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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

Appellate Case No.: 2013-000279

Unpublished Opinion No. 2014-UP-422 (S.C. Ct.App - filed November 26, 2014)

Johnson Koola,..... Petitioner,

v.

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 Lake Apartment Homes, LP, Classic Properties of Charleston, Inc., Cambridge Contracting, LP, Trademark Properties, Inc., Carolina One Charleston Home Team 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.

PETITION FOR A WRIT OF CERTIORARI

Johnson Koola
1587 Cambridge Lakes Dr
Mt. Pleasant, SC 29464
(843) 849-9241

Petitioner pro se

Other Counsels of Record:

David J. Parish, Esq.
Nexsen Pruet, LLC
P.O. Box 486
Charleston, S.C. 29402
(843) 720-1771
Attorney for Respondents
Cambridge Two, LLC and
Albert Estee

Linda Weeks Gangi, Esq.
Thompson & Henry, P.A.
P.O. Box 1740
Conway, S.C. 29528-1740
(843) 248-5741
Attorney for Respondents
Cambridge Lakes, LP and
Stephen R. Heape

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CERTIFICATE OF PETITIONER PRO SE

Petitioner pro se certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 26, 2015.

QUESTIONS PRESENTED

1. Did the Court of Appeals err because the Court failed to apprehend that the respondents lied in their Brief stating that the HOA asserted S.C. Horizontal Property Act violations in its 2008 lawsuit, and petitioner asserted construction defects in his 2010 lawsuit?
2. Did the Court of Appeals err because the Court failed to apprehend that the petitioner's cause of action is for the Respondents' S.C. Horizontal Property Act violations and *Holly Woods Ass'n of Residence Owners v. Hiller* is the controlling authority?
3. Did the Court of Appeals err because the Court failed to apprehend that the respondents did not establish that petitioner knew about the respondents' S.C. Horizontal Property Act violations in 2008?
4. Did the Court of Appeals err because the Court did not apply the proper burden of proof standard to show that a genuine issue of material fact existed to preclude the grant of summary judgment on this issue?
5. Did the Court of Appeals fail to apply the Doctrine of Equitable Tolling as established in *Hooper v. Ebenezer Sr. Services and Rehabilitation Center* to the petitioner's claims?

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari following Court of Appeals' denial of petitioner's Appeal, and denial of the Petition for Rehearing.

On November 4, 2010, petitioner Johnson Koola (the "petitioner") brought claims against respondents for alleged violations of the South Carolina Horizontal Property Act (S.C. Code Ann. §§ 27-31-10, *et seq.*) ("SCHPA"), more specifically S.C. Code Ann. § 27-31-430 ("SCHPA § 27-31-430"), violation of the South Carolina Unfair Trade Practices Act (S.C. Code Ann. § 39-5-10 *et seq.*) ("SCUPTA"), fraud, negligence and negligence per se and breach of contract and warranty. (R. pp. 26-28).

In February 2004, petitioner purchased a condominium in Cambridge Lakes subdivision in Mount Pleasant, South Carolina, from the respondents. (R. p. 23-24). Just prior to the purchase of the condominium, the respondents provided a copy of the Master Deed, (R. p.067), and Builder's Certification, (R. p. 066), to the petitioner. The Master Deed stated that the respondents complied with the provisions of the SCHPA in the recordation of Master Deed and subsequent sale of condominiums to the public. (R. p. 067, lines8-14). The respondents further certified in the Builder's Certification that: "For condo conversion: The structural, health & safety repairs and remodeling have been completed." (R. p. 066, lines 38-39). The Builder's Certification was intended to represent to the petitioner that the respondents had complied with the mandates of SCHPA § 27-31-430.

In June 2008, the Cambridge Lakes Home Owners Association (the "HOA") filed lawsuit, (R. pp. 070-076), against the respondents and other parties alleging, *inter alia*, massive construction defects. (R. p. 112).

Petitioner tried to sell his condominium in 2008, 2009 and 2010 to pay off his mortgage related debts. (R. p. 102, lines 25-38, p.103, lines 1-16). Because of the ongoing HOA's construction defects litigation, the petitioner could not sell his condominium. (R. p. 103, lines 11-16). In September 2010, petitioner discovered that the plaintiffs in the HOA litigation had filed a Third Amended Complaint, (R. p. 077-083), which now alleged new claims that respondents had violated SCHPA, (R. p. 080, lines 9-10, lines 16-17, p. 081, lines 11-12). At this time in September 2010, petitioner first realized that he had a claim against the respondents for SCHPA violations.

On November 4, 2010, petitioner filed a complaint, (R. p. 022-029), against the respondents for alleged violations of SCHPA, SCUPTA, as well as for common law fraud, negligence, negligence *per se* and breach of contract and warranty. (R. pp. 23-29). Service of Summons and Complaint on the respondents was completed in January 2012. (R. pp. 94-95).

