THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

REPLY BRIEF OF APPELLANT

George E. Mullen
Mullen Wylie, LLC
P.O. Box 5969
Hilton Head Island, SC 29938
(843) 785-6969

Frank E. Grimball
Mullen Wylie, LLC
171 Church Street, Ste. 370
Charleston, South Carolina 29401
(843) 853-6200
Attorneys for Appellant

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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:

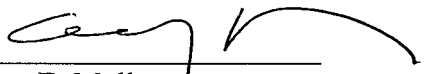
> The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. at 29-30, 644 S.E.2d at 671; *see also* Pride v. S. Bell Tel. & Tel. Co., 244 S.C. 615, 619, 138 S.E.2d 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; 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 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.

Respectfully Submitted,



George E. Mullen
Mullen Wylie, LLC
P.O. Box 5969
Hilton Head Island, SC 29938
(843) 785-6969

Frank E. Grimball
Mullen Wylie, LLC
171 Church Street, Ste. 370
Charleston, South Carolina 29401
(843) 853-6200
Attorneys for Appellant

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CERTIFICATE OF COMPLIANCE

I certify that I have complied with the South Carolina Appellate Court Rule 211(b) in the submission of the Brief of the Appellant and the Reply Brief of the Appellant.

December 27, 2013

George E. Mullen
Mullen Wylie, LLC
200 Merchant Street (29926)
P.O. Box 5969
Hilton Head Island, SC 29938
Tel: 843-785-6969

Francis E. Grimball
Mullen Wylie, LLC
171 Church Street, Ste. 370
Charleston, South Carolina 29401
(843) 853-6200
Attorneys for Appellant

Other Counsel of Record:

David J. Parrish
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402
Attorney for Respondents The Beach Company, Long Grove at Seaside Farms, LLC & Gulfstream Construction Company, Inc.

Laura F. Locklair
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
Attorney for Respondent James, Harwick & Partners, Inc. n/k/a JHP Architecture/Urban Design, PC

L. Dean Best
Best Honeycutt, PA
PO Box 13466
Charleston, SC 29422
Attorney for Long Grove Vista, LLC & Vista Realty Partners, LLC

Jesse A. Kirchner
Thurman Kirchner Timbes & Yelverton, PA
15 Middle Atlantic Wharf, Suite 101
Charleston, SC 29401
Attorney for Long Grove Vista, LLC & Vista Realty Partners, LLC

Morgan S. Templeton
Taylor H. Stair
Elmore & Wall, PA
145 King Street, Suite 302
Charleston, SC 29401
Attorneys for Sam Mayo d/b/a SCM Construction, Inc.

Elizabeth Jowers
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Attorneys for Essex Engineering Corporation

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PROOF OF SERVICE

I certify that I have served the Brief of the Appellant and the Reply Brief of the Appellant on

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

Inc. by hand delivery on December 30, 2013, to their attorney of record, David J. Parrish, at his office, Nexsen Pruet, LLC, located at 205 King St, Suite #400, Charleston, SC 29401 and that I have served James Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C. by hand delivery on December 30, 2013, to its attorney of record, Laura F. Locklair, at her office, Parker Poe Adams & Bernstein, LLP, located at 200 Meeting Street, Suite 301, Charleston, SC 29401.

April 24, 2014

Stephen Boynton, Legal Assistant to
Francis E. Grimball
(S.C. Bar Number 002310)
Mullen Wylie, LLC
171 Church Street, Ste. 370
Charleston, South Carolina 29401
Tel: (843) 853-6200
Fax: (843) 853-8994
Email: fgrimball@mullenwylie.com
Attorney for Appellant

Other Counsel of Record:

David J. Parrish
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402
Attorney for Respondents The Beach Company, Long Grove at Seaside Farms, LLC & Gulfstream Construction Company, Inc.

Laura F. Locklair
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
Attorney for Respondent James, Harwick & Partners, Inc. n/k/a JHP Architecture/Urban Design, PC

L. Dean Best
Best Honeycutt, PA
PO Box 13466
Charleston, SC 29422
Attorney for Long Grove Vista, LLC & Vista Realty Partners, LLC

Jesse A. Kirchner
Thurman Kirchner Timbes & Yelverton, PA
15 Middle Atlantic Wharf, Suite 101
Charleston, SC 29401
Attorney for Long Grove Vista, LLC & Vista Realty Partners, LLC

Morgan S. Templeton
Taylor H. Stair
Elmore & Wall, PA
145 King Street, Suite 302
Charleston, SC 29401
Attorneys for Sam Mayo d/b/a SCM Construction, Inc.

Elizabeth Jowers
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Attorneys for Essex Engineering Corporation