

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

J. Michael Baxley, Circuit Court Judge

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Appellate Case No. 2015-002131

Circuit Court Case No. 2009-CP-10-6746

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Long Grove at Seaside Farms, LLC; The Beach Company; Gulfstream Construction  
Company, Inc., Respondents,

v.

Long Grove Property Owners' Association, Inc.; Vista Realty Partners, LLC; and Long Grove  
Vista, LLC;

Of Whom Long Grove Property Owners' Association is Petitioner.

Long Grove Property Owners' Association, Inc., Third-Party Plaintiffs,

v.

James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C; Sam Mayo d/b/a  
SCM Construction, Inc.; Essex Engineering Corporation, Third Party Defendants;

Of Whom James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban  
Design, P.C is Respondent.

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**BRIEF OF PETITIONER**

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George E. Mullen  
Lauren Mullen Thomas  
Mullen Wylie, LLC  
P.O. Box 5969  
Hilton Head Island, SC 29938  
(843) 785-6969  
Attorneys for Petitioner

**TABLE OF CONTENTS**

Table of Authorities ..... *iii*

Questions Presented ..... 1

1. DID THE COURT ERR BY HOLDING THE GENERAL CONTRACTOR AND ARCHITECT CAN WAIVE LIABILITY FOR VIOLATIONS OF STATUTORILY ENACTED BUILDING CODES?

2. DID THE COURT ERR BY FAILING TO APPLY S.C. CODE § 32-2-10 WHICH PROHIBITS EXCULPATORY CONTRACTS FOR CONTRACTORS AND ARCHITECTS IN AGREEMENTS RELATED TO CONSTRUCTION?

3. DID THE COURT ERR BY HOLDING THE GENERAL CONTRACTOR AND ARCHITECT CAN DISCLAIM THEIR IMPLIED WARRANTIES OF WORKMANSHIP AND SUFFICIENCY OF PLANS, EVEN THOUGH SUCH WARRANTIES ARISE FROM INDEPENDENT LEGAL DUTIES IMPOSED BY LAW?

4. DID THE COURT ERR IN HOLDING THE PROPERTY OWNERS ASSOCIATION IS BOUND BY THE DISCLAIMER ENTERED INTO BY ITS PREDECESSOR IN TITLE, EVEN THOUGH THE MANIFESTATION OF DAMAGES DID NOT OCCUR UNTIL THE POA’S OWNERSHIP?

Statement of the Case ..... 1

Arguments ..... 5

I. THE COURT ERRED BY HOLDING THAT THE GENERAL CONTRACTOR AND ARCHITECT CAN WAIVE LIABILITY FOR VIOLATIONS OF THEIR STATUTORY OBLIGATIONS TO COMPLY WITH BUILDING CODES ..... 6

    A. Gulfstream And JHP Owed A Duty Of Care To the Long Grove Homeowners And Property Owners Association To Design And Build The Project In Accordance With Building Codes And Industry Standards ..... 7

    B. General Contractors And Architects Cannot Waive Liability For Non-delegable Duties Imposed By Statutory, Regulatory And Common Law ..... 8

    C. South Carolina Has A Clear And Explicit Public Policy To Protect The Public From Poor Design And Construction Defects ..... 12

D.	The Court Erred By Failing To Recognize That The Release Is An Exculpatory Contract In Violation Of Public Policy.....	15
II.	THE COURT ERRED BY FAILING TO APPLY S.C. CODE § 32-2-10, WHICH PROHIBITS EXCULPATORY CONTRACTS FOR CONTRACTORS AND ARCHITECTS IN AGREEMENTS RELATED TO CONSTRUCTION.....	19
III.	THE COURT ERRED BY FAILING TO RECOGNIZE THAT THE IMPLIED WARRANTIES OF WORKMANSHIP AND SUFFICIENCY OF PLANS ARISE FROM INDEPENDENT LEGAL DUTIES AND THUS CANNOT BE DISCLAIMED OR WAIVED.....	23
IV.	THE COURT ERRED IN HOLDING THE PROPERTY OWNERS ASSOCIATION IS BOUND BY THE DISCLAIMER ENTERED INTO BY ITS PREDECESSOR IN TITLE .....	28
A.	The Causes Of Action For Negligence And Implied Warranty Of Workmanship Had Not Yet Accrued And Thus Could Not Be Disclaimed By the POA’s Predecessor In Interest .....	28
B.	The Property Owners Association And Subsequent Homeowners Were Not Parties To The Transaction At Issue And Thus Are Not Bound To The Release And Disclaimer Contained Therein.....	29
	Conclusion .....	30

## TABLE OF AUTHORITIES

### CASES

<u>Amann v. City of Tacoma</u> , 16 P.2d 601, 606 (Wash. 1932).....	10
<u>Atlantic Nat. Bank of Jacksonville v. Modular Age, Inc.</u> , 363 So. 2d 1152 (Fla. 1st Dist. App. 1978) .....	10
<u>Beachwalk Villas Condominium Assoc., Inc. vs. Martin</u> , 305 S.C. 144; 406 S.E.2d 372 (1991).....	26, 30
<u>Bicknell v. Richard M. Hearn Roofing C., Inc.</u> , 318 S.E.2d 729 (Ga. Ct. App. 1984) .....	21
<u>Cain v. Banka</u> , 932 So.2d 575, 31 Fla. L. Weekly D1780 (Fla.App. 5 Distr. 2006) .....	16
<u>Carson v. Vance</u> , 326 S.C. 543, 485 S.E.2d 126 (Ct. App. 1997) .....	9
<u>City of Dillingham v. CH2M Hill Northwest, Inc.</u> , 873 P.2d 1271 (Alaska 1994) .....	21
<u>Dow v. Holly Mfg. Co.</u> , 321 P.2d 736. (Cal. 1958).....	10
<u>Downey v. Chutehall Const. Co., Ltd.</u> , 42 N.E.3d 1194 (Mass.App.Ct. 2016).....	18
<u>Evard v. S. California Edison</u> , 153 Cal. App. 4th 137 (2007) .....	10
<u>Fisher v. Sterns</u> , 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003).....	16
<u>Frazer v. City of Albany</u> , 265 S.E.2d 581 (Ga. 1980) .....	21
<u>Gardenvillage Realty Corp. v. Russo</u> , 366 A.2d 101 (Md. App. 1976).....	10, 11
<u>Garner v. Houck</u> , 435 S.E.2d 847 (1993) .....	22
<u>Gladden v. Boykin, et. al.</u> , 402 S.C. 140, 739 S.E.2d 882 (2013) .....	16, 17
<u>Gordon v. Drews</u> , 595 S.E.2d 864 (S.C. App. 2004).....	29
<u>Hill v. Polar Pantries</u> , 219 S.C. 263, 64 S.E.2d 885 (1951) .....	24, 25
<u>Holt v. O'Brien Imports of Fort Myers, Inc.</u> , 862 So.2d 87, 28 Fla. L. Weekly D2664 (Fla.App. 2 Dist. 2003) .....	18
<u>Hubert v. Aitken</u> , 15 Daly, 237, 2 N.Y Supp 711 (1888) .....	10
<u>Johnson v. Salem Title Co.</u> , 425 P.2d 519 (Or. 1967) .....	10
<u>Jones v. Centex Homes</u> , 967 N.E.2d 1199 (Ohio 2012) .....	27

<u>Kennedy Development Co., Inc. v. Camp</u> , 719 S.E.2d 442 (Ga. 2011) .....	21, 22 23
<u>Kennedy v. Columbia Lumber &amp; Manufacturing Co., Inc.</u> , 299 S.C. 335, 384 S.E.2d 730 (1989).....	7, 8, 12, 24, 25, 28, 30, 31
<u>Kirkman v. Parex, Inc.</u> , 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006).....	24
<u>Kitchens of the Oceans, Inc. v. McGladrey &amp; Pullen, LLP</u> , 832 So.2d 270, 27 Fla. L. Weekly D2664 (Fla.App. 4 Dist. 2002).....	17
<u>Lane v. Trenholm Bldg. Co.</u> , 267 S.C. 497, 229 S.E.2d 728 (1976).....	19, 24, 30
<u>Lanier At McEver, L.P. v. Planners &amp; Engineers Collaborative, Inc.</u> , 663 S.E.2d 240 (Ga. 2008) .....	21
<u>Lempke v. Dagenais</u> , 547 A.2d 290 (N.H. 1988) .....	26
<u>Loewe v. Seagate Homes, Inc.</u> , 987 So.2d 758, 33 Fla. L. Weekly D1748 (Fla.App. 5 Dist. 2008).....	17, 18
<u>Lucier v. Williams</u> , 841 A.2d 907 (N.J. Super. App. Div. 2004) .....	17
<u>McCune v. Myrtle Beach Indoor Shooting Range, Inc.</u> , 364 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005) .....	16
<u>Murphy v. North American River Runners, Inc.</u> , 412 S.E. 2d. 504, 186 W.Va. 310 (W.Va. 1991) .....	18
<u>Murray v. Texas Co.</u> , 172 S.C. 399, 174 S.E. 231 (1934).....	27
<u>Nedrow v. Pruitt</u> , 336 S.C. 668, 521 SE 2d. 755 (S.C. 1999).....	9
<u>Newton’s Crest Homeowners’ Ass’n v. Camp</u> , 702 S.E.2d 41 (Ga. App. 2010).....	22
<u>Olson v. Molzen</u> , 558 S.W. 2d. 429 (Tenn. 1977).....	17
<u>Pride v. Southern Bell Tel. &amp; Tel. Co.</u> , 244 S.C. 615, 619, 138 S.E.2d 155, 157 (1964) .....	16, 17
<u>Queen’s Grant Villas Horizontal Property Regimes I-V v. Daniel Int’l Corp.</u> , 286 S.C. 555, 335 S.E.2d 365 (1985) .....	23
<u>R.J. Griffin &amp; Co. v. Beach Club II Homeowners Ass’n</u> , 384 F.3d 157 (4th Cir. 2004).....	25
<u>Russ v. Woodside Homes, Inc.</u> , 905 P.2d 901 (Utah App. 1995).....	27