In January 2012, the respondents filed motions to dismiss petitioner's lawsuit, asserting that petitioner's claims against them were time barred by the application of a three-year statute of limitations. (R. p. 30-33). No affidavits or memoranda were filed by either respondent contemporaneously with the filing of these motions or prior to or at the hearing. (R. pp. 37-58). During motion hearing, the respondents argued that: (i) In June 2008, the HOA filed a lawsuit against the respondents and others alleging construction defects and SCHPA violations, (R. p. 004, lines 9-15, p. 044, lines 17-23); (ii) Petitioner's lawsuit filed against the respondents in November 2010 also alleged the same construction defects and SCHPA violations, (R. p. 004, 20-22, p. 045, lines 8-10); (iii) The HOA's lawsuit and the petitioner's lawsuit have alleged the same causes of action; and therefore, the respondents argued that the petitioner knew or should have known about the respondents' SCHPA violations in June 2008, (R. p. 004, lines 9-15, lines 20-22, R. p. 045, lines 5-10); and (iv) The respondents further argued that the limitations period began to accrue in June 2008 and petitioner's lawsuit is barred by the Statute of Limitations as the petitioner served the Summons and Complaint on the respondents in January 2012. (R. p. 046, lines 1-7).

During the motion hearing, (R. p. 052- 056), and in the post-hearing Memorandum with exhibits, (R. pp. 60-83), petitioner represented to the Trial

Judge that: (i) Petitioner's complaint did not include allegations of construction defects, but allegations of SCHA violations, (R. p. 055, lines 1-4); (ii) The HOA's lawsuit filed in June 2008 did not include allegations of SCHA violations, (R. p. 055, lines 10-16, p. 062- 27-33); (iii) The HOA added claims of SCHA violations against the respondents in its Third Amended Complaint filed in July 2010, (R. p. 055, lines 16-19, p. 062, lines 32-33, p. 063, lines 1-5); and (iv) petitioner learned about the respondents' SCHA violations while reading the HOA's Third Amended Complaint in September 2010, (R. p. 055, lines 16-19, p. 062, lines 32-33, p. 063, lines 1-5); and (v) Therefore, the Statue of Limitations began to rum in September 2010 and not in June 2008 as claimed by the respondents. The Trial Judge did not accept petitioner's position. The Trial Judge did not ask the respondents to produce evidence to show that the HOA's complaint filed in June 2008 included allegations of SCHA violations, and petitioner's complaint filed in November 2010 included any construction defects allegations. The Trial Judge granted Summary Judgment to the respondents. (R. pp. 003-009). The Trial Judge also denied petitioner's Motion for Amendment and Reconsideration of the Court's September 18, 2012 Order. (R. pp. 084-093).

The Court of Appeals did not determine whether the evidences presented to the Court in the Record on Appeal, (R. pp. 60-83), supported the Trial Court's fact-finding and ruling granting Summary Judgment to the respondents. (R. p. 003-009). Instead, the Decision of the Court in denying petitioner's Appeal stated that the date on which discovery should have been made is an objective rather than subjective standard. The Court of Appeals also denied petitioner's Petition for Rehearing.

ARGUMENT

I. THE COURT OF APPEALS FAILED TO APPREHEND THAT THE RESPONDENTS LIED IN THEIR BRIEF STATING THAT THE HOA ASSERTED S.C. HORIZONTAL PROPERTY ACT VIOLATIONS IN ITS 2008 LAWSUIT, AND PETITIONER ASSERTED CONSTRUCTION DEFECTS IN HIS 2010 LAWSUIT.

In his Petition for Rehearing, petitioner argued that the respondents willfully lied or misrepresented in their Brief when stating that the HOA asserted respondents' SCHA violations in its lawsuit filed in June 2008, (Petition, p. 2, lines 5-12, p. 3, lines 15-20), and the petitioner asserted construction defects in his lawsuit filed in November 2010. (Petition, p. 3, lines 14-15, p 4, lines 3-5). "It is unlawful for a person to willfully give false, misleading, or incomplete information on a document, record, report, or form required by the laws of this State." S.C. Code Ann. § 16-9-10(2). Giving false information in a document or report required by the laws of the State is "perjury". *State v. Stanley*, 365 S.C. 24, 615 S.E.2d 455, 460. "A lawyer shall not knowingly make a false statement of material fact or law to a third person." Rule 4.1(a), RPC, Rule 407, SCAPC.

The Respondents' brief (Respondents' brief, p. 2, lines 9-14) states: "On June 16, 2008, the HOA on behalf of itself and the individual condominium unit owners, filed a lawsuit against the respondents and other parties. (ROA. p. 115). In the lawsuit the HOA asserted claims for alleged defects in the construction of the condominium buildings, garages, and pool/clubhouse building, and SCHA violations in connection with the conversion and sale of the condominiums. (ROA. p. 115)."

