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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal From The Charleston County
Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

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Appellate Case No. ***2015-002131***
Case No. 2009-CP-10-6746

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RECEIVED
JUN 29 2017
S.C. SUPREME COURT

Long Grove at Seaside Farms, LLC; The Beach Company; and 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, Inc. is the

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.; and Essex Engineering Corporation,

Third-Party Defendants,

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

Respondent.

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# AMENDED JOINT BRIEF OF RESPONDENTS

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A. Whether the POA has the right or ability to challenge the terms of a contract to which it is neither a party nor a third-party beneficiary?

B. Whether the circuit court erred in finding it is inappropriate to allow a subsequent purchaser to revive and assert claims for negligence and breach of implied warranties that were released and disclaimed by the prior owner pursuant to a bargained for purchase agreement?

C. Whether an architect who designs an apartment complex and a general contractor who builds an apartment complex owe any duty to persons who, years later, after the apartment complex has been sold to another commercial developer who converts the apartment project to condominiums, purchased one of those condominiums?

D. Whether the circuit court erred in finding that the owner of an apartment complex may be released from liability and disclaim all warranties for itself and its affiliates when the owner of the apartment complex negotiates the sale of the property with a sophisticated commercial developer who specifically agrees to releases and waivers of any and all claims and warranties related to the design and construction of the apartment project?

E. Whether the South Carolina anti-indemnity statute, *S.C. Code Ann.* § 32-2-10, prohibits exculpatory contracts or releases in the sale of a used commercial property?

F. Whether the nondelegable duty doctrine has any application in a case that does not involve vicarious liability or the delegation of the performance of a duty?

G. Whether a subsequent purchaser may ignore the releases and waivers by its predecessor in interest and resurrect previously waived and released claims?

## II. STATEMENT OF THE CASE

This appeal concerns a condominium property owner association's challenge to the legal effect and enforceability of disclaimers and releases arising from the sale of a commercial apartment complex that was subsequently converted to condominiums.

In 1999 Long Grove at Seaside Farms, LLC ("LGSF") hired Gulfstream Construction Company, Inc. ("Gulfstream") to construct an apartment complex in Mount Pleasant, South Carolina. LGSF contracted with James, Harwick & Partners, Inc. ("JHP") to act as the project's architect and design plans for the apartment complex. LGSF owned and operated the property as a rental apartment complex.

In 2005 LGSF sold the apartment complex to Vista Realty Partners, LLC ("Vista") on a strictly "as-is" "where-is" and "with all faults" basis pursuant to an extensively negotiated contract (the "Sales Contract"). The Sales Contract contains provisions releasing LGSF and its affiliates—including Gulfstream and JHP—from all liability related to the design, construction, and condition of the property. In addition to the releases, the Sales Contract disclaims all warranties related to the design, construction, and condition of the property. The Sales Contract provided Vista with a due diligence period in which Vista hired independent contractors and designers to inspect the apartment complex. Following the inspections, LGSF agreed to pay Vista $200,000 for the repair of defects that Vista identified in the apartment complex.

After taking possession of the apartment complex Vista converted the property from rental apartments to condominiums. Vista sold the individual condominiums to individual purchasers subject to a master deed (the "Master Deed") that was prepared and recorded by Vista. The Master Deed contains clear notice to all prospective condominium buyers that LGSF had sold the property to Vista on an "as-is" "where is"

"without recourse" and "with all defects" basis and provided clear notice that none of the parties involved in the original design and construction of the apartments would not be responsible for any defects in the condominiums that were created and sold by Vista when it converted the apartments to condominiums.

In 2006 Vista turned over control of the Property Owners Association (the "POA") to a Board of Directors that was elected by the individual condominium unit owners. In 2009 the POA initiated this litigation against LGSF, Gulfstream, and JHP, among others, based upon alleged construction defects in the condominiums that were created and sold by Vista. The circuit court granted summary judgment in favor of LGSF, Gulfstream, and JHP on the following grounds: (1) LGSF, JHP and Gulfstream did not extend any warranties to the POA and do not owe the POA a duty of care; (2) the assumption of liability, disclaimers, and releases are valid and enforceable; (3) the Sales Contract is not contrary to public policy under *S.C. Code Ann.* § 32-2-10; (4) the release and disclaimers in the Sales Contract are not unconscionable, unjust, or unfair to the POA; (5) the release and disclaimers in the Sales Contract do not violate public policy; and (6) the POA lacked standing to challenge the terms of the Sales Contract. The Court of Appeals affirmed the circuit court's grant of summary judgment and adopted the circuit court's order in its entirety.

Now the POA requests this Court reverse the circuit court and Court of Appeals and find that Gulfstream and JHP should be liable for alleged defects in the condominiums based on negligence and breach of the implied warranty of workmanship on the theory that—according to the POA—liability for those claims may never be released or disclaimed because to allow builders and designers to negotiate releases and disclaimers in a contract for the sale of real property "violates public policy." Under the POA's theory

of the case, a general contractor and architect are forever liable to all subsequent purchasers of a property regardless of whether the property was transferred pursuant to valid releases and disclaimers that were expressly negotiated by two sophisticated commercial entities who were represented by counsel, and regardless if the subsequent purchaser changes the use and nature of the property. If the Court adopts the POA's argument and finds the releases and disclaimers in the Sales Contract are void, then all settlement agreements in construction defect cases would be void and future settlements would be discouraged because builders, architects, and developers would remain liable in perpetuity regardless of whether they entered into valid agreements that release them from liability.

Contrary to the POA's arguments, the South Carolina courts have repeatedly recognized that parties are free to enter into contracts releasing and disclaiming claims and warranties. Moreover, South Carolina courts have never found that an architect who designs an apartment complex, and a general contractor who builds an apartment complex, owe any duty to persons who—years later, after the apartment complex has been sold to another commercial developer who converts the apartment complex to condominiums—purchased one of those converted condominiums.

For the reasons set forth below, the Court should affirm the circuit court's grant of summary judgment.

## A. FACTS AND PROCEDURAL HISTORY

In 1999 LGSF hired Gulfstream to construct an apartment complex in Mount Pleasant, South Carolina (the "Long Grove Apartments"). LGSF contracted with JHP to act as the project's architect and design plans for the apartment complex.

LGSF owned and operated the Long Grove Apartments solely as a rental apartment complex and never as a condominium development. In 2004 LGSF

considered selling the complex. From the beginning of the transaction, LGSF made it absolutely clear that if any buyer intended to convert the rental apartment property to condominiums, LGSF and its "affiliates" involved in the design and construction of the rental apartments, must be released from all such liability. (R. 987:24; 989:18).

LGSF received bids for the property from both income investors and converters. Ultimately, Vista was the high bidder. Vista is owned by Eduard de Guardiola, who has a law degree and is an experienced real estate developer and condominium converter. (R. 1048:3–1051:3; 1052:24–1055:7). Vista was an independent, arms-length buyer that has no relationship of any kind with LGSF.

Upon receipt of Vista's high bid, Vista and LGSF, both represented by legal counsel, began negotiating the terms of the sale of the apartments, and at each step of that process, LGSF set forth its position that it was disclaiming and should be released from liability regarding condition of the property. The initial term sheet signed by Vista and LGSF stated in pertinent part:

> **LONG GROVE at SEASIDE FARM**
> **INITIAL TERM SHEET**
>
> * * *
>
> **As-Is** The Property will be sold and purchased "as-is, where-is, and with all faults"; Seller will be released from all liabilities except those arising under the purchase and sale agreement.

(R. 1067). Similarly, the cover letter forwarding the signed term sheet to Mr. de Guardiola states in pertinent part:

> The indemnification language will include a release of all claims related to the development, design, construction, maintenance, alteration, and repair of the property. We propose that the release of claim will not only be in the Sales Contract but also in the deed of conveyance at closing and will survive the closing of this transaction.

(R. 1064). Ultimately, LGSF and Vista entered into a Sales Contract, which stated, in pertinent part, as follows:

> 14. **Condition of Property.** . . . The Property shall be sold and conveyed strictly on an "as is", "where is", "without recourse" and "with all defects" basis, as it exists on the last day of the Inspection Period, 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 expressly disclaimed except as contained in this Agreement. Without limiting the generality of the foregoing, Purchaser acknowledges that Seller has made no representations, warranties or covenants (except as otherwise provided specifically in this Sales Contract, specifically including but not limited to the representations and warranties contained in paragraph 6 hereof) as to the compliance of the Property with any federal, state, municipal or local statutes, laws, rules, regulations or ordinances, including, without limitation, those pertaining to construction, rent control, building and health codes, land use (or permits issued in connection therewith) . . . .

(R. 70-71). The Sales Contract also stated:

> 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.
>
> b) . . . Purchaser on behalf of itself and its heirs, representatives, successors, and assigns, agrees to never sue and completely releases Seller, The Beach Co., Gulfstream Construction Company, Seller's other affiliates, agents, officers, directors, employees, insurers, representatives, successors, assigns, and all other companies, partnerships, entities, or persons involved in the design, development and/or construction of the apartment buildings and apartments therein and all other improvements prior to the Closing Date of this sale transaction (collectively, the "Affiliates"), 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, including unknown and unforeseen claims that may now exist or that may arise in the future.

(R. 71).

In an effort to ensure that Vista would provide future condominium buyers with notice that LGSF, Gulfstream, and JHP had no role in the conversion and would not be

responsible for any claimed construction defects, LGSF in the Sales Contract required that if Vista converted the apartments to condominiums after buying the property, any Master Deed prepared and recorded by Vista to create a condominium regime should include a notice of Vista's complete assumption of liability, disclaimers, and releases of all claims related to the construction and condition of the property. (R. 72) (Paragraph 16 in the Sales Contract).

