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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2009-CP-10-6746

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

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

Of Whom Long Grove Property Owners' Association is Appellant.

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

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

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

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STATEMENT OF ISSUES ON APPEAL

1. **THE COURT ERRED BY FAILING TO RECOGNIZE THAT THE CONTRACT AT ISSUE IS AN EXCULPATORY CONTRACT WHICH VIOLATES PUBLIC POLICY AND IS VOID.**
2. **THE COURT ERRED IN ALLOWING PLAINTIFFS TO RELEASE BY CONTRACT NON-DELEGABLE DUTIES IMPOSED BY STATUTORY, REGULATORY AND COMMON LAW.**
3. **THE COURT ERRED IN FINDING THAT THE PROPERTY OWNERS' ASSOCIATION IS BOUND BY CONTRACT TO WHICH IT WAS NOT A PARTY.**
4. **THE COURT ERRED BY FAILING TO RECOGNIZE THAT THE CONTRACT AT ISSUE IN THE CASE IS UNCONSCIONABLE AND UNENFORCEABLE AND, THEREFORE, IS VOID.**

STATEMENT OF THE CASE

This case arises from an effort by the general contractor and developer to avoid their statutory, regulatory and legal obligations for the development, design, and construction of the Long Grove Apartment Project located in the Seaside Farms subdivision in Mt. Pleasant, South Carolina and its subsequent conversion to the Long Grove Condominiums. Respondents Long Grove at Seaside Farms, LLC, The Beach Company, and Gulfstream Construction Company, Inc. filed a declaratory judgment action pursuant to South Carolina Code Ann. §§15-53-10 and named the Appellant Long Grove Property Owners' Association ("POA") as a party defendant. (Plaintiffs' Summons and Complaint, R. pp. 44-270). Respondents are the original developers and general contractor, and sought to have the Court rule that certain contractual provisions, the notice thereof embedded in the Master Deed, exonerates them from liability for their design and construction defects which have caused extensive damage to the buildings at

Long Grove. (Long Grove POA's Memorandum in Opposition to Plaintiffs Motion to Dismiss and/or Motion for Summary Judgment dated September 23, 2011, R. pp. 606-687).

In response to the Complaint, the Appellant POA filed counterclaims and third-party claims asserting causes of actions for defective development, design and construction against Respondents Long Grove at Seaside Farms, LLC, The Beach Company, Gulfstream Construction Company, Inc. and James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C. and others, for construction and design defects in the project. (Long Grove POA Answer and Counterclaim, R. pp. 271-298). On December 30, 2009, Respondents Long Grove at Seaside Farms, LLC, The Beach Company, and Gulfstream Construction Company, Inc. filed a motion to dismiss the POA's counterclaims pursuant to Rule 12(b)(6), SCRCF, or in the alternative, for a judgment on the pleadings pursuant to Rule 12(c), SCRCF. (Long Grove at Seaside Farms' et. al. Motion to Dismiss, R. pp. 299-301). On February 24, 2010, Respondent James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C. (hereinafter referred to as "JHP"), the original project architect, filed its Motion to Dismiss Third-Party Complaint and For Judgment on the Pleadings. (JHP Motion to Dismiss, R. pp. 302-303). These arguments were based on the same or similar arguments as set forth by Long Grove at Seaside Farms, LLC, The Beach Company, and Gulfstream Construction Company, Inc.

The POA filed its Memorandum in Opposition to Respondents Long Grove at Seaside Farms, LLC, The Beach Company, and Gulfstream Construction Company, Inc. on or about May 20, 2010 and September 23, 2011 and filed its Memorandum in

Opposition to Respondent JHP on September 23, 2011. (Long Grove POA's Memorandum in Opposition dated May 20, 2010, R. pp. 304-342); (Long Grove POA's Memorandum in Opposition dated September 23, 2011 with Exhibits, R. pp. 343-777); (Long Grove POA's Memorandum in Opposition to JHP Motion to Dismiss dated September 23, 2011, R. pp. 778-779).

On September 27, 2011, the Court of Common Pleas heard the motions of Respondents Long Grove at Seaside Farms, LLC, The Beach Company, Gulfstream Construction Company, Inc. and JHP. (Transcript- September 27, 2011, R. pp. 829-899). The presentation of matters outside the pleadings converted those Motions to motions for summary judgment pursuant to Rule 56, SCRCR. On October 14, 2011, the Court issued a decision letter directing counsel for The Beach Company, Long Grove at Seaside Farms, Gulf Stream Construction, and JHP to prepare proposed Orders granting their summary judgment motions.

Due to the complex and novel issues involved and due to substantial disagreement as to the proposed Orders, the Court rescinded the previous decision letter and set the matter for another hearing on April 30, 2012. (Letter dated March 26, 2012, R. pp. 1209-1211). Between October 14, 2011 and April 30, 2012, the POA sent additional letters, information and caselaw to the Court and all counsel of record. (Long Grove POA Motion to Reconsider, Exhibit 1-Letter dated November 29, 2011, R. pp. 787-796) (Long Grove POA Motion to Reconsider-Exhibit 2- Letter dated February 10, 2012, R. pp. 797-801). The motion was reheard on April 30, 2012. (Transcript – April 30, 2012 hearing, R. pp. 900-984). After the hearing, the POA sent another letter with new caselaw to the Court. (Long Grove POA Motion to Reconsider – Exhibit 3- Letter dated May 31, 2012,

R. pp. 802-812). On June 25, 2012 the Court issued a Proposed Order Granting Summary Judgment to The Beach Company, Long Grove at Seaside Farms, Gulf Stream Construction and JHP and requested the parties to comment on the Order. (Long Grove POA Motion to Reconsider – Exhibit 4 Defendant Long Grove Property Owners' Associations' Comments as Requested by the Court-July 12, 2012, R. pp. 813-828). On July 26, 2012, the Court issued the Order granting summary judgment in favor of Long Grove at Seaside Farms, LLC, The Beach Company, Gulfstream Construction Company, Inc. and James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C. (Order July 26, 2012, R. pp. 1-41).

The Appellant POA filed a Motion to Reconsider on August 3, 2012 (Motion to Reconsider, R. pp. 784-828) and the Court issued an Order Denying Long Grove Property Owners' Association, Inc. Motion to Reconsider on November 2, 2012. (Order denying Motion to Reconsider, R. pp. 42-43). The POA then filed and served the Notice of Appeal on November 26, 2012 and now asks the Court to reverse the Order Granting Summary Judgment.

FACTS

Long Grove at Seaside Farms, LLC, through its manager, the Beach Company developed and built the Long Grove Apartments in 1999-2000. The Beach Company was the property manager for the Long Grove Apartments which were used as a multi-family residential property and operated as an apartment complex after original construction was complete. James, Harwick & Partners, Inc. n/k/a JHP Architecture/Urban Design, P.C. was the architect of record for the original construction. Gulf Stream Construction Company, Inc., a wholly-owned subsidiary of The Beach Company, was the general

contractor for the construction of the multi-family residential project. The Project consists of seventeen (17) buildings with two hundred seventy-two units and a clubhouse. The buildings are wood-frame construction and a combination of Hardi-plank and brick exterior cladding.

In 2004, The Beach Company hired L.J. Melody, Inc. to market the Long Grove Apartment project to prospective purchasers as a "272-Unit Condominium Conversion Opportunity." (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss, September 23, 2011 - Exhibit 2- "Marketing Brochure-Condominium Conversion Opportunity", R. pp. 385-438); (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss, September 23, 2011- Exhibit 3-Depo. Kent Johnson, 30(b)(6) Designee of The Beach Company, p. 23, l. 24 - p.24, l. 5, R. p. 443, l. 24 - p. 444, l.5). The Beach Company specifically marketed the property to be converted from apartments to condominiums and marketed the property as "an exceptional condominium conversion opportunity." (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss, September 23, 2011 - Exhibit 2- Marketing Brochure - Condominium Conversion Opportunity, R. p. 387); (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss - September 23, 2011- Exhibit 4 -Depo. Hudson Hooks, p. 29, l. 25- p. 30, l.24, R. p. 450, l.25 - p. 451, l.24). In the brochure, "Long Grove present[ed] converters the ability to 'beat the clock' by being able to sell quality apartments immediately with *no construction risk* involved." (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss September 23, 2011 - Exhibit 2- Marketing Brochure - Condominium Conversion Opportunity, R. p. 399)(emphasis added). In both the Executive Summary portion and in the Condominium Market Overview portion of the Marketing Brochure, the materials represent that "Long

Grove was developed by The Beach Company, one of the Southeast's most prestigious developers. The quality of construction and attention to detail is unmatched." (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss September 23, 2011 - Exhibit 2- Marketing Brochure - Condominium Conversion Opportunity, R. pp. 397-402 and R. pp. 424-428).

In the Financial Analysis section of the Marketing Brochure, the Replacement Reserves section represents: "The quality of the construction and continued detailed management of the grounds and buildings will limit further capital expenditures at the property.

Therefore, our team has conservatively forecast capital reserve requirements of \$150 per unit." (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss September 23, 2011- Exhibit 2- Marketing Brochure – Condominium Conversion Opportunity, R. pp. 413-419).

On December 28, 2004, The Beach Company and Vista Realty, Inc., signed the Term Sheet. (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss September 23, 2011, Exhibit 11 [sic also Ex. 8 to Johnson Depo.], R. pp. 575-578). That contract did not contain a requirement that the future owners or the yet to be created property owners association release The Beach Company or any other party from their duties established by our courts and the Legislature through the adoption of building codes, licensing regulations and other statutes. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 688-766).

After the initial term sheet was signed, The Beach Company and Long Grove at Seaside Farms demanded that Vista, as the converting developer, assume all liabilities for the property and its condition and that Vista release not just The Beach Company and

Long Grove at Seaside Farms, but also numerous unnamed parties to the original design and construction. They also required that a notice of this release be part of the Master Deed.

On January 27, 2005, The Beach Company and Vista Realty Partners, L.L.C. signed the Sales Contract. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 688-766). On March 1, 2005, Long Grove Vista, LLC was incorporated. On April 13, 2005, Long Grove Vista executed the Master Deed. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed, R. pp. 606-687). The Long Grove Property Owners Association did not exist and did not sign the Master Deed. The POA was not incorporated until April 21, 2005.

The purported notice of "release" itself is found on at Paragraph 24 on Page 43 of the Master Deed and By-Laws which total over 100 pages in length. It states:

24. RELEASE.

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

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

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

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

Accordingly, as part of the valuable consideration exchanged in the sale transaction on March 7, 2005 noted above, the receipt and sufficiency of which are hereby acknowledged, Declarant on behalf of itself and its heirs, representatives, successors, and assigns (including the Owners and all other successors-in-title to all or a portion of the property comprising the Regime), agreed to never sue and completely release Long Grove, The Beach Co., Gulfstream Construction Company, its affiliates, agents, officers, directors, employees, insurers, representatives, successors, assigns, and all other companies, partnerships, entities, or Persons 9 (collectively, the "Affiliates") involved in the design, development and/or construction of the apartment buildings and apartments therein and all other improvements prior to March 7, 2005, for and from any and all claims of every kind whatsoever arising from or related to the development, design, construction, maintenance, alteration, or repair of the property comprising the Regime, including unknown and unforeseen claims that may now exist or that may arise in the future.

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

(Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed, p. 43, R. pp. 654-655). This is the same language in the Sales Contract.

(Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. p. 763).

The "release" language found on Page 43 of the Master Deed is inconspicuous, and has the same heading and same font as every other paragraph. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed, R. pp. 606-687). This notice language is not accentuated or emphasized in any way. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed, R. pp. 654-655). The release does not appear in the sales contracts between Vista and the individual purchasers. (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss September 23, 2011, Exhibit 11 [sic also Ex. 8 to Johnson Depo.], R. pp. 575-578).

After the sale of the Long Grove Project to Vista and the conversion of the apartments to condominiums, The Beach Company marketed and sold the individual units for Vista under a separate contract. (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss dated September 23, 2011- Exhibit 17 – Marketing Contract between Vista and The Beach Company, R. pp. 767-777); (Long Grove POA

Memorandum in Opposition to Plaintiffs Motion to Dismiss dated September 23, 2011- Exhibit 5-Depo. de Guardiola, p.58, l.8 - p.60, l.7., R. p. 490, l. 8 – p. 492, l.7). Pursuant to this arrangement, The Beach Company undertook the responsibility for the content of the sales contract and deeds. The Beach Company served as the broker and agent for the seller, and, frequently, as the agent for the purchaser. It directed purchasers to a closing attorney. The Beach Company clearly had the ability to make sure that each prospective purchaser was completely and fully aware of the notice of release. It did not.

In 2009, the POA discovered that these buildings suffer from severe defects including but not limited to the following: (1) Failure of balcony waterproofing; (2) Lack of proper waterproofing system at balconies; (3) Lack of proper window flashing; (4) Lack of proper chimney flashing; (5) Lack of proper roof flashing; (6) improper repairs and failure of repairs to balconies; (7) Lack of proper fire protection at the HVAC system; (8) Leaks at windows; (9) Leaks at balconies; (10) Leaks at chimneys; (11) Decay of structural building components; (12) Mold infestation; (13) improper brick installation; (14) Lack of code compliant fire protection; (15) Defects that have caused decay of building components; (16) improper architectural details at balconies and doors; (17) Lack of proper details at balconies, roof, chimneys, attics, brick, and windows; (18) Lack of proper flashing details; (19) Defects in plans causing water intrusion and decay of building components. (Long Grove POA Memorandum in Opposition to Plaintiffs Motion to Dismiss dated September 23, 2011- Exhibit 1 - Affidavit of Peter Sherratt, AIA, R. pp. 383-384). Due to the negligence and breach of warranties of the Plaintiffs and other entities, the Long Grove POA and the individual unit owners now face millions of dollars in repairs.

