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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Trial Court Judge

Case No. 2012-CP-40-8512
Appellant Case No. 2016-002440

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

vs.

DDC Construction, Inc.; Kapasi Glass Mart, Inc.; DMC Consolidated, Inc.; DMC Builders, Co., Inc., individually and d/b/a The Dinerstein Companies, DC Developers - Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; 31-W Insulation Company, Inc.; Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing Inc.; LTB Construction, Inc.; Martin Morales Jr. Painting & Drywall, LLC; Metal Construction Materials, Inc.; Southwest Ironworks, Inc.; The Clerkley/Watkins Group, LP; Tindall Corporation; Triad Pest Control, Inc.; Wyman Acoustics LLC; Alenco Holding Corporation, Alenco Window GA, LLC, New Alenco Window, Ltd.; AWC Holding Company; Crosby Window, Inc., f/k/a/ Action WinDoor Technology, Inc.; Geo-Systems Design & Testing, Inc.; HGE Consulting, Inc.; Maintenance Builders Supply, Ltd.; SCA Engineers, Inc.; Sinclair & Associates, Inc.; Faultless Hardware, individually and d/b/a Pamex Inc.; T & M Concrete, Inc.; Loveless Commercial Contracting, Inc.; Economy Waterproofing, Inc.; BMC West Corporation; Highway One Construction, Inc.; J.I. Windows LLC; Dietrich Industries, Inc., a/k/a Dietrich Metal Framing, Inc. n/k/a Clarkwestern Dietrich Building Systems LLC; Best Masonry and its successor in interest, OldCastle APG; Headwaters, Inc. d/b/a Best Masonry; and John Doe #1-10, Defendants,

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

PETITIONERS' AMENDED REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners submit this Reply in further support of their Petition for Writ of Certiorari and in response to Respondents' ("Developer") Amended Return filed February 8, 2017.[1]

SUMMARY OF ARGUMENT

This Court should grant certiorari because the Court of Appeals' decision is wrong, and if left uncorrected, the decision will: (a) nullify well-established South Carolina precedent; (b) abrogate long-standing policies protecting South Carolina homeowners; (c) advance bad law with draconian results; and (d) create chaos among our courts.

Rather than address the merits of the novel and first impression issues presented (such as whether a developer's unilateral insertion of developer-favoring provisions in a Master Deed while an Association is under the control of the developer constitutes breach of fiduciary duty; and whether an Association's Amendment removing these developer-favoring provisions retroactively applies to the developer), Developer focuses on non-existent preservation issues. (Am. Return, pp. 8, n. 3, 9, 15).

Further, in light of the Court of Appeals' decision containing multiple factual and legal errors (such as failing to separately analyze Association waiver; failing to read related contractual provisions together; failing to zealously scrutinize oppressive provisions; failing to construe ambiguities against the drafter; and failing to recognize any Master Deed available at purchase was unfinalized); Developer's conclusory assertion that these errors are not worthy of certiorari falls flat. (Am. Return, p. 9).

As will be shown herein, many of the Developer's own arguments contradict each other, are misleading, or some are obviously false.[2]

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[1] Developer's Amended Return removed references to settlement-related arguments.

[2] For example, Developer sets forth Article XXXV's Subsection A after Subsection D in its Return in an obvious attempt to camouflage the fact that "Bound Parties" are not referenced in Subsection

ARGUMENT

I. Petitioners' Points Are Properly Preserved

Developer portrays this Petition as entirely "unpreserved"; yet addresses only two purportedly "unpreserved" issues: (1) fiduciary duty; and (2) Association waiver applicability. (Am. Return, pp. 8, n. 3, 9, 15). Because Developer limits its preservation arguments to these two issues, Petitioners address only the preservation of these issues in detail. *See, e.g., Glasscock, Inc. v. U.S. Fid. & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (An issue is deemed abandoned and will not be considered if the argument is raised but not supported).

