THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Unpublished Opinion No. 2015-UP-377 (S.C. Ct. App. filed July 29, 2015)

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

v.

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

Of Whom Long Grove Property Owners' Association is Petitioner.

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

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 18, 2015.

QUESTIONS PRESENTED

1. DID THE COURT ERR BY FAILING TO RECOGNIZE THAT DUTIES AND WARRANTIES PROVIDED BY GENERAL CONTRACTORS AND ARCHITECTS ARE DIFFERENT AND DISTINCT FROM THE DUTIES AND WARRANTIES OF A DEVELOPER/SELLER?

2. DID THE COURT ERR BY FAILING TO RECOGNIZE THE DISCLAIMER AND RELEASE IS AN EXCULPATORY CONTRACT IN VIOLATION OF PUBLIC POLICY?

3. DID THE COURT ERR BY FAILING TO RECOGNIZE AND ADDRESS THAT THE RELEASE VIOLATES PUBLIC POLICY AND ENABLES GENERAL CONTRACTORS AND ARCHITECTS TO DODGE THEIR STATUTORY OBLIGATIONS?

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

5. DID THE COURT ERR BY FAILING TO ADDRESS THE ISSUE OF WHETHER A GENERAL CONTRACTOR AND ARCHITECT CAN DISCLAIM OR BE RELEASED FROM NON-DELEGABLE DUTIES?

6. DID THE COURT ERR BY FAILING TO PROVIDE ANY LEGAL AUTHORITY TO SUPPORT THE POSITION THAT THE PROPERTY OWNERS ASSOCIATION IS BOUND BY DISCLAIMERS AND RELEASES ENTERED INTO BY ITS PREDECESSOR IN TITLE?

7. DID THE COURT ERR BY ADOPTING THE CIRCUIT COURT ORDER WHICH CONTAINED SPECIFIC CONCLUSIONS OF LAW WHICH WERE CONTRARY TO THE EXISTING LAW AND REPUGNANT TO THE PUBLIC POLICY OF THIS STATE?

STATEMENT OF THE CASE

This case arises from an effort by a general contractor and architect to evade their legal obligations and ultimate responsibility for the defective and deficient design and

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

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

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

In 2009, upon discovering numerous and severe construction deficiencies, The Long Grove POA notified The Beach Company of the discovered latent defects, and

[1] The Beach Company and its wholly owned subsidiary, Long Grove at Seaside Farms, LLC, were the developers of the Project, and are hereinafter jointly referred to as "The Beach Company".

provided The Beach Company the statutory right to cure prior to filing suit. The Beach Company responded by filing this declaratory judgment action on behalf of itself and Contractor. The POA counterclaimed for defective construction, naming additional parties to the suit.

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

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

24. RELEASE.

> Declarant purchased the property comprising the Regime from Long Grove at Seaside Farms, LLC ("Long Grove") on March 7, 2005. In the Sales Contract between Long Grove and Declarant, dated January 18, 2005, to convey the property comprising the Regime to Declarant, Declarant agreed to include the following provision regarding release in this Master Deed:
>
> Save and excepting only the limited warranty of title hereinafter set forth and herein contained, the property comprising the Regime was conveyed to Declarant in the sale on March 7, 2005 noted above strictly on an "as is", "where is" and "with all defects" basis, without representation, warranty or covenant, express, implied or statutory, of any kind whatsoever, including, without limitation, representation, warranty or covenant as to condition (structural, environmental, mechanical or

otherwise), past or present use, construction, development, lease performance, investment potential, tax ramifications or consequences, income, compliance with law, habitability, tenancies, merchantability, or fitness or suitability for any purpose, all of which are hereby 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 an correcting all defects or problems, if any, that existed, to ensure that the property comprising the Regime is properly constructed and suitable for use as condominiums in accordance with all applicable building regulations, codes, standards, and other applicable laws and requirements.