ARGUMENT

"We have made it clear that it would be *intolerable* to allow builders to place defective and inferior construction into the stream of commerce."

Kennedy v. Columbia Lumber¹

The ramifications of the Court's Order are extreme. The effect of the Order is not just to transfer a risk between the parties to the contract, Long Grove at Seaside Farms, LLC, the original developer, and Vista Realty, the conversion developer, but also to allow non-parties to the contract, Gulf Stream Construction, the general contractor, and unnamed subcontractors and designers, to avoid the statutory, regulatory, and common law duties established by the State of South Carolina. The ultimate effect of the Order is to burden a complete stranger to the contract, the Long Grove Property Owners' Association with the cost of correcting the breaches of the duties by the original architect, general contractor, subcontractors, and developers. The Court does this by incorrectly ruling that The Beach Company, Long Grove at Seaside Farms, LLC, Gulfstream Construction, and unnamed parties, such as JHP and subcontractors, (1) could, through a clause in a sales contract, all avoid their statutory, regulatory and common law obligations established by South Carolina's three branches of government; (2) could burden a yet to be created property owners' association with millions of dollars in costs to repair damages caused by defective design and defective construction; (3) could all disclaim any and all warranties as to the condition of the property to the current and subsequent buyers; (4) could be permanently released from any liability for their breaches of these duties and for the condition of the property; and (5) could require the buyer, Vista Realty, to assume all responsibility for the

¹ Kennedy v. Columbia Lumber & Manufacturing, Co., Inc., 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989) (emphasis added).

statutory, regulatory, and common law duties and liability for breaching these duties.

(Order Granting Summary Judgment issued July 26, 2012, R. pp. 1-41).

1. **THE COURT ERRED BY FAILING TO RECOGNIZE THAT THE CONTRACT AT ISSUE IS AN EXCULPATORY CONTRACT WHICH VIOLATES PUBLIC POLICY AND IS VOID.**

The Beach Company, Long Grove at Seaside Farms, Gulf Stream Construction and JHP are attempting to use an exculpatory clause in a sales contract to avoid liability and duties owed to the public, specifically subsequent purchasers of the property they develop. Developers, general contractors and architects all have statutory, regulatory and common law duties with which they must comply to protect the health, safety and welfare of the public, and they cannot by contract avoid their responsibility for violating those duties. By enforcing the exculpatory agreement, the Court erred because that agreement allows Respondents to have violated those duties with impunity in violation of this State's public policies.

A. **Contracts that contravene public policy are void and unenforceable.**

If a contract contravenes public policy, it is void. Fisher v. Sterns, 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003). That this State has overriding public policies in effect that govern and control the development, design, and construction of buildings is obvious from the tremendous amount of work undertaken by our state and local legislative branches in enacting laws and regulations and by our executive branches in enforcing those laws and regulations to protect people like those at Long Grove from the consequences of defective design, development and construction.²

² Our Legislature has passed the following statutes to protect the public from defective buildings and other structures: S.C. Code Ann. §§ 27-31-10 (Horizontal Property Act); S.C. Code Ann. §§ 27-40-10 (Residential Landlord and Tenant Act); S.C. Code Ann. §§ 27-50-10 (The Residential Property Condition Disclosure Act); S.C. Code Ann. §§ 31-15-

Statutory and regulatory laws have been enacted to regulate professionals and further protect the public from poor design and construction practices.³ *See, e.g.,* S.C. Code Ann. §§40-1-10 (Professions and Occupations); S.C. Code Ann. §§40-11-5 (Contractors); S.C. Code Reg. 29-1 - 29-110 (Department of Labor, Licensing and Regulation – State Licensing Board for Contractors); S.C. Code Ann. §§40-3-5 (Architects); S.C. Code Reg. 11-1 – 11-14 (Department of Labor, Licensing and Regulation – State Board of Architectural Examiners); S.C. Code Reg. 8-100 – 8-701 (Buildings Codes Council). The State, counties, and municipalities have established building departments and have adopted and then periodically updated numerous building codes as laws.⁴ The Standard Building Code (the code in effect when Respondents

10 (Dwelling Unfit for Human Habitation); S.C. Code Ann. §§ 40-1-10 (Professions and Occupations); S.C. Code Ann. §§ 40-3-5 (Architects); S.C. Code Ann. §§ 40-10-5 (Fire Protection Sprinkler Systems Act); S.C. Code Ann. §§40-11-5 (Contractors); S.C. Code Ann. §§40-22-2 (Engineers and Surveyors); S.C. Code Ann. §§ 40-26-10 (Commercial Inspectors); S.C. Code Ann. §§ 40-28-10 (Landscape Architects); S.C. Code Ann. §§ 40-49-10 (Plumbers and Plumbing); S.C. Code Ann. §§ 40-57-5 (Real Estate Brokers, Salesmen, and Property Managers); S.C. Code Ann. §§ 40-59-10 (Residential Home Builders); S.C. Code Ann. §§ 40-60-2 (South Carolina Real Estate Appraiser License, and Certification Act); S.C. Code Ann. §§ 45-5-10 (Hotels, Motels, Restaurants and Boarding Houses); S.C. Code Ann. §§ 57-1-10 (Highways, Bridges and Ferries).

³ The Legislature has created the following departments and boards to regulate and protect the public from defective buildings and other structures: Department of Transportation, Department of Labor, Licensing and Regulation; Board of Architectural Examiners; Board of Professional Engineers and Land Surveyors; State Fire Marshall, Contractors Licensing Board, Residential Builders Commission; Landscape Architectural Examiners; Real Estate Commission, Real Estate Appraisers Board.

⁴ *See e.g.,* SOUTH CAROLINA BUILDING CODE (2006 International Code Council, Inc.); COUNTY OF CHARLESTON, S.C. ORDINANCES FOR BUILDINGS AND BUILDING REGULATIONS, ch.4, Sect. 101 – 118(2008); TOWN OF MOUNT PLEASANT, S.C. ORDINANCE FOR BUILDING REGULATIONS, Ch. 150, Sect. 150.001 – 150.054; 2006 INTERNATIONAL BUILDING CODE; SOUTH CAROLINA MECHANICAL CODE (2006 International Code Council); SOUTH CAROLINA PROPERTY MAINTENANCE CODE (2006 International Code Council); 2006 SOUTH CAROLINA PERFORMANCE CODE (2006 International Code Council); SOUTH CAROLINA BUILDING CODE (2006 International Code Council); SOUTH CAROLINA FIRE CODE (2006 International Code Council); SOUTH CAROLINA RESIDENTIAL CODE (2006 International Code Council); SOUTH CAROLINA EXISTING BUILDING CODE

developed and constructed Long Grove) was created and adopted to "protect the public's life, health and welfare in the built environment." Preface, 1997 STANDARD BUILDING CODE. Charleston County and the Town of Mt. Pleasant adopted as law the Standard Building Code which has now been replaced by the International Building Code and town ordinances to provide minimum standards to be followed by all design and construction professionals to protect the public. The county and municipal building departments review the designs, issue permits, inspect construction as it is done, and enforce these building codes.

These statutes, regulations and codes create duties that are independent of contracts. Two parties cannot agree to submit a design and construct a building that violates these laws. The establishment of the agencies and departments and enactment of these laws creates and sets forth the public policy of this State that the construction industry is to be regulated to protect the public, including the owners of Long Grove.

In S.C. Code Ann. §§ 40-1-10, the Legislature outlines the professions and occupations which are regulated to protect the health, safety and welfare of the public. These professions and occupations have "inherent qualities peculiar to it that distinguish it from ordinary work or labor" and "require specialized skill or training and the public needs and will benefit by assurances of initial and continuing professional and occupational ability." S.C. Code Ann. §40-1-10(B). These professions and occupations, including contractors and architects, owe a higher standard of care because they hold licenses in these specialized areas. The Legislature enacted statutory law and regulatory law specific to both contractors and architects to protect the health, safety and welfare of the public.

(2006 International Code Council); and 2006 SOUTH CAROLINA PLUMBING CODE (2006 International Code Council).

These statutory and regulatory laws mandate that general contractors and architects build and design in accordance with the applicable building codes to protect the health, safety and welfare of the public. *See* S.C. Code Ann. §§40-1-10 (Professions and Occupations); S.C. Code Ann. §§40-11-5 (Contractors); S.C. Code Reg. 29-1 - 29-110 (Department of Labor, Licensing and Regulation – State Licensing Board for Contractors); S.C. Code §§40-3-5 (Architects); S.C. Code Reg. 11-1 – 11-14 (Department of Labor, Licensing and Regulation – State Board of Architectural Examiners); S.C. Code Reg. 8-100 – 8-701 (Buildings Codes Council).

These laws and regulations control the licensing, certification, occupational requirements, examinations, fees, finances, investigations, disciplinary actions, and penalties for these professions. All of this was done to protect the public. S.C. Code Ann. §§40-11-5; S.C. Code Ann. §§40-11-10 (The South Carolina Contractor's Board was created to "protect the health, safety and welfare of the public through the regulation of businesses and individuals who . . . provide contract work to individual or other legal entities...");⁵ S.C. Code Reg. 8-100 – 8-701.

The original design, development and construction team at Long Grove failed to comply with these minimum standards, yet under the Court's Order, none remain accountable. This private contract eviscerates the laws and regulations adopted and enforced by the Legislative and Executive Branches of state and local governments and effectively destroys the public policies of this state. The contract is void and unenforceable for that reason.

⁵ The regulations of the Contractor's Licensing Board within the Department of Labor, Licensing and Regulation has established 28 classifications of contractors. S.C. Code Reg. 29-1.

The Respondents all had duties to ensure that these buildings were constructed and designed in accordance with the applicable building codes and industry standards. They cannot be relieved of those duties which were instituted to protect the health and safety of the public. A corporation cannot by contract relieve itself from a duty which it owes the public under state law. Murray v. Texas Co., 172 S.C. 399, 402, 174 S.E. 231, 232 (1934) (stating "[I]t is, of course, clear that a person cannot by contract relieve himself from a duty which he owes the public independently of the contract . . . "); See S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct. App. 1984); See Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336 at 347 (Md. Ct. App. 1986). In S.C. Code Ann. §32-2-10, the Legislature, in furtherance of these public policies⁶ requiring that the developers, architects, and contractors remain responsible for their work, prohibited the enforcement of the assumption of liability and releases in agreements made in connection with the design and construction of buildings. Not only did the Court err in failing to hold that this statute rendered the exculpatory contract unenforceable, but it also erred in failing to recognize the public policy reason for the statute: parties such as these Respondents cannot avoid their responsibility for their defective design and construction.

In summary, the state and local legislature and executive branches have through laws, and agencies established a public policy to protect people from defective design and construction. Our Supreme Court recognizes this as the law in South Carolina:

A violation of a building code violates a legal duty for which a builder can be held liable in tort for proximately caused losses. Terlinde,⁷ imposes a legal duty on builders to undertake construction commensurate with industry standards. Where a building code or industry standard does not apply, public policy further

⁶ The Title of the Statute is, "Contracts Against Public Policy."

⁷ Terlinde, 275 S.C. at 399, 271 S.E.2d at 770

demands the imposition of a legal duty on a builder to refrain from constructing housing that he knows or should know will pose serious risks of physical harm. We recognized such a duty, which should extend to foreseeable parties, in Rogers⁸. . . . Any builder who violates such a duty should justly be held accountable for the losses that his breach caused, whether they be physical harm or the diminution in the value of the house.

Kennedy v. Columbia Lumber & Manufacturing, Co., Inc., 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989). To allow the Respondents to escape from their responsibility for their defective design and construction is to defeat the public policy of our state.

B. The Respondents are professionals who cannot exempt themselves from statutory and regulatory standards.

To design and construct buildings, professionals, such as Gulf Stream and JHP, must obtain a license and are subject to regulation by state and local governments. S.C. Code Ann. §§40-1-10; S.C. Code Ann. §§40-11-5; S.C. Reg. 29-1 - 29-110; S.C. Code Ann. §§40-3-5; S.C. Reg. 11-1 - 11-14; S.C. Reg. 8-100 - 8-701. These licensing requirements enacted by the Legislature and enforced by the South Carolina Department of Labor, Licensing and Regulation establish the public interest that Respondents seek to avoid. The interest of the public is to be able to purchase a home such as a Long Grove condominium without fear of it having latent defects causing rot and deterioration and costing millions of dollars to repair. The interest of the public is to be secure in one's home, and an interest that has existed for thousands of years. The Beach Company holds itself and its wholly owned subsidiary, Gulf Stream Construction, out as one of the best developers and contractors in the Southeast. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 2- Marketing Brochure-Condominium Conversion Opportunity, R. pp. 385-438). The public interest is for such a developer and

⁸ Rogers, 251 S.C. at 134, 161 S.E.2d at 84

its general contractor, subcontractors, and architect to stand behind this work and not run away from it.