A reading of the HOA's complaint, (R. pp. 115-120), will confirm to this Court that the HOA has not alleged any claims for respondents' SCHA violations

in its Complaint filed in June 2008. The Brief is based on this misrepresentation. The respondents did not cite to specific page and line numbers in the Record on Appeal to prove that the HOA's June 2008 lawsuit included a claim for respondents' SCHA violations. Rule 211(b), SCACR; 4, C.J.S. References to record § 728 at 662 (2007). This is to conceal the misrepresentation from the Court of Appeals' immediate scrutiny during the appeal.

The Respondents' brief (Respondents' Brief. p. 3, lines 2-4) states further: "The Plaintiff/[petitioner] filed his lawsuit on November 4, 2010, alleging that construction defects and violations of the S.C. Horizontal Property Regime Act made his unit not "fit, habitable, and marketable." (ROA pp. 22-27)." This Court may take notice that: (i) The petitioner did not allege construction defects as a cause of action in his complaint. (R. p. 025-028). The respondents deliberately did not cite to the specific page and line numbers in the Record on Appeal where petitioner alleged construction defects as a cause of action in his lawsuit. Rule 211(b), SCACR; 4 C.J.S. References to record § 728 at 662 (2007); (ii) What petitioner alleged in his complaint was substantially different from what the respondents misrepresented: "At the time the Plaintiff purchased his condominium the actions and representations of the Defendants, their employees, and agents lead the Plaintiff to believe that the condominium he was purchasing was fit, habitable and was marketable", (R. p. 026, lines 28-30); and (ii) The respondents fixed parts of the petitioner's complaint, (R. pp. 022-29), extracting words and phrases from different parts of the petitioner's complaint and assembled together a new statement sentence. The words "construction defects" appear only once in paragraph 14 of the complaint, (R. p. 025, line 15), which is just a statement about

the HOA's lawsuit and not a petitioner's allegation, (R. pp. 025-028). The related words "South Carolina Horizontal Property Act, S.C. Code §§ 27-31-10 et seq." appear multiple times. The related words "fit, habitable and marketable" appear in paragraphs 30, 31 and 32 of the cause-of-action-paragraph, "BREACH OF CONTRACT/WARRANTY". (R. p. 026, lines 30, 32 and 34). The words "construction defects and the related words "South Carolina Horizontal Property Act, S.C. Code §§ 27-31-10 et seq." do not appear in paragraphs 30, 31 and 32 of the petitioner's complaint. Combining these words or phrases from different parts of the complaint, the petitioners misrepresented to the Court that the petitioner alleged construction defects and respondents' SCHPA violations in his lawsuit. S.C. Code Ann. § 16-9-10(2); *State v. Stanley*, 365 S.C. 24, 615 S.E.2d 455, 460.

Respondents made the same misrepresentations to the Trial Court during Motion hearing. (R. p. 044, line 20), (R. p. 045, lines 6-10).

The respondents wrongfully claimed that: (i) Petitioner knew about the allegations of respondents' SCHPA violations in June 2008; (ii) Petitioner received 'notice' about the respondents' SCHPA violations in June 2008; (iii) petitioner had a claim against the respondents for SCHPA violations since June 2008; and (iv) and the Statute of Limitations began to accrue from June 2008. (Respondents' Brief, p. 6, lines 19-28).

It is a demonstrated fact that: (i) The HOA did not allege respondents' SCHPA violations in June 2008; (ii) The petitioner did not receive a notice in 2008 that the respondents violated SCHPA; and (iii) The petitioner did not allege construction defects as a cause of action in his lawsuit.

The respondents chose not to file a Return to Petition for Rehearing. The respondents did not deny petitioner's arguments in the Trial Court (R. p. 055), in his post-hearing submissions to the Trial Court (R. p. 062, lines 20-33, p. 063, lines 19), and in the Motion for Amendment and Reconsiderations of September 4, 2012 Order of the Trial Judge (R. 088, lines 18-25, p. 089) that: (i) The HOA did not allege respondents' SCHPA violations in its lawsuit filed in 2008; (ii) The petitioner did not allege construction defects in his Complaint filed in November 2010; and (iii) the HOA first alleged respondents' SCHPA violations in its Third Amended Complaint filed in July 2010. The petitioner expressly stated in his Reply Brief (Appellant's Reply Brief, p. 1, lines 22- 26, p. 2, lines 1-3): "In South Carolina appellate jurisprudence, when an appellant raises and supports an issue that the respondent fails to argue against, the appellate court may determine that said issue is uncontested and decide the same in favor of the appellant. If an appellee fails to respond to an issue in its brief, the [appellate] court may treat the failure to respond as a concession that the appellant's position is correct. 5 Am. Jur. 2d Appellate Review § 512 (2013).