The record reflects: (1) Petitioners raised both fiduciary duty and Association waiver to the Court of Appeals; (2) the Court of Appeals addressed both fiduciary duty and Association waiver in finding (*albeit* erroneously) the waivers enforceable; and thus, (3) both issues are properly preserved for this Court's review. *Kleckley v. Nw. Nat. Cas. Co.,* 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) ("An issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari.") (emphasis added) *citing, Anonymous (M-150-90) v. State Bd. of Med. Examiners,* 329 S.C. 371, 375, 496 S.E.2d 17, 18-19 (1998) (finding a preservation issue unpreserved because this issue was not addressed by the lower court and not raised in Petition for Rehearing). Because both these criteria were satisfied, both these issues are preserved.

A. Petitioners Raised Fiduciary Duty and Association Waiver

D. (Am. Return, pp. 4, 9-10). This is compounded by Developer's misrepresentation, also at page nine, that the Trial Court did not consider this issue when, in fact, the Trial Court ordered: " ... and the language of the 'jury trial' part of the waiver, itself, makes no reference to the POA." (R., p. 50) (emphasis added). Similarly, Developer's representation that the Master Deed does not contain liability disclaimers at page 12 is false. (Master Deed, R. p. 911-12) (including disclaimers limiting Developer's responsibility, waiving all express and implied warranties, and precluding monetary damages.)

Petitioners raised their fiduciary duty and Association waiver arguments throughout at each stage of this litigation.[3] Beginning with the Trial Court, Petitioners maintained: (1) Developer violated its fiduciary obligations by unilaterally inserting anti-suit provisions into an adhesive Master Deed and acting in its interest as opposed to Petitioners' interest;[4] and (2) the Master Deed's "waiver provisions do not apply to the Association".[5] On appeal, Petitioners continued to raise these arguments in their initial briefing, through supplemental authority,[6] during oral argument,

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[3] *See,* Rule 242, SCACR; Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002) (noting the prerequisites for preserving an issue for Supreme Court consideration are: (1) raising the issue in arguments to the Court of Appeals; and (2) raising the issue in the Petition for Rehearing before the Court of Appeals); *see also Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant's arguments."); *Eubank v. Eubank,* 347 S.C. 367, 374, n. 2, 555 S.E.2d 413, 417 (Ct. App. 2001) (finding the statement of issue, read with the argument, sufficiently raised the issue).

[4] During the June 2014 Motion Hearing before the Trial Court, for example, Petitioners stated:

> I would [call to] the Court's attention the fact that … at the time the grantor inserted these anti-suit clauses into the master deed, that was a clear violation of the grantor's fiduciary duty to this ensuing neighborhood, both under the *Dunes West* case and under the *Goddard* case … [At inception], they owed a fiduciary duty [not to value their] own rights … over that of the homeowners and the neighborhood. By restricting the homeowners and the association from the ability to hold the developer accountable was a breach of that fiduciary duty …

(R. p. 1303) (emphasis added). The Trial Court agreed. (R. p. 46) ("Here, [Petitioners] clearly had no choice or input as to any aspect of the pre-amended Master Deed … Rather, the terms of the Master Deed were unilaterally imposed on [the Association]")

[5] It is because of this argument that the Trial Court found "the language of the 'jury trial' part of the waiver, itself, makes no reference to the [Association]." (R. p. 50) (emphasis added).

[6] Petitioners submitted supplemental authority to the Court of Appeals, prior to oral argument, further clarifying a developer's fiduciary obligations to the property regimes they create. This included an Order in *Walbeck versus The I'On Company, LLC*, wherein the Honorable Stephanie McDonald recognized a developer's overarching fiduciary duty to place regime interests over its own interests. (App. C, p. 29(a), n. 18) (a developer's "inherent conflict of interest creates a *high threshold* for the developer to act in the best interests of both his company and the ward.") (hereinafter "I'On Order"). The I'On Order cites to a wealth of South Carolina Supreme Court precedent relating to fiduciary relationships, all of which the Court of Appeals decision undermines.

and again, in their Petition for Rehearing:[7]

> Statement of Issues on Appeal … Whether the Circuit Court correctly determined that the subject waiver provisions are unenforceable and unconscionable based upon the facts and circumstances of this case.

(F. Brief, p. 1) (emphasis added).

