THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

APPELLATE CASE No.: 2015-000399

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 REHEARING
THE DENIAL OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Did the Court err because the Court failed to apprehend that the respondents lied or perjuriously misrepresented in their Return to Petition for Writ of Certiorari stating that the HOA asserted SCHPA violations in its 2008 lawsuit, and petitioner asserted construction defects in his 2010 lawsuit?**

2. **Did the Court err because the Court failed to apprehend that the petitioner's cause of action is for the respondents' SCHPA violations and applied incorrect standard governing Statute of Limitations?**

3. **Did the Court err because the Courts 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 to petitioners?**

4. **Did the Court apply the Doctrine of Equitable Tolling as established in *Hooper v. Ebenezer Senior Serv. and Rehab. Ctr.* to the petitioner's claims?**

STATEMENT OF THE CASE

This is a Petition for Rehearing following the May 20, 2015 Order of the Court denying the Petition for Writ of Certiorari. Rule 240(j), SCACR, provides that any review of an order issued by an individual justice shall be by petition for rehearing. Rule 240(i) provides that this Court will entertain petition for rehearing if the action of the Court has the effect of dismissing a party's appeal.

A writ of certiorari and a petition for rehearing is not a matter of right, but of sound judicial discretion and will be granted where there are important reasons. Rule 242(b), SCACR. A petition for rehearing shall state with particularity the points misapprehended by the Court. Rule 221(a), SCACR. The petition for Writ of Certiorari alleged, *inter alia*, the issue of perjury committed by the respondents, which, if confirmed by the Court, is a violation of Offenses Against Public Justice, S.C. Code Ann. § 16-9-10(A)(2). The May 20, 2015 Order of the Court did not address the issue of perjury and has the effect of overriding the Legislative mandate

of S.C. Code Ann. § 16-9-10 *et seq.* and legalizing perjury. Also, the Court did not apply the "Principles of statutory interpretation" while denying the Petition for Writ of Certiorari: When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute to its literal meaning. For the stated reasons, petitioner prays that this petition be reviewed by the Court *en blanc* after providing an opportunity for an oral argument under Rule 240(h), SCACR.

STATEMENT OF FACTS

In February 2004, petitioner bought a condominium converted from apartment in Cambridge Lakes subdivision in Mount Pleasant, South Carolina, from the respondents. (R/A. p. 128, lines 6-13). Respondents provided petitioner with a copy of the Master Deed of the condominiums, which stated that the conversion of the apartments to condominiums satisfied the provisions of South Carolina Horizontal Property Act, § 27-31-10 *et seq.*, (the "SCHPA"). (R/A. p. 067, lines 10-16). Respondents also provided petitioner with a copy of the "Builder's Certification" which stated that they have completed "all the necessary structural, health & safety repairs" which implied that they complied with the provisions of South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-430. (R/A. p. 066, lines 39-40).

On June 19, 2008, the Cambridge Lakes Homeowners Association (the "HOA") filed a lawsuit (the "HOA's 2008 lawsuit") against the respondents [and other parties] alleging (a) Negligence, (b) Breach of Warranties, and (c) Unfair Trade Practice. (R/A. pp. 114-120, p. 118, line 5, p. 119, line 6, p. 119, line 16). In June/July 2008, petitioner attempted to sell his condominium to pay off his mortgage related debts, but could not due to the ongoing HOA's 2008 lawsuit. (R/A.

p. 149, lines 3-7). The inability to sell the condominium ultimately led to a mortgage foreclosure action on the petitioner by the mortgagee. (R/A. p. 148, lines 17-18, line 28).

In July 2010, the HOA filed the Third Amended Complaint against the respondents, which now alleged the respondents' SCHPA violations. (R/A. pp. 077-083, p. 080, lines 8-10, p. 081, lines 11-12). Petitioner learned about the respondents' SCHPA violations after reading the HOA's Third Amended Complaint in September 2010. (R/A. p. 062, line32-p. 063, line 5). On November 4, 2010, petitioner filed a lawsuit against the respondents and other parties alleging "Violation of the Horizontal Property Act, Breach of Contract/Warranty. Fraud, Negligence, Unfair Trade Practices." (R/A. pp. 022-029, p. 023, lines 25-28). Petitioner served the Summons and Complaint on the respondents in January 2012, but within the three-year statute of limitations. (R/A. pp 094-095). On July 25, 2012, the Trial Court dismissed petitioner's claims against the respondents by granting them a Summary Judgment Motion. (R/A. pp. 003-009).