In *Regions Bank v. Strawn*, 399, S.C. 530, 732 S.E.2d 230 (Ct.App. 2012), involving a claim against the Bank for its failure to mark a mortgage on the property satisfied pursuant to S.C. Code Ann. §§ 29-3-310, 320 (2007), appellant Bank and petitioners presented conflicting testimony to the trial court. The petitioners testified that they hand-delivered a payoff letter with a payoff check, which specifically requested the mortgage be satisfied within three months. Bank denied receiving the notice of the request to satisfy the mortgage. The Trial Court found that

evidences supported the respondents' testimony and held the Bank liable to petitioners. The Court of Appeals affirmed the Trial Court's Decision.

In *Bowen v. Lee Process Systems Co.*, 342 S.C. 232, 36 S.E.2d 86, 88, 89 (Ct.App. 2000), the Court of Appeals ruled that: " We therefore hold a trial court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review. Such an order must include those facts, which the circuit finds relevant, determinative of the issues and undisputed. In doing so the trial Court should provide clear notice to all parties and the reviewing court as to the rationale applied in granting....summary judgment." On appeal of an action at law tried without jury, the Appellate Court will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings. *Regions Bank b. Strawn*, supra. In the Appeal at bar, the Trial Court and the Court of Appeals failed to determine whether evidences supported the respondents' misrepresentations.

II. THE COURT OF APPEALS FAILED TO RECOGNIZE THAT PETITIONER'S CAUSE OF ACTION IS FOR THE RESPONDENTS' S.C. HORIZONTAL PROPERTY ACT VIOLATIONS AND HOLLY WOODS ASS'N OF RESIDENCE OWNERS V. HILLER IS THE CONTROLLING AUTHORITY.

Since all the condominium owners own the common elements of condominiums jointly and severally, S.C. Code Ann. 27-31-60(a), only the HOA is authorized to maintain, repair, and pursue construction defects remedies. *Queen's Grant Villas Horizontal Property Regimes I-IV v. Daniel Internat'l Corp.*, 286 S.C. 555, 335 S.E.2d 365 (S.C. 1985). On the contrary, the petitioner, as an individual condominium owner, can pursue a cause of action against the respondents for negligent misrepresentation in the Master Deed (R. p. 067)), for violation of

SCPHA § 27-31-430 and for providing a falsified and fraudulent Builder's Certification (R. p. 066) to petitioner.

During the motion hearing for Summary Judgment and in the respondents' Brief, the respondents misrepresented to the Court that: (i) The HOA's June 2008 lawsuit filed against the respondents asserted claims for alleged construction defects and violations of SCHPA, (Respondents' Brief, p. 2, lines 9-14, R. p. 044, line 20); and (iii) Petitioner alleged construction defects and respondents' SCHPA violations in his November 2010 lawsuit. (Respondents' Brief. p. 3, lines 2-4, R. p. 045, line 6). Thereby, the respondents argued that since petitioner knew about the HOA's allegations of SCHPA violations against the respondents in June 2008, petitioner ought to have known about the violation of SCHPA allegations against the respondents in June 2008, and petitioner had a claim against the respondents since June 2008. (Respondents' Brief, p. 6, lines 19-28).

Petitioner repeatedly represented to the Trial Judge and to the Court of Appeals that: (i) Petitioner's cause of action against the respondents is for violation of SCHPA and not for any construction defects; (ii) Petitioner knew about the respondents' SCHPA violations in September 2010 after reading the HOA's amended Complaint filed in July 2010 which specifically alleged violation of SCHPA by the respondents. (R. p. 062, lines 20-33, p. 063, lines 18).

In denying petitioner's appeal and petition for rehearing, the decision of the Court of Appeals is in conflict with its own prior decisions, specifically *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787 (Ct.App. 2012).

In *Holly Woods Ass'n of Residence Owners*, the Court learnt:

“The record contains evidence that the Association did not learn of several problems within the development until 2002. Therefore the Association was allowed to present evidence of damages from 2002 to 2005. Here, the Appellants argue the Association knew of problems prior to 2002. Accordingly, appellants maintain the Association should have brought its action earlier and was barred from bringing its action under the statute of limitations.”

“The Association claims it experienced a series of problems within the development. However, the Association maintains the problems existing when it brought suit were different from problems it experienced prior to 2002.....”

Mary Louise Reeves, secretary of the Association’s Board, testified the Association was only seeking damages that occurred from 2002 to 2005. Reeves testified problems have always existed within the development and some are the same problems, but some are the different problems.....”

Then the *Holly Woods Ass’n of Residence Owners* Court reasoned and affirmed the lower court’s decision:

“We find it is a jury question as to whether the damages the Association claimed in 2005 were different from those it experienced in the past. There is evidence from board members and Geiger that the problems, though similar in nature, were different. Therefore, we find the circuit court did not err in denying Appellant’s directed verdict motion based on the statute of limitations’.

Id.

The Court of Appeals failed to apply the Court’s reasoning in *Holly Woods Ass’n of Residence Owners*, *id.*, to petitioner’s arguments in his Reply Brief, (Appellant’s Reply Brief, page 2, lines 4-13), that construction defects are not the same as SCHA violations, SCHA violations by the respondents came to be known to the HOA in July 2010 and to petitioner in September 2010, and the petitioner did not allege construction defects as a cause of action in his lawsuit.