> The waivers inserted by [the Developer] are unenforceable. The purported waivers … were not entered into knowingly and voluntarily by [Petitioners]. The waivers are also unenforceable due to their unconscionable and ambiguous terms, and the result of which was a breach of the Developer's duty.

(F. Brief, p. 14) (emphasis added).

> 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 [Developer] that amounted to a breach of the [Developer's] fiduciary duty.

(F. Brief, p. 20-21) (emphasis added);[8] *see also* Petition, App. G, pp. 126-29(a).

> 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 [of the Association] 'is of no moment here' … like the developer-controlled Board in *Magnolia*, Developers control over [the Association's] Board prohibited Petitioners from having any control of when the alleged waivers were inserted in the Master Deed.

(F. Brief, p. 32) (emphasis added); *see also* Petition, App. G, pp. 112(a), 118-22(a).

> [Petitioners] lacked both the voluntary capacity and the knowledge necessary to understand that its interests in the common elements were at risk – the [Petitioners] did not know: (a) the [Developer] would ultimately vest defective common elements; and (b) the [Developer] would fail to properly fund the repair of the same. . .To hold otherwise would allow [Developer] to employ the waiver doctrine as a means to unfairly profit from their breach of the contractual

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[7] Developer concedes these issues were raised in the Petition for Rehearing. (Am. Return, pp. 9, 15).

[8] Citing *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 257, 259-60, 562 S.E.2d 633, 637-638 (2002) (acknowledging the fiduciary relationship between a developer and the property regime it develops); *Goddard v. Fairways Dev. Gen. P'ship,* 310 S.C. 408, 415, 426 S.E.2d 828, 832 (Ct. App. 1993) (finding a corollary between promoters of a corporation and developers of a neighborhood and recognizing that, in both instances, a fiduciary duty exists, and thus, developers are bound to act in good faith and in the best interest of the regime it develops).

> obligations and fiduciary duties owed to the [Association] and its members.

(F. Brief, pp. 32-33) (emphasis added).[9]

> South Carolina's policy requires developers, such as [Developer], 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] clearly acted in its interest and against the well-established policies of this State which required [Developer] to act in the best interest of The Gates community.

(F. Brief, p. 45) (emphasis added).[10]

As demonstrated by the foregoing, Petitioners raised "their numerous fiduciary arguments" as well as "Association waiver applicability" well before their Petition for Rehearing. (Am. Return, pp. 8, n. 3, 9, 15). Further, each time raised, Petitioners cited facts and authority showing: (a) Developer inserted ambiguous and unconscionable waiver provisions which are unenforceable as to both the Association and the Homeowners; (b) Developer controlled all circumstances such that the Association and Homeowners had no choice; (c) Developer utilized this control to take unfair advantage of the Association and Homeowners by stacking the deck against them; (d) this unfair advantage amounts to a breach of Developer's fiduciary duties; and (e) because of the forgoing circumstances and precedent, the transactions at issue here require a higher threshold of scrutiny. As such, these issues are properly before this Court.

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[9] *Citing Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344345 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. . .[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.").

[10] *Citing Simpson v. MSA of Myrtle Beach, Inc.,* 373 S.C. 14, 29-30, 644 S.E.2d 663, 671 (2007) ("The general rule is that courts will not enforce a contract which is violative of public policy, statutory law or provisions of the Constitution"); *Concerned Dunes W. Residents, Inc*, 349 S.C. at 256-60, 562 S.E.2d at 636-38; *Goddard,* 310 S.C. at 414-17, 426 S.E.2d at 832-33.

B. The Court of Appeals Addressed Fiduciary Duty and Association Waiver Applicability

Not only did Petitioners properly raise their fiduciary and association waiver-related arguments, the Court of Appeals addressed these arguments as it mistakenly defined "Homeowners" as a collective reference to both the Association and the class of Gates Homeowners, and then proceeded to analyze every issue as if these two different parties were one in and of the same:

> This matter comes before the Court after the Circuit Court denied [Developers] motion for nonjury trial and to strike the class action allegations of [Homeowners] and [the Association] (collectively "Homeowners"). (App. F, pp. 90-91(a)) (emphasis added);
>
> The circuit court found Homeowners should not be bound by the waivers in the Master Deed because the [Association] was controlled by the Developer at its creation, and thus, Homeowners had no way to voluntarily relinquish their rights. We disagree. (App. F, p. 104(a))(emphasis added);
>
> Because we find the Homeowners knowingly and voluntarily waived these rights, and these rights were conspicuously and unambiguously[11] set forth in the Master Deed, we reverse the Circuit Court and find the waivers are enforceable. (App. F, p. 105(a))(emphasis added).

