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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

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Case No. 2012-CP-40-08512
Appellate Case No. 2016-002440

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

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., d/k/a Dietrich Metal Framing, Inc. n/k/a Clarkwestern Dietrich Building Systems LLC; Best Masonry and its successor in interest, OldCastle APG; Headwaters, Inc. d/b/a Best Masonry; and John Doe #1-10, ...

Defendants,

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

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**Respondents' Return to the Petition for Writ of Certiorari**

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## Introduction

This Court should deny the petition for a writ of certiorari filed by petitioners The Gates at Williams-Brice Property Owners Association ("the Association") and individual unit owners ("the Homeowners") at The Gates. The Court of Appeals correctly decided this case, and the Homeowners and the Association raise no issues that require this Court's consideration. *See* Rule 242(b), SCACR. In addition, the Court of Appeals' ruling is supported by South Carolina law and does not offend public policy. The Homeowners and the Association attempt to make this appeal worthy of certiorari by injecting multiple issues into the case that they did not raise in their briefing before the Court of Appeals and by attempting to create numerous factual issues that are not grounds for reversal and are not supported by the record. Therefore, respondents DDC Construction, Inc. and Columbia Condos, LP (together, "the Developer") respectfully request that this Court deny the petition for certiorari.[1]

## Counter-Statement of the Questions Presented for Review

1. Did the Court of Appeals properly find the jury trial and class action waiver provisions in the Master Deed are enforceable?

2. Did the Court of Appeals properly find the Homeowners' and Association's amendment of the Master Deed is not effective against the Developer?

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[1] Because the Homeowners and Association have "settled" this matter, they argue this Court should "vacate" the Court of Appeals' opinion. The settlement will take effect upon a final resolution of this appeal, and there is no need to vacate the Court of Appeals' opinion. The Homeowners and Association have failed to ask the Court of Appeals to vacate its opinion. Thus, this Court should finally end this action by denying certiorari as the issues, by the Homeowners' and Association's admission, are settled. The request to "vacate" is not supported by "facts that warrant this extraordinary relief" as envisioned by Rule 261(d), SCACR. In fact, the Homeowners and Association offer *no reasons* warranting the vacation of the Court of Appeals' opinion. Rather, the only justification for vacating the opinion offered by the Homeowners and Association is their disagreement with the outcome. Denying certiorari ends this settled matter. The Court of Appeals' opinion is correct and should stand.

## Counter-Statement of the Case

This case arose from alleged construction defects at The Gates. The Gates, located adjacent to the University of South Carolina's Williams-Brice Stadium, were built as game-day condominiums and were substantially completed in July 2007. According to the Association's By-Laws, which were adopted on July 2, 2007, the Developer incorporated the Association as a non-profit corporation. (R. 1077-1097). In accordance with the requirements of the South Carolina Horizontal Property Act, *see* S.C. Code Ann. §§ 27-31-10 to -300, the Developer recorded a Master Deed for The Gates on July 11, 2007. (R. 1123). The Master Deed included alternative dispute resolution sections in article XXXV, which included a jury trial waiver and a class action waiver in bold, capital letters:

> **D. Waiver of Jury Trial**
>
> **BY ACCEPTANCE OF A DEED TO ANY UNIT OR OTHER PROPERTY HEREUNDER CO-OWNER(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.**

(R. 1162-1163). Article XXXV(A) explained which parties are bound by the waivers:

> Bound Party. Includes: Grantor;[2] all co-owners; the Association and its officers, directors, and committee members, including any corporation or other entity formed to serve as the Association; all persons and entities subject to this Master Deed; any person or entity not otherwise subject to this Master Deed who agrees to submit to this Article; any person or entity that now has or hereafter acquires any interest in a Unit; the developer of the Regime; 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 Common Element in the Regime; any heir, successor, delegatee or assignee of any person or entity listed in this paragraph.

(R. 1159-1160).