The disclaimers, releases, and notice provisions were specifically bargained for components of LGSF's and Vista's negotiations regarding the terms of the Sales Contract. For LGSF, those terms were non-negotiable fundamental terms of the contract, and representatives of LGSF and Vista both testified that LGSF would not have sold the property to Vista if Vista had not agreed to those terms. (R. 1000:22–1001:7). Vista ultimately accepted LGSF demands and signed the Sales Contract containing those terms.[1]

Additionally, the Sales Contract gave Vista a due diligence period to inspect the condition of the property prior to closing. Vista hired engineers to inspect the property and the eventual property condition reports identified defects in the buildings, including water damage on the exterior balconies. (R. 1100; 1178). Prior to closing, Vista required LGSF to escrow $200,000.00 of the sales proceeds to cover Vista's future cost for the balcony repairs. (R. 1187). Afterwards, Vista hired its own contractors to repair the balconies and perform other work on the buildings. (R. 1099:3-16). Vista then received the $200,000.00 escrowed funds.

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1 Prior to closing, Vista assigned its rights under the Sales Contract to Long Grove Vista, LLC, which is an entity established by Eduard de Guardiola to take title to the property. Vista Realty Partners, LLC and Long Grove Vista, LLC are collectively referred to as "Vista" for brevity and ease of reference.

The sale of the apartment property to Vista closed on March 7, 2005. The duly recorded real estate deed from LGSF to Vista states, in pertinent part as follows:

> . . . the Property is being conveyed 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 expressly disclaimed. Without limiting the generality of the foregoing, Grantee acknowledges that Grantor and its affiliates (The Beach Co. and Gulfstream Construction Company) have made no representations, warranties or covenants as to the compliance of the Property with any federal, state, municipal or local statutes, laws, rules, regulations or ordinances . . . .

(R. 143-144).

After closing on the property, Vista converted the rental apartments to condominiums. Vista's legal counsel prepared and recorded a Master Deed which created the Long Grove Horizontal Property Regime and the POA. (R. 1098:2-9). As required in the LGSF and Vista Sales Contract, the Master Deed prepared and recorded by Vista contained notice that LGSF had sold the property on an "as-is" and "with all defects" basis and had disclaimed and been released from all warranties and liabilities associated with the condition of the property. The notice, which is set forth in Paragraph 24 in the Master Deed prepared and recorded by Vista, states:

**MASTER DEED FOR LONG GROVE HORIZONTAL PROPERTY REGIME**

* * *

24. **RELEASE**.

> Declarant [*i.e.*, Vista] 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 [i.e., LGSF] 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 sales 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 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 representations, warranties or covenants as to the compliance of the property compromising the Regime with any federal, state, municipal or local statutes, laws, rules, 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 compromising the Regime for the purpose of converting such property into condominiums which it is or will sell 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 being exchanged in the sale transaction on Marcy 7, 2005 note 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 released Long Grove, The Beach Company, Gulfstream Construction, 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 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 compromising 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.

(R. 197-198) (Emphasis added).

As in the lower courts, the POA's Brief to this Court insinuates that LGSF "buried" this release provision in the Master Deed,[2] which suggestion intentionally ignores that LGSF no longer owned the property when Vista created the condominium regime and that, Vista, as the owner of the property, was solely responsible for preparing and recording the Master Deed. Following its recording of the Master Deed that created the POA, Vista controlled the POA by appointing the POA's board of directors. (R. 1059:8–1059:3).

In addition to the notices in the Master Deed, when Vista sold its newly developed condominiums to individual condominium unit buyers, the deeds from Vista to the buyers (which were prepared and recorded by Vista as the owner and developer of the condominiums) notified the purchasers that Vista had "converted the rental units at Long Grove Apartments to condominium ownership," (R. 242) and contained notice that Vista's conveyance of the units to the buyers was subject to the terms of the Master Deed for the POA.[3]

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**2** *See* POA Brief, p.5 (stating, "The 'release' language is inconspicuous, has the same heading and same font as every other paragraph of the Master Deed, and is no accentuated or emphasized in any way.").

**3** The individual deeds from Vista to the condominium unit purchasers stated that the property sold was subject to the following provision:

By 2006 Vista had sold all of the units and turned over control of the POA to a board of directors elected by the condominium unit owners pursuant to the terms of the POA's Master Deed and Bylaws. Respondents had no involvement or communications with the POA until 2009, when the Respondents received letters stating the POA was "asserting a construction defects claim" against them and demanding a response "in accordance with the Notice and Opportunity to Cure Construction Dwelling Defects Act." (R. 248, 250, 252). In turn, Respondents filed this action seeking a declaration concerning the validity of the POA's claims against them in light of LGSF having sold the property to Vista on an "as is" "where is" and "with all defects" basis and having specifically disclaimed and been released from all warranties and liabilities related to the condition of the property behalf of itself and "affiliates." The POA filed counterclaims, cross-claims, and third-party claims against JHP and the other parties alleging joint and several liability for construction defects in the condominium buildings based on breach of the implied warranties of habitability and workmanlike service, breach of express warranties, and negligence.**4**

Following extensive hearings and extensive consideration of the issues, the circuit court dismissed the POA's claims against Respondents.**5** On appeal, the Court of

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> Master Deed for Long Grove Horizontal Property Regime, as more specifically identified in the Master Deed and the exhibits thereto (together, the "Master Deed") dated April 13, 2005 and recorded April 18, 2005, in Book H533 at Page 15 et seq., as amended by First Amendment to Master Deed for Long Grove Horizontal Property Regime dated April 26, 2005 and recorded on May 5, 2005 in Book U535 at Page 435 in the RMC Office for Charleston County, South Carolina, and exhibits and further amendments thereto; . . . .

(R. 242-244).

**4** The defects alleged by the POA include leaks and water damage at the balconies – the same balconies that Vista hired its own contractors to repair after it purchased the property from LGSF and for which Vista received the $200,000 in escrowed funds that were set aside at closing to cover Vista's cost of those repairs. (R. 281) (POA's Counterclaim, paras. 59(a), (b), (f), and (i)); *see also* (R. 346) (POA's Memo, in Opp. to LGSF's Motion to Dismiss, which lists the alleged defects in the buildings).

**5** The POA's claims against Vista and the other third-party defendants were unaffected by the order and are still pending in the Circuit Court.

Appeals issued a *per curium* decision adopting the circuit court's order "in full." The POA filed a motion for rehearing with the Court of Appeals, but in that motion the POA suddenly voluntarily "abandoned" its appellate claims as to LGSF and The Beach Company, leaving Gulfstream and JHP as the sole remaining respondents in this appeal. The Court of Appeals denied the POA's request for a rehearing and the POA then petitioned this Court to grant certiorari.

## B. STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the trial court.[6] Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[7] Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by 'showing' – that is, pointing out to the court – that there is an absence of evidence to support the nonmoving party's case."[8] Once the moving party makes this demonstration, the opposing party "must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial."[9]

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6 George v. Fabri, 345 S.C. 440, 451 n.5, 548 S.E.2d 868, 873 n.5 (2001).

7 *See* Rule 56(c), SCRCP; Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991).

8 Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

9 Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545; Midland Mut. Life Ins. Co. v. Harrell, 331 S.C. 394, 397-98, 503 S.E.2d 189, 190-91 (Ct. App. 1998).

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder.[10] Under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper.[11]

## III. ARGUMENT AND CITIATION OF AUTHORITY

### A. THE POA HAS NO ABILITY OR RIGHT TO CHALLENGE THE TERMS OF THE SALES CONTRACT BY WHICH VISTA WAIVED AND RELEASED THE RIGHTS AND CLAIMS AT ISSUE IN THIS CASE.[12]

#### 1. *The POA lacks standing to challenge the terms of the contract between Vista and LGSF, and it waived the right to appeal the circuit court's finding that it lacked standing when it failed to raise the issue in its brief.*

As a preliminary matter, the Court should find the POA waived the right to challenge the terms of the Vista and LGSF contract as the POA failed to raise the issue in its brief. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground [is] the law of the case."[13]

The circuit court held the POA "lacks proper standing to raise a contractual argument as to the enforceability of the provisions contained within the contract." (R. 38). In its current brief, the POA attempts to step into Vista's shoes and challenge the content and enforceability of the releases and disclaimers in the sales agreement between LGSF and Vista. The POA's brief repeats the same argument in a variety of ways; however, in

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**10** Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003); George v. Fabri, 345 S.C. 440, 548 S.E.2d 868.

**11** Williams v. Chesterfield Lumber Co., 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976).

**12** This argument responds to all of the POA's issues attacking the Sales Contract's validity and enforceability. This argument specifically responds to the POA's assertions the circuit court erred by failing to find the release was an exculpatory contract.

**13** Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

all of its arguments the POA fails to appeal the circuit court's determination it lacked standing to challenge the enforceability of the provisions contained in the Sales Contract between LGSF and Vista. It is the law of the case that the POA lacks standing to challenge the Sales Contract's terms.[14] Accordingly, this Court may affirm the circuit court's grant of summary judgment on the grounds that the POA lacks standing to challenge the terms of the Sales Contract and the POA failed to appeal this ruling.

### 2. ***The POA is not a party to any contract—exculpatory or otherwise—with LGSF, Gulfstream, or JHP.***

When reading the POA's Brief it is easy to lose sight of an important concept: *There is no contract of any kind between the POA and either Gulfstream or JHP.* The POA cannot now attempt to step into Vista's shoes and retroactively argue against the fairness and enforceability of the terms of the Sales Contract under which LGSF sold the used apartment complex to Vista and in which Vista waived and released the claims against Gulfstream and JHP that the POA now attempts to assert. Therefore, even if the POA has properly preserved the issue of whether it has standing to challenge the terms of the Sales Contract, this Court should find that the POA lacks the ability to challenge the validity and enforceability of the terms of the Sales Contract agreed to by Vista as part of its bargained for consideration when Vista purchased the used apartment property from LGSF.

Generally, nonparties to a contract do not have standing to challenge its enforceability.[15] The POA was not a party to the Sales Contract, or to any of the

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[14] *See* ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (unappealed ruling is law of the case); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.").

