THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Appellate Case No.: 2013-000279

The Honorable W. Jeffrey Young,
Charleston County
Trial Court Case No.: 2010-CP-10-9158

JOHNSON KOOLA, Appellant,

vs.

CAMBRIDGE TWO, LLC, ALBERT V. ESTEE, Individually, CAMBRIDGE LAKES, LP, STEPHEN R. HEAPE, Individually and as General Partner of Cambridge Lakes, LP, CAMBRIDGE LAKES APARTMENT HOMES, a/k/a CAMBRIDGE LAKES APARTMENTS, LP, a/k/a CAMBRIDGE LAKES APARTMENT HOMES, LP, CLASSIC PROPERTIES OF CHARLESTON, INC., CAMBRIDGE CONTRACTING, LP, TRADEMARK PROPERTIES, INC., CAROLINA ONE CHARLESTON HOME PROPERTIES, LLC, CHARLESTON HOME TEAM, LLC, CAROLINA ONE, and WILLIAM E. JENKINSON, IV, Individually,

Of Whom CAMBRIDGE TWO, LLC, ALBERT V. ESTEE, Individually, CAMBRIDGE LAKES, LP, STEPHEN R. HEAPE, Individually and as General Partner of CAMBRIDGE LAKES, LP are the Respondents.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FINDING THAT APPELLANT'S CLAIMS AGAINST RESPONDENTS FOR VIOLATIONS OF THE SOUTH CAROLINA HORIZONTAL PROPERTY ACT, UNFAIR TRADE PRACTICES ACT AND FRAUD ACCRUED WHEN APPELLANT KNEW OF ALLEGED CLAIMS AGAINST RESPONDENTS FOR CONSTRUCTION DEFECTS IN HIS CONDOMINIUM COMPLEX?

2. DID THE TRIAL COURT APPLY THE PROPER STANDARD GOVERNING APPELLANT'S BURDEN OF PROOF TO SHOW THAT A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO WHEN APPELLANT KNEW OR SHOULD HAVE KNOWN OF HIS CLAIMS AGAINST THE RESPONDENT AT ISSUE IN THIS CASE?

STATEMENT OF THE CASE

This is an appeal from the trial court's order granting summary judgment, affirmed by denial of a motion for reconsideration, which found that the claims of appellant Johnson Koola's ("Koola" or appellant) against respondents were time barred. (R. pp. 1-9).

In the case at bar, Koola brought claims against respondents alleging that they had violated provisions of the South Carolina Horizontal Property Act (S.C. Code Ann. §§ 27-31-10, et seq.) (the "HPA"), which, *inter alia*, requires a person converting apartments into condominiums obtain and disclose to purchasers a certified written report from an engineer or architect about the condominium common areas. S.C. Code Ann. § 27-31-430. (R. pp. 23-29). A violation of the disclosure requirements of § 27-31-430 of the HPA is an express violation of the South Carolina Unfair Trade Practices Act (the "UTPA"). *Id* ("A failure to make the disclosure required by this section shall constitute a violation of the South Carolina Unfair Trade Practices Act.") (S.C. Code Ann. §§ 39-5-10, *et seq.*).

Koola has also alleged claims against respondents for fraud, negligence and negligence *per se* and breach of contract and warranty. (R. pp. 26-28). However, the crux of all of Koola's claims against respondents is essentially that: (i) respondents violated the HPA by failing to obtain certified engineering or architectural reports and failing to make the required disclosures; and (ii) respondents had falsely and fraudulently reported to Koola that they had complied with the HPA when Koola purchased a condominium from respondents in 2004. (R. pp. 23-2).

Koola filed his summons and complaint on November 4, 2010 (R. p. 22); however, service of process upon respondents was not made until January 2012. (R. pp. 94-95). By February 2012, respondents filed SCRCP Rule 12 motions to dismiss on the grounds that Koola's claims were time barred by application of a three year statute of limitation. (R. pp. 30, 32). In support, respondents argued that Koola knew or should have known of the existence of his claims against respondents by July 2008, when Koola admittedly learned that his condominium HOA and other condominium owners had filed suit[1] against respondents and other builders and subcontractors for construction defects in the Cambridge Lakes subdivision.