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

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

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

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

ARGUMENTS

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

- Can a contractor disclaim the implied warranty of good and proper workmanship?
- Can an architect disclaim the implied warranty of the suitability of his plans and specifications?
- Can the contractor and architect disclaim liability for building code violations?
- Can a developer disclaim liability on behalf of the contractor and architect for building code violations?
- Can the contractor and architect delegate responsibility for complying with the building code, thereby escaping liability?
- What are the reasons the trial court found the disclaimer and release was not an exculpatory contract in violation of public policy? Is it not an exculpatory contract? Is it not in violation of public policy?
- What does the Anti-Indemnity Statute (S.C. Code § 32-2-10) prohibit if it does not prohibit a contractor or architect from disclaiming liability for its statutorily imposed obligations and duties?
- Is a subsequent purchaser bound by the disclaimer and release entered into by his predecessor in title, even when damages first manifest themselves only during the subsequent purchaser's ownership?

These are all issues decided by the trial court with no discussion of the public policy implications nor the legal authority to support it. The trial court itself in its Order recognized this case raises novel questions of whether a developer of real property can: (1) disclaim to current and subsequent buyers any and all warranties; (2) permanently release itself from any liability for the condition of such improvement; and (3) require the buyer to assume any and all related liability therefrom.(Order, July 26, 2012, R. pp.1-2).

However, the Order fails to address the novel issues of whether an architect and contractor can also disclaim liability and "opt out" of required building codes and industry standards; disclaim liability for their professional negligence; and disclaim warranties implied by law. The Order fails to provide legal analysis or authority to support the holdings on these "novel" questions presented to the Court.

1. DID THE COURT[2] ERR BY FAILING TO RECOGNIZE THAT DUTIES AND WARRANTIES PROVIDED BY GENERAL CONTRACTORS AND ARCHITECTS ARE DIFFERENT AND DISTINCT FROM THE DUTIES AND WARRANTIES OF A DEVELOPER/SELLER?

From the beginning, the Court fails to recognize that the duties and responsibilities of general contractors and architects are different from those of the developer/seller. Unlike a seller who may disclaim liability by selling his product "as-is, with all faults," architects and contractors are held to a higher standard in order to protect the public. Gulfstream and JHP were compelled to obtain licenses from the State and be subject to regulations by state and local governments. They were compelled to design and build to the minimum requirements set forth in the various building codes and industry standards. *See, e.g.,* Kennedy vs. Columbia Lumber, 299 S.C. 335, 384 S.E.2d 730 (1989) (finding that a builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner. This is an implied warranty of workmanlike service, and is distinct from the implied warranty of habitability); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951)(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

[2] Because the Court of Appeals failed to address any issues but instead adopted the Trial Court's Order, "Court" refers to both the Court of Appeals and the trial court.

for negligence and breach of the implied warranty even though there was no contract between the architect and the condominium regime); Tommy L. Griffin Plumbing & Heating Co. vs. Jordon, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995) (a design professional owes a professional duty to the plaintiff which arises separate and distinct from any contractual duties between the parties or with third parties). Violations of building codes are negligence per se and are evidence of recklessness and willfulness supporting punitive damages. Kennedy, 299 S.C. 335, 384 S.E.2d 730 (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 Court ignores established law applicable to general contractors and architects and instead commingles them with developers/sellers who do not have the same duties and licensing requirements.

2. DID THE COURT ERR BY FAILING TO RECOGNIZE THE DISCLAIMER AND RELEASE IS AN EXCULPATORY CONTRACT IN VIOLATION OF PUBLIC POLICY?

The Court fails to address the critical issue that the "release" of Gulfstream and JHP is an exculpatory contract, other than one conclusory statement at Paragraph 116: "*The releases, disclaimers, and assumptions of liability contained within the sales contract and Master Deed are not 'exculpatory contracts' within the meaning of that term.*" (R. p. 38). An exculpatory contract is one that purports to deny an injured party the right to recover damages from a person negligently causing his or her injury. Cain v. Banka, 932 So.2d 575 (Fla. App. 5 Dist. 2006). How can the disclaimer and release not be an exculpatory contract? This Petitioner deserves an analysis and explanation of this holding.