Pursuant to the terms of the Master Deed, the Developer maintained control of the Association while condominium units were being sold. (R. 36). According to the record, purchasers began closing on condominium units after the recording of the Master Deed in July 2007. (R. 1102). Because South Carolina law requires real estate closings to be handled by lawyers, each purchaser of a condominium would have had the real estate documents—including the Master Deed—explained to them by a South Carolina licensed attorney and would have had the opportunity to ask the attorney questions about the provisions in those documents. *See* (R. 1103-04). In fact, the purchase contracts signed by the purchasing Homeowners included a provision designating the closing attorney and indicating that the purchasers could employ their own closing attorneys. (R. 1103-04). The Developer ceded control of the Association to the Homeowners in August 2009 after all units owned by the Developer had been sold. (R. 36).

On December 26, 2012, the Homeowners and Association filed their initial complaint against the Developer and several other entities. (R. 58). The Homeowners and Association alleged the case should proceed as a class action and, in the "WHEREFORE" clause at the end of

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[2] The Master Deed provides that Columbia Condos is the "Grantor." (R. 1124).

the complaint, demanded a jury trial. (R. 62-64, 68). In its answer, the Developer denied the class action allegations and denied that the Homeowners and the Association were entitled to any of the relief sought in the "WHEREFORE" clause—which included the jury trial demand. (R. 72, 74). The Developer also asserted waiver as an affirmative defense. (R. 74-75). The Homeowners and Association filed numerous amended complaints over the course of more than a year, each time adding new defendants and new claims. (R. 79, 304, 576). They filed a final amended complaint on August 7, 2014. (R. 576). The Developer filed responsive pleadings to each amended complaint, continuing to deny the Homeowners' and Association's right to a class action and a jury trial and raising waiver as an affirmative defense—including, in its answers to the second and third amended complaints, citing specifically the class action and jury trial waivers. (R. 110-12, 121-23, 400-02, 405, 407, 450-52, 456, 677-78, 680-82, 686, 719-20, 722-24, 728).

In the face of the waivers, in June 2013—more than five months after the initial complaint, two months after the Developer filed its initial responsive pleading, and approximately one month after the first amended complaint—the Association filed a purported amendment to the Master Deed.[3] (R. 1261-62). The amendment to the Master Deed purported to remove article XXXV (the class action and jury trial waivers) and certain warranty exclusions that were included in the original Master Deed recorded by the Developer. (R. 1261).

On March 24, 2014, shortly after receiving the second amended complaint and before the Homeowners and Association filed their third amended complaint, the Developer filed a demand for a non-jury trial and motion to strike the Homeowners' and Association's class action

[3] The amendment at issue in this appeal is titled "Second Amendment to the Master Deed of The Gates at Williams-Brice Horizontal Property Regime." (R. 1261). The first amendment to the Master Deed included minor changes that are not relevant to this litigation.

allegations and jury trial demand pursuant to Rules 12(f), 23(d)(1), 38, and 39 of the South Carolina Rules of Civil Procedure. (R. 900). In the motion, the Developer relied on the plain language of the waiver provisions in the Master Deed to demand a non-jury trial and ask that the class action allegations be stricken or dismissed. (R. 903-04, 1073). The Homeowners and Association opposed the motion, arguing (1) the motion was untimely because it was not filed prior to the Developer's answers, (2) the Master Deed was amended to remove the waivers after the initial complaint was filed, (3) the Homeowners and Association did not knowingly and voluntarily waive their rights to a jury trial and class action, (4) the waivers were not applicable because the Developer elected not to arbitrate, and (5) the waiver provisions were unconscionable. (R. 1053-69). The trial court denied the Developer's motion, finding (1) the Developer failed to timely raise issues relating to the mode of trial, (2) the amendment to the Master Deed "appl[ies] retroactively" and the Master Deed therefore does not contain a jury trial or class action waiver, (3) the Homeowners and Association did not knowingly and voluntarily waive their right to a jury trial or class action, (4) the Developer waived its right to compel arbitration and therefore cannot seek a nonjury trial, and (5) the waiver provisions are unconscionable. (R. 34-50).