[15] *See* Fabian v. Lindsay, 410 S.C. 475, 488, 765 S.E.2d 132, 139 (2014); Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc., 362, S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). *See also In re* Vic Supply

negotiations leading up to the formation of the Sales Contract. LGSF sold the property to Vista on an "as-is" "where is" "without recourse" and "with all defects" basis. LGSF, on behalf of Gulfstream and JHP, specifically disclaimed and was released, in a bargained for exchange, from all warranties and liabilities associated with the condition of the property. There was no "contract" between LGSF and the POA, and the purpose and effect of LGSF requiring Vista to include notice of those terms in the Master Deed was to ensure that subsequent converted condominium buyers had a means to receive notice that Gulfstream and JHP had no responsibility or liability for anything that Vista did with the property after Vista purchased the used rental apartment property from LGSF. It is easy to lose sight of this important distinction between "contract" and "notice" given that all of the POA's arguments are premised on attacking the terms and validity of the contract between LGSF and Vista. The POA received notice of the disclaimers and releases contained in the Master Deed recorded by Vista (the Master Deed created the POA and governs its actions), but the POA is not a party to the Sales Contract between LGSF and Vista that disclaims and releases Gulfstream and JHP from liability related to LGSF's sale of the rental apartment property to Vista. Therefore, the POA lacks standing to challenge the validity of the terms of the Sales Agreement. Accordingly, the Court should affirm the circuit court's findings related to the enforceability of the Sales Contract on the grounds that the POA lacks that standing to challenge the terms of the Sales Contract.

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Co., 227 F.3d 928, 931 (7th Cir. 2000) ("Obviously the fact that a third party would be better off if a contract were unenforceable does not give him standing to sue to void the contract.").

### 3. ***The Sales Contract contains valid and enforceable releases and waivers.***[16]

Contrary to the POA's protests, the Sales Contract is not an unenforceable exculpatory contract with the POA. An exculpatory contract involves a situation where a party obtains a waiver or release from potential liability for its future action or negligence. In other words, in an exculpatory contract the party seeks to be released before it has even undertaken performance of its duties under the contract. An agreement is exculpatory when it involves a release before-the-fact of performance. "Limitation of liability and exculpation clauses are routinely entered into" and this Court has routinely upheld even true exculpatory contracts in recognition of the freedom of private parties to contract as they choose.[17]

To the extent public policy disfavors exculpatory provisions in an agreement, it does so because such clauses might tend to promote a lack of due care by a party in its subsequent actions, because the party has already been released of any potential liability regardless of its due care or lack thereof.[18] However, any such public policy concerns are not applicable in this case; in fact, the direct opposite situation exists in this case. The

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**16** This issue is directly responsive to the POA's Issue I(D).

**17** *See* Gladden v. Boykin, 402 S.C. 140, 145, 739 S.E.2d 882, 884 (2013) (upholding a limitation of liability provision in a home inspection agreement which confined the liability of the inspection company to "a sum equal to the amount of the fee paid by the client for this inspection," and finding the clause neither unconscionable, nor violative of public policy); Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) (finding plaintiff's action against speedway for injuries sustained during a race was barred by a waiver and release voluntarily signed by plaintiff prior to entering the racetrack); McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005) (upholding a release which explicitly and unambiguously limited paintball range's liability for negligence); S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 192, 322 S.E.2d 453, 459 (Ct. App. 1984) (enforcing the language of an exculpatory clause in a contract for the sale of a boiler). "When a contract is entered into freely and voluntarily, contractual limitations are normally enforced." Maybank v. BB&T Corp., 416 S.C. 541, 573-574, 787 S.E.2d 498, 515 (2016), *reh'g denied* (July 13, 2016) (*citing* Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)).

**18** *See* McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005).

contract at issue before this Court involves disclaimers and releases pertaining to the condition of a used rental apartment complex when it was sold years after Gulfstream and JHP had completed their services performed on behalf of LGSF.

The circuit court carefully considered the issue and properly concluded that the disclaimers and releases contained in the Sales Contract are not unconscionable and do not violate public policy. As stated by the circuit court and adopted by reference by the Court of Appeals: "[T]his Court does not perceive that it is the public policy of this state that no selling party can enter into a contract as to real property that would disclaim responsibility when the purchasing party intends to alter the use and legal nature of the property." (R. 37).

### 4. ***S. C. Code Ann. § 32-2-10 does not apply and does not affect the validity of the waivers and releases in the Sales Contract.***[19]

The POA argues that *S.C. Code Ann.* § 32-2-10, commonly referred to as an anti-indemnity statute, prohibits the enforcement of the waiver and release terms contained in the real estate Sales Contract between LGSF and Vista. The statute does not apply here.

The anti-indemnity statute, by its own terms, applies only in relation to a promise or agreement for the design, planning, construction, alteration, repair or maintenance of a building, structure, etc. Furthermore, by its express terms, it only applies to a promise or agreement whereby one party agrees to indemnify the other party against liability for damages "arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promise . . . ." The statute does not apply to a sales contract pertaining to used pre-existing property. "Indemnity," or "to indemnify,"

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**19** This argument is responsive to the POA's Issue II and the arguments related to the South Carolina anti-indemnity statute.

means "to reimburse (another) for a loss suffered because of the third-party's or one's own act or default."**20** An agreement to indemnify is not the same as an agreement to release or to waive claims or rights against another party. Moreover, the statute does not bar or restrict waiver or release agreements by a purchaser of previously improved (and used) real estate. Here, the contract between LGSF and Vista involved a contract for the sale of an existing (used) apartment complex. None of the provisions in *S. C. Code Ann.* § 32-2-10 are presented in this case, as both the circuit court and Court of Appeals plainly and correctly observed.

As recognized by other courts, anti-indemnity statutes are primarily intended to prevent parties from eliminating their incentive to exercise due care. Such clauses are viewed skeptically because they constitute an effort to absolve a party from liability for its "future negligence."**21** The "public policy" underlying anti-indemnity statutes is generally recognized to be an intent to preserve the incentive for a party to exercise due care while it performs services in connection with the design or construction of a building. Such statutes, and the policy underlying them, have no application to releases, waivers, and disclaimers contained in a real estate Sales Contract arising long after the design and construction services have been performed.

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**20** Indemnify, Black's Law Dictionary (10th ed. 2014).

**21** *See* Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254, 257 (1996).

## B. AN ARCHITECT WHO DESIGNS AN APARTMENT COMPLEX AND A GENERAL CONTRACTOR WHO BUILDS AN APARTMENT COMPLEX DO NOT OWE ANY DUTY TO PERSONS WHO—YEARS LATER, AFTER THE APARTMENT COMPLEX HAS BEEN SOLD TO ANOTHER COMMERCIAL DEVELOPER WHO CONVERTS THE APARTMENT PROJECT TO CONDOMINIUMS—PURCHASED ONE OF THOSE CONVERTED CONDOMINIUMS.[22]

### 1. *The POA may not assert negligence claims against Gulfstream and JHP for purported defects in used commercial rental property that was converted into residential property by a sophisticated intermediate purchaser.*

The POA seeks to rely upon the decisions in *Kennedy v. Columbia Lumber & Mfg. Co.*[23] and *Beachwalk Villas Condo. Ass'n, Inc. v. Martin*[24] as the foundation for its negligence claims against Gulfstream and JHP. However, as this Court has stated, the decision in *Kennedy* was a limited one. The exception to the economic loss rule as a defense to the negligence claim against a builder or designer "is a very narrow one, applicable only in the residential real estate construction context."[25] Indeed, this Court said, "[a]t the time of our decision in *Kennedy*, we had no intention of the exception extending beyond residential real estate construction and into commercial real estate construction."[26] Furthermore, review of the *Kennedy* decision reveals clearly the limitations of that decision and plainly reflects why it is not applicable in this case. This Court in *Kennedy* announced that the seminal policy in South Carolina, upon which that

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**22** This argument is responsive to the POA's argument in Section I(A) of its brief addressing whether Gulfstream and JHP owe a duty of care to the POA and whether the circuit court erred in finding the implied warranty of workmanship is applicable in this case.

**23** Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989).

**24** Beachwalk Villas Condo. Ass'n, Inc. v. Martin, 305 S.C. 144, 146-47, 406 S.E.2d 372, 374 (1991).

**25** Sapp v. Ford Motor Co., 386 S.C. 143, 150, 687 S.E.2d 47, 51 (2009).

**26** Sapp v. Ford Motor Co., 386 S.C. 143, 150, 687 S.E.2d 47, 51.

decision was based, was the "policy of protecting the new home buyer" or "innocent new home purchasers."[27]

The present case does not involve either a new home sale or a new home purchaser. The record is clear: When JHP and Gulfstream designed and constructed the property in 1999, the only intended purpose for both their work and the property was for LGSF's commercial venture of apartment rentals. There is no evidence to support a finding that either Gulfstream or JHP were ever informed or aware the intended purpose of its plans and specifications was for condominiums to be sold or resold. The POA seeks to make a claim against Gulfstream and JHP for their activity years earlier in connection with the design and construction of commercial rental apartments. The POA did not purchase a new home (or a used home) designed or built by Gulfstream and JHP. They purchased condominiums that had been converted and created by other developers, designers, and contractors from property that had previously been operated for years as rental apartments.

As Judge Currie correctly explained in *Ross Dress for Less, Inc. v. Lauth Const. Grp., LLC*, "[i]n a professional negligence case, a plaintiff must establish that there is a duty that arises outside of a contract."[28] That duty generally arises from a special relationship between the alleged tortfeasor and the injured claimant.[29] In the present case, there is no special relationship between Gulfstream or JHP (who designed and built rental apartments for a commercial entity in 1999) and the subsequently purchasers of condominiums converted from those apartments in 2005 by a separate developer (Visa),

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**27** Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 344, 384 S.E.2d 730, 736.

**28** Ross Dress for Less, Inc. v. Lauth Const. Grp., LLC, 2012 WL 2572042, *11 (D.S.C., filed 2 July 2012) (Citation omitted).

