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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY CIRCUIT COURT

DeAndrea Gist Benjamin, Circuit Court Judge
Case No.: 2019-CP-40-00919

Appellate Case No. 2022-001434

Emad Tadros, as Trustee of the Grace Living Trust dated October 12, 2010, as amended, Appellant,

v.

Holder Properties, Inc., John R. Holder, Individually, ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association, Defendants,

of which

ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association are the Respondents.

Respondents' Return to Appellant's Motion to Remand

Respondents, by and through their undersigned attorneys, file this Return to Appellant's Motion to Remand the Appeal, which they received via email on October 11, 2023.

Introduction

Appellant's motion for remand—filed exactly one year after he filed his notice of appeal and on the day his initial brief and designation of matter were due—is unsupported in fact and law, and appears to be an attempt to further delay this Court's review of his appeal despite this Court's leniency towards Appellant's prior violations of its rules and orders. The appeal has languished long enough, and this Court should deny Appellant's motion, and dismiss the appeal

for failure to comply with the rules and this Court's orders. In the alternative, this Court should require Appellant to prosecute the appeal with the current transcript, but require Appellant demonstrate good cause why the appeal should continue.

Background

Appellant Emad Tadros owns two commercial properties comprising four individual units within the Adesso Columbia mixed-use condominium development (Adesso) that he purchased in December 2014. He filed suit in February 2019 against Respondents—the Homeowners' Association, Horizontal Property Regime, and the former owner of Adesso—challenging the parking allocation for his units and arguing Respondents violated the Adesso Master Deed and City of Columbia zoning restrictions. Appellant also asserted the Homeowners' Association improperly charged him costs and expenses under the Master Deed, and had made misrepresentations to him. ***See Ex. 1 (Amend. Cmplt.)***.

Respondents moved for summary judgment, arguing Appellant's claims were time-barred by the three-year statute of limitations. The evidence gathered in discovery showed that Appellant knew or should have known of a potential claim related to the parking allocation, and the Master Deed and zoning requirements, when he purchased his units in 2014 or in 2015 when he was made aware of additional information on the parking. Respondents also argued that the parking allocation complied with the Master Deed and zoning requirements, and that Appellant was charged in compliance with the Master Deed. ***See Ex. 2 (MSJ Memo)***.

The circuit court agreed with Respondents, granting them summary judgment on September 21, 2021, on the grounds Respondents argued in their motion. ***See Ex. 3 (Order granting Summary Judgment)***. Appellant moved the circuit court to reconsider, which was

denied, and then appealed the order granting summary judgment to this Court on October 11, 2022.

Appellant asserts he encountered issues with ordering the hearing transcript for the motion for summary judgment. As the appeal languished and the transcript had not been acquired, Respondents moved to dismiss the appeal. **Ex. 4 (MTD Appeal)**. The Motion to Dismiss, Return, and Reply (incorporated herein by reference) contain the factual background and supporting documents establishing how the appeal has failed to progress despite this Court's leniency towards Appellant with deadlines. Appellant's counsel's communications with the court reporter make clear he was on notice there could be issues with the transcript because it was recorded via WebEx. Appellant received that transcript on August 11, 2023, and certainly knew by that point of issues with the transcript. **See Ex. 5 (App. Return to MTD)**. This Court denied the Motion to Dismiss and granted Appellant an additional 30 days to file the initial brief and designation of matter. **See Ex. 6 (Order Denying MTD)**.

Now, precisely one year since Appellant noticed his appeal, he moves to remand the case for another hearing on the motion for summary judgment because the transcript has errors. However, Appellant has not shared that transcript with Respondents' counsel or the Court, and did not file the transcript with the motion to remand. Respondents request this Court deny the motion to remand and dismiss the appeal. In the alternative, Respondents request this Court deny the motion to remand, and require Appellant to proceed with the appeal if he can demonstrate good cause.

Argument

I. Appellant has not met his burden to obtain a remand because he did not file the transcript with his motion and neither the Court nor Respondents can evaluate or respond to the claims there are errors in the transcript.

When the record on appeal has not been filed or when the facts relied on in support of a motion are not in the record, a party filing a motion must file affidavits or other documents in support of their position. Rule 240(c)(3), SCACR. If a moving party fails to perform an act required by Rule 240, the moving party has abandoned the motion. *See* Rule 240(g).

Appellant claims the transcript contains numerous omissions that warrant remanding the case back to the circuit court. The record on appeal has not been filed and the facts upon which Appellant relies to support his motion are outside of anything filed with the Court thus far. As indicated in Respondents' Motion to Dismiss the appeal, Appellant did not copy the Court or opposing counsel on any communications with the court reporter and Appellant has not otherwise produced the transcript. Therefore, Appellant was required to provide the transcript with his motion. Appellant failed to do so. Without the transcript, it is impossible for this Court to evaluate the substance of Appellant's position that the omissions warrant remand. Without the transcript, it is impossible for Respondents' counsel to respond to Appellant's position that the omissions warrant remand. Because the Appellant failed to file the transcript to support his motion, he has failed to comply with Rule 240(c)(3). Pursuant to Rule 240(g), this Court should deem Appellant's failure an abandonment of the motion to remand.

In addition, to the extent Appellant provides the transcript in reply to this return, there is no mechanism in the Appellate Court Rules that would allow Respondents' counsel to file another return to the motion, thereby depriving Respondents' counsel from meaningfully

responding to Appellant's arguments. Therefore, if Appellant files the transcript along with his reply, this Court should still find the motion abandoned under Rule 240(g), SCACR.

II. Even if Appellant provided the transcript, Appellant has not established any prejudice or that this Court cannot perform a meaningful review without the transcript.

As a threshold matter, it is unclear what relief Appellant is seeking. Appellant asserts in his introduction the appeal should be remanded "to allow for the creation of a transcript of record," but then asks this Court to remand for "another summary judgment hearing."

Case law governing remand due to transcript issues appears to follow a two-step process: (1) a motion to remand to the circuit court to reconstruct the record or transcript, and (2) the Court of Appeals evaluating the reconstructed record to determine if it can perform a meaningful appellate review of the issues without prejudicing the appellant. *See State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 273 (Ct. App. 2007) (remanding to the circuit court to reconstruct the record of the three-day trial and, when returned, the Court of Appeals evaluated the reconstructed record to determine if it could perform a meaningful review of the issues without prejudicing the appellant).

To the extent Appellant requests a new summary judgment hearing, that would be improper at this stage because the appellate court would need a reconstructed record before ordering a new hearing. To the extent Appellant requests a remand to the circuit court to reconstruct the record, a remand is not necessary because this Court can evaluate the claims on appeal without the transcript or with the transcript as is.

An appellant has the burden of presenting the court with an adequate record. *Harkins v. Greenville Cnty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000). A judgment should not be

reversed for insubstantial errors not affecting the result. *Jensen v. Conrad*, 292 S.C. 169, 172, 355 S.E.2d 291, 293 (Ct. App. 1987).

The inability to prepare a complete transcript does not necessarily present a ground for reversal. *State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 273 (Ct. App. 2007). To warrant reversal, or remand for reconstruction, the appellant must identify specific claims the court would not be able to effectively review. *Id.* at 325, 644 S.E.2d at 273. When the omissions or errors in the record do not prejudice the appellant, remand for reconstruction or a new trial is not necessary. *See Sweat v. Crawford*, 292 S.C. 324, 327, 356 S.E.2d 147, 149 (Ct. App. 1987) (finding omissions from the record did not prejudice appellant because the evidence included in the record sufficiently supported the findings of fact made by the referee); *Koon v. State*, 358 S.C. 359, 368, 595 S.E.2d 456, 460-61 (2004) (refusing to remand for a reconstruction hearing based on *Brady* violation because the petitioner did not provide specifics on how counsel was ineffective or whether the issue was preserved for review), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

Furthermore, the party requesting remand must establish prejudice. *See Ladson*, 373 S.C. at 325, 644 S.E.2d at 273 (“We believe our supreme court would follow a rule requiring the party challenging a reconstructed record on appeal to demonstrate prejudice flowing from an inadequate record.”). After reconstructing a record, to warrant a new trial the appellant must establish the court cannot perform a meaningful appellate review because of an incomplete transcript. *Id.*, 644 S.E.2d at 274. In fact, most cases around the country dealing with transcript issues on appeal involve only a portion of the transcript missing and meaningful appellate review is still possible without prejudicing the parties. *Id.* at 326-27, 644 S.E.2d at 274.

For example, in *Ladson* a new trial was warranted because the appellate court could not perform a meaningful review of the issues without the record and it would prejudice Ladson. *Id.* at 325-26, 644 S.E.2d at 274. There was no transcript of the proceedings for a three-day criminal trial resulting in 25-year non-parolable sentence. *Id.* On remand to reconstruct the trial record, the parties and judge attempted to recall the testimony from all of the witnesses and arguments, but could really only provide conclusory summaries. *Id.* Prejudice existed because the reconstructed record was conclusory, with references to generic motions and objections, but no context for the motions or objections. *Id.* at 327. There was a significant list of unknowns from the reconstructed record, including disputes about whether the defendant testified, expert qualifications, chain of custody, and the identity of witnesses and the substance of their testimony. *Id.* at 322-23, 644 S.E.2d at 272. Because the reconstructed record lacked completeness and reliability, the court reversed and remanded for a new trial. *Id.* at 327-28, 644 S.E.2d at 275.

In contrast to *Ladson*, the Court of Appeals found in *Sweat v. Crawford* that omissions in a transcript, consisting of portions that were “inaudible” and missing one witness’s testimony, were not prejudicial because the evidence in the record was sufficient to support the underlying court’s determination. 292 S.C. at 327, 356 S.E.2d at 149.

Here, Appellant asserts he argued at the hearing that he “was threatened to execute the Release and Settlement under duress” and that argument is missing from the transcript. *See Mot. for Remand, at 4.* Appellant asserts he also argued at the hearing over the regime fees charged to his commercial units, but there are five “inaudibles” in the three pages of that argument. *Id.* These are the only two specific issues that Appellant argues warrant remand. First, Appellant’s complaints that his arguments are not contained in full in the transcript are

inconsequential to the appeal. It is well settled that arguments of counsel, and statements of fact contained in arguments of counsel not supported in the record, are not evidence and will not be considered. *See, e.g., S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105 n.8, 590 S.E.2d 511, 513 n.8 (Ct. App. 2003). Thus, the absence or incompleteness of the arguments in the transcript are inconsequential to the appeal.

Second, the arguments allegedly missing from the transcript are briefed in Appellant's Memorandum in Opposition to Summary Judgment with exhibits. ***See Ex. 7 at 5 (Pltf's Memo. In Opp. to MSJ)*** (outlining the facts regarding the settlement agreement with emails and an affidavit); ***id. at 12-13*** (arguing against Respondents' position on legality of assessments charged to Appellant, referencing an affidavit in support). Therefore, this Court can review the substance of Appellant's arguments without the complete transcript and without prejudicing Appellant.

Further, the circumstances of cases that find a new hearing is necessary based on a missing transcript are significantly different from the circumstances of this case. *Ladson* involved a missing transcript from a three-day criminal trial with many factual disputes, where the reconstructed record contained conclusory statements that were inaccurate. The other case Appellant cites, *Adams v. H.R. Allen, Inc.*, is also distinguishable. In *Adams*, the court of appeals remanded the case for a new hearing based on due process violations because, when the single commissioner in a workers' compensation case attempted to reconstruct a previous hearing he allowed the employee to testify anew but would not allow the employer to ask any questions different from the prior hearing or ask follow up questions. Unlike *Ladson*, this case does not involve a criminal appeal where the entire record of a three-day trial is missing and the reconstructed record is woefully insufficient. Unlike *Adams*, there are no procedural due process concerns in this case. This matter is more similar to *Sweatt*, in that the omissions in the

transcript are inconsequential because there is sufficient information in the expected record on appeal permitting this Court to meaningfully review the circuit court's decision without prejudicing Appellant. Accordingly, no remand is necessary.

Last, even if it was necessary to remand to reconstruct the transcript, the remand would have to go to the judge who held the summary judgment hearing and that would be impossible. Judge DeAndrea Benjamin heard the motion for summary judgment. **See Ex. 3 (Order granting MSJ)**. Judge Benjamin is now a federal appellate court judge with the Fourth Circuit Court of Appeals. Undoubtedly, this Court would not be able to remand the case to a judge who is no longer within the state judiciary.

III. Appellant's initial brief and designation of matter are late and, therefore, this Court should enter an order dismissing the appeal and permit Appellant an opportunity to reinstate the appeal if Rule 260, SCACR, is met.

"Upon the failure of the appellant to file and serve his brief within the time prescribed, the clerk of the appellate court shall sign an order dismissing the appeal, and the appeal shall not be reinstated except as provided by Rule 260." Rule 208(a)(4), SCACR; *see Roberts v. LaConey*, 375 S.C. 97, 100, 650 S.E.2d 474, 475 (2007) (dismissing exceptions to special referee's report and recommendations because the appellant failed to file a record or brief under Rule 208(a)(4) as instructed).

"Unless otherwise provided by these Rules, or ordered by the appellate court, the time limits imposed by these Rules shall not be stayed by the filing of a motion or petition." Rule 240(b), SCACR. A motion to dismiss does stay the time limits, but the Appellate Court Rules treat motions to remand separately. *See* Rule 240(b), SCACR (stating a motion to dismiss an appeal stays time limits); Rule 240(a), SCACR (noting Rule 240 governs all motions, including

“motions to remand or dismiss”). To reinstate an appeal, the moving party must show good cause. Rule 260(a), SCACR.

In ruling on Respondents’ prior motion to dismiss, this Court ordered Appellant to file his initial brief and designation of matter by October 11, 2023. **See Ex. 6 (Order on MTD)**. The due date was exactly two months after Appellant received the transcript. Pursuant to Rule 208, Appellant’s initial brief and designation of matter, as ordered by this Court, was due October 11. On October 11, however, Appellant filed the present motion to remand. Appellant did not request a stay or additional time to file the initial brief in the event the Court denies his motion. Pursuant to Rule 240(a) & (b), the motion to remand did not stay the deadline by which Appellant had to file his initial brief and designation of matter. Thus, Appellant’s initial brief and designation of matter is late under Rule 208, SCACR, and this Court (or the clerk) should dismiss the appeal under Rule 208(a)(4) and give Appellant an opportunity to reinstate the appeal if he meets the requirement of Rule 260 to show good cause.

Conclusion

This Court should find Appellant abandoned his motion to remand because he did not include the necessary documents or information (i.e. the transcript) to support his claims the omissions in the transcript warrant remand. Even if the transcript contains the errors Appellant claims, remanding for reconstruction is not necessary because the expected record on appeal will contain the motions, responses, exhibits, and orders that have the information needed for this Court to meaningfully review the issues. Ultimately, this Court should discontinue its leniency towards Appellant, dismiss the appeal because Appellant has repeatedly failed to abide by the Appellate Court Rules and did not file his initial brief and designation of matter on time, and reinstate the appeal only if Appellant meets Rule 260’s requirement of good cause.

Respectfully submitted,

This 20th day of October, 2023.

s/Skyler C. Wilson

DOUGLAS W. MACKELCAN

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***Attorneys for Respondents Adesso Horizontal
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Association***

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY CIRCUIT COURT

DeAndrea Gist Benjamin, Circuit Court Judge
Case No.: 2019-CP-40-00919

Appellate Case No. 2022-001434

Emad Tadros, as Trustee of the Grace Living Trust dated October 12, 2010, as amended, Appellant,

v.

Holder Properties, Inc., John R. Holder, Individually, ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association, Defendants,

of which

ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association are the Respondents.

PROOF OF SERVICE

I certify that I have served *Respondents' Return to Appellant's Motion to Remand* upon the parties below by depositing a copy of it in the United States Mail, postage prepaid and/or via electronic mail, on October 20, 2023, addressed as follows:

T. Jeff Goodwyn, Jr., Esq.
Charles G. Blackburn, Esq.
Goodwyn Law Firm, LLC
2309 Devine Street
Columbia, SC 29205
jgoodwyn@goodwynlaw.com
cblackburn@goodwynlaw.com
Counsel for Appellant

This 20th day of October, 2023.

COPELAND, STAIR, VALZ & LOVELL, LLP

By: s/Skyler C. Wilson
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REPLY TO SC OFFICE

October 20, 2023

VIA EMAIL and REGULAR MAIL

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
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RECEIVED
Oct 20 2023
SC Court of Appeals

Re: Emad Tadros, as Trustee of the Grace Living Trust dated October 12, 2010, as amended, Appellant,
v. ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and
ADESSO Homeowners' Association, Respondents
Appellate Case No. 2022-001434

Dear Ms. Kitchings:

Enclosed for filing, please find *Respondents' Return to Appellant's Motion to Remand* in this case, together with Exhibits 1-7 and Proof of Service. By copy of this letter, we are providing the Return to Appellant's counsel. If anything further is required from these Respondents at this time, please advise.

Sincerely,

s/Skyler C. Wilson

DOUGLAS W. MACKELCAN
SKYLER C. WILSON

SCW:tjr
Enclosures
cc:

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From: [Rewt, Teri J.](#) on behalf of [Mackelcan, Douglas W.](#)
To: jgoodwyn@goodwynlaw.com; cblackburn@goodwynlaw.com
Cc: [Mackelcan, Douglas W.](#); [Wilson, Skyler C.](#); [Moran, Rosie](#)
Subject: Tadros v Adesso HPR and Adesso HOA; Appellate Case No. 2022-001434; CSVL File No.: 59242
Date: Friday, October 20, 2023 3:24:00 PM
Attachments: [Ltr Court of Appeals encl Return to Appellant's Motion to Remand w Exs 1-7.pdf](#)
[image001.png](#)

Good afternoon Counselors,

On behalf of Attorneys Doug Mackelcan and Skyler Wilson, attached is a copy of Respondent's Return to Appellant's Motion to Remand in this case, with Exhibits 1-7, which we will be filing with the Court today.

Best regards,



Teri Rewt
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EXHIBIT**1**

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Emad Tadros, M.D. as Trustee of the
Grace Living Trust dated October 12,
2010, as amended,

Plaintiff,

v.

Holder Properties, Inc., John R. Holder,
Individually, ADESSO/Columbia, LLC,
ADESSO Horizontal Property Regime,
and ADESSO Homeowners' Association,

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

) Civil Action No.: 2019-CP-40-00919

AMENDED SUMMONS

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Amended Complaint upon the subscriber, Charles G. Blackburn, Allen & Newman, PLLC, Post Office Box 1481 Columbia, South Carolina 29202, within 30 days after service hereof, exclusive of the day of such service. If you fail to answer the Amended Complaint within the aforesaid time, judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

s/ Charles G. Blackburn

(SC Bar No. 69458)

Allen & Newman, PLLC

PO Box 1481

Columbia, South Carolina 29202

Telephone: (803) 714-9606, ext. 2202

cblackburn@allenandnewman.com**ATTORNEYS FOR PLAINTIFF**

Columbia, South Carolina
May 9, 2019

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Emad Tadros, M.D. as Trustee of the) Civil Action No.: 2019-CP-40-00919
Grace Living Trust dated October 12,)
2010, as amended,)

Plaintiff,)

**AMENDED COMPLAINT
(Verified)**

v.)

Holder Properties, Inc., John R.)
Holder, Individually,)
ADESSO/Columbia, LLC, ADESSO)
Horizontal Property Regime, and)
ADESSO Homeowners' Association,)

Plaintiff Emad Tadros, M.D. as Trustee of the Grace Living Trust dated October 12, 2010, as amended, complaining of Defendants Holder Properties, Inc., ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association herein files this Amended Complaint and would allege and show as follows:

PARTIES

1. Plaintiff Emad Tadros, M.D. as Trustee of the Grace Living Trust dated October 12, 2010, as amended ("Tadros"), a trust formed under the laws of the State of California, owns the real property known as the commercial property units ("the commercial units") in the ADESSO Horizontal Property Regime (the "Adesso"), located at 601 Main Street, Suites A – D, in Columbia, South Carolina.

2. The Adesso is a horizontal property regime that exists by virtue of the Master Deed of the ADESSO Horizontal Property Regime, dated January 14, 2008 and

recorded January 14, 2008, in the Office of the Register of Deeds for Richland County, South Carolina, in Book 1392-855 ("Master Deed").

3. Holder Properties, Inc. ("Holder Properties") is a foreign corporation organized and existing under the laws of the State of Georgia, authorized to do business in the State of South Carolina and at all times relevant hereto conducted and transacted business in the State of South Carolina in the form of the original planning, designing, developing, constructing, marketing, selling, repairing, maintaining and/or managing the Adesso.

4. ADESSO/Columbia, LLC ("ADESSO") is a foreign limited liability company organized and existing under the laws of the State of Georgia, authorized to do business in the State of South Carolina, and at all times relevant hereto conducted and transacted business in the State of South Carolina in the form of planning, designing, developing, constructing, marketing, selling, repairing, maintaining and/or managing the Adesso.

5. John R. Holder ("Holder") is, upon information and belief, a citizen and resident of the State of Georgia and at all times relevant hereto transacted business in the State of South Carolina in the form of planning, developing, constructing, marketing, selling, repairing, maintaining and/or managing the Adesso as the sole member of ADESSO.

6. ADESSO Homeowners' Association ("ADESSO HOA") is a nonprofit corporation organized and existing under the laws of the State of South Carolina that controlled the Adesso since April 23, 2013 after turnover by ADESSO.

VENUE

7. Venue is proper in Richland County as this is where the property interests at issue are located and where the actions giving rise to this claim took place.

JURISDICTION

8. This Court has personal and subject matter jurisdiction over all parties.

FACTS

9. The ADESSO condominium project (the "project") entailed the development of a "live/work" planned unit development at 601 Main Street, Columbia, South Carolina 29201.

10. The project includes residential condominiums and commercial units constructed over a two-level parking garage.

11. Holder Properties was the developer of the project.

12. Holder Properties, upon information and belief, control of the Adesso on or about April 23, 2013 but retained control of the management and finances of Adesso until May 2016.

13. ADESSO/Columbia, LLC is identified, in the Master Deed, as the Grantor and sole owner of the land and improvements of the project and, among other things, compliance with the terms of the Master Deed.

14. Holder is, upon information and belief the sole member of the ADESSO.

15. The Master Deed, drafted by Holder Properties, set forth many contractual obligations including, but not limited to, complying with all laws, zoning ordinances and regulations of all governmental authorities having jurisdiction over the Adesso.

16. On December 5, 2014, Tadros purchased and took title (the "purchase") to the commercial units in the Adesso.

17. The purchase by Tadros is subject to, among other things, compliance with all zoning ordinances and applicable governmental regulations set forth in the Master Deed.

18. The commercial units are part of the ADESSO Horizontal Property Regime and members of the ADESSO Homeowners' Association.

19. The Master Deed assigns a certain number of parking spaces to the exclusive use of the commercial units owned by Tadros.

20. The City of Columbia Planning and Zoning Development requires that a certain number of parking spaces be allocated for the exclusive use of the commercial units.

21. The number of parking spaces allocated to the commercial units in the Master Deed and in subsequent meetings with the City of Columbia Planning and Zoning Department to amend the square footage of the commercial units has been miscalculated by deception and misrepresentations by the Defendants to the City of Columbia Planning and Zoning Department

22. The Master Deed identified the square footage of the commercial units to be approximately 8,139 square feet.

23. Defendants have converted, changed, or altered the commercial unit parking spaces so that the parking spaces do not comply, and have never complied, with the City of Columbia Planning and Zoning Development's ordinances.

24. Defendants knew its actions in failing to comply with the City of Columbia Planning and Zoning Department parking space requirements for the commercial units violated the City of Columbia Planning and Zoning Department parking space requirements from the beginning of construction of the project.

25. However, Defendants did not take necessary actions to correct the violations of the zoning requirements set forth in the Master Deed and subsequent amendments to the Master Deed especially during the several meetings with the City of Columbia Planning and Zoning Department.

26. The Defendants, in particular Holder Properties, through deception and misrepresentations, created a parking situation for the commercial units that did not comply with the City of Columbia Planning and Zoning Department's ordinances.

27. Tadros was not aware of the zoning violations when he purchased the commercial units in December 2014.

28. Tadros relied upon the false and misleading information he received regarding the parking spaces during his purchase of the commercial units, all to his detriment.

29. Tadros did not consent to any reduction in the number of parking spaces assigned to the commercial units and has brought the parking issue to the Defendants' attention and to the attention of the City of Columbia Planning and Zoning Department without any relief from the parking situation.

30. Furthermore, in particular Holder Properties and the HOA, have required Tadros to pay monthly rent for certain parking spaces that should have been allocated

to the commercial units pursuant to the City of Columbia Planning and Zoning ordinances.

31. Defendants have, in violation of the Master Deed, charged Tadros fees in excess of the amounts permitted by the Master Deed, including but not limited to costs, expenses, and budget items that should have been specifically attributable only to the residential units and not to the commercial units.

32. Defendants have failed and refused to provide Tadros with a clear explanation and itemization or quantification of annual budgets applicable to the costs for maintenance of the common areas of the commercial units compared to that of the residential condominiums.

33. Defendants have failed and refused to provide Tadros with a clear and complete accounting of the monthly fees charged to the commercial units.

34. Tadros has leased the commercial units to various retail, restaurant, and service establishments.

35. Tadros has lost multiple tenants from the commercial units because Tadros' tenants' employees and patrons were unable to access the parking spaces that should have been allocated to the commercial units.

36. The domino effect of the turnover of Tadros' tenants, because of the lack of parking, resulted in the tenants' businesses failing and in the inability of Tadros to keep tenants in his commercial units, creating a stigma on the commercial units and have all lead to Tadros' damages.

37. The fees charged to Tadros for maintenance of the common areas outside of the commercial units' common areas of the Adesso, charges for parking spaces that

were to be owned by Tadros in combination with the violations of the parking ordinances set and enforced by the City of Columbia Planning and Zoning Department have damaged Tadros.

FOR A FIRST CAUSE OF ACTION
Negligence/Gross Negligence

38. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

39. Defendants owed a duty to Tadros to exercise reasonable care in the enforcement of the terms of the Master Deed, original construction, planning, design, maintenance and modification of any parking spaces allocated to the commercial units and in compliance with all zoning requirements mandated by the City of Columbia Planning and Zoning Department.