Courts have consistently refused to enforce exculpatory contracts contrary to the public interests. Professionals licensed by this state cannot exempt themselves from standards imposed by law by the mere execution of exculpatory contracts. As the Tennessee Supreme Court understands:

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

Olson v. Molzen, 558 S.W. 2d. 429 (Tenn. 1977); (Long Grove POA Motion to Reconsider, R. pp. 784-828). Likewise, in a case recognized by the South Carolina Court of Appeals, the Supreme Court of Appeals of West Virginia stated:

A plaintiff's express agreement to assume the risk of defendant's violation of a safety statute enacted for the purpose of protecting the public will not be enforced; *the safety obligation created by the statute for such purpose is an obligation owed to the public at large and is not within the power of any private individual to waive.*

Murphy v. North American River Runners, Inc., 412 S.E. 2d. 504 at 509 (W.Va. 1991) (emphasis added). (Long Grove POA Motion to Reconsider, R. pp. 784-828).

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

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

Loewe v. Seagate Homes, Inc., 987 So. 2d. 758 (Fla. App. 5 Dist. 2008); VoiceStream Wireless Corp. v. U.S. Communications, Inc., 912 So.2d 34, 38 (Fla. 4th DCA 2005) (" a party cannot waive liability imposed by statutory provisions that are intended to protect both an individual and the public because to do so would be contrary to public policy"); Holt v. O'Brien Imports of Fort Myers, Inc., 862 So.2d 87, 89 (Fla. 2d DCA 2003) (" [A]n individual cannot waive the protection of a statute that is designed to protect both the public and the individual.") (quoting Coastal Caisson Drill Co. v. Am. Cas. Co., 523 So.2d 791, 793 (Fla. 2d DCA 1988), approved, 542 So.2d 957 (Fla.1989)).

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

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

Jones v. Centex Homes, 967 N.E.2d 1199 (Ohio 2012). Vista could not agree to the waiver of the duties of the Respondents. The public interests and public policy require that the exculpatory agreements be found void. The public interest of this State is frustrated if these Respondents, developers, general contractor and architect, are immunized from liability from their having breached their positive statutory duties to protect the well-being of others.

C. The Exculpatory Contract at Issue is Unenforceable Against the POA.

The agreement between Vista Realty and Long Grove at Seaside Farms found in Paragraph 15 is an exculpatory contract. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 699-700). An exculpatory clause is one that purports to deny an injured party the right to recover damages from a person negligently causing his or her injury. Cain v. Banka, 932 So.2d 575, 31 Fla. L. Weekly D1780 (Fla.App. 5 Distr. 2006)(Exculpatory clauses are by public policy disfavored because they relieve one party of the obligation to use due care, and shift the risk of injury to the party who is probably least equipped to take the necessary precautions to avoid injury and bear the risk of loss); Kitchens of the Oceans, Inc. v. McGladrey & Pullen, LLP, 832 So.2d 270 (Fla. 4th DCA 2002); Loewe v. Seagate Homes, Inc., 987 So.2d 758, 760 (Fla. 5th DCA 2008).

Exculpatory contracts are not favored at law. Because exculpatory contracts "tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon." Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 619, 138 S.E.2d 155, 157 (1964); Dobratz vs. Thomson, 468 N.E.2d 654, 161 Wis.2d 502 (Wis. 1991) (finding exculpatory contracts tend to allow conduct in the given area of activity or pursuit which conduct is below the acceptable standard of ordinary and reasonable care applicable to that activity or pursuit). For the Court to approve Respondents' scheme in this case is to invite developers and contractors, in converting apartments to condominiums, to avoid their responsibility to design and construct buildings that comply with the minimum standards and to sell defective condominiums to an unsuspecting public.

In addition, exculpatory contracts are enforceable only where and to the extent that the intention to be relieved from liability is made clear and unequivocal. Neither the Sales

Contract nor the Master Deed directly states that Respondents are exempt from liability for their own "negligence," which is a word not used in either document. An exculpatory clause will be void when the provisions are too broad and do not inform a party that he/she would be waiving all claims to a defendants' negligence. Fisher, 584 S.E.2d 149; *See Yauger v. Skiing Enters., Inc.*, 206 Wis.2d 76, 557 N.W.2d 60 (1996) (finding an exculpatory contract void as against public policy because it did not clearly inform the plaintiff he was waiving all claims due to defendants' negligence); *See also S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct. App. 1984)(stating that exculpatory clause will never be construed to exempt a party from liability for his own negligence 'in the absence of explicit language clearly indicating that such was the intent of the parties') The modern approach to examining contracts of adhesion and exculpatory clauses is to treat them differently from other contracts. "The trend is justified based on three considerations: (1) there was not true assent to a particular term; (2) even if there was assent, the term is to be excised from the contract because it contravenes public policy; or (3) the term is unconscionable and should be stricken." Gladden v. Boykin, et. al., 739 S.E.2d 882 (2013) (quoting 7 Joseph M. Perillo, Corbin on Contracts §29.10, at 415-16 (rev. ed. 2002)).

The exculpatory clause in the Sales Contract at Paragraph 15 and as quoted in Paragraph 24 of the Master Deed fails to comply with these requirements. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 699-700); (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed and ByLaws, R. pp. 654-655). The POA is a corporation and obligated by the Master Deed to maintain the common elements of the POA. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed and

ByLaws, R. pp. 606-687). With these obligations, comes the right and fiduciary duty to bring litigation against developers and contractors responsible for defective construction and design of buildings for which they are responsible. Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel Int'l Corp., 286 S.C. 555, 335 S.E.2d 365 (1985). The exculpatory clause of the Sales Contract, as found in the Master Deed, fails to mention the POA and fails to disclose the release of the rights of the POA. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 688-766). The common elements of these buildings suffer from significant defects and damages. The exculpatory language of the contract fails to disclose the intent to contract away the right of the Association to seek damages for defects in the common elements. An ordinary and knowledgeable person would not know that Vista Realty, The Beach Company and Long Grove at Seaside Farms, LLC had contracted away the right to recover for damages to the common elements against the parties who originally developed, designed, and constructed the common elements. It never clearly and specifically states, "Neither this Association nor any Owner may ever file a lawsuit against the original developer, general contractor, architect and subcontractors named herein to recover damages to the common elements for defective design or defective construction." The Court failed to recognize that the contract at issue in this case is such an exculpatory contract that violates public policy, is drafted broadly, and is void.

Finally, this exculpatory contract is unenforceable because it contravenes the Statutes of Limitations (S.C. Code Ann. §15-3-530) and of Repose (S.C. Code Ann. § 15-3-640); See Barringer v. Fidelity & Deposit Co. of Maryland, 161 S.C. 4, 159 S.E. 373 (1931). In Barringer v. Fidelity & Deposit Co. of Maryland, 161 S.C. 4, 159 S.E. 373 (1931), the Supreme Court affirmed the Order of the Circuit Court refusing to enforce a

contract that required that a lawsuit be brought by a date certain before the expiration of the statute of limitations. The Supreme Court held that a private contract between two parties that contravene a statute was ineffective. Barringer v Fidelity & Deposit Co. of Maryland, 161 S.C. 4, 159 S.E. 375 (1931).

In this case, the POA was not a party to the contract. The two parties to the contract, Vista and Long Grove at Seaside Farms, entered into the agreement that contravened the Statute of Limitations and Statute of Repose of a third party, the POA. If the parties to a contract cannot contravene the Statute of Limitations and Repose as between themselves then certainly the parties to a contract cannot contravene the Statute of Limitations and Repose as to a third party.

Vista Realty and Long Grove at Seaside Farms could not agree to contravene the Statute of Repose. Barringer v Fidelity & Deposit Co. of Maryland, 161 S.C. 4, 159 S.E. 375 (1931).

2. THE COURT ERRED IN ALLOWING PLAINTIFFS TO RELEASE BY CONTRACT NON-DELEGABLE DUTIES IMPOSED BY STATUTORY, REGULATORY AND COMMON LAW.

In an effort to escape from their liability, Long Grove at Seaside Farms and The Beach Company improperly attempt to delegate to Vista Realty all duties to ensure the buildings were built to Code and constructed in a good and workmanlike manner.

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

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.

(Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, p.10, R. pp. 699-700). The agreement delegates to Vista Realty duties that Gulf Stream Construction, JHP, the subcontractors, The Beach Company, and Long Grove at Seaside Farms owe to the public and failed to exercise during the design and construction of the Long Grove apartments.

Once they began the development, design, and construction of Long Grove, the Respondents, regardless of their contracts, were obligated to comply with the duties created by building codes, laws, and regulations. The developer is the builder of the project even though he may delegate the physical acts of construction to others. Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336, 347 (Md. Ct. App. 1986). These provisions enacted by the Legislature are non-delegable duties owed to the public. Obligations and duties created by statute are non-delegable. *See, McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005); Loewe v. Seagate Homes, Inc., 987 So.2d 758, 760 (Fla. 5th DCA 2008); Olson v. Molzen, 558 S.W. 2d. 429 (Tenn. 1977).

"The real effect of finding a duty to be non-delegable is to render not the duty, but the liability, non-delegable; the person subject to a non-delegable duty is certainly free to delegate the duty, but will be liable to third parties for any negligence of the delegatee, regardless of any fault on the part of the delegator." Nedrow v. Pruitt, 336 S.C. 668, 521 S.E. 2d. 755 (SC 1999). The Court erred by finding that these four entities could be released from their liabilities for these non-delegable duties.

Because these are non-delegable duties, the release and assumption of liabilities is unenforceable against the POA. *See Green Springs, Inc. v. Calvera*, 239 So. 2d 264 (Fl. 1970); *See Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co.*, 517 S.2d 336, 347 (Md. Ct. App. 1986) ("The developer is, in a sense, the builder of the project, even though he may delegate to others the physical acts of construction.").

These non-delegable duties are critical. The Building Codes adopted by counties and towns as laws establish minimum requirements to safeguard the public health, safety and general welfare.⁹ Designers and contractors must abide by the applicable building codes and industry standards. *See e.g.*, South Carolina Building Code (2006 International Code Council, Inc.).

Pursuant to S.C. Reg. 11-12 Code of Professional Ethics,

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

S.C. Code Reg. 11-12. A licensed architect shall not, in the conduct of his professional practice, knowingly violate the law. 2007 Code of Ethics & Professional Conduct, Canon II – Obligations to the Public, Rule 2.101. Vista Realty and Long Grove at Seaside Farms could not agree to the delegation of these duties to Vista and the waiver of these duties on behalf of JHP, Gulf Stream Construction, or any other person or corporation involved in

⁹ *See e.g.*, COUNTY OF CHARLESTON, S.C. ORDINANCES FOR BUILDINGS AND BUILDING REGULATIONS, ch.4, Sect. 101.3 Intent.

the design and construction of the Long Grove Apartments. JHP and Gulf Stream are not absolved of their responsibilities for the violations of the building codes.

JHP is liable for designing a project that violates S.C. Reg. 11-12 and the applicable building codes. JHP violated its duty not to engage in incompetent practice and not to design a project in violation of applicable building codes and regulations.

Gulfstream, as the general contractor violated its duties in constructing buildings that do not adhere to the building code. These duties cannot be delegated by Vista Realty and Long Grove at Seaside Farms to Vista Realty. They cannot waive the duty to build structures according to code so that the public is protected by those minimum building standards. They cannot ignore the county and town building codes and ordinances.

These duties and responsibilities also exist in our common law. *See, e.g., Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (A design professional undertaking to furnish plans and specifications impliedly warrants their sufficiency for the intended purpose); *Beachwalk Villas Condominium Assoc., Inc. vs. Martin*, 305 S.C. 144; 406 S.E.2d 372 (1991) (An architect can be held liable to an owner for negligence and breach of the implied warranty even though there was no contract between the architect and the homebuyer); *Tommy L. Griffin Plumbing & Heating Co. vs. Jordon, Jones & Goulding, Inc.*, 320 S.C. 49; 463 S.E.2d 85 (1995) (a design professional owes a professional duty to the plaintiff which arises separate and distinct from any contractual duties between the parties or with third parties). Violations of building codes are negligence per se and are evidence of recklessness and willfulness supporting punitive damages. *Kennedy vs. Columbia Lumber*, 299 S.C. 335, 384 S.E.2d 730 (1989). *Terlinde vs. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980) (a general contractor has a duty of care to construct within industry standards).

The agreement delegates to Vista Realty duties that must remain with Respondents. Those duties are, in part, to design and construct the buildings in accordance with building codes and industry standards in a good and workmanlike manner; to inspect the work as it is done; and to correct deficiencies during construction. They are further liable for any latent defects that are discovered within the Statute of Repose. The defects at Long Grove are so severe and extensive that these parties obviously failed to comply with those duties.

The practical reasons why these duties and the responsibility for failing to comply with those non-delegable duties should remain with Respondents include:

1. The only real time to properly exercise those duties is during the design stages and the construction stages. To delegate those duties five years after the design and construction are complete assures the defects are hidden by the work.
2. The out-of-state conversion developer who has no ties to this local community or even this State is motivated not to find defects but to do as little work as possible to maximize profits.
3. The best people to comply with the duties are the people who know the most about the buildings. Those are the people who are there day in and day out observing the work as it is done; working out design and construction difficulties; and taking the steps to fix problems as they occur and not years later.

These four entities constructed a multi-family project with numerous code violations and did not adhere to the minimum requirements necessary to protect the public. These entities remain liable for breaching these non-delegable duties. The exculpatory agreement is unenforceable.

3. **THE COURT ERRED IN FINDING THAT THE PROPERTY OWNERS' ASSOCIATION IS BOUND BY CONTRACT TO WHICH IT WAS NOT A PARTY.**

The Sales Contract was executed on January 27, 2005. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 688-766). The Master Deed was filed on April 15, 2005. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed and ByLaws, R. pp. 606-687). The Property Owners' Association was incorporated on April 21, 2005. As a corporation, the POA is a separate and distinct entity. Its rights and obligations are established by statute, case law, and the Master Deed. It does not own the common elements at Long Grove. It has the duty to maintain the common elements and the Queen's Grant fiduciary duty to file a lawsuit to recover damages for defective design and construction. See Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel Int'l Corp., 286 S.C. 555, 335 S.E.2d 365 (1985); (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed and ByLaws, R. pp. 606-687).

