

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, Circuit Court Judge

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Case No. 2012-CP-40-8512

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

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NOV 18 2016

SC Court of Appeals

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

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**Respondents' Reply to Appellants' Return to Petition for Rehearing**

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## SUMMARY

Appellants' Return to Petition for Rehearing provides scant opposition to Respondents' thoroughly articulated Petition for Rehearing. It fails to address many points; and it only facially addresses others, before segwaying into non-sequitur discussion. It misapplies the *Herron* case upon which it relies; misstates that Respondents did not brief the issue of fiduciary duty; implicitly admits that the Association itself is not a Bound Party to the jury trial waiver provision; and fails to recognize that this Court should sustain the Trial Court for any reason appearing in the Record. While time and page limits prevent a tit-for-tat response, exemplars of each of the foregoing are set out below.

## ARGUMENT

### **I. APPELLANTS' COMPLAINT THAT RESPONDENTS ARE RAISING NEW ISSUES IS WRONG.**

Appellants erroneously complain in several arguments that Respondents are raising new issues. The below examples show otherwise.

#### **A. That the Waivers were Inserted in Violation of the Developer Fiduciary Duty is Not a New Issue.**

The heading in Sec. VI of Appellants' Return asserts that "Respondents Did Not Properly Raise Fiduciary Duty Arguments in Their Brief." (Return, p. 8). This is clearly incorrect. Respondents raised this in their Statement of Issues:

5. WHETHER THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE SUBJECT WAIVER PROVISIONS ARE UNCONSCIONABLE AND UNENFORCEABLE BASED UPON THE FACTS AND CIRCUMSTANCES OF THIS CASE.

Respondents asserted that offensive provisions had been inserted into the Master Deed in breach of Appellants' fiduciary duties (and related matters) at pages 21, 32-3, 34, and 46 of Respondents'

Brief. This issue was argued at length during oral argument this summer.<sup>1</sup> For example, Respondents cited facts and authority<sup>2</sup> evidencing that the insertion of the provisions violated the Developer's fiduciary duty to Respondents, that the Association did not voluntarily waive its rights and that the Developer's fiduciary relationship with Respondents requires a higher threshold of scrutiny regarding any alleged waiver.

Notably, on May 6, 2016, Respondents also submitted supplemental authority to the Court of Appeals (in advance of Oral Argument in this case) that further clarified the broad implications of the fiduciary duty context that applies to a developer. Respondents submitted to this Court the post-trial Order in *Brad J. Walbeck, et al. v. The I'on Company, LLC, et al.*, where the Charleston County Court of Common Pleas found a developer has an overarching fiduciary duty to act in the best interest of the regimes and neighborhoods they create, control, and manage and to not put their interests in front of those of the ensuing community. Order Denying Defendants' Motion for Judgment Notwithstanding the Verdict, for a New Trial Absolute, and for a New Trial Nisi

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<sup>1</sup> During the June 2014 Trial Court oral arguments, Respondents also raised their fiduciary arguments:

I would also call out to the Court's attention the fact that ... at the time the grantor inserted these anti-suit clauses into the master deed, that was a clear violation of the grantor's fiduciary duty to this ensuing neighborhood, both under the *Dunes West* case and under the *Goddard* case set forth in our brief at page – I believe it's page 14. At the time of the inception, they owed a fiduciary duty for the developer to value his own rights and assets, his own benefit, over that of the homeowners and the ensuing neighborhood. By restricting the homeowners and the association from the ability to hold the developer accountable was a breach of that fiduciary duty, and to condone it would be for the Court to condone that breach of fiduciary duty which the courts should not do.

(June 9, 2014 Hearing Transcript, 15:6-19, R. p. 1303)(emphasis added)

<sup>2</sup> *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 562 S.E.2d 633 (2002); *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993).

