

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

SC Court of Appeals

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,

v.

Johnson Koola,.....Appellant.

**PETITION FOR REHEARING**

Appellant pro se, Johnson Koola, ("Koola" or "Petitioner") files this Petition for Rehearing of the Court of Appeal's Unpublished Opinion No. 2015-UP-391 filed on August 5, 2015 under Rule 221(a), (c), and Rule 240(c)(3), and (i) SCACR.

Petitioner files this Petition for Rehearing stating with particularity the points overlooked or misapprehended by the court as provided under Rule 221(a), SCACR. Further, the petitioner files an Affidavit and other documents as provided under Rule 240(c)(3), SCACR, as some of the facts relied upon in support of the Petition are not contained in the Record on Appeal.

Petitioner requests an oral hearing before the petition for rehearing is decided on under Rule 240(h), SCACR.

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1. IT WAS A MANIFEST ERROR FOR THE COURT OF APPEALS TO DISMISS PETITIONER'S CLAIM FOR CONSPIRACY RULING THAT RESPONDENT'S MANAGEMENT COMPANY AND ATTORNEYS ARE ITS AGENTS OVERRULING A SUPREME COURT DECISION.

A. Respondent's Management Company and its attorneys are not its agents by law.

Petitioner has pled a claim against the respondent for civil conspiracy among the members of the Board of Directors of the respondent Homeowner Association ("BOD"), its Management Company (Ravenel Associates) and its attorneys for their obstruction of petitioner's short sale of his condominium alleging injury and special damages. (R. p. 051, line 25-p. 055, line 2; p. 080, line 8-p. 084, line 22, Bf. P. 13, line 3-p. 15; Reply Bf. P. 15, line 3-18, line 6). An action for conspiracy is an action at law. *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). Although petitioner clearly stated the elements to establish civil conspiracy, this Court ruled that "a civil conspiracy can not exist when the alleged acts arise in the context of a principal-agent relationship because by virtue of the relationship such acts do not involve separate entities." This Court cites to *McMillan*: "agents for a corporation acting in the scope of their duties cannot conspire with the corporation absent the guilty knowledge of a third party." *Id.* at 564, 626 S.E.2d at 887. This Court erred because it missed the fact that the keywords in *McMillan* is "guilty knowledge of a **third party**."

The Supreme Court has defined the relationships between a principal and agent and a master and servant in a very distinct language:

"There is this marked distinction between [**principal** and **agent** and master and servant]: The **agent** is appointed for the purpose of establishing a new **contractual relation between the principal and a third person**...."

"Now, the relation of **master** and **servant** is essentially different from that of principal and agent, in that the **servant** is deputized to complete, not a contractual relation between the master and a third person, as the agent is

expected to do, but **to perform an operative service for the master**" (Emphasis added).

*Goble v. American Railway Express Co.*, 124 S.C. 19, 30, 31, 115 S.E. 900, 904 (1920).

The respondent's Management Company and its attorneys perform certain operative services for the respondent, not a contractual service for third parties such as petitioner, on behalf of the respondent. They cannot be considered as its agents.

The ruling of this Court in the current Appeal clearly contradicts the definition of an agent by the Supreme Court. It was a manifest error for this Court to dismiss petitioner's claim for conspiracy ruling that respondent's Management Company and its attorneys are its agents.

"[A]lthough a corporation cannot conspire with itself, "the agents of a corporation are legally capable, as individuals, of conspiracy among themselves or with third parties". (Internal citation omitted).

*Pridgen v. Ward*, 391 S.C. 238, 244, 705 S.E.2d 58, 62 (Ct.App. 2010);

"Each conspirator is jointly and severally liable for all damages resulting from the conspiracy....Since the liability of conspirators is joint and several, the action may be maintained against one only of the conspirators, or plaintiff may at his option join all the alleged conspirators as defendants in one action."

*Exchange Bank of Meggett v. Bennett*, 193 S.C. 320, 326, 8 S.E.2d 515, 517 (1940).

## **B. Petitioner's Injury and Special damages**

Petitioner has expressly alleged that the purpose of the respondent's decision to institute multiple actions against petitioner (a lien (R. pp. 019-021), this appeal<sup>1</sup>, and a foreclosure action<sup>2</sup>) was to injure the petitioner by precluding his ability to short sell his

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<sup>1</sup> Cambridge Lakes HOA v. Koola, Appellate Case No.: 2013-001632

<sup>2</sup> Summons on Crossclaim of Defendant Cambridge Lakes Condominium Homeowners Association, Inc., Case No.: 2010-CP-10-6060, Dec. 15, 2010

condominium, which was the only means for the petitioner to clear off any dues to the respondent. (R. R. pp. 019-021, Bf. P. 14, lines 8-17, Reply Bf. P. 16, lines 20-24).

