IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Trial Court Judge

Case No. 2012-CP-40-8512

Appellant Case No. 2015-000180

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

vs.

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 Respondents.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Petitioners' Counsel certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 17, 2016.[1]

INTRODUCTION

Petitioners seek a Writ of Certiorari to review the Court of Appeal's decision (hereinafter "the Opinion")[2] enforcing anti-suit provisions promulgated by a Developer while in control of the Homeowners Association and Property Regime (hereinafter "Association"), which: (a) benefited the Developer at the expense of the ensuing Association (and its members); (b) were unconscionable, ambiguous, and one of which was inapplicable to the Association; (c) were rightfully and reasonably removed by way of an Amendment to the Master Deed; and (d) were not timely enforced by the Developer. The anti-suit provisions sustained by the Court gutted the Developer's legal responsibility for the construction defects and restricted the remaining illusory claims to substantial procedural limitations. The Opinion, relying upon patently erroneous findings of fact and analysis, violates the public policy of this State to protect residential homeowners and grants the Developer's request for 159 separate bench trials for the repair of the 158 condominiums and their common elements.

This Court should grant the Writ of Certiorari requested for several "special and important" reasons,[3] not only including the host of legal errors relating to contract construction, fiduciary

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[1] Rule 242(d)(1), SCACR. This Order was amended/supplemented by Order dated November 23, 2016. By Order dated December 6, 2016, the Supreme Court granted Petitioner an extension to January 9, 2016, to file this Petition.

[2] Opinion 5438, August 31, 2016. The Court of Appeals will be referred to as "the Court," and the Supreme Court will be referred to as "this Court."

[3] Rule 242(b), SCACR (noting certiorari should be granted "where there are special and important reasons"); *see also* Rule 242(b)(2)(3), SCACR (appeals involving novel questions of law and conflicting legal precedents are "special and important" for purposes of granting certiorari).

relationships, other precedent cited herein, and novel issues presented herein; but also because the Opinion has far-reaching implications for tens of thousands residents of this State, unless rectified by this Court. There can be little doubt that the Opinion is bad for South Carolina homeowners; the question that remains is whether its draconian result can be justified.

QUESTIONS PRESENTED

I. Was the Court of Appeals justified in eroding the public policy protection afforded to residential homeowners in the State of South Carolina?

II. Is a wholly controlled association in its infancy capable of giving independent (knowing and voluntary) consent to actions taken by the Developer controlling it?

III. Does a Fiduciary Relationship still exist in this state as between Developers and the neighborhood/association/regime that they create, similar to the one first recognized by Duncan as between a corporation and its promoters, and as applied to developers in cases such as Goddard, Dunes West, and Magnolia ?

IV. Does the existence of a fiduciary relationship require a strict, critical look at dealings between the fiduciary and its ward?

V. Does self-dealing, e.g., the insertion of one-sided, advantageous provisions in a transaction between the fiduciary and the ward, shift the burden of proof to the fiduciary to show the fairness of the transaction?

VI. Is the insertion by the fiduciary of multiple liability waivers in a transaction between the fiduciary and the ward, with procedural limitations on the remaining claims such an advantage to the fiduciary such that it is subject to the above scrutiny and burden shifting?

VII. Can a jury trial waiver be enforced against an entity that is not included in the defined waiver?

VIII. Can a party "knowingly" and "voluntarily" accept strictly construed waivers which are conflicting, ambiguous, unconscionable, and un-finalized?

IX. Can a property owners association amend its master deed to remove self-serving liability and procedural limitations imposed by the Developer when the master deed gives the association the right to amend the master deed?

X. Must the defense asserting an alleged jury trial and class action wavier be timely raised?

XI. Should a claim regarding a common construction component be compelled to be split amongst 159 non- jury trials – if it even can be? And to the extent its impractical, should a developer be able to use this mechanism as insulation from liability?

STATEMENT OF THE CASE

This case challenges a developer's strategy to evade its responsibility for the shoddy construction of The Gates at Williams-Brice ("Gates"). The Developer, who has facially disclaimed legal responsibility for anything, seeks to force each Homeowner and the Association to prove otherwise in 159 separate non-jury trials. The general background of this matter is set forth in the Trial Court's decision in favor of Petitioners (R.p. 34-50), incorporated by reference.

The Developer drafted the Master Deed, which created the Horizontal Property Regime. Concurrently, the Developer formed the Association (and drafted its By-Laws). In the Master Deed, the Developer inserted anti-suit provisions patently intended to provide the Developer with an advantage in the event of a legal dispute/claim. In other words, the Developer inserted provisions into the Master Deed serving the interests of the Developer at the expense of the Association/homeowners. These commenced with liability disclaimers, and completed by restricting any remaining claims to adverse procedures. The "final"[4] version of this Developer-drafted Master Deed essentially disclaimed all liability for defects, including a disclaimer of the warranty of habitability (R. p. 901), and limited all remaining illusory claims to an "Alternative Dispute Resolution" Section (Article XXXV), meant to, inter alia, make litigation of condominium defects prohibitively unwieldy.

