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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2015-002131

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

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.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities ..... *iii*

Reply Argument 1

1. DOES THE LONG GROVE POA HAVE STANDING TO CHALLENGE THE TERMS OF THE BEACH COMPANY/VISTA CONTRACT WHICH ATTEMPTS TO IMPOSE BURDENS AND RESTRICT THE RIGHTS OF THE POA?

2. DOES THE ARCHITECT AND CONTRACTOR OWE DUTIES TO THE OWNERS OF A CONVERTED APARTMENT BUILDING UNDER THEORIES OF NEGLIGENCE AND IMPLIED WARRANTY OF WORKMANSHIP?

3. ARE BUILDING CODE REQUIREMENTS AND COMPLIANCE WITH INDUSTRY STANDARDS NON-DELEGABLE DUTIES FOR WHICH AN ARCHITECT AND CONTRACTOR MAY BE LIABLE TO SUBSEQUENT OWNERS OF A CONDOMINIUM CONVERSION PROJECT?

4. DOES S.C. CODE ANN. §32-2-10 APPLY TO THE AGREEMENT ENTERED INTO BY BEACH COMPANY AND VISTA?

5. DOES PUBLIC POLICY REQUIRING CONTRACTORS' AND ARCHITECTS' LIABILITY TO SUBSEQUENT PURCHASERS UNREASONABLY RESTRICT A PARTY'S ABILITY TO LIMIT LIABILITY OR ENGAGE IN LEGTIMATE SETTLEMENT AGREEMENTS?

Conclusion 10

TABLE OF AUTHORITIES

CASES

Arvai v. Shaw, 289 S.C. 161, 345 S.E.2d 715 (1986) 6

Baker v. Town of Sullivan's Island, 279 S.C. 581, 310 S.E.2d 433 (Ct. App. 1983) 3, 4

Beachwalk Villas Condominium Assoc., Inc. vs. Martin,
305 S.C. 144; 406 S.E.2d 372 (1991) 5, 6

Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003) 2

Fattah v. Bim, 52 N.E.3d 332 (Ill. 2016) 6

Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008) 9, 10

Fisher v. Stevens, 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003) 2

Hill v. Polar Pantry, 219 S.C. 263, 64 S.E.2d 885 (1951) 5, 6

Holly Woods Ass'n of Owners v. Hiller, 392 S.C. 172, 708 S.E.2d 787 (Ct.App. 2011) 9

Hutson v. Cummins Carolinas, Inc., 280 S.C. 552, 314 S.E.2d 19 (Ct.App. 1984) 5, 6

Jones v. Centex Homes, 967 N.E.2d 1199 (Ohio 2012) 5, 11

Kennedy v. Columbia Lumber & Manufacturing, Co., Inc.,
299 S.C. 335, 384 S.E.2d 730 (1989) 1, 2, 3,6

Kirkman v. Parex. 369 S.C. 477, 632 S.E.2d 854 (2006) 6

Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980) 3

Tommy L. Griffin Plumbing & Heating Co. vs. Jordon, Jones & Goulding, Inc.,
320 S.C. 49, 463 S.E.2d 85 (1995) 5, 6

STATUTES AND REGULATIONS

S.C. Code Ann. § 15-3-530 9

S.C. Code Ann. § 15-3-640 (Supp.2003) 9

S.C. Code Ann. § 15-73-10 (2005) 10

S.C. Code Ann.§ 32-2-10 (1976 revised 2007) 7, 8

1997 Standard Building Code 4, 5

ARGUMENT IN REPLY

The fundamental questions of this case are quite simple: can two parties, by private contract, circumvent and ignore laws enacted to protect the general public; and can those parties skirt with impunity their legal duties to the detriment of innocent homeowners?

Respondents would like the Court to believe this is merely a case of "freedom to contract," however, that could not be further from the truth. If the lower court's decision is allowed to stand, then this Court will seriously undermine two of the central tenants of this State's construction defect jurisprudence: this Court's holding in Kennedy v. Columbia Lumber, and the doctrine of implied warranty of workmanship. The Respondents' release and disclaimer is an exculpatory contract in violation of the fundamental protections afforded to the public, homeowners specifically, and an affront to the public policy of this state.

