

The Supreme Court of South Carolina

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MAY 28 2017

SC Court of Appeals

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

v.

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

Appellate Case No. 2016-002440

ORDER

As part of a settlement agreement, the parties ask this Court to dismiss this matter and to vacate the opinion of the South Carolina Court of Appeals.

Pursuant to 261(d) of the South Carolina Appellate Court Rules, this matter is referred to the Court of Appeals for it to make a recommendation to this Court regarding the request for vacation of the opinion. The Court of Appeals should provide its recommendation within ten (10) days of the date of this order.



FOR THE COURT

C.J.

Columbia, South Carolina

May 25, 2017 |

cc: Howard A. Van Dine, III, Esquire
Erik Tison Norton, Esquire
Allen Mattison Bogan, Esquire
Justin O'Toole Lucey, Esquire
Stephanie D. Drawdy, Esquire
Dabny Lynn, Esquire
The Honorable Jenny Abbott Kitchings (with copy of memorandum of settlement)

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The Gates at Williams-Brice Condominium Association, et al.
vs. DDC Construction, Inc., et al.
Appellate Case No: 2015-000180

JAN 30 2017

MEMORANDUM OF SETTLEMENT (Rule 2016) **S.C. SUPREME COURT**

By and Between, DDC Construction, Inc. and Columbia Condos, LP (“Appellants”) and The Gates at Williams-Brice Condominium Association, Katharine Swinson, and all others similarly situated (collectively “HOA”):

Whereas, Appellants are no longer operating entities;

Whereas, Appellants’ insurance carrier has previously obtained covenants not to execute in Appellants’ favor, in March of 2016 in the case known as *Lexington Insurance Company vs. The Gates at Williams-Brice Condominium Association, et al.*, Civil Action No: 2015-CP-40-00747 (“the coverage case”);

Whereas, these covenants not to execute insulate Appellants and their principals and agents from further liability in this matter;

Whereas, Appellants’ insurance carrier has now resolved the HOA’s claims in the coverage case, and has no further interest in this Appeal or the underlying action;

Now therefore, the Parties agree as follows:

1. If the Supreme Court grants the Rule 261 request as described herein, thus obviating further prosecution of the appeal by Appellants, Thirty-Five Thousand Dollars shall be paid to the HOA by or on behalf of Appellants. If the Supreme Court denies the request, and the Appeal is further litigated, the portion of this Thirty-Five Thousand Dollars utilized in further prosecution of this Appeal (including the defense of the Petition for Writ of Certiorari) shall not be paid to the HOA, but the balance, if any, shall be paid to the HOA; provided, however, under no circumstances shall the payment to the HOA be less than Five Thousand Dollars.

2. The Supreme Court is hereby requested to vacate the Opinion of the Court of Appeals in Appellate Case No: 2015-000180 and to dismiss this appeal.

3. HOA submits that the facts and issues set forth in the attached Exhibit A warrant the extraordinary relief sought herein.

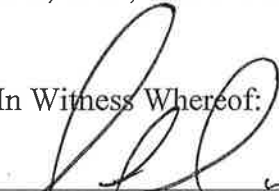
4. DDC Construction, Inc. and Columbia Condos, LP do not object to the above-requested relief; and concur that this appeal presented complicated and novel issues and that the Article XXXV extract appended to Exhibit A is a true and accurate extract of the dispute resolution provision in the Master Deed contained in the Record on Appeal. Appellants take no position on the remaining grounds for vacating the Opinion propounded above by HOA, but such position should not be construed or deemed to indicate Appellants agree with the remaining grounds.

Appellants further reserve the right to file an opposition to any Petition for Writ of Certiorari filed by the HOA regardless of the pendency of this request to vacate.

Upon final resolution of this Appeal, the HOA will provide DDC Construction, Inc. and Columbia Condos, LP with a complete Mutual Release and Dismissal with Prejudice from the case known as *The Gates at Williams-Brice Condominium Association, et al., vs. DDC Construction, Inc., et al.*, Civil Action No: 2012-CP-40-8512 (“Underlying Action”) which release shall include an agreement to indemnify and hold harmless DDC Construction and Columbia Condos from any claims by, through or on behalf of the HOA or the homeowners relating to, among other things, the design, construction, sale, marketing or operation of The Gates at Williams-Brice condominiums. Release shall end all matters between these Parties, except for the enforcement of this Agreement.

