THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-8512

Appellant Case No. 2015-000180

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; HCM Utah, LLC; Headwaters, Inc. d/b/a Best Masonry; Labrador Electric Company; AAA Accurate Plumbing, Heating & Air, LLC, f/k/a AAA Accurate Plumbing Solutions Division of AAA Accurate Backflow Testing & Repair, LLC; Time Warner Cable Southeast, LLC; Southern Equipment Company, Inc., d/b/a Ready Mixed Concrete Company; and John Doe #1-10.,

Defendants,

v.

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.

Respondents' Final Brief

Justin O'Toole Lucey, Esquire
SC Bar No.: 15438
Stephanie D. Drawdy, Esquire
SC Bar No.: 70205
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mount Pleasant, South Carolina 29201
Telephone: 843.849.8400
Telecopier: 843.849.8406
E-Mail: jlucey@lucey-law.com

Attorneys for the Respondents

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT PROPERLY DETERMINED THAT APPELLANTS ARE PROCEDURALLY PRECLUDED FROM CHALLENGING THE VALIDITY OF THE SECOND AMENDMENT WHICH EFFECTIVELY REMOVED THE JURY TRIAL AND CLASS ACTION WAIVERS FROM THE GATES' MASTER DEED

2. WHETHER THE CIRCUIT COURT CORRECTLY CHARACTERIZED APPELLANTS' FIRST CHALLENGE TO MODE OF TRIAL ISSUES AS UNTIMELY WHEN APPELLANTS FAILED TO RAISE SUCH ISSUES UNTIL MORE THAN A YEAR AFTER THE UNDERLYING CASE COMMENCED

3. WHETHER THE CIRCUIT COURT RIGHTFULLY FOUND THAT APPELLANTS WAIVED THEIR RIGHT TO ENFORCE THE SUBJECT WAIVERS GIVEN APPELLANTS' ACTIVE PARTICIPATION IN THE UNDERLYING CASE

4. WHETHER THE CIRCUIT COURT PROPERLY ASSESSED THE RETROACTIVE APPLICATION OF THE SECOND AMENDMENT BASED UPON PREVAILING JURISPRUDENCE

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

6. WHETHER THE CIRCUIT COURT RIGHTFULLY DENIED APPELLANTS' MOTION TO RECONSIDER BECAUSE SAID MOTION WAS IMPROPERLY SERVED, IMPROPERLY RAISED NEW ISSUES, AND OTHERWISE WITHOUT MERIT

INTRODUCTION

This appeal arises from the Circuit Court's denial of Appellants' untimely Motion for Non-Jury Trial and to Strike Class Action Allegations and Jury Trial Demand, which was filed approximately one year after the Developer/General Contractor Appellants' first opportunity and approximately seven months after the remaining Appellants' first opportunity. (Appellant's Initial Br., pp. 2, 8-11).

Appellants' Statement of Issues on Appeal states that the only issue before this Court relates to jury trial and class action waivers that are, in fact, no longer a part of The Gates' Master Deed: "[d]id the trial court err in failing to enforce the written jury trial and class action waivers in the Master Deed?" (Appellant's Initial Br., p. 1). As the Circuit Court correctly found, Respondents amended the Master Deed to *remove* these waivers, and Appellants failed to challenge that amendment in the proceedings below. (R. p. 37). Thus, on appeal, Appellants are seeking to enforce waivers that no longer exist pursuant to an amendment that Appellants can no longer challenge.

STATEMENT OF THE CASE

This appeal arises from an underlying action commenced by Respondents, against several Defendants, including Appellants, for construction deficiencies existing within The Gates at Williams-Brice ("The Gates"), a condominium complex located in Columbia, South Carolina. Respondents are The Gates at Williams-Brice Condominium Association ("COA") and Katharine Swinson, individually, and on behalf of the owners of the one hundred fifty-eight (158) condominiums at The Gates. Appellants include the

Developer/General Contractor of The Gates and certain sub-contractors engaged for the original construction of The Gates.

In December 2012, Respondents filed the underlying construction defect suit, The Gates at Williams-Brice Condominium Assoc., et al v. DDC Construction, Inc., et al, Case No.: 2012-CP-40-8512, and demanded a jury trial. (R. pp. 55-69). In its Complaint, Respondents assert claims of negligence/gross negligence, breach of warranty, and strict liability. (R. pp. 55-69).

In March 2013, Appellant DDC Construction, Inc. ("DDC") answered the Complaint. (R. pp. 70-78).

In May 2013, Respondents amended the Complaint to name additional defendants, including the remaining Appellants. (R. pp. 79-97).

In July 2013, Appellant DDC filed its Answer to the Amended Complaint. (R. pp. 98-107).

In August 2013, all Appellants answered the Amended Complaint. (R. pp.108-303).

In February 2014, Respondents filed a Second Amended Complaint (R. pp.304-324).

On March 13 and 21, 2014, Appellants answered the Second Amended Complaint. (R. pp 325-575).

On March 24, 2014, Appellants filed their Motion for Non-Jury Trial and To Strike Respondents' Class Action Allegations and Jury Trial Demand (the "Motion").[1] (R. pp. 900-1046).

On June 9, 2014, a hearing was held before the Circuit Court regarding Appellants' Motion. (R. pp.1289-1332).

On July 18, 2014, the Circuit Court issued its Order denying Appellants' Motion, finding that: (a) Appellants failed to challenge the mode of trial at the first opportunity; (b) Appellants improperly sought enforcement of the class action and jury trial waivers that had long since been amended out of the Master Deed; (c) Appellants failed to challenge the validity of the Second Amendment to the Master Deed, which deleted the alleged jury trial and class action waivers; (d) Appellants could not effectively challenge Respondents' right to amend the Master Deed; (e) Appellants waived enforcement of the Master Deed's arbitration provisions (which include the waivers at issue); and (f) Appellants were precluded from enforcing "unconscionable arbitration and alternative dispute resolution provisions" that contained "oppressive, one-sided terms." (R. p. 50, lines 8-15).

On August 1, 2014, Appellants filed a Motion to Reconsider with the Circuit Court. (R. pp.1268-1288).

On January 22, 2015, the Circuit Court denied Appellants' Motion to Reconsider, finding:

> After consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered.

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[1] Appellants did not file a Memorandum in Support of their Motion. (R. pp.1413-1425.

R. p. 52).

On or about January 29, 2015, Appellants filed a Notice of Appeal, regarding both Orders, and subsequently, filed an Amended Notice of Appeal on or about February 3, 2015. (R. pp.1347-1399).

FACTUAL BACKGROUND

I. Introduction

Circa 2006, the Developer/General Contractor Appellants (the "Dinerstein Appellants") began construction of The Gates.[2] (R. pp.1400-1407). On July 1, 2007, the Certificate of Occupancy was issued for The Gates. (R. p. 1408). Also in July 2007, the Master Deed and By-Laws for The Gates were recorded by the Dinerstein Appellants. (R. pp. 1077-1098, 1123-1267).

In spring 2008, prior to the Dinerstein Appellants' turnover of The Gates' Board to homeowners, the Dinerstein Appellants exercised the Master Deed's right to amend by recording the First Amendment to the Master Deed and Bylaws of The Gates at Williams-Brice Horizontal Property Regime (the "First Amendment"). The First Amendment related to conformance with lending approval requirements.

Circa August 2009, the Dinerstein Appellants tendered the control of the Board to the homeowners (R. pp. 1409-1410).

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[2] Appellants describe The Gates as "game day condominiums" (Appellants' Initial Br., p. 2); however, in addition, The Gates' condominiums are also owned and occupied by full time residents as well as owners who purchased units as investments and rent the properties to full time residents.

In the fall of 2012, the homeowners were put on initial notice of the first defects that gave rise to this suit when a maintenance company (Watertight Systems, Inc.) refused to bid an exterior caulk job at The Gates, and this underlying suit was subsequently filed. (R. pp. 1411-1412).

In its initial Answer filed in March 2013, Appellant DDC failed to assert defenses related to the putative class action or demand for a jury trial included in Respondents' complaint. (R. pp. 70-78).

In May 2013, Respondents acted under the Master Deed's right to amend by removing self-serving provisions inserted into the Master Deed by the Dinerstein Appellants, including certain arbitration provisions that purported to waive Respondents' right to bring suit as a class, right to a jury trial, and a provision purporting to limit certain warranty rights (the "Second Amendment"). (R. pp. 1261-1264).

In June 2013, Respondents' Second Amendment to the Master Deed was recorded, making the amendment a matter of public record. (R. pp. 1261-1264).

In its Answer to Amended Complaint filed in July 2013, Appellant DDC again failed to assert defenses related to the putative class action or demand for a jury trial, and made no reference to the alleged waivers of those rights. (R. pp. 98-107).

In their Answers filed in August 2013, Appellants failed to assert defenses related to the putative class action or demand for a jury trial, and made no reference to the alleged waivers of those rights. (R. pp. 108-303).

From November 2013 to March 2014, Appellants: (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) otherwise actively litigated the underlying action. Notably, during this time, Appellants never once asserted defenses related to the alleged waivers of Respondents' right to bring suit as a class or right to a jury trial.

In March 2014, *one year* after Appellant DDC filed its initial answer and *approximately seven months* after all Appellants filed answers to the Amended Complaint, Appellants filed an answer to Respondents' Second Amended Complaint, wherein Appellants *for the first time* asserted that Respondents waived their right to bring a class action and right to a jury trial, and demanded a bench trial..[3] (R. pp. 325-575).

During oral argument at the June 2014 hearing before the Circuit Court, Appellants did not challenge the proceedings that adopted the Second Amendment or the reasonableness of the Second Amendment. (R. pp. 1289-1332).

In their August 2014 Motion to Reconsider, Appellants challenged the proceedings that adopted the Second Amendment and the reasonableness of the Second Amendment for the first time. (R. pp. 1268-1288).