The Developer filed a motion to reconsider, which the trial court denied. (R. 51, 1268). The Developer timely appealed to the Court of Appeals. (R. 1347). After oral argument, the Court of Appeals reversed the trial court's order in a published opinion. *See The Gates at Williams-Brice Condo. Ass'n v. DDC Constr., Inc.*, 418 S.C. 282, 792 S.E.2d 240 (Ct. App. 2016). The Court of Appeals found (1) the Developer raised the class action and jury trial waivers in a timely manner; (2) the amendment to the Master Deed could not apply retroactively against the Developer; (3) the jury trial and class action waivers were conspicuous and unambiguous, the Homeowners and Association knowingly and voluntarily waived their rights to a jury trial and class action, and the

waiver provisions are enforceable; and (4) the Developer's election not to seek arbitration did not constitute a waiver of its right to a nonjury trial. *See id.* The Homeowners and Association filed a petition for rehearing, which the Court of Appeals denied. (App'x 107a-143a, 176a-77a). The Homeowners and Association then filed a petition for a writ of certiorari with this Court and later notified the Court of a settlement, which they contend should result in a vacation of the Court of Appeals' decision.

## Argument

This case presents a single issue—whether the Homeowners and Association waived their rights to a jury trial and to proceed as a class action. They did. Certiorari should be denied.

The resolution of that issue depends primarily on the answers to two questions of law: (1) whether the jury trial and class action waiver provisions in the master deed are enforceable, and (2) whether the Homeowners' and Association's second amendment to the master deed effectively removed those waiver provisions for purposes of this litigation. The Court of Appeals correctly found the provisions are enforceable and the amendment is ineffective against the Developer in this litigation, and this Court should reject the Homeowners' and Association's attempt to formulate new issues and should deny the petition for certiorari.[4]

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[4] This Court should summarily deny the petition for certiorari without reaching the merits because the Homeowners and Association failed to comply with the requirements of Rule 242 of the South Carolina Rules of Civil Procedure. Specifically, they have not presented a "direct and concise argument" in support of their petition. *Id.* Instead, the Homeowners' and the Association's petition for certiorari—from a Court of Appeals opinion that contained, at most, four issues—includes eleven "questions presented," many of which cite little or no supporting authority and several of which are not preserved for review by this Court because they were not raised to the Court of Appeals until the petition for rehearing. *See* (Pet. for Cert. 2-3). Therefore, this Court should summarily deny the petition. *See* Rule 242(d)(4) ("Failure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.").

## I. The Court of Appeals properly held the jury trial and class action waiver provisions are enforceable.

South Carolina law allows a party to waive its right to a jury trial by contract. *See Wachovia Bank v. Blackburn*, 407 S.C. 321, 332, 755 S.E.2d 437 (2014); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002); *Leasing Service Corp. v. Crane*, 804 F.2d 828, 832-33 (4th Cir. 1986). "Whether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). Similarly, written class action waivers are enforceable under South Carolina law. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 94, 749 S.E.2d 139, 153 (Ct. App. 2013); *Muriithi v. Shuttle Exp., Inc.,* 712 F.3d 173, 180 (4th Cir. 2013); *Patricia Rowe P.A. v. AT&T, Inc.,* CA 6:13-cv-01206-GRA, 2014 WL 172510 at *10 (D.S.C. Jan. 15, 2014).

In its analysis of the waiver provisions, the Court of Appeals held the Developer raised the class action and jury trial waivers in a timely manner and the waivers were enforceable. *See* 418 S.C. at 292-96, 299-300, 792 S.E.2d at 245-48, 249. The Court of Appeals found the provisions were conspicuous and unambiguous and were not unconscionable, and each Homeowner was charged with having read the Master Deed at the time he or she agreed to be bound by its terms. *Id.* at 300-02, 792 S.E.2d at 250-51. The Court of Appeals' analysis is correct, and this Court should deny the petition for a writ of certiorari.