40. Defendants were negligent, grossly negligent, reckless, willful, and wanton in converting, changing, or altering the parking configuration to reduce the number of parking spaces assigned to the commercial units to comply with the zoning requirements set forth in the City of Columbia's Planning and Zoning Department's ordinances.

41. Defendants owed a duty to Tadros to assess regime fees in a manner consistent with the terms of the Master Deed.

42. Defendants were negligent, grossly negligent, reckless, willful, and wanton, by assessing fees for the commercial units in excess of those permitted by the Master Deed, including but not limited to costs, expenses, and budget items that should have been specifically attributable only to the residential units.

43. The co-mingling of the assessment of fees to the commercial units with the assessment fees of the residential units has damaged Tadros in subjecting Tadros to pay more than he is required by the terms of the Master Deed.

44. As a direct and proximate result of Defendants' conduct, Tadros has been damaged in the form of lost rental income, excessive and improper fees paid to Defendants, rent Tadros has had to pay for the use of parking spaces that should have been allocated to the commercial units and the threat of foreclosure of his commercial units for allegedly paying fees that were not the responsibility of Tadros.

45. As a result of Defendants' negligent, grossly negligent, reckless, willful, and wanton conduct, Tadros is entitled to recover from Defendants direct, consequential, punitive damages and reasonable attorney fees in bringing this action.

FOR A SECOND CAUSE OF ACTION
Breach of Master Deed

46. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

47. The Master Deed assigns a certain number of specified parking spaces to the exclusive use of the commercial units.

48. However, the number of specified parking spaces set forth in the Master Deed and subsequent amendments to the Master Deed are incorrect and violate the ordinances set by the City of Columbia Planning and Zoning Department.

49. Defendants have breached and violated the terms of the Master Deed since the filing of the Master Deed by failing to identify the correct number of parking spaces allocated to the commercial units, converting, changing, or altering the parking

configuration to reduce the number of parking spaces assigned to the commercial units in violation of the City of Columbia Planning and Zoning Department's ordinances.

50. Tadros did not consent to any reduction in the number of parking spaces assigned to the commercial units and had no control for the deceptive and fraudulent allocation of the parking spaces dedicated to the commercial units.

51. All such actions began with the filing of the Master Deed, subsequent amendments to the Master Deed and during meetings with the City of Columbia Planning and Zoning Department.

52. Defendants have breached and violated, among other things, the terms of the Master Deed by requiring Tadros to pay monthly rent for certain parking spaces that should have been allocated to the commercial units rent-free.

53. Defendants have breached and violated, among other things, the terms of the Master Deed by assessing fees for the commercial units in excess of those permitted by the Master Deed, including but not limited to costs, expenses, and budget items that should have been specifically attributable only to the residential units.

54. As a direct result of Defendants' conduct, Tadros has incurred actual and consequential damages, and he is entitled to an award of such actual and consequential damages in an amount to be proven at trial.

FOR A THIRD CAUSE OF ACTION
Declaratory Judgment

55. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

56. This is an action for a declaratory judgment pursuant to the Uniform Declaratory Judgment Act of South Carolina, as set forth in Section 15-53-10 of the

South Carolina Code of Laws, 1976, as amended, *et seq.*, for the purpose of determining the rights, status, and legal relations between Tadros and Defendants arising under the Master Deed and in compliance with the City of Columbia Planning and Zoning Department's ordinances governing commercial unit parking spaces.

57. A justiciable controversy exists between the parties regarding their rights under the Master Deed and the zoning ordinance requirements set forth in the City of Columbia's Planning and Zoning ordinances.

58. Such justiciable controversy concerns the proper number of parking spaces that should be allocated to the exclusive use of the commercial units rent-free.

59. Tadros is informed and believes that he is entitled to a decree from the Court finding that he is entitled to have the number of parking spaces as required by the City of Columbia Planning and Zoning Department ordinances applicable to the exclusive use of the commercial units in the Adesso.

60. A further justiciable controversy exists regarding the terms of the Master Deed addressing the amount of fees that are permitted to be assessed against the commercial units.

61. Tadros is further informed and believes that he is entitled to a decree from the Court finding that the commercial units should only be assessed amounts permitted under the Master Deed and should not be assessed costs, expenses, and budget items specifically attributable only to the residential units.

FOR A FOURTH CAUSE OF ACTION
Injunctive Relief

62. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

39. Tadros will continue to suffer irreparable harm if Defendants are not enjoined to take action to allocate and designate the correct number of parking spaces for the exclusive use of the commercial units and eliminate the excessive fees charged by Defendants to Tadros for the upkeep of the common areas.

40. Tadros will continue to suffer irreparable harm if Defendants are permitted to continue to assess improper fees against the commercial units, including but not limited to costs, expenses, and budget items specifically attributable only to the residential units.

41. The harm that would be suffered by Tadros if Defendants are not so enjoined outweighs any harm that would be suffered by Defendants as a result of any such injunction.

42. Tadros has no adequate remedy at law.

43. Tadros, therefore, is entitled to a permanent injunction requiring Defendants to take action to allocate and designate the correct number of parking spaces for the exclusive use of the commercial units, rent-free and to prohibit Defendants from assessing improper costs against the commercial units, including but not limited to costs, expenses, and budget items specifically attributable only to the residential units.

FOR A FIFTH CAUSE OF ACTION
Violation of South Carolina Unfair Trade Practices Act

44. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

45. The Plaintiff has suffered an ascertainable loss of money.

46. Defendants' conduct constitutes unfair and deceptive trade practices, as defined by the Unfair Trade Practices Act (SCUTPA), S.C. Code Ann. § 39-5-10, *et seq.*

47. Furthermore, Defendants' conduct was willful.

48. Defendants' conduct is capable of repetition.

49. Defendants' actions constitute unfair and deceptive acts.

50. Defendants' conduct affects the public interest.

51. Defendants' knew or should have known that Defendants' actions constituted unfair and deceptive trade practices.

52. As a direct, foreseeable, and proximate result of Defendants' unfair and deceptive trade practices, the Tadros has suffered an ascertainable loss of money and property.

53. Tadros is entitled to recover his actual damages, which amount should be trebled, together with interest and attorney's fees.

FOR A FIFTH CAUSE OF ACTION
Negligent Misrepresentation

54. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

55. Defendants held themselves out and represented to Tadros that Defendants were familiar with the requirements set forth in the governing documents of Adesso, including the Master Deed, subsequent amendments to the Master Deed and the South Carolina Horizontal Property Regime Act, S.C. Code §27-31-10, *et . Seq.*

56. Tadros relied upon Defendants' representations to his detriment.

57. The representations of Defendants' were material in Tadros entering into the contract to purchase the commercial units.

58. Defendants' were negligent, reckless, willful and wanton in making these representations including the perpetuation of violations of the City of Columbia Planning and Zoning ordinances.

59. Defendants had a pecuniary interest in making these statements.

60. Defendants knew or should have known Tadros would rely upon the Defendants' representations and Tadros justifiably relied on the representations to his detriment and pecuniary loss.

61. As a direct and proximate result of Defendants' negligent misrepresentations, Tadros is entitled to actual and punitive damages, reasonable attorney fees and costs in an amount to be determined at the trial of this matter, plus pre-judgment and post-judgment interest.

FOR A FIFTH CAUSE OF ACTION
Constructive Fraud

62. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

63. Defendants made representations to Tadros the parking for the commercial units were in compliance with the City of Columbia Planning and Zoning ordinances and Tadros would be charged fees as set forth in the Master Deed.

64. The Defendants knew of the falsity of Defendants' statements.

65. The Defendants statements, actions and inactions were material to Tadros' purchase of the commercial units.

66. The Defendants knew the statements, actions and inactions made by the Defendants were false and/or made with a reckless disregard of its truth or falsity.

67. The Defendants' statements, actions and inactions as set forth above were made with the intent that the representations, actions and inactions be acted upon by Tadros.

68. Tadros was not aware of the falsity of Defendants' statements, actions and inactions.

69. Tadros relied on the Defendants' statements, actions and inactions and relied on Defendants' statements, actions and inaction to the detriment of Tadros.

70. As a direct and proximate result of Defendants' false and fraudulent statements used to induce Tadros to purchase the commercial units, Tadros has been damaged and suffered pecuniary loss.

71. Tadros has been damaged and is entitled to actual, consequential, punitive damages and reasonable attorney fees and costs in bringing this action.

WHEREFORE, having complained of Defendants, Tadros prays the Court enter judgment awarding it all available relief including but not limited to the following:

- A. a trial by jury on all such issues so triable;
- B. Tadros be awarded actual, consequential, and punitive damages;
- C. Tadros be awarded any prejudgment and post-judgment interest;
- D. Tadros be awarded declaratory judgment as pled herein;
- E. Tadros be awarded injunctive relief;
- F. Tadros' damages be trebled pursuant to S.C. Code Ann. § 39-5-10, *et seq.*;
- G. Tadros be awarded reasonable attorney's fees and court costs; and
- H. For such other and further relief as this Court may deem just and proper.

Signature on Following Page

Respectfully submitted,

/s Charles G. Blackburn
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ATTORNEYS FOR PLAINTIFF

May 9, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

EMAD TADROS, M.D. AS TRUSTEE OF
THE GRACE LIVING TRUST DATED
OCTOBER 12, 2010, AS AMENDED

PLAINTIFF,

vs.

HOLDER PROPERTIES, INC., JOHN R.
HOLDER, INDIVIDUALLY,
ADESSO/COLUMBIA, LLC, ADESSO
HORIZONTAL PROPERTY REGIME, AND
ADESSO HOMEOWNERS' ASSOCIATION

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

C/A No: 2019-CP-40-00919

CERTIFICATE OF SERVICE

I, the undersigned of Allen & Newman, PLLC, Attorneys for Plaintiff, do hereby certify that I have served the **Plaintiff's Amended Complaint** in connection with the above-referenced case by Electronic Court Filing and by placing a copy of the same in the U.S. Mail, first class, postage prepaid to the following address:

Defendant's Attorney for Holder Properties, Inc. and Adesso/Columbia, LLC

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Columbia, South Carolina
May 9, 2019

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Emad Tadros, M.D. as Trustee of the Grace
Living Trust dated October 12, 2010, as
amended,

Plaintiff,

vs.

Holder Properties, Inc., John R. Holder,
Individually, ADESSO/Columbia, LLC,
ADESSO Horizontal Property Regime, and
ADESSO Homeowners' Association,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
) CASE NO.: 2019-CP-40-00919
)

**DEFENDANTS ADESSO HORIZONTAL
PROPERTY REGIME AND ADESSO
HOMEOWNERS' ASSOCIATION'S
MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT**

NOW COME Defendants Adesso Horizontal Property Regime ("Regime") and Adesso Homeowners' Association ("Association") (collectively, "HOA Defendants"), by and through their undersigned counsel, and respectfully submit this Memorandum of Law in Support of HOA Defendants' Motion for Summary Judgment, filed December 28, 2020 ("HOA Defendants' Motion for Summary Judgment"). In support of HOA Defendants' Motion for Summary Judgment, HOA Defendants would respectfully show this Court as follows:

INTRODUCTION

This is a frivolous action in which Plaintiff alleges HOA Defendants' allocation of parking spaces serving Plaintiff's two (2) commercial properties ("Commercial Units")—comprising a total of four (4) individual units—within the Adesso Columbia mixed-use condominium development (the "Adesso") violates City of Columbia zoning ordinances and the Master Deed of Adesso Horizontal Property Regime ("Master Deed"). Plaintiff further alleges that HOA Defendants have failed to comply with the Master Deed in assessing Plaintiff's Commercial Units

amounts for certain costs, expenses, and budget items for the maintenance and upkeep of the Adesso.

Plaintiff purchased the Commercial Units in 2014, at which time all of the parking-related conditions about which Plaintiff complains were matters of public record and/or open and obvious at the Adesso site. However, as will be discussed below, Plaintiff purchased the properties without having first completed the necessary due diligence involved in a large commercial property transaction—including failing to personally visit and inspect the properties, failing to review any title or zoning documents affecting the properties, and failing to hire competent representation with regard to the transaction. More than four (4) years have elapsed since Plaintiff's purchase of the Adesso commercial units, and now, due to recent economic downturns and poor performance by some of Plaintiff's business tenants, Plaintiff seeks to recover from the Defendants named in this lawsuit for his own poor investment choices.

RELEVANT FACTUAL BACKGROUND

The Adesso is a mixed-use development comprising 110 upscale residential condominium units, ground floor commercial units, and associated common and limited common elements. Ex. 1 (Pltf.'s Fourth Amend. Compl.) at ¶ 6. All units, common elements, and limited common elements are housed within one building located at 601 Main Street, Columbia, SC 29201. *Id.* Defendant Holder Properties, Inc. ("Holder") developed the Adesso. Ex. 2 (Pltf.'s Amend. Compl.) at ¶ 11. On January 14, 2008, Defendant ADESSO/Columbia, LLC—as then-owner of the Adesso—recorded the Master Deed in the Office of the Register of Deeds for Richland County, in Book 1392 at Page 855. *Id.* at ¶ 2. The Master Deed established the Adesso Horizontal Property Regime and created the Association to, among other things, manage the Regime's affairs, prescribe rules for the use of the Regime's General Common Elements, Ex. 3 (Adesso Master Deed), p. 20

at § XV, and to “maintain[], repair[], and replace[] all of the General and Limited Common Elements...”. *Id.*, pp. 23-24, § XXII.

Moreover, in furtherance of the above powers, the Association, acting through its Board of Directors (“Board”), possesses the authority “[t]o make, levy, and collect assessments against members and members’ Units to defray the cost of the common areas and facilities of the Regime, and to use the proceeds of said assessments in the exercise of the powers and duties granted unto the Association.” Ex. 4 (Adesso Bylaws), p. 6 at § 4(j)(i). Generally, in calculating annual assessments to unit owners, each owner is assessed an amount for his or her share of the Association’s expenses equal to the share of the interest his or her unit bears in relation to the entire undivided interest of the Regime. Ex. 5 (Affidavit of C. Michael Munson) at ¶¶ 9-10. The Plaintiff’s Commercial Units comprise a total 8.54279% interest in the total undivided interest of the Regime. *Id.* at ¶ 11. However, of particular relevance to this action, in the development of annual assessment budgets for the Adesso, the Master Deed also requires the following:

“[S]eparate budgets for the Commercial Units and Residential Units shall be developed annually and no costs, expenses and budget items specifically attributed to Residential Units shall be included in the budget for Commercial Units and vice versa; likewise, costs, expenses, and budget items which affect Residential and Commercial units shall be appropriately allocated in relation to the use by the Owners of such Units...”

Ex. 3, p.12 at § V(A)(3)(iii).

Additionally, the Master Deed identifies certain Limited Common Elements benefitting either Residential and Commercial Units, or solely Commercial Units. Ex. 5 at ¶¶ 14-15. Pursuant to § V(C)(5) of the Master Deed, “Retail Parking Spaces as identified in Exhibit ‘C’ [to the Master Deed] shall be Limited Common Elements, limited to the use of the Commercial Unit it/they serve. Such spaces shall be marked with identification information designating the limited use of such...[and]...may not be reassigned and shall remain a Limited Common Element relating to the Commercial Unit.” Ex. 3, p. 14 at § V(C)(5). Notwithstanding this provision,

ADESSO/Columbia, LLC, with the consent and joinder of the required number of unit owners, recorded a certain Fourth Amendment to Master Deed of Adesso Horizontal Property Regime (“Fourth Amendment”) on April 22, 2013 in the Richland County Register of Deeds Office, in Book 1854 at Page 818, attached hereto as Exhibit 6. On April 23, 2013, Holder—which by virtue of its status as developer, had controlled the Association and its Board—relinquished control of the Association to the condominium owners. Ex. 1 at ¶ 85.

In contravention of the Master Deed, the Fourth Amendment reassigned the Retail Parking Spaces—specifically spaces numbered 001-017, 108, 157, and 220-221—either to the use of both Commercial and Residential guests, or as leased spaces to the United States Marine Corps and one Adesso resident. Ex. 6 at pp. 6-7. Further, the reassignment of the Retail Parking Spaces violated the commercial parking requirements established by the governing zoning ordinance, the Adesso Planned Unit Development (“PUD”), as amended by letter of Holder Properties, Inc. dated January 24, 2008 (“January 2008 Amendment”). Ex. 7 (Deposition of Rachel Lynn Bailey), Pltf.’s Ex. 5. Per the January 2008 Amendment, the Adesso Commercial Units were required to have a total of at least twenty-six (26) dedicated parking spaces, with nineteen (19) restricted access spaces within the building itself, and seven (7) spaces located along Main and Blossom Streets. Ex. 7 at 51:1-12. The January 2008 Amendment also provided a formula to calculate the required number of parking spaces based upon future increases or decreases in the Commercial Units’ square footage. *Id.* at 128:25-129:15. The Adesso PUD, as amended, rather than general City of Columbia zoning ordinances controls the parking requirements for the Adesso. *Id.* at 98: 24-25, 99: 1-12.

Plaintiff purchased the Adesso Commercial Units on December 5, 2014. Ex. 2 at ¶ 16. He did not purchase the properties from Defendants or Holder; rather, Plaintiff purchased them from Ford Elliott, the current owner at the time. Ex. 8 (Deposition of Emad Tadros, M.D.) at 169: 17-19. Plaintiff is a sophisticated and well-educated physician who holds a board certification in

psychiatry from the American Board of Psychiatry and Neurology and has been in private practice since 1993. *Id.* at 9: 12-15. Additionally, by 2014, Plaintiff possessed significant prior experience with commercial real estate acquisitions, having previously acquired four (4) commercial properties—three of which were acquired for investment purposes. *Id.* at 13:23-15:14.

However, despite his prior experience, Plaintiff did not personally inspect the Commercial Properties or review any of the recorded documents relating to the Adesso development prior to his purchase. *Id.* at 66:21-67:1; 89:24-90:7. Plaintiff did not actually visit the Adesso Commercial Units until late 2016 or early 2017—between two and three years after his purchase of the units. *Id.* at 229:19-230:2. Plaintiff did not personally communicate with HOA Defendants at all prior to purchasing the Commercial Units. *Id.* at 125: 17-25, 127: 15-19. Moreover, Plaintiff's hired professional advisor did not communicate with HOA Defendants with regard to the transaction. *Id.* at 126: 3-5; 127: 2-5, 7-11; 129: 17-25¹.

On March 4, 2015, Plaintiff was notified by a representative of Holder—which provided property management services to the Association until May, 2016—that a lottery would be held among the Adesso owners to determine leasing rights for three of the Adesso Commercial Parking Spaces. *Id.* at 90:12-19. Plaintiff was informed that such rights would be sold to the highest bidder. *Id.* The Adesso Master Deed specifically prohibits the leasing of the Commercial Parking Spaces in this manner. *Id.* at 90: 20-22. Plaintiff further testified that had he known this at the time, he would not have agreed to lease the parking spaces. *Id.* at 88: 10-89:17. Additionally, around March of 2015, Plaintiff was notified by one of his tenants—the United States Marine Corps (“Marines”)—of issues relating to the allocation of Commercial Parking Spaces at the Adesso. *Id.* at 91:5-92:7. Specifically, the Marines informed Plaintiff of their intent to vacate their

¹ It should be noted that Plaintiff has brought a negligence action against his former advisor regarding Plaintiff's purchase of the Adesso Commercial Units, which is pending in the Richland County Court of Common Pleas, C/A No. 2017-CP-40-07120.

leased recruiting center space in one of Plaintiff's Commercial Units if Plaintiff was not able to secure parking for them. *Id.*

Despite being made aware of the Marines' complaints regarding parking, as well as being required to lease back Commercial Parking Spaces almost immediately after he took ownership of the Commercial Units, Plaintiff took no action to investigate the parking requirements of the Adesso Master Deed or the Adesso PUD until 2017. *Id.* at 92:8-12. Similarly, Plaintiff paid assessments to the Association for two (2) years, without taking any action to determine or investigate their propriety under the Adesso governing documents until around February 15, 2017. *Id.* at 37:18-24; 130:23-132:3. Around that time, Plaintiff formed the belief that the assessments being charged to his Commercial Units violated the Master Deed, and although Plaintiff has failed to specifically identify what he believes is a proper formula for calculating such assessments, he determined any such formula by speaking with his tenants regarding their usage of the Adesso building. *Id.* at 132:4-7.

Plaintiff did not file this action until February 14, 2019—over four (4) years after his purchase of the Adesso Commercial Units. Plaintiff's Amended Complaint asserts causes of action for: (1) Negligence/Gross Negligence; (2) Breach of Master Deed; (3) Declaratory Judgment; (4) Injunctive relief; (5) Violation of the South Carolina Unfair Trade Practices Act; (6) Negligent Misrepresentation; and (7) Constructive Fraud. As set forth in more detail below, HOA Defendants are entitled to judgment as a matter of law in their favor regarding all of Plaintiff's claims.

PROCEDURAL STANDARD

Pursuant to Rule 56, SCRCP, "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to Interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law." In ruling on a Motion for Summary Judgment, the Court must view the facts and inferences therefrom in a light most favorable to the nonmoving party. *Bravis v. Dunbar*, 316 S.C. 263, 265, 449, S.E.2d 495, 496 (Ct. App. 1994).

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading..." Rule 56(e), SCRC. The nonmoving party must establish specific facts showing there is a genuine issue of material fact for trial, or the court must grant summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Holmes v. East Cooper Community Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014) (internal citation omitted). Nevertheless, when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted. *Id.*

ARGUMENT

I. Plaintiff failed to file this lawsuit within the applicable statute of limitations.

Pursuant to S.C. Code Ann. § 15-3-530(1), "an action upon a contract, obligation, or liability, express or implied," such as Plaintiff's claims asserted herein, must be brought within three (3) years of the date on which the cause of action accrues. The date of accrual for a cause of action is the time in which a plaintiff knew or, by exercise of reasonable diligence, should have known that he/she had a cause of action. The objective test is whether a person of common knowledge and experience should have known the operative facts. *Wilson v. Shannon*, 299 S.C. 512, 386 S.E.2d 257 (Ct. App. 1989). A statute of limitations analysis requires "very little to start the clock." *Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998) (citation omitted). Whether the plaintiff understands the full extent of the damages is immaterial to the

issue of whether the statute begins to run. *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996). Furthermore, the statute begins to run on the date the plaintiff discovered or should have discovered the injury, not on the date that the plaintiff discovers the identity of the wrongdoer. *Tollison v. B & J Machinery Co., Inc.*, 812 F. Supp. 618 (D.S.C. 1993).

Plaintiff purchased his Commercial Units at the Adesso in December, 2014. Plaintiff's own testimony indicates he failed to exercise even the slightest diligence—much less reasonable diligence, required for statute of limitations purposes—with regard to his purchase. Plaintiff did not personally inspect the Commercial Properties or review any of the recorded documents relating to the Adesso development prior to his purchase. Ex. 8 at 66:21-67:1; 89:24-90:7. Plaintiff made no visits to the Adesso Commercial Units until late 2016 or early 2017—between two and three years after his purchase of the units. *Id.* at 229:19-230:2. Further, Plaintiff did not personally communicate with HOA Defendants at all prior to the consummation of the transaction. *Id.* at 125: 23-25, 127: 15-19.

Plaintiff testified that prior to his purchase in 2014, he was not specifically aware of the Adesso Master Deed or other recorded documents governing the Regime and Association. *Id.* at 27:21-28:1-9, 22-25; 29:1-3. However, Plaintiff did testify that his agent hired to represent him in connection with the transaction may have reviewed the Master Deed prior to the transaction. *Id.* at 28:12-21.

Regardless, it is immaterial whether Plaintiff actually knew about the Adesso Master Deed, its amendments, and any other recorded Adesso governing documents because South Carolina law charges Plaintiff with constructive notice under these facts. “Constructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts. Therefore, this person is presumed to have actual knowledge of the

undisclosed facts.” *Spence v. Spence*, 368 S.C. 106, 119, 628 S.E.2d 869, 876 (2006) (citing *Strother v. Lexington County Recreation Com’n*, 332 S.C. 54, 64 n.6, 504 S.E.2d 117, 122 n. 6 (1998)).

Moreover, “constructive or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world.” *Id.* As previously discussed, the Adesso Master Deed was recorded on January 14, 2008 in the Office of the Register of Deeds for Richland County, in Book 1392 at Page 855. The January 2008 Amendment to the Adesso PUD, which is also a public record, was submitted to the City of Columbia Zoning Department and approved in 2008. Both documents control the allocation of Commercial Parking Spaces at the Adesso. Additionally, the Fourth Amendment to the Adesso Master Deed was recorded on April 22, 2013 in the Richland County Register of Deeds Office, in Book 1854 at Page 818. Accordingly, the Master Deed, 2008 PUD Amendment, and Fourth Amendment to the Master Deed were all of matters of public record at the time Plaintiff purchased the Commercial Units in December, 2014.

Moreover, Plaintiff testified that he understood the Fourth Amendment’s allocation of Commercial Parking Spaces to violate the Master Deed, Ex. 8 at 62:10-63:15, and that he was also able to determine the allocation of spaces at the Adesso violated the 2008 PUD Amendment. *Id.* at 70:16-71:3. By late 2014, Plaintiff had at least constructive knowledge of the existence of the three preceding public records. The recording of a document alerts all future grantees of the rights of the recorder because the law assumes the grantee will search the index and discover the interest or claim. *Spence*, 628 S.E.2d 869 at 876 (citing *Epps v. McCallum Realty Co.*, 139 S.C. 481, 499 138 S.E. 297, 303 (1927) (“recording amounts to notice, whether known or unknown, because the means of information are at hand.”)). Similarly, had Plaintiff or his agent exercised reasonable

diligence in connection with the Commercial Units purchase, they would have examined the publicly-available Adesso PUD documents—including the 2008 PUD Amendment—and would have been able to determine the Fourth Amendment’s allocation of Commercial Parking Spaces violated the zoning requirements of the Adesso PUD.