ARGUMENT

I. THE COURT FAILED TO APPREHEND THAT THE RESPONDENTS LIED OR PERJURIOUSLY MISREPRESENTED IN THEIR RETURN TO PETITION FOR WRIT OF CERTIORARI THAT THE HOA ASSERTED SCHPA VIOLATIONS IN ITS 2008 LAWSUIT, AND PETITIONER ASSERTED CONSTRUCTION DEFECTS IN HIS 2010 LAWSUIT.

In his Petition for Writ of Certiorari (Petition, pp. 6-10) and Reply to Return to Petition for Writ of Certiorari (Reply to Return, pp. 2-4), petitioner argued that the respondents willfully lied or perjuriously misrepresented in their Return to Petition for Writ of Certiorari when stating that the HOA asserted SCHPA violations and construction defects against the respondents in the HOA's 2008 lawsuit, (Return to

the Petition, p. 2, lines 9-14), and that the petitioner asserted claims for construction defects and SCHPA violations against the respondents in his lawsuit filed in November 2010. (Return to Petition, p. 3, lines 2-4).

The undisputed facts are that:

(i) The HOA did not assert SCHPA violations and construction defects against the respondents in HOA's 2008 lawsuit. (R/A. pp.115-120);

(ii) The HOA asserted only: (a) Negligence; (b) Breach of Warranties; and (c) Unfair Trade Practice against the respondents in HOA's 2008 lawsuit. (R/A. p. 118, line 6, p. 119, line 6, line 16);

(iii) The HOA asserted respondents' SCHPA violations in its Third Amended Complaint filed on July 14, 2010. (R/A. pp. 077-083, p. 80, lines 8-10, p. 81, lines 11-12); and

(iv) The petitioner did not assert construction defects in his lawsuit filed in November 2010 but asserted respondents' SCHPA violations. (R/A. pp. 23-29, p. 025, line 29-p. 26, line 13).

Any representations by the respondents contrary to these evidentiary facts are intentional lies or perjurious misrepresentations.

The respondents chose: (i) Not to address this issue of perjury in their Return to the Petition for Writ of Certiorari; and (ii) Not to deny perjury allegations. If an appellee fails to respond to an issue in its brief, the [appellate] court may determine that said issue is uncontested and may treat the failure to respond as a concession that the appellant's position is correct. (R/A. p. 160, lines 20-p. 161. line 3). *U.S. Fid. & Guar. Co. v. First Nat. Bank of S. C. of Columbia*, 244 S.C. 436, 443, 454, 137 S.E.2d 582, 585, 590 (1964); 5 Am. Jur. 2d, Appellate Review § 512 (2013).

"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(A)(2) (2003). The Legislature has made its intention clear and unambiguous and provided that a person who violates the provisions of S.C. Code Ann. § 16-9-10(A)(2) (2003) is guilty of misdemeanor and can be subjected to fine or imprisonment or both. S.C. Code Ann. § 16-9-10(B)(2) (2003). The respondent shall be bound by the matters stated or alleged in his statement of the Case. Rule 208(b)(2), SCACR.

By misrepresenting to the Court that the HOA asserted both SCHPA violations and construction defects against the respondents in the HOA's 2008 lawsuit, and that petitioner asserted the same SCHPA violations and construction defects against the respondents in his November 2010 lawsuit, the respondents induced the Court to believe that petitioner knew or should have known about the respondents' SCHPA violations at the earliest by June 2008.

The intentional lie or the perjurious misrepresentation by the respondents is a *per se* violation of S.C. Code Ann. § 16-9-10(A)(2) (2003). This Court did not adjudicate whether the respondents committed perjury as alleged by the petitioner. Instead, this Court denied the Petition for Writ of Certiorari. Accordingly, the May 20, 2015 Order of the Court has the effect of overriding the clear and unambiguous Legislative mandate of S.C. Code Ann. § 16-9-10 *et seq.* and legalizing perjury.

While denying the Petition for Writ of Certiorari without adjudicating on the issue of perjury committed by the respondents, this Court did not apply the "Principles of statutory interpretation" to the appeal at bar: "The issue of interpretation of a statute is a question of law for the court....The cardinal rule of

statutory interpretation is to determine the intent of the legislature....Once the legislature has made a choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy....When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction, and a court must apply the statute according to its literal meaning...." *Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc.*, 378 S.C. 160, 168-171, 662 S.E.2d 430, 434-437 (Ct.App. 2008). It is manifestly in the public interest that the law remain permanently settled. Especially is this so in the construction of statutes, for if any change in the statutory law is desired, the General Assembly may readily accomplish it. *Wehle v. The S. C. Ret. Sys.*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005). It is also the long-standing policy of the Court that statues and rules of court should be construed liberally in favor of the right of appeal. *Wieters,* 378 S.C. at 167, 662 S.E.2d at 434.