In *Grillo v. Speedrite Products, Inc.*, 340 S.C.498, 532 S.E.2d 1 (Ct.App. 2000), the Trial Court denied the appellant’s claims against the respondents for the injury caused by the use of ink products containing carcinogenic chemical

solvents. The Trial Judge granted summary judgment to the respondents because the appellant, who first experienced symptoms of injury in May 1992, filed the lawsuit against the respondent only in December 1995, and the statute of limitations barred the claims. The Court of Appeals reversed the Trial Court's Decision stating that: (i) The fundamental test ... in determining whether a cause of action has accrued[] is whether the party asserting the claim can maintain an action to enforce it, (ii) a key element in the reasonable diligence test is "notice", which is an objective, not a subjective, determination, (iii) Institution of an action based upon those temporary symptoms would likely have been premature and possibly frivolous. The Court of Appeals failed to apply its reasoning in *Grillo v. Speedrite Products, Inc.*, supra, to the petitioner's Appeal at bar.

III. THE RESPONDENTS DID NOT ESTABLISH THAT PETITIONER KNEW ABOUT THE RESPONDENTS' S.C. HORIZONTAL PROPERTY ACT VIOLATIONS IN 2008.

During the motion hearing on July 25, 2012, the respondents presented extracts from petitioner's lawsuit filed in November 2010, (R. pp. 042-045), and from Interrogatory Answers from petitioner's foreclosure case filed in May 2011, (R. pp. 046-048), to establish that petitioner complained about construction defects in his lawsuit, and he knew about respondents' SCHPA violations in June 2008. Petitioner addresses each of the respondents' misrepresentation to the Court:

(i) "[Petitioner] is complaining about construction defects and problems with his unit in his lawsuit". (R. p. 042, lines 24-25).

Petitioner has not alleged construction defects as a cause of action in his lawsuit. (R. pp. 025-028).

(ii) "[Petitioner] stated in paragraph 14 of his lawsuit that "[petitioner] learned about the [HOA] lawsuit in 2008, the [said] lawsuit alleged construction defects,

violation of the Horizontal Property Act, and anything that [petitioner] is alleging in his own lawsuit and that [petitioner] knew about all these allegations in 2008.” (R. p. 044, lines 18-23).

In paragraph 14 of his lawsuit, petitioner stated: “In 2008 the plaintiff learned that the Cambridge Lakes’ Homeowners Association and several individual owners filed a lawsuit against the defendants’ named in this matter (excluding William E. Jenkinson, IV, and Carolina One) and various contractors and subcontractors for various construction defects.” Violation of Horizontal Property Act is not at all mentioned in this paragraph. (R. p. 025, lines 12-15).

(iii) Petitioner stated in paragraph 15 of his lawsuit that “[Petitioner] also learned that the [respondents] allegedly violated the Master Deed and the Horizontal Property Act.” (R. p. 044, lines 24-25, p. 045, line 1).

Petitioner did not state that he knew about the respondent’s’ alleged violations of Master Deed and the Horizontal Property Act in 2008. Paragraph 15 is extracted from petitioner’s lawsuit filed in November 2010. Petitioner has expressly stated that he knew about the respondents’ SCHPA violations in September 2010. (R. p. 062, lines 31-32, p. 063, lines 1-5). At this point in time in and after September 2010, petitioner learned that the respondents allegedly violated the Master Deed and the Horizontal Property Act.

(iv) Petitioner stated in paragraph 16 of his lawsuit that: “Upon learning of the [HOA’s] lawsuit that was fled in 2008, [petitioner] reviewed the Builder’s certificate.” (R. p. 045, lines 2-4).

Upon learning of the HOA’s lawsuit, petitioner reviewed the Builder’s Certification in 2009 and 2010 and confirmed the respondents’ stated claim that they had complied with SCHPA § 27-31-430. Petitioner knew about the respondent’ SCHPA violation in September 2010 while reading the HOA’s Third Amended Complaint filed in July 2010 which alleged the respondents’ SCHPA

violations. (R. p. 062, lines 31-32, p. 063, lines 1-5). Thus in September 2010, petitioner realized that the respondents fraudulently certified in the Builder's Certification that they complied with SCHPA § 27-31-430.

(v) Petitioner stated in paragraphs 17 and 18 that "[petitioner] determined that all sorts of things were improperly done. So by his own allegations, on the four corners of his complaint, he was on notice about 2008 about allegations that had been made by the HOA of which he is now copying those and asserting the same allegations". (R. p. 045, lines 5-10).

Paragraph 17 of petitioner's November 2010 complaint stated: "Had the [petitioner] known that neither the work nor paperwork to complete the condominium conversion was done he would not have purchased his condominium unit". (R. p. 025, lines 22-23). This is a factual statement.