### A. The waivers clearly and unambiguously apply to both the Homeowners and Association.

This Court should reject the argument that the waiver provisions do not apply to the Association. First, the Association did not raise this issue to the Court of Appeals until it filed its petition for rehearing, and the argument therefore cannot be presented for certiorari. *See* Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals *and* in the petition for

rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." (emphasis added)). Neither the Court of Appeals nor the trial court considered this issue, and it is therefore unpreserved. *See Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) (finding an issue that was raised for the first time in a petition for rehearing and was not addressed by either the trial court or the Court of Appeals was not preserved for review by this Court).

Second, the Court of Appeals properly held the waiver provisions clearly and unambiguously apply to both the Homeowners and the Association. Contrary to the Homeowners' and Association's assertion, no "distinct analysis" between the Homeowners and the Association is necessary. Article XXXV expressly defines the parties bound by the waiver provisions, which include the Developer, all Homeowners, the Association, "all persons and entities subject to [the] Master Deed," and "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 The Gates. (R. 1160). Thus, the Homeowners and the Association are both bound by the terms of the Master Deed—including the waiver provisions—and the Court need not conduct a separate analysis for each party.

Further, the jury trial waiver provides that no Homeowner or "legal representative" of the Homeowners may seek a jury trial. (R. 1163). The Association does not hold any interest in the horizontal property regime and can act only as the legal representative of the Homeowners when asserting claims as to the physical condition of the property. *See generally* (R. 1123-63). The Association otherwise has no independent standing to sue. Therefore, the jury trial waiver clearly and unambiguously applies to the Homeowners' "legal representative." (R. 1162-63). Finally, a former member of the board of the Association admitted in his deposition that all Homeowners

and the Association are bound by the Master Deed. (R. 1121). Thus, the Homeowners' and Association's argument that the Court of Appeals failed to conduct a different analysis for the Association is not a ground for certiorari.

### B. The Homeowners and Association knowingly and voluntarily waived their right to a jury trial and to pursue a class action.

The Court of Appeals properly found the Homeowners and the Association knowingly and voluntarily waived their rights to a jury trial and class action. *See* 418 S.C. at 300, 792 S.E.2d at 250. Specifically, the Court of Appeals found the waiver provisions were conspicuous and unambiguous, and the Homeowners were charged with having read the waivers when they purchased their condominiums. *Id.* at 300-01, 792 S.E.2d at 250-51.

First, the waiver is written in bold and capitalized letters in a section entitled "Waiver of Jury Trial," and it is therefore conspicuous. *See Blackburn*, 407 S.C. at 333, 755 S.E.2d at 443 (finding waivers that are "printed in all capital letters and have a bold heading called 'WAIVER OF JURY TRIAL'" are conspicuous). Second, the waiver unambiguously includes the heading "**Waiver of Jury Trial**" and waives the right to a jury trial and a class action suit: "**NEITHER CO-OWNER NOR ANY ASSIGNEE ... OR LEGAL REPRESENTATIVE OF CO-OWNER OR GRANTOR[] SHALL SEEK A JURY TRIAL IN ANY LAWSUIT . . . , INCLUDING WITHOUT LIMITATION WAIVER OF ANY TYPE OF CLASS ACTION SUIT**." (R. 1163).

The Homeowners and Association cite no authority in support of their argument that the Master Deed, By-Laws, and purchase contracts must be read together and therefore are all ambiguous. (Pet. for Cert. 11-16). Contrary to that assertion, the purchase contracts and By-Laws expressly provide that those documents are subject to the terms of the Master Deed, which

supersede any conflicting terms in the purchase contracts or By-Laws. (R. 1077, 1104). Therefore, the documents should *not* be read together; instead, only the waiver provisions in the Master Deed are relevant. Acceptance of the Homeowners' and Association's argument would preclude a Master Deed from containing alternative dispute resolution procedures or similar provisions that in any way impact the rights of the Association or the Homeowners—exactly the opposite of what the law requires. *See* S.C. Code Ann. § 27-31-100 (requiring a party establishing a horizontal property regime to record a master deed, which must include 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"). Such a rendering of the law would be contrary to public policy and should be rejected. *See, e.g.*, *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342-43, 713 S.E.2d 278, 283 (2011) (citing *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000)) ("Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention."); *Ross v. Waccamaw Comm. Hosp.*, 404 S.C. 56, 66, 744 S.E.2d 547, 551 (2013) (noting "strong public policy favoring alternative dispute resolution").