In addition to the public records providing Plaintiff at least constructive notice of his claims, Plaintiff admitted he had actual knowledge in early 2015 of parking-related issues raised by both Holder and the Marines. Ex. 8 at 88: 10-89:17; 90:12-19; 91:5-92:7. Had Plaintiff further investigated these issues, he would have discovered his Commercial Units did not have all the parking spaces to which they were entitled under the Master Deed or the Adesso PUD. Therefore, as early as December, 2014—when Plaintiff purchased the Commercial Units—and as late as early 2015, there was sufficient information, of public record and otherwise, relating to the then-existing improper allocation of Adesso Commercial Parking Spaces to put a person of common knowledge and experience, in the exercise of reasonable diligence, on notice of the existence of Plaintiff’s parking-related claims. As such, Plaintiff’s claims accrued by early 2015 at the latest, the date by which Plaintiff would have discovered his claims. Despite this, Plaintiff took no action to investigate the parking issues, or to even visit the Adesso, until 2017.

Pursuant to S.C. Code Ann. § 15-3-530(1), Plaintiff was required to bring an action to enforce his parking-related claims by 2018 at the latest. Plaintiff did not file this action until February 14, 2019. Therefore, as they relate to the allocation of Commercial Parking Spaces at the Adesso, Plaintiff’s claims are barred by the applicable statute of limitations. HOA Defendants are entitled to judgment as a matter of law on this ground, and the Court should dismiss Plaintiff’s claims with prejudice.

II. The current allocation of Commercial Parking Spaces at the Adesso complies with the Master Deed, the Adesso PUD Documents, and applicable City of Columbia Zoning Ordinances.

The Court should also dismiss with prejudice Plaintiff's claims for Declaratory and Injunctive relief, as they relate to Plaintiff's parking claims, because there is no genuine issue of material fact that the number of parking spaces in and around the Adesso available for the Commercial Units' use and/or in their possession has complied with the requirements of the Master Deed, the Adesso PUD Documents, and applicable City of Columbia Zoning Ordinances since 2018. The South Carolina Declaratory Judgment Act provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) (citing S.C.Code Ann. § 15-53-20).

To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy. *Id.* A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character. *Id.* Moreover, "[a] declaratory judgment should not address moot or abstract matters." *Sunset Cay, LLC*, 593 S.E.2d 462 at 466 (citing *Waller v. Waller*, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951)).

Plaintiff seeks a declaratory judgment decreeing he is "entitled to have the number of parking spaces as required by the City of Columbia Planning and Zoning Department ordinances applicable to the exclusive use of the commercial units in the Adesso." Ex. 2 at ¶ 59. However, the parking-related matters underpinning Plaintiff's declaratory judgment claim are moot. There is no genuine issue of material fact that Plaintiff's Commercial Units have the requisite number of parking spaces to which they are entitled under the Adesso PUD and applicable City of Columbia zoning ordinances. In June, 2018, Defendants changed the signage for, or otherwise restricted

access to, 21 parking spaces within the Adesso, to limit the spaces designated for the use of the Commercial Units to “retail use only,” Ex. 7 at 99: 16-19; 104: 2-20, to bring the allocation of Commercial Parking Spaces into compliance with Section V of the Master Deed.

Moreover, based upon the availability of sufficient additional on-street parking within 400 feet of the Adesso to serve the Commercial Units, the City of Columbia Zoning Administrator has made a final determination that no known zoning violations relating to parking exist at the Adesso. *Id.* at 99: 20-101: 21; 103: 9-104: 25; Pltf.’s Ex. 2 to Dep. of Rachel Lynn Bailey. Therefore, with regard to Plaintiff’s parking-related claims, Plaintiff has failed to present a justiciable controversy, and the Court should enter judgment for HOA Defendants and dismiss Plaintiff’s Declaratory Judgment claim with prejudice.

Similarly, Plaintiff seeks a permanent injunction “requiring Defendants to take action to allocate and designate the correct number of parking spaces for the exclusive use of the commercial units.” Ex. 2 at ¶ 43. However, the facts and circumstances of this case do not warrant the grant of a permanent injunction. “The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction.” *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) (citing *Calcutt v. Calcutt*, 282 S.C. 565, 320 S.E.2d 55 (Ct.App.1984)). The remedy of an injunction is a drastic one and ought to be applied with caution. *Id.* (citing *Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E.2d 420 (1950)). Moreover, “[i]n deciding whether to grant an injunction, the court must balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant.” *Id.*

Here, Plaintiff would not benefit from the grant of an injunction in his favor. As previously established, Defendants took the action Plaintiff desires in June, 2018, such that Plaintiff’s Commercial Units have been allocated the correct number of parking spaces pursuant to the Adesso Master Deed, the Adesso PUD documents, and applicable City of Columbia zoning

ordinances. Accordingly, because Plaintiff has already obtained the relief he seeks with regard to the allocation of Commercial Parking Spaces at the Adesso, the Court should enter judgment for Defendants and dismiss with prejudice Plaintiff's claim for injunctive relief.

III. The assessments charged to Plaintiff's Commercial Units comply with the requirements set forth by the Adesso Master Deed.

HOA Defendants are entitled to judgment in their favor regarding Plaintiff's assessment-related claims because the costs, expenses, and budget items assessed annually to Plaintiff's Commercial Units comply with the Master Deed's requirements for calculating such assessments. Specifically, the Master Deed states:

"[S]eparate budgets for the Commercial Units and Residential Units shall be developed annually and no costs, expenses and budget items specifically attributed to Residential Units shall be included in the budget for Commercial Units and vice versa; likewise, costs, expenses, and budget items which affect Residential and Commercial units shall be appropriately allocated in relation to the use by the Owners of such Units..."

Section V(A)(3) of the Master Deed sets forth examples of Limited Common Elements benefitting both Commercial and Residential Units. Such Limited Common elements include, but are not limited to: (1) "Sidewalks, Plantings, and Lighting along Main and Blossom and all appurtenances thereof;" (2) "Trash Chute;" (3) "Trash Compactor;" (4) "Service Elevator;" (5) "Loading Dock and all appurtenances thereof;" (6) Exterior security cameras and all appurtenances thereof;" and (7) "Roof." Ex. 5 at ¶ 14. Additionally, Section V(B) of the Master Deed sets forth examples of General Common Elements benefitting the Adesso as a whole. *Id.* at ¶ 16.

The above list of examples set forth in the Master Deed is not exhaustive. Any budget items for Adesso Common Elements, whether Limited or General, which affect both Residential and Commercial Units are properly chargeable to the owner of the Commercial Units, in proportion to his or her use of such Common Elements. *Id.* at ¶ 17. Pursuant to the Affidavit of C. Michael Munson ("Munson"), a witness with 35 years of property management experience,

Plaintiff's share of each cost, expense, or budget item assessed against his Commercial Units for the years 2018-2020 was the result of the proper allocation of such items between the Adesso Commercial and Residential units pursuant to the Master Deed. *Id.* at ¶ 25.

Moreover, Munson states: "[E]ach budget item, cost, or expense contained in the 2018, 2019, and 2020 Budgets, for which there is a charge to the Plaintiff's Commercial Units ('Retail 1 & 2'), is not specifically attributable to the Adesso Residential Units, and is therefore, properly includable in Plaintiff's annual assessment amount." *Id.* at ¶ 26. To date, Plaintiff has relied merely on the allegations in his pleadings, non-specific, hearsay conversations with Commercial Unit tenants, and personal speculation to support his claims regarding the impropriety of assessments charged to his Commercial Units.

Accordingly, Plaintiff has failed to set forth specific facts demonstrating a genuine issue of material fact regarding the subject assessments. Defendants are entitled to judgment as a matter of law that: (1) the assessments charged to Plaintiff's Commercial Units comply with the applicable requirements of the Adesso Master Deed; (2) HOA Defendants have not breached the Master Deed; and (3) HOA Defendants have not breached any duties owed to Plaintiff with regard to the calculation or collection of assessments against his Commercial Units. Therefore, the Court should dismiss Plaintiff's claims, as they relate to assessments against the Commercial Units, with prejudice.

IV. Plaintiff's claims for Negligent Misrepresentation and Constructive Fraud fail because HOA Defendants did not make false representations to Plaintiff in connection with Plaintiff's purchase of the Adesso commercial units.

HOA Defendants are entitled to judgment as a matter of law regarding Plaintiff's claims for Negligent Misrepresentation and Constructive Fraud because there is no genuine issue of material fact that HOA Defendants made no false representations to Plaintiff in connection with his 2014 purchase of the Adesso Commercial Units. "To establish liability for negligent

misrepresentation, the plaintiff must show by a preponderance of the evidence,” among other elements, that “the defendant made a false representation to the plaintiff.” *Turner v. Milliman*, 392 S.C. 116, 123, 708 S.E.2d 766, 769 (2011) (listing the 6 required elements of the tort of Negligent Misrepresentation). Similarly, “[t]o establish constructive fraud, all elements of actual fraud except the element of intent must be established.” *Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 333, 574 S.E.2d 502, 509 (Ct. App. 2002) (citing *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct.App.1993)). An essential element of the tort of Constructive Fraud is a false representation. *See id.* at 334, 431 S.E.2d at 509 (citing *Ardis* at 515, 431 S.E.2d at 269) (setting forth the 9 elements required to establish a claim for actual fraud).

Here, HOA Defendants made no representations to Plaintiff in connection with his purchase of the Adesso Commercial Units. Plaintiff has admitted he did not have any communications with HOA Defendants at all prior to the transaction. Ex. 8 at 125: 17-25, 127: 15-19. Moreover, Plaintiff’s hired professional advisor also did not communicate with HOA Defendants with regard to the transaction. *Id.* at 126: 3-5; 127: 2-5, 7-11; 129: 17-25. As discussed above, Plaintiff purchased the Commercial Units from Ford Elliott, *Id.* at 169:19, not HOA Defendants. With regard to the allocation of Commercial Parking Spaces, Plaintiff could only testify that he “would assume [Defendants] [were] in compliance [with applicable Columbia Zoning ordinances]...” because “[Plaintiff] can’t walk around and ask people questions.” *Id.* at 128: 18-19, 24-25. However, Plaintiff and/or his agent never communicated with HOA Defendants to confirm Plaintiff’s assumptions. Therefore, Plaintiff has failed to establish that HOA Defendants made any representations—much less false representations—to him in connection with his purchase of the Adesso Commercial Units, and HOA Defendants are entitled to judgment in their favor, as a matter of law, with regard to Plaintiff’s Negligent Misrepresentation and Constructive Fraud Claims.

V. Plaintiff has abandoned his South Carolina Unfair Trade Practices Act claim as to HOA Defendants.

Finally, the Court should dismiss with prejudice Plaintiff's South Carolina Unfair Trade Practices Act ("SCUTPA") claim, as to HOA Defendants, because there is no genuine issue of material fact that Plaintiff has abandoned this claim. Plaintiff's Answer to Interrogatory Number 12, contained in Defendants' First Set of Interrogatories to Plaintiff—attached hereto as Exhibit 9—evidences Plaintiff's desire to withdraw his SCUTPA claim as to HOA Defendants. Plaintiff further confirmed his intent to withdraw the claim during his deposition. Ex. 8 at 232:22-233:15. Therefore, the Court should dismiss Plaintiff's SCUTPA claim, as to HOA Defendants, with prejudice.

CONCLUSION

Based on the foregoing, as well as any oral argument made at a future hearing on HOA Defendants' Motion for Summary Judgment, HOA Defendants are entitled to judgment in their favor, as a matter of law, with regard to all claims asserted against them in this action by Plaintiff. HOA Defendants seek an Order granting their Motion for Summary Judgment and dismissing all of Plaintiff's claims with prejudice. HOA Defendants further seek any additional relief this Court deems just and proper, including an award of attorney's fees and costs, pursuant to Rule 54, SCRPC, the *South Carolina Frivolous Civil Proceedings Sanctions Act*, S.C. Code Ann. § 15-36-10, *et seq.*, and any other applicable statutory authority.

[SIGNATURE PAGE TO FOLLOW]

This 5th day of January, 2021.

Respectfully submitted,

COPELAND, STAIR, KINGMA & LOVELL, LLP

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Defendants.

**ORDER GRANTING ADESSO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Upon consideration of the pleadings, evidence, written briefs, and arguments of counsel, the Adesso Defendants' Motion is hereby GRANTED. In support of this Order, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Defendant Adesso Homeowners' Association ("Association") is a nonprofit corporation organized and existing under the laws of the State of South Carolina, with its principal place of business being in Richland County.

2. Defendant Adesso Horizontal Property Regime ("Regime") is a horizontal property regime organized pursuant to the South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-10, *et seq.*

3. Defendant Holder Properties, Inc. ("Holder") is a corporation organized and existing under the laws of the State of Georgia and is authorized to conduct business in South Carolina.

4. Defendant Adesso/Columbia, LLC is a limited liability company organized and existing under the laws of the State of Georgia and is authorized to conduct business in South Carolina.

5. Defendant John R. Holder is a citizen and resident of the State of Georgia, and at times relevant hereto, transacted business in Richland County as the sole member of Adesso/Columbia, LLC.

6. The Adesso is a mixed-use development comprising 110 upscale residential condominium units, ground floor commercial units, and associated common and limited common elements.

7. All units, common elements, and limited common elements are housed within one building located at 601 Main Street, Columbia, SC 29201.

8. Holder developed the Adesso. On January 14, 2008, Defendant Adesso/Columbia, LLC established the Regime by recording the Adesso Master Deed in the Office of the Register of Deeds for Richland County, in Book 1392 at Page 855 ("Master Deed"). The Master Deed is

attached as Exhibit 3 to the Adesso Defendants' Memorandum in Support of their Motion for Summary Judgment and is incorporated, in full, in this Order by reference.

9. The Master Deed also created the Association to, among other things, manage the Regime's affairs, prescribe rules for the use of the Regime's General Common Elements, and to "maintain[], repair[], and replace[] all of the General and Limited Common Elements...".

10. Each owner of a unit at the Adesso is a member of the Regime and the Association, and he or she is subject to the Master Deed, Bylaws, and other governing documents of the Association.

11. The Association, acting through its Board of Directors ("Board"), possesses the authority "[t]o make, levy, and collect assessments against members and members' Units to defray the cost of the common areas and facilities of the Regime, and to use the proceeds of said assessments in the exercise of the powers and duties granted unto the Association."

12. To calculate annual assessments to unit owners, the Master Deed generally requires that each unit owner be assessed an amount for his or her share of the Association's expenses equal to the share of the interest his or her unit bears in relation to the entire undivided interest of the Regime.

13. The Plaintiff's Commercial Units at issue in this case ("Commercial Units") comprise a total 8.54279% interest in the total undivided interest of the Regime.

14. To develop annual assessment budgets for the Adesso, the Master Deed also requires the allocation of residential and commercial assessments as follows:

"[S]eparate budgets for the Commercial Units and Residential Units shall be developed annually and no costs, expenses and budget items specifically attributed to Residential Units shall be included in the budget for Commercial Units and vice versa; likewise, costs, expenses, and budget items which affect Residential and Commercial units shall be appropriately allocated in relation to the use by the Owners of such Units..."

15. The Master Deed identifies certain Limited Common Elements benefitting either Residential and Commercial Units, or solely Commercial Units.

16. Section V(A)(3) of the Master Deed sets forth examples of Limited Common Elements benefitting both Commercial and Residential Units. Such Limited Common elements include, but are not limited to: (1) “Sidewalks, Plantings, and Lighting along Main and Blossom and all appurtenances thereof;” (2) “Trash Chute;” (3) “Trash Compactor;” (4) “Service Elevator;” (5) “Loading Dock and all appurtenances thereof;” (6) Exterior security cameras and all appurtenances thereof;” and (7) “Roof.” Additionally, Section V(B) of the Master Deed sets forth examples of General Common Elements benefitting the Adesso as a whole.

17. Further, any budget items for Adesso Common Elements, whether Limited or General, which affect both Residential and Commercial Units are properly chargeable to the owner of the Commercial Units, in proportion to his or her use of such Common Elements.

18. The Adesso budget items for which Plaintiff’s Commercial units have been assessed are properly chargeable to Plaintiff’s units, and the Adesso Defendants have complied with the terms of the Master Deed in doing so.

19. Pursuant to § V(C)(5) of the Master Deed, “Retail Parking Spaces as identified in Exhibit ‘C’ [to the Master Deed] shall be Limited Common Elements, limited to the use of the Commercial Unit it/they serve. Such spaces shall be marked with identification information designating the limited use of such...[and]...may not be reassigned and shall remain a Limited Common Element relating to the Commercial Unit.”

20. The Fourth Amendment to Master Deed of Adesso Horizontal Property Regime (“Fourth Amendment”) was recorded on April 22, 2013 in the Richland County

Register of Deeds Office, in Book 1854 at Page 818. The Fourth Amendment is attached as Exhibit 6 to the Adesso Defendants' Memorandum in Support of their Motion for Summary Judgment and is incorporated in this Order by reference.

21. The Fourth Amendment contravened § V(C)(5) of the Master Deed by reassigning the Retail Parking Spaces—specifically spaces numbered 001-017, 108, 157, and 220-221—either to the use of both Commercial and Residential guests, or as leased spaces to the United States Marine Corps and one Adesso resident.

22. The reassignment of the Retail Parking Spaces also violated the commercial parking requirements established by the governing zoning ordinance, the Adesso Planned Unit Development ("PUD"), as amended by letter of Holder Properties, Inc. dated January 24, 2008 ("January 2008 Amendment"). The January 2008 Amendment is attached as Plaintiff's Exhibit 5 to the Deposition of Rachel Lynn Bailey, City of Columbia Zoning Administrator, and is incorporated in this Order by reference.

23. Per the January 2008 Amendment, the Adesso Commercial Units were required to have a total of at least twenty-six (26) dedicated parking spaces, with nineteen (19) restricted access spaces within the building itself, and seven (7) spaces located along Main and Blossom Streets. The January 2008 Amendment also sets forth a formula to calculate the required number of parking spaces based upon future increases or decreases in the Commercial Units' square footage.

24. The Adesso PUD, as amended, rather than general City of Columbia zoning ordinances, controls the parking requirements for the Adesso.

25. Plaintiff purchased the Adesso Commercial Units on December 5, 2014. He did not purchase the properties from the Adesso Defendants or Holder Defendants; rather, Plaintiff purchased them from Ford Elliott, the current owner at the time.

26. By 2014, Plaintiff—who is a well-educated, board-certified Psychiatrist—possessed significant prior experience with commercial real estate acquisitions, having previously acquired four (4) commercial properties—three of which were acquired for investment purposes.

27. Despite his prior experience, Plaintiff did not personally inspect the Commercial Properties or review any of the recorded documents relating to the Adesso development prior to his purchase. Further, Plaintiff did not actually visit the Adesso Commercial Units until late 2016 or early 2017—between two and three years after his purchase of the units.

28. Neither Plaintiff nor his hired professional communicated with the Adesso Defendants with regard to Plaintiff's acquisition of the Commercial Units, and the Adesso Defendants made no statements or other representations to Plaintiff in connection therewith.

29. On March 4, 2015, Plaintiff was notified by a representative of Holder—which provided property management services to the Association until May, 2016—that a lottery would be held among the Adesso owners to determine leasing rights for three of the Adesso Commercial Parking Spaces. Plaintiff was informed that such rights would be sold to the highest bidder.

30. The Adesso Master Deed specifically prohibits the leasing of the Commercial Parking Spaces in this manner.

31. Around March of 2015, one of Plaintiff's tenants, the United States Marine Corps ("Marines"), notified Plaintiff of insufficient parking and of their intent to vacate their leased recruiting center space in one of Plaintiff's Commercial Units if Plaintiff was not able to secure parking for them.

32. Despite being made aware of the Marines' complaints regarding parking, as well as being required to lease back Commercial Parking Spaces almost immediately after he took ownership of the Commercial Units, Plaintiff took no action to investigate the parking requirements of the Adesso Master Deed or the Adesso PUD until 2017.

33. Further, Plaintiff has paid assessments to the Association since the date he purchased the commercial units, and he took no action to investigate any potential claims relating to the charging of assessments until 2017.

34. In June, 2018, the Adesso Defendants changed the signage for, or otherwise restricted access to, 21 parking spaces within the Adesso, to limit the spaces designated for the use of the Commercial Units to "retail use only," to bring the allocation of Commercial Parking Spaces into compliance with Section V of the Master Deed.

35. In addition to the 21 parking spaces within the Adesso, there is sufficient on-street parking within 400 feet of the Adesso to serve Plaintiff's Commercial Units, such that the parking spaces available for the use of Plaintiff's units also comply with the Adesso PUD, which is the applicable City of Columbia Zoning Ordinance.

36. Plaintiff took no action to investigate his potential claims until 2017.

37. Plaintiff did not file this action until February 14, 2019.

38. Plaintiff has agreed to withdraw his South Carolina Unfair Trade Practices (SCUTP) claim as to the Adesso Defendants.

Based upon the foregoing, the undersigned finds and concludes as follows:

CONCLUSIONS OF LAW

39. This Court has proper jurisdiction over the parties to this action and the claims herein asserted.

40. Venue is proper in Richland County.

41. The Adesso Defendants have not breached the Master Deed.

42. The Adesso Defendants have complied with the provisions of the Adesso Master Deed in charging assessments to Plaintiff's Commercial Units.

43. The allocation of Adesso Retail Parking Spaces limited to the use of Plaintiff's Commercial Units complies with the Master Deed.

44. Further, the allocation of Adesso Retail Parking Spaces available for the use of Plaintiff's Commercial Units complies with the requirements of the Adesso PUD, which is the controlling City of Columbia Zoning Ordinance.

45. By as early as December, 2014, at the time Plaintiff purchased the Commercial Units, Plaintiff knew or should have known of the existence of his claims regarding the allocation of parking spaces at the Adesso and the charging of assessments. At the time of purchase, information regarding parking-related conditions and charging of assessments, about which Plaintiff complains, were matters of public record.

46. Further, by as late as March, 2015, Plaintiff knew or should have known of his parking-related claims because Plaintiff possessed actual knowledge regarding matters of Commercial parking allocation, raised by both Holder and the Marines, which conflicted with Section V of the Master Deed.

47. Plaintiff's claims, if any, regarding the allocation of parking spaces at the Adesso and the charging of assessments to his Commercial Units accrued as early as December, 2014, and by no later than March, 2015.

48. Pursuant to the discovery rule, as articulated by the Court of Appeals in *Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (S.C. Ct. App. 1998) and the Supreme Court in *Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 443 S.E.2d 537 (1994)), the undersigned finds that a person of common knowledge and experience, through the

exercise of reasonable diligence, would have discovered Plaintiff's parking-related claims and assessment claims by as early as December, 2014, and in any event, no later than March, 2015. Prior to and at the time he purchased the Commercial Units, Plaintiff had ample opportunity to investigate the public record—which would have disclosed the state of Commercial parking allocation at the Adesso and the method by which assessments would be charged to Plaintiff's Commercial Units—had he chosen to do so.

49. A person of common knowledge and experience, through the exercise of reasonable diligence under the facts of this case, would have investigated any matters potentially affecting Plaintiff's Commercial Units prior to purchasing them—including the publicly-available: (1) Adesso Master Deed; (2) amendments to the Master Deed; (4) other Adesso governing documents; and (5) Adesso PUD and other City of Columbia Zoning documents.

50. Plaintiff made no attempts to investigate the matters underlying his claims until 2017, and Plaintiff did not file this action February 14, 2019.

51. The doctrines of equitable estoppel and equitable tolling are inapplicable to this case because Plaintiff has failed to produce sufficient evidence that the Adesso Defendants made any false representations to Plaintiff. Further, Plaintiff knew or had the means to know the truth as to the facts in question by no later than March, 2015, and Plaintiff could not have justifiably relied on representations, if any, made by Defendants.

52. Pursuant to S.C. Code Ann. § 15-3-530, Plaintiff was required to bring his claims for Negligence/Gross Negligence, Breach of Master Deed, Declaratory Judgment, Injunctive Relief, Negligent Misrepresentation, and Constructive Fraud by 2018, or his claims were forever barred.

53. Pursuant to S.C. Code Ann. § 39-5-150, Plaintiff was required to bring an action to enforce his Unfair Trade Practices Act claim by 2018, or his claim was forever barred. Additionally, even if such claim were not time-barred, Plaintiff has withdrawn it as to the Adesso Defendants.

54. Therefore, pursuant to Rule 56, SCRPC, and upon consideration of all the evidence and arguments presented by the parties, the undersigned finds there is no genuine issue of material fact that Plaintiff had at least constructive knowledge of the existence of his potential parking-and-assessment-related claims by no later than March, 2015, and further, that Plaintiff failed to bring an action to enforce his claims by 2018. Therefore, the Adesso Defendants are entitled to judgment as a matter of law that Plaintiff's claims are time-barred by the above statutes of limitations.

55. In addition to the grounds set forth in Paragraph 54, the undersigned also finds there is no genuine issue of material fact that: (1) the allocation of Commercial parking spaces at the Adesso complies with both the Master Deed and the Adesso PUD, which is the applicable City of Columbia Zoning ordinance; and (2) the Adesso Defendants have complied with the terms of the Master Deed in charging assessments to Plaintiff's Commercial Units. Further, because the Commercial parking allocation and charging of assessments comply with the Adesso Master Deed and City of Columbia Zoning requirements, Plaintiff has failed to demonstrate facts and circumstances warranting an injunction in this action. *See Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Therefore, the Adesso Defendants are entitled to judgment as a matter of law regarding Plaintiff's claims for Declaratory Judgment, Injunctive Relief, Breach of Master Deed, and Negligence/Gross Negligence.

Therefore, it is ORDERED, ADJUDGED, AND DECREED that:

A. The Adesso Defendants' Motion for Summary Judgment is hereby GRANTED as to all claims asserted in this action by Plaintiff.

B. This action, and all claims asserted herein against the Adesso Defendants, are hereby **dismissed with prejudice**.

IT IS SO ORDERED.

The Honorable DeAndrea G. Benjamin
Fifth Judicial Circuit

[Signature Page to Follow]

6639372v.1



Richland Common Pleas

Case Caption: Emad Tadros , plaintiff, et al vs Holder Properties Inc , defendant, et al
Case Number: 2019CP4000919
Type: Order/Summary Judgment

So Ordered

s/DeAndrea Gist Benjamin, #2161

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY CIRCUIT COURT

DeAndrea Gist Benjamin, Circuit Court Judge
Case No.: 2019-CP-40-00919

Appellate Case No. 2022-001434

Emad Tadros, as Trustee of the Grace Living Trust dated October 12, 2010, as amended, Appellant,

v.

