

**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

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**APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas**

**The Honorable R. Markley Dennis, Jr., Circuit Court Judge**  
Circuit Court Case No. 2010-CP-10-9305

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**APPELLATE CASE NO.: 2013-001632**

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Cambridge Lakes HOA,.....Respondent,

v.

Johnson Koola,.....Appellant.

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**APPELLANT'S RETURN TO RESPONDENT'S MOTION TO STRIKE**

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On July 17, 2013, Appellant pro se Johnson Koola filed Notice of Appeal in the Appellate case No.: 2013-001632, received an extension to file the Initial Brief till September 16, 2013 and filed the Initial Brief on Sep. 16, 2013.

On Sep. 19, 2013, Respondent filed a Motion to Dismiss the appeal. This was followed by Appellant's Return to the Motion to Dismiss the Appeal followed by three other motions and countermotions. The Court of Appeals decided on the Motion to Dismiss on Dec. 04, 2013. Respondent received an extension to file the Respondent's Brief till Feb. 3, 2014.

Respondent has now filed a Motion to Strike certain materials from the Appellant's Designation of Matter. Appellant pro so files a Return to the Motion to Strike.

The Supreme Court of South Carolina reviewed and clarified the law on 'additional sustaining grounds' in l'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). Since then the appellate courts of South Carolina have ruled on 'additional sustaining grounds' on numerous occasions. The Supreme Court reversed the decision of the Court of Appeals on 'additional sustaining grounds' in Spence v. Wingate, 381 S.C. 487, 674 S.E.2d 169 (2009). Significantly, the appellate courts have made the following rulings: In order for an issue to be preserved for an appellate review, **with few exceptions**, it must be raised and ruled upon by the trial judge. Chastain v. Hiltabidle, 381 S.C. 508, 673 S.E.2d 826 (S.C.App. 2009), Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437 (S.C.App. 2005), Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (S.C.App. 2004). A question not raised in **pleadings** or passed upon by the lower court, will not be considered for the first time on appeal. Epworth Orphanage v. Long, 207 S.C. 384, 36 S.E.2d 37 (1945). Emphasis added.

Appellant pro se represents his arguments to the Court of Appeals for the inclusion of disputed Designation of Matter in the Record of Appeals.

i. Item No. 6, Summons on Crossclaims of HOA, Dec. 15, 2010

The Respondent filed "Summons on Crossclaims of HOA, Dec. 15, 2010" in the foreclosure case, No.: 2010-CP-10-6060, against Appellant pro se in the Court of Common Pleas. This was in addition to the civil case No.: 2010-CP-10-9305; all the filings are also available in the case docket. Based on 'Respondent's Motion to Consolidate', civil case No.: 2010-CP-10-9305 and foreclosure case No.: 2010-CP-10-6060 were subsequently combined into a single action, Case No.: 2010-CP-10-9305

through a court order on Dec. 15, 2011. Appellant pro se/Defendant Koola's "Reply to Respondent/Plaintiff's Motion for Summary Judgment" (Exhibit 1, page 1) makes reference to the foreclosure case No.: 2010-CP-10-6060, and therefore its subject matter was presented to the Presiding Judge of the Court of Common Pleas for his review and subsequent decision. Furthermore, Rule 208 (b), SCACR, requires that the Statement of the Case includes Statement of Facts and Procedural History, hence inclusion of "Item No. 6, Summons on Crossclaims of HOA, Dec. 15, 2010" in the Designation of Matter in the Record on Appeals.

ii. Item No. 7, President's Report 2011 at 3

Respondent *produced* the "President's Report 2011" to Appellant pro se in response to Appellant's discovery requests. This is a vital part of the case. The "President's Report 2011" contains the names of twenty-nine (29) out of one hundred and four (104) Cambridge Lakes homeowners (25%), who had regime assessment ***dues in 2011 alone***. Appellant pro se/Defendant Koola's "Reply to Respondent/Plaintiff's Motion for Summary Judgment" (Exhibit 1, page 8) makes reference to this fact by stating, "Approximately, 35% of the homeowners lost their homes [to short sale and foreclosure during the period 2008 – 2013]", and therefore the subject matter was presented to the Presiding Judge of the Court of Common Pleas for his review and subsequent decision. The actual Report was not included as an exhibit in the filing to make the filing more comprehensive. Since the format of the Appellate Court briefs is different, Appellant pro se included the "Item No. 7, President's Report 2011" in the Designation of Matter in the Record of Appeals.

iii Item No. 9, Koola, Answer and Counterclaim, Case No. 2010-CP-10-6060, March 3, 2011.