This collective way in which the Court of Appeals addressed the issues is one of the primary reasons why Petitioners seek this Court's review because the Court of Appeals should have: (a) separately analyzed the issue of Association waiver; (b) scrutinized all waiver-related provisions (and, thereafter, realized all these provisions are related and must be read together); and (c) considered the public policy and the overwhelming weight of South Carolina precedent geared toward protecting homeowners and property owner associations. The fact that the Court of Appeals failed to follow precedent does not mean the Court did not address these issues for purposes of

[11] While the incorrect result, Petitioners note the Court of Appeals "unambiguous" finding addresses their argument that the Association was not part of the jury trial waiver included in the Master Deed.

preservation. The Court simply erred in how it addressed these issues; the Court failed to correct this error when again alerted, and thus, these issues (and all related issues) are preserved for review.[12]

C. All Grounds in the Petition for Certiorari were Properly Preserved

Developer's unsupported assertion that Petitioners' "eleven questions" presented were not raised to the Court of Appeals until the Petition for Rehearing (Am. Return, p. 8, n. 3) is not correct; The Questions Presented were briefed in the following locations: Question Presented I (F. Brief, pp. 20-21, 33, 38-47); Question Presented II (F. Brief, pp. 20-21, 30-33, 44-45); Question Presented III-VI (F. Brief, pp. 20-21, 44-45); Questions Presented VII-VIII (F. Brief, pp. 30-33, 38-47); Question Presented IX (F. Brief, pp. 25-29); Question Presented X (F. Brief, pp. 21-23, 29-30); Question Presented XI (F. Brief, pp. 37-45). Rephrasing the Questions Presented for purpose of clarity does not negate the issue preservation.

II. There are Several "Special and Important" Reasons Establishing Why Certiorari is Warranted Here

Developer relies upon procedural posturing and obfuscating as it cannot deny the existence of special and important reasons necessitating this Court's review of this matter. Rule 242(b), SCACR.

A. The Court of Appeals' Opinion is Contrary to South Carolina Law and Public Policy

The Court of Appeals' Opinion offends the well-established law and public policies of this

[12] *See, e.g.,* 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. A question presented will be deemed to include every subsidiary question fairly comprised therein.") (emphasis added).

State geared toward: (1) protecting property owners' associations and their homeowner members; (2) preventing fiduciaries from taking unfair advantage of their wards; and (3) limiting the effect of onerous and one-sided provisions in adhesive contracts. Rule 242(b)(3), SCACR (noting a writ of certiorari should be granted "[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.").

For example, this Court recognizes: (a) the fiduciary relationship between a Developer and its ensuing property regimes; (b) a Developer cannot take advantage of this "special relationship" by not acting in good faith and with the interests of the regime in mind; and thus, (c) transactions occurring between a Developer and its ensuing property regime require a higher level of scrutiny. *Concerned Dunes W. Residents, Inc.*, 349 S.C. at 257, 562 S.E.2d at 637 (acknowledging the fiduciary relationship existing between developers and the property regimes they develop); *Duncan v. Brookview House Inc.,* 262 S.C. 449, 456, 205 S.E.2d 707, 710 (1974) ("The promoters of a corporation occupy a relation of trust and confidence towards the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries."); *Wilson v. Wilson*, 117 S.C. 454, 117 S.E. 330, 331 (1920) ("[W]herever a fiduciary relation exists between two persons and a business transaction occurs between them, as a result of which the superior party obtains a possible benefit, equity raises a presumption against its validity, throwing the burden upon him to prove his good faith.");[13] As stated in *Island Car Wash, Inc. v. Norris*:

> [I]t is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. It is a doctrine repeatedly announced by the courts. . .[courts] will

[13] *See also, Magnolia N. Prop. Owners' Ass'n,* 397 S.C. at 375-376, 725 S.E.2d at 127 (recognizing the developer-regime fiduciary relationship); *Wogan v. Kunze,* 366 S.C. 583, 605, 623 S.E.2d 107, 119 (Ct. App. 2005) *aff'd as modified,* 379 SC 581, 666, S.E.2d 901 (2008); *Goddard,* 310 S.C. at 414-415, 426 S.E.2d at 832-822.

> scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage. . .)

292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987).[14] The Court of Appeals' decision conflicts with this precedent. *Id.*

This Court also previously recognized: (a) the unequal bargaining positions between a homeowner and a Developer; (b) the disfavor of non-negotiated warranty disclaimers; and (c) the considerable skepticism required in reviewing adhesive transactions occurring between a sophisticated party and innocent consumer. *See, e.g., Sapp v. Ford Motor Co.*, 386 S.C. 143, 148, 687 S.E.2d 47, 49-50 (2009) (acknowledging "courts have recognized that the transaction between a builder and a buyer for the sale of a home largely involves inherently unequal bargaining power between the parties" and noting the "long line of South Carolina cases directed toward protecting consumers only in the residential home building context" as well as "cases from around the country expanding protections afforded to homebuyers"); *Kirkman v. Parex, Inc.*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006) (disclaimers of the implied warranty of habitability are disfavored); *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670 ("We … proceed to analyze this contract between a consumer and automobile retailer with 'considerable skepticism.'"); *Beachwalk Villas Condo Ass'n, Inc. v. Martin,* 305 S.C. 144, 146, 406 S.E.2d 372, 374 (1991) ("We find that extension of the holding in *Kennedy* to architects is a logical expansion of our law to provide protection for homebuyers. . ."); *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989) ("We have therefore taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.");

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[14] Developer's Return erroneously limits the developer fiduciary obligation to transferring "common areas that are in good repair" (Am. Return, p. 15); and ignores the zealous scrutiny and burden shifting to which these transactions are subject. *See notes 6 and 8.*

Rutledge v. Dodenhoff, 254 S.C. 407, 414, 175 S.E.2d 792, 795 (1970) (finding the law of *caveat emptor*, traditionally applied to defeat implied warranties in the sale of real estate, does not govern the sale of a new house due, in part, to the disparity of bargaining positions between the seller and purchaser).[15] The Court of Appeals' decision conflicts with this precedent.

Additionally, this Court previously recognized: (a) the need to review related contractual provisions together;[16] (b) the need to construe ambiguous contractual provisions against the drafter;[17] and (c) the need to reject unconscionable provisions.[18] *Smith v. D.R. Horton, Inc.* 417 S.C. 42, 48-49, 790 S.E.2d 1, 4 (2016) (rejecting D.R. Horton's interpretation of the *Prima Paint* doctrine, finding the entire Warranties and Dispute Resolution Section included in a D.R. Horton purchase contract must be construed "as a whole," and finding the Section was unconscionable,

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[15] *See also, Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 296 (4th Cir. 1989) ("When a manufacturer is aware that its product is inherently defective, but the buyer has no notice of [or] ability to detect the problem, there is perforce a substantial disparity in the parties' relative bargaining power. . .In such a case, the presumption is that the buyer's acceptance of limitations on his contractual remedies—including of course any warranty disclaimers—was neither 'knowing' nor 'voluntary,' thereby rendering such limitations unconscionable and ineffective") (internal citations omitted).

[16] Developer's Return erroneously claims Petitioners failed to cite authority supporting this proposition. (Am. Return, p. 11). Petitioners cited *Brady vs. Brady*, *Smith vs. D.R. Horton*, as well as the fundamental contract principle that provisions involving the same subject matter must be construed together. (Cert. Pet., pp. 17-18).