The only parties to the contract, and exculpatory clause are Long Grove at Seaside Farms, LLC and Vista Realty. The only named third-party beneficiaries are The Beach Company and Gulfstream Construction. JHP was not specifically identified. When the contract was signed the POA did not exist. More importantly, the POA is not identified in the agreement or the Master Deed as being bound by the agreement. (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 16 Sales Contract, R. pp. 688-766); (Long Grove POA Memorandum in Opposition dated September 23, 2011- Exhibit 15 Master Deed and ByLaws, R. pp. 606-687).

There is no legal authority to support the contention by Respondents and the ruling by the Court that a corporation (the POA) bears the burden of a contract to which it was not a party and in which it is not identified as being bound. There is also no authority that Vista

Realty can enter into a contract that detrimentally burdens the Owners who were not a party to that contract.

The Property Owners' Association and the individual owners were not parties to the contract, had no knowledge of the elimination of their rights, no bargaining power and no ability to negotiate any of the terms and provisions of the contract. Neither received a benefit. Neither is bound by the contract.

The Respondents' obligations to construct Long Grove in compliance with building codes and industry standards extend to foreseeable parties.¹⁰ These obligations, owed to the current Long Grove owners, could not be waived by their predecessor in title.

4. THE COURT ERRED BY FAILING TO RECOGNIZE THAT THE CONTRACT AT ISSUE IN THE CASE IS UNCONSCIONABLE AND UNENFORCEABLE AND, THEREFORE, IS VOID.

When applied to the POA, the terms of this release are unconscionable. In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Smith v. D.R. Horton, Inc., Appellate Case No. 2011-204347 (Op. No. 5118 Ct. App. April 17, 2013); Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004); Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct. App. 1998); *See also* S.C. Code Ann. § 36-2-302(1) (2003); Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663

¹⁰ Kennedy v. Columbia Lumber, 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980)

(2007) (stating that legislation permits this Court to “refuse to enforce” any unconscionable clause in a contract or to “limit its application so as to avoid an unconscionable result.”); *See also* Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360,364 (2001) (holding that general contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause).

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *See* Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir. 1989). In determining whether a contract was “tainted by an absence of meaningful choice,” (*Id.* at 295), courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties’ bargaining power; the parties’ relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.* at 293. *See also* Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) (“A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.”(quoting 17A Am.Jur.2d Contracts § 279 (2004))). The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. Carolina Care Plan, 361 S.C. at 555, 606 S.E.2d at 758.

In this case, because the POA was not in existence at the time of the execution of the sales contract, it had no meaningful choice. The rights of the POA were extinguished, and it could not completely fulfill its fiduciary obligations under Queen’s Grant Villas Horizontal Property Regimes I-V v. Daniel Int’l Corp. from the moment of its incorporation. Queen’s Grant Villas Horizontal Property Regimes I-V v. Daniel Int’l Corp., 286 S.C. 555, 335 S.E.2d 365 (1985).

No POA would ever choose to enter into a contract that prevented it from filing a lawsuit to recover damages without obtaining any benefit. The terms of that agreement as they relate to the POA, therefore, are completely one-sided. Long Grove at Seaside Farms, LLC sold the property for \$37 million dollars, yet incredibly was relieved of its liability as developer. The POA was left with having to pay millions of dollars to repair rotten and deteriorating buildings.

The effect of this contract is to deprive the POA of the fundamental fairness necessary for a contract to be valid. The Court's Order ignored this by examining the contract too narrowly by focusing on the two parties to the contract, Long Grove at Seaside Farms, LLC and Vista Realty. (Order Granting Summary Judgment issued July 26, 2012, R. pp. 1-41). The Court failed to take into account all of the facts and circumstances of this case and failed to take into account the effect of its ruling on the efficacy of the public policies of the State. (Order Granting Summary Judgment issued July 26, 2012, R. pp. 1-41). Viewing this matter fully and keeping in mind the public policies of the State leads to the inescapable conclusion that the contract is fundamentally unfair and unconscionable. The Order should, therefore, be reversed.

Further, Vista, with the knowledge of The Beach Company through its role as broker in charge and real estate sales agent, buried the notice of this release of all liabilities in the Master Deed. (Long Grove Property Owners' Association Memorandum in Opposition filed September 23, 2011- Exhibit 15 Master Deed and ByLaws, R. pp. 606-687). A broad release waiving all claims due to Respondents' negligence, including waiver of any and all statutory, regulatory and building code violations by the developer, general contractor and architect is not expected to be found buried in the middle of a Master Deed for the formation of the Horizontal Property Regime. See Gladden v. Boykin,

et. al., 739 S.E.2d 882 (2013) (dissent finding that the limitation of liability provision in the contract did not stand out any more than other provisions and was not any more noticeable than the other provisions). With the "Release" hidden in the middle of one hundred (100) pages of technical jargon, the Owners did not have notice and were not informed by that paragraph of the extinguishment of their rights against these parties. The individual sales contracts and the individual deeds referred to the Master Deed, but did not bring to the attention of the purchasers the Notice of Release buried within. (Long Grove POA Memorandum in Opposition to Motion for Summary Judgment- September 23, 2011 - Exhibit 6, R. pp.500-543). In paragraph 16 of the Sales Contract, The Beach Company and Long Grove Vista specifically agreed that the conveyances of condominium units by Long Grove Vista would not contain the disclosures found in the Master Deed. (Long Grove POA Memorandum in Opposition to Motion for Summary Judgment – September 23, 2011 – Exhibit 16 Sales Contract, R. pp. 688-766). No reasonable person would purchase a condominium unit for full price knowing that he/she would then owe thousands of dollars more that could not be collected from the responsible parties through the POA. Prospective purchasers had no meaningful choice concerning the "release" and the release was not brought to their attention in any conspicuous manner. The POA had no ability to protect itself from the effect of the release and disclaimer. Under an analysis similar to that set forth in the case of Myrtle Beach Pipeline Com. v. Emerson Elec. Co., 843 F. Supp. 1027 (D.S.C. 1993), the release and disclaimer are unconscionable.

Factors that may be used in assessing unconscionability include: (1) the nature of the injuries suffered by the plaintiff, (2) whether plaintiffs a substantial business concern, (3) disparity in parties' bargaining powers,(4) parties' relative sophistication,(5) whether there is an element of surprise in the exclusion,(6) and the conspicuousness of the clause.

Myrtle Beach Pipeline Com. v. Emerson Elec. Co., 843 F. Supp. 1027 (D.S.C. 1993). In this case, all of these factors favor the POA and require reversal of the Order: (1) The POA has suffered and will suffer significant damages; (2) The POA is an eleemosynary corporation and not a substantial business concern; (3) The POA was created AFTER the Master Deed was signed by the Declarant Long Grove Vista. It had no ability to bargain; (4) The POA is unsophisticated relative to Mr. de Guardiola and Vista and Mr. Darby and the Beach Company; (5) The POA, because it was formed after the Master Deed was executed, could not help but be surprised; (6) The release and disclaimer is not conspicuous.

Not only are these provisions one-sided, but as previously discussed, they also nullify the legal and statutory duties of all parties in derogation of public policy. If these provisions are upheld and are used to bar the POA claims against Respondents, then the Sales Contract benefits these third-parties such as Gulf Stream Construction and JHP by excluding them from their legal and statutory duties. At the same time, however, this provision creates a tremendous detriment to separate third parties such as purchasers and the POA who are damaged by their inability to bring suit against these contractors and architects who have violated their legal and statutory duties by constructing buildings which do not meet minimum construction standards and violate statutory, regulatory and municipal laws and ordinances. The Court erred by allowing Gulf Stream and JHP, alleged third-party beneficiaries, to use the unconscionable terms in a Sales Contract (to which neither was a party) as a defense to their professional duties and obligations. This Order should be reversed.

CONCLUSION

If building codes and regulations are not followed, the consequences can be devastating: the pedestrian bridge that collapsed in North Carolina injuring over one hundred people; the fire in North Myrtle Beach killing college students on spring break; the factory that collapsed in Bangladesh killing over 600 persons; a building at River Oaks in Myrtle Beach being completely engulfed in flames in thirty minutes; numerous projects of rot and disintegration causing hundreds of millions of dollars in damages to homeowners. Bad construction has the capacity to inflict a heavy toll on life, limb and property, and the financial consequences can be devastating.

Through the passage of the laws and the adoption of regulation and building codes, our three branches of government have created public policies to prevent the severe consequences that can result from poor design and construction practices. South Carolina statutory, regulatory and common law have been instituted to protect the public from entities like The Beach Company, Long Grove at Seaside Farms, Gulf Stream Construction and JHP who try to avoid the consequences of their inferior and sub-standard development, design and construction practices.

The Long Grove property suffers from the consequences of defective construction and defective design. In addition to the million dollars that the Long Grove property owners have already spent to repair damages caused by the Respondents, the owners are faced with having to spend millions of dollars more to repair the damages caused by the defective development, design, and construction of these condominiums. Many of the parties who committed these wrongful acts have been sued in other cases, because of these same types of problems. That there are three of these similar cases against some of these same parties is further reason why the public policies examined above must be enforced and not ignored.

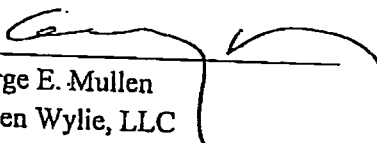
The South Carolina Supreme Court has been in the vanguard of protecting people like the residents of Long Grove from companies like The Beach Company, Gulfstream and JHP who develop, construct and design buildings such as the ones at Long Grove that are infected with code violations, rot, and defective construction. Kennedy v. Columbia Lumber, 299 S.C. 335, 384 S.E.2d 730 (1989); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980); Wise v. Broadway, 315 S.C. 273, 433 S.E.2d 857 (1993); Tommy L. Griffin Plumbing & Heating Co. v. Jordon, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951); Beachwalk Villas Condominium Assoc., Inc. v. Martin, 305 S.C. 144, 406 S.E.2d 372 (1991); Lane v. Trenholm Bldg. Co., 267 S.C. 497, 229 S.E.2d 728; Concerned Dunes West Residents, Inc., v. Georgia-Pacific Corp., 349 S.C. 251, 562 S.E.2d 633 (2002). These cases, like the statutes, regulations and building codes, have furthered the public policy promoting development, design and construction of residences that meet minimum building code standards and provide safe places to live and buildings and residences that are not ridden with latent defects and rot. All three branches of government, our courts, our Legislature, and our executive branch are fully committed to protecting an unsuspecting public.

In this case, the Beach Company, Long Grove at Seaside Farms, and Gulfstream Construction, have attempted to create a clever way to avoid these responsibilities on behalf of themselves and on behalf of the architect and subcontractors: Build an apartment complex, sell it before the latent defects become apparent and before they have to repair them, sell the project to an out of state developer at a huge profit, and skip out on their statutory, regulatory and common law responsibilities. In furtherance of the firmly established public policy of this State, this Court should not allow this mechanism to stand. The public policy of this State is that developers, design professionals, general contractors,

and subcontractors doing business in South Carolina must comply with Building Codes, ordinances, statutory law, and regulatory law. Approving this mechanism eviscerates this crucial public policy.

The Court erred by finding that The Beach Company, Long Grove at Seaside Farms, Gulf Stream Construction and JHP could waive their duties to the public, endanger the public by developing, designing and constructing buildings with serious code violations, and could use such broad language in an exculpatory clause that would absolve all liability for anything in the future. This clause is violative of public policy, is unconscionable, is void and unenforceable. The Court's findings should be reversed.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Court of Common Pleas
For Charleston County
Civil Action No. 2009-CP-10-6746
Appellate Case No. 2012-213584

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 Appellant.

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
Respondent.

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STATEMENT OF THE CASE

Plaintiffs-Respondents Long Grove at Seaside Farms, LLC (“LSFSF”), The Beach Company, and Gulfstream Construction Company, Inc. (“Gulfstream”) (collectively, “Plaintiffs”), filed this action for a declaratory judgment to determine a controversy and to obtain a declaration of the legal rights between the Plaintiffs and Defendant-Appellant Long Grove Property Owners’ Association, Inc. (the “POA”) concerning the legal effect and enforceability of disclaimers and releases arising from the sale and subsequent conversion of a rental apartment complex to condominiums.

In response to the Plaintiffs’ declaratory judgment Complaint, the POA filed counterclaims and third-party claims asserting various causes of action against the Plaintiffs, the architect of the apartments (James, Harwick & Partners, Inc. (“JHP”)), the condominium converter (Long Grove Property Owners’ Association, Inc. and Long Grove Vista, LLC (collectively, “Vista”)), and against the building inspector (Essex Engineering Corporation, (“Essex”)) and contractor (Sam Mayo) used by the converter, asserting claims for alleged construction defects in the condominiums. The Plaintiffs and JHP (collectively the “Respondents”) filed motions to dismiss the POA’s counterclaims pursuant to Rule 12(b)(6), SCRCF, or in the alternative, for a judgment on the pleadings pursuant to Rule 12(c), SCRCF.

By agreement of the parties, while Respondents’ motions to dismiss were pending the POA obtained documents and took depositions concerning the transactional aspects of the sale of the property from the rental apartment owner to the condominium converter-developer.