Holder Properties, Inc., John R. Holder, Individually, ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association, Defendants,

of which

ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association are the Respondents.

Respondents' Motion to Dismiss

Respondents, by and through their undersigned attorneys, move the Court of Appeals for an order of dismissal, pursuant to Rules 207, 208, 240, and 260 of the South Carolina Appellate Court Rules.

Background

Appellant Emad Tadros filed his notice of appeal on October 11, 2022. This Court notified Appellant's counsel on December 7, 2022, that the time to order the transcript had expired, and reminded Appellant of his obligation to copy the Court, the Office of Court Administration, and Respondents' counsel with all correspondence concerning the transcript.

Exhibit 1. In response to the Court of Appeals letter, Appellant’s counsel provided numerous email messages with the circuit court and court reporter trying to track down the transcript, none of which copied opposing counsel. **Exhibit 2.** The Clerk of Court responded on December 19, 2022, directing Appellant to move for relief from the Court or file the initial brief. **Exhibit 3.**

Appellant moved the Court for an extension of time to serve and file the initial brief and designation of matter and, on January 20, 2023, the Court granted the motion and gave Appellant until March 20, 2023, to file and serve the initial brief and designation of matter. **Exhibit 4.** On March 20, 2023, Appellant moved for a second extension to file the initial brief and designation of matter, requesting an additional 60 days and including a communication from the court reporter that did not copy opposing counsel, court administration, or the Court of Appeals. **Exhibit 5.**

On March 29, 2023, the Clerk of Court acknowledged Appellant’s second motion for an extension of time, indicating Appellant had not paid for the transcript. **Exhibit 6.** Again, Appellant was reminded to copy opposing counsel, court administration, and the Court of Appeals on all correspondence with the court reporter. **Exhibit 6.** The time to serve and file the initial brief and designation of matter was held in abeyance pending receipt of the transcript. **Exhibit 6.** Apparently, Appellant submitted proof the following day the transcript was paid for. However, opposing counsel has not been copied on any correspondence with the court reporter, and it is unclear whether the transcript was received.

Argument

Respondents request this Court dismiss the appeal for Appellant’s failure to follow the Appellate Court Rules regarding ordering the transcript and keeping the parties copied on correspondence with the court reporter, under Rule 207. “Whenever it appears that an appellant

or petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court.” Rule 260(a), SCACR. An appeal can be reinstated if the appellant demonstrates good cause for failure to follow the rules. *Id.*

Rule 207 commands an appellant to “contemporaneously furnish all parties, the Office of Court Administration, and the clerk of the appellate court with copies of all correspondence with the court reporter. Rule 207(a)(1), SCACR. The transcript must be delivered within 60 days of the request, but Court Administration is empowered to grant extensions for a total of up to 90 days. Rule 207(a)(2), (3), SCACR. Any further extensions must be by order of the Chief Justice. Rule 207(a)(3), SCACR. If an appellant does not receive the transcript within the allotted time, the appellant must notify the Office of Court Administration, the clerk of the appellate court, and the court reporter in writing. Rule 207(a)(5), SCACR.

The date the appellant receives the transcript is critical for prosecuting the appeal because it triggers Appellant’s 30-day deadline for filing the initial brief and designation of matter. Rule 208(a)(1), SCACR; Rule 209(a), SCACR. If the appellant fails to file and serve the “brief within the time prescribed, the clerk of the appellate court shall sign an order dismissing the appeal.” Rule 208(a)(4). The appeal can be reinstated if the appellant demonstrates good cause under Rule 260. *Id.*

Here, Appellant failed to copy opposing counsel and, at times, court administration and the clerk of the appellate court, on correspondence with the court reporter while ordering the transcript. Pursuant to Rule 260(a), the clerk “shall” issue an order of dismissal.

Respondents understand the clerk’s March 29, 2023 order indicates the timing for filing the initial brief and designation of matter is held in abeyance until the Appellant receives the

transcript. In other words, it appears there is no deadline for the court reporter to provide the transcript. Pursuant to the Appellate Court Rules, the clerk may give the court reporter extensions totaling up to 90 days, but further extensions must be by order of the Chief Justice. Ninety days has come and gone, it is unclear whether Appellant has received the transcript, and the appeal is languishing in the pre-briefing stage. More than 140 days have passed since the clerk of the appellate court issued its order and Appellant paid for the transcript. It is difficult to believe that Appellant has not communicated with the court reporter and has not received the transcript since March 29, 2023. Certainly, Appellant's counsel has not notified the Court it has yet to receive the transcript.

In sum, Appellant has failed to abide by the Appellate Court Rules, and the many reminders by the clerk of the appellate court, to copy Respondents' counsel, court administration, and the clerk of the appellate court on correspondence with the court reporter. This has led to the appeal languishing before briefing can begin, and Respondents' counsel being unaware of the status of the transcript. Under the circumstances, Respondents assert the clerk must dismiss the appeal for failure to follow the Appellate Court Rules. In the alternative, Respondents request the Court order Appellant to demonstrate good cause for the failure to follow the Appellate Court Rules and provide proof or explain whether Appellant has received the transcript. In the event Appellant received the transcript and has not filed the initial brief within 30 days, the appeal should similarly be dismissed under Rules 208 and 260. In the event Appellant has not received the transcript and the Court does not dismiss the appeal, Respondents request the Court order Appellant to prosecute the appeal without the transcript.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

This 18th day of August, 2023.

s/Skyler C. Wilson

DOUGLAS W. MACKELCAN

State Bar No.: 76332

SKYLER C. WILSON

State Bar No.: 102865

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***Attorneys for Respondents Adesso Horizontal
Property Regime, and Adesso Homeowners'
Association***

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
CIRCUIT COURT

DeAndrea Gist Benjamin, Circuit Court Judge
Case No. 2019-CP-40-00919

Appellate Case No. 2022-001434

Emad Tadros, as Trustee of the Grace Living Trust dated October 12, 2010, as
amended.....Appellant,

v.

Holder Properties, Inc., John R. Holder, Individually, ADESSO/Columbia, LLC, ADESSO
Horizontal Property Regime, and ADESSO Homeowners' Association, Defendants,

of which

ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners'
Association ,.....Respondents.

REPLY TO RESPONDENTS' MOTION TO DISMISS

**TO: DOUGLAS W. MACKELCAN, ESQUIRE AND SKYLAR C. WILSON,
ESQUIRE, ATTORNEYS FOR THE RESPONDENTS AND TO THE RESONDENTS
NAMED ABOVE:**

The Appellant Emad Tadros, as Trustee of the Grace Living Trust dated October 12,
2010, as amended, herein files his Reply to Respondents' Motion to Dismiss and would show as
follows:

BACKGROUND

Appellant filed his appeal arising out of the Court Granting Respondents' Motion for Summary Judgment heard on January 7, 2021. The Court took the matter under advisement and issued a Form 4 Order Granting Respondents' Motion for Summary Judgment (the "Order"). Appellant filed a Motion to Reconsider the Order. Appellant's Motion to Reconsider the Order was denied by Form 4 Order filed September 19, 2022. Appellant file his Notice of Appeal on October 11, 2022, and ordered a copy of the transcript of the hearing from the January 7, 2021 Motion for Summary Judgment hearing.

The Clerk of Court for the South Carolina Court of Appeals notified Appellant's counsel on December 7, 2022, that the time for ordering the transcript had expired. Appellant and the staff at the Goodwyn Law Firm spent numerous hours and sent multiple emails to the underlying court, the clerk for the South Carolina Court of Appeals attempting to locate the court reporter and obtain a copy of the transcript from the January 7, 2021, hearing. Respondent's Exhibit 2 to its Motion to Dismiss is replete with the numerous attempts Appellant and the Goodwyn Law Firm's staff made with to obtain a copy of the transcript from the January 7, 2021.

In addition to the alleged missing transcript and other problems, including audio difficulties with the transcript, Attorney Charles G. Blackburn began work with the Goodwyn Law Firm in May 2022. When the court reporter had been identified, the Court reporter would not produce a copy of the transcript to Mr. Blackburn until Mr. Blackburn received an Order from the underlying Court that Mr. Blackburn was working for the Goodwyn Law Firm, LLC. The Goodwyn Law Firm, LLC received an Order filed January 5, 2023, allowing the Goodwyn Law Firm, LLC and attorney T. Jeff Goodwyn to receive a copy of the transcript from January 7, 2021.

The court reporter then informed Mr. Blackburn by email of January 6, 2023, that the courts in January 2021, were experiencing technical difficulties and that she would do her best to prepare a transcript with no or few audibles and that it would take a “few weeks” to prepare the transcript.

A timeline of events outlining the significant issues Appellant encountered during his pursuit of the transcript is outlined below. The chronology of the efforts made by Appellant’s counsel to obtain a copy of the transcript, illustrates the significant problems encountered by the Appellant during its pursuit of a copy of the transcript.

1	10-11-22	Transcript Request Form (the day the appeal was filed)
2	12-7-22	Letter from Court of Appeals notifying Appellant the time for ordering the transcript expired
3	12-12-23	Appellant’s letter to Court of Appeals saying transcript cannot be found
4	12-19-22	Letter from Court of Appeals saying file a Motion to obtain transcript
5	12-28-22	Letter to Judge Benjamin requesting Order allowing copy of transcript be produced to the Goodwyn Law Firm
6	1-4-23	Our letter to Judge Benjamin with Proposed Order for Transcript
7	1-5-23	Filed Order allowing transcript be produced to the Goodwyn Law Firm
8	1-6-23	Email from Court Reporter regarding difficulties with transcribing the transcript
9	1-18-23	Appellant’s Motion for Extension of Time to file Initial Brief
10	1-20-23	Order Extending Filing Time to March 20, 2023
11	1-25-23	Letter to Respondent from Court of Appeals regarding deficiency in Order of Substitution for Respondent attorney Michael Masciale

12	2-2-23	Order substituting attorney Michael Masciale
13	3-20-23	Appellant's Second Motion for Extension of Time to File Initial Brief
14	3-29-23	Order Holding in Abeyance time to serve Initial Brief
15	8-11-23	Email from Court Reporter to attorney Blackburn with attached transcript from January 7, 2021 hearing with notation that the court reporter did the best she could with the poor quality of the Webex audio as there was great interference
16	8-18-23	Respondent filed Motion to Dismiss
17	8-18-23	Email from attorney Blackburn to Respondents notifying them of receipt of the transcript with the numerous inaudibles and "she did the best she could considering the poor quality of the Webex audio."

The emails from the court reporter are contained as exhibits in the Appellant's Motion for Extension to file Initial Brief and Designation of Matter filed with this Court on January 18, 2023, that are reiterated in the August 11, 2023, email from the Court Reporter to attorney Blackburn. Appellant has finally obtained a poor-quality transcript from the Court Reporter that covered the January 7, 2021, hearing to prepare Appellant's initial brief.

Argument

Respondents base its Motion to Dismiss on essentially two grounds: 1) the time it has taken Appellant to obtain a copy of the hearing from January , 2021; and 2) Appellant not copying co-counsel with communications between the Appellant and the Court Reporter.

The Respondents move for an order of dismissal, pursuant toe Rules 207, 208, 240 and 260 of the South Carolina Appellate Court Rules.

Good cause is the standard that determines if an appeal can be reinstated. "The good cause standard exists to ensure the interests of justice are protected even when a party missteps,

so a harmless procedural foot fault does not spring a trap door that mindlessly jettisons innocent parties out of court, regardless of the circumstances.” *Jordan v. Hartford Fin. Grp., Inc.*, 453 S.C. 501, 868 S.E.2d 400 (S.C. App. 2002).

To jettison Appellant out of court over the inability to obtain a copy of a transcript despite multiple efforts and time spent to obtain the transcript is unconscionable harmless error. Goodwyn Law Firm did everything in its power to obtain a copy of the transcript of the transcript so that this appeal would not be jettisoned out of court.

Furthermore, the Respondents’ argument that Appellant did not copy the Court, the Office of Court Administration, and Respondents’ counsel with **all** correspondence concerning the transcript is not accurate. Counsel for Appellant was in constant communication with the court reporter attempting to obtain a copy of the transcript. Although Appellant did not copy **all** communications with the court reporter to the above-mentioned parties and entities, counsel for Appellant did make sure all said parties and entities were kept apprised of the status of the search for the transcript.

“Where there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief.” *Columbia Pools, Inc. v. Galvin*, 228 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986). Appellant made a good faith attempt to contact counsel for respondent and the court concerning the status of the transcript. To grant Respondents’ Motion to Dismiss over technicalities’ when prejudice is absent from the scene is prejudicial to Appellant, especially at this stage of the Appeal. “The practice of law is challenging enough without having to endure the overbearing enforcement of technicalities when prejudice is absent from the scene.” *Supra Jordan*.

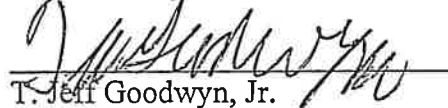
The touchstone here is good cause, a standard designed to excuse honest, harmless human mistakes so a case may be judged on its merits rather than its missteps” Id *Jordan*; See *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 348 S.E. 2d 617 (Ct. App. 1986).

Conclusion

For good cause, as referenced herein, including the lack of prejudice and harmless human mistakes similar to *Jordan*, the Respondents’ Motion to Dismiss must be denied so this appeal may be heard on the merits.

Respectfully submitted,

The Goodwyn Law Firm, LLC



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Charles G. Blackburn

Goodwyn Law Firm, LLC

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JGoodwyn@Goodwynlaw.com

Attorneys for Appellate

Columbia, South Carolina
August 27, 2023

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
CIRCUIT COURT

DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2019-CP-40-00919

Emad Tadros, M.D.,.....Appellant,

v.

Holder Properties, Inc.,.....Respondents.

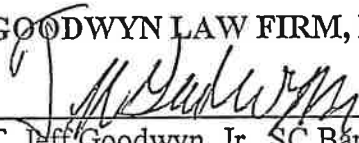
PROOF OF SERVICE

I certify that I have served a copy of Appellant's Reply to Respondents' Motion to Dismiss on Douglas W. Mackelcan, Esquire, and Skylar C. Wilson, Esquire, counselors for the Respondents at the address below via email and by depositing a copy of same in the United States Mail, postage prepaid, on August 28, 2023.

Douglas W. Mackelcan, Esquire
Skylar C. Wilson, Esquire
Copeland, Stair, Valz & Lovell, LLP
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Charleston, SC 29401
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(Signature on next page)

GOODWYN LAW FIRM, LLC



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Attorneys for Appellant

Columbia, South Carolina
August 28, 2023

The South Carolina Court of Appeals

Emad Tadros, M.D. as Trustee of the Grace Living Trust
dated October 12, 2010, as amended, Appellant

v.

Holder Properties, Inc., John R. Holder, Individually,
ADESSO/Columbia, LLC, ADESSO Horizontal Property
Regime, and ADESSO Homeowners' Association,
Defendants,

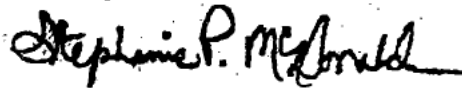
of which

ADESSO/Columbia, LLC, ADESSO Horizontal Property
Regime, and ADESSO Homeowners' Association are the
Respondents.

Appellate Case No. 2022-001434

ORDER

On August 18, 2023, Respondents filed a motion to dismiss because Appellant failed to comply with Rule 207(a)(1), SCACR, by not contemporaneously furnishing all parties, the Office of Court Administration, and the clerk of the Court of Appeals with copies of all correspondence with the court reporter. Appellant filed a return, and Respondents filed a reply. After careful consideration, we deny the motion to dismiss. In light of Appellant having received the transcript, the timelines are no longer being held in abeyance. We order Appellant to file the initial brief and designation of matter within thirty days of the date of this order.



FOR THE COURT

Columbia, South Carolina

FILED
Sep 11 2023

cc:

Thomas Jefferson Goodwyn, Jr., Esquire

Charles Grant Blackburn, Esquire

Douglas Walker MacKelcan, III, Esquire

Skyler Cole Wilson, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Emad Tadros, M.D. as Trustee of the Grace
Living Trust dated October 2, 2010, as amended

Plaintiff,

vs.

Holder Properties, Inc., John R. Holder,
Individually, ADESSO/Columbia, LLC,
ADESSO Horizontal Property Regime and
ADESSO Homeowner's Association

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2019-CP-40-00919

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO HOLDER
DEFENDANTS' AND
DEFENDANTS ADESSO
HORIZONTAL PROPERTY REGIME
AND ADESSO HOMEOWNER'S
ASSOCIATION'S MOTIONS FOR
SUMMARY JUDGMENT**

The Plaintiff Emad Tadros, M.D. as Trustee of the Grace Living Trust dated October 12, 2010, as amended (hereinafter "Plaintiff"), by and through his undersigned attorney, respectfully submits this Memorandum in Opposition to the motions for summary judgment filed by the Holder Defendants and the ADESSO Horizontal Property Regime and ADESSO Homeowner's Association. For the reasons stated within this memorandum, the Holder Defendants' and the ADESSO Horizontal Property Regime and ADESSO Homeowner's Association's Motions for Summary Judgment should be denied.

STATEMENT OF FACTS

Plaintiff owns real property located at 601 S. Main Street, Suites A, B, C and D, Columbia, South Carolina. Suites A, B, C and D (the "units") are located in the ADESSO Horizontal Property Regime (the "ADESSO"). Plaintiff purchased the units on December 5, 2014.

The ADESSO was created by the recording of a Master Deed (the “Master Deed”) on January 14, 2008 with the Richland County, South Carolina Register of Deeds. The Master Deed was filed in the manner provided for by the South Carolina Horizontal Property Act, as amended, S.C. Code Ann. §27-31-10 et seq. (1976).

The Master Deed identified ADESSO/Columbia, LLC as the Owner and Holder Properties, Inc. as the Developer of the ADESSO.

The ADESSO consists of one hundred and ten (110) residential units in five (5) stories with ground level commercial units consisting of approximately eight thousand one hundred thirty-nine (8,139) square feet.

The ADESSO is built over a ground level parking area for residential unit owners and the owner of the commercial units.

Each residential unit owner and commercial owner is subject to the ADESSO governing documents including the recorded Master Deed and By-Laws governing the ADESSO.

The Master Deed includes an arbitration provision on the first page of the Master Deed:

**“THIS INSTRUMENT CONTAINS AN ARBITRATION PROVISION
PURSUANT TO THE SOUTH CAROLINA ARBITRATION ACT.”**

Furthermore, **Article XXXIV** mandates the **“MASTER DEED BINDING UPON GRANTOR, ITS SUCCESSOR AND ASSIGNS, AND SUBSEQUENT CO-OWNER:”**

“The restrictions and burdens imposed by the covenants of this Master Deed are intended to and shall constitute covenants running with the land and shall constitute an equitable servitude upon each Unit and its appurtenant undivided interest in General and Limited Common Elements. This Master Deed and all easements reserved herein shall be binding upon Grantor, its successors and

assigns, and upon all parties who may subsequently become Co-Owners of Units in the Regime and their respective heirs, legal representative, and successors and assigns.”

Article XXXVI of the Master Deed under “MISCELLANEOUS:”

D. BY ACCEPTANCE OF A DEED TO ANY UNIT OR OTHER PROPERTY HEREUNDER OWNER(S) HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY HEREBY AGREE, THAT

- **(D)(1): NEITHER OWNER NOR GRANTOR ANY ASSIGNEE, SUCCESSOR, HEIR, OR LEGAL REPRESENTATIVE OF OWNER OR GRANTOR, SHALL SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, COUNTERCLAIM, OR ANY OTHER LITIGATION PROCEDURE ARISING FROM OR BASED UPON THE MATTERS SET FORTH HEREUNDER, OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE PARTIES THERETO;**
- **(D)(2): NEITHER OWNER NOR GRANTOR WILL SEEK TO CONSOLIDATE ANY SUCH ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL HAS NOT BEEN OR CANNOT BE WAIVED;**
- **(D)(3): NEITHER OWNER NOR GRANTOR HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS SECTION WILL NOT BE FULLY ENFORCED IN ALL INSTANCES;**
- **(D)(4): THIS PROVISION IS A MATERIAL INDUCEMENT FOR GRANTOR TO MAKE THE DECLARATIONS SET FORTH HEREIN.**

John R. Holder executed the Master Deed on **January 11, 2008** on behalf of the **grantor ADESSO/COLUMBIA, LLC** as its sole member. **(emphasis added).**

Chapter 31 (The South Carolina Horizontal Property Act), Section 27-31-170 requires
“Each co-owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same maybe lawfully amended from time to time and with the covenants, conditions and restrictions set forth in the

master deed or lease or in the deed or lease to his apartment. Failure to comply with any of the same shall be grounds for a civil action to recover sums due for damages or injunctive relief, or both, maintainable by the administrator or the board of administration, or other form of administration specified by the bylaws, on behalf of the council of co-owners, or in a proper case, by an aggrieved co-owner.” S.C. Code Ann. §27-31-10 et seq. (1976)

Defendant Holder Properties, Inc. (“HPI”) was the original property manager at the ADESSO and remained the property manager at ADESSO through May 2016. (***Memorandum in Support of Motion for Summary Judgment by Holder Defendants, page 3***).

On August 11, 2015, Applied Building Sciences, Inc. (“ABS”) performed a Preliminary Visual Assessment of the ADESSO on behalf of then board president Mrs. Patricia Durkin. ABS issued a Preliminary Visual Evaluation and on January 25, 2016 (**Exhibit A at page 1**).

Mrs. Durkin was concerned about construction deficiencies related to the original construction of the ADESSO by the developer HPI and with the condition of the ADESSO prior to the turnover to a homeowner-controlled board (**Exhibit A at page 1**).

In spite of the arbitration provision contained in the Master Deed, on **February 9, 2016**, the ADESSO Homeowner’s Association filed a **lawsuit** (the “**2016 lawsuit**”) on behalf of the owners at the ADESSO against the grantor and the developer and 38 other defendants involved in the development, construction, and management of the ADESSO project. (***Memorandum in Support of Motion for Summary Judgment by Holder Defendants, page 4, Exhibits 5 (sic) and Exhibit 2***). (**Emphasis added**).

Furthermore, the Plaintiff, although named as a Plaintiff in the **2016 lawsuit**, was not given notice of the 2016 lawsuit until **May 2017**. (**Exhibit B** “**Affidavit of Emad Tadros, M.D.**”). (**Emphasis added**).

The Plaintiff first learned of the lawsuit on or around **May 21, 2017** where counsel representing the Plaintiffs in the 2016 lawsuit attempted to obtain Plaintiff’s signature on a Commercial Claims Settlement Agreement and Release. (**Exhibit B** “**Affidavit of Emad Tadros, M.D.,**” particularly **Exhibit C to Affidavit of Emad Tadros, M.D.**)

Exhibit C to the Affidavit of Emad Tadros, M.D. contains a series of emails between the Plaintiffs’ attorney in the 2016 lawsuit and the Plaintiff showing the Plaintiff first became aware of the 2016 lawsuit in May 2017 and that Plaintiff’s counsel in the 2016 lawsuit was threatening Dr. Tadros that he would have a suit brought against him if he did not execute the Commercial Claims Settlement Agreement.

Furthermore, the Affidavit of Emad Tadros, M.D. is evidence of the duress exerted and promises made to the Plaintiff that the Plaintiff would not be barred from asserting claims against the developer and grantor of the ADESSO related to the issues Plaintiff had with the grantor/developer.

Plaintiff filed this suit on February 14, 2019 against Holder Properties, Inc., ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners’ Association and filed an Amended Complaint on May 9, 2019 against Holder Properties, Inc., John R. Holder, Individually, ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners’ Association alleging:

1. Negligence/Gross Negligence;
2. Breach of Master Deed;

3. Declaratory Judgment;
4. Injunctive Relief;
5. Violation of South Carolina Unfair Trade Practices Act (subsequently withdraw);
6. Negligent Misrepresentation; and
7. Constructive Fraud.

STANDARD OF REVIEW

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); *See also* Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing and Regulation, 337 S.C. 476, 523 S.E.2d 795 (S.C. App. 1999).

In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (S.C. App. 1999).

If triable issues exist, those issues must go to the jury. Rothrock v. Copeland, 305 S.C. 402, 409 S.E.2d 366 (1991). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000).

Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Carolina Alliance, supra*.

At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a factfinder for

summary judgment to be denied Hill v. York County Sheriff's Dept. 313 S.C. 303, 413 S.E.2d 179 (S.C. App. 1993); *See also* Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009) (holding the non-moving party is only required to submit a scintilla of evidence in order to withstand a motion for summary judgment).

ARGUMENT

The executed Commercial Settlement Agreement and Release is at the crux of the Holder Defendants' argument for its Motion for Summary Judgment.

Defendants ADESSO Horizontal Property Regime and ADESSO Homeowners' Association (collectively hereinafter the "HOA"). The HOA's Motion for Summary Judgment seeks Motion for Summary Judgment on: **1)** Plaintiff failed to file this action within the three (3) year statute of limitations period provided by S.C. Code Ann. §15-3-530; **2)** Defendants complied with the terms of the ADESSO governing documents and any applicable law charging assessments to Plaintiff's commercial units located at the ADESSO; **3)** Defendants did not make any false representations to Plaintiff in connection with Plaintiff's purchase of the ADESSO commercial units; and **4)** Parking spaces in and around the ADESSO, currently available for the use of Plaintiff's commercial units and their tenants, comply with both the ADESSO Master Deed and the applicable City of Columbia Zoning Ordinance.

For the reasons set forth below this Honorable Court should deny Holder Defendants' and the HOA's Motions for Summary Judgment.

1. Summary Judgment should be denied because the 2016 lawsuit violated the arbitration provisions contained in the Master Deed.