Appellant pro se filed his "Answer and Counterclaim [in the foreclosure] Case No.: 2010-CP-10-6060" filed by the Respondent against him, which is also available in the case docket. Appellant pro se/Defendant Koola's "Reply to Respondent/Plaintiff's Motion for Summary Judgment" (Exhibit 1, page 1) makes reference to item No. 9 by stating "Mr. Koola [Plaintiff pro se] filed a timely response and counterclaim to the cross-claim". Therefore the subject matter of item No. 9 was presented to the Presiding Judge of the Court of Common Pleas for his review and subsequent decision. The actual Report was not included as an exhibit in the filing to make the filing more comprehensive. Since the format of the Appellate Court Briefs is different, Appellant pro se included "Item No.9, Koola, Answer and Counterclaim, Case No. 2010-CP-10-6060, March 3, 2011" in the Designation of Matter in the Record of Appeals.

iv. Item No. 21, Minutes of the meetings of the BOD April 2008, May 2008 and June 2008

Appellant pro se requested Respondent to produce the minutes of the meetings of the BOD for all the months from September 2004 to June 2011. Respondent *produced* the minutes of meeting for certain months, but ***selectively withheld*** the minutes of the meeting for certain critical months. On Dec. 7, 2012, Respondent filed "Memorandum in Support of Plaintiff's Motion for Summary Judgment" in which it stated: "***During March-April 2008***, the Board of Directors first learned of potential construction defects to the Association's property. (Fisher Aff. At1 5) .....Because of the defects, the Association retained attorney John C. Hayes, IV to file a construction lawsuit on its

behalf. (Fisher at 19; Henning Aff. at 12; Blevins Aff. at 12). (Exhibit 2, page 8). Respondent filed the construction lawsuit<sup>1</sup> in June 2008

The April 2008 minutes of the BOD (Exhibit 3, page 2) meeting makes the following statement: "*New Business Homeowner request: The water intrusion for unit 1487 will be checked. Ms. Moore will get estimates to check the damages from the inside of the unit as well as the interior of the unit just above unit 1487*". The May 2008 minutes of the BOD meeting (Exhibit 3, page 3) makes the following statement: "*Leaks: Ms. Moore to get the estimates*". The June 2008 minutes (Exhibit 3) do not have any reference to construction defects and leaks and authorization to file construction lawsuit by attorney John C. Hayes, IV. This implies that the Respondent through its attorneys made a **false statement** in the "Memorandum in Support of Plaintiff's Motion for Summary Judgment" and that **the BOD did not officially authorize attorney John C. Hayes, IV to file the construction lawsuit**. Attorney John C. Hayes, IV apparently filed the construction lawsuit outside the scope of the official business of the BOD.

Stephan Fisher, President of the Respondent BOD, filed a **sworn affidavit** (Exhibit 4, page 2) in support of the "Memorandum in Support of Respondent/Plaintiff's Motion for Summary Judgment" and makes the following statements: "*#15. In March-April 2008, the Board of Directors learned of potential construction defects to the Association property...# 19. Immediately upon learning of the defects, the Association retained attorney John C. Hayes, IV to file a construction lawsuit on its behalf.*" Margel S. Henning, a director of the Respondent BOD, filed a **sworn affidavit** (Exhibit 4, page

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<sup>1</sup> *Cambridge Lakes Condominium Homeowners Ass'n, Inc. et al. vs. Bostic Brothers Construction, Inc. et al.*, Case No.: 2008-CP-10-3506, June 19, 2009, Amended Complaint, Oct. 27, 2009, Second Amended Complaint, June 23, 2010 and Third Amended Complaint, July 14, 2010.

4) in support of the "Memorandum in Support of Plaintiff's Motion for Summary Judgment" and makes the following statements: "*# 12. When the Board learned of certain construction defects to the common elements of Cambridge Lakes, we retained John C. Hayes, IV to file a construction lawsuit on the Association behalf.*" Erin K Blevins, a director of the Respondent BOD, filed a **sworn affidavit** (Exhibit 4, page 6) in support of the "Memorandum in Support of Plaintiff's Motion for Summary Judgment" and makes the following statement: "*# 12. The Association retained attorney John C. Hayes, IV to file a construction lawsuit on its behalf immediately upon learning of construction defects to the Association's common elements.*" The statements made by the members of the Respondent BOD are not supported by the minutes of the BOD meetings for April, May and June 2008 (Exhibit 3). In simple words, three BOD members **lied in their sworn statements**.

Appellant pro se has **moral and ethical dilemma** to state that three fellow citizens, who are also the members of the Respondent BOD, **lied in their sworn affidavits**. Therefore, he made a very simple statement in his "Reply to Plaintiff's Motion for Summary Judgment" to state:

The April 2008 Minutes of the Board of Directors of the Association makes the following statement:

"New Business Homeowner Request: The Water intrusion for unit 1487 will be checked, Ms. Moore will get estimates to check the damages from inside of the unit as well as the interior unit".