The trial judge held two separate and extended hearings on the matter, and the trial judge requested and received extensive briefing from the parties addressing the issues presented.

Thereafter, the trial judge issued an order¹ dismissing the POA's claims against Respondents (the "Order"). The POA filed an appeal from that Order.

FACTS

This is an alleged construction defects case arising from the conversion of a rental apartment complex to a condominium development. Emphasis is placed on the concept of "alleged" construction defects because this case is before this Court on the basis of the legal effect presented by the disclaimers and notices at issue, the facts and circumstance of which are not in dispute, while assuming, without admitting, for purposes of the legal analysis that the alleged construction defects exist.

This lawsuit concerns the Long Grove Condominiums located in the Seaside Farm Development in Mount Pleasant (Charleston County), South Carolina. The Long Grove Condominiums were formerly the Long Grove Apartments, which was a rental apartment complex.

LGSF was the owner of the apartments. Gulfstream was the general contractor that constructed the apartments for LGSF. The Beach Company was the manager of the entity that in turn was the managing member of LGSF, and Beach Company acted as the property manager for the apartment complex. JHP was the architect that designed the apartments for LGSF.

The Long Grove Apartments were designed and constructed in or around 1999 for use as a rental apartment complex.² LGSF owned and operated the property solely as a rental

¹ R. p. 1.

² R. p. 986, lines 5-7.

apartment complex in which apartment units were leased to tenants. LGSF never owned or operated the property as a condominium development.

In 2004 LGSF considered selling the apartment complex. LGSF hired L.J. Melody & Company ("L.J. Melody") as its exclusive marketing advisor to market the property nationwide. The offering materials described the property as being suitable for continued use as rental apartments (i.e., for "income investors") or for conversion to condominiums (i.e., "converters").³ A set price was not specified for the property; instead the offering materials invited qualified buyers to bid on the property pursuant to certain defined parameters. The offering materials indicated that the property was being offered on an "as is, where is" basis,⁴ which is an important fact the POA fails to mention in its Brief. The POA also fails to mention that none of its representatives or members even knew those materials existed until they were first discovered by the POA's counsel during discovery in this case.

As described by LGSF's representative, John Darby of the Beach Company, from the beginning LGSF made it clear that if any buyer intended to convert the property to condominiums, LGSF and its affiliates must be released from all such liability:

Q: When you went to L.J. Melody to market the property, did you give them any terms for what would be in the sales contract, your requirements?

A: Yeah. . . . We made it clear in the beginning that if the intentions were to convert the apartments to condominiums, that we wanted to be indemnified [sic] of any liability. At that particular time, there were a lot of conversions going on throughout the country.

Q: Right. And the fact that there were conversions going on throughout the country, how did that affect what you were doing?

A: What do you mean?

³ R. pp. 1062-1063.

⁴ R. p. 1061 (first paragraph in "Introduction" section).

Q: Well, you mentioned that, which means to me that it must have some importance that there were conversions sort of going on around the country.

A: Well, we had never done a conversion. And the apartments were built to be apartments, to be managed as apartments and occupied as apartments. And if someone wanted to change that use, such as converting them into individual ownership condominiums, there's risk involved in that and we didn't want to share the risk.

...

Q: Now, was that requirement for indemnification a non-negotiable term?

A: Yes.⁵

LGSF received bids for the property from both income investors and converters. Ultimately Defendant Vista Realty Partners, LLC ("Vista") was the high bidder. Vista is a Georgia limited liability company owned by Eduard de Guardiola, who has a law degree and is an experienced real estate developer and condominium converter.⁶ Vista was an independent, arms-length buyer that has no direct or indirect relationship with LGSF.

Upon receipt of Vista's high bid, Vista and LGSF began to negotiate the terms of the sale of the apartments. 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.⁷

Similarly, Beach Company's cover letter forwarding the signed term sheet to Mr. de Guardiola states in pertinent part:

⁵ R. p. 987, line 24-p.989, line 18.

⁶ R. p. 1048, line 3-p. 1051, line 3; p. 1052, line 24-p. 1055, line 7.

⁷ R. p. 1065 at p.1067.

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.⁸

Vista and LGSF then began negotiating the terms of a written sales contract. Vista was represented by an Atlanta law firm and LGSF was represented by South Carolina counsel in the negotiations and preparation of a contract for the sale.

Following the negotiations concerning the terms of the contract, LGSF, as the Seller, and Vista,⁹ as the Purchaser, entered into a Sales Contract for the apartment complex dated January 18, 2005, that states in pertinent part:

14. **Condition of Property.** Except as otherwise provided specifically in this Sales Contract, specifically including but not limited to the representations and warranties contained in Section 6 hereof, Purchaser acknowledges that neither Seller nor anyone acting for or on behalf of Seller has made any representation, statement, warranty, or promise to Purchaser with respect to the Property. Purchaser shall immediately examine the Property, and become familiar with the physical condition thereof. 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), zoning, lead paint, urea formaldehyde foam insulation, asbestos, hazardous or toxic wastes or substances, pollutants, contaminants or other environmental matters. Purchaser knowingly and fully assumes the entire risk as to all such matters. Purchaser shall confirm the aforesaid acknowledgments in writing as of

⁸ R. p.1064.

⁹ Prior to closing Vista Realty Partners, LLC 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 Closing Date. The provisions of this Section shall survive the closing and the delivery of the deed or any expiration or termination of this Agreement. . . . 10

The Sales Contract also stated:

15. **Assumption of Liability and Release of Claims.**

a) Purchaser acknowledges that the Property was originally developed and constructed by Seller and its Affiliates (as herein defined). Purchaser represents that it is purchasing the Property for the purpose of converting the Property into condominiums which will be sold to the public. 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) Accordingly, as part of the valuable consideration being exchanged in this sale transaction, the receipt of which is hereby acknowledged, 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. . . . [emphasis added] 11

The above assumption of liability, disclaimers, and releases in Paragraphs 14 and 15 of the Sales Contract were a key part of the negotiations between LGSF and Vista concerning the terms of the Sales Contract. LGSF's representative, John Darby of the Beach Company, testified that those terms were non-negotiable fundamental terms of the contract:

Q: Mr. Darby, was the release and indemnification language in the sales contract and in the letter of intent, was that a core or fundamental term of the bargain with Vista?

A: Yes.

Q: Would [LGSF] have sold this property to Vista if Vista had not agreed to that language regarding the release and indemnification?

10 R. p. 60 at pp. 70-71.

11 R. p. 71.

A: No.¹²

Vista's owner, Eduard de Guardiola, similarly testified that it would have been a "deal breaker" for LGSF if Vista had refused to agree to the provisions in Paragraphs 14 and 15 of the Sales Contract:

Q: [Mr. de Guardiola] you told [the POA's counsel] that it was a quote deal breaker end quote for John Darby that these terms of paragraphs 14 and 15 be contained in the contract?

A: Yes.

Q: And tell me what you meant by deal breaker?

A: John told me that he had to have these provisions in the contract in order for him to accept our offer.

Q: In other words, if you didn't agree to it he wasn't going to sell the property to you.

A: That's correct.¹³

Vista's acquisitions and development consultant on the project described these requirements as being a "contentious issue" between Vista and LGSF.¹⁴

In an effort to ensure that Vista would provide future condominium buyers with notice that Respondents had no role in the conversion and would not be responsible for any claimed construction defects in the condominiums, LGSF insisted that the Sales Contract include a provision requiring that the Master Deed for any condominium regime that was prepared and recorded by Vista after it purchased the property include a notice of the assumption of liability, disclaimers, and releases of all claims against LGSF related to the construction and condition of

¹² R. 1000, line 22-p.1001, line 7.

¹³ R. p. 1056, line 16-p. 1057, line 3.

¹⁴ R. p. 1097, lines 11-20.

the property. That requirement is set forth in Paragraph 16 in the Sales Contract, which states in pertinent part:

16. **Condominium Regime Documents.**

Purchaser [i.e., Vista] acknowledges and agrees that the Assumption of Liability and Release of Claims in Section 15 above is intended to be binding on all subsequent purchasers of the Property or any condominiums or other subdivisions of the Property. In order to give effect to this intention, the provision set forth in Exhibit I [emphasis added], attached hereto and incorporated herein, will be included in the Master Deed (as herein defined) establishing any condominium regime, and in any and all deeds or any other conveyances of all or part of the Property (except for conveyances of condominium units by Purchaser), including, but not limited to, a sale of a company (or corporate stock or partnership interest) interest.¹⁵

Exhibit I to the Sales Contract, as referred to in the above-quoted portion of Paragraph 16, specifies that the following notice language be included in the Master Deed recorded by Vista:

EXHIBIT I [to Sales Contract]
Disclosure Language

Save and excepting only the limited warranty of title hereinafter set forth and herein contained, 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 [i.e., the POA] acknowledges that Grantor's [i.e., Vista's] predecessor in title, Long Grove at Seaside Farms, LLC ("Long Grove") and its Affiliates (as herein defined) 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, 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.

Grantee acknowledges that the Property was originally developed and constructed by Long Grove and its Affiliates (as herein defined). Grantor purchased the Property for the purpose of converting the Property into condominiums which it is selling to the public. Grantor assumed all responsibility for identifying and correcting all defects or problems, if any, that existed, 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.

¹⁵ R. p. 72.

Accordingly, as part of the valuable consideration being exchanged in this sale transaction, the receipt and sufficiency of which are hereby acknowledged, Grantor on behalf of itself and its heirs, representatives, successors, and assigns (including Grantee and all other successors-in-title to all or a portion of the Property), agrees to never sue and completely releases Long Grove at Seaside Farms, LLC, The Beach Co., Gulfstream Construction Company, its affiliates, agents, officers, directors, employees, insurers, representatives, successors, assigns, and all other companies, partnerships, entities, or persons (collectively, the "Affiliates") involved in the design, development and/or construction of the apartment buildings and apartments therein and all other improvements prior to March , [sic] 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, including unknown and unforeseen claims that may now exist or that may arise in the future.

Grantor and Grantee 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 or any condominiums or other subdivisions of the Property. 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. [emphasis added]¹⁶

Following discussions between the parties and their counsel concerning LGSF's requirement that Vista provide notice of the disclaimers and releases as reflected Paragraphs 14, 15 and 16 in the Sales Contract, Vista accepted LGSF demands and signed the Sales Contract containing those terms.

The Sales Contract provided Vista with a due diligence period under which it could inspect the condition of the property prior to closing. Vista hired an engineering company, Essex, to inspect the property. Essex issued a property condition report that identified defects in the buildings, including water damage on the exterior balconies.¹⁷ Vista also received a report issued by a local engineer, Russell T. Wallace, P.E., that identified water damage on the exterior balconies of the units.¹⁸ Prior to closing, Vista required LGSF to escrow \$200,000 of the sales

¹⁶ R. p. 135.

¹⁷ R. pp. 1100.

¹⁸ R. pp. 1178.

proceeds to cover Vista's future cost of the balcony repairs.¹⁹ Vista then closed on the Sales Contract and purchased the apartment complex from LGSF.

The closing of the sale of LGSF's apartment complex to Vista occurred on March 7, 2005. The deed from LGSF to Vista, which was recorded in the Charleston County RMC Office and appears in the chain of title to the property, states in pertinent part:

... 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, 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. [emphasis added]²⁰

After closing on the property, Vista began converting the rental apartments to condominiums. Vista hired its own contractors to repair the balconies and perform other work on the buildings.²¹ Vista then requested and received the \$200,000 in funds that were escrowed at closing to cover the costs of the balcony repairs. Vista also prepared and recorded a Master Deed that created the Long Grove Horizontal Property Regime and the POA. The Master Deed was prepared and recorded by Vista's legal counsel. ²²

¹⁹ R. pp. 1187.

²⁰ R. pp. 143 at p. 144 (first paragraph).

²¹ R. p. 1099, lines 3-16.

²² R. p. 1098, lines 2-9.

As required in Paragraph 16 of the Sales Contract between LGSF and Vista, 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 comprising 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 comprising 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 comprising the Regime, and the Owners. In order to give effect to this intention, these provisions are included in this Master Deed, and will also be included in any other conveyances outside the coverage of this Master Deed. [emphasis added]²³

Following its recording of the Master Deed that created the POA, Vista controlled the POA by appointing its board of directors.²⁴

When Vista purchased the apartment complex from LGSF, the rental apartments were occupied by rental tenants. Beach Company's property management division had been

²³ R. pp. 151 at pp. 197-198.

²⁴ R. p. 1058, line 8-p. 1059, line 3.

managing the rental apartments for LGSF, and when Vista purchased the property from LGSF it entered into an apartment management agreement with Beach Company under which Beach Company continued to manage the rental apartments for Vista.²⁵ That management agreement was for management of the rental units during the conversion process and specifically excluded management of units once Vista had converted them to condominiums:

2.11 Horizontal Property Regime. The parties agree and acknowledge that Owner [i.e., Vista] intend to convert the Property to a horizontal property regime by recording a Master Deed in the Office of the RMC for Charleston County, South Carolina (the "Conversion"). On or before the date of the closing of the sale of the first unit, such date to be determined by Owner, the condominium association for said horizontal property regime may assume responsibility for certain maintenance, management and repair of portions of the Property deeded "Common Elements" and at Owner's discretion and direction Management [i.e., the Beach Company] shall be deemed released from the perform [sic] of such responsibilities under this Agreement. Unless the condominium association and Manager agree otherwise, Manager shall not receive any compensation for the management of the condominium association.²⁶

Beach Company and Vista also discussed the possibility of entering into an agreement for Beach Company to manage the condominium association as the apartment units were converted to condominiums, but they could not agree on terms and Beach Company never operated or managed the POA in any form or fashion.²⁷

As such, for a brief period of time after Vista purchased the apartment complex from LGSF, Beach Company continued to manage the rental units pursuant to its apartment management agreement with Vista, while Vista operated and managed the POA as Vista converted and sold units as condominiums. During that period, Beach Company sent Vista a letter stating its concerns regarding the scope of the apartment management services that Vista

²⁵ R. p. 1193.