Petitioner put up his unit for short sale in April 2010 and did not receive any offers. (R. p. 102, lines 25-38). In September 2010, petitioner knew about the respondents' SCHPA violations. (R. p. 062, lines 31-32, p. 063, lines 1-5). Hence, the petitioner stated in Paragraph 18 of his November 2010 complaint: "The [petitioner] placed his condominium unit up for sale but learned that the condominium was virtually worthless because of the violations of the Horizontal Property Act §§ 27-31-10 et seq." (R. p. 025, lines 24-26).

Respondents established that petitioner knew about the HOA's June 2008 lawsuit, and that the HOA alleged construction defects in the June 2008 lawsuit. Respondents did not establish that the HOA alleged SCHPA violations in June 2008, and the petitioner knew about respondents' SCHPA violations in June 2008 or before September 2010.

The respondents further refer to the statements the petitioner made in his Interrogatory Answers in his foreclosure case, (R. pp. 099-105), to establish that

the petitioner knew about respondents' SCHA violations in 2008 or before. The Interrogatory Answers in the foreclosure case was filed in May 2011. Specifically, the respondents refer to a conversation in 2004 that petitioner had with Mr. Steve Fisher, a member of the Board of Directors of the HOA (R. p. 46, lines 24-25, p. 047, lines 1-3): "[Petitioner] had a meeting with Mr. Fisher on November 20, 2004 and asked him about rumors of construction defects in Cambridge Lakes condominiums". (R. p. 099, lines 40-41). Certainly, the petitioner spoke to the member of the Board about construction defects and not about SCHA violations.

The respondents further refer to petitioner's first attempt to sell the property in June/July 2008. (R. p. 047, lines 6-15). In his Interrogatory Answers, the petitioner stated: "First attempt to sell the property: [Petitioner] listed the property for sale in June/July 2008.... [Petitioner] did not receive any offer from prospective buyers to buy the property....Under information and belief, [Petitioner] alleges that the ongoing [HOA's] lawsuit and the massive construction defects as alleged in the lawsuit were the prime factors why petitioner did not receive a single offer from prospective buyers". (R. p.103, lines 8-16). Certainly, these statements in the Interrogatory Answer would establish that petitioner knew about construction defects in Cambridge Lakes in June 2008. There is no mention at all about respondents' SCHA violations in this paragraph.

The respondents further refer to a letter sent by the HOA informing the homeowners about the HOA's already filed lawsuit. (R. p. 047, lines 18-21). The letter under reference, (R. pp. 110-113), stated the following construction defects "in the development, design, manufacture of products, repair, conversion, and/or construction of my/our Unit and the buildings at Cambridge Lakes in the

foundation, main walls, windows, roofs, trusses, framing or any other part of the structure or building envelope". (R. p. 112). The HOA' letter under reference clearly established that petitioner knew about construction defects in Cambridge Lakes in June 2008. The HOA's letter did not address the respondents' SCHPA violations.

The respondents further refer to the petitioners' Interrogatory Answer # 10. (R. p. 048, lines 13-16). The interrogatory question # 10 stated: "List and identify all documents supporting [petitioner's] contention that the association was allegedly aware that the developer falsified a Builder's Certification". (R. p. 104, lines 10-11). In answer, Petitioner identified the following documents: (i) Builder's Certification (ii) Master Deed and (iii) South Carolina Horizontal Property Act. In the Answer, the petitioner did not state that he studied these documents in 2008. (R. p. 104, lines 10-42, p. 105, lines 1-11). Petitioner learned about the respondents' SCHPA violations in September 2010. (R. p. 062, lines 31-32, p. 063, lines 1-5). Thereafter, after September 2010, petitioner studied these documents and confirmed that the respondents falsified Builder's Certification, violated SCHPA, and misrepresented in the Master Deed.

In summary, the respondents did not establish that the petitioner knew about respondents' SCHPA violations in 2008. Rather, they established that the petitioner certainly knew about construction defects in Cambridge Lakes in 2008. Petitioner pointed out to the Trial Judge that the HOA's lawsuit initiated in June 2008 for construction defects was wholly irrelevant because petitioner did not maintain any claim in his case against respondents for construction defects. (R. p. 089).

IV. THE COURT OF APPEALS DID NOT APPLY THE PROPER STANDARD GOVERNING PETITIONER'S BURDEN OF PROOF TO SHOW THAT A GENUINE ISSUE OF MATERIAL FACT EXISTED TO PRECLUDE THE GRANT OF SUMMARY JUDGMENT ON THIS ISSUE.

South Carolina Rules of Civil Procedure and numerous Appellate Court decisions have established standards for the grant of summary judgment:

(i) *Summary Judgment is appropriate where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavit, if any show that there is no genuine issue of material fact and that moving party is entitled to judgment as a matter of law. Rule 56, SCRPC.*

Either respondent filed no affidavits or memoranda contemporaneously with the filing of their motions, prior to or at the hearing. (R. pp. 37-58); (Respondents' Brief, p. 3, lines 8-9, lines 15-22). In *Black v. Lexington School Dist. No. 2*, 448 S.E.2d 327 (1997) the Supreme Court ruled that on motion for Summary judgment, trial court may refuse to consider materials that were not timely served, such that opposing party had no time to prepare response.