In *USAA Prop. and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651-52, 661 S.E.2d 791, 795 (2008), this Court was concerned whether the counsel for appellant/respondent made a false representation, a perjury, to the Trial Court that she did not receive Notice of Entry of Judgment. Rule 407(1), Rule 3.3(a)(1), Rule 4.1(a), Rule 8.4(d), RPC, Rule 407, SCACR. This Court determined that the counsel for appellant/respondent was credible in explaining her delay in filing the Motion and no perjury was involved.

In *Regions Bank v. Strawn*, 399 S.C. 530, 536-37, 732 S.E.2d 230, 233 (Ct.App. 2012), the petitioners testified that they hand-delivered a payoff letter and a payoff check to the bank requesting the mortgage be satisfied within three months pursuant to S.C. Code Ann. §§ 29-3-310, 320 (2007). Bank denied receiving the

said letter. These conflicting statements raised the possibility that one of the parties is making a misrepresentation to the Court, a perjury. The Trial Court reviewed the evidence to determine the facts and found that evidences supported the respondents' testimony and held the Bank liable to petitioners. The Court of Appeals affirmed the Trial Court's ruling.

Giving false information in a document or report required by the laws of the State is "perjury". *State v. Stanley*, 365 S.C. 24, 35, 615 S.E.2d 455, 460 (Ct.App. 2005).

The Supreme Court has reviewed allegations of perjury in an appeal to set aside a lower court's judgment in the context of "Rule 60(b)(3), SCRCP, motion". *Raby Const., LLP, v. Orr, Jr.* 358, S.C.10, 17-23, 594 S.E.2d 478, 481-484 (2004). The Court ruled that the allegations of perjury, which could be discovered through discovery before the trial, fall under the category of intrinsic fraud and relief under Rule 60(b)(3), SCRCP, is not available. *Raby Const., LLP, Id.* Petitioner's appeal at bar is fundamentally different from *Raby Const., LLP,* in that the perjury committed by the respondents is a *per se* violation of S.C. Code Ann. § 16-9-10(A)(2) (2003). This Court has intrinsic authority to interpret court rules under SCACR and SCRCP. When a statute's terms are clear and unambiguous on their face, a court must apply the statute according to its literal meaning.

In the case at bar, petitioner and respondents made conflicting statements to the Court. (This petition, Argument I, *supra,* p. 3 lines 22-p. 4. line 17). This Court did not review the evidence in the Record to determine the facts, but presumed that the petitioner knew about the respondents' SCHPA violations in June 2008 and erroneously denied petitioner's Writ of Certiorari.

It is respectfully submitted that it is fundamentally improper to afford respondents the benefit of their perjury/misrepresentations to the Court. This issue should be remanded to the Trial Court for a proper ruling based on evidence regarding the date that the petitioner knew or should have known respondents' SCHPA violations.

II. THE COURT FAILED TO APPREHEND THAT PETITIONER'S CAUSE OF ACTION IS FOR THE RESPONDENTS' SCHPA VIOLATIONS AND ERRED BY NOT APPLYING THE CORRECT STANDARD GOVERNING STATUTE OF LIMITATIONS.

In its Return to Petition for Writ of Certiorari filed on March 23, 2015, the Respondents represented to the Court that on June 16, 2008, the HOA fled a lawsuit (the "HOA lawsuit") against respondents and other parties which alleged defects in the construction of the Cambridge Lakes condominiums and SCHPA violations (Respondents' Return, p. 2, lines 9-14) and cite to the Record on Appeal. (R. p. 115 and p. 77-83). This Court may take notice that the respondents did not cite to the specific page and line numbers in the record to support their claims. Rule 211(b), SCACR; 4, C.J.S. § 728 References to record, 662 (2007). Record at page 115 (R/A. pp. 115-120) is the HOA's Complaint filed on June 19, 2008. There is no even a single mention of respondents' SCHPA violations in the HOA's lawsuit filed in June 2008. Respondents' assertion that the HOA's 2008 lawsuit included allegations of SCHPA violations against the respondents is an intentional lie. The respondents intentionally lied or perjuriously misrepresented to the Court the facts of the case.