1. DOES THE LONG GROVE POA HAVE STANDING TO CHALLENGE THE TERMS OF THE BEACH COMPANY/VISTA CONTRACT WHICH ATTEMPTS TO IMPOSE BURDENS AND RESTRICT THE RIGHTS OF THE POA?

As a preliminary matter, Respondents improperly extract one sentence from the trial court's 41 page Order and distort its significance in an attempt to have the appeal dismissed on a technicality pursuant to the two-issue rule. Under its conclusion of law, VIII, "The Sales Contract Is Not An Impermissible Exculpatory Contract", the circuit court includes among its supporting statements:

> As previously stated,[1] **the Court finds it appropriate to point out** that the POA, not being a party to the Sales Contract between LGSF and Vista, lacks proper standing to raise a contractual argument as to the enforceability of the provisions contained within the contract.[2]

[1] This is incorrect. Nowhere was it "previously stated" in the Order that the POA lacks standing.
[2] Paragraph 114 of Judge Baxley's Order (R. pg 38).

This statement is not a conclusion of law, nor is it a finding of fact: it is merely an observation of the Judge. Respondents' reliance on this incidental, non-determinative statement in the Order as an "independent ground" upon which the circuit court made its decision is erroneous.[3] Petitioner has fully briefed and argued why the lower court erred in concluding: "The Sales Contract Is Not An Exculpatory Contract".[4]

Petitioner challenges the validity and enforceability of the disclaimer and release as an exculpatory contract in violation of public policy, which is therefore void and unenforceable as a matter of law.[5] The crux of Respondents' standing argument is that the POA was not a party to the Sales Contract, and therefore cannot challenge the validity of the disclaimer and release provisions contained therein. The architect and contractor owed independent legal duties to subsequent homeowners such as the POA, which Respondents claim were released by their predecessor in title. If the POA truly does lack standing to defend itself and challenge the terms of the contract, then it cannot be bound nor suffer the burden of its terms. Conversely, if the POA is bound by the terms of the contract, and its rights are restricted thereby, then logically it has standing to challenge its legality.

2. DOES THE ARCHITECT AND CONTRACTOR OWE DUTIES TO THE OWNERS OF A CONVERTED APARTMENT BUILDING UNDER THEORIES OF NEGLIGENCE AND IMPLIED WARRANTY OF WORKMANSHIP?

A. Negligence

Respondents blatantly misrepresent the established precedent under Kennedy v.

[3] *See* Curcio v. Caterpillar, Inc., 355 S.C. 316, 319-20, 585 S.E.2d 272, 273 (2003).
[4] The issue of standing is implicit in Petitioner's arguments, and specifically addressed in (1) Plaintiff's Motion to Reconsider Judge Baxley's Order (R. p. 827); (2) Appellant's Motion to Reconsider to the Court of Appeals; and (3) Petitioner's Petition for Writ of Certiorari.
[5] Fisher v. Stevens, 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003).

Columbia Lumber,[6] as protecting only "the new homebuyer" or "innocent new home purchasers", and therefore the contractor and architect owe no duties to the POA. In Kennedy, the Supreme Court specifically held 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." 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989). The Supreme Court held:

> . . . 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. Kennedy expressly held that such duties extend to foreseeable parties, specifically subsequent purchasers. 299 S.C. 347, 384 S.E.2d 737; relying on Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980).

B. There is no distinction between apartments and residential condominiums under the case law or building codes

A common theme throughout Respondents' brief focuses on the "altered use and legal nature of the property". Respondents go to great lengths in an attempt to draw a distinction between the "commercial rental apartments" JHP and Gulfstream were hired to design and construct and the "residential" condominiums that were sold to the public following conversion; however, no such distinction exists under applicable case law or the Building Codes. Conversion of apartments into the condominium form of ownership does not change the legal nature or use

[6] 299 S.C. 335, 384 S.E.2d 730 (1989)

of the property—from the time of original construction to the present, the property has always remained ***multi-family residential dwellings***.[7] "The conversion from an apartment building to condominiums constitutes a change of ownership, rather than a change in use." Baker v. Town of Sullivan's Island, 279 S.C. 581, 584–85, 310 S.E.2d 433, 435–36 (Ct. App. 1983). Just as in Baker, "The property would still be used for residential purposes as it was before."