In the disclaimers, the Developer disclaimed any liability for:

- The condominiums themselves, limiting responsibility "solely to the general and limited common elements" (Art. IV, R. p. 911);

[4] The "final" version is differentiated because the purchase contracts upon which the Court mistakenly relied upon referenced a preliminary Master Deed (R. pp. 1102 and 1105)

- All express and implied warranties (including habitability[5], workmanship, fitness, quality, soundness, value and suitability) (Art. IV, R. p. 911-912);

- Secondary, incidental, or consequential damages (Art. IV, R. p. 912);

- Monetary damages (Art. IV, R. p. 911); and

The remaining illusory rights/claims, if any, were then procedurally restricted:

Article XXXV: Alternative Dispute Resolution[6]:

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 <u>shall be resolved by final and binding arbitration</u>...<u>all</u> claims and causes of action of all persons and entities entitled to enforce (or bound by) this arbitration provision <u>shall be asserted in a single arbitration proceeding and multiple parties may be joined in the arbitration proceeding</u> so that all disputes may be resolved in one forum...

C. Association Claims

<u>In addition to compliance with the foregoing arbitration procedures outlined in this article</u>, the board shall not be authorized or obligated to, and the association shall not initiate any judicial proceeding <u>unless first approved by 75% affirmative vote of the entire Association membership</u>...

D. Waiver of Jury Trial

(i) <u>Neither co-owner nor any assignee, successor, heir or legal representative of co-owner or grantor</u> shall seek a jury trial in any lawsuit, proceeding or any other litigation proceeding...including, without limitation, waiver of any type of class action suit;

(ii) <u>Neither co-owner nor grantor</u> 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;

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[5] *Kirkman v. Parex*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006) (disclaimers of the implied warranty of habitability are disfavored and require proof of specific negotiation).

[6] Section "A" of Article XXXV defines applicable terms used throughout the Article, including: (1) Bound Party; (2) Claim; (3) Claimant; and (4) Respondent. (R. pp. 944-945). The Association is listed as a Bound Party, and Bound Parties are referenced in the Arbitration clause, (Article XXXV(B)), but not in the jury trial waiver (Article XXXV (D)).

(iii) <u>Neither co-owner nor grantor</u> has in any way agreed with or represented that the provisions of this section will not be fully enforced in all instances; and

(iv) The provisions contained this article are a material inducement for grantor to make the declarations set forth herein.

(Master Deed, R. pp. 946-948) (emphasis added). As stated above, the Developer then restricted the remaining illusory rights/claims to 158 bench trials – which the Court made into 159.

The Developer additionally inserted into its standard, boiler-plate purchase contracts and appended limited warranty, two (2) dispute resolution provisions that conflict with Article XXXV of the "final" Master Deed, indicating that the enforcement of arbitration is a precondition necessary to the enforcement of any non-jury and class action waiver. (R. p.1102-1113).

ARGUMENT

I. There Can be No Doubt that the Public Policy of this State is to Protect Residential Homeowners, and the Opinion Offends this Policy

As codified in numerous decisions, it is the public policy of this State to protect residential homeowners.[7] The Opinion offends and undermines this public policy. Requiring 158 bench trials

[7] *See, e.g., Sapp v. Ford Motor Co.*, 386 S.C. 143, 148, 687 S.E.2d 47, 49-50 (2009) (acknowledging "courts have recognized that the transaction between a builder and a buyer for the sale of a home largely involves inherently unequal bargaining power between the parties" and noting the "long line of South Carolina cases directed towards protecting consumers only in the residential home building context" as well as "cases from around the country expanding protections afforded to homebuyers…"); *Beachwalk Villas Condominium Ass'n, Inc. v. Martin,* 305 S.C. 144, 146, 406 S.E.2d 372, 374 (1991) ("We find that extension of the holding in *Kennedy* to architects is a logical expansion of our law to provide protection for homebuyers."); *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 343 384 S.E.2d 730, 735-36 (1989) ("We have therefore taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller"); *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.,* 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984) (holding where a lender repaired defects in order to facilitate further sales, the lender could be held liable in tort for negligent repairs); *Terlinde v. Neely,* 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980) (holding a subsequent purchaser of a home may pursue a cause of action in contract or tort against a developer because the court's "objective is to protect the innocent purchaser from latent defects"); *Lane v. Trenholm Bldg. Co.,* 267 S.C. 497, 500, 229 S.E.2d 728,

of the remaining illusory claims is facially ludicrous. However, when you add the nature of a condominium property, where some building elements, e.g., balconies, are owned by the Association but the responsibility of each of the 158 condominium owners, the Opinion creates an unmanageable challenge that completes the Developer's strategy of avoiding legal responsibility for his profitable derelicts.

Basically, the Court's Opinion provides developers with a pre-sanctioned, "How-To" primer on stripping future homeowners of important legal rights, both as to liability and procedure, completely ignoring the fact that homeowners are in unequal bargaining positions compared to sophisticated developers (as many times recognized by this Court).

If the Opinion stands, as every developer in this State copies the developer in this case, the residents of this State will: (1) lose important legal remedies; (2) see a corresponding decline in the already subpar quality of residential construction occurring in this State as developers become less accountable; and (3) have no legitimate recourse in the residential-building context, a context that this State has recognized warrants additional consumer protection. Such a result cannot be countenanced, as it is clearly against the public policy and laws of this State.