**29** Ross Dress for Less, Inc. v. Lauth Const. Grp., LLC, 2012 WL 2572042, *12.

designer and contractor. As Judge Currie observed, "*Kennedy* is not applicable in the commercial context and is a discussion of an exception to the economic loss rule, not an exception to the requirement that parties in a negligence action must have a special relationship to impose a legal duty."**30**

The public policy of South Carolina that the POA seeks to use as the sword against of JHP and Gulfstream is clearly stated to be a "policy of protecting the ***new home buyer***."**31** In this case, the POA cannot be said to be, or to represent, purchasers of a "new" "home." Furthermore, JHP and Gulfstream cannot be said to have designed and constructed a "new" "home" for sale. The apartment buildings that JHP and Gulfstream designed and constructed specifically for LGSF in 1999 were commercial property for rental only—not residential property for sale.

Moreover, the South Carolina courts recognize that rental apartments are commercial property and not residential property. Each time our courts have been asked to categorize apartments, they have concluded that apartments are commercial property—not residential property. In *Hoffman v. Cohen*, Justin Littlejohn writing for this court observed:

> Though a condominium is not strictly speaking a commercial project, it involves . . . many of the undesirable characteristics incident to a commercial undertaking such as a hotel. It is common knowledge that beach residences, especially apartments (conventional or condominium), are often rented to temporary guests at least part of the year. When so used in a building of this type, the property would become a commercial-type operation . . . ."**32**

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**30** Ross Dress for Less, Inc. v. Lauth Const. Grp., LLC, 2012 WL 2572042, *12 (Citation omitted).

**31** Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 341, 384 S.E.2d 730, 734; Beachwalk Villas Condo. Ass'n, Inc. v. Martin, 305 S.C. 144, 146, 406 S.E.2d 372, 374 (Emphasis added).

**32** Hoffman v. Cohen, 262 S.C. 71, 76, 202 S.E.2d 363, 366 (1974).

The conclusion that apartments are commercial property and not residential property is consistent with the view in other jurisdictions. In New Jersey it is clear that apartments are viewed and treated as commercial property and not residential property.**33** In Iowa apartments are always held to be commercial property. In *Timberland Partners XXI, LLP v. Iowa Department of Revenue*, the Iowa Supreme Court said:

> A condominium is typically occupied by the owner whereas an apartment is always a commercial enterprise. The primary use of each is dissimilar. One is typically residential whereas the other is exclusively commercial.**34**

The POA's claims are barred because the POA and its members did not purchase new residential property. The POA and its members acquired used commercial rental property from a subsequent purchaser who had converted that commercial property to condominiums. JHP and Gulfstream provided services for a commercial rental apartment complex, and neither performed any work related to the design or development of a new (or used) residential property. Therefore, this Court should affirm the circuit court's dismissal of the POA's negligence claims against Gulfstream and JHP.

### 2. ***The implied warranty of workmanlike service is inapplicable to used commercial property that is subsequently converted to condominiums.***

The circuit court properly dismissed the POA's claim for breach of the implied warranty of workmanship**35** because that warranty is inapplicable in this case. The implied warranty of workmanship, like the exception to the economic loss rule in

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**33** *See* Tierney v. Gilde, 561 A.2d 638, 639 (N.J. App. Div. 1989); Stewart v. 104 Wallace St., Inc., 432 A.2d 881 (N.J. 1981).

**34** Timberland Partners XXI, LLP v. Iowa Dep't of Revenue, 757 N.W.2d 172, 176-77 (Iowa 2008) (Internal citation omitted).

**35** The implied warranty of "workmanship" is also sometimes referred to as the implied warranty of "workmanlike service."

negligence cases, has been recognized by courts in South Carolina as a mechanism to protect purchasers of a new home.**36** 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. In fact, in *Arvai*, the court refused to apply the implied warranty in regards to a used home.**37**

Under the implied warranty of workmanlike service, a builder who contracts to construct a new home is held to impliedly warrant that the work will be performed in a careful, diligent, workmanlike manner.**38** The rationale for the rule was analyzed and discussed in detail in *Smith v. Breedlove*. The court stated that:

> The rationale of the decisions which hold the builder-vendor of a new house liable on the basis of an implied warranty is that the seller and buyer are not on an equal footing in such a transaction. . . . [T]he primary purpose of the transaction is to provide the purchaser with a habitable dwelling and the transfer of the land is secondary. The seller holds himself out as an expert in such construction and the prospective purchaser, if he buys, is forced to a large extent to rely on the skill of the builder. This is true because the ordinary purchaser is precluded from making a knowledgeable inspection of the completed house not only because of the expense and his unfamiliarity with building construction, but also because the defects are usually hidden rendering inspection practically impossible. Under such circumstances, the purchaser is at the mercy of the builder-vendor.**39**

When this Court later extended the application of the implied warranty of workmanship to protect subsequent home purchasers in *Terlinde*, it did so on the specific

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**36** *See* Arvai v. Shaw, 289 S.C. 161, 163, 345 S.E.2d 715, 716 (1986) (discussing the judicial policy first recognized in Rutledge v. Dodenhoff, 254 S.C. 407, 413-414, 175 S.E.2d 792, 795 (1970), and progressing through Lane v. Trenholm Building Co., 267 S.C. 497, 229 S.E.2d 728 (1976), and Terlinde v. Neely, 275 S.C. 395, 398-399, 271 S.E.2d 768, 769-770 (1980)).

**37** Arvai v. Shaw, 289 S.C. 161, 164, 345 S.E.2d 715, 717 ("[N]o warranty attaches to sales of used homes.").

**38** Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 344, 384 S.E.2d 730, 736.

**39** Smith v. Breedlove, 377 S.C. 415, 422-423, 661 S.E.2d 67, 71 (2008) (*quoting* Rutledge v. Dodenhoff, 254 S.C. 407, 413-14, 175 S.E.2d 792, 795).

basis that, "[T]he rationale supporting the imposition of liability for breach of an implied warranty of workmanlike service is that a purchaser is forced to rely on the skill of a professional builder."**40**

In *Breedlove*, this Court indicated that the implied warranty can only be asserted against a professional builder or a seller who builds a property intended for immediate sale to members of the public, and this Court affirmed the circuit court's determination that "the implied warranty of workmanlike service only applies to builders in the business of building new dwellings for sale."**41** This Court also expressly found that the implied warranty does not apply when the purchaser "had every chance to have the residence inspected" and when there was an inspection actually performed of the existing, used structure.**42** Indeed, in *Breedlove* this Court expressly recognized that the implied warranty of workmanship did not apply because that case did not involve "a one-sided transaction where [plaintiff/purchaser] had no choice but to rely on the construction skill and expectation of [defendant]."**43**

Applying the express limited rationale of the implied warranty of workmanship to the facts of this case plainly indicates why the implied warranty is not a legitimate basis for imposing liability on Gulfstream or JHP. First, Gulfstream and JHP did not design, construct, or sell a new home intended for sale to home buyers. JHP designed a commercial rental apartment complex for use by a specific commercial developer and Gulfstream constructed those apartments. Neither JHP nor Gulfstream had any

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**40** Smith v. Breedlove, 377 S.C. 415, 423, 661 S.E.2d 67, 72.

**41** Smith v. Breedlove, 377 S.C. 415, 422, 661 S.E.2d 67, 71.

**42** Smith v. Breedlove, 377 S.C. 415, 424, 661 S.E.2d 67, 72.

**43** Smith v. Breedlove, 377 S.C. 415, 424, 661 S.E.2d 67, 72.

knowledge or expectations they were designing or building condominiums for resale to individual purchasers in the public at large.

Second, after the rental apartments had been occupied and used for several years, they were purchased by a separate sophisticated commercial entity (Vista). That sophisticated commercial buyer was given express notice that no warranty would attach to its purchase of the apartments. In fact, that sophisticated commercial developer negotiated an express agreement that afforded it the right and opportunity to have the property inspected by other professional designers and contractors. The record is clear that the purchaser had the apartments inspected by professional designers and contractors. Those inspections revealed some issues for which the purchaser negotiated payment of money to allow for repairs in exchange for a bargained for release in favor of LGSF, Gulfstream, and JHP.

Third, the sophisticated commercial purchaser of the apartments made a decision to convert the apartments to condominiums. That conversion is a regulated activity in South Carolina governed by a separate set of policies and laws. In connection with the conversion, the sophisticated commercial purchaser/converter—not LGSF, JHP, or Gulfstream—was obligated by statute to make written disclosure for the benefit of all prospective purchasers by means of:

> a written report prepared by an independent registered architect or engineer licensed to practice his profession in this State, describing the present condition of all general common elements. The report shall contain a good faith estimate of the remaining useful life to be expected for each item reported on, together with a list of any notices of uncured violations of building codes or other county or municipal regulations, together with the estimated cost of curing those violations.[44]

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[44] S.C. Code Ann. § 27-31-430.

In summary, the underlying rationale of the implied warranty—to protect innocent new home buyers who lack the skills and ability to inspect a home for defects from sophisticated designers and builders—is simply inapplicable in this case. On the facts here, there is no rational basis to impose the implied warranty on Gulfstream or JHP. This Court should affirm the circuit court's dismissal of the POA's warranty claims against Gulfstream and JHP.

### C. THE NONDELEGABLE DUTY DOCTRINE DOES NOT APPLY HEREIN.[45]

The nondelegable duty doctrine has no application in this case. A nondelegable duty is merely a species of vicarious liability. The doctrine merely recognizes, in certain limited instances, liability for the fault of another based not on defendant's (the delegator's) own fault but on policy considerations.[46] The nondelegable duty doctrine is merely an exception, in certain limited circumstances, to the general rule that a person is not vicariously liable for the negligent acts of his independent contractor—one to whom he delegated a duty of performance for an action for which he was otherwise obligated.[47] No new duty or standard of care is created by reference to a nondelegable duty. A duty must have pre-existed by virtue of some existing contract or relationship. The significance of the nondelegable duty doctrine is merely the recognition that, in certain limited instances, the liability for the negligent breach of the duty cannot be delegated to the

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**45** This argument is responsive to the POA's argument that general contractors and architects cannot waive liability for non-delegable duties. Specifically, this section is responsive to the POA's arguments in Issue I(B) and Issue III.