Because only the waiver provisions in the Master Deed apply, the Homeowners' and Association's argument that the Developer must first seek arbitration before seeking a nonjury trial is incorrect. The waiver provisions unambiguously provide two avenues that the Developer or any other "bound party" may pursue: binding arbitration or a nonjury trial. (R. 1162-63). The Developer is not required to first elect arbitration.

Third, the waiver provisions are not unconscionable. *See Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) ("Unconscionability has been recognized 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."). The Master Deed does not contain "liability waivers" or "damage waivers" and does not "disclaim[] the Developer's liability for everything." *See* (Pet. for Cert. 19-20). There is no limitation on liability or the right to bring a legal action, and the waiver provisions do not "eviscerate all Association and Homeowner rights against the Developer and serve as an express limitation on the ability of any judge or arbiter to award damages." *See* (Pet. for Cert. 20-21; R. 1162-63). Moreover, the Master Deed does not lack mutuality or contain one-sided provisions that allow the Developer to take legal action but prohibit the Association from doing so.[5] Instead, the Master Deed contains only a mutual waiver of the right to a jury trial and class action lawsuit. (R. 1162-63). These waivers are routinely enforced by South Carolina courts. *See Blackburn*, 407 S.C. at 333-34, 755 S.E.2d at 443-44; *see also Muriithi*, 712 F.3d at 181 (reversing the district court's finding that a class action waiver was unconscionable).

Fourth, the Master Deed is not oppressive and is not a contract of adhesion. The Homeowners and the Association cite *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013), in support of their argument that the waiver provisions are unconscionable. (Pet. for Cert. 29 n.27). The warranty provisions in this case are distinguishable from the warranty

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[5] The Association and Homeowners assert several times in their petition that the provision in the Master Deed restricting the Association from initiating legal proceedings unless first approved by 75% of the Homeowners is an example of a one-sided, unconscionable restriction. *See* (Pet. for Cert. 19-20; R. 1162). The purpose of that provision is not to prevent the Homeowners and Association from pursuing legal action against the Developer. The purpose of that provision is to prevent a small group of litigious Homeowners from miring the Association in costly litigation and wasting Association resources to the detriment of the remaining Homeowners. Therefore, the provision is not one-sided or unconscionable and is not material to this appeal. Further, no evidence of the alleged unconscionability was presented below and the Homeowners and Association fail to meet the elements of unconscionability.

provisions in *Smith*. In that case, the warranty provisions contained a "Limitation on Liability" section that provided a contractor "could not be liable for monetary damages of any kind." *Id.* at 15, 742 S.E.2d at 40. Moreover, the limitations on liability were not mutual because they permitted the contractor to seek monetary damages while denying the homeowner the same right. *Id.* In this case, however, the Master Deed does not contain any limitation as to the recovery of monetary damages, and the dispute resolution provisions are mutual. (R. pp. 1162-1163). Accordingly, the Court of Appeals properly held the Master Deed is not unconscionable.