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729 (1976) (holding there is an implied warranty of fitness for its intended use which springs from the sale of a new home; *Rutledge v. Dodenhoff*, 254 S.C. 407, 414, 175 S.E.2d 792, 795 (1970) (finding the law of *caveat emptor*, traditionally applied to defeat implied warranties in the sale of real estate, does not govern the sale of a new house due to the disparity of bargaining positions between the seller and purchaser, reliance by the purchaser on the skill of the builder, and the inability of the purchaser to inspect the house for latent defects; and holding, "there is an implied warranty that [a new] house was built in a reasonably workmanlike manner and is reasonably suitable for habitation").

II. The Court Erred in Ignoring the Fiduciary Relationship and Finding Petitioners "Knowingly" and "Voluntarily" Accepted the Waivers

The Court's conclusion that the Association and Homeowners "knowingly and voluntarily" accepted the class and jury trial waiver provisions inserted by the Developer into Gates' Master Deed is erroneous and requires review for several reasons.

A. The Court Erred by Ignoring the Fiduciary Relationship and by Failing to Zealously Scrutinize the Waiver Provision and Surrounding Circumstances

The Court failed to recognize the fiduciary relationship existing between the Developer and the ensuing Association. As a result, the Court presumed the Association "voluntarily" accepted the Master Deed's waiver provision when it should have presumed the opposite according to the law governing fiduciary relationships.

1. Developers Owe a Fiduciary Duty to the Ensuing Development

South Carolina law recognizes the fiduciary relationship between a Developer and its ensuing development.[8] The Developer cannot take advantage of this "special" relationship by failing to act in good faith and with the interests of the Regime in mind. The nature of this relationship is aptly described as follows:

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[8] *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 636 (2002) (acknowledging the fiduciary relationship existing between developers and the property regimes they develop); *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) (same); *Wogan v. Kunze,* 366 S.C. 583, 605, 623 S.E.2d 107, 119 (Ct. App. 2005) *aff'd as modified,* 379 S.C. 581, 666 S.E.2d 901 (2008) ("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, 415, 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); *see also, Duncan v. Brookview House, Inc.,* 262 S.C. 449, 456, 205 S.E.2d 707, 710 (1974) ("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.").

> [I]t is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of that 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).[9] Any transaction occurring within the fiduciary context is presumably invalid and requires "zealous scrutiny": Wilson v. Wilson, 112 S.C. 454, 117 S.E. 330, 331 (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.") (emphasis added).[10]

2. The Court's Analysis and Conclusion Conflicts with the Law Governing Fiduciary Relationships

The Court failed to "zealously scrutinize" the advantages taken by the Developer in the Master Deed and failed to presume the invalidity of the offensive provisions (Order, App. p. 198a). See Wilson, supra. Simply put, the law presumes that the advantages taken by the Developer in the insertion of the anti-suit provisions in the Master Deed are invalid until shown otherwise. The Court's failure to apply the correct standard and presumption to this fiduciary transaction is contrary to law, rendering the Court's findings related to the alleged "voluntary and knowing" acceptance and "enforceability" of the Master Deed's anti-suit provisions erroneous. This is all the more egregious given our public policy to protect residential home buyers.

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[9] *Goddard* quotes *Island Car Wash* for the same proposition. 310 S.C. at 414, 426 S.E.2d at 832.

[10] *Cf. Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 670 (2007) (finding a purchase contact for an automobile must be viewed with "considerable skepticism" because automobiles are necessities in modern society.) This "considerable skepticism" standard runs parallel with the "zealous scrutiny" standard in the current context, but the Court ignored both standards.

B. The Court Erred in Finding the Association "Knowingly" and "Voluntarily" Accepted the Waiver Provision When the Court Failed to Conduct a Separate Waiver Analysis as to the Association and the Association is Not Included in the Waiver Provision

The Court further erred in its failure to differentiate its waiver analysis between the Association and the Homeowners; and it failed to observe that the jury trial waiver did not include the Association as a waving party.

1. Waiver by the Association Requires an Analysis Distinct from that of Waiver by Homeowners - Which the Court Did Not Perform

After defining "Homeowners" as a collective reference to both the Association and the Homeowners at the commencement of the Opinion, the Court treated these two Plaintiffs as the same throughout the entirety of its Opinion[11] – this is an error of immeasurable magnitude given these are different Parties with different legal rights and factual circumstances. The Association 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 and for years thereafter. (Order, R. p. 36). Because it was controlled by the Developer, the Association had no independent capacity to "voluntarily" accept anything on its own behalf.

The Court patently misconstrued the Trial Court when it said:

> The Trial 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, App. p. 104a) (emphasis added). Contrarily, the Trial Court found that:

> [T]he Plaintiff POA waived none of its rights because the Plaintiff POA as it was being formed, was controlled by the [Developer], and thus, independently had no way to 'voluntarily' relinquish any rights.

[11] "This matter comes before the Court after the Trial Court denied [Developers] motion for nonjury trial and to strike the class action allegations of Katherine Swinson, individually, and on behalf of all others similarly situated and the Gates at Williams-Brice Condominium Association (collectively "Homeowners")". (Opinion, App. pp. 91a-92a).

(Order, R. p. 46). 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. The Court completely fails to consider whether the Association waived its right to a jury trial, as every fact referenced by the Court to support its waiver findings applies only to the Homeowners – not to the Association.