**46** Gary v. Askew, 417 S.C. 232, 241 789 S.E.2d 94, 99 (2016) (*citing* Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. Rev. 431, 453 (1996)).

**47** *See* Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 390-91, 611 S.E.2d 235, 238 (2005); Durkin v. Hansen, 313 S.C. 343, 347, 437 S.E.2d 550, 552-53 (Ct.App. 1993).

person to whom the actual performance of the duty was delegated. The original obligor remains vicariously liable under the doctrine.**48**

The basic principles underlying the "nondelegable" duty doctrine are not applicable to the facts of this case and the POA's arguments regarding the application of the nondelegable duty doctrine should be disregarded as meritless. The POA seemingly misapprehends the "nondelegable duty" doctrine and seeks to craft an argument that misapplies the nondelegable duty doctrine to this case. The POA argues that Gulfstream and JHP are responsible—in perpetuity—for the design and construction of a used commercial rental apartment complex that the original apartment owner sold to a third-party developer who then converted the apartments to condominiums and sold those condominium units to members of the POA. The POA's contention is that Gulfstream and JHP may never escape liability for the design and construction of the original apartment complex.**49** The POA really asserts not that duties are nondelegable, but that claims are nonreleasable. No such legal proposition has ever been articulated or endorsed by this Court.

The nondelegable duty doctrine does not apply in these circumstances. JHP did not delegate its duty to design the apartment complex and Gulfstream did not delegate its duty to construct it. Neither of those entities had any duty, after the apartments were designed and constructed, continually to inspect, monitor, maintain and repair the apartment project after construction. They undertook no duty to Vista, the POA, or individual condominium purchasers with respect to the conversion of the apartments to

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**48** *See* Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000).

**49** The POA's contention, if adopted, would also flow down and apply to every subcontractor that works on a project, because both contractors and subcontractors are such to licensing statutes.

condominiums, and they had no control over Vista's use and development of the property. Gulfstream and JHP, along with LGSF and the other affiliated entities, had every right to negotiate and to obtain a release and waiver of any duties, claims, and liabilities as part of LGSF's sale of the apartments to Vista. Reference to the nondelegable duty doctrine does not create any separate or new duty or obligation with respect to JHP's performance of its design work on the apartments or Gulfstream's construction work.

Notably, the POA has not asserted that Gulfstream and JHP are liable for Vista's actions in converting the apartments to condominiums. In fact, seen under the nondelegable duty doctrine, they could not be so liable. Here, the POA must establish that Gulfstream or JHP are liable to the POA, either based on their own negligence or on an applicable implied warranty. There is no other applicable duty, absolute or otherwise, at issue. There is no contract between the POA, or its members, and Gulfstream or JHP, and there is no other special relationship between them. Application of the nondelegable duty doctrine to find that Gulfstream and JHP may be held liable for alleged construction defects in an apartment building that they did not convert to condominiums or sell to the POA or its members would be erroneous and unprecedented. Accordingly, the Court should, for sound and fair legal policy reasons, disregard all of the POA's arguments related to the nondelegable duty doctrine.

### 1. ***The nondelegable duty doctrine in South Carolina is recognized in only a very few specific instances.***

South Carolina courts have found a nondelegable duty to exist in only six specific instances. The concept of a nondelegable duty applying so as to create vicarious liability exists only in cases of:

i. An employer has a nondelegable duty to employees to provide a reasonably safe workplace;

ii. A landlord who undertakes repair of his property by use of a separate contractor has a nondelegable duty to see that the repairs are done properly.

iii. A common carrier has a nondelegable duty to ensure that cargo is properly loaded and secured.

iv. A bail bondsman has the nondelegable duty to supervise the work of his employees.

v. A municipality has a nondelegable duty to provide safe streets (even when maintenance work on those streets is undertaken by another, including the state highway department;

vi. A hospital has a nondelegable duty to render competent service to its emergency room patients.**50**

Litigants have argued the existence of nondelegable duties in other cases in which the courts have refused to apply the doctrine. One significant and relevant example of this Court's refusal to apply the doctrine is in the case of *Rock Hill Tel. Co., Inc. v. Globe Communications, Inc.*.**51**

As this Court has observed, the decision to apply a nondelegable duty in any particular case must be clearly indicated by the underlying contract and a clear public policy. "A mere passing reference to the general concept of public policy" will not provide

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**50** Gary v. Askew, 417 S.C. 232, 241-242, 789 S.E.2d 94, 99-100 (Ct. App. 2016), *reh'g denied* (Aug. 17, 2016).

**51** Rock Hill Tel. Co. v. Globe Commc'ns, Inc. 363 S.C. 385, 390-391, 611 S.E.2d 235, 238 (holding a utility did not have a nondelegable duty that made it vicariously liable for a subcontractor's negligence). *See also* Gary v. Askew, 417 S.C. 232, 241-242, 789 S.E.2d 94, 99-100; Smith v. Reg'l Med. Ctr. of Orangeburg & Calhoun Ctys., 394 S.C. 110, 114, 713 S.E.2d 656, 658-59 (Ct. App. 2011).

a sufficient basis upon which to find that a nondelegable duty exists.**52** Since "nondelegable duty is liability without fault . . . in our fault-based tort system . . . [nondelegable duty should be] assigned only on the basis of potent policy."**53**

### 2. ***The nondelegable duty doctrine is inapplicable as a vehicle for the POA imputing liability upon either Gulfstream or JHP because the underlying requirements of establishing an ostensible or apparent agency were not satisfied.***

This Court recognized that "few [states] have adopted the nondelegable duty doctrine."**54** However, in explanation of the doctrine, and support for it, the court in *Simmons* reasoned that it is analogous to (or consistent with) the doctrine of apparent authority or apparent agency.**55** Indeed, in recognizing the sixth specific circumstance in which a principal can be vicariously liable for the negligence of its independent contractor, this Court in *Simmons* justified the application of the so-called nondelegable duty doctrine by use of the apparent agency analysis.**56** This Court expressly adopted the test set forth in *Restatement (Second) of Torts: Employers of Contractors*, § 492 (1965). Thus, the test (commonly referred to as ostensible agency) is:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.**57**

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**52** Gary v. Askew, 417 S.C. 232, 249, 789 S.E.2d 94, 104.

**53** McWilliams & Russell, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C. L. Rev. 431, 453-454; Gary v. Askew, 417 S.C. 232, 249, 789 S.E.2d 94, 104.

**54** Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 45, 533 S.E.2d 312, 319.

**55** Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 45, 533 S.E.2d 312, 319.

**56** Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 45, 533 S.E.2d 312, 319.

**57** Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 51, 533 S.E.2d 312, 322 (*quoting* Restatement (Second) of Torts: *Employers of Contractors* § 492).

Further, as the Court went on to recognize, in order to establish liability under this apparent agency or nondelegable duty theory,

> a plaintiff must show that (1) the [principal] held itself out to the public by offering to provide services; (2) the plaintiff looked to the [principal] rather than the individual [contractor], for care; and (3) a person in similar circumstances reasonably would have believed that the [contractor] who treated him or her was a [employee of the principal]. When the plaintiff does so, the [principal] will be held vicariously liable for any negligent or wrongful act committed by the [contractor].**58**

In this case, there is no allegation that an agent acting, or appearing to act, on behalf of Gulfstream and JHP made any representation to the POA upon which the POA relied to its detriment and, therefore, neither Gulfstream, nor JHP, may be held liable under the nondelegable duty doctrine for the actions of an apparent agent. Neither Gulfstream nor JHP represented to the POA that they would provide the POA with certain services or perform any duty on the POA's behalf. In fact, the notice in the Master Deed made it perfectly clear that they had disclaimed and been released from any involvement with the property. Gulfstream and JHP performed specific tasks in the furtherance of the construction of an apartment complex in 1999. At no point did they, or any of their representatives, make any representation that they were undertaking any duty with respect to the sale of the apartments or their conversion to condominiums after 2005. Certainly, neither JHP nor Gulfstream had, or undertook, any duty in 2005 to visit or inspect the apartment project to determine its condition or reassess building code compliance or anything else.

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**58** Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 51, 533 S.E.2d 312, 322 (*quoting* Restatement (Second) of Torts: *Employers of Contractors* § 492).

The POA did not look to Gulfstream or JHP for the provision of any services. The individual condominium owners who make up the POA purchased their units from Vista. The condominium owners did not look to Gulfstream and JHP to perform inspection services in 2005. In fact, under the *South Carolina Horizontal Property Act*,[59] South Carolina law and public policy imposed on Vista the duty to hire an independent third-party architect or engineer to inspect and write a report describing the present condition of all general common elements and provide "a list of any notices of uncured violations of building codes or other county or municipal regulations, together with the estimated cost of curing those violations." This duty solely belonged to Vista by operation of law. It was not a duty of Gulfstream or JHP that they delegated to Vista or to Vista's inspector. Therefore, regardless of any nondelegable duty that the POA may allege to exist, the duty to inspect the property prior to converting the apartments into condominiums belonged solely to Vista. Neither Gulfstream nor JHP may be held vicariously liable for the performance of a duty by Vista that did not belong to them and that they were never obligated to perform.

The POA and its members provide no basis for a belief that a general contractor and an architect who designed and constructed a rental apartment complex would, years later, be liable to the individuals who purchased individual units after they had been converted to condominiums. Even if the Master Deed did not contain notice of the release and disclaimers, there is no basis for the POA or its members to reasonably assume that contractors and architects maintain a responsibility to ensure that the buildings they construct and design remain serviceable or in compliance with building codes in perpetuity and regardless of a subsequent change in their form of use. Accordingly, the

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**59** S.C. Code Ann. § 27-31-430.

Court should find that the POA has failed to state a claim for breach of a nondelegable duty based upon a theory of apparent agency.

### 3. *The nondelegable duty doctrine does not void Vista's negotiated waiver and release of the architect's and general contractor's liability for implied warranties and negligence.*[60]

The POA's nondelegable duties arguments improperly conflate and confuse the concept of duties and responsibility arising at the time of initial construction with, as presented here, the effect of disclaimers and releases pertaining to the condition of used property when years later it was sold to a sophisticated commercial purchaser who altered the use and legal nature of the property.