Fifth, the Master Deed was recorded prior to closing and incorporated into the Association's By-Laws, which were also created prior to closing. (R. 1097, 1123). Therefore, all of the Homeowners would have had the Master Deed explained to them by a South Carolina lawyer and would have had the opportunity to ask the attorney about the waiver provisions. The Homeowners' and Association's argument that "the only thing the Homeowners could be 'charged with having read' . . . in advance of closing was their respective purchase contracts" is unsupported by the record. (Pet. for Cert. 13). The Master Deed and By-Laws were created and recorded *prior* to the closing date indicated on the purchase contract included in the record. *See* (R. 1077, 1097, 1102, 1123). Therefore, the Court of Appeals correctly held the Homeowners are each charged with having read the available, completed Master Deed at the time of closing. *Blackburn*, 407 S.C. at 333, 755 S.E.2d at 443. Accordingly, the Court of Appeals properly applied South Carolina law to determine the waivers were knowing and voluntary.

Finally, the Homeowners and Association seek to inject myriad new factual arguments into the case to undermine the Court of Appeals' ruling. These factual arguments do not provide a basis for this Court to grant certiorari. For example, the Homeowners' and Association's argument about the Developer supplying a partisan closing attorney is a red herring. The purchase

contract indicated the Developer would supply its own closing attorney and each purchaser could use the Developer's attorney or retain his own attorney. (R. 1103-04). The Homeowners and Association seek to push the closing attorney's duty to inform his or her client of the waiver provisions onto the Developer. Moreover, in South Carolina, lawyers may represent both buyers and sellers at a real estate closing. *See McNair v. Rainsford*, 330 S.C. 332, 345, 499 S.E.2d 488, 495 (Ct. App. 1998) (noting the Ethics Advisory Committee of the South Carolina Bar has "concluded an attorney may represent all three parties to a real estate closing without violation of the [Rules of Professional Conduct] provided, however, no negotiation is required, no problem has arisen which may jeopardize the closing, no party is relying on the attorney for substantive advice about how or whether to proceed, there has been full disclosure of the potential for conflict to all the parties to the closing, all of the parties understand their right to seek other legal counsel, and all parties agree."). Therefore, the closing attorney argument is not a ground to grant certiorari.

### C. The Homeowners' and Association's fiduciary duty arguments are not preserved for review by this Court.

The Homeowners and Association did not raise any of their numerous fiduciary duty-related arguments to the Court of Appeals until they filed their petition for rehearing. *See* (Pet. for Cert. 7-8). They did not argue anywhere in their briefing to the Court of Appeals that the Developer's alleged breach of a fiduciary duty required the court to "zealously scrutinize" the waivers with "considerable skepticism" and to presume the waivers were invalid. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (providing an issue "must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge"). Therefore, these issues are not preserved for review by this

Court, and this Court should deny certiorari as to the Homeowners' and Association's questions III, IV, V, and VI.

Further, any fiduciary duty that the Developer may have owed to the Homeowners and the Association does not change the standard by which a court must review the jury trial and class action waiver provisions. The cases cited by the Homeowners and the Association provide only that a developer has a fiduciary duty to a homeowners association to transfer common areas that are in good repair. *See, e.g.*, *Concerned Dunes W. Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 260, 562 S.E.2d 633, 638 (2002); *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 374, 725 S.E.2d 112, 126 (Ct. App. 2012); *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 415, 426 S.E.2d 828, 832 (Ct. App. 1993). Those cases do not support the Homeowners' and Association's arguments that a court must "zealously scrutinize" the Master Deed or "presume" that the Master Deed is invalid.[6] The issue before the Court of Appeals was whether the Homeowners and the Association knowingly and voluntarily waived their rights to a jury trial and to pursue a class action. Whether the Developer breached a fiduciary duty to turn the common areas over to the Homeowners and the Association in good repair is not

[6] The remaining cases cited by the Homeowners and the Association in support of their fiduciary duty arguments did not involve a developer and a homeowners association and therefore do not support the proposition that the Developer in this case had a "special" relationship to the Association. *See generally Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007) (discussing a consumer contract for the purchase of an automobile that contained an arbitration clause); *Duncan v. Brookview House, Inc.*, 262 S.C. 449, 205 S.E.2d 707 (1974) (analyzing a fiduciary duty owed by the promoters of a corporation); *Wogan v. Kunze*, 366 S.C. 583, 623 S.E.2d 107 (Ct. App. 2005), *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008) (analyzing a doctor-patient relationship); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987) (analyzing a civil conspiracy claim against defendants who fraudulently diverted money from a corporation).

at issue on the waiver provisions. Therefore, this Court should reject all fiduciary duty-related arguments and should deny the petition for certiorari.