The standards of construction for all buildings, commercial or residential, are governed by the provisions of the Building Code in effect at the time of construction.[8] The standards that apply to the construction of a particular building are based on its use or occupancy classification, which depends on the number of occupants and how the building will be used *by the occupants.*[9] The pre-conversion apartments and post-conversion condominiums both constitute "Residential Occupancy - Group R-2," defined as "[m]ultiple dwellings where the occupants are primarily permanent in nature, including: *apartment houses*, . . "[10] The Code further defines "apartment houses," as "a building used as a multi-family dwelling providing three (3) or more separate dwelling units."[11] There is **zero** distinction in the Building Code whether the project is an apartment building or a condominium. The contractor and architect must meet the exact same construction standards whether Long Grove was apartments or condominiums, as the Code defines both as "apartment houses". And it is this very violation of the building code that creates the legal duty for which the contractor and architect are negligent.

Respondents likewise cannot argue that they were hired to design and build "commercial rental apartments," with no intention the buildings would be sold to the public as condominiums.

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[7] *See* 1997 Standard Building Code § 311.2

[8] The 1997 Standard Building Code governed the construction of Long Grove Apartment Project.

[9] 1997 SBC §301.2 provides 9 general use/occupancy classification groups: Group (A) Assembly; (B) Business; (E) Education; (F) Factory; (H) Hazardous; (I) Institutional; (M) Mercantile; (R) Residential; and (S) Storage).

[10] *See* 1997 SBC § 311.1 ("Group R occupancy is the **use** of a building or structure, or any portion thereof, for sleeping accommodations"); § 311.2 (Residential Occupancy – Group R2)

[11] 1997 SBC § 202

When Gulfstream and JHP were hired by the original developer to design and construct the Project, they were required to design and build the buildings in accordance with the minimum standards as set forth in the Building Code. The Code provisions for multi-family residential dwellings would have applied to construction of the Project, regardless of whether it was intended to be "commercial"[12] rental apartments or "residential" condominiums.[13]

C. Implied Warranty Workmanship

This Court has long held that 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). It is a performance-based warranty, which arises from the legal duties imposed on builders and architects, independent of any duties assumed under contract, and thus cannot be waived by contract. *See e.g.*, Jones v. Centex, (967 NE 2d 1199 Ohio 2012).

Respondents' brief addressing the implied warranty of workmanship contains their most blatant misstatement of the law. Respondents state:

> The implied warranty of workmanship, like the exception to the economic loss rule in negligence cases, has been recognized by courts in South Carolina as a mechanism to protect purchasers of a new home. In each case, the implied warranty was applied only in the context of a builder-vendor involved in the construction and/or sale of a new home (Res. Brief p. 21)

This simply is not the law of South Carolina. The warranty of workmanship is not merely "a mechanism to protect purchasers of a new home" and apply "only in the context of a builder involved in the construction of a new home." In fact, this Court first recognized an implied warranty of workmanship in the context of *commercial* construction regarding the design of an

[12] This is Respondents' term. The Building Code defines apartment houses as "Residential".
[13] *See* 1997 Standard Building Code § 311.2

industrial freezer. *See* Hill vs. Polar Pantry, 219 S.C. 263, 64 S.E.2d 885; *see also* Hutson v. Cummins Carolinas, Inc., 280 S.C. 552, 314 S.E.2d 19 (Ct.App. 1984)(mechanic's repairs of truck); Beachwalk Villas Condominium Assoc., Inc. vs. Martin, 305 S.C. 144; 406 S.E.2d 372 (1991) (architect's designing condominiums); Tommy L. Griffin Plumbing & Heating Co. vs. Jordon, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (engineer's design of water trunk line).

Respondents' reliance on Arvai v. Shaw,[14] an implied warranty of habitability case, for the proposition that the implied warranty of workmanship does not apply to the sale of "used" property is wrong. Kennedy is dispositive on this issue, holding that the implied warranty of workmanship is separate and distinct from the implied warranty of habitability and extends to subsequent purchasers. 299 S.C. 335, 384 S.E.2d 730.