2. The Association is Not Included in the Master Deed's Waiver Provision and the Court Erred by Failing to Strictly Construe This Provision

If the Court properly examined the Article XXXV(D) waiver provision, it would have realized that it does not include the Association as a Party that is waving a jury trial; in fact, it expressly omits the "Association" and most "Bound Parties." At a minimum, accepting Respondents' previous arguments, this paragraph is ambiguous as to whether the Association is subject to the waiver; and, therefore, this ambiguity must be resolved in the Association's favor.

Article XXXV includes four (4) subsections 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"), defines 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 for "Association Claims", without using any defined terms.
- The fourth subsection, XXXV(D) ("Subsection D"), sets forth a "jury trial waiver", also without using any defined terms. Rather, each subparagraph of Subsection D begins, "Neither Co-Owner or/nor Grantor." (p. 1163) (emphasis added).[12]

[12] The Developer implicitly acknowledged the Association is not referenced in Subsection D in its Return to the Petition for Rehearing which, for the first time, asserted the Association is acting purely as a "legal representative." (Return, App. 153a).

Subsection D, the only provision in Article XXXV that includes waiver language, expressly indicates the waiver is applicable to "owners" as opposed to "the Association". It is very apparent that the Developer intended to distinguish "Association Claims" (Subsection C) and "Owner Claims" (Subsection D) in an effort to keep these Claimant Parties from consolidating their claims, thereby 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).

It is unfathomable how the Court believed the Association somehow "knowingly" and "voluntarily" accepted a jury trial waiver provision the Court, itself, found was inapplicable to the Association:

> [T]he Master Deed contemplated litigation outside of the arbitration context by prohibiting either an owner or grantor from seeking a jury trial....

(Opinion, App. p. 106a) (emphasis added).[13]

C. The Court Erred in Finding the Homeowners "Knowingly" and "Voluntarily" Accepted a Waiver Provision Promulgated in Circumstances Completely Controlled by Developer and Which Conflicts With Other Waiver Provisions

The Court's conclusion that the Homeowners "knowingly and voluntarily" accepted the Master Deed's waiver provision is also contrary to the facts, which indicate the Homeowners had no control over the Master Deed and little control over their purchase transactions. There is no evidence that the Homeowners received the finalized terms of the Master Deed prior to purchase;

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[13] This presents a perfect example of why the Court's collective reference to the Association and Homeowners (and corresponding analysis) constitutes reversible error. Despite acknowledging jury trial waivers must be strictly construed and finding Subsection D's jury trial waiver provision, as written, applies to either the "owners" or "grantor", the Court did not strictly construe this provision in favor of the Association, because its waiver analysis focused on the homeowner class. (Opinion, App. pp. 103a-104a).

and, even if they did, the Homeowners could not have understood any waiver-related terms because they all conflict with each other (and remain conflicting for this Court).[14]

1. The Court Made Significant Factual Errors

The Opinion recites that the Homeowners "voluntarily" accepted the Master Deed's waiver provision by signing purchase contracts at closing and receiving By-Laws, purportedly incorporating the terms of the Master Deed, all of which the Homeowners supposedly had the opportunity to review with homeowner counsel. (Opinion, App. p. 104a). [15] None of this is correct or has any basis in the record:

- The purchase contracts were not signed at closing;[16]
- The purchase contracts did not incorporate the finalized terms of the Master Deed. Rather, the purchase contracts expressly indicate a preliminary Master Deed will be filed in the future;
- The By-Laws also did not incorporate the finalized terms of the Master Deed, similarly indicating the complete Master Deed will be filed in the future; and
- The Homeowners were not represented by independent counsel in their purchase transactions.[17]

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[14] Interestingly, the Court relied heavily upon the purchase contracts in its analysis in this case. Prior to this, the purchase contracts had not been a focus of the Trial Court's decision. As shown herein, this altered focus does not support the Court's decision.

[15] Per the Court, the Homeowners "voluntarily relinquish[ed] their rights" because "[t]he terms of the Master Deed were expressly incorporated into each unit owner's purchase contract. By signing the purchase contract at closing, each homeowner was charged with reading the Master Deed. Further, the Master Deed was also incorporated into the bylaws of the POA, which were available to all unit owners prior to purchasing their units." (Opinion, App. p. 104a).

[16] Purchase contracts do not get signed at closing. Further, closings do not get arranged until a purchase contract comes into existence and other events occur. The single purchase contract in the record is dated five (5) weeks before the target closing on the unit. (R. p. 1102).

[17] As evidenced by Developer's standard form sales contract, "each unit owner" did not receive "independent" counsel. Rather, Homeowners were represented by counsel selected by the Developer. (Purchase Contract, R. p. 1103) ("The following Seller's designated attorney shall be the Settlement Agent at Closing…) (emphasis added). Not only was the Homeowners' counsel Developer-designated, it was Developer-employed. (Purchase Contract, R. p. 1104) ("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

The purchase contracts (similar to the By-laws[18]) do not incorporate the finalized terms of the Master Deed, but instead, loosely reference a "preliminary" Master Deed that may be changed at-will by the Developer without notice to any purchaser:

> [The Purchaser] desires to purchase [a Unit] which is more fully described in the plans attached to the preliminary Master Deed...
>
> 18. A recorded Master Deed and Exhibits thereto shall be posted on the Seller's website. The preliminary Master Deed and Exhibits may be changed during construction by Seller without notice to the Purchaser and such changes shall be posted on Seller's website from time to time[19]...such changes shall neither affect the validity or enforceability of the Contract nor entitle the Purchaser to any reduction of the Purchase Price or to terminate the Contract.
>
> (R. pp. 1102 and 1105) (emphasis added).