The Court sanctions the disclaimer and release of gross negligence of a general contractor and an architect, allows the release and transfer of non-delegable duties of a general contractor and an architect, and ignores that the release violates public policy. The Court fails to provide any analysis whatsoever or cite any legal authority for its conclusion. By enforcing the exculpatory contract, the Court has allowed professionals licensed by this state to be exempt from standards imposed by statutory and regulatory law, designed to protect the public safety and welfare.

3. DID THE COURT ERR BY FAILING TO RECOGNIZE AND ADDRESS THAT THE RELEASE VIOLATES PUBLIC POLICY AND ENABLES GENERAL CONTRACTORS AND ARCHITECTS TO DODGE THEIR STATUTORY OBLIGATIONS?

The Court ignores that this "release" violates public policy and enables Gulfstream and JHP to evade codes and regulations adopted by the Legislature to protect purchasers from defective design and construction by general contractors and architects. The Legislature has declared "the public policy of South Carolina is to maintain reasonable standards of construction in building" (S.C. Code Ann. §6-9-5) and to that end requires all local governments to adopt applicable building codes. S.C. Code Ann. §6-9-10. Violation of these building codes violates a legal duty owed to the public. Kennedy, 299 S.C. 335, 384 S.E.2d 730 (1989). The Legislature further enacted S.C. Code Ann. §32-2-10 which reinforces the public policy of South Carolina that individuals who design and construct buildings may not contractually avoid their responsibility for defective construction. *See* Loewe v. Seagate Homes, Inc. 987 So.2d 758 (Fla. App. 5 Dist. 2008) ("...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 where the code is designed to protect.").

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; s*ee 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 Court allows Gulfstream and JHP to avoid their statutory obligations, contravene the statutes, and violate the public policy of this state, but provides no case law, analysis or authority to support such novel position. Our Legislature has declared the public policy for South Carolina to require minimum standards of construction to protect the general public. General contractors and architects are bound by the building codes imposed to regulate the construction industry, and these standards and obligations cannot be waived by private contract.

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

Title 32, Chapter 2 of the SC Code of Laws is entitled "Contracts Against Public Policy." Our legislature has enacted only one Section under this Chapter, Section 32-2-10, which prohibits an exculpatory contract in favor of contractors and architects. The statute states:

> Notwithstanding any other provision of law,...[an] agreement in connection with the design...[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). The manifest purpose of Section 32-2-10 is to prevent architects or contractors from shifting ultimate responsibility for its negligence to another. The Court again allows a general contractor and architect to skirt its responsibilities in violation of the public policy of the State.

5. DID THE COURT ERR BY FAILING TO ADDRESS THE ISSUE OF WHETHER A GENERAL CONTRACTOR AND ARCHITECT CAN DISCLAIM OR BE RELEASED FROM NON-DELEGABLE DUTIES?

The contract between the Developer/Seller and Vista provided at Paragraph 15, Assumption of Liability and Release of Claims:

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

(R. p. 71). This provision attempts to delegate to Vista the obligations owed by the contractor, Gulfstream, and the architect, JHP, to assure compliance with building codes and further assure the property is properly constructed, while attempting to relieve the

contractor and architect of their statutorily mandated duty 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, 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. 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.").

The Court fails to cite any authority or analyze why a general contractor or architect should be released from their non-delegable duties. The Court fails to analyze and affirm that a contractor's obligation to construct a dwelling in a workmanlike manner is a duty imposed by laws and therefore cannot be waived by the owner. The Court fails to analyze why an architect who furnishes plans and impliedly warrants their sufficiency for the intended purpose should be released from this duty imposed by law. *See* Kennedy, 299 S.C. 335, 384 S.E.2d 730 (1989); Hill, 219 S.C. 263, 64 S.E.2d 885 (1951); Beachwalk Villas Condominium Assoc., Inc., 305 S.C. 144; 406 S.E.2d 372 (1991).

