and when it took those actions—for example, denying an allegation in an answer or filing a motion to strike—are questions of fact. However, the significance of those actions and whether they comply with the legal requirement that a party raise the mode of trial issue "at the first opportunity" is a question of law, which this court reviews de novo. Therefore, the circuit court's finding of untimeliness is entitled to no deference. *See Blackburn*, 407 S.C. at 328, 755 S.E.2d at 441 (2014) ("Appellate courts may decide questions of law with no particular deference to the circuit court's findings."); *see also* JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 193 (2d ed. 2002) ("Construction of a pleading is a matter of law." (citing *Monteith v. Harby*, 190 S.C. 453, 3 S.E.2d 250 (1939)). That finding is an error of law, which this court properly reversed.

This court correctly interpreted *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 431 S.E.2d 587 (1993). Our supreme court's holding in *Foggie* does not support the circuit court's conclusion that a party must raise a mode of trial issue in a motion to strike before filing its initial pleading. Rather, the only holding in *Foggie* relating to mode of trial issues is that a party must immediately appeal a circuit court's order denying the party's motion for a particular mode of trial. *Id.* at 23, 431 S.E.2d at 590; *see also Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (reiterating that a party must immediately appeal an order affecting the mode of trial); *Frampton v. S.C. Dep't of Transp.*, 406 S.C. 377, 385-86, 752 S.E.2d 269, 274 (2013) (repeating the rule from *Foggie* and *Lester*). Thus, this court properly determined the circuit court committed an error of law in relying on *Foggie*.

No matter the standard, this court was correct in reversing the circuit court's findings and finding the waivers properly raised. An appellate court will reverse findings of fact when they are wholly unsupported by the evidence. *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121,

127, 631 S.E.2d 252, 255-56 (2006) ("[T]he trial court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or unless it clearly appears the findings were influenced or controlled by an error of law."). The circuit court's finding that the Developer did not raise the mode of trial issue until its motion to strike is not supported by evidence in the record. Instead, the record indicates the Developer raised the mode of trial issue in its answer to the operative complaint by denying that the plaintiffs were entitled to a jury trial or to proceed as a class. (R. 71-77); *see also Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (noting pleadings must be liberally construed). Thus, the circuit court's finding that the Developer did not raise the mode of trial issue until eighteen months after the filing of the original complaint and fifteen months after the Developer filed its original answer is wholly unsupported by the evidence, and this court correctly reversed that finding.

This court should decline to rehear this and the other issues.

## CONCLUSION

For the foregoing reasons, this court should deny Respondents' petition for rehearing.

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November 7, 2016

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Of Whom DDC Construction, Inc.; Columbia Condos, LP; C&B Utilities, LP; Carolina Floor Systems, Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing Inc.; LTB Construction, Inc.; Martin Morales Jr. Painting & Drywall, LLC, ..... Appellants.

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PROOF OF SERVICE

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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' Return to Petition for Rehearing

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November 7, 2016

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November 7, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia SC 29211

RE: The Gates at Williams-Brice v. DDC Construction, Inc., et al.
Appellate Case No. 2015-000180
Our File No. 41087/01500

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellants' Return to Petition for Rehearing in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of this Return.

Very truly yours,

Matt Bog

A. Mattison Bogan

AMB:lpw
Enclosure
cc: Justin O'Toole Lucey, Esquire
Stephanie D. Drawdy, Esquire
Dabny Lynn, Esquire