<u>Schofield Interior Contractors, Inc. v. Standard Bldg. Co.</u> , 668 S.E.2d 316 (Ga. App. 2008) .....	26
<u>Schornberg v. Panorama Custom Home Builders, Inc.</u> , 972 So. 2d 243 (Fla. 2d Dist. App. 2007) .....	29
<u>Simmons v. Tuomey Regional Medical Center</u> , 341 S.C. 32, 533 S.E.2d 312 (2000).....	9
<u>Simpson v. MSA of Myrtle Beach, Inc.</u> , 373 S.C. 14, 644 S.E.2d 663 (2007) .....	16
<u>Speight v. Walters Dev. Co., Ltd.</u> , 744 N.W.2d 108, 113 (Iowa 2008).....	26
<u>Standard Fire Ins. v. Spectrum</u> , 141 Cal App 4 <sup>th</sup> 1117 (2006) .....	29
<u>Stofer v. Shapell</u> , 233 Cal. App. 4 <sup>th</sup> 176 (2015).....	29
<u>Terlinde v. Neely</u> , 275 S.C. 395, 271 S.E.2d 768 (1980) .....	8, 19, 25, 28, 30
<u>Tommy L. Griffin Plumbing &amp; Heating Co. vs. Jordon, Jones &amp; Goulding, Inc.</u> , 320 S.C. 49; 463 S.E.2d 85 (1995) .....	7, 26
<u>VoiceStream Wireless Corp. v. U.S. Communications, Inc.</u> , 912 So.2d 34, 38 (Fla. 4th DCA 2005).....	18
<u>White v. J. M. Brown Amusement Co.</u> , 360 S.C. 366, 371, 601, S.E.2d 342, 345 (2004) .....	16

**STATUTES AND REGULATIONS**

S.C. Code Ann. §6-9-5(2003) .....	7, 13
S.C. Code Ann. § 6-9-10(2003).....	13
S.C. Code Ann. § 6-9-80(2003).....	13
S.C. Code Ann. §32-2-10.....	5, 13, 19, 20, 22, 23
S.C. CODE ANN. §§ 40-1-10 .....	14
S.C. CODE ANN. § 40-11-270 .....	11
S.C. CODE ANN. §§ 40-11-5 .....	14
S.C. CODE ANN. §§ 40-3-5 .....	14
S.C. CODE REG. 11-1 – 11-14 .....	11
OCGA §13-8-2(B) .....	20, 21

**OTHER AUTHORITIES**

1997 STANDARD BUILDING CODE .....12, 13

COUNTY OF CHARLESTON, S.C. ORDINANCES FOR BUILDINGS AND BUILDING  
REGULATIONS, Ch.4, Sect. 101.3 Intent .....10, 13

Restatement (Second) of Torts §424, at 411 (1965).....10

## **QUESTIONS PRESENTED**

1. DID THE COURT ERR BY HOLDING THE GENERAL CONTRACTOR AND ARCHITECT CAN WAIVE LIABILITY FOR VIOLATIONS OF STATUTORILY ENACTED BUILDING CODES?
2. DID THE COURT ERR BY FAILING TO APPLY S.C. CODE § 32-2-10 WHICH PROHIBITS EXCULPATORY CONTRACTS FOR CONTRACTORS AND ARCHITECTS IN AGREEMENTS RELATED TO CONSTRUCTION?
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## **STATEMENT OF THE CASE**

This case arises from an effort by a general contractor and architect to evade their legal obligations and ultimate responsibility for the defective and deficient design and construction of the Long Grove Horizontal Property Regime. The contractor and architect seek to circumvent and contravene statutorily imposed building codes and long established duties and standards set by public policy, relying on suspect language in a private contract between the original developer and the converter of the condominium project, in order to exculpate themselves from ultimate liability for their breach of duties owed to the general public and specifically the owners at Long Grove.

In 1999-2000, The Beach Company<sup>1</sup> developed the Long Grove Apartments, a 272 unit project in the Seaside Farms Subdivision in Mt. Pleasant, South Carolina. The project was designed by James, Harwick & Partners, Inc. (hereinafter “Architect” or “JHP”) and constructed by Gulfstream Construction Company, Inc. (hereinafter “Contractor” or “Gulfstream”), a subsidiary of The Beach Company.

After operating Long Grove as an apartment rental complex for four years, in 2004 The Beach Company elected to sell Long Grove to Vista Realty, Inc., which intended to convert the apartments into condominiums. As part of the negotiated terms for the sale, The Beach Company required Vista to purchase the property “as is”, “with all defects”; disclaiming all warranties; and agreeing to an assumption of liabilities and a release of claims, including unknown claims and damages which may arise in the future. Vista further agreed to place within the master deed of the new condominium regime notice of the disclaimer, release, and assumption of liabilities which Vista had executed and intended to bind the new Regime. It is this disclaimer and release which is the subject of this appeal.

In 2009, upon discovering numerous and severe construction deficiencies, The Long Grove Property Owners Association (POA) notified The Beach Company of the discovered latent defects, and provided The Beach Company the statutory right to cure prior to filing suit. The Beach Company responded by filing this declaratory judgment action on behalf of itself and Contractor.<sup>2</sup> The POA counterclaimed for defective construction, naming additional parties to the suit.

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<sup>1</sup> The Beach Company and its wholly owned subsidiary, Long Grove at Seaside Farms, LLC, were the developers of the Project, and are hereinafter jointly referred to as “The Beach Company”.

<sup>2</sup> This action was commenced on October 26, 2009

Judge Michael Baxley granted summary judgment to The Beach Company, the Architect and the Contractor based upon the disclaimer and release in the Vista contract.<sup>3</sup> The South Carolina Court of Appeals adopted Judge Baxley's Order in full as the opinion of the Court. (R. pp.1-41). On motion for rehearing, Appellant Long Grove abandoned its appeal as to the developer, The Beach Company, and elected to proceed only as against the Architect and Contractor for their negligence in violating numerous building codes and their breach of implied warranties of proper workmanship.<sup>4</sup>

Petitioner Long Grove challenges the validity and enforceability of the disclaimer and release as an exculpatory contract in violation of public policy. The release as executed by The Beach Company and Vista is included in the Long Grove Master Deed at Paragraph 24 on Page 43, in non-descript type, providing:

24. RELEASE.

Declarant purchased the property comprising the Regime from Long Grove at Seaside Farms, LLC ("Long Grove") on March 7, 2005. In the Sales Contract between Long Grove and Declarant, dated January 18, 2005, to convey the property comprising the Regime to Declarant, Declarant agreed to include the following provision regarding release in this Master Deed:

Save and excepting only the limited warranty of title hereinafter set forth and herein contained, the property comprising the Regime was conveyed to Declarant in the sale on March 7, 2005 noted above strictly on an "as is", "where is" and "with all defects" basis, without representation, warranty or covenant, express, implied or statutory, of any kind whatsoever, including, without limitation, representation, warranty or covenant as to condition (structural, environmental, mechanical or otherwise), past or present use, construction, development, lease performance, investment potential, tax ramifications or consequences, income, compliance with law, habitability, tenancies, merchantability, or fitness or suitability for any purpose, all of which are hereby

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<sup>3</sup> Summary judgment motion was heard on September 27, 2011; re-heard on April 30, 2012; and Order granting judgment in favor of The Beach Co. dated July 26, 2012.