The nondelegable duty doctrine states that a party who seeks to delegate its existing duties to another may not escape liability for the performance of that duty.[61] The purpose of the nondelegable duty doctrine is to protect innocent parties who believe that another party has agreed to undertake the performance of an absolute duty on their behalf. The nondelegable duty doctrine does not ban parties from knowingly entering into a release from liability and a disclaimer of warranties related to the performance of a duty. In fact, the nondelegable duty doctrine has no bearing as to whether a particular duty may be released.

The POA's effort to frame the nondelegable duty doctrine as a decree that the liability for the performance of a certain duty may not be released pursuant to an extensively negotiated contract between two sophisticated entities is without precedential support. In fact, South Carolina has never gone so far as to state, or suggest that builders, sellers, and designers can never disclaim liability for construction defects and must

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**60** This section is responsive to the arguments raised in Section I(D) of the POA's brief.

**61** Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 42, 533 S.E.2d 312, 317.

remain strictly liable under all circumstances. To the contrary, this Court has recognized limits on the liability imposed on builders and sellers. In *Kirkman v. Parex*, this Court found that "the principle of freedom of contract permits a party to effectively disclaim the implied warranty of habitability."[62]

Arguably, the implied warranty of habitability, which springs from the sale of a new home, is the strongest or most important of the three theories of liability for construction defects claims (the other two theories being the implied warranty of workmanlike service and negligence), because that warranty arises when new construction is knowingly placed into the stream of commerce and directly into the hands of a home buyer. If under South Carolina law the implied warranty of habitability, which arises from the sale of a new home, can be disclaimed by the seller as stated in Kirkman, then it must logically follow that liability based on negligence and on the implied warranty of workmanlike service, which arise from the construction (as opposed to the sale) of a new home, can also be disclaimed. Under the POA's argument, the supposed nondelegable duties imposed by the building and design codes would prohibit the right of disclaimer recognized in Kirkman. Accordingly, the Court should affirm the circuit court's grant of summary judgment on the grounds that the Sales Contract and Master Deed constitute valid and enforceable releases, waivers and disclaimers of all liability and warranties.

The concept that the implied warranties of workmanship and implied warranties of plans and specifications can be disclaimed is especially appropriate in the context of waivers applicable to subsequent purchasers. The POA does not cite any case

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**62** Kirkman v. Parex, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006). *See also* Gladden v. Boykin, 402 S.C. 140, 145, 739 S.E.2d 882, 884 (2013) ("Limitation of liability and exculpation clauses are routinely entered into. Moreover, they are commercially reasonable in at least some cases, since they permit the provider to offer the service at a lower price, in turn making the service available to people who otherwise would be unable to afford it.").

supporting the concept that a subsequent purchaser can revive an implied warranty disclaimed or released by a prior purchaser. While this case appears to be the first time that this Court has been presented with that issue, in 2016 the Illinois Supreme Court was presented with a similar issue and concluded that the implied warranty of habitability arising in favor of the first home purchaser does not extend to a second purchaser when a valid, bargained-for waiver of the warranty has been executed by the first purchaser.**63**

The reasoning of the Illinois Supreme Court in *Fattah* is powerful and persuasive and comes from a state with similar law and policy favoring the protection of new home purchasers. In *Fattah*, the builder-vender sold a new house to the first (original) purchaser and pursuant to a contract that contained a waiver and disclaimer of the implied warranty of habitability.**64** The first purchaser then sold the house to the second purchaser on an "as is" basis.**65** Less than one year after the sale to the second purchaser, a retaining wall in the rear of the house gave way and a portion of the patio collapsed.**66** In analyzing the issue of whether the second purchaser possessed a claim for breach of the implied warranty of workmanship, the Illinois Supreme Court recognized—like the court in *Kennedy*—that implied warranties may pass to subsequent purchasers who are not in privity with the builder.**67** However, the court found the second purchaser was not entitled to bring a claim for breach of the implied warranty of habitability because the first

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**63** Fattah v. Bim, 52 N.E.2d 332, 338 (Ill. 2016).

**64** Fattah v. Bim, 52 N.E.2d 332, 338.

**65** Fattah v. Bim, 52 N.E.2d 332, 338.

**66** Fattah v. Bim, 52 N.E.2d 332, 338.

**67** Fattah v. Bim, 52 N.E.2d 332, 338.

purchaser had entered into a valid and enforceable disclaimer and, therefore, the first purchaser may not pass the implied warranty of habitability onto the second purchaser.**68**

The Illinois Supreme Court provided the following basis for allowing a builder to contract with a buyer for the waiver of the implied warranty of habitability and enforcing that waiver against subsequent purchasers:

> A builder-vendor offers the purchaser of a new house a bargained-for waiver of the implied warranty of habitability in order to obtain a date certain on which the builder-vendor's exposure to financial risk relating to the house will end. Obtaining this certainty, however, comes at a cost. The builder-vendor must either offer the purchaser a reduction in the price of the house or, as in this case, some other consideration, such as an express warranty, in exchange for the waiver.
>
> If the implied warranty is extended to a second purchaser even in the face of a valid waiver, the financial certainty, which the builder-vendor bargained for and assumed it had obtained, is lost. The builder-vendor has no means of knowing when the house might be sold by the first purchaser or to whom and, thus, no way of knowing when, or if, liability for latent defects in the construction of the house will reappear. Thus, in this case, extending the implied warranty of habitability to plaintiff would mean that defendants paid the price to obtain the waiver of the implied warranty from [the first purchaser], by providing and performing under an express warranty, but face liability anyway. This is unreasonable.
>
> Moreover, because a waiver of the implied warranty of habitability is effectively meaningless if liability may be revived at any time the house is sold, we think it fair to say that allowing the implied warranty to extend to second purchasers under the facts of this case would ensure that no builder-vendor would ever enter into waiver agreements in the future. A practice we expressly authorized in [a previous case] and that has been utilized in the housing industry for almost 40 years would thus be eliminated.**69**

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**68** Fattah v. Bim, 52 N.E.2d 332, 338.

**69** Fattah v. Bim, 52 N.E.2d 332, 338.

Moreover, under South Carolina law, even if the implied warranty of workmanship is distinguished from the implied warranty of habitability, the implied warranty of workmanship does not last forever and instead only applies for a "reasonable period after the home's construction."[70] Under the POA's argument, the supposed non-delegable duties imposed by the building and design codes would prohibit the right of disclaimer recognized in *Kirkman* and would have required imposition of liability on the builder-seller in *Breedlove*.

Gulfstream and JHP did not design, build, or sell condominiums and they did not place any condominiums in the "stream of commerce." To the contrary, the notice contained in the POA's Master Deed clearly indicates that Gulfstream and JHP disclaimed that the used rental apartment property was suitable for conversion to condominium use and had disavowed and been released from liability for any such use. None of the cases cited by the POA in its brief arise in the context of the situation here or stand in support of the POA's attempt here to avoid releases agreed to by the prior arm's length purchaser of a used rental apartment complex who then converted the apartments to condominiums and formed the POA.

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[70] Fields v. J. Haynes Waters Bldrs, Inc., 376 S.C. 545, 561, 658 S.E.2d 80, 89 (2008) (*citing* Terlinde v. Neely, 275 S.C. 395, 397, 271 S.E.2d 768, 769).

## D. THE NOTICE OF DISCLAIMER AND RELEASE IN THE POA'S MASTER DEED "CUT THE STRING" BETWEEN ANY WARRANTIES AND DUTIES ARISING FROM THE ORIGINAL CONSTRUCTION OF THE APARTMENTS AND THOSE ARISING AFTER VISTA CHANGED THE LEGAL CHARACTER AND USE OF THE PROPERTY TO CONDOMINIUMS.[11]

The POA argues that the releases and disclaimers in its Master Deed are invalid because they release JHP and Gulfstream from "non-delegable duties" arising under building codes and statutes, in violation of public policy. The POA also relies on its non-delegable duty theory to support its argument that the implied warranty of workmanship cannot be disclaimed or released. The POA abandoned its appeal as to the developer-seller (LGSF) in an attempt to now recast this appeal before this Court as an attack solely on the contractor and architect based on the same theory of non-delegable and non-releasable duties that the circuit court and the Court of Appeals soundly rejected.

### 1. *Professional licensing statutes and requirements, applicable to designers and builders do not create non-delegable and non-releasable duties or establish an independent basis for civil liability.*

The POA "non-delegable duties" arguments improperly attempt to conflate and confuse the separate concepts of civil liability imposed by common law for defective construction or design and the private professional responsibility arising from the licensing requirements imposed by licensing boards that govern contractors and architects.[12] S.C. Code Ann. §§ 40-3-5 *et seq.*, S.C. Code Ann. Reg. R.11-1 *et seq.*, and the other licensing statutes cited by the POA in its Brief do not contain any language evidencing a legislative intent to create such a legal duty, nor is there any evidence that the legislature enacted

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[11] This section is responsive to the arguments raised in Section I(B) of the POA's brief.

[12] *See* 16 Jade Street, LLC v. R. Design Const. Co., LLC., 405 S.C. 384, 390 747 S.E.2d 770, 773 (2013) ("[W]e disagree with the court's conclusion that professional responsibility is tantamount to civil liability. The only consequences imposed by virtue of an individual's license are to be meted out specifically by the appropriate licensing board, not a civil court.").

the statutes for the benefit of the POA or any other private party. Thus, the licensing statutes cited by the POA are not sufficient to create an independent duty or private right of action by the POA against JHP or Gulfstream.