Koola does not dispute that a three year statute of limitations applies to his claims in this action, nor does he dispute that in July 2008 he knew his HOA had brought a lawsuit against respondents and others for alleged construction defects. However, in the case at bar, Koola has not brought any claim against respondents for alleged construction defects. (R. pp. 23-29). Again, Koola's claims are only that

[1] The 2008 litigation filed by the Cambridge Lakes Condominium HOA against respondents and certain contractors was entitled, *Cambridge Lakes Condominium Homeowners Association, et al., v. Bostic Brothers Construction, Inc., Cambridge Two, LLC, et al.*; Case No.: 2008-CP-10-3506 (the "HOA Litigation") (R. pp. 71, 77).

respondents violated the HPA (and thereby the UTPA) by failing to make certain disclosures required by the HPA, by failing to obtain certified engineering or architectural reports and by falsely and fraudulently reporting that they had complied with the HPA. *Id.*

At the hearing on respondents' motions to dismiss, which were converted into motions for summary judgment, and afterwards in post-hearing submission and motion for reconsideration, Koola repeatedly and unequivocally stated that he did not know that respondents committed violations of the HPA and UTPA or had misrepresented their purported compliance with the HPA until September of 2010. (R. pp. 55, 62-63, 85, 88, 90-92). It was only in September 2010, Koola represented, that he reviewed a Third Amended Complaint filed on July 14, 2010 in HOA Litigation against respondents and saw that new claims against respondents for their failure to comply with the HPA, UPA and fraud in misrepresenting that their purported compliance with the HPA had been added in its Third Amended Complaint. *Id.*

As a claim accrues for purposes of commencing the statute of limitation when a plaintiff knows or should know about the existence of said claim or grounds thereof, Koola maintained that his claims for violations of the HPA, UTPA and common law claims only accrued in September 2010. (R. pp. 55, 62-63, 85, 88, 90-92). Therefore, when the summons and complaint were served upon respondents in January 2012, Koola's claims against respondents were within the applicable three year statute of limitations and thereby timely. In sum, it is Koola's contention that the trial court: (i) misapplied the proper accrual date triggering the running of Koola's claims against the respondents; and (ii) failed to apply the proper standard of proof and production

required in showing that a genuine issue of material fact existed as to when Koola's claims against respondents accrued. In either case, the trial court's grant of summary judgment, dismissing Koola's claims on the grounds that said claims are untimely, was clear error.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In February 2004, Koola purchased a condominium unit located in Mount Pleasant, South Carolina from respondents. (R. p. 23). Prior to that time, the unit in question had been one of 104 individual apartments owned and leased by respondents Cambridge Two, LLC, Cambridge Lakes, L.P. and other business entities either owned or operated by Albert V. Estee ("Estee") and Stephen R. Heape ("Heape"). (R. p. 24) Between 2002 and 2004, Estee and Heape converted these apartment premises, known as the Cambridge Lakes subdivision, into individual condominium units and offered those condominiums for sale to the general public. (R. pp. 24-25).

As required by the South Carolina Horizontal Property Act, when apartments into condominiums, the respondents were obligated to obtain and tender to purchasers a written disclosure statement certifying that respondents had obtained a written report from an independent registered architect or engineer describing the present condition of the common elements, the expected useful life for each individual common element and a list and notice of any uncured violations of building codes and violations, together with a list of the estimated cost of remedying such violations. S.C. Code Ann. § 27-31-430.