Record at pp. 077-083 is the HOA's Third Amended Complaint filed on July 14, 2010 in the HOA's lawsuit. Herein, the HOA alleged respondents' SCHPA violations. (R/A. p. 080, lines 8-10, p. 081, lines 11-12). *This Court may notice that*

respondents withheld information from the Court that the HOA filed its Third Amended Complaint in July 2010, and that HOA asserted SCHPA violations against the respondents in its Third Amended Complaint filed on July 14, 2010 and not in June 2008. The factual chronological history is very critical for determination of Statute of Limitations. Petitioner has repeatedly represented to the Court that petitioner learned about the respondents' SCHPA violations in September 2010 after he studied the HOA's Third Amended Complaint which was filed on July 14, 2010. (R/A. p. 62, line 32-p 63, line 5).

In its Return to Petition for Writ of Certiorari filed on March 23, 2015, the Respondents represented to the Court that "the Plaintiff [petitioner] filed this lawsuit on November 4, 2010, alleging construction defects and violations of S.C. Horizontal Property Regime Act made his unit not "fit, habitable, and marketable." (Respondents' Return, p. 3, lines 2-4) and cite to the Record R/A. pp. 22-27. This Court may take notice that the respondents did not cite to the specific page and line numbers in the record to support their claims. Rule 211(b), SCACR; 4, C.J.S. § 728 References to record, 662 (2007). Petitioner's complaint carries the caption: "Complaint[:] Violation of the Horizontal Property Act, Breach of Contract/Warranty. Fraud, Negligence, Unfair Trade Practices." (R/A. p. 023, lines 25-28). Petitioner has not alleged a cause of action for construction defects against the respondents in his lawsuit filed on November 4, 2010. Respondents' claim that petitioner alleged construction defects against the respondents is an intentional lie or perjurious misrepresentation.

In its Return to Petition for Writ of Certiorari, respondents represented to the Court that the petitioner was on notice of the claims he is asserting in his lawsuit by

June 2008. (Respondents' Return, p. 6, lines 8-10). This court may notice that respondents did not specify: (i) What claims he is asserting in his lawsuit; (ii) When petitioner field the lawsuit; and (iii) Petitioner was on notice for which claims against the respondents.

In its Return to Petition for Writ of Certiorari, respondents quote from petitioner's Complaint:

> 14. In 2008 Plaintiff learned that the Cambridge Lakes Homeowners Association and several individual unit owners filed a lawsuit against the defendant's named in this matter (excluding William E. Jenkinson, IV, and Carolina One) and various contractors and subcontractors for various construction defects. (ROA p. 25). (Respondents' Return, p. 6, lines 12-15).
>
> 15. The Plaintiff also learned that the defendants named herein did not file with the master deed or provide copies of a report required by the South Carolina Horizontal Property Act, S.C. Code Ann. 27-31-10 *et seq.* (ROA p. 25). (Respondents' Return, p. 6, lines 16-18).

This Court may notice that while quoting from petitioner's Complaint the respondents deliberately withheld information from the Court that petitioner filed the Complaint against the respondents on November 4, 2010 and not in June 2008. By withholding information that petitioner filed his Complaint in November 2010, respondents induced the Court to believe that petitioner knew about his allegations [SCHPA violations] against the respondents in June 2008.

In paragraph 14 of his Complaint petitioner stated that he knew about the HOA's lawsuit in 2008 in which the HOA alleged construction defects in Cambridge Lakes against various parties. Respondents are bringing up a wholly irrelevant matter in the Respondents' Return to Petition for Writ of Certiorari because Petitioner has not alleged construction defects against the respondents.

In paragraph 15 of his Complaint petitioner stated that respondents did not provide copies of a report mandated by SCHPA to the petitioner. This is a factual statement, and an allegation made against the respondents. When petitioner filed his lawsuit in November 2010, he learned that the respondents violated SCHPA and that the respondents did not provide the "Disclosure of the physical condition of the Building" report mandated by S.C. Code Ann. § 27-31-430 to the petitioner.

In its Return to Petition for Writ of Certiorari filed on March 23, 2015, the Respondents further represented to the Court:

(i) Petitioner filed interrogatory responses in his lender's mortgage foreclosure lawsuit and cites to the foreclosure case, BAC Home Loans Servicing v. Johnson D. Koola, et al., Case No. 2010-CP-10-6060. (Respondents' Return, p. 6, lines 19-20).