II. The Second Amendment

The May 2013 Second Amendment to the Master Deed was passed with a 74.78% homeowner proxy vote in favor of amendment, which was in conformance with the requirements for amendment under Section XXVII of the Master Deed:

> Amendment of Master Deed: Neither this Master Deed nor the Bylaws nor any of its provisions shall be amended without the acquiescence of the co-

[3] Appellants misrepresent to the Court that they asserted the alleged waivers in Appellant DDC's March 2013 Answer to Complaint and in each responsive pleading filed thereafter. (Appellants' Initial Br., pp. 4, 9, 11). This is false.

> owners *owning at least two-thirds of the total interest in the Common Elements per the percentages set forth in Exhibit "D".* Any amendment of this Master Deed shall be executed and subscribed with the same formalities required in South Carolina for the making of deeds, and recorded in the public records of Richland County. Any amendment of the Bylaws does not require such recordation.

(R. p. 1155, para XXVII) (emphasis added).

The Second Amendment removed provisions of the Master Deed, originally inserted by the Dinerstein Appellants, that purported to limit the Respondents' rights, including their right to bring suit as a class action, right to receive a jury trial (requiring binding arbitration instead), and certain warranty rights. (R. pp. 1261-1264).

A. The Second Amendment Deleted Certain Warranty Limitations and All Anti-Suit Provisions in The Gates' Master Deed

Using the powers granted under the Master Deed[4], the Board called for a vote on the Second Amendment to the Master Deed to remove warranty limitations and anti-suit provisions included by the Dinerstein Appellants. (R. pp. 1261-1264). As referenced above, the Second Amendment was duly executed and recorded by the COA and its members pursuant to the Regime Instruments and the Horizontal Property Regime Act ("HPRA"). (R. pp. 1261-1264).

B. All Alleged Waivers and Certain Warranty Provisions Deleted

The provisions deleted from The Gates' Master Deed attempted to wrongfully disclaim the Dinerstein Appellants' liability and to restrict Respondents' right to bring suit

[4] The Gates' Master Deed grants to the Board the power to amend the Master Deed under Section XXVII, entitled "Amendment of Master Deed". (R. p. 1155, para XXVII).

as a class, right to receive a jury trial, and certain warranty rights. These provisions were found at Sections IV and XXXV of the Pre-Amended Master Deed. From Section IV, entitled "Warranty", the Second Amendment removed a provision under the "Additional Warranty Exclusions" section inserted by the Dinerstein Appellants that attempted to disclaim Appellants' liability for "[a]ny and all secondary, incidental or consequential damages caused by any defect or breach hereof". (R. p. 1127, para 5).

The Second Amendment also removed the provision from Section IV entitled "**Arbitration Agreement**"[5]:

> 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 ANY COMMON AREA THAT IS ASSERTED BY (I) ANY PERSON OR ENTITY THAT NOW HAS OR HEREAFTER ACQUIRES ANY INTEREST IN A UNIT, (II) THE GRANTOR OR DEVELOPER, (Ill) THE UNIT OWNER'S ASSOCIATION (INCLUDING ANY CORPORATION OR OTHER ENTITY FORMED TO SERVE AS UNIT OWNERS' ASSOCIATION), (IV) ANY PERSON OR ENTITY THAT HAS PREVIOUSLY OR HEREAFTER SUPPLIES (DIRECTLY OR INDIRECTLY) LABOR, MATERIALS, DESIGN SERVICES, EQUIPMENT OR OTHER THINGS OF VALUE IN CONNECTION WITH THE CONSTRUCTION OR MAINTENANCE OF ANY UNIT OR THE COMMON AREA, OR (V) ANY HEIR, SUCCESSOR, DELEGATEE OR ASSIGNEE OF ANY SUCH PERSONS OR ENTITIES, SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION BEFORE A PANEL OF THREE ARBITRATORS PURSUANT TO THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION AS MODIFIED HEREIN.
>
> ***

[5] The arbitration provisions of The Gates' Pre-Amended Master Deed are not recited in their entirety since Appellants' Motion is not one to compel arbitration.

> THE GRANTOR, DEVELOPER, CONTRACTOR, ARCHITECT, THE ASSOCIATION, AND THE INDIVIDUAL UNIT OWNERS EXPRESSLY WAIVE ALL RESORT TO TRIAL BY JURY OF ANY AND ALL ISSUES OTHERWISE SO TRIABLE.
>
> ANY CLAIM OR CAUSE OF ACTION NOT COVERED BY THIS ARBITRATION AGREEMENT SHALL BE COVERED BY ARTICLE XXXV HEREIN.

(R. pp. 1127-1128).

Finally, the Second Amendment also removed Section XXXV of the Pre-Amended Master Deed, entitled "Alternative Dispute Resolution" ("ADR"), in its entirety, including sub-section D, entitled "**Waiver of Jury Trial**":

> BY ACCEPTANCE OF A DEED TO ANY UNIT OR OTHER PROPERTY HEREUNDER COOWNER(S) HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY HEREBY AGREE, THAT: (I) NEITHER CO-OWNER NOR ANY ASSIGNEE, SUCCESSOR, HEIR, OR LEGAL REPRESENTATIVE OF CO-OWNER OR GRANTOR, SHALL SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, OR ANY OTHER LITIGATION PROCEDURE ARISING FROM OR BASED UPON THE MATTERS SET FORTH HEREUNDER, OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE GRANTOR, ITS AGENTS, CONTRACTORS, SUBCONTRACTORS, ARCHITECTS, ENGINEERS AND THE CO-OWNERS OR THE ASSOCIATION, 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 OR CANNOT BE WAIVED; (III) NEITHER OWNER NOR GRANTOR HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS SECTION WILL NOT BE FULLY ENFORCED IN ALL INSTANCES; AND (IV) THE PROVISIONS CONTAINED IN THIS ARTICLE ARE A MATERIAL INDUCEMENT FOR GRANTOR TO MAKE THE DECLARATIONS SET FORTH HEREIN.

(R. pp. 1162-1163, para D) (emphasis added).

Upon review of the Pre-Amended Master Deed, the Circuit Court found that the Waiver of Jury Trial provision that contained the class action and jury trial waivers was an "unconscionable" restriction on Respondents' rights to bring suit as a class and have a jury trial, was "ambiguous" on its face, and was "undecipherable to an unsophisticated party". (R. p. 49, line 21 - p. 50, line 5).

STANDARD OF REVIEW[6]

This appeal relates to the Circuit Court's denial of Appellants' Motion for Non-Jury Trial and to Strike Respondents' Class Action Allegations and Jury Trial Demand, and Appellants' Motion to Reconsider that denial. Due to the nature of the rulings included in the Circuit Court's denial of Appellants' Motion, two standards of review apply.

I. Determination of the Arbitrability of a Claim Is Subject To *De Novo* Review

The question of the arbitrability of a claim is an issue for judicial determination. *AT&T Techs., Inc. v. Communications Workers of America,* 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986) (citations omitted); *Partain v. Upstate Auto. Grp*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010) ("The question of arbitrability of a claim is an issue for the courts."); *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 393–94, 498 S.E.2d 898, 901 (Ct. App. 1998) ("The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law; In an action at law, the appellate court's jurisdiction is limited to the correction of errors of law and factual findings which are unsupported by any evidence."). Thus, "[a]rbitrability determinations are subject to *de novo* review." *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App.

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[6] Appellants do not reference any standard of review in their brief. (Appellants' Initial Br.).

2005); *see also Mailsource, LLC v. M.A. Bailey & Assocs.,, Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) ("[T]he determination of whether a party 'waived its right to arbitrate is a legal conclusion subject to *de novo* review. . ." under which factual findings "will not be overruled if there is any evidence supporting them"). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if *any* evidence reasonably supports the findings." *Simpson v. MSA of Myrtle Beach, Inc.,* 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (emphasis added);

II. Determinations Regarding Mode of Trial Issues and Appellants' Motion to Strike Are Subject to an Abuse of Discretion Standard.

The Circuit Court's rulings on mode of trial issues will not be reversed unless the Appellants have shown an abuse of discretion. *King v. Shorter*, 291 S.C. 501, 502–03, 354 S.E.2d 402, 403 (Ct.App.1987) (abuse of discretion standard to Rule 38(b) motion applied); *Satcher v. Satcher*, 351 S.C. 477, 490, 570 S.E.2d 535, 541–42 (Ct.App.2002) (abuse of discretion standard to Rule 39 motion applied).

The Circuit Court's denial of a motion to strike is governed by the same standard. *Brown v. Coastal States Life Ins. Co.*. 264 S.C. 190, 194, 195, 213 S.E.2d 726, 728 (1975) ("The granting or refusal of a [m]otion to strike ... will not be reversed except for an abuse of discretion or unless the action of the trial judge was controlled by an error of law.") (internal citation omitted); *see also Mayes v. Paxton,* 313 S.C. 109, 115, 437 S.E.2d 66, 70 (1993) (absent an abuse of discretion, the trial court's ruling on a motion to strike will not be reversed).

Under an abuse of discretion standard, the appellant bears the burden of demonstrating that the Circuit Court abused its discretion, and the appellant was prejudiced as a result. *Halverson v. Yawn*, 328 S.C. 618, 621, 493 S.E.2d 884 (Ct. App. 1997) ("An abuse of discretion may be found by this court where the appellant shows that the decision of the trial judge was without reasonable factual support and resulted in prejudice to the appellant, thereby amounting to an error of law."); *Burroughs v. Worsham*, 352 S.C. 382, 391, 574 S.E.2d 215, 219 (Ct. App. 2002) (to warrant reversal under an abuse of discretion standard, an appellant must show both the error of the ruling and resulting prejudice). A Circuit Court's findings will not be disturbed on appeal absent a clear abuse of discretion that amounts to an error of law. *Belk of Spartanburg, S.C., Inc. v. Thompson*, 337 S.C. 109, 126-27, 522 S.E.2d 357, 366 (Ct. App. 1999); *Burns v. Wannamaker*, 286 S.C. 336, 338, 333 S.E.2d 358, 359 (Ct. App. 1985), *aff'd as modified*, 288 S.C. 398, 343 S.E.2d 27 (1986) (factual findings under an abuse of discretion standard will be affirmed where there is *any* evidence to support those findings).