This is the only mention of any issues and is insufficient for the Association to proceed with litigation. The minutes for the months of May and June 2008 do not mention anything about defects and repairs. There are no references in these minutes that the Association authorized Attorney Mr. John C. Hayes, IV, to file the civil action # 2008-CP-10-3506. To date, Mr. Koola has not been supplied with the information regarding when this litigation was authorized and by whom. The discussion about these defects,

and the decision to file the lawsuit were held outside of the official business of the Association, as there are no references in the minutes of any meeting. Exhibit 1, page 14

The subject matter of "Item No. 21, Minutes of the meetings of the BOD April 2008, May 2008 and June 2008" was thus presented to the Presiding Judge of the Court of Common Pleas for his review and subsequent decision. Because of his moral and ethical dilemma as noted above, Appellant pro se did not include the minutes of the meetings of the Respondent BOD May 2008 and June 2008 and the sworn affidavits as exhibits in his "Reply to Respondent/Plaintiff's Motion for Summary Judgment", but included the minutes of the April 2008 BOD meeting. This is an extraordinary situation, and Appellant pro se requests the permission of the Court of Appeals to include the "Item No. 21, Minutes of the meetings of the BOD April 2008, May 2008 and June 2008" in the Designation of Matter in the Record of Appeals.

v. Item No. 22, Notice of Condominium Conversion and Offer to Purchase

In 2002, the developer/seller, who sold the Cambridge Lakes condominiums, sent a letter (Exhibit 5) to **all the apartment residents** (tenants in possession) of Cambridge Lakes before the conversion of Cambridge Lakes apartments to condominiums in which:

(1) Developer/seller announces his intention to Cambridge Lakes apartment tenants in possession to convert Cambridge Lakes apartments to Cambridge Lakes condominiums under Horizontal Property Act, and that the tenants in possession have a right to purchase the apartments they occupy after conversion to condominiums. (2) Developer/seller informs the tenants in possession that the developer/seller is statutorily required to provide the tenants in possession a "Disclosure of the physical condition of the building" report prepared by a qualified architect and engineer according to S.C. Code Ann. § 27-31-430 (1976).

Although mandated by law, the developer/seller did not provide the "Disclosure of the physical condition of the building" report to the tenants in possession of Cambridge Lakes apartments and is in violation of S.C. Code Ann. § 27-31-430 (1976). Four members of the Respondent HOA, who were the tenants in possession of Cambridge Lakes apartments, should have received this letter. They were, therefore, aware of the violation of S.C. Code Ann. § 27-31-430 (1976) by the developer/seller in 2002 and by implication they were aware of the construction defects in Cambridge Lakes as early as 2003 or 2004. (By contrast, the general public including Appellant pro se who were not tenants in possession, and who bought the condominiums after conversion, did not receive the said letter from the developer/seller and did not know of the violation of violation of S.C. Code Ann. § 27-31-430 (1976) by the developer/seller until 2010.) What is relevant here is that the Respondent BOD **intentionally did not disclose** the violation of S.C. Code Ann. § 27-31-430 (1976) by the developer/seller until 2010 and therefore breached fiduciary duty to Appellant pro se and many other Cambridge Lakes homeowners.

On November 4, 2004 Appellant pro se met with Stephen Fisher, Member, Respondent BOD and asked him about the rumors of construction defects in Cambridge Lakes. Fisher denied any construction defects in Cambridge Lakes and did not act further on this matter. Fisher was grossly **negligent** in not pursuing the information about the construction defects. (Exhibit 1, page 15). Fisher also did not inform Appellant pro se that the developer/seller is in violation of S.C. Code Ann. § 27-31-430 (1976); Fisher had this information with him since 2002 as explained above.

Appellant pro se discovered the said letter sent by the developer/seller to the tenants in possession of Cambridge Lakes only in June 2013 while reviewing the filings in the case docket of Respondent's construction lawsuit<sup>1</sup>. Therefore, he could not present this matter during trial. This is an extraordinary situation, and Appellant pro se requests the permission of the Court of Appeals to include the "Item No. 22, Notice of Condominium Conversion and Offer to Purchase" in the Designation of Matter in the Record of Appeals.

vi. Item No. 23, Cambridge Lakes HOA Annual Budgets 2007, 2009, 2010 and 2013.