The POA's arguments also improperly attempt to conflate the concepts of duties and responsibility arising at the time of initial construction with, as presented here, the effect of disclaimers and releases pertaining to the condition of the property when years after construction it was sold to a purchaser that altered the use and legal nature of the property. As noted above, there is a significant difference between rental apartments and condominiums for purposes of applying residential construction defects law. An apartment renter (*i.e.*, a tenant) does not own anything and merely rents use of an apartment, typically on a short-term basis (i.e., on a month-to-month or yearly rental basis). Unlike an owner that has purchased a home, a renter has no investment in a rental apartment.[73] A renter that is not satisfied with the condition of an apartment can simply walk away from the property. Conversely, renters have no right to continued occupancy of an apartment at the end of a lease. As such, rental apartments are more akin in nature to a one-owner commercial office building that is leased to office tenants, rather than of a residential character existing in a condominium building sharing common ownership among multiple residential owners.

LGSF constructed the apartments as a rental property. When Vista converted the apartments to condominiums, Vista changed the use of the property from commercial-type use (i.e., rental for profit) to a residential use, and Vista changed the type of ownership from that of a single owner-landlord to individual ownership of individual units.

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**73** *Cf.* Sapp v. Ford Motor Co., 386 S.C. 143, 148, 687 S.E.2d 47, 49 (2009) ("A home is typically an individual's single largest investment").

The POA was created by Vista and for a period of time was operated and controlled by Vista, and the POA is the successor in interest to Vista.

LGSF sold the property to Vista on an "as-is" and "with all defects" basis and with a full disclaimer and release of Gulfstream and JHP from all warranties and liabilities associated with the condition of the property. LGSF took the extraordinary step of requiring that Vista provide notice of those disclaimers and releases to future buyers if Vista converted the property to condominiums. Neither Gulfstream, nor JHP, had control over Vista's subsequent use, conversion, and sale of the property. Gulfstream and JHP performed their duties with respect to the design and construction of property when it was built as apartments in and around 1999, and the intent of the Sales Contract was not to *delegate* those duties to Vista in 2005. Rather, Vista knowingly and intentionally *released* Gulfstream and JHP from any duties they owed with respect to the property for valuable consideration after it had an opportunity to inspect the property. None of the South Carolina licensing statutes cited by the POA prohibit parties from *releasing* their claims for negligence, breach of warranty, or other causes of action.

Here the POA focuses solely on the original construction of the apartment buildings and completely disregards the fact that Vista purchased and then altered the use and legal nature of the property by creating condominiums and selling the condominiums as new units. Contrary to the POA's arguments, licensing statutes and codes applicable at the time of the initial construction of the apartments do not prohibit Gulfstream and JHP from disclaiming and being released from liability for the condition of the property when years later the used apartments were sold to a purchaser (Vista) that altered the use and legal nature of the property.

The South Carolina General Assembly spoke on the issue of responsibility for the conversion of rental apartments to condominiums in S. C. Code Ann. § 27-31-430, an owner of a building who undertakes to convert rental apartment units to condominium ownership by recording a master deed must obtain and provide to all prospective purchasers, including tenants in possession, a written report disclosing the "physical condition of the building" prepared by an independent registered architect or engineer licensed to practice his profession in this State, describing the present condition of all general common elements." The General Assembly enacted S. C. Code Ann. 27-31-430 in order to protect condominium buyers from the potential problems inherent when converting "used" and aged rental apartment buildings into new condominiums. The duty of protecting the condominium purchasers from defects in the design and construction, including building code violations, was assigned by law to the converter—not the original designer and builder. Consistent with the South Carolina Supreme Court's recent observations in *Gladden v. Boykin*,**74** which involved the issue of liability of a home inspector for failing to discover undisclosed defects,**75** by adopting S. C. Code Ann. § 27-31-430 the South Carolina General Assembly has spoken on the issue and provided specific protection for the consumer risks associated with undisclosed defects in conversation of apartments to condominiums.

In short, the POA proposes a theory which results in the imposition of eternal, unending, and virtually absolute strict liability on contractors and architects. That is not

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**74** Gladden v. Boykin, 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013).

**75** Regarding the concept of "undisclosed defects" that permeates South Carolina construction defects common law, here the POA's Master Deed clearly indicates that the property as conveyed to Vista with "all defects" and Vista was responsible for ensuring that the property was "suitable for use as condominiums." Moreover, alleged defects claimed by the POA were identified in Essex's property inspection report dated March 1, 2005 (R. 1100), and issued before Vista purchased the property.

the law in South Carolina and the circuit court addressed this point in its order, which the Court of Appeals adopted. Indeed, in *Fields v. J. Haynes Waters Bldrs, Inc.*,[76] this court recognized and acknowledged that strict liability does not apply in connection with the design or construction of residential property.

Contrary to the POA's contention, the disclaimers and releases executed by Vista in favor of Gulfstream and JHP when Vista purchased the apartment property from LGSF did not leave the POA or the condominium owners without a remedy; it just limited their remedy to the entities responsible for the converting the property to condominiums. The notice contained in the POA's Master Deed provides clear and explicit notice that Gulfstream and JHP were not responsible for the condition of the property or for what Vista intended to do with it. Accordingly, the circuit court and Court of Appeals properly concluded that the notice in the Master Deed operates to cut the string on the POA's attempt to tie Gulfstream and JHP to liability after Vista fully discharged them from all liability and then proceeded to change the legal character and use of the property.

## E. A PURCHASER MAY NOT CHOOSE TO IGNORE THE RELEASES AND WAIVERS AGREED TO BY ITS PREDECESSOR IN INTEREST AND RESURRECT PREVIOUSLY WAIVED AND RELEASED CLAIMS.[77]

The POA's claims for negligence and breach of implied warranties against Gulfstream and JHP are barred because Vista executed a valid release and disclaimer and the POA could not obtain any greater rights than what it received from Vista.

A subsequent purchaser is subject to disclaimers and limitations on warranties and releases made to the original purchaser and does not acquire greater rights than those

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[76] Fields v. J. Haynes Waters Bldrs, Inc., 376 S.C. 545, 565-66, 658 S.E.2d 80, 91.

[77] This argument is responsive to the POA's assertion that it may assert claims for negligence and breach of implied warranty which is located in Section IV of the POA's brief.

held by the original purchaser.**78** Other jurisdictions have recognized that a subsequent purchaser may not acquire greater rights than the seller when a property is sold pursuant to a valid and enforceable waiver of the implied warranty of habitability.**79**

South Carolina precedent requires that the Court analyze the issues in this case in a manner similar to the court in *Fattah*. While South Carolina has recognized that the implied warranty of habitability may pass to subsequent purchasers,**80** our courts have found that the implied warranty of habitability may be disclaimed.**81** Like home buyers in Illinois, a home buyer in South Carolina may not acquire greater rights than those of the seller.**82**

When the POA members purchased their individual condominiums from Vista they did not—and could not—acquire rights greater than those possessed by Vista. The defects alleged by the POA include construction defects and water damage at the

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**78** *See* Hoogenboom v. City of Beaufort, 315 S.C. 306, 313, 433 S.E.2d 875, 880-881 (Ct. App. 1992), *adhered to on reh'g* (Apr. 29, 1993) ("One claiming title by deed has no greater title than the original grantor in the chain of title upon which he relies."); Buettner v. R.W. Martin & Sons, Inc., 47 F.3d 116, 118 (4th Cir. 1995) (holding a disclaimer of the implied warranty of merchantability extended to the purchaser and all subsequent users even if the subsequent user did not negotiate the disclaimer); Brooks v. GAF Materials Corp., 284 F.R.D. 352, 358-359 (D.S.C. 2012), *amended in part*, 2012 WL 5195982 (D.S.C., filed 19 October 2012), *clarified on denial of reconsideration*, 2013 WL 461468 (D.S.C., filed 6 February 2013) ("[T]o the extent that a plaintiff seeks the protections of an express warranty as a third-party beneficiary, the plaintiff is also bound by the warranty limitations and disclaimers."); Lecates v. Hertrich Pontiac Buick Co., 515 A.2d 163, 166 (Del. Super. Ct. 1986) ("As secondary purchasers, they have no greater rights than the party to whom the automobile was originally sold. To say otherwise would mean that a disclaimer or warranty modification loses its effectiveness upon resale of goods, with later purchasers receiving warranty rights denied to their sellers."); Transp. Corp. of Am. v. Int'l Bus. Machines Corp., 30 F.3d 953, 958-59 (8th Cir. 1994) ("Disclaimers of implied warranties are extended to third party purchasers . . . ."); William K. Jones, *Economic Losses Caused by Construction Deficiencies: The Competing Regimes of Contract and Tort*, 59 U. Cin. L. Rev. 1051, 1081 (1991) ("Absent express language to the contrary, courts should assume that a sale of property is a comprehensive transaction and that the buyer obtains from the seller all rights possessed by the seller. . . . [A]nd, since the assignee obtains only the rights of the assignor, the obligations of the builder are not enlarged by assignment.").

**79** Fattah v. Bim, 52 N.E.2d 332, 338.

**80** Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 344, 384 S.E.2d 730, 736.

**81** Kirkman v. Parex, 369 S.C. 477, 485, 632 S.E.2d 854, 858.

**82** Hoogenboom v. City of Beaufort, 315 S.C. 306, 313, 433 S.E.2d 875, 880-881.

balconies—the same balconies that Vista hired contractors to repair after it purchased the property from LGSF and for which Vista received $200,000 in escrowed funds paid by the apartment seller at closing to cover Vista's cost of those repairs. It would be unjust and inequitable to allow a subsequent purchaser to revive a claim against a party who specifically bargained for the release and waiver of such a claim.

Under the POA's theory, even if Vista had sued Gulfstream and JHP, and reached a settlement agreement regarding the condition of the balconies, Vista's release of Gulfstream and JHP from future liability, which would have been expressed in that settlement agreement, would be void. Despite having been sued on the claims and having paid to resolve those defect claims in exchange for an express release, under the POA's nondelegable and nonreleasable theory Gulfstream and JHP would nonetheless be, and remain, liable to subsequent future purchasers or owners. If the Court were to adopt the POA's position, then it would effectively nullify and void the disclaimers and releases contained in every settlement of every past and future construction defects lawsuit in South Carolina. Such results must be recognized as absurd—just as the trial court clearly concluded in a detailed and well-reasoned order, which the Court of Appeals affirmed by adoption of the circuit court's order.