SUMMARY OF ARGUMENT

This appeal fails for multiple reasons. Initially, there are two procedural reasons why Appellants' appeal fails. First, Appellants are precluded from challenging the validity of the Second Amendment to the Master Deed – an amendment that removed the waivers that are the crux of Appellants' issue on appeal – due to Appellants' failure to raise the issue in the court below (except on reconsideration). Second, Appellants failed to timely file the underlying Motion on which this appeal is based.

Additionally, Respondents' Second Amendment is an insurmountable barrier to Appellants' appeal. The weight of authority affirms that such an amendment can be applied retroactively to claims that arose and were put in suit prior to its passage. Moreover, Appellants lack standing to challenge the validity of the Second Amendment because Appellants are no longer members of the COA and no longer own an interest in The Gates.

Finally, the waivers inserted by the Dinerstein Appellants are unenforceable. The purported waivers of the right to a jury trial and right to bring suit as a class were not knowingly and voluntarily entered into by Respondents. The waivers are also unenforceable due to their unconscionable and ambiguous terms, and the result of which was a breach of the Developer Appellant's duty.

ARGUMENT

I. Appellants Failed To Timely Challenge the Validity of the Second Amendment, Which Eliminated The Waivers That Appellants Now Seek To Enforce.

The Circuit Court's Order warrants affirmance because the waivers Appellants seek to enforce no longer exist by virtue of a valid amendment that Appellants cannot challenge due to Appellants' failure to properly preserve this issue. The record confirms Appellants did not preserve this issue because Appellants failed to challenge the validity of the Second Amendment (which removed the subject waivers) prior to their Motion to Reconsider. Based on this failure, the Circuit Court appropriately ruled that it would not consider Appellants' argument as to the Second Amendment's validity:

> The Dinerstein and OCIP Defendants' sole grounds for this Motion is that Plaintiffs waived the right to a jury trial and the right to bring a class action based on provisions no longer in the Master Deed. The Master Deed, via its Second Amendment, contains neither of these alleged waivers, and

> *Defendants do not challenge the Second Amendment's validity. Accordingly. Defendants' Motion is procedurally precluded - Defendants failed to challenge the validity of the Second Amendment deleting the alleged waivers from the Master Deed, and thus, Defendants cannot maintain an argument as to the effectiveness of such waivers.*

(R. p. 42, lines 7-13) (emphasis added). This Court must reach this same conclusion - Appellants failed to raise and preserve the issue of the Second Amendment's validity, which procedurally precludes this argument on appeal. Because Appellants are procedurally precluded from challenging the amendment's validity, Appellants are precluded from enforcing the waivers that the Second Amendment validly removed from the Master Deed. Given the only issue raised by Appellants on appeal is an issue that is unpreserved for appellate consideration, this Court must affirm the Circuit Court's Order. *See Smoak v. Liebherr-America, Inc.*, 281 S.C. 420, 423, 315 S.E.2d 116, 118 (1984) (under "two issue" rule, appellate court need only address a single ground that requires affirmance); *see also* SCACR Rule 220(c) (appellate court may affirm an order on any ground in the record).

A. Issues Raised For The First Time In A Motion to Reconsider Are Unpreserved.

The first time Appellants attempted to challenge the validity of the Second Amendment was in its Motion to Reconsider – *after* the Circuit Court ruled that the issue was precluded. (R. p. 1279). It is well established that an issue is not preserved if it is raised for the first time in a motion to reconsider. "An issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Products Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (citing *Commercial Credit Loans. Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) ("[I]t appears the first time Commercial Credit made

this argument was in its Rule 59(e) motion for reconsideration. Accordingly, this issue is not properly preserved for our review.")); *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010) (claim not properly preserved where it was raised for the first time in motion to reconsider); *Dawkins v. Mozie*, 399 S.C. 290, 294, 731 S.E.2d 342, 345 (Ct. App. 2012) (issue not preserved for appeal where appellants failed to raise issue in their answer and counterclaim or during hearing before special referee); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct.App.1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.").[7]

The wealth of authority on this point simply dooms this appeal – this Court cannot consider unpreserved issues, and the record clearly reflects any question as to the validity of the Second Amendment is unpreserved.

B. Even If Preserved, Appellants are Precluded from Challenging the Voting Procedure for and Reasonableness of the Second Amendment.

Even if Appellants preserved the issue of the Second Amendment's validity, Appellants are nevertheless precluded from challenging the same for a multitude of reasons.

1. The COA Effectuated the Second Amendment and, as such, Only the COA or its Members Can Challenge the Second Amendment Under South Carolina Law

[7] *See also Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge."); 15 S.C. Jur. Appeal and Error § 71 ("Nor may a party rely on issues mentioned by the trial judge.") (citing *Wierszewski v. Tokarick*, 308 S.C. 441, 418 S.E.2d 557 (Ct. App. 1992) (issue not preserved merely because the trial judge mentions it).

First, and as correctly noted by the Circuit Court, Appellants are "barred from challenging the Amendment by the applicable provisions of the Uniform Non-Profit Corporation Act." R. p. 44, lines 11-12. Under South Carolina's Uniform Non-Profit Corporation Act (the "Act"), "the validity" of a non-profit corporation's action can only be challenged by a "member or members" of the corporation, and Appellants do not fulfill this statutory requirement. *See* S.C. Code § 33-31-304(b). Also, an affirmative defense is not a "proceeding" as defined in the Act, nor is it a suit to enjoin corporate action or a demonstrative action. *See* S.C. Code § 33-31-140 (29). Thus, Appellants are precluded from challenging the validity of the Second Amendment according to the applicable provisions of the Act – Appellants have not met and cannot meet the requirements of the Act, which allows *ultra vires* challenges to be brought only in "a proceeding ... to enjoin" the action and mandates that such proceedings brought by a "member or members" must be brought in a derivative proceeding. *See* S.C. Code § 33-31-304(b).

While Appellants include a three sentence argument in their twenty-three page brief that the Second Amendment is "not a corporate act", Appellants fail to cite to any authority supporting their conclusory assertion (which interestingly is placed as an afterthought in a wholly unrelated argument). (Appellants' Initial Br., p. 17). The conclusory nature of Appellants' assertion, alone, warrants affirmation of the Circuit Court's finding that the Act precludes Appellants from challenging the Second Amendment. *S.C. Dep't of Probation, Parole & Pardon Servs. v. Reynolds*, 343 S.C. 465, 468, 540 S.E.2d 480, 482 (Ct. App. 2000) (noting an appellate court will decline to consider an argument where there is no citation of authority, and it is so conclusory as to be an abandonment of the issue on

appeal); *Shields v. S.C. Dep't of Highways & Pub. Transp.*, 303 S.C. 439, 442, 401 S.E.2d 185, 188 (Ct. App. 1991) (noting a conclusory argument of an issue by appellant amounts to an abandonment of the issue). Simply stated, Appellants abandoned this issue, and by so abandoning, accepted the Circuit Court's determination. *Smoak*, 281 S.C. at 423, 315 S.E.2d at 118; *see also* SCACR Rule 220(c).

Even assuming this Court considers Appellants' conclusory argument, Appellants' argument is substantively flawed. The Second Amendment was a proper corporate act by the COA. As the Second Amendment provides, "the COA does hereby exercise its right under the Master Deed to amend the Master Deed and By-Laws". (R. pp. 1261, lines 19-21). This right to amend is found in the Master Deed at Section XXVII, which provides in pertinent part that:

> Without limiting the foregoing, the Grantor, its successors or assigns, "acting alone" shall have the power, but not the obligation, at any time (and from time to time), to unilaterally amend the Master Deed and Bylaws to correct typographical or scrivener's errors, to correct inconsistencies, and to cause the Master Deed to conform to the requirements of the South Carolina Horizontal Property Act, the South Carolina Non-Profit Corporation Act, the City of Columbia, the requirements of the Federal National Mortgage Association (specifically in order to receive FNMA condominium project approval), and/or the Federal Home Loan Mortgage Corporation.

(R. p. 1155, para XXVII).[8]

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[8] As of June 5, 2013, when the Second Amendment was recorded in Richland County in Deed Book 1867, page 408, Appellants were or should have been on notice of the Second Amendment. R. pp. 1261-1264. "It is an early and well-recognized principle that one great object in spreading an instrument of writing on a public record is to give constructive notice of its contents to all mankind." *Neslin v. Wells,* 104 U.S. 428, 434, 26 L. Ed. 802 (1881). *See also Ten Woodruff Oaks, LLC v. Point Dev., LLC*, 385 S.C. 174, 183, 683 S.E.2d 510, 515 (Ct. App. 2009) ("[C]onstructive notice or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world."). *See generally 66 C.J.S. Constructive Notice* § 6 (2015)

Moreover, the COA, as a non-profit corporation, has the powers conferred upon it by the statutory provisions allowing its very existence and delineating its powers. Section 33-31-302 of the South Carolina Code endows all non-profit corporations with the powers described in subsections (1) – (18) of this statute, which provides, in pertinent part, that:

> Unless its articles of incorporation provide otherwise, every corporation has … the same powers as an individual to do all things necessary or convenient to carry out its affairs, including *without limitation*, power: (1) to sue and be sued, complain, and defend its corporate name.

(emphasis added). This very first power, without limitation, provides the COA with the power to sue, unless the Articles of Incorporation provide otherwise, which they do not.

2. Assuming Reasonableness is the Applicable Standard, The Second Amendment Is Reasonable.

Although unpreserved and not recognized by any South Carolina court in the context of Master Deeds, to the extent the Court considers Appellants' argument regarding "reasonableness", the Second Amendment is reasonable in light of the "circumstances surrounding the parties' bargain". *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 548, 633 S.E.2d 78, 81 (2006). These circumstances include Appellants' lack of candor when they inserted inconspicuous waivers of their liability and waivers of Respondents' rights into the Master Deed, and then vested to Respondents a defectively constructed condominium complex. *See Grove Isle Ass'n, Inc. v. Grove Isle Associates,*

("'Constructive notice' is notice arising by a presumption of law from the existence of facts and circumstances that a party had a duty to take notice of, such as a registered deed or a pending lawsuit; it is notice presumed by law to have been acquired by a person and thus imputed to that person.").