<sup>4</sup> By Order dated September 18, 2015, the Court of Appeals denied Appellant's Petition for Rehearing. This Petition for Writ of Certiorari followed.

expressly disclaimed. Without limiting the generality of the foregoing, the Owners acknowledge that Declarant's predecessor in title, Long Grove and its Affiliates (as herein defined) have made no representation, warranties or covenants as to the compliance of the property comprising the Regime with any federal, state, or local statutes, laws, rules, or regulations or ordinances, including, without limitation, those pertaining to construction, rent control, building and health codes, land use (or permits issued in connection therewith), zoning, lead paint, urea formaldehyde foam insulation, asbestos, hazardous or toxic wastes or substances, pollutants, contaminants or other environmental matters.

The Owners acknowledge that the property comprising the Regime was originally developed and constructed by Long Grove and its Affiliates (as herein defined). Declarant purchased the property comprising the Regime for the purpose of converting such property into condominiums which it is or will be selling to the public. Declarant assumed all responsibility for identifying and correcting all defects or problems, if any, that existed, to ensure that the property comprising the Regime is properly constructed and suitable for use as condominiums in accordance with all applicable building regulations, codes, standards, and other applicable laws and requirements.

Accordingly, as part of the valuable consideration exchanged in the sale transaction on March 7, 2005 noted above, the receipt and sufficiency of which are hereby acknowledged, Declarant on behalf of itself and its heirs, representatives, successors, and assigns (including the Owners and all other successors-in-title to all or a portion of the property comprising the Regime), agreed to never sue and completely release Long Grove, The Beach Co., Gulfstream Construction Company, its affiliates, agents, officers, directors, employees, insurers, representatives, successors, assigns, and all other companies, partnerships, entities, or Persons (collectively, the "Affiliates") involved in the design, development and/or construction of the apartment buildings and apartments therein and all other improvements prior to March 7, 2005, for and from any and all claims of every kind whatsoever arising from or related to the development, design, construction, maintenance, alteration, or repair of the property comprising the Regime, including unknown and unforeseen claims that may now exist or that may arise in the future.

Declarant and the Owners acknowledge and agree that the assumption of liability and release of claims above is intended to be binding on all subsequent grantees of the property comprising the Regime, the grantees of any condominiums or other subdivisions of the property comprising the Regime, and the Owners. In order to give effect to this intention, these provisions are included in this Master Deed, and will also be included in any other conveyances outside the coverage of this Master Deed.

(Master Deed, p. 43, R. pp. 654-655). This is essentially the same language of disclaimer and release in the Sales Contract between The Beach Company and Vista. The "release" language is inconspicuous, has the same heading and same font as every other paragraph of the Master Deed, and is not accentuated or emphasized in any way.

Today the Long Grove POA residences suffer from severe construction defects including: (1) Lack of proper window, chimney, and roof flashings; (2) Failure of balcony waterproofing; (3) improper brick installation; (4) Decay of structural building components as a result of leaks at windows, decks, roofs; (5) Mold infestation; (6) Lack of code compliant fire protection; and (7) Lack of proper architectural details at balconies, roof, chimneys, attics, brick, and windows causing water intrusion and decay of building components. (Affidavit of Peter Sherratt, AIA, R. pp. 383-384). Due to the negligence and breach of warranties of Gulfstream and JHP, the POA and the individual unit owners now face millions of dollars in repairs.

### **ARGUMENTS**

The Court of Appeals adopted the Circuit Court Order without analysis and failed to discuss or analyze the critical issues presented on appeal and failed to cite supporting legal authority. Appellants sought certiorari in order to address the numerous novel issues presented, including:

- Can the contractor and architect disclaim liability for building code violations?
- Can a contractor disclaim the implied warranty of good and proper workmanship?
- Can an architect disclaim the implied warranty of the suitability of his plans and specifications?
- Does the Anti-Indemnity Statute (S.C. Code § 32-2-10) prohibit a contractor or architect from disclaiming liability for its statutorily imposed obligations and duties?
- Is the “disclaimer, release and assumption of liability” an exculpatory contract in

violation of public policy?

- Can the contractor and architect delegate responsibility for complying with the building code, thereby escaping liability?
- Is a subsequent purchaser bound by the disclaimer and release entered into by his predecessor in title, even when damages first manifest themselves only during the subsequent purchaser's ownership?

These are all issues decided by the trial court with no discussion of the public policy implications nor the legal authority to support it. The trial court itself in its Order recognized this case raises novel questions of whether a developer of real property can: (1) disclaim to current and subsequent buyers any and all warranties; (2) permanently release itself from any liability for the condition of such improvement; and (3) require the buyer to assume any and all related liability therefrom. However, the Order fails to address the novel issues of whether an architect and contractor can also disclaim liability and "opt out" of required building codes and industry standards; disclaim liability for their professional negligence; and disclaim warranties implied by law. The Order fails to provide legal analysis or authority to support the holdings on these "novel" questions presented to the Court.

**I. THE COURT ERRED BY HOLDING THAT THE GENERAL CONTRACTOR AND ARCHITECT CAN WAIVE LIABILITY FOR VIOLATIONS OF THEIR STATUTORY OBLIGATIONS TO COMPLY WITH BUILDING CODES**

The Court ignores that the "release" at issue violates public policy and enables Gulfstream and JHP to evade codes and regulations adopted by the Legislature to protect purchasers from defective design and construction practices. Our Legislature has declared the public policy for South Carolina to require minimum standards of construction to protect the

general public (SC Code § 6-9-5). General contractors and architects are bound by the building codes imposed to regulate the construction industry, and these standards and obligations cannot be waived by private contract. The Court allows Gulfstream and JHP to avoid their statutory obligations, contravene the statutes, and violate the public policy of this state, but provides no case law, analysis or authority to support such novel position, which is antithetical to the law and policy of our State.

**A. Gulfstream And JHP Owed A Duty Of Care To the Long Grove Homeowners And Property Owners Association To Design And Build The Project In Accordance With Building Codes And Industry Standards**

In Kennedy v. Columbia Lumber, 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989), our Supreme Court held that a violation of a building code violates a legal duty and that “a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage.” The Supreme Court held:

The Court of Appeals itself correctly recognized in Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct.App.1986) that a violation of a building code violates a legal duty for which a builder can be held liable in tort for proximately caused losses. Terlinde, 275 S.C. at 399, 271 S.E.2d at 770, imposes a legal duty on builders to undertake construction commensurate with industry standards. Where a building code or industry standard does not apply, public policy further demands the imposition of a legal duty on a builder to refrain from constructing housing that he knows or should know will pose serious risks of physical harm. We recognized such a duty, which should extend to foreseeable parties, in Rogers, 251 S.C. at 134, 161 S.E.2d at 84 . . .

Id. at 346, 384 S.E.2d at 737. Gulfstream and JHP were compelled to design and build to the minimum requirements set forth in the various building codes and industry standards. *See, e.g., Id.; Tommy L. Griffin Plumbing & Heating Co. vs. Jordon, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995) (a design professional owes a professional duty to the plaintiff which arises separate and distinct from any contractual duties between the parties *or with third parties*).

Violations of building codes are negligence per se and are evidence of recklessness and willfulness supporting punitive damages. Kennedy, 299 S.C. 335, 384 S.E.2d 730; Terlinde vs. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980) (a general contractor owes a duty of care to construct within industry standards). The Court's Order is simply wrong when it concludes that Gulfstream and JHP did not owe a duty of care to the POA.

Today we present the novel question of whether liability for building code violations may be waived by contractual agreement, and further whether such liability may be waived and disclaimed by a contract entered into by two developers, to which the contractor and architect are not parties. By ignoring the clear language of Kennedy v. Columbia Lumber, the Court avoids analyzing this novel issue of law, ignores the demands of public policy, and reaches a conclusion in conflict with prior case law.

**B. General Contractors And Architects Cannot Waive Liability For Non-delegable Duties Imposed By Statutory, Regulatory And Common Law**

In an effort to escape from its liability, The Beach Company improperly attempt to delegate to Vista all duties to ensure the buildings were built in accordance with the building codes and industry standards and constructed in a good and workmanlike manner. The contract between the Developer/Seller and Vista provided at Paragraph 15, Assumption of Liability and Release of Claims:

[Vista] assumes all responsibility for identifying and correcting all defects or problems . . . to ensure that the property is properly constructed...in accordance with all applicable building regulations, codes, standards and other applicable laws and requirements.

(R. p. 71). This provision attempts to delegate to Vista the obligations owed by Gulfstream and JHP, as General Contractor and Architect, to assure compliance with building codes and industry standards, while simultaneously attempting to relieve the Contractor and Architect of their

statutorily mandated duty to protect the public from defective and dangerous construction.

A non-delegable duty will be imposed where an “absolute duty” is owed to another, or as explained by our Supreme Court, “[a] person or entity entrusted with *important duties* in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong.” Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 44, 533 S.E.2d 312, 318 (2000) (holding that a hospital owes a nondelegable duty based on public policy considerations). As the Court of Appeals has stated:

an employer who, by reason of his calling or the business in which he is engaged, **owes special legal duties and obligations to the public** or to those with whom there exists some contractual relation cannot shirk or evade such special duties and obligations by committing its performance to another; he is bound absolutely to perform the obligation, and he is liable for a failure to do so in any respect whereby injury results to others.