Respondents deliberately failed to state when the lender filed the mortgage foreclosure case and when the petitioner filed the interrogatory responses. By doing so, respondents induced the Court to believe that lender filed the mortgage foreclosure case in June 2008, and the petitioner filed the interrogatory responses also in June 2008. For record, lender filed the Complaint on July 27, 2010 and amended Complaint on September 1, 2010 in the mortgage foreclosure case. Petitioner filed the interrogatory responses on May 23, 2011. (R/A. p. 099).

(ii) Petitioner met with a member of the HOA Board on November 20, 2004 and discussed with him rumors of constriction defects in Cambridge Lakes. (ROA p. 99). (Respondents' Return, p. 6, lines 21-25).

(iii) On November 20, 2004, petitioner sent a letter to one of the HOA's board members and requested him to contact the architectural firm or consultant that built the Cambridge Lakes to get information about construction defects in Cambridge Lakes. (ROA p. 106). (Respondents' Return, p. 7, lines 1-6)

(iv) Petitioner listed his property for sale in June/July 2008 and did not receive any offer from prospective buyers. Petitioner stated in his interrogatory responses to the lender's mortgage foreclosure action that he did not receive a single offer from prospective buyers because of the HOA's ongoing lawsuit (Case No.: 2998-cp-3506) and massive construction defects in Cambridge Lakes. (ROA pp. 102-103). (Respondents' Return, p. 7, lines 7-11).

(v) Petitioner stated in his interrogatory responses to the lender's mortgage foreclosure action that on June 25, 2008, the HOA and its attorney sent a letter (Exhibit 5) to the homeowners informing them that the HOA has filed a lawsuit (#2008-cp-10-3506) against the respondents and others. (ROA p. 103) (Respondents' Return, p. 7, lines 12-14).

The respondents established conclusively that petitioner knew about construction defects in Cambridge Lakes by June 2008. However, respondents are bringing up a wholly irrelevant matter in the Respondents' Return to Petition for Writ of Certiorari that petitioner knew about construction defects in Cambridge Lakes in 2008, because petitioner has not alleged construction defects in Cambridge Lakes against the respondents. Respondents just waste judicial time.

(vi) Petitioner stated in his interrogatory responses to the lender's mortgage foreclosure action that (a) petitioner studied the "Builder's Certification" provided by the respondents to petitioner when he purchased the condominium in 2004, (b) he studied the Master Deed of Cambridge Lakes Condominiums and (c) respondents stated in the Master Deed that they submitted Cambridge Lakes property to the provisions of South Carolina Horizontal Property Act, § 27-31-10 et seq. and therefore the respondents knew about the provisions of South Carolina Horizontal Property Act, § 27-31-10 et seq. (ROA p. 104). (Respondents' Return, p. 7, lines 15-22).

In paragraph (vi) above, petitioner did not state that he knew about the respondents' SCHPA violations in 2008. What petitioner stated was that the respondents stated in the Master Deed that they submitted Cambridge Lakes property to the provisions of SCHPA. The statements made in paragraph (vi) were

contained in petitioner's interrogatory answers filed on May 23 2011 in lender's mortgage foreclosure action. Lender filed the foreclosure action on July 27, 2010 and September 1, 2010. The statements contained in paragraph (vi) above refer to the time period May 2011 when petitioner filed his interrogatory responses to lender's mortgage foreclosure action.

By perjuriously misrepresenting to the Court that the HOA asserted both SCHPA violations and constructions defects in 2008 against the respondents, and petitioner asserted the same SCHPA violations and constructions defects in his November 2010 lawsuit against the respondents and by withholding critical chronological facts, the respondents ***induced*** this Court to believe that petitioner knew or should have known about the respondents' SCHPA violations in 2008. *Holy Loch Distrib. v. Hitchcock*, 332 S.C. 247, 254-59, 503 S.E.2d 787, 791-94 (Ct.App. 1998). Respondents falsely affirmed in the Master Deed that they complied with the provisions of SCHPA. (R/A. p. 067, lines 10-16). They fraudulently certified in the Builder's Certification that they have completed all the necessary structural, health & safety repairs. (R/A. p. 66, lines 39-40). Therefore, petitioner did not discover that the respondents violated SCHPA before September 2010. This Court did not review the evidence in the Record to determine the facts, presumed that the petitioner knew or should have known about the respondents' SCHPA violations in June 2008, closed the courtroom doors to the petitioner and denied petitioner's Writ of Certiorari. *Moriarty v. Garden Sanctuary Church*, 341 S.C. 320, 534 S.E. 2d 672, 678-79 (2000).