Likewise, Respondents improperly rely on the recent decision of the Illinois Supreme Court, Fattah v. Bim, 52 N.E.3d 332 (Ill. 2016) to misleadingly assert that the implied warranty of workmanship may be waived and disclaimed through provisions in a sales contract, and such disclaimer applies to subsequent purchasers. That case, however, merely supports the proposition that the implied warranty *of habitability* may be disclaimed, just as this Court held Kirkman v. Parex. 369 S.C. 477, 482-3, 632 S.E.2d 854, 857 (2006). Unlike Illinois, South Carolina recognizes an implied warranty of workmanship that is separate and distinct from the implied warranty of habitability, and thus, Respondents' reliance on Fattah v. Bim is erroneous.

Respondents continually misunderstand the distinction between the warranties of habitability and workmanship. The warranty of habitability springs from the contract of sale and is not dependent on fault, but rather on the principles of "a fair price paid" and "the benefit of the bargain". For this reason, courts allow the parties to negotiate a waiver if they so chose. The

[14] 289 S.C. 161, 345 S.E.2d 715 (1986)

warranty of workmanship, however, is based on performance of legal duties – a fault based standard. These obligations are distinct from the warranty of habitability, and cannot be waived.

3. ARE BUILDING CODE REQUIREMENTS AND COMPLIANCE WITH INDUSTRY STANDARDS NON-DELEGABLE DUTIES FOR WHICH AN ARCHITECT AND CONTRACTOR MAY BE LIABLE TO SUBSEQUENT OWNERS OF A CONDOMINIUM CONVERSION PROJECT?

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). Contrary to Respondents' assertion, the language is clear as to Beach Company's intent to *delegate* to Vista the obligations owed by Gulfstream and JHP to assure compliance with building codes, regulations and industry standards. Under the non-delegable duty doctrine, the parties may delegate *performance* to Vista, but ultimately must remain liable and responsible for their defective workmanship and breaches of their absolute legal duties. Gulfstream and JHP had a duty "to ensure that the property was properly constructed"; and that duty extended to subsequent purchasers of Long Grove.

4. DOES S.C. CODE ANN. § 32-2-10 APPLY TO THE AGREEMENT ENTERED INTO BY BEACH COMPANY AND VISTA?

Respondents provide no authority for their position that the anti-indemnity statute is inapplicable to the release and disclaimer provisions contained in the Sales Contract between Beach Company and Vista. A contract provision disclaiming and waiving all liability for the construction and design of a residential apartment complex clearly is an "agreement *in connection with* the design, construction, alteration, repair or maintenance" of the apartment

building(s). *See* S.C. Code Ann.§ 32-2-10 (1976 revised 2007). The agreement waives the liability of Gulfstream and JHP as relates to the original design and construction; and further releases their obligation to repair and cure latent defects which subsequently manifest.

Respondents cannot contend that the disclaimer and release do not constitute an "indemnification," as required under the statute. The disclaimer and release is an indemnity agreement by the very terms used by the parties and by the terms the lower court incorporated in its Order:

> The initial term sheet signed by Vista and LGSF (Beach Company) stated that Vista would **indemnify** LGSF against any claims made by purchasers of the condominium units. . . (R. pg 7)
>
> 21. Similarly, Beach Company's cover letter forwarding the signed term sheet to Mr. de Guardiola states in pertinent part: '(1) The **indemnification** language will include a release of all claims related to the development, design, construction, maintenance, alteration, and repair of the property. . . (R. pg 8)

Further, Respondents themselves quote directly from the term sheet and cover letter in their Brief, and as such cannot now argue that the parties did not intend the release and disclaimer to be an indemnification provision. (*See* Respondents Brief, p. 5).

5. DOES PUBLIC POLICY REQUIRING CONTRACTORS' AND ARCHITECTS' LIABILITY TO SUBSEQUENT PURCHASERS UNREASONABLY RESTRICT A PARTY'S ABILITY TO LIMIT LIABILITY OR ENGAGE IN LEGITIMATE SETTLEMENT AGREEMENTS?

As a final "Hail Mary," Respondents attempt to appeal to the Court's reasonableness and pragmatism, asserting that the POA seeks to hold Gulfstream and JHP responsible **"in perpetuity"** and "proposes a theory which results in the imposition of eternal, unending, and virtually absolute strict liability on contractors and architects." (Respondents Brief, p. 39). Respondents' concerns are wholly unfounded as the General Assembly and the Courts have spoken directly to these issues.