LLLP, 137 So. 3d 1081, 1091 (Fla. Dist. Ct. App. 2014) (citing *Apple II Condo. Ass'n v. Worth Bank & Trust Co.*, 277 Ill.App.3d 345, 213 Ill.Dec. 463, 659 N.E.2d 93, 97–99 (1995) in holding that amendments by an association's membership are presumed valid unless found to be arbitrary, against public policy, or in violation of a fundamental right).

Appellants rely on two North Carolina Court of Appeals cases to argue that unreasonable amendments will be deemed invalid, *Armstrong*, 633 S.E.2d 78 and *Wallach v. Linville Owners Ass'n, Inc.*, 760 S.E.2d 23 (N.C. Ct. App. 2014). However, nothing in either of these cases detracts from the "reasonableness" of the Second Amendment. In ruling on the validity of the amendment at issue in *Wallach*, the court cited with approval to the *Armstrong* definition of "amend":

> *The term amend means to improve, make right, remedy, correct an error, or repair*. Amendment provisions are enforceable; however, such provisions give rise to a serious question about the permissible scope of amendment, *which results from a conflict between the legitimate desire of a homeowners' association to respond to new and unanticipated circumstances* and the need to protect minority or dissenting homeowners by preserving the original nature of their bargain. In the same way that the powers of a homeowners' association are limited to those powers granted to it by the original declaration, *an amendment should not exceed the purpose of the original declaration.*

Wallach, 760 S.E.2d at 29 (quoting *Armstrong*, 360 N.C. at 558, 633 S.E.2d at 87) (emphasis added).

Here, the Second Amendment was necessary in order to improve, make right, and repair provisions of the Master Deed that violated South Carolina law and public policy – provisions imposed by the Developer Appellant that amounted to a breach of the Developer Appellants' fiduciary duty. *See Goddard v. Fairways Dev. Gen. P'ship.* 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993) (finding there to be a corollary between the promotors of a corporation and the developers of a neighborhood recognizing that in both instances a

fiduciary duty exists and thus, developers like promoters, are bound to act in good faith and in the best interest of the regime it develops); *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 257, 259-60, 562 S.E.2d 633, 637, 638 (2002) (holding "the developer of a PUD owes a duty to the POA to turn over common areas that are not substandard and that are in good repair" and "failure to do so subjects the developer to liability for bringing the common areas up to standard;" stated differently, "developers are held responsible for the condition of the common areas at the time these areas are deeded to the POA.").

Moreover, as the *Armstrong* Court suggested, the purpose of the original deed has not been exceeded by the Second Amendment. Rather, the Master Deed specifically provides for the COA's right to amend. Accordingly, the COA exercised that right with the Second Amendment in order to respond to "new and unanticipated circumstances" – the discovery of latent construction defects caused by Appellants.

Further, while the procedural issues presented in *Wallach* may not have been "determinative", the procedural issues here are different and dispositive. *Wallach,* 760 S.E.2d at 29. Appellants are procedurally precluded from raising an unpreserved issue and also lack standing to challenge the Second Amendment as a matter of South Carolina law. Thus, even if this Court found that the Second Amendment was unreasonable (which it is not), it is a harmless error.

II. The Circuit Court Correctly Ruled That Appellants Failed To Timely Challenge the Mode of Trial.

The Circuit Court correctly ruled that Appellants failed to timely raise their defenses and/or objections to mode of trial in the proceedings below:

> [T]he Dinerstein and OCIP Defendants failed to insert defenses/objections to Plaintiffs' right to a jury trial or right to bring a class action in DDC's original Answer to Respondents' Complaint filed March 4, 2013, DDC's Answer to Plaintiffs' Amended Complaint filed July 2, 2013, DDC's Amended Answer to Plaintiffs' Amended Complaint filed August 5, 2013, or the remaining Dinerstein Defendants and the OCIP Defendants' Answers to Plaintiffs' Amended Complaint filed August 5 and 15, 2013 respectively. *On March 21, 2014, ten months after the recording of the Second Amendment, the Dinerstein and OCIP Defendants raised, for the first time, the defenses of waiver of right to jury trial and waiver of right to proceed as a class action.*

(R. p. 41, lines 6-14). Appellants' failure to challenge Respondents' right to a jury trial and right to bring a class action at the first opportunity in their March 2013 Answer or in the multiple Answers they subsequently filed in July and August 2013, is fatal to Appellants' appeal.

A. Mode of Trial Issues Must Be Raised At the First Opportunity under South Carolina Case Law and the South Carolina Rules of Civil Procedure

According to our Supreme Court, and as even quoted by Appellants, "issues regarding mode of trial must be raised *in the trial court at the first opportunity.*" *Foggie v. CSX Transp., Inc* 313 S.C. 98, 23, 431 S.E.2d 587, 590 (1993) (emphasis added); *see also* (Appellants' Initial Br., p. 9). *Foggie* is prevailing South Carolina law and the Circuit Court's Order is properly based on *Foggie*. Appellants' arguments to the contrary amount to nothing more than a misguided attempt to create error where no error exists.

For example, while Appellants cite to "other jurisdictions" and attempt to distinguish *Foggie* as "inapposite" because it dealt with an issue first raised on appeal, Appellants' contentions are without merit – again, the *Foggie* Court clearly held that "issues regarding mode of trial ***must be raised in the trial court*** at the first opportunity"

and did not limit its South Carolina ruling to issues first raised on appeal. *Id.*; *see also* (Appellants' Initial Br., pp. 10-11).

Moreover, the Order clearly states Appellants "failed to timely challenge the mode of trial at their first opportunity" and nowhere includes a ruling that "a motion for non-jury trial must be filed before the initial pleading" as Appellants suggest. (*Compare* R. pp. 41, 50 to Appellants' Initial Br., p. 10).

Additionally, Appellants assert that the ruling of the Circuit Court is "inconsistent" with the South Carolina Rules of Civil Procedure ("SCRCP") because Rule 12 does not require "motions regarding the mode of trial or under Rule 39" to be made prior to filing a responsive pleading. (Appellants' Initial Br., pp. 9-10). Notably, Appellants chose to bring their motion under Rule 12(f), SCRCP, which expressly provides that a motion to strike be made "before responding to a pleading", which the record shows Appellants failed to do.[9]

B. The Circuit Court Acted Within its Discretion in Finding Appellants Did Not Timely Raise Mode of Trial Issues

The Circuit Court acted within its discretion in finding Appellants failed to timely challenge the mode of trial at their first opportunity as required by South Carolina law. The question of what constitutes "first opportunity" is a factual one, and the Circuit Court, after considering the evidence before it, determined Appellants missed this opportunity. The

[9] Appellants also brought their Motion under Rules 23(d)(1), 38 and 39, SCRCP. Under Rule 39(b), Appellants' motion would be interlocutory, and thus, not immediately appealable. *Rowe Furniture Corp. v. Carolina Wholesale Furniture Co.*, 292 S.C. 575, 576, 357 S.E.2d 725,725 (Ct. App. 1987) (appeal was premature since the question of whether to order a jury trial under Rule 39(b) was a matter within the discretion of the circuit court, so appellants were not entitled to a jury trial as a matter of right).

evidence in the record supports the Circuit Court's ultimate conclusion. Appellants did not challenge the mode of trial by raising the purported waivers until March 2014 – one year after Appellant DDC filed its initial Answer and approximately seven months after all Appellants filed Answers to the Amended Complaint. (R. pp. 98-303). Because evidence in the record supports the Circuit Court's determination of Appellants' untimeliness, there is no abuse of discretion, and this Court must affirm the Circuit Court's Order despite any contention Appellants posit to the contrary.[10] *Burns* 286 S.C. at 338, 333 S.E.2d at 359 (If there is any evidence to support a circuit court's factual findings under an abuse of discretion standard, those findings will be affirmed on appeal); *Smoak*, 281 S.C. at 423, 315 S.E.2d at 118 (Under the "two issue" rule, an appellate court need not address all the grounds appealed where one ground requires affirmance); SCACR Rule 220(c) ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

C. Appellants' Attempt to Justify Their Delay Fails

Finally, Appellants attempt to justify their delay by asserting that it was "necessary" to wait until March 2014 to file their Motion in order to depose The Gates' Board President Bill Yarborough and Class Representative Kathy Swinson. (Appellants'

[10] Appellants did not raise these defenses at the "first opportunity" in March 2013 or in "every responsive pleading" thereafter as Appellants erringly represent to this Court. Appellant's Initial Br., p. 4, 9, 11. Rather, Appellant DDC implicitly acknowledged Respondents' right to a jury trial in the seventh defense of its March 2013 and July 2013 Answers, which state that: "the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees." R. pp. 70-78, 98-107. Moreover, all Appellants went on to implicitly acknowledge Respondents' right to a jury trial in the seventh defense of their August 2013 Answers where they repeat the same language regarding "the jury's unfettered power to award punitive damages". R. pp. 108-303.

Initial Br., p. 11). However, the Circuit Court already weighed the facts and found Appellants' delay unjustified, and the evidence in the record supports this finding. (R. pp. 41-42, 98-303). Appellants simply cannot argue these facts now.

Moreover, even if the Court considered this argument, it fails. Appellants assert that the Yarborough and Swinson depositions allowed them "to understand the circumstances" of the Second Amendment prior to filing their Motion, without explaining the "circumstances" to which they are referring. (Appellants' Initial Br., p. 11). Rather, the Swinson transcript makes no reference to the Second Amendment; and, the Yarborough transcript does not reference any "circumstances" of the Second Amendment "necessary" for Appellants' Motion that were not already a matter of public record since June 2013. (R. pp. 1333-1346).