Additionally, the POA's argument a claim which has not yet accrued cannot be releases is meritless. The POA argues without support that a party may not release another from liability arising from claims that have not yet accrued. Contrary to the POA's assertion, our courts have repeatedly recognized that parties may contract for the present and future release of liability.**83** Moreover, settlement agreements for construction

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**83** *See* S. Glass & Plastics Co. v. Duke, 367 S.C. 421, 427-29, 626 S.E.2d 19, 22-23 (Ct.App. 2005) (enforcing a release barring "future" claims and claims that "may hereafter accrue"); Bowers v. Dep't of Transp., 360 S.C. 149, 154, 600 S.E.2d 543, 545-546 (Ct. App. 2004) (plaintiff's claims barred via a release

defects cases in South Carolina routinely include a release of any unknown and undiscovered claims. The POA's argument lacks any merit because South Carolina allows parties the freedom to contract for the present and future release of liability.

## F. IF ADOPTED, THE POA'S POSITION MEANS THE ONLY PRACTICAL OR FEASIBLE WAY AN OWNER CAN EVER AVOID FUTURE LIABILITY, FOR ITSELF, ITS CONTRACTOR AND ITS DESIGNER, IS TO REFRAIN FROM ANY SALE OF THE PROPERTY WHICH MIGHT BE USED FOR FUTURE RESIDENTIAL PURPOSES.

Under the POA's theory, future liability would be unavoidable upon the sale of improved property (even commercial property) which might ultimately be used for residential purposes. This means a developer, contractor, and designer could only limit their respective exposure to future unknown and unintended buyers by totally preventing such future sales of the property. Such an alienation on the future use of property is contrary to the basic principles of property law and the freedom of contract. South Carolina has a longstanding public policy favoring the free and unobstructed use of real property.**84** Additionally, South Carolina has a "longstanding regard for parties' freedom to contract."**85**

The POA's "non-delegable and non-releasable duty" theory, contravenes the longstanding policies regarding the free and unobstructed use of real property and the

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containing language showing a clear, explicit, and unequivocal indication the parties' intended to release all claims arising from the accident at the time the release was executed and in the future); House v. Aiken Cty. Nat. Bank, 956 F. Supp. 1284, 1287 (D.S.C.), *affirmed*, 103 F.3d 118 (4th Cir. 1996) (release valid even though the plaintiffs contended they were unaware of certain actions taken by the defendants prior to the execution of the release).

**84** SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla, 415 S.C. 72, 83, 781 S.E.2d 115, 121 (Ct. App. 2015), *reh'g denied* (Jan. 21, 2016) ("[S]ociety's best interests are advanced by encouraging the free and unrestricted use of land." (Citation omitted)); Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006) ("[A] restriction on the use of the property . . . [is] to be strictly construed, with all doubts resolved in favor of the free use of property." (*quoting* Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980))).

**85** Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 492, 763 S.E.2d 19, 21-22 (2014); Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 630, 281 S.E.2d 223, 224 ("[P]eople should be free to contract as they choose.").

recognition that parties are free to enter contracts for their own benefit or detriment. Under the POA's theory of this case Gulfstream and JHP are forever liable to the POA, and, in fact, to all subsequent unit owners, for any problems that might be linked in some way to the original design or construction of the apartments. Under the POA's theory, even if Gulfstream and JHP were to settle and make payment to the POA and the present unit owners in this case for the alleged defects, the contractor and architect would still have a "non-delegable duty and liability" into the future to subsequent downstream unit owners.

Throughout each stage of this case and appeal, the POA has been unable to provide a rational response to the following question: When selling the used rental apartment property to Vista, what more could LGSF have done to cut off future liability for itself and its architect (JHP) and contractor (Gulfstream) if Vista converted the apartments to condominiums? In short, the POA proposes a theory which results in the imposition of eternal, unending, and virtually absolute strict liability on contractors and architects. That is not the law in South Carolina and the circuit court addressed this point in its order, which the Court of Appeals adopted.

### G. IF ADOPTED THE POA'S POSITION WOULD EFFECTIVELY OPERATE TO NULLIFY THE DISCLAIMERS AND RELEASES OF FUTURE CLAIMS WHICH ARE A MATERIAL POINT IN EVERY SETTLEMENT OF CONSTRUCTION DEFECT LITIGATION IN SOUTH CAROLINA.

The POA argues that the duties imposed on contractors and architects are "non- delegable" and can never be disclaimed or released. If adopted, the POA's argument would effectively nullify and void the disclaimers and releases contained in every settlement of every past and future construction defects lawsuit in South Carolina.

"Our courts have a long standing policy favoring settlements."**86** As here, a typical residential construction defects case involves claims by an owner asserted against everyone associated with the project, including the builder, the architect, and the developer (when the builder and developer are not the same). Many of those cases ultimately settle before trial, with a standard settlement agreement provided releases of liability for the settling parties and their respective "owners, officers, agents, contractors, subcontractors" etc. Under the POA's theory, if for example, a homeowner sues an architect and contractor, and the architect and builder pay a settlement to the owner in exchange for a release, that release is not binding on subsequent purchasers of the home (the subsequent homeowner would, as the POA does here, contend that the release executed by the prior owner is an improper "exculpatory contract" that releases "non-delegable" duties).

Similarly, here the defects alleged by the POA include construction defects and water damage at the units' balconies. These are the very same balconies that which Vista (the converter) hired its own contractors to repair after Vista purchased the property from LGSF and for which Vista received $200,000.00 in escrowed funds paid by the apartment seller at closing to cover converter's cost of those repairs.**87** Under the POA's theory, even if converter had sued Gulfstream and JHP and settled with the original contractor/architect regarding the condition of the balconies, the disclaimer and release of the contractor/architect from future liability, which would have

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**86** Hudson ex rel. Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 120, 754 S.E.2d 486, 490 (2014); Darden v. Witham, 258 S.C. 380, 388, 188 S.E.2d 776, 778 (1972) ("The courts favor settlements and agreements amongst litigants").

**87** (R. 271-281) (POA's Counterclaim at 59(a), (b), (f), and (i)); *see also* (R. 346) (POA's Memorandum in Opposition to LGSF's Motion to Dismiss – listing the alleged defects in the buildings).

been expressed in that settlement agreement, would be void. Despite having been sued on the claims, and having paid to resolve those defect claims and to receive a release, as a "non-delegable and non-releasable" obligation of the contractor/architect agreement under the POA's theory, Gulfstream and JHP would nonetheless be, and remain, liable to other future purchasers or owners. Surely such results must be recognized as absurd—just as the circuit court clearly concluded in a detailed and well-reasoned order, which the Court of Appeals affirmed by adoption of the circuit court's order.

## IV. CONCLUSION

The POA abandoned its appeal as to the original apartment developer and seller in an attempt to recast this case as an attack solely on the contractor and architect under the same theory of non-delegable and non-releasable duties which the circuit court and the Court of Appeals rejected. The POA attempts to distract attention away from the following undisputed facts and legal issues that have existed, and have been addressed, from the very beginning of this case: Here, used rental apartment property was clearly and unequivocally sold to a third-party (Vista) on an "as-is" and "with all defects" basis and with a disclaimer and release of all warranties and liabilities associated with the condition of the property. The apartment owner (LGSF), on behalf of itself and its contractor and architect, took the extraordinary step of requiring Vista to provide notice of those disclaimers/releases to future buyers if Vista converted the property to condominiums. Any warranties, duties, or liabilities which arose during the construction of the rental apartments were clearly and unequivocally extinguished with Vista's express consent under the terms of Vista's and LGSF's property purchase contract.

The point of this case, and this appeal, is: *In light of the notices, disclaimers, and releases contained in the sales contract between LGSF and Vista (also recited in the POA's Master Deed), may the POA or subsequent unit buyers avoid the bargained for and unequivocal releases, and assert the contractors and architect remain liable on the theory that their duties are "non-delegable" and "non-releasable."* As astutely noted by the Trial Judge and adopted by the Court of Appeals:

> [I]t would be inappropriate to allow the purchaser of Long Grove (Vista) to waive all warranties and rights of action as part of a purchase bargain, but then create an entity (the POA) that would somehow revive those rights and warranties.

(R. 27).

Contrary to the POA's arguments, South Carolina law does not impose non-disclaimable and non-releasable never-ending liability on contractors and architects. South Carolina has never gone so far as to state or suggest that contractors or designers cannot disclaim or be released from liability for construction defects or that they must remain strictly liable under all circumstances. By claiming non-delegable and non-releasable duties, the POA is seeking a fundamental change and expansion of the law in South Carolina, the effect of which would be to nullify and void the similar disclaimers and releases which are contained in every settlement of every past and future construction defects and/or faulty workmanship lawsuit filed in the State of South Carolina. For these reasons, the relied sought the POA on appeal should be denied and this Court affirm the order of the circuit court and decision of the Court of Appeals.**88**

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**88** In accordance with Rules 208(b)(2) and 220(c), SCACR, Gulfstream and JHP also request that this Court affirm the order of the Trial Court and decision of the Court of Appeals on any other grounds appearing in the record.

Respectfully submitted:

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27 June 2017

NPCHAR1:2162865.1-APL-(SPG) 032595-00149

***THE STATE OF SOUTH CAROLINA***
***IN THE SUPREME COURT***

Appeal from the Court of Common Pleas
For Charleston County
Civil Action No.: 2009-CP-10-6746
Appellate Case No.: ***2015-002131***



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

Respondents,

v.

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

Defendants,

Of Whom Long Grove Property Owners' Association, Inc. is the

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.; and Essex Engineering Corporation,

Third-Party Defendants,

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

Respondent.

## PROOF OF SERVICE for AMENDED JOINT BRIEF OF RESPONDENTS

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I hereby certify that on June 27, 2017, a copy of the ***Amended Joint Brief of Respondents*** was served upon counsel for all parties of record in this case via United States Mail, postage pre-paid, addressed as shown below.

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