Based upon the foregoing, the only thing the Homeowners could be "charged with having read" or "were able to review with [Developer's] counsel" in advance of closing was their respective purchase contracts. There is no evidence indicating the Master Deed was posted on Developer's website; and even if it was, the evidence is that the version posted was a "preliminary" version that the Developer could amend at-will, without notice, and which the Homeowners did not, and could not, negotiate. Without knowing all of the terms contained in the completed Master Deed, there is

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paid by the Seller.") (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).

[18] Additionally appended to this "final" Master Deed are the Gates' By-Laws, which, ironically, indicate that the By-Laws are subject to the terms of a "formal Master Deed which will be recorded in the public records of Richland County." (R.p.1232) (emphasis added).

[19] The only version of the Master Deed contained in the record is the "finalized" version of the Master Deed filed by the Developer in July of 2007. The record does not contain any "preliminary" version of the Master Deed (referenced by both the purchase contracts and By-Laws) or any evidence that this preliminary version, or any changes to this preliminary version, were posted on Developer's website or otherwise provided prior to the Homeowners' finalization of their respective purchase transactions.

no way the Homeowners could "knowingly" accept these terms.[20] Willcox v. Stroup, 358 B.R. 824, 834 (D.S.C. 2006), aff'd, 467 F.3d 409 (4th Cir. 2006) ("waiver is defined as a simple voluntary relinquishment of a right with knowledge of all the facts") (internal citations omitted).[21]

D. The Waiver Provision in the Master Deed Conflicts with the Waiver Provisions in Homeowner Purchase Contracts

The purchase contracts contain two (2) waiver provisions, which contradict the eventually finalized terms of the Master Deed. For example, the purchase contracts indicate the waivers do not apply unless arbitration is sought to be enforced first. In other words, enforcement of arbitration is a precondition necessary to the enforcement of any non-jury and class action waiver:

> 35. The Seller and Purchaser agrees that any and all disputes...shall be subject to arbitration...In the event the arbitration clause herein is invalidated by a court of competent jurisdiction...the Seller...and Purchaser...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, including without limitation waiver of any type of class action suit...

(Purchase Contract, R. p. 1107):

> 4. Waiver of Jury Trial. In the event the arbitration clause herein is invalidated by a court of competent jurisdiction, the seller...and Purchaser...hereby expressly

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[20] Even if the Homeowners had received the final Master Deed at their 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 "zealous scrutiny" and there is no evidence the Developer supplied either the completed Master Deed or the By-Laws to "all unit owners prior to purchasing their units" contrary to the Court's finding. (Opinion, App. p.104a) (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.

[21] 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, Inc. v. Citizens and S. Nat. Bank. of S.C.*, 286 S.C. 272, 277, 333 S.E.2d 67, 70 (Ct. App. 1985) (emphasis added). Just as our Courts found Gold Kist's disclaimers ineffective, so too should the Court have found the Master Deed's waiver provision ineffective, given there is no evidence to suggest this specific provision formed a basis of any Homeowner purchase transaction.

> 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.

(Limited Warranty, R. p. 1113, without class action waiver) (emphasis added).

This differing language is important for several reasons. When read in conjunction with the "preliminary" or "final" Master Deed (which is how the Homeowners should read it according to the 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; or, (b) does not so clarify, leaving these contract and Master Deed waiver provisions contradictory, and therefore, ambiguous. 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 that contradicts their "must read" purchase contracts.[22] The Court erred in finding otherwise.

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[22] 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 "voluntary" and "intentional" agreed to in order to be effective. *Jervey v. Martint Envtl., Inc.*, 396 S.C. 442, 451, 721 S.E.2d 469, 473 (Ct. App. 2012), *vacated in part,* 406 S.C. 210, 750 S.E.2d 90 (2013). The party claiming waiver bears the burden in establishing both the "voluntary" and "intentional" elements, and if either one of these elements is lacking, there is no waiver. *Id.* Similarly, there is 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 no waiver, because waivers must be strictly construed, ambiguities must be strictly constructed, 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.").

E. The Court Erred in Finding the Developer's Election Proper

In its "election not to arbitrate" analysis, the Court erred by failing to consider the conflicting provisions in the purchase contracts the Court charged the Homeowners with considering. (App. pp. 105a-106a). The language prefacing the purchase contract's waiver provisions makes it clear the Developer did not intend to afford any "option to either arbitrate or seek a nonjury trial" as the Court found. (App.p. 106a). Rather, this language demonstrates (in two separate places) the Developer intended only to seek a non-jury trial if the arbitration clause was enforced, then invalidated. Both provisions condition the waivers on arbitration being invalidated: "In the event the arbitration clause herein is invalidated by a court of competent jurisdiction [...]" (R.p. 1107 and 1113) (emphasis added). Because the Developer did not seek to enforce arbitration, jury trial and class action waivers do not apply.