Plaintiff's case is directly on point with the holding in The Gates at Williams-Brice Condominium Association and Katharine Swinson, individually, and on behalf of all others

similarly situated v. DDC Construction, Inc. et al, 418 S.C. 282, 792 S.E.2d 240 (S.C. App. 2016).¹

In *Gates*, the developer (DDC Construction, Inc. “DDC”) contended the circuit court erred in failing to enforce the written jury trial and class action waivers in the master deed for the *Gates*. On appeal, the South Carolina Court of Appeals reversed the circuit court finding. The Court of Appeals in *Gates* found the homeowners knowingly, voluntarily, and intelligently waived their rights to a **jury trial** and to a class action when they signed the deeds to their condominiums. *Id. at p. 297 (Emphasis added)*.

Similarly, the Holder Defendants in the 2016 lawsuit demanded a **trial by jury**. (*Memorandum in Support of Motion for Summary Judgment by Holder Defendants*, Exhibit 2 at page 34) (**Emphasis Added**).

Furthermore, in *Gates*, the court reversed the circuit court and found the homeowners knowingly and voluntarily waived the rights to a jury trial, and these rights were conspicuously and unambiguously set forth in the Master Deed. *Id at page 251; See Wachovia Bank, Nat. Ass’n v. Blackburn*, 407 S.C. 321, 775 S.E.2d 437 (2014) (finding jury trial waivers were conspicuous and unambiguous when waivers were printed in all capital, had a bold heading titled “WAIVER OF JURY TRIAL,” and were located at the end of a six-page document).

Similar to the holding in *Gates* and *Blackburn*, the ADESSO Master Deed included a conspicuous arbitration provision on the first page of the Master Deed and on page 6 of the Master Deed:

“Each co-owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto . . . Failure to comply with any of the same shall be

grounds for a civil action to recover sums due for damages or injunctive relief, or both, maintainable by . . . an aggrieved co-owner.” (Emphasis added).

S.C. Code Ann. §27-31-10 et seq. (1976)

The Plaintiff as a co-owner at ADESSO is entitled for relief under Section 27-31-170 based, inter alia, the violations of the Master Deed by the Holder Defendants and the HOA Defendants.

2. Summary Judgment should be denied because the 2016 lawsuit was initiated by way of fraudulent and ultra vires actions taken by the Holder Defendants and the HOA.

Plaintiff’s expert Michael Parades believes that all the Settlement Agreements in the 2016 lawsuit are invalid because filing the 2016 is an illegal ultra vires act by the ADESSO board of directors (**Exhibit C**, at page 7).

Even more incredulous, in Mr. Parades’ opinion, is that the Holder Defendants knew the ADESS HOA could not bring a lawsuit seeking a jury trial because the Holder Defendants wrote the Master Deed and John R. Holder executed the Master Deed as the sole member of each of the Holder Defendants (**Exhibit C**, page 9).

Mr. Parades also believes the Commercial Claims Settlement Agreement and Release should be vacated as it was obtained fraudulently and by ultra vires actions taken by the HOA.

The first time the Plaintiff learned about the 2016 lawsuit was during the time Class counsel was attempting to obtain the signature of the Plaintiff on the Commercial Claims Settlement and Release Agreement (**Exhibit C to the Affidavit of Emad Tadros, M.D.**). This raises the question of whether Class counsel ever sent out the required notice of the 2016 lawsuit. (**Exhibit C: Affidavit of Michael Parades**, page 9).

After reading all of the minutes produced by the HOA Defendants, Mr. Parades believes the ADESSO HOA board was trying to keep owners from knowing what was going on until the

very end of the 2016 lawsuit. Several of the major actions do not have appeared to have been properly approved as evidenced in the board meeting minutes. (**Exhibit C: Affidavit of Michael Parades, page 9**).

The major actions taken by the HOA Defendants include:

1. Hiring ABS sometime in August 2015 to conduct a Preliminary Visual Inspection that resulted in a report dated January 25, 2016 presented to presumably the board. There is no mention of a report being received in the meeting minutes.
2. Engaging attorney Frank Smith to represent the ADESSO HOA and file a lawsuit against Holder Properties, et al.;
3. Authorizing Frank Smith to proceed with filing a lawsuit against Holder Properties, et al.;
4. Approving mediation in early 2017; and
5. Approving the proposed settlement in March 2017.

The Affidavit of Michael Parades contains significant questions of fact involving the breaches of the Master Deed by the Holder Defendants and the ultra vires actions taken by the HOA.

3. The Affidavit of Darrell A. Terry, PhD identifies the undue influence and ultra vires acts used in the 2016 lawsuit.

In addition to the opinions by Mike Parades of the ultra vires actions taken by the HOA, the Affidavit of Dr. Darrell Terry attached hereto as **Exhibit D** filed with Court on December 16, 2019, a board member during the time of the 2016 lawsuit, sets forth his concerns regarding the actions taken by the HOA Defendants in obtaining the Plaintiff's executed Settlement Agreements and Releases but also the undue influence exerted upon the Plaintiff to execute the Commercial Claims Settlement Agreement.

In fact, Dr. Terry's Affidavit recounts the attorney representing the Plaintiffs in the 2016 construction defect lawsuit was frustrated that Dr. Tadros would not execute the necessary Settlement Agreements and Releases to fully settle the construction defect lawsuit. (**Exhibit D, page 2**).

Dr. Terry's Affidavit recounts that Mr. Smith recommended the board retain an attorney file suit against Dr. Tadros if Dr. Tadros did not sign the Settlement Agreements and Releases. (**Exhibit D, page 2**).

Furthermore, Dr. Terry recounted in his Affidavit that Mr. Smith assured the board that Dr. Tadros' execution of the Settlement Agreements and Releases would not preclude Dr. Tadros from pursuing the claims he had against the developer and contractor that developed and built the ADESSO.

4. Fact issues preclude the HOA Defendants' and the HOA's Motion for Summary.

The HOA argues that the Plaintiff's claim should be dismissed based on the Statute of Limitations. This argument fails because the Statute of Limitations does not apply in this case.

It has long been settled in South Carolina that where there is any conflicting evidence as to whether a claimant knew or should have known whether he has a cause of action, the question is one for the jury and not the court. Arant v. Kressler, 327 S.C. 225, 489 S.E.2d 206 (1997); *See also Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989) (the discovery rule to a claim is a question of fact for the jury.)

The Plaintiff first became aware of the violations of the Master Deed in approximately February 2017. The Plaintiff filed this action on February 14, 2019, within the time allowed to file this claim.

The HOA next argues that the HOA complied with the terms of the ADESSO governing documents and any applicable law in charging assessments to Plaintiff's commercial units at the ADESSO. This argument also fails.

Mike Parades, in his Affidavit, calls into question the tactics used by the Holder Defendants and the HOA Defendants related to Plaintiff's parking spaces. (**Exhibit C, at page 8**).

Specifically, the Holder Defendants scheme of varying commercial space when negotiating with the City of Columbia zoning authorities to change parking space requirement for commercial spaces, changing signage to imply the spaces were for Guest parking and NOT restricted to commercial/retail parking and requiring the Plaintiff to pay rent for his parking spaces. (**Exhibit C, at page 8**).

The HOA argues that the HOA did not make any false representations to Plaintiff in connection with Plaintiff's purchase of the ADESSO commercial units. This argument is fails because Plaintiff did not purchase the units from the HOA. However, the HOA continued the perpetuation of the parking spaces dedicated to the exclusive use of the commercial units by leaving incorrect signage in place until 2018 when the Plaintiff complained to the City of Columbia Zoning Administration. The City of Columbia Zoning Administration conducted an inspection of the parking area and demanded the HOA remove and replace the incorrect and improper signage designating the commercial parking spaces.

Furthermore, the Affidavit of Michael Parades calls into question the City of Columbia Zoning Administration's final determination in March 13, 2019. Mr. Parades questions the basis for the final determination that the commercial parking spaces complied with the City of Columbia Zoning Administration's determination. (**Affidavit of Michael Parades at page 8**)

Mr. Parades and the Plaintiff also take exception to the HOA's argument that the HOA's monthly assessments were proper or accurate. (See Affidavit of Michael Parades, at p. 13). "Based on my experience of over 30 years there are several line items are not appropriate to be included in the commercial budget and other line items that appear high." (**Affidavit of Mike Parades, at page 13**).

CONCLUSION

The questions of fact contained in this Memorandum in Opposition to Defendants' Motions for Summary Judgment include factual issues that should be left to a jury to decide. In particular, the Affidavits of the Plaintiff, Michael Parades and Darrell A. Terry present questions of fact that meet the standard of the scintilla of evidence found in the holding of Hancock ("a mere scintilla of evidence in order to withstand a motion for summary judgment"). Therefore, this Honorable Court should deny the Motions for Summary Judgment filed by both the Holder Defendants and the HOA consistent with the holding in Hancock.

For the reasons stated herein and as will be more fully shown at the hearing of this matter, this Honorable Court should deny the Holder Defendants' and the HOA's Motion for Summary Judgment and grant such other relief as this Honorable Court deems just and proper.

Signature on Following Page

Respectfully submitted,

VERNIS & BOWLING OF COLUMBIA, LLC

By: /s/ Charles G. Blackburn

Charles G. Blackburn

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ATTORNEYS FOR THE PLAINTIFF

January 5, 2021

EXHIBIT**1**

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Emad Tadros, M.D. as Trustee of the
Grace Living Trust dated October 12,
2010, as amended,

Plaintiff,

v.

Holder Properties, Inc., John R. Holder,
Individually, ADESSO/Columbia, LLC,
ADESSO Horizontal Property Regime,
and ADESSO Homeowners' Association,

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

) Civil Action No.: 2019-CP-40-00919

AMENDED SUMMONS

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Amended Complaint upon the subscriber, Charles G. Blackburn, Allen & Newman, PLLC, Post Office Box 1481 Columbia, South Carolina 29202, within 30 days after service hereof, exclusive of the day of such service. If you fail to answer the Amended Complaint within the aforesaid time, judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

s/ Charles G. Blackburn

(SC Bar No. 69458)

Allen & Newman, PLLC

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Columbia, South Carolina 29202

Telephone: (803) 714-9606, ext. 2202

cblackburn@allenandnewman.com**ATTORNEYS FOR PLAINTIFF**

Columbia, South Carolina
May 9, 2019

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Emad Tadros, M.D. as Trustee of the) Civil Action No.: 2019-CP-40-00919
Grace Living Trust dated October 12,)
2010, as amended,)

Plaintiff,)

**AMENDED COMPLAINT
(Verified)**

v.)

Holder Properties, Inc., John R.)
Holder, Individually,)
ADESSO/Columbia, LLC, ADESSO)
Horizontal Property Regime, and)
ADESSO Homeowners' Association,)

Plaintiff Emad Tadros, M.D. as Trustee of the Grace Living Trust dated October 12, 2010, as amended, complaining of Defendants Holder Properties, Inc., ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association herein files this Amended Complaint and would allege and show as follows:

PARTIES

1. Plaintiff Emad Tadros, M.D. as Trustee of the Grace Living Trust dated October 12, 2010, as amended ("Tadros"), a trust formed under the laws of the State of California, owns the real property known as the commercial property units ("the commercial units") in the ADESSO Horizontal Property Regime (the "Adesso"), located at 601 Main Street, Suites A – D, in Columbia, South Carolina.

2. The Adesso is a horizontal property regime that exists by virtue of the Master Deed of the ADESSO Horizontal Property Regime, dated January 14, 2008 and

recorded January 14, 2008, in the Office of the Register of Deeds for Richland County, South Carolina, in Book 1392-855 ("Master Deed").

3. Holder Properties, Inc. ("Holder Properties") is a foreign corporation organized and existing under the laws of the State of Georgia, authorized to do business in the State of South Carolina and at all times relevant hereto conducted and transacted business in the State of South Carolina in the form of the original planning, designing, developing, constructing, marketing, selling, repairing, maintaining and/or managing the Adesso.

4. ADESSO/Columbia, LLC ("ADESSO") is a foreign limited liability company organized and existing under the laws of the State of Georgia, authorized to do business in the State of South Carolina, and at all times relevant hereto conducted and transacted business in the State of South Carolina in the form of planning, designing, developing, constructing, marketing, selling, repairing, maintaining and/or managing the Adesso.

5. John R. Holder ("Holder") is, upon information and belief, a citizen and resident of the State of Georgia and at all times relevant hereto transacted business in the State of South Carolina in the form of planning, developing, constructing, marketing, selling, repairing, maintaining and/or managing the Adesso as the sole member of ADESSO.

6. ADESSO Homeowners' Association ("ADESSO HOA") is a nonprofit corporation organized and existing under the laws of the State of South Carolina that controlled the Adesso since April 23, 2013 after turnover by ADESSO.

VENUE

7. Venue is proper in Richland County as this is where the property interests at issue are located and where the actions giving rise to this claim took place.

JURISDICTION

8. This Court has personal and subject matter jurisdiction over all parties.

FACTS

9. The ADESSO condominium project (the "project") entailed the development of a "live/work" planned unit development at 601 Main Street, Columbia, South Carolina 29201.

10. The project includes residential condominiums and commercial units constructed over a two-level parking garage.

11. Holder Properties was the developer of the project.

12. Holder Properties, upon information and belief, control of the Adesso on or about April 23, 2013 but retained control of the management and finances of Adesso until May 2016.

13. ADESSO/Columbia, LLC is identified, in the Master Deed, as the Grantor and sole owner of the land and improvements of the project and, among other things, compliance with the terms of the Master Deed.

14. Holder is, upon information and belief the sole member of the ADESSO.

15. The Master Deed, drafted by Holder Properties, set forth many contractual obligations including, but not limited to, complying with all laws, zoning ordinances and regulations of all governmental authorities having jurisdiction over the Adesso.

16. On December 5, 2014, Tadros purchased and took title (the "purchase") to the commercial units in the Adesso.

17. The purchase by Tadros is subject to, among other things, compliance with all zoning ordinances and applicable governmental regulations set forth in the Master Deed.

18. The commercial units are part of the ADESSO Horizontal Property Regime and members of the ADESSO Homeowners' Association.

19. The Master Deed assigns a certain number of parking spaces to the exclusive use of the commercial units owned by Tadros.

20. The City of Columbia Planning and Zoning Development requires that a certain number of parking spaces be allocated for the exclusive use of the commercial units.

21. The number of parking spaces allocated to the commercial units in the Master Deed and in subsequent meetings with the City of Columbia Planning and Zoning Department to amend the square footage of the commercial units has been miscalculated by deception and misrepresentations by the Defendants to the City of Columbia Planning and Zoning Department

22. The Master Deed identified the square footage of the commercial units to be approximately 8,139 square feet.

23. Defendants have converted, changed, or altered the commercial unit parking spaces so that the parking spaces do not comply, and have never complied, with the City of Columbia Planning and Zoning Development's ordinances.

24. Defendants knew its actions in failing to comply with the City of Columbia Planning and Zoning Department parking space requirements for the commercial units violated the City of Columbia Planning and Zoning Department parking space requirements from the beginning of construction of the project.

25. However, Defendants did not take necessary actions to correct the violations of the zoning requirements set forth in the Master Deed and subsequent amendments to the Master Deed especially during the several meetings with the City of Columbia Planning and Zoning Department.

26. The Defendants, in particular Holder Properties, through deception and misrepresentations, created a parking situation for the commercial units that did not comply with the City of Columbia Planning and Zoning Department's ordinances.

27. Tadros was not aware of the zoning violations when he purchased the commercial units in December 2014.

28. Tadros relied upon the false and misleading information he received regarding the parking spaces during his purchase of the commercial units, all to his detriment.

29. Tadros did not consent to any reduction in the number of parking spaces assigned to the commercial units and has brought the parking issue to the Defendants' attention and to the attention of the City of Columbia Planning and Zoning Department without any relief from the parking situation.

30. Furthermore, in particular Holder Properties and the HOA, have required Tadros to pay monthly rent for certain parking spaces that should have been allocated

to the commercial units pursuant to the City of Columbia Planning and Zoning ordinances.

31. Defendants have, in violation of the Master Deed, charged Tadros fees in excess of the amounts permitted by the Master Deed, including but not limited to costs, expenses, and budget items that should have been specifically attributable only to the residential units and not to the commercial units.

32. Defendants have failed and refused to provide Tadros with a clear explanation and itemization or quantification of annual budgets applicable to the costs for maintenance of the common areas of the commercial units compared to that of the residential condominiums.

33. Defendants have failed and refused to provide Tadros with a clear and complete accounting of the monthly fees charged to the commercial units.

34. Tadros has leased the commercial units to various retail, restaurant, and service establishments.

35. Tadros has lost multiple tenants from the commercial units because Tadros' tenants' employees and patrons were unable to access the parking spaces that should have been allocated to the commercial units.

36. The domino effect of the turnover of Tadros' tenants, because of the lack of parking, resulted in the tenants' businesses failing and in the inability of Tadros to keep tenants in his commercial units, creating a stigma on the commercial units and have all lead to Tadros' damages.

37. The fees charged to Tadros for maintenance of the common areas outside of the commercial units' common areas of the Adesso, charges for parking spaces that

were to be owned by Tadros in combination with the violations of the parking ordinances set and enforced by the City of Columbia Planning and Zoning Department have damaged Tadros.

FOR A FIRST CAUSE OF ACTION
Negligence/Gross Negligence

38. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

39. Defendants owed a duty to Tadros to exercise reasonable care in the enforcement of the terms of the Master Deed, original construction, planning, design, maintenance and modification of any parking spaces allocated to the commercial units and in compliance with all zoning requirements mandated by the City of Columbia Planning and Zoning Department.

40. Defendants were negligent, grossly negligent, reckless, willful, and wanton in converting, changing, or altering the parking configuration to reduce the number of parking spaces assigned to the commercial units to comply with the zoning requirements set forth in the City of Columbia's Planning and Zoning Department's ordinances.

41. Defendants owed a duty to Tadros to assess regime fees in a manner consistent with the terms of the Master Deed.

42. Defendants were negligent, grossly negligent, reckless, willful, and wanton, by assessing fees for the commercial units in excess of those permitted by the Master Deed, including but not limited to costs, expenses, and budget items that should have been specifically attributable only to the residential units.

43. The co-mingling of the assessment of fees to the commercial units with the assessment fees of the residential units has damaged Tadros in subjecting Tadros to pay more than he is required by the terms of the Master Deed.

44. As a direct and proximate result of Defendants' conduct, Tadros has been damaged in the form of lost rental income, excessive and improper fees paid to Defendants, rent Tadros has had to pay for the use of parking spaces that should have been allocated to the commercial units and the threat of foreclosure of his commercial units for allegedly paying fees that were not the responsibility of Tadros.

45. As a result of Defendants' negligent, grossly negligent, reckless, willful, and wanton conduct, Tadros is entitled to recover from Defendants direct, consequential, punitive damages and reasonable attorney fees in bringing this action.

FOR A SECOND CAUSE OF ACTION
Breach of Master Deed

46. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

47. The Master Deed assigns a certain number of specified parking spaces to the exclusive use of the commercial units.

48. However, the number of specified parking spaces set forth in the Master Deed and subsequent amendments to the Master Deed are incorrect and violate the ordinances set by the City of Columbia Planning and Zoning Department.

49. Defendants have breached and violated the terms of the Master Deed since the filing of the Master Deed by failing to identify the correct number of parking spaces allocated to the commercial units, converting, changing, or altering the parking

configuration to reduce the number of parking spaces assigned to the commercial units in violation of the City of Columbia Planning and Zoning Department's ordinances.

50. Tadros did not consent to any reduction in the number of parking spaces assigned to the commercial units and had no control for the deceptive and fraudulent allocation of the parking spaces dedicated to the commercial units.

51. All such actions began with the filing of the Master Deed, subsequent amendments to the Master Deed and during meetings with the City of Columbia Planning and Zoning Department.

52. Defendants have breached and violated, among other things, the terms of the Master Deed by requiring Tadros to pay monthly rent for certain parking spaces that should have been allocated to the commercial units rent-free.

53. Defendants have breached and violated, among other things, the terms of the Master Deed by assessing fees for the commercial units in excess of those permitted by the Master Deed, including but not limited to costs, expenses, and budget items that should have been specifically attributable only to the residential units.

54. As a direct result of Defendants' conduct, Tadros has incurred actual and consequential damages, and he is entitled to an award of such actual and consequential damages in an amount to be proven at trial.

FOR A THIRD CAUSE OF ACTION
Declaratory Judgment

55. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

56. This is an action for a declaratory judgment pursuant to the Uniform Declaratory Judgment Act of South Carolina, as set forth in Section 15-53-10 of the

South Carolina Code of Laws, 1976, as amended, *et seq.*, for the purpose of determining the rights, status, and legal relations between Tadros and Defendants arising under the Master Deed and in compliance with the City of Columbia Planning and Zoning Department's ordinances governing commercial unit parking spaces.

57. A justiciable controversy exists between the parties regarding their rights under the Master Deed and the zoning ordinance requirements set forth in the City of Columbia's Planning and Zoning ordinances.

58. Such justiciable controversy concerns the proper number of parking spaces that should be allocated to the exclusive use of the commercial units rent-free.

59. Tadros is informed and believes that he is entitled to a decree from the Court finding that he is entitled to have the number of parking spaces as required by the City of Columbia Planning and Zoning Department ordinances applicable to the exclusive use of the commercial units in the Adesso.

60. A further justiciable controversy exists regarding the terms of the Master Deed addressing the amount of fees that are permitted to be assessed against the commercial units.

61. Tadros is further informed and believes that he is entitled to a decree from the Court finding that the commercial units should only be assessed amounts permitted under the Master Deed and should not be assessed costs, expenses, and budget items specifically attributable only to the residential units.

FOR A FOURTH CAUSE OF ACTION
Injunctive Relief

62. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

39. Tadros will continue to suffer irreparable harm if Defendants are not enjoined to take action to allocate and designate the correct number of parking spaces for the exclusive use of the commercial units and eliminate the excessive fees charged by Defendants to Tadros for the upkeep of the common areas.

40. Tadros will continue to suffer irreparable harm if Defendants are permitted to continue to assess improper fees against the commercial units, including but not limited to costs, expenses, and budget items specifically attributable only to the residential units.

41. The harm that would be suffered by Tadros if Defendants are not so enjoined outweighs any harm that would be suffered by Defendants as a result of any such injunction.

42. Tadros has no adequate remedy at law.

43. Tadros, therefore, is entitled to a permanent injunction requiring Defendants to take action to allocate and designate the correct number of parking spaces for the exclusive use of the commercial units, rent-free and to prohibit Defendants from assessing improper costs against the commercial units, including but not limited to costs, expenses, and budget items specifically attributable only to the residential units.

FOR A FIFTH CAUSE OF ACTION
Violation of South Carolina Unfair Trade Practices Act

44. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

45. The Plaintiff has suffered an ascertainable loss of money.

46. Defendants' conduct constitutes unfair and deceptive trade practices, as defined by the Unfair Trade Practices Act (SCUTPA), S.C. Code Ann. § 39-5-10, *et seq.*

47. Furthermore, Defendants' conduct was willful.

48. Defendants' conduct is capable of repetition.

49. Defendants' actions constitute unfair and deceptive acts.

50. Defendants' conduct affects the public interest.

51. Defendants' knew or should have known that Defendants' actions constituted unfair and deceptive trade practices.

52. As a direct, foreseeable, and proximate result of Defendants' unfair and deceptive trade practices, the Tadros has suffered an ascertainable loss of money and property.

53. Tadros is entitled to recover his actual damages, which amount should be trebled, together with interest and attorney's fees.

FOR A FIFTH CAUSE OF ACTION
Negligent Misrepresentation

54. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

55. Defendants held themselves out and represented to Tadros that Defendants were familiar with the requirements set forth in the governing documents of Adesso, including the Master Deed, subsequent amendments to the Master Deed and the South Carolina Horizontal Property Regime Act, S.C. Code §27-31-10, *et . Seq.*

56. Tadros relied upon Defendants' representations to his detriment.

57. The representations of Defendants' were material in Tadros entering into the contract to purchase the commercial units.

58. Defendants' were negligent, reckless, willful and wanton in making these representations including the perpetuation of violations of the City of Columbia Planning and Zoning ordinances.

59. Defendants had a pecuniary interest in making these statements.

60. Defendants knew or should have known Tadros would rely upon the Defendants' representations and Tadros justifiably relied on the representations to his detriment and pecuniary loss.

61. As a direct and proximate result of Defendants' negligent misrepresentations, Tadros is entitled to actual and punitive damages, reasonable attorney fees and costs in an amount to be determined at the trial of this matter, plus pre-judgment and post-judgment interest.

FOR A FIFTH CAUSE OF ACTION
Constructive Fraud

62. Each and every allegation not inconsistent herewith is incorporated herein as if set forth verbatim above.

63. Defendants made representations to Tadros the parking for the commercial units were in compliance with the City of Columbia Planning and Zoning ordinances and Tadros would be charged fees as set forth in the Master Deed.

64. The Defendants knew of the falsity of Defendants' statements.

65. The Defendants statements, actions and inactions were material to Tadros' purchase of the commercial units.

66. The Defendants knew the statements, actions and inactions made by the Defendants were false and/or made with a reckless disregard of its truth or falsity.

67. The Defendants' statements, actions and inactions as set forth above were made with the intent that the representations, actions and inactions be acted upon by Tadros.

68. Tadros was not aware of the falsity of Defendants' statements, actions and inactions.

69. Tadros relied on the Defendants' statements, actions and inactions and relied on Defendants' statements, actions and inaction to the detriment of Tadros.

70. As a direct and proximate result of Defendants' false and fraudulent statements used to induce Tadros to purchase the commercial units, Tadros has been damaged and suffered pecuniary loss.

71. Tadros has been damaged and is entitled to actual, consequential, punitive damages and reasonable attorney fees and costs in bringing this action.

WHEREFORE, having complained of Defendants, Tadros prays the Court enter judgment awarding it all available relief including but not limited to the following:

- A. a trial by jury on all such issues so triable;
- B. Tadros be awarded actual, consequential, and punitive damages;
- C. Tadros be awarded any prejudgment and post-judgment interest;
- D. Tadros be awarded declaratory judgment as pled herein;
- E. Tadros be awarded injunctive relief;
- F. Tadros' damages be trebled pursuant to S.C. Code Ann. § 39-5-10, *et seq.*;
- G. Tadros be awarded reasonable attorney's fees and court costs; and
- H. For such other and further relief as this Court may deem just and proper.