6. DID THE COURT ERR BY FAILING TO PROVIDE ANY LEGAL AUTHORITY TO SUPPORT THE POSITION THAT THE POA IS BOUND BY DISCLAIMERS AND RELEASES ENTERED INTO BY ITS PREDECESSOR IN TITLE?

The only parties to the contract were Long Grove at Seaside Farms, LLC and Vista Realty. There is no legal authority to support the ruling by the Court that the POA bears the

burden of a contract to which it was not a party. There is no authority that Vista Realty can enter into a disclaimer and release that bounds future Owners for claims and causes of action which did not presently exist. A cause of action for damages to real property accrues when the defendants' acts cause immediate and permanent injury resulting in actual and appreciable harm to the property. Stofer v. Shapell, 233 Cal App 4th 176 (2015). The cause of action for defective construction belongs to the owners who first discovered the property damage. Standard Fire Ins. v. Spectrum, 141 Cal App 4th 1117 (2006). Until the damages accrue and manifest themselves, there was no claim or cause of action for Vista to release. The damages at Long Grove occurred during the ownership of the POA, and it is the POA's claim to assert. Gulfstream and JHP's obligations to construct and to design Long Grove in compliance with building codes and industry standards is a duty owed to subsequent owners. Kennedy, 299 S.C. 335, 384 S.E.2d 730 (1989); Terlinde, 275 S.C. 395, 271 S.E.2d 768 (1980). These obligations, therefore, are owed to the current Long Grove owners, and could not be waived by their predecessor in title.

7. DID THE COURT ERR BY ADOPTING THE CIRCUIT COURT ORDER WHICH CONTAINED SPECIFIC CONCLUSIONS OF LAW WHICH WERE CONTRARY TO THE EXISTING LAW AND REPUGNANT TO THE PUBLIC POLICY OF THIS STATE?

Incorrect Conclusion of Law #1 and #2

"The Court Finds Gulfstream[3] And JHP Did Not Extend Any Warranties To The POA And Owes No Duty Of Care To The POA." **(Order, Sect. I, R. pp. 20-28).**

"Gulfstream did not extend any warranties to the POA and owes no duty of care to the POA." **(Order, ¶87, R. p. 28).**

[3] Judge Baxley's Order refers to LGSF to collectively include Gulfstream and the developer entities. Since the Developers are no longer involved in this appeal, Gulfstream will be substituted for LGSF in citing the Order.

- The Court is wrong. Gulfstream extended warranties and owed a duty of care to the POA. When General Contractor Gulfstream undertook the construction of Long Grove, it extended the warranty of workmanlike service and impliedly warranted that the work undertaken would be performed in a careful, diligent, workmanlike manner. This warranty extends to subsequent purchasers of the property. Kennedy, 299 S.C. 335, 384 S.E.2d 730 (1989).
- Gulfstream owed a duty of care to construct within industry standards. Terlinde, 275 S.C. 395, 271 S.E.2d 768 (1980).
- The Court is wrong as to JHP Architecture which extended warranties and owed a duty of care to the POA. When JHP undertook the furnishing of plans and specifications for the design of Long Grove, it impliedly warranted the sufficiency of those plans for the intended purpose. Hill, 219 S.C. 263, 64 S.E.2d 885 (1951); Beachwalk Villas Condominium Assoc., Inc., 305 S.C. 144; 406 S.E.2d 372 (1991).
- A design professional owes a professional duty which arises separate and distinct from any contractual duties. Tommy L. Griffin Plumbing & Heating Co., 320 S.C. 49, 463 S.E.2d 85 (1995).