At minimum, ambiguities exist when comparing the clearly related, and clearly contradictory, purchase contract and Master Deed waiver provisions, and these ambiguities must be construed against Developer. The Court erred in ignoring these ambiguities.

III. The Court Erred by Failing to Find the Waiver Provision Ambiguous, by Failing to Construe the Ambiguous Provision Against the Developer, and by Failing to Find the Provision Unconscionable and Unenforceable

In a similar vein, the Court erred in ultimately finding "the waiver provisions" were "unambiguous," "conscionable," and "enforceable,"[23] as the Court ignored fundamental tenants of contract construction.

A. The Court's Interpretation and Analysis of the Master Deed is Entirely Flawed

The Court's ambiguity and unconscionability analyses erroneously consider only Subsection D, which is a sub-part of the "overarching" Article XXXV, which is a sub-part of the

[23] Opinion, App. pp.103a-105a

overarching Master Deed. Each and every provision included in the Master Deed that relates to the Developer's anti-suit plan must be read together, as well as with the similar provisions in the Homeowners' purchase contracts. The Court ignored principals of contract construction sanctioning the developer's anti-suit strategy.

In this regard, it appears that due to the collateral arbitration clause, the Court mistakenly conducted a Prima Paint analysis – a tunnel vision analysis which is only required in evaluating arbitration clauses,[24] and thus, is inapplicable here because Respondents are not seeking to enforce the arbitration clause.[25] The Court provided no justification as to why it separately considered Subsection D as opposed to the entirety of Article XXXV and the related anti-suit provisions in contravention of prevailing precedent. The Court failed to conduct any severability analysis, failed to acknowledge the Master Deed was adhesive in nature, and failed to properly analyze the practical effect of a number of provisions the Developer included under one heading, and intended to be read together, along with other provisions involving the same subject matter.

As this Court explained in Brady:

> It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning. Agreements should be liberally construed so as to give them effect and carry out the intention of the parties. In arriving at the intention of the parties...the subject matter, the surrounding circumstances, the situation of the parties, and the object in view and intended to be accomplished by the parties at the time, are to be regarded, and the [contract] construed as a whole. Different provisions dealing with the same subject matter are to be read together.

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[24] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 406, 87 S.Ct. 1801, 1807, 18 L.Ed.2d 1270 (1967) (holding to avoid arbitration, a party must assert a contractual defense to the arbitration agreement itself, and not to the contract as a whole).

[25] The Court's analysis is exactly the type of analysis this Court recently rejected in *Smith v. D.R. Horton,* Inc. 417 S.C. 42, 48-50, 790 S.E.2d 1, 4-5 (2016), *reh'g denied* (Sept. 5, 2016) (rejecting D.R. Horton's interpretation of the *Prima Paint* doctrine, finding the entire Warranties and Dispute Resolution Section included in a D.R. purchase contract must be construed "as a whole," and "as a whole", the Section was unconscionable, unseverable, and unenforceable).

Brady v. Brady, 222 S.C. 242, 246-47, 72 S.E.2d 193, 195 (1952) (emphasis added) (internal citations omitted); see also, Thomas–McCain, Inc. v. Siter, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977).

In limiting its analysis solely to Subsection D, the Court erred by failing to consider Article XXXV (despite later characterizing this Article as "overarching" Subsection D); it did not consider earlier, liability disclaimer provisions the Developer drafted and intended to severely limit the effectiveness of any dispute resolution procedure; failing to consider that these related provisions, individually and collectively, stack the deck against innocent consumers by developing a dispute resolution framework that provides no meaningful resolution; failing to consider the inferior bargaining position of the Association or the Homeowners; and, failing to consider the surrounding circumstances completely controlled by the Developer.

In contrast to the Opinion, the Trial Court did apply rules of construction; found the offensive terms unconscionable and ambiguous; and, found the jury trial waiver did not include the Association. The reversal of the Trial Court was in error.

B. The Court Erred in Failing to Find Related Provisions Ambiguous and Failing to Construe Ambiguities against Developer

Courts must construe ambiguous provisions in favor of the non-drafting party by resolving any ambiguity against the party who drafted the agreement. Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. at 8, 274 S.E.2d at 426. The court failed to consider the entirety of Article XXXV, as well as other remedially-related provisions, which when read together (as they should be), are: (a) internally inconsistent; (b) patently ambiguous; and, (c) lacking in mutuality. For example, Subsection D of Article XXXV purports to eliminate the important rights to a jury trial and to proceed as a class action; yet, the other provisions in Article XXXV indicate: (1) ALL

claims SHALL be asserted in a single arbitration proceeding (as opposed to a non-jury trial); (2) multiple parties, WITHOUT LIMITATION, may be joined in the arbitration proceeding (contradicting any class action waiver)[26]; (3) arbitration will be enforced in ALL circumstances (which the Developer failed to enforce); and (4) the Association's membership CANNOT immediately take any sort of legal action, enforcement of the arbitration provision or otherwise, while the Developer CAN (creating one-sided bias favoring Developer). (Subsection C).