Carson v. Vance, 326 S.C. 543, 550, 485 S.E.2d 126, 130 (Ct. App. 1997).

"The real effect of finding a duty to be non-delegable is to render not the duty, but the liability, non-delegable; the person subject to a non-delegable duty is certainly free to delegate the duty, but will be liable to third parties for any negligence of the delegatee, regardless of any fault on the part of the delegator." Nedrow v. Pruitt, 336 S.C. 668, 521 S.E. 2d. 755 (SC 1999). As a matter of public policy, the imposition of a non-delegable duty serves to provide compensation to innocent victims and “to give parties with crucial duties a keen incentive to avoid violating those duties. Simmons, 341 S.C. at 49, 533 S.E.2d at 321.

Once they undertook the design and construction of Long Grove, Respondents, regardless of their contracts, were obligated to comply with the duties created by building codes, laws, and regulations. These provisions, enacted by the Legislature to protect the public health, safety and welfare, are **owed to the public** and, thus, are non-delegable. *See e.g.*, Simmons, 341 S.C. 32, 533 S.E.2d 312. This position is widely accepted and has been adopted by the American Law

Institute:

One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

Restatement (Second) of Torts § 424, at 411 (1965); Evard v. S. California Edison, 153 Cal. App. 4th 137, 147 (2007) (“The duty to comply with applicable safety regulations and statutes is a nondelegable duty.”); Dow v. Holly Mfg. Co., 321 P.2d 736. (Cal. 1958)(a general contractor has a nondelegable duty to construct a building safely); Amann v. City of Tacoma, 16 P.2d 601, 606 (Wash. 1932)(by undertaking to do work pursuant to a building permit, a builder assumes a nondelegable duty to ensure that the work is performed in compliance with the building code); Gardenvillage Realty Corp. v. Russo, 366 A.2d 101, 108–09 (Md. App. 1976)(building code provisions affirmatively placed responsibility on builder, as permit holder, to ensure that construction was code compliant: permit holder was in the best position to oversee the work and its compliance with building codes.); Atlantic Nat. Bank of Jacksonville v. Modular Age, Inc., 363 So. 2d 1152 (Fla. 1st Dist. App. 1978) (an architect has a non-delegable duty to ensure the plans and specifications comply with building codes); Hubert v. Aitken, 15 Daly, 237, 2 N. Y. Supp. 711 (1888); Johnson v. Salem Title Co., 425 P.2d 519, 522 (Or. 1967) (An architect who undertakes to design a building has a non-delegable duty to meet the minimum safety standards of the building code’s design provisions).

The Building Codes, adopted by counties and towns as laws, establish minimum requirements to safeguard the public health, safety and general welfare. Designers and contractors must abide by the applicable building codes and industry standards.<sup>5</sup>

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<sup>5</sup> See e.g., COUNTY OF CHARLESTON, S.C. ORDINANCES FOR BUILDINGS AND BUILDING REGULATIONS, ch.4, Sect. 101.3 Intent.

The licensing statutes impose a nondelegable duty on the licensed contractor to supervise the work of subcontractors acting under its license and to ensure that the work complies with the law. S.C. Code Ann. § 40-11-270(E);<sup>6</sup> This statutory mandate is an absolute, non-delegable duty imposed on Gulfstream due to its status as general contractor and license holder for construction of Long Grove. Gulfstream, as general contractor, was in the best position to oversee that the work performed was in compliance with the laws. *See e.g., Gardenvillage Realty*, 366 A.2d at 109. Gulfstream’s liability for its non-delegable duty to supervise and account for the work of its subcontractors, thus could not be delegated to Vista by contract.

JHP is liable for designing a project that violates S.C. Reg. 11-12 and the applicable building codes. The duties created under S.C. Reg. 11-12 are nondelegable regulatory mandates, for which JHP must remain liable. Pursuant to S.C. Reg. 11-12 - Code of Professional Ethics,

An architect or firm shall not engage in dishonest practice, unprofessional conduct, or incompetent practice . . . An architect or firm shall not violate any state or federal criminal or civil law, rule, or regulation . . . An architect or firm shall act with reasonable care and competence and shall apply the technical knowledge and skill which is ordinarily applied by architects and firms in good standing in South Carolina . . . An architect or firm shall take into account all applicable state and municipal building laws and regulations . . . [A]n architect or firm shall not design a project in violation of such laws and regulations...

S.C. Code Reg. 11-12.

JHP and Gulfstream cannot be absolved of their responsibilities for the violations of the building codes, which are at the heart of their nondelegable statutory mandates. The architect and contractor cannot waive their duty to design and build structures to the minimum standards our statutes have adopted. Respondents cannot ignore the county and town building codes and

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<sup>6</sup> “Licensees may utilize the services of unlicensed subcontractors to perform work . . . provided, the licensee provides supervision. The licensee is fully liable for any violation of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.” S.C. Code Ann. § 40-11-270(E)(2016).

ordinances, which are central to their mandated, nondelegable duties.

Because these are non-delegable duties, the release and assumption of liabilities is unenforceable against the POA. Vista Realty and The Beach Company could not agree to the delegation of these duties to Vista and the waiver of these duties on behalf of JHP, Gulfstream Construction, or any other person or corporation involved in the design and construction of the Long Grove Apartments. These duties and liabilities cannot be delegated by The Beach Company to Vista Realty.

**C. South Carolina Has A Clear And Explicit Public Policy To Protect The Public From Poor Design And Construction Defects**

By upholding the “release” at issue in this case, the Court neglects the key public policy of our State and enables Gulfstream and JHP to evade codes and regulations adopted by the Legislature to protect purchasers from defective design and construction practices by contractors and architects. The interest of the public is to be secure in one’s home, an interest that has existed for hundreds of years. If contractors and architects can disclaim their negligence and can ignore building codes, the public policy of South Carolina is absolutely at issue. *See Kennedy*, 299 S.C. 335, 384 S.E.2d 730 (1989).

That this State has overriding public policies in effect that govern and control the development, design, and construction of buildings is obvious from the tremendous amount of work undertaken by our state and local legislative bodies in enacting laws and regulations protecting the public from the consequences of defective design and construction.<sup>7</sup>

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<sup>7</sup> Our Legislature has passed numerous statutes to protect the public from defective buildings and other structures, including, but not limited to, the following: S.C. Code Ann. §§ 27-50-10 (The Residential Property Condition Disclosure Act); S.C. Code Ann. §§ 31-15-10 (Dwelling Unfit for Human Habitation); S.C. Code Ann. §§ 40-1-10 (Professions and Occupations); S.C. Code Ann. §§ 40-3-5 (Architects); S.C. Code Ann. §§ 40-10-5 (Fire Protection Sprinkler Systems Act); S.C. Code Ann. §§40-11-5 (Contractors); S.C. Code Ann. §§40-22-2 (Engineers and

The Legislature has declared “the public policy of South Carolina is to maintain reasonable standards of construction in building,” (S.C. Code Ann. §6-9-5) and to that end requires all local governments to adopt applicable building codes. S.C. Code Ann. §6-9-10. The Legislature further enacted S.C. Code Ann. §32-2-10, which reinforces the public policy of South Carolina that individuals who design and construct buildings must be held accountable and may not contractually avoid their responsibility for defective construction.

Statutory and regulatory laws have been enacted to regulate professionals and further **protect the public from poor design and construction practices.**<sup>8</sup> These statutory and regulatory laws mandate that general contractors and architects build and design in accordance with the applicable building codes to protect the health, safety and welfare of the public. The Legislature further mandates civil citation and fines against individuals found to be in violation of a building code or regulation promulgated thereunder. S.C. Code Ann. §6-9-80. The State, counties, and municipalities have adopted building codes and established building departments to review designs, issue permits, inspect construction, and enforce the building codes. Charleston County and the Town of Mt. Pleasant adopted the Standard Building Code<sup>9</sup> as law to provide minimum standards to be followed by all design and construction professionals. The Standard Building Code was expressly created and adopted to "protect the public's life, health and welfare in the built environment." Preface, 1997 STANDARD BUILDING CODE.

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Surveyors); S.C. Code Ann. §§ 40-26-10 (Commercial Inspectors) S.C. Code Ann. §§ 40-59-10 (Residential Home Builders); et. al.

<sup>8</sup> See, e.g., S.C. Code Ann. §§40-1-10(2011); S.C. Code Ann. §§40-11-5 et seq. (Supp. 2006) (Contractors); S.C. Code Reg. 29-1 - 29-110 (Department of Labor, Licensing and Regulation – State Licensing Board for Contractors); S.C. Code Ann. §§40-3-5 et seq. (1998) (Architects); S.C. Code Reg. 11-1 – 11-14 (Department of Labor, Licensing and Regulation –State Board of Architectural Examiners); S.C. Code Reg. 8-100 – 8-701 (Buildings Codes Council).