In 2008, Koola learned that the Cambridge Lakes Home Owners Association (the "HOA") had filed suit against the respondents, as well as, building

contractors involved in the original construction of the apartment complex for negligent construction practices and defects (the "HOA Litigation"). (R. p. 25). Most of the individual owners of the Cambridge Lakes condominiums joined this lawsuit as individual plaintiffs; however, Koola did not. *Id.*

After initiation of the HOA Litigation against respondents, Koola reviewed his closing documentation and found that defendants had indeed represented that they had complied with the requirements of the HPA, including the filing of a Master Deed and having certified reports from an engineer or architect regarding the common areas. R. pp. 79-80). However, in September 2010, Koola discovered that the plaintiffs in the HOA Litigation had filed a Third Amended Complaint, which now alleged new claims that respondents had violated the HPA (and thereby the UTPA) by "failing to comply with applicable South Carolina statutes, including but not limited to the South Carolina Horizontal Property Act (citations omitted)...". (R. pp. 79-80, 55, 62-63, 85, 88, 90-92).

On November 4, 2010, Koola filed a complaint against respondents Cambridge Two, LLC and Albert V. Estee, as well as, Stephen R. Heape, Cambridge Lakes, L.P. and a number of affiliated entities, alleging that these respondents violated the HPA (S.C. Code Ann. §§ 27-31-10, et seq.), the UTPA (S.C. Code Ann. §§ 39-5-10, et seq.), as well as, committed common law fraud, negligence, negligence *per se* and committed breach of contract and warranty. (R. pp. 23-29). Again, the crux of Koola's claims was that respondents failed to comply with the HPA (and thereby violated the UTPA) and falsely and fraudulently reported that they had complied with the HPA. (R. pp. 25-26).

Service of Koola's November 4, 2010 Summons and Complaint was not made upon respondents until January of 2012. (R. pp. 94-95). In response, both respondents Cambridge Two/Estee and Cambridge Lakes/Heape filed motions to dismiss, asserting that all of Koola's claims against them were time barred by application of a three year statute of limitations. (R. pp. 30-33). No affidavits or memoranda were filed by either respondent contemporaneously with the filing of these motions. *Id.* The motions to dismiss were scheduled for hearing before Circuit Court Judge W. Jeffrey Young on July 25, 2010. (R. pp. 33-37). Again, no affidavits or memoranda were filed by respondents prior to or at the hearing. (R. pp. 37-58) However, in argument, respondents maintained that because Koola knew by July 2008 that there were claims for construction defects against the respondents regarding the Cambridge Lakes condominiums, Koola's claims for HPA and UTPA violations also started to accrue in July 2008 and were time barred by the time that service of process was effectuated upon respondents in January 2012. (R. pp. 40-51).

In response, Koola maintained during the July 25, 2012 hearing that while he knew there were potential claims for construction defects in July 2008, he did not know that the respondents had additionally violated the HPA and UTPA until discovering that HPA/UTPA claims were the subject of a third amended complaint filed on July 14, 2010 in the HOA Litigation. (R. p. 55). The trial court allowed the parties ten days to file any additional submissions (R. p. 57) and Koola filed a Post-Hearing Memorandum with exhibits on August 1, 2012 (R. pp. 60-83). In this memorandum, Koola expressly and repeatedly pointed out to the trial court that he did not learn of the

existence of any claim against respondents for violations of the HPA and UTPA until September 2010. (R. pp. 61-63).

Notwithstanding that Koola met his summary judgment burden of clearly identifying a genuine factual dispute as to when he learned that respondents had committed violations of the HPA and UTPA, the trial court issued a September 18, 2012 Order finding that by July 2008, Koola was on notice that "some right of his had allegedly been invaded by the Moving Defendants or that some claim against the Moving Defendants might exist." (R. p. 8). Finding that Koola's claims against respondents accrued in July 2008, the trial court held that by the time service was effectuated against respondents three and half years later in January 2012, the three year statute of limitations had already expired. (R. pp. -89).

On September 28, 2012, Koola filed a Motion for Amendment and Reconsideration of the trial court's September 18, 2012 Order. (R. p. 84). In support of that motion for reconsideration, Koola filed a September 28, 2012 affidavit, in which he reiterated his position that he did not know or have any reason to know that he might have had claims against respondents for violations of HPA and UTPA before reading the Third Amended Complaint in the HOA Litigation sometime in September 2010. (R. pp. 86-93). Koola also pointed out that his knowledge in July 2008 that the HOA Litigation for constructed defects had been commenced was wholly irrelevant because Koola was not maintaining any claim in the present case against respondents for construction defects. *Id.*

On January 13, 2013, Koola was advised by the Chambers of the trial court that his motion for reconsideration had been considered; however, said motion was denied. (R. p. 10). Koola filed a timely Notice of Appeal on February 3, 2013. (R. pp. 96-97).