²⁶ R. p. 1193 at p. 1198.

²⁷ R. p. 1175, line 21-p. 1176, line 10.

was requesting from Beach Company. That letter, dated August 5, 2005, states in pertinent part:

During the last few months, Vista Realty Partners has requested that the Beach Company assist it in activities related to the construction, repairs, and remodeling work associated with the conversion of Long Grove from apartments to condominiums. For example, Vista has requested that the Beach Company's managers and staff handle apartment-to-condominium renovations such as vinyl and carpet replacement and painting. Such work might be included in a standard "turn" of rental units in a completed apartment. However, at this stage of the project, this type of work is related to the construction, repairs, and remodeling work involved in the conversion of the project to condominiums, and the requested work exceeds the scope of The Beach Company's management agreement.

Accordingly, the purpose of this letter is to confirm and document that The Beach Company is acting only as the leasing/rental manager. The Beach Company is not responsible for managing or handling any of the construction and remodeling work associated with Vista Realty Partner's conversion of the project from apartments to condominiums.

Vista Realty Partners agrees that it is solely responsible for the coordination and supervision of all design, development, construction, and remodeling activities related to conversion of the project from apartments to condominiums. This coordination and supervision includes a turn-key process that follows through with the completion of any and all punch list items. The Beach Company shall have no requirement or responsibility for such improvements under its management agreement.

To the fullest extent permitted by law, Vista Realty Partners, on behalf of itself and its successors and assigns, agrees to hold release, harmless, defend, and indemnify The Beach Company . . . of and from any and all claims, lawsuits, demands, losses, damages, and all other expenses of any kind whatsoever (including without limitation attorney's fees and costs) arising out of or in any way related to Vista Realty Property's development, design, construction, repairs, and remodeling work associated with the conversion of Long Grove from apartments to condominiums;

Please acknowledge Vista Realty Partner's receipt, understanding, acceptance, and acknowledgment of this notice and agreement by signing and returning a copy of this letter to my attention no later than August 11, 2005.²⁸

Vista refused to sign the letter, and in a follow up letter dated September 12, 2005, the Beach Company notified Vista that it was terminating its management services of the property.²⁹ Vista then hired other company, Ravenel Associates, to manage the property, and Ravenel continues to manage the property for the POA today.

²⁸ R. pp. 1204-1205.

²⁹ R. p. 1177.

In addition to a property management division, Beach Company has a residential real estate sales division (Beach Residential). After it purchased the property, Vista entered into an agreement with the Beach Company for Beach Company to provide marketing services and sales support to Vista in connection with Vista's sale of its condominium units. Vista prepared and provided Beach Company with a form Purchase Agreement that Vista used to sign contracts with condominium buyers. The Purchase Agreement used by Vista to sell the condominium units contains several provisions that are pertinent to Beach Company's role as the broker-in-charge in light of several improper statements made by the POA in its Brief:

LONG GROVE HORIZONTAL PROPERTY REGIME
PURCHASE AGREEMENT [for individual condominium units]

THIS AGREEMENT is made and entered into this ____ day of ____, 200__, by and between Long Grove Vista, LLC, a Georgia limited liability company (hereinafter referred to as the "Seller"), and _____ (hereinafter referred to as the "Purchaser").

....

7. DISCLAIMER. Purchaser and Seller acknowledge that they have not relied upon any advice, representations or statements of Brokers [i.e., Beach Company] and waive and shall not assert any claims against Brokers involving the same. . . . Purchaser and Seller agree that Brokers shall not be responsible to advise Purchaser and Seller on any matter, including but not limited to the following: . . . the condition of the Unit, any portion thereof, or any item therein; . . .

....

10. LONG GROVE PROPERTY OWNERS ASSOCIATION, INC.

(a) Governing Documents. Purchaser acknowledges that the Unit being purchased is a portion of the [Long Grove Horizontal Property] Regime and improvements that have been or will be made subject to the Master Deed referred to in Paragraph 1. The nature and extent of the rights and obligations of the Purchaser in acquiring and owning the Unit will be controlled by and subject to the Master Deed, as well as the Articles of Incorporation, the Bylaws, and the rules and regulations of the Association. Purchaser agrees to comply with all of the terms, conditions and obligations set forth therein.

(b) Membership in Association. Upon conveyance of title to the Unit to Purchaser, Purchaser shall automatically become a member of the Association and shall be subject to the assessment obligations and other provisions set forth in the Master

Deed, including the obligation of the Purchaser to pay a contribution to the working capital of the Association referred to in Paragraph 5(b) above.

(c) Disclosure Package. Purchaser hereby acknowledges that he/she has received a copy of the property condition report required under Section §27-31-430 of the South Carolina horizontal Property Act, a copy of the Master Deed, a copy of the Bylaws of the Association, a copy of the Articles of Incorporation of the Association, a copy of the estimated budget of the Association (the "Disclosure Package").

24. ENTIRE AGREEMENT. This Agreement contains the entire agreement between the parties hereto. No agent, representative, salesman or officer of the parties hereto has authority to make, or has made, any statements, agreements, or representations, either oral or in writing, in connection herewith, modifying, adding to, or changing the terms and conditions hereof and neither party has relied upon any representation or warranty not set forth in this Agreement. No dealings between the parties or customs shall be permitted to contradict, vary, add to, or modify the terms hereof.³⁰

The "Disclosure Package" referenced in Paragraph 10(c) in the above quoted form Purchase Agreement included a copy of the Master Deed that contains notice that LGSF had sold the property to Vista on an "as is", "where is", and "with all defects" basis and had specifically disclaimed and been released from all warranties and liabilities related to the condition of the property.³¹

In addition to the notices in the Master Deed and unit sales contracts, when Vista sold its newly developed condominiums to individual condominium unit buyers, the deeds from Vista to the buyers contained following provision providing the buyers with notice that Vista had converted the apartments to condominiums:

WHEREAS, Long Grove Vista, LLC has converted the rental units at Long Grove Apartments to condominium ownership pursuant to S.C. Code of Laws, Section 27-31-410, et seq., and has complied with the disclosure, notice and offer requirements, set forth therein, including but not limited to compliance with Section 27-31-420(B) . . . ³²

³⁰ R. p. 1015 at pp. 1018-1019, 1023.

³¹ R. p. 1212 at pp. 1213, 1260-1261 (paragraph 24).

³² R. p. 242 (second "Whereas" paragraph).

The deeds from Vista to the individual condominium buyers also contained the following notice that the conveyance of the units from Vista to the buyers was subject to the terms of the Master Deed for the POA:

Said property subject to the following:

1. 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; . . . **33**

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 POA, through its attorney, sent demand letters to LGSF, Gulfstream, and The Beach Company stating that the POA "is asserting a construction defects claim" against them and demanding a response "in accordance with the Notice and Opportunity to Cure Construction Dwelling Defects Act."**34**

Thereafter, Plaintiffs filed this declaratory judgment lawsuit 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 on behalf of its "affiliates."

33 R. p. 242 at p. 244 (paragraph "1").

34 R. pp. 248, 250, 252.

Upon Plaintiffs' filing of this declaratory judgment action, the POA filed counterclaims, cross-claims, and third-party claims against JHP and the other parties in this case 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. 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.³⁵

In response to the POA's counterclaims and third-party claims, Respondents filed motions to dismiss the POA's claims pursuant to Rule 12(b)(6), SCRCP, or for a judgment on a pleadings pursuant to Rule 12(c), SCRCP, on the grounds that: (i) Respondents owe no legal duty to the POA; (ii) Respondents did not extend any warranties to the POA; and (iii) the POA is bound by the assumption of liability, disclaimers, releases, in the instruments of record (i.e., the POA's Master Deed) and is estopped as a matter of law from disclaiming or collaterally attacking those instruments of record.³⁶ JHP also moved on the additional ground that the POA did not state a proper third-party complaint under SCRCP 14(a), SCRCP.³⁷

Following several extended hearings and extensive consideration of the issues, the trial judge issued an order dismissing the POA's claims against LGSF, Beach Company, Gulfstream

³⁵ R. p. 271 at p. 281 (POA's Counterclaim at ¶¶ 59(a), (b), (f), and (i)). See also R. p. 346 (POA's Memorandum in Opposition to LGSF's Motion to Dismiss, which lists the alleged defects in the buildings).

³⁶ R. pp. 299 and 302.

³⁷ R. p. 780.

and JHP, who are now the Respondents in this appeal. The POA's claims against Vista and the other third-party defendants were unaffected by the order and are pending in the circuit court.

Summary of the Facts

In summary, LGSF designed and built an apartment complex for its own purpose and proceeded to utilize the property for that specific purpose (i.e., rental apartments) for a number of years. Respondents did not design or build condominiums. LGSF later sold the used apartment complex to a sophisticated third-party (Vista) in an arms-length transaction. When Vista converted the apartments to condominiums, Vista changed the use of the property and changed the type of ownership from that of a single owner-landlord to individual ownership of individual units. The Master Deed prepared and recorded by Vista contains clear notice that LGSF sold the property on an "as is", "where is", "without recourse" and "with all defects" basis and that Respondents would not be responsible for any defects in the condominiums that were created and sold by Vista. Those disclaimers and release arose from extensive arm's-length negotiations between sophisticated entities that enjoyed equal bargaining power. The POA was created by Vista and for a period of time was controlled by Vista. This not a situation in which a homebuyer with no bargaining rights relied on Respondents to design or construct them a condominium. Respondents did not design or build any condominiums, and they did not sell any condominiums to anyone.

ARGUMENT

“[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.”

(Judge Baxley’s Order ¶ 86)³⁸

All of the POA’s arguments underlying its appeal can be boiled down and summarized as follows: A builder/developer/architect can never end responsibility for the condition of the property upon its sale and instead after the sale remain strictly liable to future downstream purchasers for any defects in the condition of the property, regardless of any notices and disclaimer given to the buyer and regardless of whether the buyer subsequently converts the form of use of the property. That is not the law or policy—and it should not be the law or policy—in the State of South Carolina. All of the arguments raised by the POA were meticulously considered and thoroughly addressed by the trial court in the order dismissing the POA’s claims against Respondents, and the Respondents fully adopt and incorporate that order as a response to the POA’s appeal.³⁹

1. **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.**

The POA argues that the releases and disclaimers in its Master Deed are an invalid “exculpatory contract” because they release Respondents from “non-delegable duties” arising

³⁸ R. p. 1 at p. 27.

³⁹ Judge Baxley’s Order is so detailed and so thoroughly analyzes and addresses the issues on appeal that Respondents’ counsel struggled to avoid having this Brief essentially duplicate the contents of that Order.

under building codes and statutes in violation of public policy. The POA's arguments are misplaced.

a. There is no “exculpatory “contract”—or any other contract—between the POA and Respondents.

As a threshold issue, it is important to recognize that there is no “contract” of any kind between the POA and Respondents. The POA's arguments regarding it being bound to a “contract” are based on the POA's subtle 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. That Sales Contract was extensively negotiated, executed, and closed before the POA even existed. The POA was not a party to the Sales Contract or to any of the discussions leading up to the Sales Contract. Similarly, the POA and subsequent condominium unit buyers never saw the LJ Melody marketing materials for the sale of the apartment complex which the POA repeatedly and disingenuously references in its Brief. The POA did not even exist at that time and the POA did not know those marketing materials existed until the materials were produced years later during discovery in this case. The POA also ignores the fact that those marketing materials state that the property would be sold “as is.”⁴⁰

There is no contract between the POA and any of the Respondents. In fact, there could not be any contract between them because the POA did not even exist when LGSF sold the apartment complex to Vista. Likewise no condominium units or condominium buyer/owners existed when LGSF sold the property to Vista. The condominiums were created after Vista purchased the property and subsequently converted it to condominiums, and the owners were

⁴⁰ R. p. 1061 (first paragraph in “Introduction” section).

“created” when Vista subsequently sold the converted condominiums to buyers. As such, it was physically and legally impossible for any of the Respondents to enter into any contract with a POA or condominium owners that did not exist at the time of sale.

LGSF sold the property to Vista on an “as-is” and “with all defects” basis and Respondents specifically disclaimed and were released 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 buyers had a means to receive notice that Respondents had no responsibility or liability for anything that Vista did with the property after Vista purchased the 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.

Moreover, even if the notice in the Master Deed is improperly viewed as an exculpatory contract, the South Carolina Supreme Court routinely upholds exculpatory contracts in recognition of the freedom of private parties to contract as they choose. *Huckaby v. Confederate Motor Speedway, Inc.*, 276 S.C. 629, 281 S.E.2d 223 (1981); *Pride v. Southern Bell Tel. & Tel. Co.*, 244 S.C. 615, 138 S.E.2d 155 (1964); *South Carolina Elec. & Gas Co. v. Combustion Engineering, Inc.*, 283 S.C. 182, 322 S.E.2d 453, 459 (Ct. App.1984). As recently observed by the South Carolina Supreme Court, “[I]mitation of liability and exculpation clauses are routinely entered into.” *Gladden v. Boykin*, 402 S.C. 140, 145, 739 S.E.2d 882, 884 (2013). None of the cases from other states cited in the POA’s Brief contain the detailed and explicit notice of disclaimers and release like the notice contained in the POA’s Master Deed. The trial court

carefully considered the issue and properly concluded that the notice of disclaimers and release contained in the Master Deed are not unconscionable and do not violate public policy. As stated by the trial judge: “[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.”⁴¹

Accordingly, the fundamental issue presented in this appeal is not whether the POA is bound to the terms of the contract between LGSF and VISTA; rather, the issue is whether the POA is legally bound by the “notice” of the disclaimers and release contained in the Master Deed under which the POA was subsequently created and exists, and under which the units that were created by Vista and are governed by the POA were created, sold, and conveyed.