<sup>9</sup> The Standard Building Code has since been replaced by the International Building Code, however, as the Code in effect at the time that the Long Grove Apartments were developed and constructed, it governs.

In S.C. Code Ann. §40-1-10 (2011), the Legislature outlines the professions and occupations which are regulated to protect the health, safety and welfare of the public. These professions and occupations, including contractors and architects, owe a higher standard of care due to the profession's "inherent qualities peculiar to it that distinguish it from ordinary work or labor," and that it "requires specialized skill or training and the public needs and will benefit by assurances of initial and continuing professional and occupational ability." Id. §40-1-10(B). The legislature has set forth ten policy-based considerations that must be taken into account when determining the proper degree of regulation. Id. § 40-1-10(C)-(D). Those policies include, but are not limited to, the following:

- (4) whether . . . this service is required by a substantial portion of the population;
- (5) whether the profession or occupation requires high standards of public responsibility, character, and performance of each individual engaged in the profession or occupation, as evidenced by established and published codes of ethics;
- (6) whether the profession or occupation requires such skill that the public generally is not qualified to select a competent practitioner without some assurance that the practitioner has met minimum qualifications;
- (7) whether the professional or occupational associations do not adequately protect the public from incompetent, unscrupulous, or irresponsible members of the profession or occupation; . . .
- (9) whether the characteristics of the profession or occupation make it impractical or impossible to prohibit those practices of the profession or occupation which are detrimental to the public health, safety, and welfare;
- (10) whether the practitioner performs a service for others which may have a detrimental effect on third parties relying on the expert knowledge of the practitioner.

Id. § 40-1-10(D).

Pursuant to this mandate, the Legislature has enacted statutory and regulatory law specific to both contractors and architects governing the licensing, certification, occupational requirements, examinations, fees, reporting, financial requirements, investigations, disciplinary actions, and penalties for these professions. S.C. Code Ann. §§ 40-3-5 et seq., 40-11-5 et seq. (2013). The Legislature has further mandated minimum building standards through the adoption

of uniform building codes. These laws and regulations were adopted specifically to protect the health, safety and welfare of the public.

These statutes, regulations and codes create duties that are independent of contracts. Parties cannot independently agree to design and construct a building that violates these laws. The enactment of laws, specifically the building codes, creates and sets forth the public policy of this State that the construction industry is to be regulated to protect the public, including the owners of Long Grove. The original design and construction team at Long Grove failed to comply with these minimum standards, yet under the Court's Order, none remain accountable. This private contract eviscerates the laws and regulations adopted by the Legislature of our State and effectively destroys the public policies they advance. The contract is void and unenforceable for that reason.

**D. The Court Erred By Failing To Recognize That The Release Is An Exculpatory Contract In Violation Of Public Policy**

The Court's Order sanctions the disclaimer and release of gross negligence of a general contractor and architect, allows the release and transfer of non-delegable duties of a general contractor and architect, and ignores that the release violates public policy. By enforcing the exculpatory contract, the Court has, in effect allowed professionals licensed by this state to exempt themselves from standards imposed by statutory and regulatory law, specifically designed to protect the public safety and welfare.

General contractors and architects have statutory, regulatory and common law duties with which they must comply to protect the health, safety and welfare of the public, and they cannot by contract avoid their responsibility for violating these nondelegable duties. Gulfstream and JHP were compelled to obtain licenses from the State and be subject to regulations by state and local governments.

If a contract contravenes public policy, it is void. Fisher v. Sterns, 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003). In Gladden v. Boykin, Justice Beatty, writing for the dissent, recognized the paramount concern for protecting the public in the construction arena:

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 [v. MSA of Myrtle Beach, Inc.], 373 S.C. at 29-30, 644 S.E.2d at 671; *see also* Pride v. S. Bell Tel. & Tel. Co., 244 S.C. 615, 619, 138 S.E.2d 155, 156-57 (1964) ("[A] contractual provision seeking to relieve a party to a contract from liability for his own negligence may or may not be enforceable, depending upon whether it is violative of public policy."). "Since such provisions tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon." Pride, 244 S.C. at 619, 138 S.E.2d at 157; *see also* McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 247-51, 612 S.E.2d 462, 464-67 (Ct. App. 2005) (same).

"[O]ur decisions recognize the general principle that considerations of public policy prohibit a party from protecting himself by contract against liability for negligence in the performance of a duty of public service, or *where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty, or when the parties are not on roughly equal bargaining terms.*" Pride, 244 S.C. at 619-20, 138 S.E.2d at 157 (emphasis added). Expressions of public policy may be found in constitutional or statutory authority or in judicial decisions. White v. J.M. Brown Amusement Co., 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004).

Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882 (2013) (Beatty, J., dissenting).

Exculpatory contracts are not favored at law. An exculpatory clause is one that purports to deny an injured party the right to recover damages from a person negligently causing his or her injury. Cain v. Banka, 932 So.2d 575 (Fla.App. 5 Distr. 2006).

Since [exculpatory] provisions tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon. When considered valid, it is generally upon the ground that no considerations of public policy are present which would override the fundamental right of freedom of contract.

Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 619, 138 S.E.2d 155, 157 (1964); Cain, 932 So.2d at 575 (Exculpatory clauses are by public policy disfavored because they relieve one

party of the obligation to use due care, and shift the risk of injury to the party who is probably least equipped to take the necessary precautions to avoid injury and bear the risk of loss); Kitchens of the Oceans, Inc. v. McGladrey & Pullen, LLP, 832 So.2d 270 (Fla. 4th DCA 2002); Loewe v. Seagate Homes, Inc., 987 So.2d 758, 760 (Fla. 5th DCA 2008).

Regardless of the terminology used in the contract, the intent and effect of the “assumption and release” clause is to completely absolve the general contractor and architect from all liability, and thus it is an exculpatory clause. *See e.g.*, Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 618, 138 S.E.2d 155, 156 (1964)(recognizing that “[a]lthough the provision in question is in the form of a limitation of liability, it is in practical effect an agreement against liability . . .”).

Professionals licensed by this state cannot exempt themselves from standards imposed by law by the mere execution of exculpatory contracts. As the Tennessee Supreme Court understands:

A professional person should not be permitted to hide behind the protective shield of an exculpatory contract and insist that he is not answerable for his own negligence. We do not approve the procurement of a license to commit negligence in professional practice.

Olson v. Molzen, 558 S.W. 2d. 429 (Tenn. 1977). “The very nature of a professional service is one in which the person receiving the service relies upon the expertise, training, knowledge and stature of the professional. Exculpation provisions are antithetical to such a relationship.” Lucier v. Williams, 841 A.2d 907, 914 (N.J. Super. App. Div. 2004)(cited with approval by Justice Beatty in his dissent in Gladden, 402 S.C. at 156, 739 S.E.2d at 890.). Likewise, the Supreme Court of Appeals of West Virginia has held that:

A plaintiff's express agreement to assume the risk of defendant's violation of a safety statute enacted for the purpose of protecting the public will not be enforced; *the safety obligation created by the statute for such purpose is an*

*obligation owed to the public at large and is not within the power of any private individual to waive.*

Murphy v. North American River Runners, Inc., 412 S.E. 2d. 504 at 509 (W.Va. 1991)

(emphasis added);

The Florida Court of Appeals directly addressed the issue before us, holding that an exculpatory clause relieving a contractor from building code violations is void as against public policy. The court stated:

...a party may not contract away its responsibility to comply with a building code when the person with whom the contract is made is one of those whom the code is designed to protect. . . Florida's comprehensive regulation of the licensing of building contractors and building construction standards reflect a clear public policy to protect purchasers of residential homes from personal injuries caused by improper construction practices...

Loewe, 987 So. 2d. 758 (Fla.App. 5 Dist. 2008); VoiceStream Wireless Corp. v. U.S. Communications, Inc., 912 So.2d 34, 38 (Fla.App. 4th Dist. 2005)("a party cannot waive liability imposed by statutory provisions that are intended to protect both an individual and the public because to do so would be contrary to public policy"); Holt v. O'Brien Imports of Fort Myers, Inc., 862 So.2d 87, 89 (Fla.App. 2d 2003) ("[A]n individual cannot waive the protection of a statute that is designed to protect both the public and the individual.").

If contractors and architects are allowed to waive their affirmative obligations to comply with their statutory obligations and building codes, the potential consequences to the public could be severe, as the Massachusetts Court of Appeals has aptly noted:

To permit a waiver by a homeowner of his or her right to compel a contractor to comply with the contractor's obligations under the building code would permit, even encourage, contractors, and perhaps consumers, to waive provisions of the building code on an ad hoc basis, in the hope of saving money in the short-run, but endangering future homeowners, first responders, and the public in general.