Incorrect Conclusion of Law #3

"[T]the Court finds that Gulfstream and JHP did not place the condominiums into the stream of commerce ... thus the POA claims are barred as a matter of law." **(Order, ¶63, R. p. 21)**

- The General Contractor and Architect's liability is derived from their performance of their construction duties, not from placing the condominiums into the stream of commerce; both still owe implied warranties and duties of care that do not spring

from the sale. The General Contractor impliedly warranted the work undertaken would be performed in a careful, diligent workmanlike manner which does not spring from a sale. Privity of contract as a defense to an implied warranty action has been abolished in this State. Kennedy, 299 S.C. 335, 384 S.E.2d 730 (1989)

- When JHP undertook the furnishing of plans and specifications for the design of Long Grove, it impliedly warranted the sufficiency of those plans for the intended purpose which does not spring from a sale. Hill, 219 S.C. 263, 64 S.E.2d 885 (1951). Lack of privity is not a defense when one undertakes the design and impliedly warrants the design. Tommy L. Griffin Plumbing & Heating Co., 320 S.C. 49, 463 S.E.2d 85 (1995).

Incorrect Conclusion of Law #4

"...[A]s a matter of law the POA cannot now claim that Gulfstream placed the property in the stream of commerce as is required to trigger liability for construction defects in the property based on theories of implied warranties and negligence."

(Order, ¶85, R. p. 27).

- This conclusion has no legal basis. Placing the property into the stream of commerce is not required to trigger general contractor and architect's liability for implied warranties and negligence. Gulfstream Construction impliedly warranted the work undertaken would be performed in a careful, diligent, workmanlike manner. This is distinct from the implied warranty of habitability which springs from the sale. Kennedy, 299 S.C. 335, 384 S.E.2d 730 (1989); Terlinde, 275 S.C. 395, 271 S.E.2d 768 (1980).

- When JHP undertook the furnishing of plans and specifications for the design of Long Grove, it impliedly warranted the sufficiency of those plans for the intended purpose which again does not spring from a sale. Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951); Beachwalk Villas Condominium Assoc., Inc., 305 S.C. 144; 406 S.E.2d 372 (1991).

Incorrect Conclusion of Law # 5

"The Court finds the Release is not Contrary to Public Policy Under S.C. Code Ann.§ 32-2-10." **(Order, Sect. IV, R. pp. 31-32).**

"This Court finds the POA's reliance on §32-2-10 is misplaced because . . . that statute pertains to hold harmless clauses in "construction contracts..." **(Order, ¶97, R. pp. 31-32).**

". . . There was no construction contract between Gulfstream and Vista. The terms of 32-2-10...do not apply here." **(Order, ¶98, R. p. 32).**

- The Court ignores the full text in the body of §32-2-10 and takes a narrow view that §32-2-10 does not apply because there was no "construction contract" between Gulfstream and Vista, relying on the heading of the Section "Hold harmless clauses in certain construction contracts." Titles and headings may not be construed to limit the plain meaning of the text of the law. Garner v. Houck, 435 S.E.2d 847 (1993). The statute applies to promises or agreements in connection with the design or construction of a building. Clearly the promise to release and not sue Gulfstream and JHP are agreements in connection with such construction.
- The Court incorrectly finds S.C. Code Ann. §32-2-10 is not applicable based on the heading of the statute and ignores the language of the statute itself. Title 32, Chapter

2 is entitled "Contracts Against Public Policy." The topics in §32-2-10 include "promises or agreements in connection with the design, planning, construction, alternation, repair or maintenance of a building, structure." S.C. Code Ann. §32-2-10.

- The General Contractor made implied warranties and owed duties *in connection with the construction* of this project that cannot be waived. The Architect made implied warranties and owed *duties in connection with the design* of this project that cannot be waived. The General Contractor and Architect cannot enter into a hold harmless agreement to indemnify against liability for damages arising out of bodily injury or property damage caused by the negligence of the general contractor or architect. It is against public policy and unenforceable, in clear violation of S.C. Code Ann. §32-2-10.