- b. Respondents did not place the condominiums in the stream of commerce, and they did not extend any warranties to the POA and owe no duty of care to the POA.**

The POA argues that South Carolina public policy imposes “non-delegable” duties on Respondents under building and design codes and statutes that prohibit a builder, developer, owner, or architect from disclaiming liability for the condition of a property when it is sold. The POA also argues that Respondents remain liable to future downstream purchasers regardless of whether the buyer subsequently changes the use or condition of the property. In essence, the POA argues that a builder, architect, owner, and developer remains strictly liable for the condition of the property after it is sold, regardless of the terms of the sale and regardless of what the buyer does with the property after it is purchased. Contrary to the POA’s arguments, the

⁴¹ Judge Baxley’s Order ¶ 112; R p. 37.

laws and statutes of the State of South Carolina do not impose non-disclaimable and never-ending liability on builders, architects, and owners.

South Carolina law applicable to construction defects is an entirely judicially crafted framework of common law that has evolved in a somewhat convoluted fashion over the years as the appellate courts struggled to deal with the fact that the builder and seller of a new home might not be the same person or entity. The common law evolved to impose three theories of liability—the implied warranty of habitability, the implied warranty of workmanlike service and negligence—based on the Court’s concern to protect home buyers, especially new home buyers, against builders that place defective construction into the “stream of commerce.” *See Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989) (“We have made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce.”); *Kirkman v. Parex, Inc.*, 369 S.C. 477, 483, 632 S.E.2d 854, 857 (2006) (stating that the determining factor for imposing the implied warranty of a new house’s habitability, is whether the defendant “places it, by the initial sale, into the stream of commerce.”) (quoting *Arvai v. Shaw*, 289 S.C. 161, 164, 345 S.E.2d 715, 717 (1986)). The duties and obligations of architects and builders arising under the codes and statutes that govern builders and architect are embodied in the framework of common law pertaining to residential construction defects law in this State. *See, e.g., Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. at 347, 384 S.E.2d at 738 (holding a builder may be liable to a home buyer when the builder has violated an applicable building code).

The rationale of the Court’s rejection of the doctrine of caveat emptor (buyer beware) was its concern with the unequal bargaining power between the new home buyer and seller, the

new home buyer's reliance on the skills of the builder, and the inability of the new home buyer to inspect a new house for latent defects prior to purchase. See *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. at 343, 384 S.E.2d at 735-36; *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 500, 229 S.E.2d 728, 729 (1976) (citing *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970)); *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147-48, 687 S.E.2d 47, 49 (2009). Here, however, the property at issue was used and not new, the arms-length transaction took place between two sophisticated parties represented by counsel, and Vista had an opportunity to and did inspect the property for defects prior to purchase.

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 remain strictly liable under all circumstances. To the contrary, the South Carolina Supreme Court has recognized limits on the liability imposed on builders and sellers. For example, in *Kirkman v. Parex* the Court pronounced that “the principle of freedom of contract permits a party to effectively disclaim the implied warranty of habitability” in a contract for the sale of a new home. *Id.*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006). Thereafter, in *Smith v. Breedlove*, 377 S.C. 415, 661 S.E.2d 67 (2008), the Court held that the implied warranty of workmanlike service, which arises from the construction of home, did not apply to an owner who sold his home that he built as his own general contractor and he owed no duty of care in construction of the house to the subsequent purchaser, despite the argument that he placed the home in the stream of commerce when he sold it. *Cf. Gladden v. Boykin*, 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013) (“It is one thing to impose greater demands on the builder of a new home, who is in a position to know of the home's defects”) [emphasis added].

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 of 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 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 v. Parex*, 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 non-delegable duties imposed by the building and design codes would prohibit the right of disclaimer recognized in *Kirkman v. Parex* and would have required imposition of liability on the builder-seller in *Smith v. Breedlove*.

Respondents 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 the Respondents had disclaimed that the property was suitable for condominium use and had disavowed and been released from liability for any such use.

c. Vista changed the use and legal nature of the property when it converted it to condominiums.

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 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. *Cf. Sapp v. Ford Motor Co.*, 386 S.C. 143, 148,

Here, Respondents did not design, build or sell a new condo, a used condo—or anything else—to the POA. LGSF sold a used rental apartment complex to Vista, and after the sale Respondents had no control over Vista’s subsequent use, conversion, and sale of the property. LGSF sold the property to Vista on an “as-is” and “with all defects” basis and with a full disclaimer and release of Respondents 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. Any warranties or duties that arose during the construction of the rental apartments were clearly and unequivocally extinguished (“cut”) with the consent of the buyer (Vista) under the terms of the contract by which Vista purchased the property from LGSF.

- d. **If adopted, the POA’s arguments will that mean the only practical or feasible way that an owner can ever avoid future liability is to not sell any property that might be used for residential purposes, and the POA’s arguments will vitiate and effectively void the disclaimers and releases that are contained in every settlement of a construction defects lawsuit.**

Adoption of the POA’s position in this appeal would mean that a designer, builder, and owner can never disclaim or be released from responsibility for the condition of the property and instead remain strictly liable for any defects in the condition of the property after it is sold and regardless of whether the buyer subsequently converts the nature and use of the property. Such a result, if adopted, logically leads to two troubling results:

1. The only practical or feasible way that an owner can ever avoid future liability is to not sell any property that might be used for residential purposes. This is contrary to basic principles of law that discourage parties from sitting on their property rights. Respondents did not have any ownership interest or right of control over the property when Vista converted the

property to condominiums and then sold the converted units. When pressed by the trial judge on this topic, the POA's counsel could not articulate any feasible or practical way that LGSF could have cut the liability "string" when it conveyed the property to Vista other than not to sell it.⁴²

2. If adopted, the POA's arguments would vitiate and effectively void the disclaimers and releases that are contained in every settlement of a construction defects lawsuit. Despite the dismissal of the POA's claims against the Respondents, the claims asserted by the POA and the unit owners are still pending and will go forward. If Vista subsequently enters into a settlement agreement with the POA and owners, that agreement will include standard release language discharging Vista from future claims related to its development and sale of the condominium project. Under the POA's arguments asserted in this appeal, however, future buyers would not be bound to the terms of the release because they could claim that it was an "exculpatory contract" because it released Vista from "non-delegable duties" in violation of public policy. The arguments advanced by the POA create a conflict with the common law in this State.

Looking at the issue another way, if after purchasing the property would Vista had been able to come back and assert claims against the Respondents for construction defects and/or building code violations? Given that the answer to that question should unequivocally and unhesitatingly be "No" in light of the disclaimers and releases in the sales contract between LGSF and Vista, then why should the POA or subsequent unit buyers be entitled to a different result? As observed by the trial judge: "[It] 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

⁴² Judge Baxley's Order ¶ 107; R p. 35.

then create an entity (the POA) that would somehow revive those rights and warranties.”⁴³ It is axiomatic that an assignee’s rights can be no greater than those of his assignor. *Dixie Wood Preserving Co. v. Albert Gersten & Associates*, 244 S.C. 57, 135 S.E.2d 368 (1964); *Rosemond v. Campbell*, 288 S.C. 516, 522-23, 343 S.E.2d 641, 645 (Ct. App. 1986). Moreover, as Vista’s assignee, the POA’s rights are subject to all equities and defenses which Respondents could have asserted against Vista at the time of the assignment, including the disclaimers and releases. *Chet Adams Co. v. James F. Pedersen Co.*, 308 S.C. 410, 413, 418 S.E.2d 337, 338 (Ct. App. 1992).

Contrary to the POA’s contention, the release does not “interfere with the ability of the POA to fulfill its fiduciary duties” or leave the POA or the condominium owners without a remedy. Instead, the disclaimers and releases merely require the POA to look to Vista to remedy any problems with the condominiums that were created and sold by Vista. The notice contained in the POA’s Master Deed provides clear and explicit notice that the Respondents were not responsible for the condition of the property or for what Vista intended to do with it. Accordingly, the notice in the Master Deed operates to cut the string on the POA’s attempt to tie the Respondents to liability after Vista fully discharged them from all liability and then proceed to change the legal character and use of the property.

⁴³ Judge Baxley’s Order ¶ 86; R p. 27.

2. **THE POA'S "NON-DELEGABLE DUTIES" ARGUMENTS IMPROPERLY FUSE (AND CONFUSE) THE CONCEPT OF DUTIES AND RESPONSIBILITY ARISING AT THE TIME OF INITIAL CONSTRUCTION WITH THE CONCEPT, AS PRESENTED HERE, OF THE EFFECT OF DISCLAIMERS AND RELEASES PERTAINING TO THE CONDITION OF USED PROPERTY WHEN YEARS LATER IT WAS SOLD TO A PURCHASER WHO ALTERED THE USE AND LEGAL NATURE OF THE PROPERTY.**

The POA "non-delegable duties" arguments improperly attempt to fuse (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. *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."). South Carolina Code Ann. §§ 40-3-5 et seq., S.C. Code of Regulations 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 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 against JHP or Gulfstream.

The POA's arguments also improperly attempt to fuse (and confuse) 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. Respondents performed their duties with respect to the design and construction of property when

it was built 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* Respondents from any duties they owed with respect to the property for valuable consideration after it had an opportunity to inspect the property.⁴⁴ None of the authorities cited by the POA prohibit parties from *releasing* their claims for negligence, breach of warranty, or other causes of action. In fact, as stated above, if this were the case, it would prevent settlement of any construction defect lawsuit and effectively void the releases of any individuals or entities involved in construction upon subsequent sale of the property.

- a. **The South Carolina General Assembly has spoken on the issue and provided specific protection for the consumer risks associated with undisclosed defects in conversion of apartments to condominiums.**

The South Carolina General Assembly has not enacted any statutes that define the extent of duties and warranties arising in the residential construction context. The General Assembly has, however, spoken on the issue of undisclosed defects existing in the conversion of rental apartments to condominiums. Under S.C. Code Ann. § 27-31-430, if an owner of a building undertakes to convert rental apartment units to condominium ownership by recording a master deed, the owner 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,

⁴⁴ The bargained-for price paid and negotiated exchanged between LGSF and Vista is sufficient consideration to support the release. See *Furse v. Timber Acquisition*, 303 S.C. 388, 390, 401 S.E.2d 155, 156 (1991) (“Generally, no special consideration need be singled out or apportioned for each separate provision in a contract, and a number of agreements covering more than one subject may be founded on one consideration.”); see also 17 CJS *Contracts* § 71 (1963). However, the record suggests that Vista received specific consideration after opportunity for inspection. (See Escrow Agreement, R. p. 1187).

describing the present condition of all general common elements.” The General Assembly enacted Section 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. Consistent with the South Carolina Supreme Court’s recent observations in *Gladden v. Boykin*, 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013), which involved the issue of liability of a home inspector for failing to discover undisclosed defects,⁴⁵ by adopting Section 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 conversion of apartments to condominiums.

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 Respondents 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.

⁴⁵ 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. p. 1100), and issued before Vista purchased the property.

3. THE TRIAL JUDGE PROPERLY CONCLUDED THAT THE DISCLAIMERS AND RELEASE APPLY TO LGSF'S ARCHITECT AND OTHER "AFFILIATES" AND BIND THE POA.

The arguments in Section 3 of the POA's Brief essentially repeat the arguments contained in Sections 1 and 2 of its Brief. Accordingly, for brevity and to avoid duplication, Respondents incorporate their responses in Sections 1 and 2 of this Brief above by reference.

Section 3 of the POA's Brief contains the following two-sentence statement: "The only named third-parties beneficiaries [to the disclaimers and release] are the Beach Company and Gulfstream. JHP [the architect] was not specifically identified." (POA's Brief p. 26). The scope of the disclaimer and release language in the Master Deed includes LGSF's "affiliates."⁴⁶ To the extent that the foregoing are intended to argue that the JHP is not entitled to the benefit of the release, Section VIII (paragraphs 109 through 112) of trial judge's order⁴⁷ specifically considers and soundly rejects that argument.

The trial court's determination that the releases and disclaimers apply to JHP is well-supported by the record. Specifically, the terms of the Sales Contract release and disclaim liability of "companies...involved in the design, development and/or construction buildings" for and from "any and all claims of every kind whatsoever arising from or relating to the development, design, construction, maintenance, alteration or repair of the property, including unknown and unforeseen claims that may not exist or that may arise in the future."⁴⁸ Moreover,

⁴⁶ The notice of disclaimers and release in paragraph 24 (at R. p. 198) in the Master Deed specially defines the term "affiliates" to as being "[t]he Beach Company, Gulfstream Construction, . . . 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[.]"

⁴⁷ R. pp. 36-37.