III. The Second Amendment to The Gates' Master Deed Retroactively Applies Given That All Parties To The Master Deed Were On Notice of The Right To Amend Provided In The Master Deed.

The Circuit Court correctly ruled that, like the First Amendment, the Second Amendment has the same force and effect as if it had been part of the Master Deed:

> In spring 2008, the Dinerstein Defendants acted under the terms of the Master Deed to pass the First Amendment to the Master Deed and By-Laws. *Since that time, the First Amendment has been held to be part of the original Master Deed.* Following the Dinerstein Defendants' turnover of the Board to the Association, *the current Board has been vested with the same right to amend the Master Deed, and their Second Amendment is also now part of the original Master Deed.*

(R. p. 42, lines 15-20)(emphasis added).

Despite the Circuit Court's reference to the retroactive application of the Dinerstein Appellants' First Amendment in its ruling, Appellants' brief is void of *any*

reference to the First Amendment. (Appellants' Initial Br.). Appellants also fail to offer a reason why the First Amendment would apply retroactively, but the Second Amendment allegedly would not. (Appellants' Initial Br., pp. 11-16). Instead, Appellants avoid this topic and instead attack the Order's finding on this point as being "wholly without support." (Appellants' Initial Br., p. 12).

However, the Circuit Court's ruling is supported by authority for retroactive application of an amendment to a contract like a Master Deed[11]. *Apple II Condo. Ass'n v. Worth Bank & Trust Co.*, 659 N.E.2d 93, 98 (Ill. App. Ct. 1995) (amendment to document establishing a condominium association is recognized as having "the same force and effect as if it had been part of the original Declaration"); *Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 365, 628 S.E.2d 902, 915 (Ct. App. 2006) (citing S.C. Code § 27-31-100(f) to hold that, "[t]he Act requires that the master deed include a comprehensive list of particulars, including a description of the full legal rights and obligations, both currently existing *and which may occur*, of the apartment owner, the co-owners, and the person establishing the regime.") (emphasis added). (R. pp. 42, line 21 - p. 43, line 12).

As to *Apple II* and *Queens Grant*, Appellants argue these cases are "inapposite" because each deals with amendments to Declarations applied to condominium owners not developers, and only question retroactive application of the amendment to owners who

[11] Notably, even a case cited by Appellants, *Armstrong*, 633 S.E.2d 78, FN 2, cites to authority in support of retroactive application of amendments. *See Worthinglen Condo. Unit Owners' Ass'n v. Brown*, 57 Ohio App. 3d 73, 77, 566 N.E.2d 1275, 1279 (1989) (notes that retroactive application of an amendment to a declaration may be enforceable).

purchased units prior to the amendment. (Appellants' Initial Br, pp. 13-14). However, these are irrelevant distinctions. The fact remains that *Apple II* and *Queens Grant* support the proposition that parties to an association document are bound by amendments to that document where it provides that changes, such as amendments, may occur.

Appellants also attempt to distinguish another case cited by the Circuit Court, *Frantz v. Piccadilly Place Condominium Ass'n*, but ultimately cite the very proposition relied on by the Circuit Court, that "contracting parties may agree for terms to apply retroactively". (Appellants' Initial Brief, pp. 14-15); *Frantz v. Piccadilly Place Condo. Ass'n, Inc.*, 278 Ga. 103, 105, 597 S.E.2d 354, 357 (2004) (holding that "an amendment to condominium declaration applied retroactively to condominium association's claims against a unit owner.")

Appellants also argue that *Crest Builders v. Willow Falls Improvement Ass'n,* another case cited by the Circuit Court, does not deal with retroactive application of an amendment. (Appellants' Initial Br., pp. 15-16)(R. pp. 43-44). However, in *Crest*, the court noted that, following amendment of a declaration to remove a developers' right to advertise units, the developer "did not have any vested interest in the Declaration *as originally written.*" *Crest Builders, Inc. v. Willow Falls Imp. Ass'n.* 74 Ill. App. 3d 420, 423, 393 N.E.2d 107, 110 (1979).

Appellants' argue that three other cases cited by the Circuit Court, *Fort Sumter Tours, Inc. v. Babbitt, Easterby-Thackston, Inc. v. Chrysler Corp.*. and *Wayburn v. Smith,* do not support the Circuit Court's ruling; however, these cases reinforce the principle that changes to contracts (such as a Master Deed) will be retroactively enforced where the

contract contemplated such changes. (Appellants' Initial Brief, p. 16). *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1331-1332 (4th Cir. 1995) (finding retroactive application of amended contract was appropriate where changes to contract were contemplated by parties at execution); *Easterby-Thackston, Inc. v. Chrysler Corp.*, 477 F. Supp. 954, 956 (D.S.C. 1979) (holding contract changes will be deemed valid where original contract language contemplated change); *Wayburn v Smith*, 270 S.C. 38, 42 239 S.E.2d 890, 892 (1977) (South Carolina requires that a "deed must be construed as a whole, and given effect to every part thereof). (R. pp. 43-44).

Moreover, Appellants' argument that the Second Amendment "has no bearing on this action" because Appellants, as "Bound" parties to the Master Deed, did not consent to the amendment assumes two inaccurate points: that the waivers are effective, and that Appellants can challenge the validity of the Second Amendment. (Appellants' Initial Br., p. 12). Because both of these assumptions by Appellants are wrong, this argument fails.

Assuming *arguendo* that the Court considers Appellants' argument on this point, it also fails because it is contrary to authority. (Appellants' Initial Br., p. 12). Courts have held that, where a Master Deed allows for amendment, parties to the Master Deed are on notice that an amendment may likely have retroactive application. *Townhouse III Condo. Ass'n, Inc. v. Mulligan*, No. CV 92 50183 S, 1995 WL 118739, at *3 (Conn. Super. Ct. Mar. 13, 1995) (unpublished opinion) (court applied "majority rule" in the country that a valid amendment "would likely be applied retroactively"); *see also Ritchey v. Villa Nueva Condominium*, 81 Cal.App.3d 688, 146 Cal.Rptr. 695 (1978) (court upheld amendment restricting occupancy by children under Declaration's provision allowing amendment of

By-Laws); *Seagate Condo. Ass'n, Inc. v. Duffy*, 330 So. 2d 484, 486 (Fla. Dist. Ct. App. 1976) (court held retroactive application of amendment restricting ability to lease property was reasonable); *Kroop v. Carabelle Condominium, Inc.*, 323 So.2d 307 (Fla. Dist. Ct. App. 1975) (court upheld amendment restricting ability to lease unit where Declaration provided for amendment); *Bd. of Directors of By the Sea Council of Co-Owners, Inc. v. Sondock*, 644 S.W.2d 774 (Tex. App. 1982), *writ refused NRE* (court held amendment to remove parking covers was valid, noting Declaration included right to amend).

IV. Respondents Did Not Waive Their Rights to Jury Trial and to Proceed As a Class; Rather, Appellants Waived Their Right to Enforce the Alleged Waivers Included in the Arbitration Provisions of the Master Deed

The Circuit Court correctly ruled that the Plaintiffs did not knowingly and voluntarily waive their right to a jury trial or right to proceed as a class:

> Plaintiffs have not knowingly and voluntarily waived their right [to] a jury trial or to proceed as a class action.
>
> Here, Plaintiffs clearly had no choice or input as to any aspect of the pre-amended Master Deed, including the Deed's legal remedies provisions. The POA [COA] was created in part by this Master Deed and essentially did not exist prior to all predicates - incorporation, Master Deed, and adoption of By-Laws - and, as such, it could not have negotiated a waiver of rights or knowingly consented to waiver. Rather, the terms of the Master Deed were *unilaterally imposed* on it.

(R. p. 45, line 19 – p. 46)(emphasis added).

Furthermore, the Circuit Court rightly found that, *even if* Respondents had waived their right to a jury trial and right to bring suit as a class action, Appellants waived their right to enforce the arbitration provisions that contained those waivers:

> The Dinerstein and OCIP Defendants have: (a) participated in numerous depositions; (b) taken homeowner and Board Member depositions; (h) filed

> cross-claims against other defendants; (d) conducted written discovery of other defendants; (c) filed motions; and (f) actively litigated. *Such action over a lengthy period of time indicated that the Dinerstein and OCIP Defendants have waived their rights under the arbitration provisions of the Master Deed.*

(R. p. 47, lines 11-15)(emphasis added).

A. Respondents Did Not Knowingly, Voluntarily Waive The Right To A Jury Trial Or Right To Bring Suit As A Class.

Under South Carolina jurisprudence, "waiver" has been repeatedly defined as the intentional relinquishment of a known right. *See Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009) (holding waiver is a voluntary and intentional abandonment or relinquishment of a known right); *Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007) ("Waiver requires a party to have known of a right, and known that the party was abandoning that right."); *Jervey v. Martint Envtl., Inc.*, 396 S.C. 442, 451, 721 S.E.2d 469, 473 (Ct. App. 2012) (noting same); *King v. James*, 388 S.C. 16, 30, 694 S.E.2d 35, 42 (Ct. App. 2010) (noting same). As our Supreme Court held in *Harvey v. Jefferson Standard Life Ins. Co.*, 165 S.C. 427, 427, 164 S.E. 6, 8 (1932):

> The definition of waiver is this: "The voluntary relinquishment of a known legal right." The knowledge of the legal right is not limited to the knowledge that there exists such right in one's favor; *but it must be also a knowledge of the circumstances in which the parties are placed when the waiver is alleged to have occurred.* It must be a voluntary act, with knowledge of the conditions calling for action, or the voluntary refraining from action. One cannot relinquish his right voluntarily and knowingly *when he does not know that his right is in peril or in question.*

Based upon the foregoing definition, the Respondent COA waived none of its rights because the COA, in its infancy, was controlled by the Dinerstein Appellants, and thus, independently had no way to "voluntarily" relinquish any rights. The Circuit Court aptly

noted that "[t]he South Carolina Court of Appeals has recognized that a POA [property owners association] lacks control during the period that a developer-controlled board is in place," citing to *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012), *cert granted,* (June 26, 2014) (court rejected developer's assertion that "an organization they controlled would have initiated an action against itself").