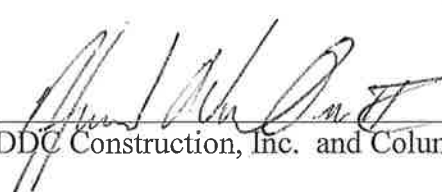
5. This Agreement shall not affect the HOA’s claims against persons and entities other than the Parties hereto pending in the case known as *The Gates at Williams-Brice Condominium Association, et al., vs. DDC Construction, Inc. et al.*, Civil Action No: 2012-CP-40-8512.

In Witness Whereof:



The Gates at Williams-Brice Condominium
Association, Katharine Swinson, and all others similarly situated

By: Its Attorney



DDC Construction, Inc. and Columbia Condos, LP

By: Attorney

Dated: January 23, 2017

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EXHIBIT A
GATES STATEMENT OF SUPPORTING REASONS

JAN 30 2017

9:01 SUPREME COURT

Former Respondents, now Petitioners, the Gates' Association (collectively "HOA"), submit that there are a number of reasons supporting the vacating of the Court of Appeals decision in this matter ("the Opinion") and the dismissal of this Appeal, including the following:

1. The Parties to this Appeal have reached a contingent¹ resolution of the portion of this case subject to this Appeal; but as the effect of the Opinion goes way beyond the portion settled, the HOA is compelled to continue to prosecute this Appeal unless the Opinion is vacated.
2. There is a serious risk to Gates that other Defendants in the Trial Court (not Party to this Appeal) could attempt to avail themselves of the benefits of the Opinion;
3. The Opinion is one of first impression, involving both complicated issues and novel of question of law;
4. The Opinion contradicts fundamental tenants of contract construction, the law governing fiduciary relationships and other precedent; and
5. The Opinion creates bad public policy law. Basically, the Opinion provides residential developers with a pre-sanctioned "How To" primer on stripping future homeowners of important legal rights, with impunity.

It is further worth noting that the Gates' defective construction dispute is in a unique procedural posture, such that the vacating of the Opinion will not have any precedential effect.

For the foregoing reasons, as expanded on in further detail below, the Court of Appeals' Opinion should be vacated and this Appeal dismissed.

(Bad Legal Precedent for Homeowners Generally)

The Court of Appeals decision, essentially, states any residential developer can deprive homeowners (people of unequal bargaining power shopping for what is clearly a necessity) of

¹ The settlement is not contingent as to finality; however, the terms of the settlement, as described in the Memorandum of Settlement, adjust depending on the outcome of this motion or the point at which the Appeal is finally resolved.

important legal rights, with impunity. Further, developers can load Master Deeds with waivers of liability for every cause of action, including the warranty of habitability. Finally, property owners' associations and their members cannot pass amendments to remove disclaimers, one-sided, or oppressive provisions even if the Master Deed expressly permits the homeowners the right to amend the Master Deed.

If the Opinion stands, every developer in this State will copy the developer in this case; and, therefore, the residents of this State will: (1) lose important legal remedies; (2) see a corresponding decline in the already subpar quality of residential construction occurring in this state as developers become less accountable; and (3) have no legitimate recourse in the residential-building context, a context which this State has recognized warrants additional consumer protection, not less.

(Novel Questions of Law)

The Opinion addresses and decides adversely to the Association and the Homeowners (and the residents of this state) a number of novel issues, including the following:

- a. Whether a developer breaches its fiduciary duty to the ensuing homeowners' association (and its members) when it inserts self-serving provisions in a Master Deed; and whether, as a result of the breach, the self-serving provisions become void or voidable;
- b. Whether a homeowners' association and/or its members, when controlled by the developer, has the independent capacity to voluntarily waive legal rights against the party controlling it;

- c. Whether a homeowners' association's successful amendment to its Master Deed applies to a developer when the Master Deed, as drafted by the developer, allowed for unilateral association amendments; and,
- d. Whether this Court would adopt a "reasonableness" standard in evaluating the propriety of a homeowners' association's amendment(s) to its Master Deed. The Court of Appeals erred in relying upon *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 633 S.E.2d 78, (2006)(an inopposite case concerning an internal conflict of interest between the members of the homeowners' association), as opposed to relying upon, e.g., *Crest Builders, Inc. v. Willow Falls Improvement Association*, 74 Ill. App. 3d 420, 423, 393 N.E.2d 107, 110 (1979)(which involved a more similar dispute between the developer and the ensuing homeowners' association and its members). *Crest Builders* recognized and held that the developer no longer had a vested interest in the original agreement with the homeowners' association which would invalidate the later amendment.²

(Contradiction of Fundamentals)

As made apparent by the foregoing discussion and points, the Opinion contradicts fundamental tenants of contract construction, the law governing fiduciary relationships and other precedent, including the public policy of this state to protect residential homeowners/consumers.