[17]The Court of Appeals documented the ambiguity existing in the Master Deed's jury trial waiver provision when it held: "the Master Deed contemplated litigation outside of the arbitration context by prohibiting either an owner or grantor from seeking a jury trial. . ." (App. F., p. 106(a)) (emphasis added). The Court acknowledged the Association is not referenced in the jury trial waiver; yet, the Court did not construe this ambiguity against the Developer. Developer also acknowledged the Association is not referenced in this provision in its Return to the Petition for Rehearing which, for the first time, asserted the Association is acting purely as a "legal representative." (App. H, p. 153(a)).

[18] One such unconscionable provision is Article XXXV's 75 percent vote prerequisite to litigation by the Association, but not the Developer. Developer's recent futile attempt to explain away this provision (not previously argued) does not negate that this provision only restricts the Association, and therefore, is lacking in mutuality. (Am. Return, p. 13, n. 4).

unseverable and unenforceable).[19] The Court of Appeals' decision conflicts with this precedent.

B. This Appeal Involves Novel Questions of Law

The second "special and important" reason is that this appeal involves novel questions of law. Rule 242(b)(1), SCACR (noting a writ of certiorari should be granted "[w]here there are novel questions of law."). The answers to these novel questions, such as whether a Master Deed amendment can apply retroactively[20] and whether a developer's unilateral insertion of developer-favoring provisions in a Master Deed, while an Association is under the control of the developer constitutes a breach of fiduciary duty, have far-reaching implications directly impacting a multitude of cases currently pending before our courts, as well as thousands of South Carolina homeowners and their developer-created property regimes. The Court of Appeals' apparent extension of the *Prima Paint* doctrine outside of the Federal Arbitration Act context also presents a novel issue.[21] These issues were briefed in the Petition for Certiorari and elsewhere in the Reply

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[19] *See also, e.g.,* 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.); *Myrtle Beach Lumber Co., Inc. v. Willoughby,* 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (courts must construe ambiguous provisions in favor of [the] non-drafting party by resolving "any ambiguity in a contract, doubt, or uncertainty as to" contractual provisions against the party who drafted the agreement); *Brady v. Brady,* 222 S.C. 242, 246-47, 72 S.E.2d 193, 195 (1952) ("It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter. . . Different provisions dealing with the same subject matter are to be read together.").

[20] The Court of Appeals' Opinion relies on a North Carolina case to support its retroactive analysis because it claims no South Carolina court has addressed this exact issue. (App. F, p. 101a-102a).

[21] This precedential conflict created by the Court of Appeals must be corrected or it will result in this Court hearing the same arguments raised by Petitioners given recent Circuit Court decisions, such as the Honorable Stephanie McDonald's I'On Order, and the Honorable Roger Young's Order in *656 Owners Association, et. al. v. WCB, LLC, et. al.*, which found:

> [A] developer in control of an association may not make decisions which benefit its own interests at the expense of the association and its members. . .The developer's interest in self-preservation, combined with its drive to make a profit, often draw judicial scrutiny on conflict situations having the appearance of self-dealings.

Brief.

III. Many of the Developer's Arguments Make No Sense

Developer's flawed arguments further highlight why certiorari is required.

A. The Second Amendment is a Corporate Act and the Association Has Power to Act on Its Own Behalf

Developer's only contention as to why its challenge to the Second Amendment is not statutorily prohibited is that the Amendment is not a "corporate act." Yet, Developer fails to cite any authority or explain why a corporation's amendment does not constitute a corporate act.

The Second Amendment is patently a corporate act. Although the vote threshold is set forth in the Master Deed, (R. p. 940), the provisions for holding the vote are set forth in the Bylaws. The Bylaws provide for proposed amendments to be "transmitted to the President …who shall thereupon call a special joint meeting of the members of the Board and the membership … and it shall be the duty of the Secretary to give to each member written or printed notice …" (R. p. 1037, para. 17 (emphasis added). Special Meetings are held when called by the President, are presided over by the President, and compliance with the "South Carolina Nonprofit Corporation Act" is expressly referenced. (R. p. 1020-21, paras. 3(b), 3(d) (emphasis added).[22] Proxies may be utilized in the amendment vote provided they are "delivered to the Secretary of the Association," and thereafter, the amendment must be "certified by the Secretary of the Association" … (R. p 1038, para. 17 (c)-(d)) (emphasis added). Additionally, the Amendment itself, R. p.1261, recites that it