Appellants inaccurately claim that "pursuant to the express terms of the Master Deed, Respondents agreed to waive their rights to a jury trial and to proceed as a class action." (Appellants' Initial Br., p. 8). In support, Appellants cite to general authority upholding jury trial and class action waivers, the presence of attorneys at closings for The Gates' units to answer questions about the Master Deed and purchase contracts, and allegedly "conspicuous" placement of "unambiguous" waivers. (Appellants' Initial Br., pp. 6-8). However, these points are unavailing in the face of the facts at the heart of the issue: that the Developer Appellant controlled the defective construction of The Gates; the Developer Appellant inserted the inconspicuously placed waivers; the purchase contracts are admittedly adhesion contracts (Appellants' Initial Br., p. 22); and the Developer Appellant turned over The Gates to Respondents without disclosing the latent construction defects that are the sole reason for the underlying action.

Moreover, the COA, at the time the Master Deed was executed and recorded, had no way to know the common elements subsequently vested by the Dinerstein Appellants to the COA and its members were *riddled with latent defects*. Clearly, had the homeowner-controlled COA known the Dinerstein Appellants would convey deficient common

elements or would misrepresent the property's condition (knowledge that was impossible for the COA to have), objections would have been made as the Dinerstein Appellants were duty-bound to convey The Gates' Regime to the COA and its members in good repair or required to provide the COA with the funds necessary to so repair. *See, e.g., Goddard v. Fairways Dev. Gen. Partn.*, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993) (fiduciary duties owed by developer to association and homeowners includes the duties: (a) to hand over common elements or amenities that developer represented as part of the development; (b) to hand over common elements or amenities in good condition; and (c) to act in the best interests of property owners while controlling the association).

Appellants also wrongly assert that the Circuit Court "incorrectly relied" on *Magnolia* because "every unit owner had notice of the waiver", and thus developer control "is of no moment here". (Appellants' Initial Br., p. 20). First, Appellants are unable to cite deposition excerpts in support of their assertion that all owners were on notice of the waiver. Second, like the developer-controlled board in *Magnolia*, the Developer Appellant's control of The Gates' Board prohibited Respondents from having any control when the alleged waivers were inserted in the Master Deed. Without such control, Respondents could not have been on "notice" of the now-removed waivers.

In light of the foregoing, the Respondents lacked both the voluntary capacity and the knowledge necessary to understand that its interests in the common elements were at risk – the Respondents did not know: (a) the Dinerstein Appellants would ultimately vest defective common elements; and (b) the Dinerstein Appellants would fail to properly fund the repair of the same. *See Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307

S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992) ("Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended. . ."). To hold otherwise would allow Appellants to employ the waiver doctrine as a means to unfairly profit from their breach of the contractual obligations and fiduciary duties owed to the COA and its members.[12] *Janasik,* 307 S.C. at 345, 415 S.E.2d at 388 (finding a waiver's "operation in all cases should be limited to saving harmless or making whole the party in whose favor they arise and should not, in any case, be made the instruments of gain or profit").

The Circuit Court's determinations that Respondents did not "knowingly" and "voluntarily" waive their right to a jury trial or to proceed as a class are factual determinations that cannot be overturned if there is *any* evidence to support them. *Crossman Communities of N.C., Inc. v. Harleyville Mut. Ins. Co.*, 395 S.C. 40, 46-47, 717 S.E.2d 589, 592 (2011) ("In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them."); *Auto Owners Ins. Co., Inc. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009) (noting same); *see also Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) (noting in law actions, the Circuit Court must be affirmed where there is "any evidence" to support its findings). Here, ample evidence in the record supports these factual findings, and the legal determination of waiver hinges upon these

[12] In an effort to attribute knowledge of the alleged waivers to Respondents, Appellants state that the waivers were "available" to homeowners in "publicly filed" documents. (Appellants' Initial Br., pp. 19, 20). Yet, Appellants simultaneously avoid the fact that the Second Amendment was also a "publicly filed" document "available" to them.

same findings. Accordingly, there is no error of law, and this Court should affirm the Circuit Court's Order.

In sum, Appellants cannot satisfy their burden in establishing any error in the Circuit Court's waiver ruling. "On appeal there is a presumption in favor of the correctness of a decree and the burden of showing error by the trial judge is on the appellant." *Cook v. Eller*, 298 S.C. 395, 398, 380 S.E.2d 853, 855 (Ct. App. 1989). "The burden is on the appellant to show not only error, but also prejudice." *Snyder's Auto World, Inc. v. George Coleman Motor Co., Inc.*, 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993). Even if the Circuit Court erred in finding Respondents did not waive their rights, this error is harmless because Appellants waived their right to enforce the anti-suit provisions that embody the waivers.

B. Appellants Waived Their Right To Enforce The Arbitration Provisions That Contain the Alleged Jury Trial and Class Action Waivers.

In South Carolina, "it is generally held that the right to enforce an arbitration clause may be waived." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999); *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992) ("A party may waive the right to arbitrate given by a contract."). The South Carolina Court of Appeals considers three factors when determining whether a party has waived its right to compel arbitration: "(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving

party was prejudiced by the delay in seeking arbitration." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

In fact, it is uniformly accepted in this State that a party who (a) fails to timely request arbitration; (b) engages in deceptive conduct; or (c) fully avails itself of the Court's discovery processes by noticing multiple depositions and engaging in substantial written discovery, as is the case here, has waived its right to invoke an arbitration clause.[13]

1. Appellants Failed To Timely Act to Enforce the Arbitration Clause

Appellants failed to timely act to enforce the arbitration clause. Timeliness is a factual determination that is supported by the record. To date, Appellants have: (a) participated in approximately fifty (50) depositions, including the depositions of Board President Bill Yarborough, Class Representative Kathy Swinson, two homeowners, and six of Plaintiffs' experts (Jesse Ehnert, Gary Moore, Rhett Whitlock, Neil Baer, Bryan

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[13] *Partain*, 386 S.C. at 494-495 (2010) (arbitration clause held to be unenforceable where auto dealership's fraudulent conduct of substituting lesser quality car was unforeseeable to purchaser); *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705,709 (2007) ("because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings."); *Rhodes*, 374 S.C. at 128, 647 S.E.2d at 252 (finding a ten-month period in which parties exchanged written interrogatories and requests to produce and took five depositions was sufficient to demonstrate waiver); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 551, 575 S.E. 74, 77 (Ct. App. 2003) ("We find evidence in the record that Accent availed itself of discovery tools unavailable in arbitration, thereby prejudicing Evans by obtaining information from her it might not have been able to otherwise obtain. . . As the party seeking arbitration, Accent bore the onus to halt discovery by seeking the court's protection. Instead, Accent failed to seek court protection and continued to engage in discovery to its benefit."); *Liberty Builders, Inc.*, 336 S.C. at 665, 521 S.E.2d at 753 (holding the right to compel arbitration waived when motion compelling arbitration filed more than thirteen months after the filing of the complaint).

Durig, and Robert Castles) whose depositions spanned a total of nine (9) days; (b) filed cross claims against other defendants; (c) conducted written discovery of other defendants; (d) filed many motions; and (e) otherwise actively litigated the underlying action. Undoubtedly, the record reflects that Appellants' active litigation of the underlying case mandates a finding that Appellants waived their right to enforce the arbitration provisions.

2. The Alleged Waivers Cannot Be Severed From the Arbitration Provisions, Which Are Unenforceable

Moreover, even if Appellants had not waived their right to enforce the arbitration provisions in the Master Deed, the Circuit Court rightly held that those arbitration provisions cannot be severed from the unconscionable warranty limitations and disclaimers contained in the Pre-Amended Master Deed and thus are unenforceable as a whole. (R. p. 49). While Courts are permitted to "sever" unconscionable, contractual provisions from each other, the ADR Section of the Pre-Amended Master Deed is not a proper candidate for the application of this remedy. South Carolina Courts, and a host of other Courts throughout the nation, "recognize severability if not always an appropriate remedy for an unconscionable provision. . . '[i]f illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts. . .'" *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673; *Smith v D.R. Horton, Inc.*, 403 S.C. 10, 17, 742 S.E.2d 37, 41 (Ct. App. 2013), *cert granted*, (July 24, 2014) ("We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly [D.R.] Horton's attempt to waive any seller liability for monetary damages of any kind, including secondary, consequential, punitive, general,

special or indirect damages.") (internal citations omitted) (emphasis added); *see also Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter"); *In re Cotton Yarn Antitrust Litig.*, 406 F.Supp.2d 585, 604 (M.D.N.C. 2005)("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutory rights. . .the Court finds that the better course of action in this case is to excise the arbitration clauses altogether.").

Similar to *Simpson* and *D.R. Horton*, the ADR Section of the Pre-Amended Master Deed is "made unconscionable" by oppressive provisions that pervade this Section, thereby rendering "severability" impractical, if not impossible. Thus, in line with South Carolina jurisprudence, all unconscionable provisions contained within the ADR Section should be read together, and ultimately rejected together by this Court. *Simpson,* 373 S.C. at 34, 644, S.E.2d at 673.

V. Appellants Lack Standing To Challenge the Second Amendment Under The Horizontal Property Regime Act.

As an additional sustaining ground for the Circuit Court's finding that Appellants lack standing to challenge the Second Amendment, Appellants no longer possess any interest in The Gates' Regime as required under the HPRA. The Gates' Master Deed created this particular horizontal property regime and caused the entire property to be subject to the statutes of the HPRA. Certain sections of the HPRA provide that once

common elements are set aside and vested in the "co-owners" of property subject to a Master Deed, such co-owners may not be unilaterally deprived of their interests in the common elements by the actions of the developer. *Reyhani v Stone Creek Cove Condo. II Horizontal Prop. Regime,* 329 S.C. 206, 211, 494 S.E.2d, 465, 468 (Ct. App 1997). ("[O]nce common elements are set aside and vested in the co-owners, *such co-owners may not be unilaterally deprived of their interests in the common elements by the actions of the developer*.")(emphasis added).