(Precedential Value to Remaining Defendants)

The Opinion found the Association and the Homeowners waived their rights to a jury trial and the Homeowners waived their rights to a class action proceeding against Appellants. Although the other remaining construction participants/defendants are not parties to the Master Deed, the

² Other errors asserted by the HOA are set forth in the HOA's Petition for Writ of Certiorari, filed January 9, 2017.

Master Deed purports to include other construction participants in the dispute resolution restrictions/provisions. (Record Excerpt of Article XXXV, Dispute Resolution, attached). Therefore, there is a risk to Plaintiffs that one or more Parties, who are not part of this Appeal, may attempt to avail themselves of the Opinion. The fact that the remaining Parties were not signatories to the Master Deed provides a distinguishing characteristic, which might lead to another appeal.

Additionally, the Opinion essentially invalidates Gates' successful Amendment of their Master Deed which, *inter alia*, removed damage, warranty, and liability waivers, *at least as to Appellants*. Again, the remaining Defendants may attempt to avail themselves of this provision.

(Unique Procedural Posture)

The Gates defective construction dispute is in a unique procedural posture. It has been litigated in many forums/cases (the principal defective construction case in the Circuit Court; the instant phase in the Court of Appeals; a Circuit Court coverage action regarding the insurance WRAP policy; a Circuit Court subcontractor coverage action; a Circuit Court action against inspectors involved in construction; and, finally, an arbitration regarding roofing.) The vast majority of the original Defendants have settled, but three engineering firms and some subcontractors/suppliers currently remain in for trial. It is further unique in that the final claims in this case against the General Contractor and the developer (Appellants) were actually settled in the parallel insurance coverage action. This has been a long journey for the Homeowners; and they are anxious to resolve this appeal, complete the trial against the remaining Defendants (discovery continued in the Circuit Court action(s) during the Appeal and nearly all experts and witnesses have been deposed), and to begin rebuilding their homes.

Any holder, insurer, or guarantor of a first mortgage shall be entitled, upon written request, to a financial statement of the immediately preceding fiscal year, free of charge to the party so requesting.

Any financial statement requested pursuant to this section shall be furnished within a reasonable time following such request.

XXXII. Severability

In the event that any of the terms, provisions, or covenants of this Master Deed are held to be partially or wholly invalid or unenforceable for any reason whatsoever, such holding shall not affect, alter, modify, or impair in any manner whatsoever any of the other terms, provisions, or covenants hereof or the remaining portions of any terms, provisions, or covenants held to be partially invalid or unenforceable.

XXXIII. Master Deed Binding Upon Grantor, Its Successor and Assigns, and Subsequent Co-Owners:

The restrictions and burdens imposed by the covenants of this Master Deed are intended to and shall constitute covenants running with the land, and shall constitute an equitable servitude upon each Unit and its appurtenant undivided interest in General and Limited Common Elements. This Master Deed and all easements reserved herein shall be binding upon Grantor, its successors and assigns, and upon all parties who may subsequently become co-owners of Units in the Regime and their respective heirs, legal representative, and successors and assigns.

XXXIV. Definitions

The definitions contained in S. C. Code Ann. § 27-31-10 et seq. (1976), are hereby incorporated herein and made a part hereof by reference. The words, "Unit" and "Apartment" shall have the same meaning as the word "Unit" as defined in S. C. Code Ann. § 27-31-20 (1976).

XXXV. Alternative Dispute Resolution

Any claim or cause of action not covered by Article IV's Arbitration Agreement shall be covered by the provisions of this Article:

A. Definitions Applicable to this Article XXXV

CLT-962333v2

1. **Bound Party.** Includes Grantor, all co-owners, the Association and its officers, directors, and committee members, including any corporation or other entity formed to serve as the Association, all persons and entities subject to this Master Deed, any person or entity not otherwise subject to this Master Deed who agrees to submit to this Article, any person or entity that now has or hereafter acquires any interest in a Unit, the developer of the Regime, any person or entity that has previously or hereafter supplies (directly or indirectly) labor, materials, design services, equipment or other things of value in connection with the construction or maintenance of any Unit or Common Element in the Regime, any heir, successor, delegatee or assignee of any person or entity listed in this paragraph.