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c) of the SCRCP. *Nexsen v. Haddock,* 353 S.C 74, 77, 576 S.E.2d 183, 185 (Ct.App. 2002). Summary judgment is proper when it is clear that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* In ruling on a motion for summary judgment, "the evidence and inferences that can be drawn therefrom should be viewed in the light most favorable to the nonmoving party." *Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394* (1994). "If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. However, if the evidence is susceptible of only one reasonable inference, the question is no longer one for the jury but one of law for the Court." *Ward v. Zelinski,* 260 S.C. 229, 232, 195 S.C.2d 385, 387 (1973).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT APPELLANT'S CLAIMS AGAINST RESPONDENTS FOR VIOLATIONS OF THE SOUTH CAROLINA HORIZONTAL PROPERTY ACT, UNFAIR TRADE PRACTICES ACT AND FRAUD ACCRUED AT THE SAME TIME WHEN APPELLANT KNEW OF CLAIMS AGAINST RESPONDENTS FOR CONSTRUCTION DEFECTS.

It is well established that a party must commence an action within three years of the date that a cause of action arises. S.C. Code Ann. § 15-3-530 (2005).

The statute of limitations "begins to run when the underlying cause of action reasonably ought to have been discovered." *Martin v. Companion Health Care Corp.*, 357 S.C. 570, 575, 593 S.E.624, 627 (Ct.App. 2004). "'Under the discovery rule, the three-year clock begins ticking on the date that the injured party either knew or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.'" *Holly Woods Association of Residential Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787 (Ct.App. 2004) (*Quoting, Martin v. Companion Health Care, supra*). The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective. *Id.* Therefore, the test before the trial court is "whether the circumstances of the case would have put a person of common knowledge on notice that "some right of his has been invaded or that some other claim against another party might exist. *Holly Woods Association v. Hiller*, *Id* at 183-84, *citing Young v. S.C. Dept. of Corrs.*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

In the case at bar, the trial court held that Koola knew by July 2008 that he had claims against respondents that are the subject of his present complaint. The trial court's reasoning was based on the fact that Koola knew that the Cambridge Lakes HOA had filed suit against respondent for construction defects by July 2008. The trial court's September 18, 2012 Order states: "[Koola]... was on notice that **some right** of his had allegedly been invaded" by the respondents. (R. pp. 8-9). Again, the evidence cited by the trial court to support this finding all deal with the fact that by 2008, Koola was aware of pending claims for construction defects against the respondents as alleged in the HOA Litigation at that time. (R. pp. 7-8).

Simply put, Koola's knowledge of the existence of claims for construction defects does not equate with knowledge of the existence of other claims against respondents for their violations of the HPA, the UTPA and common law fraud. Under the HPA, there is no bar preventing an apartment converted into a condominium from being offered for sale or sold with construction defects. The clear purpose behind the disclosure requirements in Section 27-31-430 of the HPA is to place an affirmative obligation on the part of the seller to disclose the current state of the common areas, including identifying any construction defects, so that perspective purchasers can evaluate their future liability and exposure through shared future HOA expenses and dues necessary to address those defects. *Id.* Certainly, if the sale of a condominium converted from an apartment with construction defects at the time of the sale is an automatic violation of Section 27-31-430 of the HPA, then the legislature would have expressly included language creating that liability in the statute. It did not. Moreover, if the legislature intended such a result, it most certainly would not have written provisions requiring the seller to obtain certified engineering or architectural reports and to disclose the findings of those reports to perspective buyers before such sales could take place. *See*, Section 27-31-430 of the HPA.