The COA and its members, as co-owners of the common elements, necessarily possess an interest in recovering damages arising from construction defects existing within the same. As Appellants are no longer co-owners and no longer in control of the COA, Appellants no longer possess any interest in the common elements or any other aspect of the Regime. Given Appellants' lack of interest in the Regime, the HPRA prohibits Appellants from depriving the COA and its members of their interests in the Regime, rendering Appellants' Motion meritless. *See Reyhani, 329 S.C. at 211, 494 S.E.2d at 468; see also AJG Holdings, LLC v. Dunn*, 392 S.C. 160, 167,708 S.E.2d 218, 222 (Ct. App. 2011) ("Because [developer] did not retain any property interest in the development, [developer] did not retain developer's rights.").

VI. The Circuit Court Properly Determined the Subject Waivers are Unconscionable and Unenforceable Based Upon the Facts and Circumstances of this Case.

As an additional sustaining ground, this Court should affirm the Circuit Court's determination that the waivers are unconscionable under South Carolina law given the absence of meaningful choice associated with the Pre-Amended Master Deed, and the

oppressive effect of the waivers when coupled with the Deed's other one-sided provisions. (R. pp. 48 – 50).

South Carolina law is crystal clear in the context of "unconscionability" – in cases involving adhesive contracts which contain oppressive contractual provisions that cumulatively operate to create an inequitable result, our courts may refuse to enforce said provisions – this is exactly what the Circuit Court did here. (R. pp. 48 – 50) *citing Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) (defining unconscionability as "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them."); *D.R. Horton, Inc.*, 403 S.C. 17, 742 S.E.2d at 41 (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.") (internal citations omitted).

A. The Pre-Amended Master Deed is Adhesive in Nature and Appellants Abandoned Any Argument to the Contrary

First, the Circuit Court correctly characterized the Pre-Amended Master Deed as an adhesion contract, a characterization Appellants do not effectively challenge on appeal (Appellants' Initial Br., p. 22). In fact, Appellants' argument entirely misstates South Carolina law when it comes to analyzing the "adhesiveness" element of unconscionability.

According to Appellants, "[i]n order for the waiver to be unconscionable, Respondents must show that it has oppressive and one-sided terms such that they had no meaningful choice." (Appellants' Initial Brief, p. 21). This is simply not the case – "adhesiveness" and "oppressiveness" are different elements that require independent analysis in the context of unconsconscionability. Appellants failed to recognize this fundamental distinction as evidenced by their brief, which is wholly void of any analysis regarding the "adhesiveness" of the Pre-Amended Master Deed. Because Appellants effectively abandoned any argument as to adhesiveness, and the record reflects Respondents are unsophisticated homeowners who had *no choice* and *zero input* as to *any aspect* of the "boilerplate. . . Master Deed," this Court must affirm the Circuit Court's finding in this regard. (R. p. 48); *see Lackey,* 330 S.C. at 394, 498 S.E.2d at 901 (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); *see also Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. . ."). Notably, the fact that the Pre-Amended Master Deed is adhesive required the Circuit Court (and now this Court) to analyze the Deed, including its anti-suit and waiver provisions, with "considerable skepticism." *Simpson,* 373 S.C at 27, 644 S.E.2d at 670.

B. The Waivers are Made Unconscionable by the Cumulative Effect of Oppressive and One-Sided Provisions, Provisions Inserted by Appellants in Contravention of their Fiduciary Obligations.

Next, and in line with prevailing South Carolina jurisprudence, the Circuit Court properly determined that the waiver provisions contained in the Pre-Amended Master Deed

were made unconscionable due to the cumulative effect of one-sided provisions inserted throughout the Deed. (R. pp. 48 – 50).

There is no distinctive difference between this case and *D.R. Horton* or this case and *Simpson*, and thus, Appellants cannot avoid the collective unconscionability of the Pre-Amended Master Deed so easily. For example, this Court in *Smith v. D.R. Horton* recently affirmed a Circuit Court's decision finding the arbitration provision contained in a *D.R. Horton* purchase contract unconscionable and unenforceable due to the "cumulative effect" of partisan provisions. *D.R. Horton, Inc.*, 403 S.C. at 15, 742 S.E.2d at 40. Confronted with a motion to compel arbitration brought by *D.R. Horton*, the Circuit Court viewed the warranties and arbitration section of the purchase contract as a whole, finding it "referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies. . ." *Id.* (emphasis added). Per its review, the Circuit Court held the sections' collective attempt to disclaim implied warranty claims was oppressive and unconscionable. *Id.* The Circuit Court further found "perhaps even more stark [were] the provisions in the Limitations of Liability. . ." in which *D.R. Horton* claimed it could not be liable for monetary damages of any kind. *Id.* Based upon the foregoing, the Circuit Court concluded, and this Court subsequently affirmed, the arbitration provision was "wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions." *Id.* (emphasis added).

Here, a review of the Pre-Amended Master Deed reveals strikingly similar provisions to those considered as a whole, and ultimately rejected as a whole, by this Court

in *D.R. Horton* and our Supreme Court in *Simpson.* For example, the Deed's "Alternative Dispute Resolution" Section, which incorporates the Deed's "Arbitration Agreement", collectively operates to mandate any claim, controversy, or dispute of any kind whatsoever to be resolved by arbitration, regardless of whether the action sounds in warranty, contract, statute or any other legal or equitable theory.

Specifically, the Alternative Dispute Resolution Section defines "claim" as any claim arising out of or relating to the "Master Deed;" the "sale, design, purchase or construction of the Gates;" the "Limited Warranty," the "Limitation of Remedies," or the "Disclaimer and Exclusion of All Other Warranties". Notably, the Warranty and Remedy Sections of the Pre-Amended Master Deed provide, in pertinent part, as follows:

> Grantor's, contractor's and architect's <u>sole obligation</u>, <u>to the exclusion of all other remedies</u>, is limited to the repair or replacement, at Grantor's, Contractor's and Architect's <u>option</u>, of the defective condition of the work pursuant to the plans relating solely to the <u>general and limited common elements</u>. . .The liability of the grantor is expressly limited to repairs or replacement and grantor makes no other warranties express or implied (including <u>without limitation</u> any implied warranty of merchantability, soundness, quality, workmanlike service, value, suitability, fitness [or] habitability. . .).
>
> ***
>
> Additional Warranty Exclusions:
>
> 5. Any and all secondary, incidental or consequential damages caused by any defect or breach hereof.

(R. pp. 1126-1127). The foregoing provisions purport to eliminate virtually *all* of Appellants' potential liability for The Gates. By virtue of these provisions, Appellants are supposedly not liable for any defective condition found in the interior of each of the 158 units or any damage caused to the interior of the units by defective exterior conditions -

which is a *substantial* portion of the damage currently existing at The Gates. (R. pp. 1126-1127). If this were not enough, these provisions purport to further limit Appellants' liability for breach of all implied warranties, *any* secondary, incidental or consequential damages, and only provide remedy at the Appellants' *"option"*. (R. pp. 1126-1127). Appellants' "disclaimer" of the warranty of habitability is particularly egregious in that such disclaimers are void as a matter of South Carolina public policy. Indeed, the fundamental principles of South Carolina public policy necessitate that the implied warranty of habitability apply to all in instances where a property is sold for profit. *Rutledge v. Dodenhoff*, 254 S.C. 407, 414-15, 175 S.E.2d 792, 795 (1970) ("The rationale of the decisions which hold the builder-vendor of a new house liable on the basis of an implied warranty [of habitability] is that the seller and buyer are not on an equal footing in such a transaction."); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 503, 229 S.E.2d 728, 731 (1976) ("[A developer's] liability [for breach the implied warranty of habitability] is not founded upon fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects."). In other words, limiting any aspect of the implied warranty of habitability contravenes South Carolina's clear and longstanding policy of protecting innocent purchasers because such a limitation would allow a developer to avoid liability by simply failing to correct defects even if the result was an inadequate structure.

In other words, the Pre-Amended Master Deed contains implied warranty disclaimers and liability limitations which are similar to the provisions found unconscionable in *D.R. Horton*. Appellants' <u>sole</u> argument on appeal regarding

unconscionability is that "the Master Deed does not contain any such limitations on liability;" however, a plain reading of the foregoing paragraphs clearly indicates to the contrary. (Appellants' Initial Br., p. 22). Not only does the Master Deed purport to disclaim implied warranties and limit Appellants' liability, the Deed contains additional provisions which also purport to "waive" the right to demand a jury trial or bring a class action. Although the Alternative Dispute Resolution Section makes no mention of any "waiver" in the main Section's heading, buried on page five of this Section are several confusing statements which an unsophisticated party could not decipher:

> (i) Neither co-owner nor any assignee, successor, heir or legal representative of co-owner or grantor, shall seek a jury trial in any lawsuit, proceeding, or any other litigation procedure arising from or based upon the matters set forth hereunder, or to the dealings or relationship between or among the grantor, its agents, contractors, subcontractors, architects, engineers and the co-owners or the Association, 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 another action in which a jury trial has not been or cannot be waived.