(ii) *Summary Judgment is not appropriate if the facts are conflicting, or if the inferences to be drawn from facts are doubtful. Summary judgment should not be granted even when the evidentiary facts are not in dispute, if there is dispute as to the conclusions to be drawn from those facts. Wade v. Berkeley County*, 339 S.C. 513, 518, 529 S.E.2d 743, 746 (Ct.App. 2000)

The Appellate Court and the Trial Court heard conflicting arguments from the respondents and the petitioner. The respondents misrepresented to the Courts that the HOA alleged construction defects and SCHPA violations in its lawsuit filed in June 2008, and the petitioner also alleged construction defects and SCHPA violations in its lawsuit filed in November 2010. Petitioner represented to the Courts that he has alleged SCHPA violations as a cause of action against the respondents, but not construction defects, and that he was put on notice about the respondents' SCHPA violations in September 2010. Respondents' contentions are

not supported in the Record on Appeal and are erroneous per se, because the Record on Appeal supported the opposing contentions of the petitioner. The September 4, 2012 Order of the Trial Judge did not resolve these conflicting facts presented by the opposing parties. Instead, the Trial Judge accepted respondents' contention as facts. (R. p. 013, lines 10-14). The Court of Appeals' Unpublished Order denying petitioner's Appeal is a Per Curiam Order, and there is no specific information therein whether the Court resolved these conflicting facts.

(iii) When opposing a summary judgment motion, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601.

The petitioner presented evidences to the Trial Court and the Court of Appeals that: (i) Petitioner alleged respondents' SCHPA violations in his lawsuit filed in November 2010, but not construction defects; (ii) Petitioner knew about SCHPA violations only in September 2010 while reading the HOA's Third Amended Complaint filed in July 2010.

(iv) *The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of the wrongdoer. Moriarty v. Garden Sanctuary Church of God*, 342 S.C. 320, 534 S.E.2d 72 (2000).

The petitioner's cause of action for his injury is the respondents' SCHPA violations - not construction defects, as evidenced from the four corners of his Complaint. (R. p. 025-028). The petitioner knew about his injury in September 2010 while reading the HOA's Third Amended Complaint filed in July 2010 which alleged SCHPA violations. (R. p. 062, lines 31-32, p. 063, lines 1-5). The HOA did not allege SCHPA violations in its Complaint filed in June 2008. The Court accepted respondents' misrepresentation that the HOA has alleged construction defects and SCHPA violations in its June 2008 lawsuit and petitioner has alleged construction

defects and SCHPA violations in his November 2010 lawsuit and erroneously concluded that the petitioner knew about his injury in 2008.

(v) Under the discovery rule, the statute of limitations begins to run when the facts and circumstances would put a person of common knowledge and experience on notice that some right has been invaded or that some claim against another party might exist. Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333, 334 (1981).

The HOA filed its Third Amended Complaint alleging SCHPA violations in July 2010. (R. p. 062, lines 31-32, p. 063, lines 1-5). Upon reading this Amended Complaint in September 2010, the petitioner realized that his right - the right to receive the Disclosure of the physical condition of the Building report as mandated by SCHPA § 27-31-430 – has been invaded. Within two months on November 4, 2010, the petitioner filed his claims against the respondents

(vi) The statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another. Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005). (Emphasis added).

The Trial Court as well as the Court of Appeals failed to recognize that the emphasis is on the injured person, and petitioner's injury or claim is for the respondents' SCHPA violations. (R. p. 025, lines 283, p. 026, lines 1-7). Petitioner was injured in September 2010 when he learned about respondents' SCHPA violations after reading the HOA's Third Amended Complaint filed in July 2010, which alleged respondents' SCHPA violations. (R. p. 062, lines 31-32, p. 063, lines 1-5). Thus petitioner was put on notice in September 2010 that a cause of action existed against the respondents.

(vii) The date on which discovery should have been made is an objective rather than subjective standard. Dorman v. Campbell, 331, S.C. 179, 184, 500 S.E.2d 786, 789 (Ct.App. 1998). A key element in the reasonable diligence test is "notice".

Grillo v. Speedrite Products, Inc., 340 S.C. 498, 532 S.E.2d 1. A cause of action accrues at the moment when the plaintiff has a legal right to sue it. *Id.*

The Courts should have denied the respondents' Motion for Summary Judgment under these objective standards criterion. Petitioner received "notice" about the respondents' SCHPA violations in September 2010. (R. p. 062, lines 31-32, p. 063, lines 1-5). Petitioner has no legal right to sue for construction defects, but has legal right to sue for violation of SCHPA. (This petition, *supra*, p. 12, lines 19-24, p. 13, lines 1-6). Standing to sue is a fundamental requirement in instituting an action. *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 644 S.E.2d 58. Petitioner filed his claims in November 2010 shortly after learning of the respondents' SCHPA violations in July 2010.