The Court failed to apprehend the distinction between construction defects and SCHPA violations. Builder and building contractors are liable for construction

defects. Neither petitioner nor HOA has asserted claims for construction defects against the respondents. Violations of SCHPA and S.C. Code Ann. § 27-31-430 arose because the respondents failed to provide the "Disclosure of the physical condition of the building" report mandated by S.C. Code Ann. § 27-31-430 to petitioner when they sold a condominium converted under the provisions of SCHPA to petitioner. This is a *per se* statutory violation, which makes the violators automatically liable for violation of South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.*

Only the HOA is authorized to maintain, repair, and pursue construction defects remedies. *Queen's Grant Villas Horizontal Prop. Regimes I-IV v. Daniel Int'l Corp.,* 286 S.C. 555, 556, 335 S.E.2d 365, 366 (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/A. p. 067, lines 10-16), for violation of SCPHA § 27-31-430 and for providing a falsified and fraudulent Builder's Certification to petitioner. (R/A. p. 066, lines 39-40). A court would rule a construction defects lawsuit by petitioner against respondents *frivolous*. *Grillo v. Speedrite Products, Inc.*, 340 S.C.498, 508, 532 S.E.2d 1, 6 (Ct.App. 2000),

"At the summary judgment stage of the litigation, the court does not weigh conflicting evidence with respect to a disputed material fact". *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct.App. 2001). It is a question of fact to be determined whether: (i) Petitioner knew about respondents SCHPA violations in 2010 or 2008; (ii) Facts and circumstances of HOA's construction defects lawsuit against builder and contractors would put a person of common knowledge and experience on notice that the respondents would have

violated SCHPA and would tend to establish an issue in the mind of a reasonable juror that the respondents violated SCHPA when only constructions defects were known; and (iii) Respondents induced petitioner to believe that they have not violated SCHPA through their affirmative statements in the Master Deed, (R/A. p. 067, lines 10-16) and the Builder's Certification. (R/A. p. 066, lines 39-40). Facts and circumstances of HOA's construction defects lawsuit against builder and contractors did not put HOA and nearly two hundred Cambridge Lakes homeowners on notice that the respondents violated SCHPA. Nevertheless, the Court ruled that facts and circumstances of HOA's 2008 construction defects lawsuit put petitioner on notice that the respondents violated SCHPA in 2008. As to all factual issues passed on by trial judge in law case question for Supreme Court is whether there is any evidence to support findings actually made, not whether evidence would support contrary findings. *United States Fid. & Guar. Co.,* 244 S.C. at 443, 137 S.E. 2d at 585, (1964).

In denying petitioner's appeal and petition for rehearing, the decision of the Court is in conflict with appellate courts' prior decisions. In *Holly Woods Ass'n of Residence Owners v. Hiller,* 392 S.C. 172, 184, 708 S.E.2d 787, 793-94 (Ct.App. 2012), appellants argued that the respondent Association is barred from bringing an action in 2005 for problems in the development's common areas under Statute of Limitations because those problems existed prior to 2002. The respondent Association maintained and testified that the problems the Association experienced during 2002-2005 were different from those, which existed prior to 2002. Therefore, the *Holly Woods Ass'n of Residence Owners* Court <u>*reasoned and affirmed*</u> the lower court's decision stating:

> "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....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.

In *Grillo*, 340 S.C. at 500-03, 508, 532 S.E.2d at 2-3, 6 (Ct.App. 2000), the Trial Court denied the appellant's claims against the respondent for the injury caused by the use of carcinogenic chemicals stating the appellant first experienced temporary symptoms of injury in May 1992 and filed the lawsuit 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; and (iii) Institution of an action based upon temporary symptoms would likely have been premature and possibly frivolous.

This Court failed to apply the courts' reasoning in *Holly Woods Ass'n of Residence Owners and Grillo* to petitioner's arguments that construction defects are not the same as SCHPA violations, SCHPA violations by the respondents came to be known to the HOA in July 2010 and to petitioner in September 2010.

It is respectfully submitted that it is fundamentally improper to grant Summary Judgment to the respondents because they have not presented even a mere scintilla of evidence to establish that petitioner knew about respondents' SCHPA violations in June 2008, or before September 2010. This issue should be remanded to the Trial Court for a proper ruling based on evidence regarding the date that the petitioner knew or should have known respondents' SCHPA violations.