Downey v. Chutehall Const. Co., Ltd., 42 N.E.3d 1194, 1198 (Mass.App.Ct. 2016).

Vista could not agree to the waiver of the duties of the Respondents. The public interest and public policy require that this exculpatory agreement be found void. The public interest of this State is frustrated if general contractors and architects are immunized from liability for breaching minimum building standards enacted to protect the public.

Holding general contractors and architects accountable for the quality of their work benefits the public of our state. It places the onus of compliance on the parties best suited to prevent construction defects on the front end. It incentives architects and contractors to take a level of care to supervise the work which they are charged with, and thus ensure that their projects are adequately designed and constructed in accordance with building codes and industry standards. To hold otherwise would ignore South Carolina's long tradition of being in the vanguard of protecting her citizens from shoddy construction.<sup>10</sup>

**II. THE COURT ERRED BY FAILING TO APPLY S.C. CODE § 32-2-10, WHICH PROHIBITS EXCULPATORY CONTRACTS FOR CONTRACTORS AND ARCHITECTS IN AGREEMENTS RELATED TO CONSTRUCTION**

Paragraph 15(a) of the Sales Contract mandates the Purchaser, Vista, assume all legal responsibilities of the developer, the general contractor and the architect for building code compliance . . .

15. Assumption of Liability and Release of Claims.

a) . . . Purchaser assumes all responsibility for identifying and correcting all defects or problems, if any, that may exist, to ensure that the Property is properly constructed and suitable for use as condominiums in accordance with all applicable building regulations, codes, standards, and other applicable laws and requirements. (R. pp. 699-700)

Title 32, Chapter 2 of the South Carolina Code of Laws is entitled "Contracts Against Public Policy." Our legislature has enacted only one Section under this Chapter, Section 32-2-

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<sup>10</sup> See, Lane v. Trenholm Bldg. Co., 267 S.C. 497, 229 S.E.2d 728 (1976); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980)

10, which prohibits an exculpatory contract in favor of contractors and architects. The statute states:

Notwithstanding any other provision of law, ... [an] agreement *in connection with* the design, ... construction, alteration, repair or maintenance of a building, ... purporting to indemnify the promisee [or] its independent contractors against liability for damages arising out of ... property damage proximately caused by or resulting from the sole negligence of the promisee [or] its independent contractors. ... is against public policy and unenforceable.

S.C. Code Ann. § 32-2-10 (1976 revised 2007). The manifest purpose of § 32-2-10 is to prevent an architect or contractor from shifting ultimate responsibility for its negligence to another. By failing to apply the statute to the “assumption and release,” the Court fails to effectuate the purpose of the statute and again allows a general contractor or architect to skirt its responsibilities in violation of the public policy of the State.

While no South Carolina Court has yet to address and expound upon the scope of the anti-indemnity statute, our sister-state of Georgia has ample case law interpreting the scope and application of their anti-indemnity statute, which is substantially equivalent to § 32-2-10.<sup>11</sup> The Georgia Supreme Court has consistently held that the anti-indemnity statute be broadly construed in order to carry out its express statutory purpose, stating:

The purpose of OCGA § 13-8-2(b) is to prevent a building contractor, subcontractor, or owner from contracting away liability for accidents caused solely by his negligence, *whether during the construction of the building or after the structure is completed and occupied*. Under the statute, a provision in an agreement whereby a building contractor purports to **waive liability** for property damages allegedly resulting from the sole negligence of the contractor's agents or employees is void and unenforceable.

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<sup>11</sup> Georgia's Anti-Indemnity Statute utilizes substantially the same language as § 32-2-10 as it applies to agreements related to construction (OCGA § 13-8-2(b)), and imposes more restrictive language with regards to agreements relative to contracts for engineering, architectural or land surveying services. OCGA § 13-8-2(c). OCGA § 13-8-2(b) states: “[An] agreement . . . in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure . . . purporting to require that one party to such contract . . . shall indemnify, hold harmless, insure, or defend the other party . . . against liability. . . arising out of bodily injury . . . or damage to property caused by or resulting from the sole negligence of the indemnitee . . . is against public policy and void and unenforceable. . .” Ga. Code Ann. § 13-8-2(b)

Lanier At McEver, L.P. v. Planners & Engineers Collaborative, Inc., 663 S.E.2d 240, 242 (Ga. 2008)(emphasis added) *see also*, City of Dillingham v. CH2M Hill Northwest, Inc., 873 P.2d 1271, 1277 (Alaska 1994)(interpreting “indemnify” under the statute to mean “exempt,” thus applying to limitation of liability clause).

To that end, Georgia courts apply the anti-indemnity statute to a variety of contractual provisions where the “phrasing in the parties’ clause violates the intent of OCGA § 13-8-2(b) because it acts as an indemnity or ‘hold harmless’ clause *even if such words do not appear in the parties’ agreement.*”<sup>12</sup> *Id.* at 244; *see also*, Bicknell v. Richard M. Hearn Roofing C., Inc., 318 S.E.2d 729, 732 (Ga. Ct. App. 1984)(holding that warranty provision “essentially purported to insulate (the promisee) from any liability whatsoever except for repair or replacement of the roof” was therefore void under the statute); Frazer v. City of Albany, 265 S.E.2d 581, 583 (Ga. 1980)(exculpatory clause in lease contract void). Thus, in Lanier, the Court held that a limitation of liability clause, capping an engineer’s liability at the fee for service for “any and all liability or cause of action however alleged or arising,” violated the public policy as set forth in the anti-indemnity statute, which prohibits the “complete avoidance of liability to third parties for sole negligence in a building contract.” Lanier, 663 S.E.2d at 243. The Court explained that the clause was not merely a cap on damages, “because this clause allows shifting liability for third party claims from one contractor to another, it is an indemnity.” *Id.* at 244 (footnote 6).

The Georgia Supreme Court likewise liberally construes what constitutes an agreement in connection with a contract relative to construction, alteration, maintenance or repair. *See e.g.*, Kennedy Development Co., Inc. v. Camp, 719 S.E.2d 442 (Ga. 2011). The Georgia Supreme

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<sup>12</sup> The Court indicated that where the statute applies, its prohibition is an absolute bar to enforcement, stating: “[n]othing in OCGA § 13-8-2(b) permits a construction party to shift its third-party liability for its sole negligence to another contractor, no matter how savvy the parties or how high the damages cap.” Lanier, 663 S.E.2d at 244

Court has specifically held that an “assignment and assumption” agreement, transferring a developer’s interest to the property owners’ association, comes within the ambit of the anti-indemnity statute. Id.; Newton’s Crest Homeowners’ Ass’n v. Camp, 702 S.E.2d 41 (Ga. App. 2010). In so holding, the Court explained that the anti-indemnity statute applies not only to traditional construction contracts that contemplate future construction, but also to contracts regarding completed construction in which the agreement was “a vehicle through which existing rights and responsibilities vis-à-vis past construction have been assigned and assumed.” Kennedy v. Camp, 719 S.E.2d at 445.

The lower Court incorrectly concluded that “*the POA’s reliance on §32-2-10 is misplaced because . . . that statute pertains to hold harmless clauses in “construction contracts...”*” (Order, ¶97, R. pp. 31-32). The Court ignores the full text in the body of §32-2-10 and takes a narrow view that §32-2-10 does not apply because there was no “construction contract” between Gulfstream and Vista, relying on the heading of the Section “Hold harmless clauses in certain construction contracts.” Titles and headings may not be construed to limit the plain meaning of the text of the law. Garner v. Houck, 435 S.E.2d 847 (1993). The statute applies to promises or agreements *in connection with* the design or construction of a building. Clearly the promise to release and not sue Gulfstream and JHP are agreements in connection with such construction.

Title 32, Chapter 2 is entitled “Contracts Against Public Policy.” The topics in §32-2-10 include “promises or agreements in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure.” S.C. Code Ann. §32-2-10. The Sales Contract directly related to the transfer of rights and obligations with regards to the maintenance and repair of the property of the Regime, and thus clearly falls within the ambit of agreements

covered under § 32-2-10. *See e.g., Kennedy Development v. Camp*, 719 S.E.2d 442.

The “disclaimer and release” provisions fall within the purview of the Anti-Indemnity Statute, regardless of the terminology used therein. The provisions expressly contemplate that full responsibility for statutory, regulatory and common law obligations owed by the General Contractor and Architect be shifted to Vista under the contract, and that Respondents be absolved from liability for “*any and all claims of every kind whatsoever.*” The intent and effect of the “assumption and release” provision is clearly to completely insulate and shift from the general contractor and architect any and all liability, whatsoever, arising from their own negligence, thus constituting the exact kind of agreement that the anti-indemnity statute seeks to prevent.