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(I'On Order, App. C., pp. 30(a))(citing, *e.g., Dunes West, Duncan, Goddard, Island Car Wash, infra).*

[22] The By-Laws of the Association also indicate: (a) "All Unit Owners are Members of the Association …; (b) that "the affirmative vote of the co-owner of a majority of the units represented at any duly called members' meeting at which a quorum is present shall be binding upon the members"; and (c) "Amendments may be proposed by the Board … or by members of the Association pursuant to the South Carolina Nonprofit Corporation Act." (R. p. 1019-20, 1037) (emphasis added).

is a corporate act: "the [Association] does hereby exercise its right under the Master Deed to amend the Master Deed and By-Laws …".[23]

Developer also ignores the very provisions it inserted in the Master Deed and By-Laws delineating the Association's broad powers[24] and the Association's ability to amend the regime's governing documents. *See* (R. p. 925, 927, 940, 947, 1019-21, 1037-38). Developer's "the Association lacks standing" assertion is just as misplaced as its corporate act argument, considering all the things the Association has the power to do and is responsible for doing under the terms of the Master Deed.[25]

The Second Amendment is a valid corporate act, the Association had the power and standing to cause it, and it is the Developer that lacks standing to challenge it.

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[23] *See also,* S.C. Code § 33-31-302 (authorizes non-profit corporations "to make and amend bylaws not inconsistent with its articles of incorporation or with the laws of this State for regulating and managing the affairs of the corporation."); S.C. Code § 33-31-302 ("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 …); S.C. Code § 33-31-304(a) (1994) ("Except as provided in subsection (b), the validity of a [nonprofit corporation's] action may not be challenged on the ground that the corporation lacks or lacked power to act."); Code § 33-31-304(b) (1994) (where a third party has not already acquired rights, a proceeding may be brought to challenge the nonprofit corporation's power to act, but only: (1) the Attorney General; (2) a director; or (3) a member or members in a derivative proceeding may bring the challenge) (emphasis added).

[24] The Developer both contradicts itself and violates its own preservation argument here. Developer's Return argues "the Association itself does not have the power to amend the Master Deed", when in the preceding paragraph, Developer admits it "has not argued the Homeowners or the Association lack the power to amend the Master Deed". (Am. Return, pp. 19-20) (emphasis added).

[25] *See,* (R. p. 928) ("The Grantor and the Association, through the Board of Directors, in keeping with its overall authority to control and regulate the Common Elements of the Regime …) (emphasis added); (R. p. 929) ("In addition to its authority to control and regulate activity and use of the General Common Elements, the Association also controls the activity and use of the Limited Common Elements …) (emphasis added); (R. p. 932) ("The Association, at its expense, shall be responsible for the maintenance, repair and replacement of all the General and Limited Common Elements …) (emphasis added); (R. pp. 935-36) ("The Association shall insure all Units and all General and Limited Common Elements …") (emphasis added).

B. The Master Deed Contains a Host of Disclaimers and Limitations

Developer maintains the "Master Deed does not contain 'liability waivers', 'damage waivers' or 'limitation[s] on liability or the right to bring a legal action,"[26] when the Master Deed is riddled with these types of disclaimers, (R. pp. 911-12, 947), and places a pre-litigation voting restriction on the Association as opposed to the Developer. (R. p. 947).

C. Subsection D is Not the Only Provision that is Relevant

Developer also claims "only the waiver provisions in the Master Deed are relevant"[27] when: (a) the Court of Appeals relied on the "preliminary" Master Deed's incorporation into Purchase Contracts and By-Laws (App. F, p. 104(a)); and (b) Developer's own interpretation of "the Waiver" (Subsection XXXV D) attempts to read Subsection A into Subsection D, while ignoring other related (and conflicting) waiver provisions incorporated by reference. *See* (Am. Return, pp. 4, 9-10).

D. There is No Evidence that the Developer Supplied the Completed Master Deed Prior to Purchase or Closing

Further, Developer admits the Court of Appeals charged the Homeowners with reading the Master Deed at purchase,[28] then later claims the Court charged the Homeowners with reading the Master Deed at closing.[29] This is an example of the Developer mischaracterizing the facts and the

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[26] (Am. Return, p. 12).