**D. The Developer timely raised the waiver provisions as a defense.**

The Court of Appeals properly found the Developer raised the waiver provisions in a timely manner. *See* 418 S.C. at 292-96, 792 S.E.2d at 245-48. The Developer raised the issues regarding mode of trial and the class action waiver at its first opportunity when it denied the Homeowners' and Association's demand for a jury trial and class action in its answer to the initial complaint. (R. 71). The Developer renewed its objection to the jury trial and class action demand in every responsive pleading to the Homeowners' and Association's multiple amended complaints. (R. 110-12, 121-23, 400-02, 405, 407, 450-52, 456, 677-78, 680-82, 686, 719-20, 722-24, 728). In fact, the Developer even filed its motion for a non-jury trial and to strike the class action allegations and jury trial demand before the Homeowners and the Association served their third amended complaint. (R. 900).

Pleadings must be liberally construed "to do substantial justice to all parties." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). The principal purpose of a pleading is "to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial." *Id.* at 574, 743 S.E.2d at 785. The Developer's answer to the initial complaint—and its answers to each amended complaint—placed the Homeowners and the Association on notice that the Developer intended to challenge their right to a jury trial and to proceed as a class. Therefore, the Court of Appeals properly held the Developer raised the waiver provisions in a timely manner.

The only law cited by the Homeowners and the Association in support of their timeliness argument is a case addressing whether a party waived its right to compel arbitration. *See Davis v.*

*KB Home of S.C., Inc.*, 394 S.C. 116, 133, 713 S.E.2d 799, 808 (Ct. App. 2011), *aff'd in part, vacated in part*, No. 2011-199587, 2014 WL 2535489 (S.C. Jan. 29, 2014). As the Homeowners and the Association admitted in their opposition to the Developer's motion to strike, the Developer has not attempted to compel arbitration in this case. (R. 1052). Therefore, the *Davis* case is irrelevant to this appeal, and the petition for certiorari should be denied as to the timeliness question.

## II. The Court of Appeals properly found the amendment to the Master Deed is not effective against the Developer.

The Court of Appeals properly held the second amendment to the Master Deed—enacted during this litigation—does not apply to the Developer. *See* 418 S.C. at 297-98, 792 S.E.2d at 248-49. No authority supports a finding that the amendment applies "retroactively" in the manner that the Homeowners and the Association contend this amendment should apply. The cases cited by the Homeowners to support the idea of a "retroactive" amendment address whether an amendment to a master deed applies to all homeowners, including those who purchased their units prior to the amendment, rather than only to homeowners who purchased units after the amendment. Thus, a "retroactive" amendment applies to all homeowners moving forward. It does not allow parties to go back in time and assert that the new provisions also applied in the past, even though the provisions were not part of the master deed at the time.

For example, in *Crest Builders, Inc. v. Willow Falls Improvement Association*, 393 N.E.2d 107, 110 (Ill. App. Ct. 1979)—an injunction case—a court considered whether an amendment to a declaration of covenants that removed a developer's right to advertise the sale of units on the property was valid against the developer. *Id.* at 109. In determining the amendment was binding against the developer, the court did not rule that the developer's past advertising violated the

declaration of covenants. *See id.* at 110. Rather, the court held only that the amendment was valid against the developer and the developer was prohibited from continuing to advertise on the property. *Id. Crest Builders*, like the other cases cited by the Homeowners and the Association, does not support a finding that the amendment to the Master Deed in this case is "retroactively" binding against the Developer. Rather, it provides only that the amendments may be valid going forward.[7] Similarly, in *Queens Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006), the Court of Appeals permitted an amendment to a restrictive covenant requiring that unit owners be assessed an increased maintenance fee. *See id.* at 370-71, 628 S.E.2d at 918. The court did not allow the increased maintenance fee to be imposed retroactively to prior owners or years. *See id.*