2. **Claim.** Refers to any claim, grievance or dispute arising out of or relating to:

(i) the interpretation, application, or enforcement of this Master Deed, including all documents attached thereto or incorporated by reference therein; (ii) the rights, obligations, and duties of any Bound Party under the Master Deed, including all documents attached thereto or incorporated by reference therein; or (iii) the design or construction of improvements within the Regime, including but not limited to, disputes with the Grantor, the Contractor, the Architect, or any of their successors or assigns, agents, employees, or subcontractors and the co-owners of the Units, and/or the Association regarding the sale, design or construction of The Gates at Williams-Brice or the purchased Unit, the Limited Warranty, the Limitation of Remedies, or the Disclaimer and Exclusion of All Other Warranties, or any provision of any of them,

except that the following shall not be considered a Claim unless all parties to the matter otherwise agree to submit the matter to the procedures set forth in Section B of this Article:

(i) any suit by the Association to collect assessments or other amounts due from any Co-Owner of a Unit; (ii) any suit between Unit Co-owners, which does not include Grantor or the Association as a party, if such suit asserts a Claim which would constitute a cause of action independent of the Master Deed; and (iii) any suit in which any indispensable party is not a Bound Party.

3. **Claimant.** A Bound Party asserting a Claim.

4. **Respondent.** A Bound Party against whom a Claim is made.

B. ARBITRATION

1. CLAIMANT HEREBY SUBMITS TO IN PERSONAM JURISDICTION OF THE STATE OF SOUTH CAROLINA AND AGREES THAT ITS CLAIM SHALL BE DETERMINED BY AN ARBITRATOR AS PROVIDED HEREIN IN THE STATE OF SOUTH CAROLINA AND HEREBY WAIVES ALL OBJECTIONS TO VENUE. ALL MATTERS ARISING HEREUNDER SHALL BE DETERMINED IN ACCORDANCE WITH THE LAW AND PRACTICE OF SOUTH CAROLINA AND CLAIMANT AGREES THAT ANY SERVICE OF PROCESS MAY BE ACCOMPLISHED BY CERTIFIED MAIL RETURN RECEIPT REQUESTED AT THE CLAIMANT'S LAST KNOWN HOME ADDRESS OR ANY OTHER METHOD ALLOWED IN THE STATE OF SOUTH CAROLINA OR CLAIMANT'S HOME STATE.

2. EACH AND EVERY CLAIM AND CAUSE OF ACTION ARISING OUT OF OR RELATED IN ANY WAY TO THE DESIGN, CONSTRUCTION, SALE, MAINTENANCE, HABITABILITY OF, OR CONDITION OF ANY UNIT OR ANY COMMON AREA THAT IS ASSERTED BY CLAIMANT SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION BEFORE A PANEL OF THREE (3) ARBITRATORS PURSUANT TO THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION, AS MODIFIED HEREIN. THE ARBITRATION HEARING SHALL BE CONDUCTED IN RICHLAND COUNTY, SOUTH CAROLINA. ALL CLAIMS AND CAUSES OF ACTION OF ALL PERSONS AND ENTITIES ENTITLED TO ENFORCE (OR BOUND BY) THIS ARBITRATION PROVISION SHALL BE ASSERTED IN A SINGLE ARBITRATION PROCEEDING, AND MULTIPLE PARTIES MAY BE JOINED IN THE ARBITRATION PROCEEDING SO THAT ALL DISPUTES MAY BE RESOLVED IN ONE FORUM. NO CLAIM OR CAUSE OF ACTION MAY BE ASSERTED THAT WOULD BE BARRED BY THE STATUTE OF LIMITATIONS OR THE STATUTE OF RESPONSE.

3. IN ANY ARBITRATION PROCEEDING, REQUESTS FOR PRODUCTION OF DOCUMENTS MAY BE SERVED BY EACH PARTY, AND NON-PRIVILEGED, RESPONSIVE DOCUMENTS THAT WOULD BE DISCOVERABLE UNDER RULE 34 OF THE FEDERAL RULES OF CIVIL PROCEDURE (WERE THE CLAIMS AND CAUSES OF ACTION BEING ASSERTED IN UNITED STATES DISTRICT COURT) SHALL BE PRODUCED. DEPOSITIONS MAY BE TAKEN AS ALLOWED BY THE ARBITRATION PANEL, WHICH PANEL SHALL REASONABLY LIMIT THE NUMBER OF DEPOSITIONS IN ORDER TO AVOID UNNECESSARY OR EXCESSIVE EXPENSE, DELAY, OR HARASSMENT.