Signature on Following Page

Respectfully submitted,

/s Charles G. Blackburn
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ATTORNEYS FOR PLAINTIFF

May 9, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

EMAD TADROS, M.D. AS TRUSTEE OF
THE GRACE LIVING TRUST DATED
OCTOBER 12, 2010, AS AMENDED

PLAINTIFF,

vs.

HOLDER PROPERTIES, INC., JOHN R.
HOLDER, INDIVIDUALLY,
ADESSO/COLUMBIA, LLC, ADESSO
HORIZONTAL PROPERTY REGIME, AND
ADESSO HOMEOWNERS' ASSOCIATION

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

C/A No: 2019-CP-40-00919

CERTIFICATE OF SERVICE

I, the undersigned of Allen & Newman, PLLC, Attorneys for Plaintiff, do hereby certify that I have served the **Plaintiff's Amended Complaint** in connection with the above-referenced case by Electronic Court Filing and by placing a copy of the same in the U.S. Mail, first class, postage prepaid to the following address:

Defendant's Attorney for Holder Properties, Inc. and Adesso/Columbia, LLC

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Columbia, South Carolina
May 9, 2019

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Emad Tadros, M.D. as Trustee of the Grace
Living Trust dated October 12, 2010, as
amended,

Plaintiff,

vs.

Holder Properties, Inc., John R. Holder,
Individually, ADESSO/Columbia, LLC,
ADESSO Horizontal Property Regime, and
ADESSO Homeowners' Association,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
) CASE NO.: 2019-CP-40-00919
)

**DEFENDANTS ADESSO HORIZONTAL
PROPERTY REGIME AND ADESSO
HOMEOWNERS' ASSOCIATION'S
MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT**

NOW COME Defendants Adesso Horizontal Property Regime ("Regime") and Adesso Homeowners' Association ("Association") (collectively, "HOA Defendants"), by and through their undersigned counsel, and respectfully submit this Memorandum of Law in Support of HOA Defendants' Motion for Summary Judgment, filed December 28, 2020 ("HOA Defendants' Motion for Summary Judgment"). In support of HOA Defendants' Motion for Summary Judgment, HOA Defendants would respectfully show this Court as follows:

INTRODUCTION

This is a frivolous action in which Plaintiff alleges HOA Defendants' allocation of parking spaces serving Plaintiff's two (2) commercial properties ("Commercial Units")—comprising a total of four (4) individual units—within the Adesso Columbia mixed-use condominium development (the "Adesso") violates City of Columbia zoning ordinances and the Master Deed of Adesso Horizontal Property Regime ("Master Deed"). Plaintiff further alleges that HOA Defendants have failed to comply with the Master Deed in assessing Plaintiff's Commercial Units

amounts for certain costs, expenses, and budget items for the maintenance and upkeep of the Adesso.

Plaintiff purchased the Commercial Units in 2014, at which time all of the parking-related conditions about which Plaintiff complains were matters of public record and/or open and obvious at the Adesso site. However, as will be discussed below, Plaintiff purchased the properties without having first completed the necessary due diligence involved in a large commercial property transaction—including failing to personally visit and inspect the properties, failing to review any title or zoning documents affecting the properties, and failing to hire competent representation with regard to the transaction. More than four (4) years have elapsed since Plaintiff's purchase of the Adesso commercial units, and now, due to recent economic downturns and poor performance by some of Plaintiff's business tenants, Plaintiff seeks to recover from the Defendants named in this lawsuit for his own poor investment choices.

RELEVANT FACTUAL BACKGROUND

The Adesso is a mixed-use development comprising 110 upscale residential condominium units, ground floor commercial units, and associated common and limited common elements. Ex. 1 (Pltf.'s Fourth Amend. Compl.) at ¶ 6. All units, common elements, and limited common elements are housed within one building located at 601 Main Street, Columbia, SC 29201. *Id.* Defendant Holder Properties, Inc. ("Holder") developed the Adesso. Ex. 2 (Pltf.'s Amend. Compl.) at ¶ 11. On January 14, 2008, Defendant ADESSO/Columbia, LLC—as then-owner of the Adesso—recorded the Master Deed in the Office of the Register of Deeds for Richland County, in Book 1392 at Page 855. *Id.* at ¶ 2. The Master Deed established the Adesso Horizontal Property Regime and created the Association to, among other things, manage the Regime's affairs, prescribe rules for the use of the Regime's General Common Elements, Ex. 3 (Adesso Master Deed), p. 20

at § XV, and to “maintain[], repair[], and replace[] all of the General and Limited Common Elements...”. *Id.*, pp. 23-24, § XXII.

Moreover, in furtherance of the above powers, the Association, acting through its Board of Directors (“Board”), possesses the authority “[t]o make, levy, and collect assessments against members and members’ Units to defray the cost of the common areas and facilities of the Regime, and to use the proceeds of said assessments in the exercise of the powers and duties granted unto the Association.” Ex. 4 (Adesso Bylaws), p. 6 at § 4(j)(i). Generally, in calculating annual assessments to unit owners, each owner is assessed an amount for his or her share of the Association’s expenses equal to the share of the interest his or her unit bears in relation to the entire undivided interest of the Regime. Ex. 5 (Affidavit of C. Michael Munson) at ¶¶ 9-10. The Plaintiff’s Commercial Units comprise a total 8.54279% interest in the total undivided interest of the Regime. *Id.* at ¶ 11. However, of particular relevance to this action, in the development of annual assessment budgets for the Adesso, the Master Deed also requires the following:

“[S]eparate budgets for the Commercial Units and Residential Units shall be developed annually and no costs, expenses and budget items specifically attributed to Residential Units shall be included in the budget for Commercial Units and vice versa; likewise, costs, expenses, and budget items which affect Residential and Commercial units shall be appropriately allocated in relation to the use by the Owners of such Units...”

Ex. 3, p.12 at § V(A)(3)(iii).

Additionally, the Master Deed identifies certain Limited Common Elements benefitting either Residential and Commercial Units, or solely Commercial Units. Ex. 5 at ¶¶ 14-15. Pursuant to § V(C)(5) of the Master Deed, “Retail Parking Spaces as identified in Exhibit ‘C’ [to the Master Deed] shall be Limited Common Elements, limited to the use of the Commercial Unit it/they serve. Such spaces shall be marked with identification information designating the limited use of such...[and]...may not be reassigned and shall remain a Limited Common Element relating to the Commercial Unit.” Ex. 3, p. 14 at § V(C)(5). Notwithstanding this provision,

ADESSO/Columbia, LLC, with the consent and joinder of the required number of unit owners, recorded a certain Fourth Amendment to Master Deed of Adesso Horizontal Property Regime (“Fourth Amendment”) on April 22, 2013 in the Richland County Register of Deeds Office, in Book 1854 at Page 818, attached hereto as Exhibit 6. On April 23, 2013, Holder—which by virtue of its status as developer, had controlled the Association and its Board—relinquished control of the Association to the condominium owners. Ex. 1 at ¶ 85.

In contravention of the Master Deed, the Fourth Amendment reassigned the Retail Parking Spaces—specifically spaces numbered 001-017, 108, 157, and 220-221—either to the use of both Commercial and Residential guests, or as leased spaces to the United States Marine Corps and one Adesso resident. Ex. 6 at pp. 6-7. Further, the reassignment of the Retail Parking Spaces violated the commercial parking requirements established by the governing zoning ordinance, the Adesso Planned Unit Development (“PUD”), as amended by letter of Holder Properties, Inc. dated January 24, 2008 (“January 2008 Amendment”). Ex. 7 (Deposition of Rachel Lynn Bailey), Pltf.’s Ex. 5. Per the January 2008 Amendment, the Adesso Commercial Units were required to have a total of at least twenty-six (26) dedicated parking spaces, with nineteen (19) restricted access spaces within the building itself, and seven (7) spaces located along Main and Blossom Streets. Ex. 7 at 51:1-12. The January 2008 Amendment also provided a formula to calculate the required number of parking spaces based upon future increases or decreases in the Commercial Units’ square footage. *Id.* at 128:25-129:15. The Adesso PUD, as amended, rather than general City of Columbia zoning ordinances controls the parking requirements for the Adesso. *Id.* at 98: 24-25, 99: 1-12.

Plaintiff purchased the Adesso Commercial Units on December 5, 2014. Ex. 2 at ¶ 16. He did not purchase the properties from Defendants or Holder; rather, Plaintiff purchased them from Ford Elliott, the current owner at the time. Ex. 8 (Deposition of Emad Tadros, M.D.) at 169: 17-19. Plaintiff is a sophisticated and well-educated physician who holds a board certification in

psychiatry from the American Board of Psychiatry and Neurology and has been in private practice since 1993. *Id.* at 9: 12-15. Additionally, by 2014, Plaintiff possessed significant prior experience with commercial real estate acquisitions, having previously acquired four (4) commercial properties—three of which were acquired for investment purposes. *Id.* at 13:23-15:14.

However, despite his prior experience, Plaintiff did not personally inspect the Commercial Properties or review any of the recorded documents relating to the Adesso development prior to his purchase. *Id.* at 66:21-67:1; 89:24-90:7. Plaintiff did not actually visit the Adesso Commercial Units until late 2016 or early 2017—between two and three years after his purchase of the units. *Id.* at 229:19-230:2. Plaintiff did not personally communicate with HOA Defendants at all prior to purchasing the Commercial Units. *Id.* at 125: 17-25, 127: 15-19. Moreover, Plaintiff's hired professional advisor did not communicate with HOA Defendants with regard to the transaction. *Id.* at 126: 3-5; 127: 2-5, 7-11; 129: 17-25¹.

On March 4, 2015, Plaintiff was notified by a representative of Holder—which provided property management services to the Association until May, 2016—that a lottery would be held among the Adesso owners to determine leasing rights for three of the Adesso Commercial Parking Spaces. *Id.* at 90:12-19. Plaintiff was informed that such rights would be sold to the highest bidder. *Id.* The Adesso Master Deed specifically prohibits the leasing of the Commercial Parking Spaces in this manner. *Id.* at 90: 20-22. Plaintiff further testified that had he known this at the time, he would not have agreed to lease the parking spaces. *Id.* at 88: 10-89:17. Additionally, around March of 2015, Plaintiff was notified by one of his tenants—the United States Marine Corps (“Marines”)—of issues relating to the allocation of Commercial Parking Spaces at the Adesso. *Id.* at 91:5-92:7. Specifically, the Marines informed Plaintiff of their intent to vacate their

¹ It should be noted that Plaintiff has brought a negligence action against his former advisor regarding Plaintiff's purchase of the Adesso Commercial Units, which is pending in the Richland County Court of Common Pleas, C/A No. 2017-CP-40-07120.

leased recruiting center space in one of Plaintiff's Commercial Units if Plaintiff was not able to secure parking for them. *Id.*

Despite being made aware of the Marines' complaints regarding parking, as well as being required to lease back Commercial Parking Spaces almost immediately after he took ownership of the Commercial Units, Plaintiff took no action to investigate the parking requirements of the Adesso Master Deed or the Adesso PUD until 2017. *Id.* at 92:8-12. Similarly, Plaintiff paid assessments to the Association for two (2) years, without taking any action to determine or investigate their propriety under the Adesso governing documents until around February 15, 2017. *Id.* at 37:18-24; 130:23-132:3. Around that time, Plaintiff formed the belief that the assessments being charged to his Commercial Units violated the Master Deed, and although Plaintiff has failed to specifically identify what he believes is a proper formula for calculating such assessments, he determined any such formula by speaking with his tenants regarding their usage of the Adesso building. *Id.* at 132:4-7.

Plaintiff did not file this action until February 14, 2019—over four (4) years after his purchase of the Adesso Commercial Units. Plaintiff's Amended Complaint asserts causes of action for: (1) Negligence/Gross Negligence; (2) Breach of Master Deed; (3) Declaratory Judgment; (4) Injunctive relief; (5) Violation of the South Carolina Unfair Trade Practices Act; (6) Negligent Misrepresentation; and (7) Constructive Fraud. As set forth in more detail below, HOA Defendants are entitled to judgment as a matter of law in their favor regarding all of Plaintiff's claims.

PROCEDURAL STANDARD

Pursuant to Rule 56, SCRCP, "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to Interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law." In ruling on a Motion for Summary Judgment, the Court must view the facts and inferences therefrom in a light most favorable to the nonmoving party. *Bravis v. Dunbar*, 316 S.C. 263, 265, 449, S.E.2d 495, 496 (Ct. App. 1994).

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading..." Rule 56(e), SCRCP. The nonmoving party must establish specific facts showing there is a genuine issue of material fact for trial, or the court must grant summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Holmes v. East Cooper Community Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014) (internal citation omitted). Nevertheless, when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted. *Id.*

ARGUMENT

I. Plaintiff failed to file this lawsuit within the applicable statute of limitations.

Pursuant to S.C. Code Ann. § 15-3-530(1), "an action upon a contract, obligation, or liability, express or implied," such as Plaintiff's claims asserted herein, must be brought within three (3) years of the date on which the cause of action accrues. The date of accrual for a cause of action is the time in which a plaintiff knew or, by exercise of reasonable diligence, should have known that he/she had a cause of action. The objective test is whether a person of common knowledge and experience should have known the operative facts. *Wilson v. Shannon*, 299 S.C. 512, 386 S.E.2d 257 (Ct. App. 1989). A statute of limitations analysis requires "very little to start the clock." *Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998) (citation omitted). Whether the plaintiff understands the full extent of the damages is immaterial to the

issue of whether the statute begins to run. *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996). Furthermore, the statute begins to run on the date the plaintiff discovered or should have discovered the injury, not on the date that the plaintiff discovers the identity of the wrongdoer. *Tollison v. B & J Machinery Co., Inc.*, 812 F. Supp. 618 (D.S.C. 1993).

Plaintiff purchased his Commercial Units at the Adesso in December, 2014. Plaintiff's own testimony indicates he failed to exercise even the slightest diligence—much less reasonable diligence, required for statute of limitations purposes—with regard to his purchase. Plaintiff did not personally inspect the Commercial Properties or review any of the recorded documents relating to the Adesso development prior to his purchase. Ex. 8 at 66:21-67:1; 89:24-90:7. Plaintiff made no visits to the Adesso Commercial Units until late 2016 or early 2017—between two and three years after his purchase of the units. *Id.* at 229:19-230:2. Further, Plaintiff did not personally communicate with HOA Defendants at all prior to the consummation of the transaction. *Id.* at 125: 23-25, 127: 15-19.

Plaintiff testified that prior to his purchase in 2014, he was not specifically aware of the Adesso Master Deed or other recorded documents governing the Regime and Association. *Id.* at 27:21-28:1-9, 22-25; 29:1-3. However, Plaintiff did testify that his agent hired to represent him in connection with the transaction may have reviewed the Master Deed prior to the transaction. *Id.* at 28:12-21.

Regardless, it is immaterial whether Plaintiff actually knew about the Adesso Master Deed, its amendments, and any other recorded Adesso governing documents because South Carolina law charges Plaintiff with constructive notice under these facts. “Constructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts. Therefore, this person is presumed to have actual knowledge of the

undisclosed facts.” *Spence v. Spence*, 368 S.C. 106, 119, 628 S.E.2d 869, 876 (2006) (citing *Strother v. Lexington County Recreation Com’n*, 332 S.C. 54, 64 n.6, 504 S.E.2d 117, 122 n. 6 (1998)).

Moreover, “constructive or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world.” *Id.* As previously discussed, the Adesso Master Deed was recorded on January 14, 2008 in the Office of the Register of Deeds for Richland County, in Book 1392 at Page 855. The January 2008 Amendment to the Adesso PUD, which is also a public record, was submitted to the City of Columbia Zoning Department and approved in 2008. Both documents control the allocation of Commercial Parking Spaces at the Adesso. Additionally, the Fourth Amendment to the Adesso Master Deed was recorded on April 22, 2013 in the Richland County Register of Deeds Office, in Book 1854 at Page 818. Accordingly, the Master Deed, 2008 PUD Amendment, and Fourth Amendment to the Master Deed were all of matters of public record at the time Plaintiff purchased the Commercial Units in December, 2014.

Moreover, Plaintiff testified that he understood the Fourth Amendment’s allocation of Commercial Parking Spaces to violate the Master Deed, Ex. 8 at 62:10-63:15, and that he was also able to determine the allocation of spaces at the Adesso violated the 2008 PUD Amendment. *Id.* at 70:16-71:3. By late 2014, Plaintiff had at least constructive knowledge of the existence of the three preceding public records. The recording of a document alerts all future grantees of the rights of the recorder because the law assumes the grantee will search the index and discover the interest or claim. *Spence*, 628 S.E.2d 869 at 876 (citing *Epps v. McCallum Realty Co.*, 139 S.C. 481, 499 138 S.E. 297, 303 (1927) (“recording amounts to notice, whether known or unknown, because the means of information are at hand.”)). Similarly, had Plaintiff or his agent exercised reasonable

diligence in connection with the Commercial Units purchase, they would have examined the publicly-available Adesso PUD documents—including the 2008 PUD Amendment—and would have been able to determine the Fourth Amendment’s allocation of Commercial Parking Spaces violated the zoning requirements of the Adesso PUD.

In addition to the public records providing Plaintiff at least constructive notice of his claims, Plaintiff admitted he had actual knowledge in early 2015 of parking-related issues raised by both Holder and the Marines. Ex. 8 at 88: 10-89:17; 90:12-19; 91:5-92:7. Had Plaintiff further investigated these issues, he would have discovered his Commercial Units did not have all the parking spaces to which they were entitled under the Master Deed or the Adesso PUD. Therefore, as early as December, 2014—when Plaintiff purchased the Commercial Units—and as late as early 2015, there was sufficient information, of public record and otherwise, relating to the then-existing improper allocation of Adesso Commercial Parking Spaces to put a person of common knowledge and experience, in the exercise of reasonable diligence, on notice of the existence of Plaintiff’s parking-related claims. As such, Plaintiff’s claims accrued by early 2015 at the latest, the date by which Plaintiff would have discovered his claims. Despite this, Plaintiff took no action to investigate the parking issues, or to even visit the Adesso, until 2017.

Pursuant to S.C. Code Ann. § 15-3-530(1), Plaintiff was required to bring an action to enforce his parking-related claims by 2018 at the latest. Plaintiff did not file this action until February 14, 2019. Therefore, as they relate to the allocation of Commercial Parking Spaces at the Adesso, Plaintiff’s claims are barred by the applicable statute of limitations. HOA Defendants are entitled to judgment as a matter of law on this ground, and the Court should dismiss Plaintiff’s claims with prejudice.

II. The current allocation of Commercial Parking Spaces at the Adesso complies with the Master Deed, the Adesso PUD Documents, and applicable City of Columbia Zoning Ordinances.

The Court should also dismiss with prejudice Plaintiff's claims for Declaratory and Injunctive relief, as they relate to Plaintiff's parking claims, because there is no genuine issue of material fact that the number of parking spaces in and around the Adesso available for the Commercial Units' use and/or in their possession has complied with the requirements of the Master Deed, the Adesso PUD Documents, and applicable City of Columbia Zoning Ordinances since 2018. The South Carolina Declaratory Judgment Act provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) (citing S.C.Code Ann. § 15-53-20).

To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy. *Id.* A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character. *Id.* Moreover, "[a] declaratory judgment should not address moot or abstract matters." *Sunset Cay, LLC*, 593 S.E.2d 462 at 466 (citing *Waller v. Waller*, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951)).

Plaintiff seeks a declaratory judgment decreeing he is "entitled to have the number of parking spaces as required by the City of Columbia Planning and Zoning Department ordinances applicable to the exclusive use of the commercial units in the Adesso." Ex. 2 at ¶ 59. However, the parking-related matters underpinning Plaintiff's declaratory judgment claim are moot. There is no genuine issue of material fact that Plaintiff's Commercial Units have the requisite number of parking spaces to which they are entitled under the Adesso PUD and applicable City of Columbia zoning ordinances. In June, 2018, Defendants changed the signage for, or otherwise restricted

access to, 21 parking spaces within the Adesso, to limit the spaces designated for the use of the Commercial Units to “retail use only,” Ex. 7 at 99: 16-19; 104: 2-20, to bring the allocation of Commercial Parking Spaces into compliance with Section V of the Master Deed.

Moreover, based upon the availability of sufficient additional on-street parking within 400 feet of the Adesso to serve the Commercial Units, the City of Columbia Zoning Administrator has made a final determination that no known zoning violations relating to parking exist at the Adesso. *Id.* at 99: 20-101: 21; 103: 9-104: 25; Pltf.’s Ex. 2 to Dep. of Rachel Lynn Bailey. Therefore, with regard to Plaintiff’s parking-related claims, Plaintiff has failed to present a justiciable controversy, and the Court should enter judgment for HOA Defendants and dismiss Plaintiff’s Declaratory Judgment claim with prejudice.

Similarly, Plaintiff seeks a permanent injunction “requiring Defendants to take action to allocate and designate the correct number of parking spaces for the exclusive use of the commercial units.” Ex. 2 at ¶ 43. However, the facts and circumstances of this case do not warrant the grant of a permanent injunction. “The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction.” *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) (citing *Calcutt v. Calcutt*, 282 S.C. 565, 320 S.E.2d 55 (Ct.App.1984)). The remedy of an injunction is a drastic one and ought to be applied with caution. *Id.* (citing *Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E.2d 420 (1950)). Moreover, “[i]n deciding whether to grant an injunction, the court must balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant.” *Id.*

Here, Plaintiff would not benefit from the grant of an injunction in his favor. As previously established, Defendants took the action Plaintiff desires in June, 2018, such that Plaintiff’s Commercial Units have been allocated the correct number of parking spaces pursuant to the Adesso Master Deed, the Adesso PUD documents, and applicable City of Columbia zoning

ordinances. Accordingly, because Plaintiff has already obtained the relief he seeks with regard to the allocation of Commercial Parking Spaces at the Adesso, the Court should enter judgment for Defendants and dismiss with prejudice Plaintiff's claim for injunctive relief.

III. The assessments charged to Plaintiff's Commercial Units comply with the requirements set forth by the Adesso Master Deed.

HOA Defendants are entitled to judgment in their favor regarding Plaintiff's assessment-related claims because the costs, expenses, and budget items assessed annually to Plaintiff's Commercial Units comply with the Master Deed's requirements for calculating such assessments. Specifically, the Master Deed states:

“[S]eparate budgets for the Commercial Units and Residential Units shall be developed annually and no costs, expenses and budget items specifically attributed to Residential Units shall be included in the budget for Commercial Units and vice versa; likewise, costs, expenses, and budget items which affect Residential and Commercial units shall be appropriately allocated in relation to the use by the Owners of such Units...”

Section V(A)(3) of the Master Deed sets forth examples of Limited Common Elements benefitting both Commercial and Residential Units. Such Limited Common elements include, but are not limited to: (1) “Sidewalks, Plantings, and Lighting along Main and Blossom and all appurtenances thereof;” (2) “Trash Chute;” (3) “Trash Compactor;” (4) “Service Elevator;” (5) “Loading Dock and all appurtenances thereof;” (6) Exterior security cameras and all appurtenances thereof;” and (7) “Roof.” Ex. 5 at ¶ 14. Additionally, Section V(B) of the Master Deed sets forth examples of General Common Elements benefitting the Adesso as a whole. *Id.* at ¶ 16.

The above list of examples set forth in the Master Deed is not exhaustive. Any budget items for Adesso Common Elements, whether Limited or General, which affect both Residential and Commercial Units are properly chargeable to the owner of the Commercial Units, in proportion to his or her use of such Common Elements. *Id.* at ¶ 17. Pursuant to the Affidavit of C. Michael Munson (“Munson”), a witness with 35 years of property management experience,

Plaintiff's share of each cost, expense, or budget item assessed against his Commercial Units for the years 2018-2020 was the result of the proper allocation of such items between the Adesso Commercial and Residential units pursuant to the Master Deed. *Id.* at ¶ 25.

Moreover, Munson states: "[E]ach budget item, cost, or expense contained in the 2018, 2019, and 2020 Budgets, for which there is a charge to the Plaintiff's Commercial Units ("Retail 1 & 2"), is not specifically attributable to the Adesso Residential Units, and is therefore, properly includable in Plaintiff's annual assessment amount." *Id.* at ¶ 26. To date, Plaintiff has relied merely on the allegations in his pleadings, non-specific, hearsay conversations with Commercial Unit tenants, and personal speculation to support his claims regarding the impropriety of assessments charged to his Commercial Units.

Accordingly, Plaintiff has failed to set forth specific facts demonstrating a genuine issue of material fact regarding the subject assessments. Defendants are entitled to judgment as a matter of law that: (1) the assessments charged to Plaintiff's Commercial Units comply with the applicable requirements of the Adesso Master Deed; (2) HOA Defendants have not breached the Master Deed; and (3) HOA Defendants have not breached any duties owed to Plaintiff with regard to the calculation or collection of assessments against his Commercial Units. Therefore, the Court should dismiss Plaintiff's claims, as they relate to assessments against the Commercial Units, with prejudice.

IV. Plaintiff's claims for Negligent Misrepresentation and Constructive Fraud fail because HOA Defendants did not make false representations to Plaintiff in connection with Plaintiff's purchase of the Adesso commercial units.

HOA Defendants are entitled to judgment as a matter of law regarding Plaintiff's claims for Negligent Misrepresentation and Constructive Fraud because there is no genuine issue of material fact that HOA Defendants made no false representations to Plaintiff in connection with his 2014 purchase of the Adesso Commercial Units. "To establish liability for negligent

misrepresentation, the plaintiff must show by a preponderance of the evidence,” among other elements, that “the defendant made a false representation to the plaintiff.” *Turner v. Milliman*, 392 S.C. 116, 123, 708 S.E.2d 766, 769 (2011) (listing the 6 required elements of the tort of Negligent Misrepresentation). Similarly, “[t]o establish constructive fraud, all elements of actual fraud except the element of intent must be established.” *Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 333, 574 S.E.2d 502, 509 (Ct. App. 2002) (citing *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct.App.1993)). An essential element of the tort of Constructive Fraud is a false representation. *See id.* at 334, 431 S.E.2d at 509 (citing *Ardis* at 515, 431 S.E.2d at 269) (setting forth the 9 elements required to establish a claim for actual fraud).