Incorrect Conclusion of Law #6

***"The Court finds no violation of law or public policy here."* (Order, ¶111, R. P. 37).**

The Court ignores S.C. Code Ann. §6-9-5 setting forth that the public policy of South Carolina is to maintain reasonable standards of construction in buildings . . consistent with the public health, safety and welfare of its citizens." S.C. Code §6-9-5 *et. seq.* requires local governments adopt the applicable building codes. If contractors and architects can disclaim their negligence and can ignore building codes, the public policy of South Carolina is absolutely at issue. *See* Kennedy, 299 S.C. 335, 384 S.E.2d 730 (1989).

Incorrect Conclusion of Law #7

"The Sales Contract is not an impermissible exculpatory contract and does not transfer non-delegable duties." (Order, Sect. VIII, R. pp. 38-39).

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

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

(R. p. 71). This language is a clear delegation of duties, specifically to assure the building is code compliant. The Court clearly allowed the non-delegable duties imposed upon general contractor Gulfstream and architect JHP to be delegated to Vista. The Court gives no legal basis for this conclusion.

Incorrect Conclusion of Law #8

"...[T}he Court finds ...the POA...lacks standing to raise a contractual argument as to the enforceability of the provisions contained within the contract." **(Order, ¶114, R. p.38).**

The Court finds the POA lacks standing yet burdens the POA by its decision. The Court finds the contract is enforceable against the POA but then finds that the POA has no standing to challenge the contract as against public policy. How can this contract be enforced against the POA but then mandate that the POA has no ability to challenge the contract?

Incorrect Conclusion of Law #9

"The releases, disclaimers, and assumptions of liability contained within the Sales Contract and Master Deed are not "exculpatory contracts." (Order, ¶116, R. p. 38).

The Court makes a blanket legal conclusion, but fails to explain why the release is not an exculpatory contract. The Court upholds the release of potential latent construction defects at a time when no damages had manifested within the property, and

further bound subsequent homeowners who ultimately suffered the damages. The Court gives no legal basis for such decision.

CONCLUSION

The night before oral arguments in this matter, six college students in Los Angeles, California, tragically fell to their deaths when an apartment balcony collapsed. The cause of the collapse was the failure of the waterproofing system resulting in rot and decay of the untreated joist supporting the deck. This failure was the result of the negligent design and construction of the building. If that same accident occurred at Long Grove and the Order stands as the law of this case, then those students and their families would have no recourse or remedy against the architect and general contractor who violated numerous building codes and industry standards in designing and constructing the project. The architect and general contractor would completely avoid responsibility for their gross negligence resulting in death of innocent members of the public. If the Opinion stands, this Court will give general contractors and architects the ability to contractually avoid any liability for failing to comply with mandated building codes and regulations; to nullify their non-delegable duties; and to endanger the public at large. This is a radical and dangerous decision for the homeowners of South Carolina, with devastating consequences. This Opinion is clearly against the public policy and established law of this State.

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Unpublished Opinion No. 2015-UP-377 (S.C. Ct. App. filed July 29, 2015)

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

v.

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

Of Whom Long Grove Property Owners' Association is Petitioner.

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

v.

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

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

CERTIFICATE OF SERVICE

I certify that I have served the Petition for Writ of Certiorari and Appendix to all respondents via email and United States Mail, postage prepaid on October 14, 2015, and addressed to their attorney of record, David J. Parrish, Nexsen Pruet, LLC, Post Office Box 486, Charleston, South Carolina 29402 and that I have served James Harwick & Partners, Inc., n/k/a JHP

Architecture/Urban Design, P.C. by depositing a copy of it in the United States Mail, postage prepaid on October 14, 2015, addressed to its attorney of record, Laura F. Locklair, Parker Poe Adams & Bernstein, LLP, 200 Meeting Street, Suite 301, Charleston, South Carolina 29401 and James Lynn Werner, Parker Poe Adams & Bernstein, LLP, 1201 Main Street, Suite 1450, Columbia, South Carolina 29201.

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