Clearly, under our state law principles of contract interpretation, such provisions offered on a take it or leave it basis and which serve to wrongfully deprive substantial rights are unconscionable. Here, the unconscionable nature of these provisions is compounded by the fact that said provisions were unilaterally imposed by the Developer Appellant in contravention of its fiduciary obligations to the Association and its members. *See Goddard*, 310 S.C. at 414-17, 426 S.E.2d at 832-33; *Concerned Dunes West Residents, Inc.*, 349 S.C. at 256-60, 562 S.E.2d 636-38. As noted by our Supreme Court in *Simpson*: "The general rule is that courts will not enforce a contract which is violative of public policy, statutory

law, or provisions of the Constitution. . ." *Simpson*, 373 S.C. at 29-30, 644 S.E.2d at 671 (emphasis added). South Carolina's policy requires developers, such as Appellant, to sacrifice its interests for the interests of the regimes they develop. By inserting the above-referenced provisions in the Pre-Amended Master Deed, the Developer Appellant clearly acted in its interest and against the well-established policies of this State which required Appellant to act in the best interest of The Gates community. Based upon this fact alone, the Circuit Court could, and did, refuse to enforce the waivers in accordance with South Carolina law. *Id.*

Finally, Appellants' reliance on *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013) and its progeny is misplaced – Appellants incorrectly assume "one shoe fits all" in connection with the *York* decision, but overlook our Supreme Court's clear instructions that "there is no specific set of factual circumstances establishing the line which must be crossed when evaluating contractual provision for unconscionability … Instead, we emphasize the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Simpson,* 373 S.C. at 36, 644 S.E.2d at 674 (emphasis added); *see also Holler v. Holler,* 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.") (citations omitted).

Even if a comparison is made between *York* and the present case, the outcome remains the same. In *York*, this Court analyzed the unconscionability of two arbitration clauses, finding "one *word-for-word identical* to the oppressive provision in *Simpson*." *Id.*

at 88, 749 S.E.2d at 150 (emphasis in original).As discussed in detail above, the anti-suit language at issue here is similar to the anti-suit language considered, and rejected, by both the Supreme Court in *Simpson* and this Court in *D.R. Horton*.

C. The Waivers are Not Severable from the Other Anti-Suit Provisions Contained in the Pre-Amended Master Deed.

Moreover, Appellants' argument that the subject waivers should stand alone, and in isolation from, the other anti-suit provisions puts form above function and ignores our Courts' prior decisions. Because the waivers are contractual terms, general rules of contract interpretation apply where the court must determine the clause's applicability. These general rules of contract interpretation include the well-recognized tenant that a contract should be read as a whole, especially when there are different provisions that deal with the same subject matter. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999); *see also Buice v. WMA Secs., Inc.*, 380 S.C. 149, 156-157, 668 S.E.2d 430, 434 (Ct. App. 2008) (recognizing the contracting principle that a court should construe different provisions together that deal with the same subject matter); *Skull Creek Club Ltd. P'ship v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993) (recognizing whole and different provisions dealing with the same subject matter are to be read together); *Wise v. Picow*, 232 S.C. 237, 243, 101 S.E.2d 651, 655 (1958) (different provisions dealing with the same subject matter are to be read together).

Here, the Pre-Amended Master Deed contains numerous individual provisions that deal with the same subject matter as the non-jury and class action waivers—the legal remedies available to the Association and its members. Thus, it is clear Appellants did not truly intend the waiver provisions to operate independently of other related provisions, all

of which serve to wrongfully deprive the Association and its members of their right to an effective remedy. Moreover, and as discussed above, the Circuit Court did not err in failing to sever the waivers from these related provisions. *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (recognizing "severability is not always an appropriate remedy for an unconscionable provision. . .'[i]f illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts. . .'"; *D.R. Horton,* 403 S.C. at 17, 742 S.E.2d at 41 ("We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly [D.R.] Horton's attempt to waive any seller liability for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.") (internal citations omitted) (emphasis added). In fact, the waivers are admittedly contained in the Pre-Amended Master Deed's "Alternative Dispute Resolution" Section, which references the Deed's other provisions, thereby making the waivers' "severability" from these provisions impractical, if not impossible. (Appellant's Initial Br. p. 21) (noting "[t]he waiver is found in the section of the Master Deed entitled 'Alternative Dispute Resolution'").

VII. The Circuit Court Correctly Denied Appellants' Motion to Reconsider

As noted above, on January 22, 2015, the Circuit Court denied Appellants' Motion to Reconsider, finding that its denial of Appellants' Motion contained no overlooked fact or principle of law, and no error of law:

> After consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered.

(R. p. 52).

As an additional sustaining ground for its denial of Appellants' Motion to Reconsider, the Circuit Court ruled that Appellants had failed to comply with Rule 59 (g), *South Carolina Rules of Civil Procedure*:

> This Court notes as an additional sustaining ground for its Order that Moving Defendants failed to provide a copy of their Motion to Reconsider to the undersigned within ten days of filing the Motion as Rule 59(g), SCRCP mandates.

(R. p. 52). *See Cleveland Ridge Homeowner's Ass'n, Inc. v. State Farm Fire & Cas. Co.*, Op. No. 2006-UP-295, 2006 WL 7286092, at *1 (S.C. Ct. App. Filed June 26, 2006) (unpublished opinion) (court implicitly agreed with trial court's denial of Rule 59(e) motion based on the merits and movant's failure to comply with the procedural requirements of Rule 59(g)); *see also Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002) (failure to submit copy of motion in compliance with Rule 59(g) is grounds alone for denial of motion).

CONCLUSION

This appeal fails for multiple reasons. Initially, there are three procedural reasons why Appellants' appeal fails. First, Appellants are precluded from challenging the validity of the Second Amendment to the Master Deed – an amendment that removed the waivers that are the crux of Appellants' issue on appeal – due to Appellants' failure to raise the issue in the court below (except on reconsideration). Second, Appellants failed to timely file the underlying Motion on which this appeal is based. Third, Appellants lack standing to challenge the validity of the Second Amendment because Appellants are no longer members of the COA and no longer own an interest in The Gates.

Additionally, Respondents' Second Amendment to the Master Deed is an insurmountable barrier to Appellants' appeal. The weight of authority affirms that such an amendment can be applied retroactively to claims that arose and were put in suit prior to its passage.

Finally, the waivers inserted by the Dinerstein Appellants are unenforceable for two reasons – (1) the Appellants, as opposed to the Respondents, waived their right to enforce the waivers; and (2) the waivers are unenforceable due to their unconscionable and ambiguous terms.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By: ______________________
Justin O'Toole Lucey, Esquire
SC Bar No.: 15438
Stephanie D. Drawdy, Esquire
SC Bar No.: 70205
415 Mill Street
Mount Pleasant, South Carolina 29201
Telephone: 843.849.8400
Telecopier: 843.849.8406

E-Mail: jlucey@lucey-law.com
sdrawdy@lucey-law.com

Attorneys for the Respondents

Mount Pleasant, SC
October 16, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-8512

Appellant Case No. 2015-000180

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; HCM Utah, LLC; Headwaters, Inc. d/b/a Best Masonry; Labrador Electric Company; AAA Accurate Plumbing, Heating & Air, LLC, f/k/a AAA Accurate Plumbing Solutions Division of AAA Accurate Backflow Testing & Repair, LLC; Time Warner Cable Southeast, LLC; Southern Equipment Company, Inc., d/b/a Ready Mixed Concrete Company; and John Doe #1-10.,

Defendants,

v.

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

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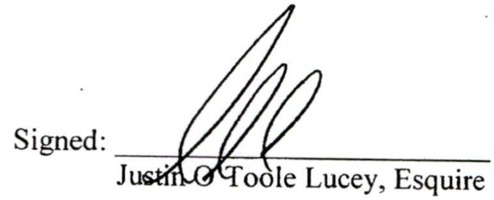
Appellants.

Certificate of Counsel

Justin O'Toole Lucey, Esquire
SC Bar No.: 15438
Stephanie L. Drawdy, Esquire
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mount Pleasant, South Carolina 29201
Telephone: 843.849.8400
Telecopier: 843.849.8406
E-Mail: jlucey@lucey-law.com

Attorneys for the Respondents

The undersigned certifies that Respondents' Final Brief complies with Rule 211(b), SCACR.



Signed: ______________________
Justin O'Toole Lucey, Esquire

Mount Pleasant, SC
October 16, 2015

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G. Thomas Cooper, Circuit Court Judge

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Appellants.

Respondents' Final Brief and
Certificate of Compliance with Rule 211(B), SCACR

Justin O'Toole Lucey, Esquire
SC Bar No.: 15438
Stephanie L. Drawdy, Esquire
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mount Pleasant, South Carolina 29201
Telephone: 843.849.8400
Telecopier: 843.849.8406
E-Mail: jlucey@lucey-law.com

Attorneys for the Respondents

I, Justin O'Toole Lucey, Esquire, hereby certify that on October 16, 2015, I served a copy of the **RESPONDENTS' FINAL BRIEF AND CERTIFICATE OF COMPLIANCE WITH RULE 211(B), SCACR** submitted by the Respondents on the following counsel, via the United States Mail, postage pre-paid, and addressed as follows:

Howard A. VanDine, III,
A. Mattison Bogan
Erik T. Norton
Tara C. Sullivan
Nelson Mullins Riley & Scarborough LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000
Attorneys for Appellants

Karl Brehmer
P.O. Box 7966
Columbia, SC 29202
(803) 771-6600
Attorney for Appellant Bailey Electric Company, LLC

James K. Cluverius, Jr.
Rogers, Townsend & Thomas, PC
401 North Main Street
Greenville, SC 29601
Attorney for Appellant C&B Utilities, LP

Sterling Graydon Davies
Jason Alan Pittman
McAngus Goudelock & Courie, LLC
P. O. Box 12519
Columbia, SC 29211
(803) 227-2235
Attorneys for Century Fire Protection, LLC

Mark Steven Barrow
Sweeney Wingate & Barrow
P.O. Box 12129
Columbia, SC 29211
Attorney for Cherokee Inc.

Mark Steven Barrow
Christy E. Mahon
Sweeney Wingate & Barrow
P.O. Box 12129
Columbia, SC 29211
Attorneys for Coronado Stucco, LP

Paul David Greene
Robert Batten Farrar
Gallivan, White & Boyd P.A.
55 Beattie Place, Suite 1200
Greenville SC 29601
T: 864-271-9580
Attorneys for Appellant Cross Plains Custom Tile, Inc.

Signed:

Justin O'Toole Lucey, Esquire

Mount Pleasant, SC
October 16, 2015