Here, HOA Defendants made no representations to Plaintiff in connection with his purchase of the Adesso Commercial Units. Plaintiff has admitted he did not have any communications with HOA Defendants at all prior to the transaction. Ex. 8 at 125: 17-25, 127: 15-19. Moreover, Plaintiff’s hired professional advisor also did not communicate with HOA Defendants with regard to the transaction. *Id.* at 126: 3-5; 127: 2-5, 7-11; 129: 17-25. As discussed above, Plaintiff purchased the Commercial Units from Ford Elliott, *Id.* at 169:19, not HOA Defendants. With regard to the allocation of Commercial Parking Spaces, Plaintiff could only testify that he “would assume [Defendants] [were] in compliance [with applicable Columbia Zoning ordinances]...” because “[Plaintiff] can’t walk around and ask people questions.” *Id.* at 128: 18-19, 24-25. However, Plaintiff and/or his agent never communicated with HOA Defendants to confirm Plaintiff’s assumptions. Therefore, Plaintiff has failed to establish that HOA Defendants made any representations—much less false representations—to him in connection with his purchase of the Adesso Commercial Units, and HOA Defendants are entitled to judgment in their favor, as a matter of law, with regard to Plaintiff’s Negligent Misrepresentation and Constructive Fraud Claims.

V. Plaintiff has abandoned his South Carolina Unfair Trade Practices Act claim as to HOA Defendants.

Finally, the Court should dismiss with prejudice Plaintiff's South Carolina Unfair Trade Practices Act ("SCUTPA") claim, as to HOA Defendants, because there is no genuine issue of material fact that Plaintiff has abandoned this claim. Plaintiff's Answer to Interrogatory Number 12, contained in Defendants' First Set of Interrogatories to Plaintiff—attached hereto as Exhibit 9—evidences Plaintiff's desire to withdraw his SCUTPA claim as to HOA Defendants. Plaintiff further confirmed his intent to withdraw the claim during his deposition. Ex. 8 at 232:22-233:15. Therefore, the Court should dismiss Plaintiff's SCUTPA claim, as to HOA Defendants, with prejudice.

CONCLUSION

Based on the foregoing, as well as any oral argument made at a future hearing on HOA Defendants' Motion for Summary Judgment, HOA Defendants are entitled to judgment in their favor, as a matter of law, with regard to all claims asserted against them in this action by Plaintiff. HOA Defendants seek an Order granting their Motion for Summary Judgment and dismissing all of Plaintiff's claims with prejudice. HOA Defendants further seek any additional relief this Court deems just and proper, including an award of attorney's fees and costs, pursuant to Rule 54, SCRCF, the *South Carolina Frivolous Civil Proceedings Sanctions Act*, S.C. Code Ann. § 15-36-10, *et seq.*, and any other applicable statutory authority.

[SIGNATURE PAGE TO FOLLOW]

This 5th day of January, 2021.

Respectfully submitted,

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Defendants.

**ORDER GRANTING ADESSO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Upon consideration of the pleadings, evidence, written briefs, and arguments of counsel, the Adesso Defendants' Motion is hereby GRANTED. In support of this Order, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Defendant Adesso Homeowners' Association ("Association") is a nonprofit corporation organized and existing under the laws of the State of South Carolina, with its principal place of business being in Richland County.

2. Defendant Adesso Horizontal Property Regime ("Regime") is a horizontal property regime organized pursuant to the South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-10, *et seq.*

3. Defendant Holder Properties, Inc. ("Holder") is a corporation organized and existing under the laws of the State of Georgia and is authorized to conduct business in South Carolina.

4. Defendant Adesso/Columbia, LLC is a limited liability company organized and existing under the laws of the State of Georgia and is authorized to conduct business in South Carolina.

5. Defendant John R. Holder is a citizen and resident of the State of Georgia, and at times relevant hereto, transacted business in Richland County as the sole member of Adesso/Columbia, LLC.

6. The Adesso is a mixed-use development comprising 110 upscale residential condominium units, ground floor commercial units, and associated common and limited common elements.

7. All units, common elements, and limited common elements are housed within one building located at 601 Main Street, Columbia, SC 29201.

8. Holder developed the Adesso. On January 14, 2008, Defendant Adesso/Columbia, LLC established the Regime by recording the Adesso Master Deed in the Office of the Register of Deeds for Richland County, in Book 1392 at Page 855 ("Master Deed"). The Master Deed is

attached as Exhibit 3 to the Adesso Defendants' Memorandum in Support of their Motion for Summary Judgment and is incorporated, in full, in this Order by reference.

9. The Master Deed also created the Association to, among other things, manage the Regime's affairs, prescribe rules for the use of the Regime's General Common Elements, and to "maintain[], repair[], and replace[] all of the General and Limited Common Elements...".

10. Each owner of a unit at the Adesso is a member of the Regime and the Association, and he or she is subject to the Master Deed, Bylaws, and other governing documents of the Association.

11. The Association, acting through its Board of Directors ("Board"), possesses the authority "[t]o make, levy, and collect assessments against members and members' Units to defray the cost of the common areas and facilities of the Regime, and to use the proceeds of said assessments in the exercise of the powers and duties granted unto the Association."

12. To calculate annual assessments to unit owners, the Master Deed generally requires that each unit owner be assessed an amount for his or her share of the Association's expenses equal to the share of the interest his or her unit bears in relation to the entire undivided interest of the Regime.

13. The Plaintiff's Commercial Units at issue in this case ("Commercial Units") comprise a total 8.54279% interest in the total undivided interest of the Regime.

14. To develop annual assessment budgets for the Adesso, the Master Deed also requires the allocation of residential and commercial assessments as follows:

"[S]eparate budgets for the Commercial Units and Residential Units shall be developed annually and no costs, expenses and budget items specifically attributed to Residential Units shall be included in the budget for Commercial Units and vice versa; likewise, costs, expenses, and budget items which affect Residential and Commercial units shall be appropriately allocated in relation to the use by the Owners of such Units..."

15. The Master Deed identifies certain Limited Common Elements benefitting either Residential and Commercial Units, or solely Commercial Units.

16. Section V(A)(3) of the Master Deed sets forth examples of Limited Common Elements benefitting both Commercial and Residential Units. Such Limited Common elements include, but are not limited to: (1) “Sidewalks, Plantings, and Lighting along Main and Blossom and all appurtenances thereof;” (2) “Trash Chute;” (3) “Trash Compactor;” (4) “Service Elevator;” (5) “Loading Dock and all appurtenances thereof;” (6) Exterior security cameras and all appurtenances thereof;” and (7) “Roof.” Additionally, Section V(B) of the Master Deed sets forth examples of General Common Elements benefitting the Adesso as a whole.

17. Further, any budget items for Adesso Common Elements, whether Limited or General, which affect both Residential and Commercial Units are properly chargeable to the owner of the Commercial Units, in proportion to his or her use of such Common Elements.

18. The Adesso budget items for which Plaintiff’s Commercial units have been assessed are properly chargeable to Plaintiff’s units, and the Adesso Defendants have complied with the terms of the Master Deed in doing so.

19. Pursuant to § V(C)(5) of the Master Deed, “Retail Parking Spaces as identified in Exhibit ‘C’ [to the Master Deed] shall be Limited Common Elements, limited to the use of the Commercial Unit it/they serve. Such spaces shall be marked with identification information designating the limited use of such...[and]...may not be reassigned and shall remain a Limited Common Element relating to the Commercial Unit.”

20. The Fourth Amendment to Master Deed of Adesso Horizontal Property Regime (“Fourth Amendment”) was recorded on April 22, 2013 in the Richland County

Register of Deeds Office, in Book 1854 at Page 818. The Fourth Amendment is attached as Exhibit 6 to the Adesso Defendants' Memorandum in Support of their Motion for Summary Judgment and is incorporated in this Order by reference.

21. The Fourth Amendment contravened § V(C)(5) of the Master Deed by reassigning the Retail Parking Spaces—specifically spaces numbered 001-017, 108, 157, and 220-221—either to the use of both Commercial and Residential guests, or as leased spaces to the United States Marine Corps and one Adesso resident.

22. The reassignment of the Retail Parking Spaces also violated the commercial parking requirements established by the governing zoning ordinance, the Adesso Planned Unit Development ("PUD"), as amended by letter of Holder Properties, Inc. dated January 24, 2008 ("January 2008 Amendment"). The January 2008 Amendment is attached as Plaintiff's Exhibit 5 to the Deposition of Rachel Lynn Bailey, City of Columbia Zoning Administrator, and is incorporated in this Order by reference.

23. Per the January 2008 Amendment, the Adesso Commercial Units were required to have a total of at least twenty-six (26) dedicated parking spaces, with nineteen (19) restricted access spaces within the building itself, and seven (7) spaces located along Main and Blossom Streets. The January 2008 Amendment also sets forth a formula to calculate the required number of parking spaces based upon future increases or decreases in the Commercial Units' square footage.

24. The Adesso PUD, as amended, rather than general City of Columbia zoning ordinances, controls the parking requirements for the Adesso.

25. Plaintiff purchased the Adesso Commercial Units on December 5, 2014. He did not purchase the properties from the Adesso Defendants or Holder Defendants; rather, Plaintiff purchased them from Ford Elliott, the current owner at the time.

26. By 2014, Plaintiff—who is a well-educated, board-certified Psychiatrist—possessed significant prior experience with commercial real estate acquisitions, having previously acquired four (4) commercial properties—three of which were acquired for investment purposes.

27. Despite his prior experience, Plaintiff did not personally inspect the Commercial Properties or review any of the recorded documents relating to the Adesso development prior to his purchase. Further, Plaintiff did not actually visit the Adesso Commercial Units until late 2016 or early 2017—between two and three years after his purchase of the units.

28. Neither Plaintiff nor his hired professional communicated with the Adesso Defendants with regard to Plaintiff's acquisition of the Commercial Units, and the Adesso Defendants made no statements or other representations to Plaintiff in connection therewith.

29. On March 4, 2015, Plaintiff was notified by a representative of Holder—which provided property management services to the Association until May, 2016—that a lottery would be held among the Adesso owners to determine leasing rights for three of the Adesso Commercial Parking Spaces. Plaintiff was informed that such rights would be sold to the highest bidder.

30. The Adesso Master Deed specifically prohibits the leasing of the Commercial Parking Spaces in this manner.

31. Around March of 2015, one of Plaintiff's tenants, the United States Marine Corps ("Marines"), notified Plaintiff of insufficient parking and of their intent to vacate their leased recruiting center space in one of Plaintiff's Commercial Units if Plaintiff was not able to secure parking for them.

32. Despite being made aware of the Marines' complaints regarding parking, as well as being required to lease back Commercial Parking Spaces almost immediately after he took ownership of the Commercial Units, Plaintiff took no action to investigate the parking requirements of the Adesso Master Deed or the Adesso PUD until 2017.

33. Further, Plaintiff has paid assessments to the Association since the date he purchased the commercial units, and he took no action to investigate any potential claims relating to the charging of assessments until 2017.

34. In June, 2018, the Adesso Defendants changed the signage for, or otherwise restricted access to, 21 parking spaces within the Adesso, to limit the spaces designated for the use of the Commercial Units to "retail use only," to bring the allocation of Commercial Parking Spaces into compliance with Section V of the Master Deed.

35. In addition to the 21 parking spaces within the Adesso, there is sufficient on-street parking within 400 feet of the Adesso to serve Plaintiff's Commercial Units, such that the parking spaces available for the use of Plaintiff's units also comply with the Adesso PUD, which is the applicable City of Columbia Zoning Ordinance.

36. Plaintiff took no action to investigate his potential claims until 2017.

37. Plaintiff did not file this action until February 14, 2019.

38. Plaintiff has agreed to withdraw his South Carolina Unfair Trade Practices (SCUTP) claim as to the Adesso Defendants.

Based upon the foregoing, the undersigned finds and concludes as follows:

CONCLUSIONS OF LAW

39. This Court has proper jurisdiction over the parties to this action and the claims herein asserted.

40. Venue is proper in Richland County.

41. The Adesso Defendants have not breached the Master Deed.

42. The Adesso Defendants have complied with the provisions of the Adesso Master Deed in charging assessments to Plaintiff's Commercial Units.

43. The allocation of Adesso Retail Parking Spaces limited to the use of Plaintiff's Commercial Units complies with the Master Deed.

44. Further, the allocation of Adesso Retail Parking Spaces available for the use of Plaintiff's Commercial Units complies with the requirements of the Adesso PUD, which is the controlling City of Columbia Zoning Ordinance.

45. By as early as December, 2014, at the time Plaintiff purchased the Commercial Units, Plaintiff knew or should have known of the existence of his claims regarding the allocation of parking spaces at the Adesso and the charging of assessments. At the time of purchase, information regarding parking-related conditions and charging of assessments, about which Plaintiff complains, were matters of public record.

46. Further, by as late as March, 2015, Plaintiff knew or should have known of his parking-related claims because Plaintiff possessed actual knowledge regarding matters of Commercial parking allocation, raised by both Holder and the Marines, which conflicted with Section V of the Master Deed.

47. Plaintiff's claims, if any, regarding the allocation of parking spaces at the Adesso and the charging of assessments to his Commercial Units accrued as early as December, 2014, and by no later than March, 2015.

48. Pursuant to the discovery rule, as articulated by the Court of Appeals in *Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (S.C. Ct. App. 1998) and the Supreme Court in *Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 443 S.E.2d 537 (1994)), the undersigned finds that a person of common knowledge and experience, through the

exercise of reasonable diligence, would have discovered Plaintiff's parking-related claims and assessment claims by as early as December, 2014, and in any event, no later than March, 2015. Prior to and at the time he purchased the Commercial Units, Plaintiff had ample opportunity to investigate the public record—which would have disclosed the state of Commercial parking allocation at the Adesso and the method by which assessments would be charged to Plaintiff's Commercial Units—had he chosen to do so.

49. A person of common knowledge and experience, through the exercise of reasonable diligence under the facts of this case, would have investigated any matters potentially affecting Plaintiff's Commercial Units prior to purchasing them—including the publicly-available: (1) Adesso Master Deed; (2) amendments to the Master Deed; (4) other Adesso governing documents; and (5) Adesso PUD and other City of Columbia Zoning documents.

50. Plaintiff made no attempts to investigate the matters underlying his claims until 2017, and Plaintiff did not file this action February 14, 2019.

51. The doctrines of equitable estoppel and equitable tolling are inapplicable to this case because Plaintiff has failed to produce sufficient evidence that the Adesso Defendants made any false representations to Plaintiff. Further, Plaintiff knew or had the means to know the truth as to the facts in question by no later than March, 2015, and Plaintiff could not have justifiably relied on representations, if any, made by Defendants.

52. Pursuant to S.C. Code Ann. § 15-3-530, Plaintiff was required to bring his claims for Negligence/Gross Negligence, Breach of Master Deed, Declaratory Judgment, Injunctive Relief, Negligent Misrepresentation, and Constructive Fraud by 2018, or his claims were forever barred.

53. Pursuant to S.C. Code Ann. § 39-5-150, Plaintiff was required to bring an action to enforce his Unfair Trade Practices Act claim by 2018, or his claim was forever barred. Additionally, even if such claim were not time-barred, Plaintiff has withdrawn it as to the Adesso Defendants.

54. Therefore, pursuant to Rule 56, SCRPC, and upon consideration of all the evidence and arguments presented by the parties, the undersigned finds there is no genuine issue of material fact that Plaintiff had at least constructive knowledge of the existence of his potential parking-and-assessment-related claims by no later than March, 2015, and further, that Plaintiff failed to bring an action to enforce his claims by 2018. Therefore, the Adesso Defendants are entitled to judgment as a matter of law that Plaintiff's claims are time-barred by the above statutes of limitations.

55. In addition to the grounds set forth in Paragraph 54, the undersigned also finds there is no genuine issue of material fact that: (1) the allocation of Commercial parking spaces at the Adesso complies with both the Master Deed and the Adesso PUD, which is the applicable City of Columbia Zoning ordinance; and (2) the Adesso Defendants have complied with the terms of the Master Deed in charging assessments to Plaintiff's Commercial Units. Further, because the Commercial parking allocation and charging of assessments comply with the Adesso Master Deed and City of Columbia Zoning requirements, Plaintiff has failed to demonstrate facts and circumstances warranting an injunction in this action. *See Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Therefore, the Adesso Defendants are entitled to judgment as a matter of law regarding Plaintiff's claims for Declaratory Judgment, Injunctive Relief, Breach of Master Deed, and Negligence/Gross Negligence.

Therefore, it is ORDERED, ADJUDGED, AND DECREED that:

A. The Adesso Defendants' Motion for Summary Judgment is hereby GRANTED as to all claims asserted in this action by Plaintiff.

B. This action, and all claims asserted herein against the Adesso Defendants, are hereby **dismissed with prejudice**.

IT IS SO ORDERED.

The Honorable DeAndrea G. Benjamin
Fifth Judicial Circuit

[Signature Page to Follow]

6639372v.1



Richland Common Pleas

Case Caption: Emad Tadros , plaintiff, et al vs Holder Properties Inc , defendant, et al
Case Number: 2019CP4000919
Type: Order/Summary Judgment

So Ordered

s/DeAndrea Gist Benjamin, #2161

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY CIRCUIT COURT

DeAndrea Gist Benjamin, Circuit Court Judge
Case No.: 2019-CP-40-00919

Appellate Case No. 2022-001434

Emad Tadros, as Trustee of the Grace Living Trust dated October 12, 2010, as amended, Appellant,

v.

Holder Properties, Inc., John R. Holder, Individually, ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association, Defendants,

of which

ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association are the Respondents.

Respondents' Motion to Dismiss

Respondents, by and through their undersigned attorneys, move the Court of Appeals for an order of dismissal, pursuant to Rules 207, 208, 240, and 260 of the South Carolina Appellate Court Rules.

Background

Appellant Emad Tadros filed his notice of appeal on October 11, 2022. This Court notified Appellant's counsel on December 7, 2022, that the time to order the transcript had expired, and reminded Appellant of his obligation to copy the Court, the Office of Court Administration, and Respondents' counsel with all correspondence concerning the transcript.

Exhibit 1. In response to the Court of Appeals letter, Appellant’s counsel provided numerous email messages with the circuit court and court reporter trying to track down the transcript, none of which copied opposing counsel. **Exhibit 2.** The Clerk of Court responded on December 19, 2022, directing Appellant to move for relief from the Court or file the initial brief. **Exhibit 3.**

Appellant moved the Court for an extension of time to serve and file the initial brief and designation of matter and, on January 20, 2023, the Court granted the motion and gave Appellant until March 20, 2023, to file and serve the initial brief and designation of matter. **Exhibit 4.** On March 20, 2023, Appellant moved for a second extension to file the initial brief and designation of matter, requesting an additional 60 days and including a communication from the court reporter that did not copy opposing counsel, court administration, or the Court of Appeals. **Exhibit 5.**

On March 29, 2023, the Clerk of Court acknowledged Appellant’s second motion for an extension of time, indicating Appellant had not paid for the transcript. **Exhibit 6.** Again, Appellant was reminded to copy opposing counsel, court administration, and the Court of Appeals on all correspondence with the court reporter. **Exhibit 6.** The time to serve and file the initial brief and designation of matter was held in abeyance pending receipt of the transcript. **Exhibit 6.** Apparently, Appellant submitted proof the following day the transcript was paid for. However, opposing counsel has not been copied on any correspondence with the court reporter, and it is unclear whether the transcript was received.

Argument

Respondents request this Court dismiss the appeal for Appellant’s failure to follow the Appellate Court Rules regarding ordering the transcript and keeping the parties copied on correspondence with the court reporter, under Rule 207. “Whenever it appears that an appellant

or petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court.” Rule 260(a), SCACR. An appeal can be reinstated if the appellant demonstrates good cause for failure to follow the rules. *Id.*

Rule 207 commands an appellant to “contemporaneously furnish all parties, the Office of Court Administration, and the clerk of the appellate court with copies of all correspondence with the court reporter. Rule 207(a)(1), SCACR. The transcript must be delivered within 60 days of the request, but Court Administration is empowered to grant extensions for a total of up to 90 days. Rule 207(a)(2), (3), SCACR. Any further extensions must be by order of the Chief Justice. Rule 207(a)(3), SCACR. If an appellant does not receive the transcript within the allotted time, the appellant must notify the Office of Court Administration, the clerk of the appellate court, and the court reporter in writing. Rule 207(a)(5), SCACR.

The date the appellant receives the transcript is critical for prosecuting the appeal because it triggers Appellant’s 30-day deadline for filing the initial brief and designation of matter. Rule 208(a)(1), SCACR; Rule 209(a), SCACR. If the appellant fails to file and serve the “brief within the time prescribed, the clerk of the appellate court shall sign an order dismissing the appeal.” Rule 208(a)(4). The appeal can be reinstated if the appellant demonstrates good cause under Rule 260. *Id.*

Here, Appellant failed to copy opposing counsel and, at times, court administration and the clerk of the appellate court, on correspondence with the court reporter while ordering the transcript. Pursuant to Rule 260(a), the clerk “shall” issue an order of dismissal.

Respondents understand the clerk’s March 29, 2023 order indicates the timing for filing the initial brief and designation of matter is held in abeyance until the Appellant receives the

transcript. In other words, it appears there is no deadline for the court reporter to provide the transcript. Pursuant to the Appellate Court Rules, the clerk may give the court reporter extensions totaling up to 90 days, but further extensions must be by order of the Chief Justice. Ninety days has come and gone, it is unclear whether Appellant has received the transcript, and the appeal is languishing in the pre-briefing stage. More than 140 days have passed since the clerk of the appellate court issued its order and Appellant paid for the transcript. It is difficult to believe that Appellant has not communicated with the court reporter and has not received the transcript since March 29, 2023. Certainly, Appellant's counsel has not notified the Court it has yet to receive the transcript.

In sum, Appellant has failed to abide by the Appellate Court Rules, and the many reminders by the clerk of the appellate court, to copy Respondents' counsel, court administration, and the clerk of the appellate court on correspondence with the court reporter. This has led to the appeal languishing before briefing can begin, and Respondents' counsel being unaware of the status of the transcript. Under the circumstances, Respondents assert the clerk must dismiss the appeal for failure to follow the Appellate Court Rules. In the alternative, Respondents request the Court order Appellant to demonstrate good cause for the failure to follow the Appellate Court Rules and provide proof or explain whether Appellant has received the transcript. In the event Appellant received the transcript and has not filed the initial brief within 30 days, the appeal should similarly be dismissed under Rules 208 and 260. In the event Appellant has not received the transcript and the Court does not dismiss the appeal, Respondents request the Court order Appellant to prosecute the appeal without the transcript.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

This 18th day of August, 2023.

s/Skyler C. Wilson

DOUGLAS W. MACKELCAN

State Bar No.: 76332

SKYLER C. WILSON

State Bar No.: 102865

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***Attorneys for Respondents Adesso Horizontal
Property Regime, and Adesso Homeowners'
Association***

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
CIRCUIT COURT

DeAndrea Gist Benjamin, Circuit Court Judge
Case No. 2019-CP-40-00919

Appellate Case No. 2022-001434

Emad Tadros, as Trustee of the Grace Living Trust dated October 12, 2010, as
amended.....Appellant,

v.

Holder Properties, Inc., John R. Holder, Individually, ADESSO/Columbia, LLC, ADESSO
Horizontal Property Regime, and ADESSO Homeowners' Association, Defendants,

of which

ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners'
Association ,.....Respondents.

REPLY TO RESPONDENTS' MOTION TO DISMISS

**TO: DOUGLAS W. MACKELCAN, ESQUIRE AND SKYLAR C. WILSON,
ESQUIRE, ATTORNEYS FOR THE RESPONDENTS AND TO THE RESONDENTS
NAMED ABOVE:**

The Appellant Emad Tadros, as Trustee of the Grace Living Trust dated October 12,
2010, as amended, herein files his Reply to Respondents' Motion to Dismiss and would show as
follows:

BACKGROUND

Appellant filed his appeal arising out of the Court Granting Respondents' Motion for Summary Judgment heard on January 7, 2021. The Court took the matter under advisement and issued a Form 4 Order Granting Respondents' Motion for Summary Judgment (the "Order"). Appellant filed a Motion to Reconsider the Order. Appellant's Motion to Reconsider the Order was denied by Form 4 Order filed September 19, 2022. Appellant file his Notice of Appeal on October 11, 2022, and ordered a copy of the transcript of the hearing from the January 7, 2021 Motion for Summary Judgment hearing.

The Clerk of Court for the South Carolina Court of Appeals notified Appellant's counsel on December 7, 2022, that the time for ordering the transcript had expired. Appellant and the staff at the Goodwyn Law Firm spent numerous hours and sent multiple emails to the underlying court, the clerk for the South Carolina Court of Appeals attempting to locate the court reporter and obtain a copy of the transcript from the January 7, 2021, hearing. Respondent's Exhibit 2 to its Motion to Dismiss is replete with the numerous attempts Appellant and the Goodwyn Law Firm's staff made with to obtain a copy of the transcript from the January 7, 2021.

In addition to the alleged missing transcript and other problems, including audio difficulties with the transcript, Attorney Charles G. Blackburn began work with the Goodwyn Law Firm in May 2022. When the court reporter had been identified, the Court reporter would not produce a copy of the transcript to Mr. Blackburn until Mr. Blackburn received an Order from the underlying Court that Mr. Blackburn was working for the Goodwyn Law Firm, LLC. The Goodwyn Law Firm, LLC received an Order filed January 5, 2023, allowing the Goodwyn Law Firm, LLC and attorney T. Jeff Goodwyn to receive a copy of the transcript from January 7, 2021.

The court reporter then informed Mr. Blackburn by email of January 6, 2023, that the courts in January 2021, were experiencing technical difficulties and that she would do her best to prepare a transcript with no or few audibles and that it would take a “few weeks” to prepare the transcript.

A timeline of events outlining the significant issues Appellant encountered during his pursuit of the transcript is outlined below. The chronology of the efforts made by Appellant’s counsel to obtain a copy of the transcript, illustrates the significant problems encountered by the Appellant during its pursuit of a copy of the transcript.