III. THE COURT 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.

(i) *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)

Respondents and petitioner presented conflicting facts to this Court. Respondents misrepresented to the Court that: (i) The HOA alleged construction defects and SCHPA violations in its lawsuit filed in June 2008, (ii) The petitioner alleged construction defects and SCHPA violations in his lawsuit filed in November 2010; and (iii) As early as June 2008, petitioner was put on about his claims [respondents' SCHPA violations] against the respondents. (This Petition, Argument I, *supra*, pp. 308).

Petitioner represented to the Court that: (i) He has alleged SCHPA violations against the respondents, but not construction defects, (ii) The HOA did not allege SCHPA violations against the respondents in its lawsuit filed in June 2008; and (iii) He was put on notice about the respondents' SCHPA violations in September 2010. Respondents' contentions are not supported in the Record and are erroneous per se. The Record supported the opposing contentions of the petitioner. (This Petition, Argument I, *supra*, pp. 3-8).

(ii) *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 (2013).*

The petitioner presented evidences to the Court that: (i) Petitioner alleged respondents' SCHPA violations in his lawsuit filed in November 2010, but not construction defects; and (ii) Petitioner knew about SCHPA violations only in September 2010, the statute of Limitations began to accrue from September 2010, and the service of process completed in January 2012 falls within the three-year limitation period. (This Petition, Argument II, *supra*, pp. 8-17).

(iii) 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)

The Court should have denied the respondents' Motion for Summary Judgment under the objective standards criteria. Petitioner received "notice" about the respondents' SCHPA violations in September 2010. (R/A. p. 062, lines 31-p. 063, lines 1-5, p. 080, lines 8-10, p. 081, lines 11-12, p. 082). Petitioner has no legal right to sue for construction defects, but has legal right to sue for violation of SCHPA. (This petition, *supra*, p. 14, lines 11-19). 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 (2007). A cause of action accrues at the moment when the plaintiff has a legal right to sue it. *Grillo*, 340 S.C. at 502, 532 S.E.2d at 3. Petitioner filed his claims in November 2010 shortly after learning of the respondents' SCHPA violations in September 2010 and completed the service of process on respondents in January 2012 within the three-year limitations period.

(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, 341 S.C. 320, 534 S.E.2d at 676 (2000).*

The petitioner's injury arose owing to the respondents' SCHPA violations - not construction defects, as evidenced from the four corners of his Complaint. (R/A. p. 025-028). The petitioner knew about his injury in September 2010. (R/A. p. 062, lines 31-p. 063, line 5, p. 80, line 8-10, p. 81, lines 11-12). 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/A. p. 080, lines 8-10, p. 081, lines 11-12). Upon reading this Third 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 and completed service of process in January 2012 within three-year limitations period.

(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).

The Court failed to recognize that the emphasis is on the *injured person*, and petitioner's injury or claim is for the respondents' SCHPA violations. (R/A. 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. (R/A. p. 062, lines 31-32, p. 063, lines 1-5, p. 80, lines 8-10, p. 81, lines 11-12). Thus petitioner was put on notice in September 2010 that a cause of action existed against the respondents. A key element in the reasonable diligence test is "notice", which petitioner received in September 2010. *Grillo,* 340 S.C. at 503, 532 S.E.2d at 3.

(vii) In Hancock v. Mid-South Management Co., 381 S.C. 326, 330-331, 673 S.E.2d 801, 803, (2009), the Supreme Court upheld scintilla of evidence standard in order to withstand summary judgment in cases applying the preponderance evidence burden of proof.

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).

It is a question of fact to be determined whether: (i) Petitioner knew about respondents SCHPA violations in 2010 or 2008; (ii) Facts and circumstances of HOA's construction defects lawsuit against builder and contractors would put a person of common knowledge and experience on notice that the respondents would have violated SCHPA and would tend to establish an issue in the mind of a reasonable juror that the respondents violated SCHPA when only construction defects were known; and (iii) Respondents induced petitioner to believe that they have not violated SCHPA through their affirmative statements in the Master Deed (R/A. p. 067, lines 10-16) and the Builder's Certification (R/A. p. 066, lines 39-40). *Facts and circumstances of HOA's construction defects lawsuit against builder and*

contractors did not put HOA and nearly two hundred Cambridge Lakes homeowners on notice that the respondents violated SCHPA. As to all factual issues passed on by trial judge in law case question for Supreme Court is whether there is any evidence to support findings actually made, not whether evidence would support contrary findings. *United States Fid. & Guar. Co.,* 244 S.C. at 443, 137 S.E. 2d at 585 (1964).