Remittitur (S.C. Ct. Common Pleas, County of Charleston, 2010-CP-10-10490), on appeal in Appellate Case No. 2015-001590 (A developer’s “inherent conflict of interest creates a *high threshold* for the developer to act in the best interests of both his company and the ward (the promoted, new, neighborhood)”).<sup>3</sup>

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<sup>3</sup> The *I’On Company* opinion cites to the South Carolina Supreme Court case of *Duncan v. Brookview House Inc.*, 262 S.C. 449, 456, 205 S.E.2d 707, 710 (1974) where a fiduciary relationship was held to exist between a corporation’s promoters and the corporation they created:

The promoters of a corporation occupy a relation of trust and confidence towards the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries.

*Id.* (emphasis added).

The *I’On Company* opinion also cites to *Goddard* where the South Carolina Court of Appeals relied on *Duncan* to delineate the fiduciary relationship between developers and property owners associations:

Finding a “corollary” between promoters and developers, the *Goddard* Court noted: [b]oth [developers and promoters] are entrusted by interested investors to bring about a viable organization to serve a specific function. *Goddard’s* holding confirms the fiduciary relationship which exists between developers and property owners, a holding which correlates with other South Carolina decisions recognizing a fiduciary relationship between a promoter and the ensuing project. Notably, most associations are organized as nonprofit corporations, and thus, the developer often assumes a dual role as (1) developer-promoter of the development; and (2) director-officer of the developments’ property owners’ association until the association is self-sufficient. The effect of this dual role is that the developer, during this period, has two separate and distinct loyalties: (1) the operation of the association; and (2) the development and marketing of the project. Such inherent conflict of interest creates a high threshold for the developer to act in the best interests of both his company and the ward (the promoted, new, neighborhood). This conflict of interest often manifests itself adversely in situations where the developer fails to manage the association adequately or where the developer engages in self-dealing. Indeed, a developer in control of an association assumes management and supervision responsibilities similar to those of a corporate director or officer. Therefore, the developer may be held liable if such control results in mismanagement.

Under this wealth of South Carolina authority, the fiduciary relationship between the Developer and the Association triggers the higher threshold standard of “zealous” scrutiny:

[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.

*Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987) (emphasis added).

The “zealous scrutiny” of self-dealing, and the burden to prove an arm’s length transaction, are requirements which accompany ANY fiduciary relationship – Appellants entirely miss this point. In other words, the cases cited by Respondents do not “only provide that a developer has a fiduciary duty to a property owners association to transfer common elements in good repair” as Developer suggests.<sup>4</sup> Rather, they establish a fiduciary relationship exists between developers and property owners associations and, as such, any transaction occurring between a developer and property owner associations is presumably invalid and requires “zealous scrutiny”. *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599 358 S.E.2d 150, 152 (Ct. App. 1987) (“[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

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*I’On Company Order*, p. 13, n.18, citing *Goddard*, 310 S.C. at 414-15, 426 S.E.2d at 832 (emphasis added).

<sup>4</sup> App. Return, p. 9.

transactions between parties occupying confidential relations toward each other. . .)<sup>5</sup> *cf. Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (finding a purchase contact for an automobile must be “viewed with ‘considerable skepticism’” because automobiles are necessities in modern society.”) (emphasis added); *see also 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.”).

This means the contracts and “quasi-contract” at issue here (all of which constitute transactions between the Developer and Gates) are (a) subject to the “zealous scrutiny” standard and (b) presumably invalid because they occurred in a fiduciary context. Further, and as stated in Respondents’ Petition, the “zealous scrutiny” standard runs parallel with the South Carolina Supreme Court’s “considerable skepticism” standard in the contractual context set out in *Simpson*,<sup>6</sup> which Respondents argued and cited to in the lower court and before this Court. Given the clear applicability of both of these standards, this Court was required to “zealously” scrutinize with “considerable skepticism” the waiver provision and surrounding circumstances related to The Gates’ Developer (Appellants).