The contract purports to transfer the General Contractor’s and Architect’s obligations, which arose in connection with the construction and design of the Project. These obligations directly implicate the POA’s obligation under the Master Deed to maintain the common elements and its legal right and fiduciary duty to pursue litigation against responsible parties and recover damages for construction defects. *See Queen’s Grant Villas Horizontal Property Regimes I-V v. Daniel Int’l Corp.*, 286 S.C. 555, 335 S.E.2d 365 (1985). The Release is in clear violation of the anti-indemnity statute, and therefore cannot be enforced against the POA.

### **III. THE COURT ERRED BY FAILING TO RECOGNIZE THAT THE IMPLIED WARRANTIES OF WORKMANSHIP AND SUFFICIENCY OF PLANS ARISE FROM INDEPENDENT LEGAL DUTIES AND THUS CANNOT BE DISCLAIMED OR WAIVED**

South Carolina recognizes two separate and unique implied warranties that arise in connection with the construction and sale of a residential building: the implied warranty of

workmanship<sup>13</sup> and the implied warranty of habitability. Kennedy, 299 S.C. 335, 384 S.E.2d 730. While the two implied warranties are necessarily related, and may somewhat overlap based on their common subject-matter, they arise independently of one another and are inherently distinct in nature and in consequence. *See e.g., id.*

An implied warranty of workmanship arises “where a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use.” Hill v. Polar Pantry, 219 S.C. 263, 271, 64 S.E.2d 885, 888 (1951). Thus, where an architect undertakes to furnish plans and specifications, to be followed by a contractor in a construction project, it impliedly warrants the sufficiency of those plans for the intended purpose. Id. “[A] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, and workmanlike manner. This is an implied warranty of workmanlike service, and is distinct from the implied warranty of habitability. Kennedy, 299 S.C. 335, 384 S.E.2d 730. These are performance-based warranties, which arise from the legal duties imposed on builders and architects under statutory and common law, independent of any duties assumed under contract, and thus cannot be waived by contractual provision. The implied warranty of habitability, on the other hand, springs from the sale itself. *See e.g., Kirkman v. Parex, Inc.*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006)(“the seller’s liability is *not founded upon fault*, but because he has profited by receiving a fair price and as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects.”)(*quoting Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 503, 229 S.E.2d 728, 731 (1976)). This warranty is founded upon the contract, and may be disclaimed in only rare circumstances.

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<sup>13</sup> Hereinafter, general reference to the general contractor and architect’s implied warranties of workmanship also encompasses the architect’s implied warranty of the sufficiency of his plans and specifications.

The nature of the warranties of workmanship is inherently distinct from the developer/seller's implied warranty of habitability—builders and architects perform services as opposed to sell a product. The implied warranty of workmanship arises from the contractor's or architect's *undertaking and performance* of construction or design services, in his role as a builder or architect, which he has held himself out as having the skill and ability to perform, versus the implied warranty of habitability which springs from the sale. *See, e.g., Kennedy*, 299 S.C. at 347, 384 S.E.2d at 737 (“An implied warranty of service attaches to a builder’s construction of new residential housing.”); *Hill*, 219 S.C. 263, 64 S.E.2d 885 (A design professional undertaking to furnish plans and specifications impliedly warrants their sufficiency for the intended purpose); *Terlinde vs. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980); *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 162 (4th Cir. 2004)(deciding that, under *Kennedy*, the implied warranty of workmanship arises from the contractor’s role as builder, not from the underlying construction contract).

The implied warranty of workmanship focuses on the undertaking of the builder or architect and its performance thereunder, creating an *independent legal duty*, with a basis in both contract and tort, which is imposed by law as a matter of public policy. As the Court in *Kennedy* stated:

The framework we adopt **focuses on activity, not consequence**. If a builder performs construction in such a way that he violates a contractual duty *only* then his liability is only contractual. If he acts in a way as to violate a legal duty, however, his liability is both in contract and in tort.

The Court of Appeals itself correctly recognized in *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct.App.1986) that a violation of a building code violates a legal duty for which a builder can be held liable in tort for proximately caused losses. *Terlinde*, 275 S.C. at 399, 271 S.E.2d at 770, imposes a legal duty on builders to undertake construction commensurate with industry standards. Where a building code or industry standard does not apply, *public policy further demands the imposition of a legal duty* on a builder to refrain from

constructing housing that he knows or should know will pose serious risks of physical harm. We recognized such a duty, which should extend to foreseeable parties, in *Rogers*, 251 S.C. at 134, 161 S.E.2d at 84.

299 S.C. at 345-6, 384 S.E.2d at 737; Tommy L. Griffin Plumbing & Heating Co. vs. Jordon, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995) (a design professional owes a professional duty to the plaintiff which arises separate and distinct from any contractual duties between the parties *or with third parties*); Beachwalk Villas Condominium Assoc., Inc. vs. Martin, 305 S.C. 144; 406 S.E.2d 372 (1991) (An architect can be held liable to an owner for negligence and breach of the implied warranty even though there was no contract between the architect and the condominium regime).

Courts of other jurisdictions have likewise held that the implied warranty of workmanship arises independently of any contract, and sounds in tort. *See e.g.*, Speight v. Walters Dev. Co., Ltd., 744 N.W.2d 108, 113 (Iowa 2008)(holding that the implied warranty of workmanlike construction “exists independently of the contract (for sale) *by its very nature*.”); Schofield Interior Contractors, Inc. v. Standard Bldg. Co., 668 S.E.2d 316, 318 (Ga. App. 2008)(Holding that “a negligent construction claim arises not from a breach of contract claim but from breach of a duty implied by law to perform the work in accordance with industry standards. This cause of action arises in tort and exists independently of any claim for breach of contract.”). “[I]mplied warranties are not created by agreement between the parties but . . . are creatures of public policy that have evolved to protect purchasers of homes upon the discovery of latent defects. . . and that, regardless of their origin exist independently.” Lempke v. Dagenais, 547 A.2d 290, 293 (N.H. 1988).

The implied warranty of workmanship arises from the independent legal duties imposed on builders and architects under statutory and common law to protect the public, independent of

any duties assumed under contract, and thus cannot be disclaimed by contractual provision. In

Murray v. Texas Co., our Supreme Court held:

The general rule with reference to such contracts is . . . as follows: **It is, of course, clear that a person cannot by contract relieve himself from a duty which he owes to the public independently of the contract.** Whether he can relieve himself from the duties to the other contracting party attaching as a matter of law to the relation created by the contract is more difficult to determine. An analysis of the decision indicates that even under the view that a person may under some circumstances contract against performance of such duties, **he cannot do so where the interest of the public requires the performance thereof . . .**

172 S.C. 399, 174 S.E. 231, 232 (1934)(emphasis added).

The Ohio Supreme Court has recognized that a contractor's obligation to construct a house in a workmanlike manner is a duty imposed by law, *and as such cannot be waived by the owner*:

We conclude that the duty to construct a house in a workmanlike manner using ordinary care is the baseline standard that Ohio home buyers can expect builders to meet. The duty does not require builders to be perfect, but it does establish a standard of care below which builders may not fall without being subject to liability, even if a contract with the home buyer purports to relieve the builder of that duty. Accordingly, we conclude that a home builder's duty to construct a house in a workmanlike manner using ordinary care is a duty imposed by law, and a home buyers' right to enforce that duty cannot be waived.

Jones v. Centex Homes, 967 N.E.2d 1199 (Ohio 2012). Likewise, the Utah Court of Appeals has stated:

Builders and others involved in the construction trade are governed by significant and specific state regulations. . . In addition, builders have a legal duty to complete construction in a good and workmanlike manner. Builders cannot, by contract, exculpate themselves from potential liability for shoddy workmanship, building code violations, negligent construction, or other liabilities arising from their finished product.

Russ v. Woodside Homes, Inc., 905 P.2d 901, 907 (Utah App. 1995).

The public interest of this State is frustrated if the Contractor and Architect are

immunized from liability for breach of their independent legal duties to perform their construction and design undertakings in a workmanlike manner. The public policy rationale forbidding disclaimer of the implied warranty of workmanship is the same for voiding exculpatory contracts relating to building code violations. The law has imposed this independent legal duty to protect the public at large, and no private contract of disclaimer should defeat warranties created to benefit not just the original homeowner, but all subsequent owners of the home.

**IV. THE COURT ERRED IN HOLDING THE PROPERTY OWNERS ASSOCIATION IS BOUND BY THE DISCLAIMER ENTERED INTO BY ITS PREDECESSOR IN TITLE**

**A. The Causes Of Action For Negligence And Implied Warranty Of Workmanship Had Not Yet Accrued And Thus Could Not Be Disclaimed By the POA's Predecessor In Interest**

The only parties to the contract were The Beach Company and Vista Realty. There is no legal authority to support the ruling by the Court that the POA bears the burden of a contract to which it was not a party. There is no authority that Vista Realty can enter into a disclaimer and release that bound future Owners for claims and causes of action which did not presently exist at the time of the agreement's execution.