Compared to the Master Deed's other remedial provisions relating to "dispute resolution" and the homeowner purchase contract's waiver provisions, even more conflicts arise:

- As the Master Deed disclaims the Developer's liability for everything, this implicitly contradicts the provisions for the dispute resolution process, because there are no claims left to assert.
- The purchase contract's waiver provisions contain additional language clarifying the Developer's "arbitration-first" intent that is not included in Article XXXV.

Each of these related provisions was prepared by the Developer, drafted so as to benefit the Developer 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, 383 F. Supp. 2d at 1353 ("[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, supra. The Court failed to recognize the ambiguities present here, and also, failed to properly construe these ambiguities in favor of the Association and the Homeowners.

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[26] While an experienced litigation attorney may know the difference between mass joinder and class action, it is unlikely a consumer would.

C. The Court Erred in Failing to Find Related Provisions Unconscionable and Unenforceable

The Court's failure to consider these related provisions, which should be read together, also means the Court erred in its unconscionability analysis. When properly construed, there are multiple "unconscionables," including the Developer's liability disclaimers, damage waivers, class action waivers, the 75% affirmative vote required before litigation restriction, and the restriction of the remaining illusory claims to 158 separate non-jury trials.[27]

While jury trial and class action waivers may not be objectionable standing alone, the totality of this anti-suit scheme is objectionable. These related provisions, when applied cumulatively as the Developer intended them to apply, leave nothing more than "illusory" remedies.[28] Developer's remedially-related provisions are "illusory" because there can be no recovery. These provisions eviscerate all Association and Homeowner rights against the

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[27] In addition to ignoring this showing of "one-sidedness", the Court also obviously chose to ignore the undisputed fact that the Master Deed is adhesive, "oppressive," and subject to "considerable skepticism" – all of which are additional reasons the Court's conclusion is entirely misplaced. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.,* 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) (defining unconscionability to include both an absence of meaningful choice as well as oppressive, one-sided contractual provisions); *Lackey v. Green Tree Fin. Corp.,* 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms); *Smith v D.R. Horton, Inc.*, 403 S.C. 10, 17, 742 S.E.2d 37, 41 (*aff'd* 417 S.C. 42, 790, S.E.2d 1 (2016)) (finding an arbitration provision wholly unconscionable and unenforceable based upon the cumulative effect of a number of oppressive and one-sided provisions); *see also* S.C. Code § 36-2-302(1) (2003) (South Carolina legislation permits this Court to refuse to enforce any unconscionable clause in a contract or to limit its application so as to avoid an unconscionable result.).

[28] As Justice Kittredge recently noted during the oral arguments in *D.R. Horton,* if the Court's review is limited to just the arbitration provision as D.R. Horton would define it (here the waiver provision as the Court of Appeals defines it), then the result would be home builders going into arbitration to "beat up" consumers with other unconscionable provisions contained in their warranties (i.e., inevitably leads to an unfair legal proceeding).

Developer and serve as an express limitation on the ability of any judge or arbiter to award damages.

In sum, the law is clear that in cases involving adhesive contracts, which contain oppressive contractual provisions that individually or cumulatively operate to create an inequitable, unconscionable result, our Courts do not enforce these provisions.

IV. The Court Erred in Finding the Second Amendment Did Not Apply to the Developer

The Court also erred in finding the Second Amendment removing Article XXXV from the Master Deed did not apply to Developer, for the many reasons set forth below.

A. The 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 (R. pp. 1261-62), the Court permitted an illegal challenge to the action of the Association. The Court permitted the Developer to challenge the substantive validity of a valid corporate act in contravention of S.C. Code § 33-31-304(a) (1994).[29] The Developer has neither the power nor the standing to challenge the Association's action. Therefore, permitting the Developer's challenge to the Amendment is a clear violation of South Carolina law.

B. The Court Erred in Blindly Relying Upon the Armstrong Case While Failing to Recognize the Justification for the Armstrong Holding is Not Present Here

The Court's reliance upon Armstrong to: (1) invalidate the Trial Court's holding that the amendment was valid; and (2) adopt and establish a reasonableness standard for master deed

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[29] "Except as provided in subsection (b), the validity of a [non-profit corporation's] action may not be challenged on the ground that the corporation lacks or lacked power to act." S.C. Code § 33-31-304(a) (1994); *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 non-profit 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).

amendments in this State was error, because the Armstrong holding 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 concerned an internal conflict of interest between the members of the Association. Courts have struggled to balance these interests, and some Courts have established a reasonableness standard in evaluating intra-Association activities, often driven by a majority of members to the dismay of a minority of members[30].

The rationale supporting the Armstrong Court's adoption of the reasonable amendment test for disputes between owners is not present here. Instead, the cases relied upon by the Trial Court to find that the Master Deed Amendment applied to the Developer were more congruent with the instant case between a unified Association and a divested developer.

C. The Court Erred in Finding the Developer had a Continuing Interest in the Regime, which Prohibited Amendments by the Association.

Armstrong was distinguished in Crest Builders, Inc. v. Willow Falls Imp. Ass'n., 74 Ill. App. 3d 420, 423, 393 N.E.2d 107, 209 (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 covenants provided advertising rights to the Developer, and provided for the amendment of covenants upon a seventy-five percent (75%) vote of the homeowners. The Association voted to end the Developer's rights to advertise units. The Court found the Developer no longer had a vested interest in the development, and ruled against the Developer.