Moreover, in the case at bar, respondents gave Koola written certification at the time of his condominium purchase that they had complied with the HPA. (R. pp. 55-56, 25, 61-62, 66-67). By implication, the argument that Koola should have known in July of 2008 that respondents had also violated the HPA simply because litigation over construction defects had been started by the HOA would require some showing that Koola was privy to the fraudulent conduct committed by respondents in failing to

comply with the HPA and falsely reporting that they had complied with said law. No evidence was presented to the trial court that Koola should have been able to uncover respondent's fraud[2] before Koola reviewed the "Third Amended Complaint" in the HOA Litigation. Indeed, the plaintiffs in the HOA Litigation presumably did not discover that the respondents had additionally violated the HPA until July 2010, when they filed a "Third Amended Complaint" adding such claims to their previously filed claims for construction defects. (R. pp. 77-83). Further, no evidence was presented to the trial court that respondents ever acknowledged or cured their misrepresentation to the Cambridge Lakes condominium owners before the HOA plaintiffs discovered the same through, presumably, discovery in the HOA Litigation. Finally, no evidence was presented to the trial court that Koola should not have been entitled to rely on the representations found in the Master Deed and closing documents that respondents had complied with the HPA.

In sum, simply because Koola discovered in July 2008 that construction defects were the subject of ongoing HOA Litigation does not equate or support the proposition that Koola either knew or should have known that the respondents had additionally violated the HPA by never obtaining the required certified engineering or

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[2] Even if Koola's claims for violations of the HPA, UTPA and fraud arose sometime before September 2010, the doctrine of equitable tolling may also be applicable to Koola's claims against the respondents under the facts of this case. In *Magnolia North Property Owner's Association v. Heritage Communities, Inc.*, this Court held that a defendant will be stopped to assert the statute of limitations in bar of a plaintiff's claim when the delay that would otherwise give operation to the statute has been induced by the defendant's conduct." *Id*, 397 S.C.2d 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012). In *Magnolia North*, this Court further commented that the doctrine of "equitable tolling is, of course, most clearly applicable where the aggrieved party's delay in bringing suit was caused by his opponent's *intentional* misrepresentation, *but* deceit is not an essential element of estoppel." *Id* at 373 (Emphasis in the original). In the case at bar, Koola has alleged and brought to the trial court's attention the fact that respondents misrepresented their purported compliance with the HPA at the time Koola purchased his unit.

architectural reports and by misrepresenting that they had. Therefore, since Koola's claims for violations of the HPA, the UTPA, fraud, etc. which are the subject of the instant complaint against respondents accrued in September 2010, the statute of limitations applicable to such claims would not expire until August 2013. Thus, service of summons and complaint upon respondents in January 2012 was not beyond the three-year statute of limitation as proscribed under S.C. Code Ann. § 15-3-530 (2005) and applicable to the claims that Koola brought in this action against respondents. It is respectfully submitted that the trial court's holding otherwise was erroneous.

II. THE TRIAL COURT FAILED TO APPLY THE PROPER STANDARD GOVERNING APPELLANT'S BURDEN OF PROOF TO SHOW THAT A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO WHEN APPELLANT KNEW OR SHOULD HAVE KNOWN OF HIS CLAIMS AGAINST THE RESPONDENTS TO PRECLUDE THE GRANT OF SUMMARY JUDGMENT ON THIS ISSUE.

Under Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that moving party is entitled to a judgment as a matter of law." *Id.* Under well established law, "Summary judgment is inappropriate when further inquiry into the facts is desirable to clarify proper application of the law. Summary judgment is not appropriate if the facts are conflicting, or if the inferences to be drawn from the facts doubtful. Summary judgment should not be granted even when the evidentiary facts are not in dispute, if there is dispute as to the conclusion to be drawn from those facts. In deciding a motion for summary judgment, the evidence and all of its inferences must be viewed in a light most favorable to the non-moving party. Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will

be improperly deprived of a trial on the disputed factual issues." *Wade v. Berkeley County*, 339 S.C. 513, 518, 529 S.E.2d 743, 746 (Ct. App. 2000) (citations omitted).