1	10-11-22	Transcript Request Form (the day the appeal was filed)
2	12-7-22	Letter from Court of Appeals notifying Appellant the time for ordering the transcript expired
3	12-12-23	Appellant’s letter to Court of Appeals saying transcript cannot be found
4	12-19-22	Letter from Court of Appeals saying file a Motion to obtain transcript
5	12-28-22	Letter to Judge Benjamin requesting Order allowing copy of transcript be produced to the Goodwyn Law Firm
6	1-4-23	Our letter to Judge Benjamin with Proposed Order for Transcript
7	1-5-23	Filed Order allowing transcript be produced to the Goodwyn Law Firm
8	1-6-23	Email from Court Reporter regarding difficulties with transcribing the transcript
9	1-18-23	Appellant’s Motion for Extension of Time to file Initial Brief
10	1-20-23	Order Extending Filing Time to March 20, 2023
11	1-25-23	Letter to Respondent from Court of Appeals regarding deficiency in Order of Substitution for Respondent attorney Michael Masciale

12	2-2-23	Order substituting attorney Michael Masciale
13	3-20-23	Appellant's Second Motion for Extension of Time to File Initial Brief
14	3-29-23	Order Holding in Abeyance time to serve Initial Brief
15	8-11-23	Email from Court Reporter to attorney Blackburn with attached transcript from January 7, 2021 hearing with notation that the court reporter did the best she could with the poor quality of the Webex audio as there was great interference
16	8-18-23	Respondent filed Motion to Dismiss
17	8-18-23	Email from attorney Blackburn to Respondents notifying them of receipt of the transcript with the numerous inaudibles and "she did the best she could considering the poor quality of the Webex audio."

The emails from the court reporter are contained as exhibits in the Appellant's Motion for Extension to file Initial Brief and Designation of Matter filed with this Court on January 18, 2023, that are reiterated in the August 11, 2023, email from the Court Reporter to attorney Blackburn. Appellant has finally obtained a poor-quality transcript from the Court Reporter that covered the January 7, 2021, hearing to prepare Appellant's initial brief.

Argument

Respondents base its Motion to Dismiss on essentially two grounds: 1) the time it has taken Appellant to obtain a copy of the hearing from January , 2021; and 2) Appellant not copying co-counsel with communications between the Appellant and the Court Reporter.

The Respondents move for an order of dismissal, pursuant toe Rules 207, 208, 240 and 260 of the South Carolina Appellate Court Rules.

Good cause is the standard that determines if an appeal can be reinstated. "The good cause standard exists to ensure the interests of justice are protected even when a party missteps,

so a harmless procedural foot fault does not spring a trap door that mindlessly jettisons innocent parties out of court, regardless of the circumstances.” *Jordan v. Hartford Fin. Grp., Inc.*, 453 S.C. 501, 868 S.E.2d 400 (S.C. App. 2002).

To jettison Appellant out of court over the inability to obtain a copy of a transcript despite multiple efforts and time spent to obtain the transcript is unconscionable harmless error. Goodwyn Law Firm did everything in its power to obtain a copy of the transcript of the transcript so that this appeal would not be jettisoned out of court.

Furthermore, the Respondents’ argument that Appellant did not copy the Court, the Office of Court Administration, and Respondents’ counsel with **all** correspondence concerning the transcript is not accurate. Counsel for Appellant was in constant communication with the court reporter attempting to obtain a copy of the transcript. Although Appellant did not copy **all** communications with the court reporter to the above-mentioned parties and entities, counsel for Appellant did make sure all said parties and entities were kept apprised of the status of the search for the transcript.

“Where there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief.” *Columbia Pools, Inc. v. Galvin*, 228 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986). Appellant made a good faith attempt to contact counsel for respondent and the court concerning the status of the transcript. To grant Respondents’ Motion to Dismiss over technicalities’ when prejudice is absent from the scene is prejudicial to Appellant, especially at this stage of the Appeal. “The practice of law is challenging enough without having to endure the overbearing enforcement of technicalities when prejudice is absent from the scene.” *Supra Jordan*.

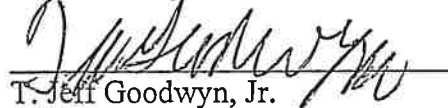
The touchstone here is good cause, a standard designed to excuse honest, harmless human mistakes so a case may be judged on its merits rather than its missteps” Id *Jordan*; See *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 348 S.E. 2d 617 (Ct. App. 1986).

Conclusion

For good cause, as referenced herein, including the lack of prejudice and harmless human mistakes similar to *Jordan*, the Respondents’ Motion to Dismiss must be denied so this appeal may be heard on the merits.

Respectfully submitted,

The Goodwyn Law Firm, LLC



T. Jeff Goodwyn, Jr.

Charles G. Blackburn

Goodwyn Law Firm, LLC

2309 Devine Street

Columbia, South Carolina 29205

(803) 251-4517

JGoodwyn@Goodwynlaw.com

Attorneys for Appellate

Columbia, South Carolina
August 27, 2023

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
CIRCUIT COURT

DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2019-CP-40-00919

Emad Tadros, M.D.,.....Appellant,

v.

Holder Properties, Inc.,.....Respondents.

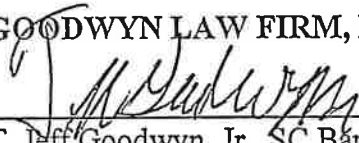
PROOF OF SERVICE

I certify that I have served a copy of Appellant's Reply to Respondents' Motion to Dismiss on Douglas W. Mackelcan, Esquire, and Skylar C. Wilson, Esquire, counselors for the Respondents at the address below via email and by depositing a copy of same in the United States Mail, postage prepaid, on August 28, 2023.

Douglas W. Mackelcan, Esquire
Skylar C. Wilson, Esquire
Copeland, Stair, Valz & Lovell, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
dmackelcan@csvl.law
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(Signature on next page)

GOODWYN LAW FIRM, LLC



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Attorneys for Appellant

Columbia, South Carolina
August 28, 2023

The South Carolina Court of Appeals

Emad Tadros, M.D. as Trustee of the Grace Living Trust
dated October 12, 2010, as amended, Appellant

v.

Holder Properties, Inc., John R. Holder, Individually,
ADESSO/Columbia, LLC, ADESSO Horizontal Property
Regime, and ADESSO Homeowners' Association,
Defendants,

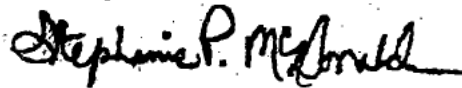
of which

ADESSO/Columbia, LLC, ADESSO Horizontal Property
Regime, and ADESSO Homeowners' Association are the
Respondents.

Appellate Case No. 2022-001434

ORDER

On August 18, 2023, Respondents filed a motion to dismiss because Appellant failed to comply with Rule 207(a)(1), SCACR, by not contemporaneously furnishing all parties, the Office of Court Administration, and the clerk of the Court of Appeals with copies of all correspondence with the court reporter. Appellant filed a return, and Respondents filed a reply. After careful consideration, we deny the motion to dismiss. In light of Appellant having received the transcript, the timelines are no longer being held in abeyance. We order Appellant to file the initial brief and designation of matter within thirty days of the date of this order.



FOR THE COURT

Columbia, South Carolina

FILED
Sep 11 2023

cc:

Thomas Jefferson Goodwyn, Jr., Esquire

Charles Grant Blackburn, Esquire

Douglas Walker MacKelcan, III, Esquire

Skyler Cole Wilson, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Emad Tadros, M.D. as Trustee of the Grace
Living Trust dated October 2, 2010, as amended

Plaintiff,

vs.

Holder Properties, Inc., John R. Holder,
Individually, ADESSO/Columbia, LLC,
ADESSO Horizontal Property Regime and
ADESSO Homeowner's Association

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2019-CP-40-00919

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO HOLDER
DEFENDANTS' AND
DEFENDANTS ADESSO
HORIZONTAL PROPERTY REGIME
AND ADESSO HOMEOWNER'S
ASSOCIATION'S MOTIONS FOR
SUMMARY JUDGMENT**

The Plaintiff Emad Tadros, M.D. as Trustee of the Grace Living Trust dated October 12, 2010, as amended (hereinafter "Plaintiff"), by and through his undersigned attorney, respectfully submits this Memorandum in Opposition to the motions for summary judgment filed by the Holder Defendants and the ADESSO Horizontal Property Regime and ADESSO Homeowner's Association. For the reasons stated within this memorandum, the Holder Defendants' and the ADESSO Horizontal Property Regime and ADESSO Homeowner's Association's Motions for Summary Judgment should be denied.

STATEMENT OF FACTS

Plaintiff owns real property located at 601 S. Main Street, Suites A, B, C and D, Columbia, South Carolina. Suites A, B, C and D (the "units") are located in the ADESSO Horizontal Property Regime (the "ADESSO"). Plaintiff purchased the units on December 5, 2014.

The ADESSO was created by the recording of a Master Deed (the “Master Deed”) on January 14, 2008 with the Richland County, South Carolina Register of Deeds. The Master Deed was filed in the manner provided for by the South Carolina Horizontal Property Act, as amended, S.C. Code Ann. §27-31-10 et seq. (1976).

The Master Deed identified ADESSO/Columbia, LLC as the Owner and Holder Properties, Inc. as the Developer of the ADESSO.

The ADESSO consists of one hundred and ten (110) residential units in five (5) stories with ground level commercial units consisting of approximately eight thousand one hundred thirty-nine (8,139) square feet.

The ADESSO is built over a ground level parking area for residential unit owners and the owner of the commercial units.

Each residential unit owner and commercial owner is subject to the ADESSO governing documents including the recorded Master Deed and By-Laws governing the ADESSO.

The Master Deed includes an arbitration provision on the first page of the Master Deed:

**“THIS INSTRUMENT CONTAINS AN ARBITRATION PROVISION
PURSUANT TO THE SOUTH CAROLINA ARBITRATION ACT.”**

Furthermore, **Article XXXIV** mandates the **“MASTER DEED BINDING UPON GRANTOR, ITS SUCCESSOR AND ASSIGNS, AND SUBSEQUENT CO-OWNER:”**

“The restrictions and burdens imposed by the covenants of this Master Deed are intended to and shall constitute covenants running with the land and shall constitute an equitable servitude upon each Unit and its appurtenant undivided interest in General and Limited Common Elements. This Master Deed and all easements reserved herein shall be binding upon Grantor, its successors and

assigns, and upon all parties who may subsequently become Co-Owners of Units in the Regime and their respective heirs, legal representative, and successors and assigns.”

Article XXXVI of the Master Deed under “MISCELLANEOUS:”

D. BY ACCEPTANCE OF A DEED TO ANY UNIT OR OTHER PROPERTY HEREUNDER OWNER(S) HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY HEREBY AGREE, THAT

- **(D)(1): NEITHER OWNER NOR GRANTOR ANY ASSIGNEE, SUCCESSOR, HEIR, OR LEGAL REPRESENTATIVE OF OWNER OR GRANTOR, SHALL SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, COUNTERCLAIM, OR ANY OTHER LITIGATION PROCEDURE ARISING FROM OR BASED UPON THE MATTERS SET FORTH HEREUNDER, OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE PARTIES THERETO;**
- **(D)(2): NEITHER OWNER NOR GRANTOR WILL SEEK TO CONSOLIDATE ANY SUCH ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL HAS NOT BEEN OR CANNOT BE WAIVED;**
- **(D)(3): NEITHER OWNER NOR GRANTOR HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS SECTION WILL NOT BE FULLY ENFORCED IN ALL INSTANCES;**
- **(D)(4): THIS PROVISION IS A MATERIAL INDUCEMENT FOR GRANTOR TO MAKE THE DECLARATIONS SET FORTH HEREIN.**

John R. Holder executed the Master Deed on **January 11, 2008** on behalf of the **grantor ADESSO/COLUMBIA, LLC** as its sole member. **(emphasis added).**

Chapter 31 (The South Carolina Horizontal Property Act), Section 27-31-170 requires
“Each co-owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same maybe lawfully amended from time to time and with the covenants, conditions and restrictions set forth in the

master deed or lease or in the deed or lease to his apartment. Failure to comply with any of the same shall be grounds for a civil action to recover sums due for damages or injunctive relief, or both, maintainable by the administrator or the board of administration, or other form of administration specified by the bylaws, on behalf of the council of co-owners, or in a proper case, by an aggrieved co-owner.” S.C. Code Ann. §27-31-10 et seq. (1976)

Defendant Holder Properties, Inc. (“HPI”) was the original property manager at the ADESSO and remained the property manager at ADESSO through May 2016. (***Memorandum in Support of Motion for Summary Judgment by Holder Defendants, page 3***).

On August 11, 2015, Applied Building Sciences, Inc. (“ABS”) performed a Preliminary Visual Assessment of the ADESSO on behalf of then board president Mrs. Patricia Durkin. ABS issued a Preliminary Visual Evaluation and on January 25, 2016 (**Exhibit A at page 1**).

Mrs. Durkin was concerned about construction deficiencies related to the original construction of the ADESSO by the developer HPI and with the condition of the ADESSO prior to the turnover to a homeowner-controlled board (**Exhibit A at page 1**).

In spite of the arbitration provision contained in the Master Deed, on **February 9, 2016**, the ADESSO Homeowner’s Association filed a **lawsuit** (the “**2016 lawsuit**”) on behalf of the owners at the ADESSO against the grantor and the developer and 38 other defendants involved in the development, construction, and management of the ADESSO project. (***Memorandum in Support of Motion for Summary Judgment by Holder Defendants, page 4, Exhibits 5 (sic) and Exhibit 2***). (**Emphasis added**).

Furthermore, the Plaintiff, although named as a Plaintiff in the **2016 lawsuit**, was not given notice of the 2016 lawsuit until **May 2017**. (**Exhibit B** “**Affidavit of Emad Tadros, M.D.**”). (**Emphasis added**).

The Plaintiff first learned of the lawsuit on or around **May 21, 2017** where counsel representing the Plaintiffs in the 2016 lawsuit attempted to obtain Plaintiff’s signature on a Commercial Claims Settlement Agreement and Release. (**Exhibit B** “**Affidavit of Emad Tadros, M.D.,**” particularly **Exhibit C to Affidavit of Emad Tadros, M.D.**)

Exhibit C to the Affidavit of Emad Tadros, M.D. contains a series of emails between the Plaintiffs’ attorney in the 2016 lawsuit and the Plaintiff showing the Plaintiff first became aware of the 2016 lawsuit in May 2017 and that Plaintiff’s counsel in the 2016 lawsuit was threatening Dr. Tadros that he would have a suit brought against him if he did not execute the Commercial Claims Settlement Agreement.

Furthermore, the Affidavit of Emad Tadros, M.D. is evidence of the duress exerted and promises made to the Plaintiff that the Plaintiff would not be barred from asserting claims against the developer and grantor of the ADESSO related to the issues Plaintiff had with the grantor/developer.

Plaintiff filed this suit on February 14, 2019 against Holder Properties, Inc., ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners’ Association and filed an Amended Complaint on May 9, 2019 against Holder Properties, Inc., John R. Holder, Individually, ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners’ Association alleging:

1. Negligence/Gross Negligence;
2. Breach of Master Deed;

3. Declaratory Judgment;
4. Injunctive Relief;
5. Violation of South Carolina Unfair Trade Practices Act (subsequently withdraw);
6. Negligent Misrepresentation; and
7. Constructive Fraud.

STANDARD OF REVIEW

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); *See also* Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing and Regulation, 337 S.C. 476, 523 S.E.2d 795 (S.C. App. 1999).

In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (S.C. App. 1999).

If triable issues exist, those issues must go to the jury. Rothrock v. Copeland, 305 S.C. 402, 409 S.E.2d 366 (1991). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000).

Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Carolina Alliance, supra*.

At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a factfinder for

summary judgment to be denied Hill v. York County Sheriff's Dept. 313 S.C. 303, 413 S.E.2d 179 (S.C. App. 1993); *See also* Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009) (holding the non-moving party is only required to submit a scintilla of evidence in order to withstand a motion for summary judgment).

ARGUMENT

The executed Commercial Settlement Agreement and Release is at the crux of the Holder Defendants' argument for its Motion for Summary Judgment.

Defendants ADESSO Horizontal Property Regime and ADESSO Homeowners' Association (collectively hereinafter the "HOA"). The HOA's Motion for Summary Judgment seeks Motion for Summary Judgment on: **1)** Plaintiff failed to file this action within the three (3) year statute of limitations period provided by S.C. Code Ann. §15-3-530; **2)** Defendants complied with the terms of the ADESSO governing documents and any applicable law charging assessments to Plaintiff's commercial units located at the ADESSO; **3)** Defendants did not make any false representations to Plaintiff in connection with Plaintiff's purchase of the ADESSO commercial units; and **4)** Parking spaces in and around the ADESSO, currently available for the use of Plaintiff's commercial units and their tenants, comply with both the ADESSO Master Deed and the applicable City of Columbia Zoning Ordinance.

For the reasons set forth below this Honorable Court should deny Holder Defendants' and the HOA's Motions for Summary Judgment.

1. Summary Judgment should be denied because the 2016 lawsuit violated the arbitration provisions contained in the Master Deed.

Plaintiff's case is directly on point with the holding in The Gates at Williams-Brice Condominium Association and Katharine Swinson, individually, and on behalf of all others

similarly situated v. DDC Construction, Inc. et al, 418 S.C. 282, 792 S.E.2d 240 (S.C. App. 2016).¹

In *Gates*, the developer (DDC Construction, Inc. “DDC”) contended the circuit court erred in failing to enforce the written jury trial and class action waivers in the master deed for the *Gates*. On appeal, the South Carolina Court of Appeals reversed the circuit court finding. The Court of Appeals in *Gates* found the homeowners knowingly, voluntarily, and intelligently waived their rights to a **jury trial** and to a class action when they signed the deeds to their condominiums. *Id. at p. 297 (Emphasis added)*.

Similarly, the Holder Defendants in the 2016 lawsuit demanded a **trial by jury**. (*Memorandum in Support of Motion for Summary Judgment by Holder Defendants*, Exhibit 2 at page 34) (**Emphasis Added**).

Furthermore, in *Gates*, the court reversed the circuit court and found the homeowners knowingly and voluntarily waived the rights to a jury trial, and these rights were conspicuously and unambiguously set forth in the Master Deed. *Id at page 251; See Wachovia Bank, Nat. Ass’n v. Blackburn*, 407 S.C. 321, 775 S.E.2d 437 (2014) (finding jury trial waivers were conspicuous and unambiguous when waivers were printed in all capital, had a bold heading titled “WAIVER OF JURY TRIAL,” and were located at the end of a six-page document).

Similar to the holding in *Gates* and *Blackburn*, the ADESSO Master Deed included a conspicuous arbitration provision on the first page of the Master Deed and on page 6 of the Master Deed:

“Each co-owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto . . . Failure to comply with any of the same shall be

grounds for a civil action to recover sums due for damages or injunctive relief, or both, maintainable by . . . an aggrieved co-owner.” (Emphasis added).

S.C. Code Ann. §27-31-10 et seq. (1976)

The Plaintiff as a co-owner at ADESSO is entitled for relief under Section 27-31-170 based, inter alia, the violations of the Master Deed by the Holder Defendants and the HOA Defendants.

2. Summary Judgment should be denied because the 2016 lawsuit was initiated by way of fraudulent and ultra vires actions taken by the Holder Defendants and the HOA.

Plaintiff’s expert Michael Parades believes that all the Settlement Agreements in the 2016 lawsuit are invalid because filing the 2016 is an illegal ultra vires act by the ADESSO board of directors (**Exhibit C**, at page 7).

Even more incredulous, in Mr. Parades’ opinion, is that the Holder Defendants knew the ADESS HOA could not bring a lawsuit seeking a jury trial because the Holder Defendants wrote the Master Deed and John R. Holder executed the Master Deed as the sole member of each of the Holder Defendants (**Exhibit C**, page 9).

Mr. Parades also believes the Commercial Claims Settlement Agreement and Release should be vacated as it was obtained fraudulently and by ultra vires actions taken by the HOA.

The first time the Plaintiff learned about the 2016 lawsuit was during the time Class counsel was attempting to obtain the signature of the Plaintiff on the Commercial Claims Settlement and Release Agreement (**Exhibit C to the Affidavit of Emad Tadros, M.D.**). This raises the question of whether Class counsel ever sent out the required notice of the 2016 lawsuit. (**Exhibit C: Affidavit of Michael Parades**, page 9).

After reading all of the minutes produced by the HOA Defendants, Mr. Parades believes the ADESSO HOA board was trying to keep owners from knowing what was going on until the

very end of the 2016 lawsuit. Several of the major actions do not have appeared to have been properly approved as evidenced in the board meeting minutes. (**Exhibit C: Affidavit of Michael Parades, page 9**).

The major actions taken by the HOA Defendants include:

1. Hiring ABS sometime in August 2015 to conduct a Preliminary Visual Inspection that resulted in a report dated January 25, 2016 presented to presumably the board. There is no mention of a report being received in the meeting minutes.
2. Engaging attorney Frank Smith to represent the ADESSO HOA and file a lawsuit against Holder Properties, et al.;
3. Authorizing Frank Smith to proceed with filing a lawsuit against Holder Properties, et al.;
4. Approving mediation in early 2017; and
5. Approving the proposed settlement in March 2017.

The Affidavit of Michael Parades contains significant questions of fact involving the breaches of the Master Deed by the Holder Defendants and the ultra vires actions taken by the HOA.

3. The Affidavit of Darrell A. Terry, PhD identifies the undue influence and ultra vires acts used in the 2016 lawsuit.

In addition to the opinions by Mike Parades of the ultra vires actions taken by the HOA, the Affidavit of Dr. Darrell Terry attached hereto as **Exhibit D** filed with Court on December 16, 2019, a board member during the time of the 2016 lawsuit, sets forth his concerns regarding the actions taken by the HOA Defendants in obtaining the Plaintiff's executed Settlement Agreements and Releases but also the undue influence exerted upon the Plaintiff to execute the Commercial Claims Settlement Agreement.

In fact, Dr. Terry's Affidavit recounts the attorney representing the Plaintiffs in the 2016 construction defect lawsuit was frustrated that Dr. Tadros would not execute the necessary Settlement Agreements and Releases to fully settle the construction defect lawsuit. (**Exhibit D, page 2**).

Dr. Terry's Affidavit recounts that Mr. Smith recommended the board retain an attorney file suit against Dr. Tadros if Dr. Tadros did not sign the Settlement Agreements and Releases. (**Exhibit D, page 2**).

Furthermore, Dr. Terry recounted in his Affidavit that Mr. Smith assured the board that Dr. Tadros' execution of the Settlement Agreements and Releases would not preclude Dr. Tadros from pursuing the claims he had against the developer and contractor that developed and built the ADESSO.

4. Fact issues preclude the HOA Defendants' and the HOA's Motion for Summary.

The HOA argues that the Plaintiff's claim should be dismissed based on the Statute of Limitations. This argument fails because the Statute of Limitations does not apply in this case.

It has long been settled in South Carolina that where there is any conflicting evidence as to whether a claimant knew or should have known whether he has a cause of action, the question is one for the jury and not the court. Arant v. Kressler, 327 S.C. 225, 489 S.E.2d 206 (1997); *See also Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989) (the discovery rule to a claim is a question of fact for the jury.)

The Plaintiff first became aware of the violations of the Master Deed in approximately February 2017. The Plaintiff filed this action on February 14, 2019, within the time allowed to file this claim.

The HOA next argues that the HOA complied with the terms of the ADESSO governing documents and any applicable law in charging assessments to Plaintiff's commercial units at the ADESSO. This argument also fails.

Mike Parades, in his Affidavit, calls into question the tactics used by the Holder Defendants and the HOA Defendants related to Plaintiff's parking spaces. (**Exhibit C, at page 8**).

Specifically, the Holder Defendants scheme of varying commercial space when negotiating with the City of Columbia zoning authorities to change parking space requirement for commercial spaces, changing signage to imply the spaces were for Guest parking and NOT restricted to commercial/retail parking and requiring the Plaintiff to pay rent for his parking spaces. (**Exhibit C, at page 8**).

The HOA argues that the HOA did not make any false representations to Plaintiff in connection with Plaintiff's purchase of the ADESSO commercial units. This argument is fails because Plaintiff did not purchase the units from the HOA. However, the HOA continued the perpetuation of the parking spaces dedicated to the exclusive use of the commercial units by leaving incorrect signage in place until 2018 when the Plaintiff complained to the City of Columbia Zoning Administration. The City of Columbia Zoning Administration conducted an inspection of the parking area and demanded the HOA remove and replace the incorrect and improper signage designating the commercial parking spaces.

Furthermore, the Affidavit of Michael Parades calls into question the City of Columbia Zoning Administration's final determination in March 13, 2019. Mr. Parades questions the basis for the final determination that the commercial parking spaces complied with the City of Columbia Zoning Administration's determination. (**Affidavit of Michael Parades at page 8**)

Mr. Parades and the Plaintiff also take exception to the HOA's argument that the HOA's monthly assessments were proper or accurate. (See Affidavit of Michael Parades, at p. 13). "Based on my experience of over 30 years there are several line items are not appropriate to be included in the commercial budget and other line items that appear high." (**Affidavit of Mike Parades, at page 13**).

CONCLUSION

The questions of fact contained in this Memorandum in Opposition to Defendants' Motions for Summary Judgment include factual issues that should be left to a jury to decide. In particular, the Affidavits of the Plaintiff, Michael Parades and Darrell A. Terry present questions of fact that meet the standard of the scintilla of evidence found in the holding of Hancock ("a mere scintilla of evidence in order to withstand a motion for summary judgment"). Therefore, this Honorable Court should deny the Motions for Summary Judgment filed by both the Holder Defendants and the HOA consistent with the holding in Hancock.

For the reasons stated herein and as will be more fully shown at the hearing of this matter, this Honorable Court should deny the Holder Defendants' and the HOA's Motion for Summary Judgment and grant such other relief as this Honorable Court deems just and proper.

Signature on Following Page

Respectfully submitted,

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