Respondent produced these documents to Appellant pro se during discovery. Appellant pro se *summarized the relevant information* from these annual budgets and presented to the Court of Common Pleas in his "Reply to Plaintiff's Motion for Summary Judgment filed on Jan 2, 2013." (Exhibit 1, page 23-24). The actual Report was not included as an exhibit to make the filing more comprehensive. Since the format of the Appellate Court Briefs is different, Appellant pro se included "Cambridge Lakes HOA Annual Budgets 2007, 2009, 2010 and 2013" as item # 23 the in the Designation of Matter in the Record of Appeals, which the Respondent is objecting to. The important point is that the relevant information from these annual budgets presented to the Presiding Judge of the Court of Common Pleas for his review and subsequent decision.

vii. Item No. 24, Certificate of Insurance

In its "Memorandum in Support of Plaintiff's Motion for Summary Judgment", Respondent states that "Koola's claim for breach of fiduciary duty fails as a matter of

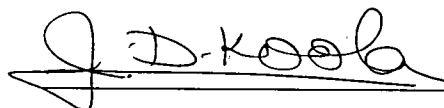
law because the actions of the members of the BOD are protected by the Business Judgment Rules". In his Reply to Respondent/Plaintiff's "Motion for Summary Judgment" Appellant pro se states: "The business judgment rule requires directors to act reasonably and in good faith. However, the rule does not apply if the directors have engaged in self-dealing and fraud or other unreasonable conduct". Kuznik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 15 (Ct.App. 2000). In another words, Respondent does not enjoy immunity per se. Supreme Court of South Carolina ruled: We hold that a member of a condominium association, established pursuant to the Horizontal Property Act, may bring an action in contract or tort against the association. Murphy, Jr. v. Yacht Cove Homeowners Ass'n, 289 S.C. 367, 345 S.E.2d 709 (1986). In spite of the Respondent's repeated claims that it is protected under business judgment rules, and that Respondent and the BOD acted in good faith and in the best interest of the association, Respondent carries Comprehensive Business Liability Insurance for Respondent's directors and officers. This insurance protection confirms that Respondent's directors and officers are liable if bad faith, dishonesty or incompetence on their part can be established.

Appellant pro se admits that he did not present this Certificate of Insurance to the Lower Court as he could not locate the document at the time.

### Conclusion

For the reasons stated above, Appellant pro se respectfully requests that the Court of appeals deny Respondent's Motion to Strike and permit Appellant pro se to include all the Designation of Matter to be included in the Record on Appeals as described in the Initial Brief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. D. Koola", written over a horizontal line.

Johnson D. Koola  
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Mt. Pleasant, SC 29464  
(843) 849-9241

Appellant pro se

Mt. Pleasant, SC  
February 4, 2014

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge  
Circuit Court Case No. 2010-CP-10-9305

APPELLATE CASE NO.: 2013-001632

Cambridge Lakes HOA,.....Respondent

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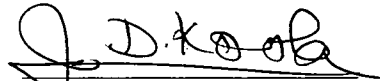
PROOF OF SERVICE

I, appellant pro se Johnson Koola, under penalty of perjury, certify that on Feb. 4, 2014, I served a copy of the Appellant's Return to the Respondent's Motion to Strike by mailing a true copy of the same to the following counsels of record for the respondent:

Eugene P. Corrigan III, Esq.  
Corrigan & Chandler, LLC  
16, Charlotte St., St. B  
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Lydia P. Brooks, Esq.  
Krawcheck and Davidson, LLC  
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Dated: Mt. Pleasant, SC  
Feb. 4, 2014



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Appellant pro se

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FEB 07 2014

SC Court of Appeals

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FEB 07 2014

SC Court of Appeals

Feb. 4, 2014

The Hon. Jenny Abbott Kitchings  
Clerk of the South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, S.C. 29201

Re: Cambridge Lakes HOA v. Johnson Koola  
Appeal Case No.: 2013-001632

Sub: Appellant's Responses to Respondent's Motion to Strike

Dear Honorable Kitchings:

I am the appellant pro se in the above appeal, Cambridge Lakes HOA v. Johnson Koola, Appeal case No.: 2013-001632.

I am writing to file appellant's responses to Respondent's Motion to Strike. Enclosed please find seven copies of the appellant's responses. Original Certificates of Service are attached to each document. I am serving a copy of this letter and enclosures to the counsels on record for the respondent. If there are any shortcomings in the filing of this Return, please write to me so that I can take immediate corrective action.

I thank you in advance for your kind efforts to accept the appellant's responses to respondent's Reply to Return to the Motion to Dismiss the Appeal.

Sincerely yours,

  
Johnson Koola

CC: Eugene P. Corrigan III, Esq.  
Corrigan & Chandler, LLC

Lydia P. Brooks, Esq.  
Krawcheck and Davidson, LLC