It is respectfully submitted that this Court should remand to the Trial Court for a proper ruling on the questions of facts in the appeal at bar by applying the proper standard governing Summary Judgment.

IV. THE COURT FAILED TO APPLY THE DOCTRINE OF EQUITABLE TOLLING AS ESTABLISHED IN *HOOPER V. EBENEZER SENIOR SERV. AND REHAB. CTR.* TO PETITIONER'S CLAIMS.

Equitable tolling is a nonstatutory tolling theory, which the courts invoke to suspend the statutory period to ensure fundamental practicality and fairness and to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits. *Hooper v. Ebenezer Senior Serv. and Rehab. Ctr.*, 386 S.C. 108, 114-119, 687 S.E.2d 29, 32-34 (2009), *Ross v. Ross,* 394 S.C. 261, 264-66, 715 S.E.2d 359, 360-62 (Ct.App. 2011).

i. During the motion hearing in the Trial Court on July 25, 2012, when the petitioner repeated his position to the Trial Judge that petitioner knew about the respondents' SCHPA violations only in September 2010, the Trial Judge remarked that the petitioner is arguing with the Trial Judge. (R/A. p. 056, lines 24-25). Therefore petitioner did not make any further representations, including doctrine of equitable tolling, to the Trial Judge. Petitioner prays to this Court to consider the

petitioner's failure to preserve the issue of doctrine of equitable tolling as an excusable neglect.

ii. Respondents' Return to Petition for Writ of Certiorari states twice that the issue of equitable tolling was never raised in the Court of Appeals and raised for the first time in the petitioner's Petition for Writ of Certiorari. (Respondents' Return, p. 4, lines 2-3, p. 11, lines 9-11). This is a false statement. Petitioner raised the issue of equitable tolling in his Initial Brief filed on November 6, 2013 and the Petition for Rehearing filed on December 10, 2014 (R/A. p. 135, lines 18-29, pp. 178-180).

iii. Petitioner served Summons and Complaint on the respondents in January 2012. (R/A. p. 94-95). If this Court determines that petitioner knew about the respondents' SCHPA violations in September 2010, and the Statute of Limitations in the case at bar accrued from September 2010 (this Petition, Argument II, *supra*, pp. 8-16), then service was completed within the three-year limitations period.

iv. Respondents intentionally lied or perjuriously and deceptively misrepresented facts of the case to the Courts and received Summary Judgment. (This Petition, Argument I, *supra*, pp. 3-7).

v. Respondents falsely affirmed in the Master Deed that they complied with the provisions of SCHPA (R/A. p. 067, lines 10-16) and fraudulently certified in the Builder's Certification that they have completed all the necessary structural, health & safety repairs. (R/A. p. 66, lines 39-40). Thus, the respondents induced petitioner to believe that they did not violate SCHPA. Petitioner knew about the respondents' SCHPA violations and falsification of the builder's certification only in September 2010. Therefore, these circumstances should toll the limitations period. *Holy Loch Distrib.*, 332 S.C. at 254-59, 503 S.E.2d at 791-94 (Ct.App. 1998).

vi. The respondents (a) Sold a condominium to the petitioner on the express representation that they have complied with SCHPA, (R/A. p. 067, lines 10-16); (b) Willfully and wantonly violated South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-430, (R/A. p. 22-29); and (c) Provided a fraudulently certified "Builder's Certification" to the petitioner, (R/A. p. 066, lines 39-40). Petitioner and all the Cambridge Lakes condominium buyers suffered gross wrong at the hands of the respondents. (R/A. p. 120, lines 8-10). Nearly 30% of the homeowners lost their homes to short sales and foreclosures. Petitioner faces imminent foreclosure. (R/A. p. 180, lines 20-21). The intervention of this Court in the case at bar would support the cause of public policy of this state.

It is within the discretion and authority of this Court to review and grant petitioner's request to toll the limitations period, provided sufficient facts presented herein justify its use 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

June 3, 2015

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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

APPELLATE CASE No.: 2015-000399

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.

PROOF OF SERVICE

I, Johnson Koola, under penalty of perjury, certify that on June 3, 2015, I mailed a copy of Petition for Rehearing Denial of Petition for Writ of Certiorari by mailing a true and accurate copy thereto to the following addressees:

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The Honorable Julie J. Armstrong
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