Gulfstream and JHP's obligations to construct and to design Long Grove in compliance with building codes and industry standards is a duty owed to subsequent owners. Kennedy, 299 S.C. at 346, 384 S.E.2d at 737(a builder's duty extends to subsequent purchasers, reasoning that "[a] builder is no less blameworthy in such a case where lady luck has smiled upon him and *no physical harm has yet occurred.*"); Terlinde, 275 S.C. 395, 271 S.E.2d 768 (1980). These obligations, therefore, are owed to the current Long Grove owners, and could not be waived by their predecessor in title.

A cause of action for damages to real property accrues when the defendants' acts cause immediate and permanent injury resulting in actual and appreciable harm to the property. Stofer v. Shapell, 233 Cal App 4<sup>th</sup> 176 (2015); Schorberg v. Panorama Custom Home Builders, Inc., 972 So. 2d 243, 246 (Fla. 2d Dist. App. 2007)(a cause of action accrues when "the last element constituent the cause of action occurs."). The cause of action for defective construction belongs to the owners who first discovered the property damage. Standard Fire Ins. v. Spectrum, 141 Cal App 4<sup>th</sup> 1117 (2006).

The Respondents' obligations to construct Long Grove in compliance with building codes and industry standards extend to foreseeable parties. These obligations, owed to the current Long Grove owners, could not be waived by their predecessor in title. Until the damages accrue and manifest themselves, there was no claim or cause of action for Vista to release. The damages at Long Grove occurred during the ownership of the POA, long after Vista transferred its interest, and it is, thus, the POA's claim to assert.

**B. The Property Owners Association And Subsequent Homeowners Were Not Parties To The Transaction At Issue And Thus Are Not Bound To The Release And Disclaimer Contained Therein**

The release cannot be enforced against the POA, which was not a party to the release agreement and received no benefit under the contract. There is no authority that Vista Realty can enter into a contract that detrimentally burdens the Owners who were not a party to that contract.

Our Court of Appeals has held that a release agreement is not enforceable against an individual or entity who was not a party to the agreement and did not agree to receive some bargained for benefit in exchange for the release of liability. Gordon v. Drews, 595 S.E.2d 864 (S.C. App. 2004)(holding specifically that "release and settlement agreement" executed by a

majority of members of corporate board was not binding on shareholder who did not sign the agreement: shareholder “did not enter into an agreement to receive any compensation or other benefit” for the release of liability.).

Neither prospective purchasers nor the POA were parties to the contract; had the ability to negotiate any of the terms and provisions of the contract; or were even in existence at the time the contract was entered into. Neither received a benefit. Neither should be bound by the exculpatory contract.

### CONCLUSION

To allow the disclaimer and release to stand would set a dangerous precedent for home purchasers, and the public generally. If the Opinion stands, this Court will give contractors and architects the ability to contractually avoid any liability for failing to comply with mandated building codes and regulations; to nullify their non-delegable duties; and to endanger the public at large. This is a radical and dangerous decision for the homeowners of South Carolina, with devastating consequences. This Opinion is clearly against the public policy and established law of this State.

As the construction industry has evolved, the courts of our state have recognized the fundamental importance of protecting innocent homebuyers from unscrupulous and dangerously defective construction. The South Carolina Supreme Court has been in the vanguard of protecting homeowners from companies like Gulfstream and JHP, who construct and design buildings that are infected with code violations, rot, and decay. Kennedy v. Columbia Lumber, 299 S.C. 335, 384 S.E.2d 730 (1989); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980); Beachwalk Villas Condominium Assoc., Inc. v. Martin, 305 S.C. 144, 406 S.E.2d 372 (1991); Lane v. Trenholm Bldg. Co., 267 S.C. 497, 229 S.E.2d 728. These cases, like the statutes,

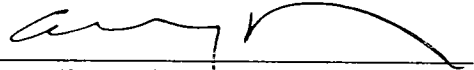
regulations and building codes, have furthered the public policy promoting design and construction of residences that meet minimum building standards, are safe, and free of latent defects.

As the construction industry has developed, the traditional builder-vendor model has evolved to embrace more complex and intricate contractual relationships and transaction structures, such as the condominium conversion model at issue in this case. Here, the Beach Company and its wholly-owned subsidiary, Gulfstream, have concocted a clever scheme to avoid all liability for violation of their legal duties to construct buildings that conform with building codes, industry standards, and that pose no risk to the public: Build an apartment complex; use as many “value-engineering” strategies as possible; sell it before any latent defects materialize to an out of state developer at a huge profit; and hire a good lawyer to carefully draft the terms of the sales contract, exculpating them of all potential future liability. In furtherance of the firmly established public policy of this State, this Court should not allow this scheme to stand.

This transactional model poses a compelling public policy risk of sham first sales, in order to completely insulate builders from responsibility for their defective work. The public policy of this State is that design professionals and general contractors doing business in South Carolina must comply with Building Codes. Violation of a building code violates a legal duty, which cannot be waived. The Court stated in Kennedy: “*We have made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce.*” This Court must not approve this mechanism which eviscerates this crucial public policy, or we will no longer be in the vanguard of protecting our citizens.

For the above reasons, Petitioner respectfully requests the lower Court’s Order granting summary judgment be reversed and this case remanded for trial on the merits.

Respectfully submitted,



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George E. Mullen  
Lauren Mullen Thomas  
Mullen Wylie, LLC  
P.O. Box 5969  
Hilton Head Island, SC 29938  
(843) 785-6969  
**Attorneys for Petitioner**

April 5, 2017

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APR 10 2017

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

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Appellate Case No. 2015-002131

Circuit Court Case No. 2009-CP-10-6746

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Long Grove at Seaside Farms, LLC; The Beach Company; Gulfstream Construction  
Company, Inc., Respondents,

v.

Long Grove Property Owners' Association, Inc.; Vista Realty Partners, LLC; and Long Grove  
Vista, LLC;

Of Whom Long Grove Property Owners' Association is Petitioner.

Long Grove Property Owners' Association, Inc., Third-Party Plaintiffs,

v.

James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C; Sam Mayo d/b/a  
SCM Construction, Inc.; Essex Engineering Corporation, Third Party Defendants;

Of Whom James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban  
Design, P.C is Respondent.

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**PROOF OF SERVICE**

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I certify that I have served the Petitioner's Brief to all respondents via United States Mail,  
postage prepaid on April 6, 2017, addressed to their attorney of record, David J. Parrish, Nexsen

Pruet, LLC, Post Office Box 486, Charleston, South Carolina 29402 and that I have served James Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C. by depositing a copy of it in the United States Mail, postage prepaid on April 5, 2017, addressed to its attorney of record, Laura F. Locklair, Parker Poe Adams & Bernstein, LLP, 200 Meeting Street, Suite 301, Charleston, South Carolina 29401 and James Lynn Werner, Parker Poe Adams & Bernstein, LLP, 1201 Main Street, Suite 1450, Columbia, South Carolina 29201.

David J. Parrish

Nexsen Pruet, LLC

P.O. Box 486

Charleston, SC 29402

**Attorney for Respondents The Beach Company, Long Grove at Seaside Farms, LLC & Gulfstream Construction Company, Inc.**

Laura Locklair

Parker Poe Adams & Bernstein, LLP

200 Meeting Street, Suite 301

Charleston, SC 29401

and

James Lynn Werner

Parker Poe Adams & Bernstein, LLP

1201 Main Street, Suite 1450

Columbia, South Carolina 29201

**Attorney for Respondent James, Harwick & Partners, Inc. n/k/a JHP Architecture/Urban Design, PC**

Other Counsel of Record:

L. Dean Best

Best Honeycutt

Post Office Box 13466

Charleston, South Carolina 29422

*Attorney for Long Grove Vista, LLC & Vista Realty Partners, LLC*

Jesse A. Kirchner

Thurman Kirchner Timbes & Yelverton, PA

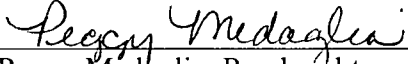
15 Middle Atlantic Wharf, Suite 101

Charleston, SC 29401

*Attorney for Long Grove Vista, LLC & Vista Realty Partners, LLC*

Morgan S. Templeton  
Taylor H. Stair  
Elmore & Wall, PA  
145 King Street, Suite 302  
Charleston, South Carolina 29401  
*Attorneys for Sam Mayo d/b/a SCM Construction, Inc.*

Sarah Wetmore  
Kathy Carlsten  
Carlock Copeland & Stair, LLP  
40 Calhoun Street, Suite 400  
Charleston, South Carolina 29401  
*Attorneys for Essex Engineering Corporation*

  
Peggy Medaglia, Paralegal to  
George E. Mullen  
Lauren Mullen Thomas  
Mullen Wylie, LLC  
Post Office Box 5969  
Hilton Head Island, South Carolina 29938  
(843) 785-6969  
Attorneys for Petitioner