(viii) *In Hancock v. Mid-South Management Co.*, 381 S.C. 326, 330-331, 673 S.E.2d 801, 803, (2009), the Supreme Court upheld:

"[We] hold that in cases applying the preponderance 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, 242-243, 19 S.E.2d 109 (1942).

V. THE COURT OF APPEALS FAILED TO APPLY THE DOCTRINE OF EQUITABLE TOLLING AS ESTABLISHED IN *HOOPER V. EBENEZER SR. SERVICES AND REHABILITATION CENTER* TO PETITIONER'S CLAIMS.

The Court of Appeals did not consider the application of the doctrine of equitable tolling to the petitioner's cause of action as the issue was not preserved for appellate review. Petitioner prays to this Court to reconsider the petitioner's failure as an excusable neglect.

In *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 386 S.C. 108, 687 S.E.2d 29, 32-34 (2009), this Court has specifically stated that the courts apply doctrine of equitable tolling in order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits.

Petitioner filed his lawsuit against the respondents in November 2010. (R. p. 22-29). Shortly thereafter, petitioner's then counsel of record wanted to withdraw representation in the case. (R. p. 049-051). Due to limited resources petitioner could not find another affordable attorney. Service of the Summons and Complaint on the respondents was completed only in January 2012. (R. p. 94-95). If this Court determines that the petitioner knew about the respondents' SCHPA violation in September 2010, then the service was completed within the limitations period.

During the motion hearing in the Lower Court on July 25, 2012, petitioner presented to the trial judge that petitioner knew about the respondents' SCHPA violations only in September 2010, which the trial judge did not accept. The petitioner repeated his position to the Trial Judge, when the Trial Judge remarked that the petitioner is arguing with the Trial Judge. (R. p. 056, lines 24-25). Thereafter, petitioner did not make any representations, including consideration of doctrine of equitable tolling, to the Trial Judge. For this reason petitioner prays to this Court to reconsider the petitioner's failure to preserve the issue of doctrine of equitable tolling as an excusable neglect.

In his Petition for Rehearing, petitioner represented to this Court that nearly 30% of the Cambridge Lakes condominium owners lost their homes to short sales and foreclosures. (Petition, p.11). The petitioner faces imminent foreclosure. The

intervention of this Court in the case at bar would support the cause of public policy of this state.

The respondents sold Cambridge Lakes condominiums to the petitioner and others on the express representation that they have complied with SCHPA and more specifically, S.C. Code Ann. § 27-31-430. In fact, they willfully and wantonly violated these South Carolina Codes. Moreover, they provided a fraudulently certified "Builder's Certification" to the petitioner. (R. p. 22-29). Because of code violations and fraudulent misrepresentation, petitioner and 30% the Cambridge Lakes condominium buyers suffered gross wrong at the hands of the respondents.

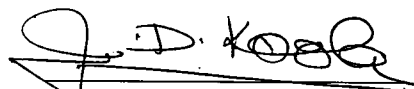
Petitioner prays to this Court to review petitioner's request in the light of *Hooper v. Ebenezer Sr. Services and Rehabilitation Center, id.*, and *Ross v. Ross*, 394 S.C. 261, 715 S.E.2d 359 (Ct.App. 2011), to toll the limitations period in the appeal at bar.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted

February 24, 2015



Johnson Koola
1587 Cambridge Lakes Dr
Mt. Pleasant, SC 29464
(843) 849-9241
Petitioner pro se

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

Unpublished Opinion No. 2014-UP-422 (S.C. Ct.App. filed November 26, 2014)

Johnson Koola,.....Petitioner,

v.

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 Lake Apartment Homes, LP, Classic Properties of Charleston, Inc., Cambridge Contracting, LP, Trademark Properties, Inc., Carolina One Charleston Home Team 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 theRespondents.

PROOF OF SERVICE

I, Johnson Koola, under penalty of perjury, certify that on February 24, 2015, I served a copy of the petitioner's Petition for a Writ of Certiorari by mailing a copy of the same through U.D. mail, first class postage affixed, to the following counsuls of record for the respondents:

David J. Parish, Esq.
Nexsen Pruet, LLC
P.O. Box 486
Charleston, S.C. 29402
(843) 720-1771
Attorney for Respondents
Cambridge Two, LLC and
Albert Estee

Linda Weeks Gangi, Esq.
Thompson & Henry, P.A.
P.O. Box 1740
Conway, S.C. 29528-1740
(843) 248-5741
Attorney for Respondents
Cambridge Lakes, LP and
Stephen R. Heape

Signature follows

February 24, 2015

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

Johnson Koola
1587 Cambridge Lakes Dr
Mt. Pleasant, SC 29464