Significantly, Respondents fail to acknowledge that their exposure to liability arising out of the construction and design of Long Grove was already temporally fixed by the thirteen-year Statute of Repose. *See* S.C. Code Ann. § 15-3-640 (Supp.2003).[15] Additionally, during the time in which the Statute of Repose is in effect, the Statute of Limitations operates to bar any claims not brought within three years of when the claim accrues. *See* id.; S.C. Code Ann. § 15-3-530. The Statute of Repose is more than a mere procedural limitation, granting builders and Architects an "absolute right" to be free from liability after the statutory period has run:

> The purpose of the statute of repose is to provide a substantive right to developers to be free from liability after a certain time period. *See Langley v. Pierce*, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993) ("A statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a statute of limitation."). Further, "[s]tatutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." Id. at 404, 438 S.E.2d at 244.

Holly Woods Ass'n of Owners v. Hiller, 392 S.C. 172, 708 S.E.2d 787 (Ct.App. 2011).

Holding the disclaimer and release void against public policy merely reinstates the expectation Respondents had when they designed and built the Project: that they would be liable to the owner for all latent defects arising in the thirteen years after completion. Prohibiting disclaimers and releases, such as this, furthers the public policy of our State by fixing contractors' and architects' liability from the outset, and is consistent with our legislature's intent as embodied in the statute of repose.

Nor does holding the independent legal duties, underlying the implied warranty of workmanship, to be absolute, non-delegable duties subject builders and architects to strict liability. *See* Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008). In

[15] The Statute of Repose has since been amended, shortening the length of time from thirteen years to eight years from the date of completion. § 15-3-640 (Supp.2005).

Fields, this Court held that the strict liability statute[16] only applies to sales of products, not to provisions of services, and thus does not apply to builders and architects.[17] Critically, the Court found persuasive that builders are subject to liability for a "reasonable period of time" under their implied warranties, for which "a builder is generally not able to limit his liability by warranties and disclaimers." Id.

Respondents raise the concern that forbidding contractors and architects from entering into disclaimers and releases such as this will, by implication, have the dire effect holding all releases contained in valid settlement agreements in construction defect litigation null and void. This would be an issue *if* the release and disclaimer had been entered into pursuant to litigation or even in anticipation of litigation, however, it was not. Unlike the circumstances involved here, parties who enter into a settlement agreement have suffered a loss; had a full and fair opportunity to investigate; or at the very least have been put on notice of their potential claim and had the opportunity to adjudicate their rights outside of the agreement. The parties to a settlement agreement are the ones who possess a cause of action; who have endured a manifestation of damages; and have the responsibility to fix the problems.

The circumstances in which the release and disclaimer at issue were entered into in no way reflect the process just described. Neither prospective purchasers nor the POA were parties to the contract, had no bargaining power and no ability to negotiate any of the terms and provisions of the contract. In fact, at the time that the contract was entered into, POA was not yet in existence. The party who suffered the loss, the homeowners, received no compensation with which to repair the deficiencies. This was no settlement agreement!

[16] S.C. Code Ann. § 15-73-10 (2005)
[17] Id. at 565, 658 S.E.2d at 91.

CONCLUSION

The public interest of this State is defeated if the contractor and architect are immunized from liability for their breaches of their affirmative duty to comply with mandatory minimum building standards in performing their undertakings in a workmanlike manner. This Court must protect the public interest:

> [T]he duty to construct a house in a workmanlike manner using ordinary care is the baseline standard that [South Carolina] 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).

In our petition for certiorari, we relayed the account of the tragedy that occurred the night before oral arguments at the Court of Appeals. Six college students in Los Angeles, California fell to their deaths when an apartment balcony collapsed. The cause of the collapse was the failure of the waterproofing system resulting in rot and decay of the untreated joist supporting the deck. This failure was the result of the negligent design and construction of the building. If that same accident occurred at Long Grove and the lower Court Opinion stands as the law of this case, then those students and their families would have no recourse or remedy against the architect and general contractor who violated numerous building codes and industry standards in designing and constructing the project. The architect and general contractor would completely avoid responsibility for their gross negligence resulting in death of innocent members of the public. If the Opinion stands, this Court will give general 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.

The impact of this decision is profound.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Petitioner's Reply Brief to all respondents via United States Mail, postage prepaid on June 12, 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 June 12, 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.

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