In *Hancock v. Mid-South Management Co.*, 381 S.C.326, 330-31, 673 S.E.2d 801, 803 (2009), the Supreme Court upheld the application of the "scintilla standard" governing the determination of motions for summary judgment where, as here, a plaintiff's claims must be met by the preponderance of the evidence:

> "[W]e hold that 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 summary judgment."

Id. South Carolina has defined the evidence which meets the scintilla standard as "any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror." *Young v. Hyman Motors, Inc.*, 199 S.C. 233, 242-43, 19 S.C.2d 109, 113 (1942).

Applying these well established principles to the evidence which was before the trial court for consideration on respondents' motions for summary judgment, it is very clear that a genuine factual dispute, material to Koola's claims, existed as to when Koola knew or should have known that he had the claims against the respondents which were alleged in the complaint. First and foremost, Koola repeatedly represented to the trial court that he did not discover that respondents may have also violated the HPA, the UTPA and committed fraud until he reviewed the "Third Amended Complaint[3]" from the HOA Litigation in September 2010. (R. pp. 55, 61-63, 87-92).

The respondents countered that he knew or should have known of his claims in July 2008 based on Koola's knowledge that his HOA had commenced the

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[3] The Third Amended Complaint, in which the HOA added claims against the respondents for violations of the HPA and UTPA, was only filed on July 14, 2010. (ROA, Koola Post-Hearing Submission, Exh. 6-A).

HOA Litigation for construction defects. As stated previously, Koola had not brought claims for construction defects against respondents in the case at bar, thus Koola's knowledge in July 2008 that the respondents may be liable for construction defects is completely irrelevant. In any event, the determination of whether Koola knew or should have known he had the claims at issue brought against defendants in July 2008 or in September 2010 is directly material to whether those claims were time-barred given.

The trial court may have misapprehended the distinction between claims for construction defects versus claims for violations of the HPA/UTPA. Nonetheless, Koola repeatedly attempted to convey his position to the trial court. Counting the July 25, 2012 oral argument, the August 1, 2012 Post-Hearing Submission and his September 28, 2012 motion for reconsideration, Koola made the trial court aware of the distinction between his knowing about claims for construction defects versus his knowing about claims for violations of the HPA in a very unequivocal manner on three separate occasions. Koola's position statements to the trial court, as well as his September 28, 2012 affidavit averments, coupled with the evidence of the timing of the "Third Amended Complaint" in the HOA Litigation, far exceeded the mere scintilla evidentiary standard of producing sufficient evidence of a genuine issue of material fact in dispute to preclude grant of summary judgment on the issue which respondents claimed that they were entitled to summary judgment. Accordingly, it is respectfully submitted that it was clear error for the trial court to grant summary judgment to the respondents.

CONCLUSION

Based upon the foregoing points and authorities, the appellant respectfully submits that the September 4, 2012 Order of the trial court granting summary judgment to the respondents should be reversed and that appellant's claims against respondents restored and remanded to the trial court.

Dated: November 6, 2013

Respectfully submitted,

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CAMBRIDGE TWO, LLC, et al.,	)
	)
Defendants.	)

PROOF OF SERVICE OF FINAL BRIEFS

I, William B. Jung, Esq., an attorney admitted to practice before this Court, under penalty of perjury, certify that on November 13, 2013, I served a copy of the appellant's Final Brief and Final Reply Brief Petition by mailing one copy of each to the following counsel of record for the defendants-appellees:

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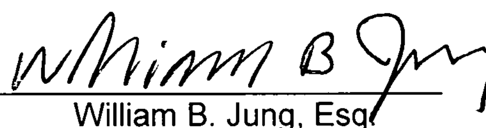
Dated: November 13, 2013



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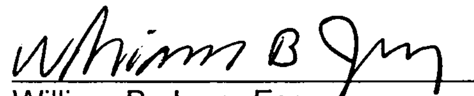
RULE 211(b) CERTIFICATION

I, William B. Jung, Esq., certify that the Final Briefs filed by the appellant comply with Rule 211(b).



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