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4. THE ARBITRATION PANEL SHALL ISSUE A WRITTEN DECISION IDENTIFYING WITH SPECIFICITY EACH CLAIM OR CAUSE OF ACTION ASSERTED OR RESOLVED IN ANY ARBITRATION, AND THE LEGAL PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL SHALL BE APPLICABLE TO ANY ARBITRATION AWARD. ANY ARBITRATION AWARD MAY BE CONFIRMED AND ENFORCED IN ANY COURT OF JURISDICTION.

5. THIS ARBITRATION PROVISION IS EXPRESSLY INTENDED TO BENEFIT AND BE ENFORCEABLE BY EACH BOUND PARTY WHETHER OR NOT SUCH PERSON OR ENTITY IS BOUND BY THIS ARBITRATION PROVISION. ANY ATTEMPT BY ANY SUCH PERSON OR ENTITY TO ENFORCE THIS ARBITRATION PROVISION SHALL CONSTITUTE CONCLUSIVE CONSENT TO BE BOUND HEREBY.

C. Association Claims

In addition to compliance with the foregoing arbitration procedures outlined in this Article, the Board shall not be authorized or obligated to, and the Association shall not initiate any judicial or administrative proceeding unless first approved by a seventy-five percent (75%) affirmative vote of the entire Association membership per the percentages in Exhibit "D", except that no such approval shall be required for actions or proceedings:

- (1) initiated to enforce the provisions of this Master Deed against a co-owner or occupant of any Unit or Common Element (excluding the provisions of the Limited Warranty contained in Article IV herein) including all documents attached thereto or incorporated by reference therein, including, but not limited to, collection of assessments and foreclosure of liens;
- (2) initiated to challenge property taxation or condemnation proceedings;
- (3) to defend claims filed against the Association or to assert counterclaims in proceedings instituted against it.

This Section C shall not be amended unless such amendment is approved by one hundred percent (100%) of votes of the Association membership.

D. Waiver of Jury Trial

BY ACCEPTANCE OF A DEED TO ANY UNIT OR OTHER PROPERTY HEREUNDER CO-OWNER(S) HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY HEREBY AGREE, THAT:

(i) NEITHER CO-OWNER NOR ANY ASSIGNEE, SUCCESSOR, HEIR, OR LEGAL REPRESENTATIVE OF CO-OWNER OR GRANTOR, SHALL SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, OR ANY OTHER LITIGATION PROCEDURE ARISING FROM OR BASED UPON THE MATTERS SET FORTH HEREUNDER, OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE GRANTOR, ITS AGENTS, CONTRACTORS, SUBCONTRACTORS, ARCHITECTS, ENGINEERS AND THE CO-OWNERS OF THE ASSOCIATION, INCLUDING WITHOUT LIMITATION, WAIVER OF ANY TYPE OF CLASS ACTION SUIT;

(ii) NEITHER CO-OWNER NOR GRANTOR WILL SEEK TO CONSOLIDATE ANY SUCH ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL HAS NOT BEEN OR CANNOT BE WAIVED;

(iii) NEITHER OWNER NOR GRANTOR HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS SECTION WILL NOT BE FULLY ENFORCED IN ALL INSTANCES; AND

(iv) THE PROVISIONS CONTAINED IN THIS ARTICLE ARE A MATERIAL INDUCEMENT FOR GRANTOR TO MAKE THE DECLARATIONS SET FORTH HEREIN.

XXXVI. Miscellaneous

- (a) Attached hereto as Exhibit "A", Legal Description.
- (b) Attached hereto as Exhibit "B", As-Built Survey.
- (c) Attached hereto as Exhibit "C", Plans.
- (d) Attached hereto as Exhibit "D", Table of Values.
- (e) Attached hereto as Exhibit "E", Certification to Plans.
- (f) Attached hereto as Exhibit "F", Articles of Incorporation of The Gates at Williams-Brice Condominium Association.
- (g) Attached hereto as Exhibit "G", By-Laws of The Gates at Williams-Brice Condominium Association.