[27] (Am. Return, pp. 11) ("[O]nly the waiver provisions in the Master Deed are relevant") (emphasis added); (Dev. Reply Brief, p. 10) ("The Waiver is entirely distinct from the allegedly unconscionable warranty provisions … Master Deed XXXV(D) … The Waiver is a stand-alone provision in the contract …")(emphasis added); (App. F, pp. 104-06(a)) (considering Subsection D as a provision in its waiver enforceability and election not to arbitrate analyses despite acknowledging this Subsection is included in the "overarching" Article XXXV).

[28] (Am. Return, p. 10) ("Specifically, the Court of Appeals found … the Homeowners were charged with having read the waivers when they purchased their condominiums.") (emphasis added).

[29] (Am. Return, p. 14) ("[T]he Court of Appeals correctly held the Homeowners are each charged with having read the available, completed Master Deed at the time of closing.") (emphasis added).

Court of Appeals' Opinion in an attempt to obfuscate. Second, Developer's new focus on what occurred in "advance of closing" versus what occurred in "advance of purchase" [30] further evidences Petitioners' point – there is no evidence the Developer supplied either the completed Master Deed or the Bylaws to "all unit owners prior to purchasing their units," and thus, the Court of Appeals' decision is wrong.[31] Developer's new focus does not address the critical question of what the homeowners knew or did not know when they signed their purchase contracts prior to closing. The only Master Deed the Homeowners could be "charged with having read" "by signing purchase contracts" is a preliminary Master Deed which the Developer could amend at will, without notice, and which the Homeowners did not, and could not, negotiate, all while the purchase contracts provided that jury trials and class actions were only waived if the arbitration agreement was deemed invalid.

CONCLUSION

For all the foregoing reasons, this Court should overrule the Developer's opposition and grant Certiorari on all issues presented.

Respectfully submitted,
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[30] (App. F, p. 104(a)) (emphasis added).
[31] (Am. Return, pp. 14-15) (including ten references to what supposedly occurred "prior to closing" with no mention of what occurred prior to homeowners signing their purchase contracts).

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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Trial Court Judge

Case No. 2012-CP-40-8512
Appellant Case No. 2016-002440

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

vs.

DDC Construction, Inc.; Kapasi Glass Mart, Inc.; DMC Consolidated, Inc.; DMC Builders, Co., Inc., individually and d/b/a The Dinerstein Companies, DC Developers - Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; 31-W Insulation Company, Inc.; Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing Inc.; LTB Construction, Inc.; Martin Morales Jr. Painting & Drywall, LLC; Metal Construction Materials, Inc.; Southwest Ironworks, Inc.; The Clerkley/Watkins Group, LP; Tindall Corporation; Triad Pest Control, Inc.; Wyman Acoustics LLC; Alenco Holding Corporation, Alenco Window GA, LLC, New Alenco Window, Ltd.; AWC Holding Company; Crosby Window, Inc., f/k/a/ Action WinDoor Technology, Inc.; Geo-Systems Design & Testing, Inc.; HGE Consulting, Inc.; Maintenance Builders Supply, Ltd.; SCA Engineers, Inc.; Sinclair & Associates, Inc.; Faultless Hardware, individually and d/b/a Pamex Inc.; T & M Concrete, Inc.; Loveless Commercial Contracting, Inc.; Economy Waterproofing, Inc.; BMC West Corporation; Highway One Construction, Inc.; J.I. Windows LLC; Dietrich Industries, Inc., a/k/a Dietrich Metal Framing, Inc. n/k/a Clarkwestern Dietrich Building Systems LLC; Best Masonry and its successor in interest, OldCastle APG; Headwaters, Inc. d/b/a Best Masonry; and John Doe #1-10, Defendants,

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

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March 16, 2017
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I, Justin O'Toole Lucey, Esquire, hereby certify that on March 16, 2017, I served a copy of the ***Petitioners' Amended Reply In Support Of Petition for Writ of Certiorari*** on the following counsel, via the United States Mail, postage pre-paid, and addressed as follows:

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