Further, the Court of Appeals properly cited *Armstrong v. Ledges Homeowners Association, Inc.*, 633 S.E.2d 78 (N.C. 2006), in its analysis. In *Armstrong*, the court held "a provision authorizing a homeowners' association to amend a declaration of covenants does not permit amendments of unlimited scope; rather, every amendment must be reasonable in light of the contracting parties' original intent." *Id.* at 87. The court found an amendment that granted a homeowners' association unlimited power to assess lot owners—in contrast to the original declaration of covenants, which provided for specific, minimal assessments—was "contrary to the original intent of the contracting parties" and was therefore unreasonable. *Id.* at 88. Similarly, the amendment to the Master Deed in this case unreasonably and unilaterally alters the terms by

[7] The remaining two cases cited in the section of the petition for certiorari addressing whether the amendment applies to the Developer, *Seagate Condominium Association, Inc. v. Duffy*, 330 So. 2d 484 (Fla. Dist. Ct. App. 1976), and *Hill v. Fontaine Condominium Association, Inc.*, 334 S.E.2d 690 (Ga. 1985), analyze the reasonableness of restraints on alienation and provide no analysis of the "retroactive" applicability of amendments.

removing waiver provisions and adding warranties—contrary to the original intent of the parties. Thus, no authority allows the amendment to the Master Deed to "retroactively" apply to the Developer as if the amendment had been in place at the beginning of this litigation.

Moreover, as the Developer's counsel noted during oral argument on the motion to strike, the Developer has not argued the Homeowners or the Association lack the power to amend the Master Deed. Rather, the Developer has argued only that the Homeowners and Association lack the power to unilaterally and "retroactively" bind the Developer to a new agreement to which the Developer is not a party. It would lead to an absurd result to allow the Homeowners to go back in time and delete the waiver provisions that existed when they filed this case.

Finally, the Developer's challenge to the applicability of the amendment to the Master Deed is not prohibited by statute. The Homeowners and the Association rely on the Non-Profit Corporation Act to argue the Developer does not have standing to challenge a valid corporate act taken by the Association. (Pet. for Cert. 21). However, that statute is inapplicable to this case. The amendment to the Master Deed is not a corporate act, and the Master Deed is not a corporate record or document of the Association. In fact, the Association itself does not have the power to amend the Master Deed. Rather, articles XIII and XXVII of the Master Deed contain express provisions allowing amendment of the Master Deed by the Grantor, the unit owners, and mortgage holders. (R. 1138, 1155). Therefore, amending the Master Deed is not a corporate act of the Association and the Non-Profit Corporation Act does not apply. Accordingly, the Developer properly challenged the applicability of the amended Master Deed to this litigation. The Court of Appeals correctly held the amendment to the Master Deed does not retroactively apply to the Developer, and this Court should therefore deny the petition for certiorari.

## Conclusion

The Court of Appeals properly decided this case, and the Homeowners and the Association have presented no grounds for this Court to grant certiorari. Accordingly, this Court should deny the petition for a writ of certiorari in its entirety and refuse to grant the improper request to vacate the Court of Appeals' opinion.

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Columbia, South Carolina

February 3, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

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Case No. 2012-CP-40-08512
Appellate Case No. 2016-002440

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

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., d/k/a Dietrich Metal Framing, Inc. n/k/a Clarkwestern Dietrich Building Systems LLC; Best Masonry and its successor in interest, OldCastle APG; Headwaters, Inc. d/b/a Best Masonry; and John Doe #1-10,..... Defendants,

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

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PROOF OF SERVICE

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I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the document(s) hereinbelow specified by mailing a copy of the same, as indicated below to the following address(es):

Document(s): Respondents' Return to the Petition for Writ of Certiorari

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February 3, 2017