Respondents have raised “reasonably clear” fiduciary arguments before the lower court and before this Court sufficient to preserve this issue. “When an issue is not specifically set out in

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<sup>5</sup> Notably, *Goddard* expressly quotes *Island Car Wash* for essentially the same proposition. *Goddard*, 310 S.C. at 414 426 S.E.2d at 832 (“A confidential or fiduciary relationship exists when one reposes 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.”) (emphasis added) *quoting Island Car Wash*, 292 S.C. at 599, 358 S.E.2d at 152.

<sup>6</sup> *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007).

the statement of issues, an appellate court may nevertheless consider the issue if it is reasonably clear from an appellant's arguments.” *Herron v. Century BMW*, 719 S.E.2d 640 (S.C. 2011); 15 S.C. Jur. Appeal and Error § 83 (citing Appellate Court Rule 208(b)(1)(B)).

**B. The Association is a Separate Legal Entity That Is Not Bound By the Master Deed’s Jury Trial Waiver.**

Similarly, Appellants apparently now concede in Sec. VII of the Return that the Association is not a named party to the jury trial waiver contained in Section XXXV(D)<sup>7</sup> by arguing that the Association is acting purely as a “legal representative.”<sup>8</sup> Appellants now argue abandonment. This argument ignores the fact that the existence of a valid, enforceable jury trial waiver by the Association has been a central issue in this case; ignores Appellants’ burden of proof on this issue; ignores fundamental contracting principles concerning ambiguities; and, ignores that this Court can sustain the Trial Court on any grounds appearing in the record. *I’On, LLC v. Town of Mt. Pleasant*, 388 SC 406, 418-9, 526 S.E.2d 716 (2000); Rule 220(c), SCACR.

The Trial Court found this provision “ambiguous” and “undecipherable” (R. p. 49); and Respondents briefed this ambiguity in their Brief (Resp. Brief at pp. 11, 14, 45, and 50). Whether

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<sup>7</sup> Each subparagraph within Section XXXV(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;
- 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).

<sup>8</sup> As a separate legal entity, the Association cannot be bound by a waiver that only names co-owners and grantors.

Sec. XXXV(D) expressly excludes the Association or does so through an ambiguity, the result is the same as ambiguities are construed against the drafter.<sup>9</sup>

## II. APPELLANTS HAVE FAILED TO PRESENT COGENT ARGUMENTS AS TO WHY RESPONDENTS' PETITION FOR REHEARING SHOULD BE DENIED.

Appellants have failed to present cogent arguments as to why Respondents' Petition for Rehearing should be denied. The majority of Appellants' arguments are disjointed, and without logical flow. Many appear designed to address one issue while subtly segwaying into different issues, with no logical linkage or thought-out opposition inter-disbursed.

For example, Appellants assert the purchase contracts are not inconsistent with the Master Deed's arbitration provision, but provide no analysis to support this proposition. (Return, p. 6). Instead, Appellants actually *admit* the contracts contain "additional language referencing invalidation of the arbitration provision." (Return, p. 6). This "additional language" makes the purchase contracts and Master Deed inconsistent by showing the Developer intended to seek a non-jury trial *only if* the arbitration clause was enforced, then invalidated. (Petition, p. 20). Such an inconsistency in the jury trial waiver renders the waiver unenforceable.<sup>10</sup>

As another example, Appellants argue the South Carolina Horizontal Property Regime Act "directly contradicts" Respondents' argument that the Association could not waive its jury trial right while controlled by the Developer (Return, p. 7). Appellants then cite to Section 27-31-150, "Administration of property; bylaws" and Section 27-31-160, "Provisions required in bylaws;

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<sup>9</sup> Note how Appellants' new argument that the Association can be included in this paragraph as a "legal representative" evidences the existence of the ambiguities permeating this section. *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") (quotations omitted) (emphasis added).

<sup>10</sup> See also *Myrtle Beach, supra*.

modification of system of administration.” (Return, p. 7). Appellants note that these provisions provide that “bylaws that govern administration of the property must be appended to the master deed of a horizontal property regime.” (Return, p. 7). This point is a red herring, and does not detract from Respondents’ point that the Developer-Controlled Association could not waive its substantive right to a jury trial.