⁴⁸ R. p. 71 at ¶ 15(b).

testimony in the record indicates that the parties intended for JHP to be protected by the assumption of liability, releases and disclaimers in the Sales Contract.⁴⁹ LGSF's interest in including JHP as an affiliate in order to avoid the potential for derivative liability through subrogation, contribution, indemnification, or other theory of joint responsibility was not lost on the lower court.⁵⁰ Accordingly, the trial court properly held that Plaintiffs and JHP are entitled to the same benefit from the disclaimers and releases included in the Sales Contract. Respondents fully adopt and incorporate the trial judge's analysis by reference.

Section 3 of the POA's brief also contains the one-sentence statement that: "More importantly, the POA is not identified in the agreement [i.e., Sales Agreement] or the Master Deed as being bound by the agreement." (POA's Brief p. 26). The POA was created and exists solely by virtue of the Master Deed, so it is difficult to conceive how the POA is not subject to releases and disclaimers contained in its own Master Deed. Moreover, the trial judge hit the nail squarely on the head by observing that: "It 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."⁵¹ As a result, the trial judge properly determined that the fact that the POA had not been created at the time Vista executed the Sales Contract did not invalidate Vista's release of Respondents or excuse the POA and individual unit owners from the terms of the Master Deed.

⁴⁹ K. Johnson Dep. p. 97 line 5-p. 98 line 10; proposed Supplemental Record on Appeal pp. S002, line 5-p. S003, line 10.

⁵⁰ Judge Baxley's Order R. p. P. 37 at ¶ 112.

⁵¹ Judge Baxley's Order R. p. 27 at ¶ 86.

4. THE TRIAL COURT PROPERLY CONCLUDED THAT THE NOTICE OF DISCLAIMERS AND RELEASE CONTAINED IN THE MASTER DEED ARE NOT UNCONSCIONABLE AND DO NOT VIOLATE PUBLIC POLICY.

In Section 4 of its Brief the POA's Brief argues that the disclaimers and release in the Master Deed are unconscionable and violate public policy. The judge carefully considered and properly rejected that argument.

- a. **Vista—not LGSF—created and recorded the Master Deed after it purchased the property, and Vista—not LGSF—determined the placement of the notice in the Master Deed.**

As a threshold issue, in its Brief the POA disingenuously alleges that LGSF (specifically, The Beach Company) “buried the notice of this release of all liabilities in the Master Deed.” (POA's Brief p. 29). The trial judge quickly jumped on this flagrant misrepresentation by observing that the Master Deed was prepared and recorded by Vista after it purchased and controlled the property.⁵² LGSF took the extraordinary step of including a provision in the Sales Contract requiring that Vista provide notice of those disclaimers and releases to future buyers if Vista converted the property to condominiums; however, Vista was solely responsible for the placement of the notice in the Master Deed it created and recorded after it purchased the property.

Similarly, the POA's Brief disingenuously states the “The Beach Company and Long Grove Vista agreed that the conveyances of the condominium units by Long Grove Vista would not contain the disclosures found in the Master Deed.” (POA's Brief p. 30). Respondents had no right to dictate the terms of the contracts used by Vista to sell the condominiums created and

⁵² Judge Baxley's Order ¶ 102; R. p. 33.

owned by Vista. Moreover, Section 10 in those contracts contains the following specific notices that the condominium being sold by Vista would be subject to and controlled by a Master Deed:

(a) Governing Documents. Purchaser acknowledges that the Unit being purchased is a portion of the [Long Grove Horizontal Property] Regime and improvements that have been or will be made subject to the Master Deed referred to in Paragraph 1. The nature and extent of the rights and obligations of the Purchaser in acquiring and owning the Unit will be controlled by and subject to the Master Deed, as well as the Articles of Incorporation, the Bylaws, and the rules and regulations of the Association. Purchaser agrees to comply with all of the terms, conditions and obligations set forth therein.

.....

(c) Disclosure Package. Purchaser hereby acknowledges that he/she has received a copy of the property condition report required under Section §27-31-430 of the South Carolina horizontal Property Act, a copy of the Master Deed, a copy of the Bylaws of the Association, a copy of the Articles of Incorporation of the Association, a copy of the estimated budget of the Association (the "Disclosure Package").⁵³

Accordingly, and contrary to the POA's assertion, Respondents did not own the property, did not sell the condominiums, and had no right to dictate the terms of the contracts used by Vista to sell the condominiums created and owned by Vista. The contracts by which Vista sold condominiums included notice that each condominium would be governed and controlled by a Master Deed; and each Contract included a "Disclosure Package" that included a copy of the Master Deed.

b. Even a cursory review of the Master Deed and the deeds of conveyance appearing in the chain of title for each condominium would have readily provided notice of the disclaimers and release of liability.

The South Carolina Supreme recently stated that, when examining whether a limitation of liability clause in a contract is conspicuous, "the proper test is whether an important clause was particularly inconspicuous, as if the drafter intended to obscure the term." *Gladden v. Boykin*, 402 S.C. 140, 146, 739 S.E.2d 882, 885 (2013) (emphasis added) (citing *Simpson v. MSA of*

⁵³ R. p. 1019.

Myrtle Beach, Inc., 373 S.C. 14, 27-28, 644 S.E.2d 663, 670 (2007), and *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)). Here, the notice of disclaimers and releases are clearly stated in the Master Deed, which was referenced and provided with the contract of sale for each condominium unit sold by Vista. That notice in the Master Deed is not merely some boiler plate language buried in form contract. Instead, that notice spans two pages of the Master Deed and is set forth together with many other important requirements and restrictions in the Master Deed governing the use and ownership of the property (e.g., the Master Deed defines what portion of the space is owned by individual owners versus being common elements; requires payment of assessments for maintenance and repairs; and contains ARB restrictions on how owners can use and occupy their units). Under the POA's argument, the POA and its members could chose to ignore any of the other provisions in the Master Deed because they "had no meaningful choice" in accepting those provisions. Again note too that Vista—not Respondents—created and recorded the Master Deed after it purchased the property.

The logical result of the POA's position, if adopted, would be a complete nullification of any and all provisions in the Master Deed that the POA or unit owners deem unacceptable. The POA was created and exists solely by virtue of the Master Deed, and the individual unit owners were on record notice of all the terms in the Master Deed and when they purchased a unit, and they could have and should have readily ascertained their legal rights by simply reading the terms of the Master Deed that governs their use and ownership of the property. *See Evins v. Richland County Historic Preservation Commission*, 341 S.C. 15, 20, 532 S.E.2d 876, 878 (2000); *Regions Bank v. Schmauch*, 354 S.C. 648, 663-664, 582 S.E.2d 432, 440 (Ct. App. 2003) ("A person who signs a contract or other written document cannot avoid the effect of the

document by claiming he did not read it. One entering into a written contract should read it and avail himself of every reasonable opportunity to understand its content and meaning. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it.”) (internal quotations and citations omitted)

The POA also skips over the fact that, in addition to the Master Deed, the deed conveying the property from LGSF to Vista contains the following notice of the disclaimers and releases at issue here:

Save and excepting only the limited warranty of title hereinafter set forth and herein contained, 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, 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. [emphasis added]⁵⁴

That deed—and the notices contained therein—appeared in the immediate chain of title for each of the newly created condominium units sold by Vista. Further, when Vista sold its newly developed condominiums to individual condominium unit buyers, the deeds from Vista to the buyers included the following provision notifying the buyers that Vista had converted apartments to condominiums:

⁵⁴ R. p. 143 at p. 144 (first paragraph).

WHEREAS, Long Grove Vista, LLC has converted the rental units at Long Grove Apartments to condominium ownership pursuant to S.C. Code of Laws, Section 27-31-410, et seq., and has complied with the disclosure, notice and offer requirements, set forth therein, including but not limited to compliance with Section 27-31-420(B) ⁵⁵

Short of erecting a billboard outside the entrance to the project, it is difficult to conceive what other reasonable measures that Respondents could have reasonably taken to ensure that Vista's future buyers would have notice of the disclaimers and releases of Respondents, especially when considering that Respondents did not own or control the property after it was purchased by Vista. Even a cursory review of the Master Deed and the deeds conveying title to the property appearing in the chain of title for each condominium would have readily provided notice of the disclaimers and release of liability applicable to the Respondents.

Accordingly, the trial judge properly concluded that the notice of disclaimers and release contained in the Master Deed was not inconspicuous, unconscionable, or contrary to public policy. Again, as concluded by the trial judge, "this 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."⁵⁶

5. AFFIRMANCE IS PROPER ON ANY GROUND(S) APPEARING IN THE RECORD.

In accordance with Rules 208(b)(2) and 220(c), SCACR, Respondents request that this Court affirm the lower court's decision on any grounds appearing in the record.

⁵⁵ R. p. 242 at p. 242 (second "Whereas" paragraph).

⁵⁶ Judge Baxley's Order ¶ 112; R. p. 37.

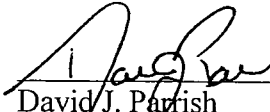
CONCLUSION

The fundamental issue presented in this appeal is whether the POA is legally bound by the notice of the disclaimers and release contained in the Master Deed under which the POA was created and exists, and under which the units the POA governs were sold and conveyed. In light of the disclaimers and releases contained in Sales Contract between LGSF and Vista and the notice in the POA's Master Deed, the net effect of the POA's argument is that the individuals involved in the design, construction, and sale of an existing building must continue to incur unlimited liability to future owners after the building is sold to a third-party who releases the individuals from liability as part of the sales transaction and then converts the building to a different use. That is not the law in South Carolina. The trial judge's order dismissing the POA's claims against Respondents does not leave the POA without a remedy and instead merely requires the POA to look to Vista to remedy any problems with the condominiums that were created, developed, and sold by Vista. The learned trial judge carefully considered, analyzed, and properly rejected each the arguments raised by the POA on appeal, and this Court should affirm the order and judgment of the trial judge.

CERTIFICATE OF COUNSEL

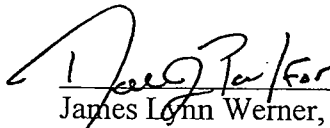
The undersigned counsel certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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December 30, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

J. Michael Baxley, Circuit Court Judge

Case No. 2009-CP-10-6746

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

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

Of Whom Long Grove Property Owners' Association is Appellant.

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

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

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

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REPLY ARGUMENT

Respondents brief goes to great lengths to describe the efforts in which the developer, The Beach Co., engaged in attempting to disavow and disclaim any responsibility or liability for itself, its contractors, and its architects for the numerous building code violations incorporated within the Long Grove project. The question is not whether this developer was thorough in its attempts to skirt the legal obligations imposed by law, but rather will our law allow it.

This case is not one of simply two parties to a contract agreeing to limit or waive their rights derived solely from the contract; nor is it a case of two parties attempting to limit or waive rights exclusive to themselves. No, this case involves the Respondents attempting to avoid their obligations created by law to protect the health and safety of the public at large, and specifically for the benefit of all subsequent owners of the Long Grove property.

1. CONTRACTS WHICH VIOLATE PUBLIC POLICY ARE VOID

a. S.C. Code Ann. §32-2-10 prohibits exculpatory contracts for contractors and architects.

South Carolina prohibits exculpatory contracts for contractors and architects. Title 32, Chapter 2 of the SC Code of Laws is entitled "Contracts Against Public Policy." Under Chapter 2, our legislature has enacted only the statute, prohibiting hold harmless clauses for defective designs and construction. Section 32-2-10 prohibits an exculpatory contract in favor of contractors and architects. The statute states:

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

S.C. Code Ann. §32-2-10 (1976 revised 2007). Respondents would argue their contract with Vista was a release and waiver, not an indemnity agreement. Regardless of the language, the intent was to hold harmless the contractor and architect for their negligence. The manifest purpose of this legislation was to prevent one party from shifting ultimate responsibility for its negligence to another.

The contract between Beach Co. and Vista provided at Paragraph 15. Assumption of Liability and Release of Claims:

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

(Long Grove POA Memorandum in Opposition dated September 23, 2011 – Exhibit 16 Sales Contract, p.10, R. pp. 699-700). This is precisely the obligations owed by the contractor, Gulfstream, and the architect, JHP, which constitute their non-delegable duties to protect the public from defective and dangerous construction. See Murphy v. North American River Runners, Inc., 412 S.E.2d 504 at 509 (W.Va. 1991) (holding that a “Plaintiff’s express agreement to assume the risk of defendant’s violation of a safety statute enacted for the purpose of protecting the public will not be enforced; the safety obligation created by the statute for such purpose is an obligation owed to the public at large and is not within the power of any private individual to waive.”); Loewe v. Seagate Homes, Inc., 987 So.2d 758 (Fla. App. 5 Dist. 2008) (stating that “a party may not contract away its responsibility to comply with a building code when the person with whom the contract is made is one of those whom the code is designed to protect. .. Florida’s comprehensive regulation of the licensing of building contractors and building construction standards reflect a clear public policy to protect purchasers of residential homes from personal injuries caused by improper construction practices.”).

In Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882 (2013), Justice Beatty writing for the dissent recognized the paramount concern for protecting the public in the construction arena:

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

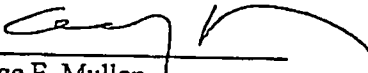
"[O]ur decisions recognize the general principle that considerations of public policy prohibit a party from protecting himself by contract against liability for negligence in the performance of a duty of public service, or *where a public duty is owed, or public interest is involved, or where public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

Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882 (2013) (Beatty, J., dissenting). The attempted shift of these obligations to Vista contravenes the statute and violates the public policy of this state.

CONCLUSION

Our Legislature has declared the public policy for South Carolina to require minimum standards of construction to protect the general public. Developers, general contractors, and architects are bound by the building codes imposed to regulate the construction industry. These standards and obligations cannot be waived by private contract.

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