The Crest holding is in accord with South Carolina law. AJG Holdings LLC v. Dunn, 392 S.C. 160, 166, 708 S.E.2d 218, 222 (Ct. App. 2011)(aff'd 410 S.C. 346, 764, S.E.2d 912 (2014))

[30] "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*, 633 S.E. 2d at 88 (emphasis added).

("Because [Developer] did not retain <u>any property interest</u> in the development, [Developer] did not retain Developer's rights."); see also, Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 362-363, 628 S.E.2d 902, 914(Ct. App. 2006) (noting the Supreme Court of Georgia held that when a Developer is divested of property interest, he is divested of his right to amend the covenants) (citing Armstrong v Roberts, 254 Ga. 15, 325, S.E.2d 769, 770 (1985)).

D. The Court Erred in Finding the Amendment Could Not Bind the Developer

The Court erred by overruling the Trial Court's reliance on cases indicating that an amendment to a master deed can modify existing vested rights. Indeed, the Court's own decision in Queens Grant II noted that amendments <u>may retroactively extinguish existing legal rights</u>. 368 S.C. at 368, 628 S.E.2d at 917 (Ct. App. 2006) (citing McElveen-Hunter v. Fountain Manor Ass'n, Inc., 96 N.C. App. 627, 630, 386 S.E.2d 435, 436 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991) (holding that amendments 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 Condo. Ass'n, Inc. v. Duffy, 330 So.2d 484 (Fla. Dist. Ct. App. 1976); Hill v. Fontaine Condo. Ass'n, Inc., 255 Ga. 24, 334 S.E.2d 690 (1985). As the <u>Developer-drafted</u> Master Deed expressly 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 <u>actually draft and record</u> the provision that grants that ability. The removal of the anti-suit provisions does nothing but protect and benefit the Association and its members' rights.

E. The Court Erred in Finding that a Contract Expressly Providing for Unilateral Modification Cannot Be Unilaterally Modified

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 a unilateral

amendment, permitted by the terms of the contract, therefore contemplated in advance by the parties, is permitted).[31] As the Master Deed here expressly provided for unilateral modification, the amendment was bona fide. (R. p. 1155).

V. The Court Erred in Finding the Developer Timely Raised Waiver

Despite the Court acknowledging the "requirement to timely raise" waiver and mode of trial issues (Opinion, App. p. 97a), the Court concluded the Trial Court erred in finding the Developer did not timely assert the waiver issue. Id. Importantly, the first take-away is that the Trial Court did not err in its ultimate conclusion: that the law required the Developer timely raise waiver; the only remaining question is the propriety of the Trial Court's conclusion that waiver was not timely pled.

As the Trial Court found that the Developer failed to plead waiver more than one (1) year after being named in this action (and more than ten (10) months after the Master Deed was amended) despite ample opportunity to do so[32], the Trial Court's finding that the Developer's actions were untimely was sustained by the record.[33] The Court ignored all of this, choosing instead to rely upon vague prior pleadings by the Respondent,[34] a pleading by a dismissed party (Highway

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

[32] Prior to asserting wavier, Developer: (a) participated in sixteen (16) depositions; (b) noticed and deposed two (2) homeowners and Board Members; (b) filed cross claims against other defendants; (d) conducted written discovery of other defendants; (e) filed numerous motions; and (f) actively litigated the underlying action.

[33] *Cf., Davis v. KB Homes of SC, Inc.*, 394 S.C. 116, 133, 713 S.E.2d 799, 808 (Ct. App. 2011), *aff'd in part, vacated in part,* No. 2011-199587, 2014 WL 2535489 (S.C. Jan. 29, 2014) (party waived its right to compel arbitration when a substantial time had passed since commencement of action and motion to compel arbitration, the parties had engaged in extensive discovery, and the parties had availed themselves of the Trial Court's assistance on several occasions).

[34] There is a clear distinction between a pleading opposing a class action, because the ability to bring a class action is purportedly waived versus opposing the properness of any class action certification pursuant to the criteria of Rule 23, SCRCP.

One),[35] and the timeliness of the appeal. The Court erred by failing to sustain the factual findings of the Trial Court which was managing the case, and by confusing the timeliness of an appeal with that of a Trial Court pleading. The Court further erred by relying on a settled Co-Defendant's pleading (Highway One) to assist in its timeliness finding. (Opinion, App. p. 97a).

CONCLUSION

For all the foregoing reasons, this Court should grant certiorari and review the Court of Appeals' decision in this matter.

Respectfully submitted,

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January 9, 2017

[35] It is troubling how the Court relied on the existence of the Highway One responsive pleading to mitigate the Developer's late actions. Highway One settled and a Motion to Dismiss Highway One was filed before oral argument. The dismissal was not granted by the Court until after its Opinion was issued, a lapse of three (3) to four (4) months.

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IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Trial Court Judge

Case No. 2012-CP-40-8512

Appellant Case No. 2015-000180

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

vs.

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 Respondents.

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I, Justin O'Toole Lucey, Esquire, hereby certify that on January 9, 2017 I served a copy of the Petitioner's Writ of Certiorari on the following counsel, via the United States Mail, postage pre-paid, and addressed as follows:

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