As yet another example, Appellants provide no opposition to Respondents’ points and authorities on the alleged retroactive effect of the Second Amendment (Return, Sec. VIII). Appellants simply parrot this Court’s prior discussion, which Respondents have challenged.

### **III. APPELLANTS HAVE FAILED TO ADDRESS A MYRIAD OF ISSUES RAISED IN RESPONDENTS’ PETITION.**

Appellants have failed to address a myriad of issues raised in Respondents’ Petition. The following is a summary list of some of the points asserted in Respondents’ Petition that Appellants failed to address in their Return:

- Appellants are silent on Respondents’ argument that the terms of the purchase contracts charge the Homeowners with reading an “incomplete Master Deed, which the Developer could amend at will, without notice, and which the Homeowners did not, and could not, negotiate.” (Petition at 4);
- Appellants ignore Respondents’ assertion that “[n]ot only was the Master Deed *not* incorporated into the purchase contracts, it was apparently not even finalized during the initial sales of the condominiums.” (Petition at 3); instead, Appellants assert Respondent’s Petition “omits any reference” to “Purchase Contracts incorporating the Master Deed.” (Return at 4);
- Appellants ignore Respondents’ point that “[t]he Homeowners did not sign deeds when they purchased their respective condominiums – the Developer did. [] the Association did not sign any deeds either.” (Petition at 2); instead, Appellants flatly assert that the Court did not err in finding The Gates Homeowners “waived their rights to a jury trial and a class action when they signed the deeds to their condominiums.” (Return at 3);
- Appellants fail to address Respondents’ challenge to the suggestion that “the Homeowners somehow ‘knew’ unknown terms because they had ‘legal representation’” at closing; instead, Appellants cite to authority that suggests seller’s

counsel would commit an ethical violation by representing The Gates Homeowners who would rely on the attorney “for substantive advice about how or whether to proceed” (Return at 7) (citing *McNair v. Rainsford*, 330 S.C. 332, 345, 499 S.E.2d 488, 495 (Ct. App. 1998));

- Appellants are silent on Respondents’ point that there is a “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” (Petition at 11); and
- Appellants generally reference Respondents’ “numerous arguments” as to the Second Amendment, but fail to provide any substantive response to Respondents’ authority supporting their assertions that this Court erred when it:
  - o “merged the issue of a challenge to the Amendment’s reasonableness with the issue of the application of the Amendment to the Developer”;
  - o “permitted an illegal challenge to the action of the Association”;
  - o blindly relied on *Armstrong v. Ledges Homeowners Ass’n, Inc.*, 360 N.C. 547, 633 S.E.2d 78 (2006);
  - o found the Developer had a continuing interest in the regime that prohibited amendments by the Association;
  - o failed to find the Developer could be bound by the Second Amendment; and
  - o found the Master Deed could not be unilaterally amended.

(Return, p. 11); (Petition, pp. 20-26).

The Return provided little further on most of these issues, and Respondents’ Petition is essentially unrefuted.

### CONCLUSION

Respondents’ Petition for Rehearing should be granted for the foregoing reasons as well as those reasons stated in Respondents’ Petition.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By:  \_\_\_\_\_

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Mount Pleasant, SC  
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Certificate of Service

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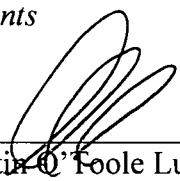
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I, Justin O'Toole Lucey, Esquire, hereby certify that on **November 15, 2016** I served a copy of the *Respondents' Reply to Appellants' Return to Petition for Rehearing* submitted by the Respondents on the following counsel, via the United States Mail, postage pre-paid, and addressed as follows:

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November 15, 2016

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**BY US MAIL**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court Of Appeals  
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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' Reply to Appellants' Return to Petition for Rehearing*. I also enclose a *Proof of Service* indicating service of the *Respondents' Reply to Appellants' Return to Petition for Rehearing*.

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