To meet the third element to claim "special damage", petitioner has alleged that the objective of the conspiracy was to injure the petitioner as well as to destroy him financially. (R. p. 053, lines 15-25; p. 082, lines 7-15; Bf. P. 14; line 18-p. 15, line 22; Reply Bf. P. 17, line 1-p. 18, line 2). In his Initial Brief, petitioner has stated that after short sale in 2010, petitioner would have received anywhere between \$120,000 and \$125,000 as sales price sufficient to pay off all mortgage-related debts. A foreclosure action would bring about \$50,000 to \$60,000 to the table, which would result in deficiency and civil judgments of about \$100,000 and would destroy petitioner financially. At age 71, petitioner has no income or resources to pay off even a small fraction of these judgments. The psychological pressure of this potential judgment and its consequences destroy petitioner's life. This is the special damage that the respondent conspired to inflict on the petitioner. Lawful acts become actionable as a civil conspiracy when the "object is to ruin or damage the business of another." *Charles v. Texas*, 199 S.C. 156, 170, 18 S.E.2d 719, 724 (1942); *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988); *Gynecology Clinic, Inc. v. Cloer*, 334 S.C. 555, 556, 514 S.E.2d 592 (1999). "When a man is injured personally, his hand cut off, his foot mashed, something like that, you haven't any standard to go by. It is the same way when a man's business is ruined..." *Charles*, 199 S.C. at 173, 18 S.E.2d at 725.

The infliction of special damage would have the following adverse, detrimental effects on the petitioner: (i) after foreclosure and civil judgment, petitioner will be evicted from his condominium. Because of poor credit resulting from foreclosure and civil

judgments and no wage income and other resources, petitioner would have a very difficult time to rent an apartment; (ii) petitioner is a professional chemist and was unemployed since 2007. In 2010, petitioner was under the retirement age. After short sale in 2010 and clearing off all mortgage related dues, petitioner could have moved to elsewhere and sought a professional chemist's job. Petitioner could not move out due to the prolonged litigations and remains unemployed since 2007. The resulting damage from these civil actions is enormous and the cost of litigation is beyond petitioner's affordability. Petitioner borrows money on credit card to pay for the litigation cost. These are the aftereffects of the special damage that the HOA inflicted on the petitioner due to conspiracy. The only goal of the respondent in litigating against petitioner is to inflict special damage on him even at the risk of not collecting any dues.

"Special damages are those elements of damages that are the natural, but not the necessary or usual, consequences of the defendant's conduct." *Hackworth v. Greywood At Hammett, LLC*, 385 S.C. 110, 116, 682 S.E.2d 871, 875 (2009). Respondent's rejection of petitioner's offer of short sale of his condominium to clear off his dues, if any, to it and institution of multiple civil actions to destroy him financially and to destroy his life are very reprehensible. Respondent has allowed other homeowners to short sell their units and did not pursue any legal actions against many others for the dues. "In considering the degree of reprehensibility, a Court should consider whether:

(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and the harm was the pursuit of intentional malice, trickery, or deceit rather than mere accident."

*Jenkins v. Few*, 39 S.C. 209, 222, 705 S.E.2d 457, 464 (Ct.App. 2010).

**C. A court considering summary judgment does not make factual determination.**

The respondent has never claimed that its Management Company and its attorneys are its agents. *Pro se* petitioner represents that a court adjudicates on the issues raised by the opposing parties rather than making factual or legal arguments in favor of a party. "A Court considering summary judgment makes neither factual determination nor considers the merits of competing testimony." *Chastain v. Hiltabidle*, 381 S.C. 508, 514, 673 S.E.2d 826, 829 (2009); *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

Petitioner respectfully submits to this Court to reverse its Order affirming the grant of Summary Judgment to the respondent and remand the case to the Trial Court.

**II. THE COURT OF APPEALS OVERLOOKED THE FACT THAT PETITIONER RAISED THE ISSUE OF ENFORCEABILITY OF THE INVALID MASTER DEED IN HIS REPLY TO RESPONDENT'S MOTION FOR SUMAMRY JUDGMENT AND ERRONEOUSLY AFFIREMD THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT TO THE RESPONDENT.**

Petitioner raised the issue of enforceability of the Master Deed *first* in his Reply to plaintiff/respondent's Motion for Summary Judgment (R. p. 047, line 22-p. 48 A, line 13; p. 49, line 4-p. 50, line 24) and *additionally* in Motion to Reconsider (R. p. 076, line 3-p. 077, line 3; p. 077, line 18-p. 080, line 7), Appellant's Initial Brief (p. 9, line 13-p. 10), and Reply Brief (p. 5, line 10-p. 7, line 8) arguing that the Master Deed, because of the violation of South Carolina Horizontal Property Act, §27-31-10 *et seq.* ("SCHPA"), is invalid.

The Court of Appeals affirmed the Trial Court's Order granting Summary Judgment to the respondent by stating that petitioner *raised the issue of enforceability of the Master Deed for the first time* in the Motion to Reconsider and

not before. *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009). Petitioner had, indeed, raised the issue in his Reply to plaintiff/respondent's Motion for Summary Judgment (R. p. 047, line 22-p. 48 A, line 13; p. 49, line 4-p. 50, line 24)

In his Reply to plaintiff/respondent's Motion for Summary Judgment, petitioner raised the following issues:

(i) the respondent Cambridge Lakes Homeowners Association's ("Respondent HOA") Master Deed is registered according to the provisions of SCHPA, (R. p. 047, line 22-p. 048, line 7);

(ii) the said Master Deed is invalid and unenforceable because it violated a key provision of the South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-430, "Disclosure of the physical condition of the building, (R. p. 048, line 8-p. 48 A, line 8), the violation of which constitutes violation of S.C. Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq. ("SCUTPA"), (R. p. 048, line 23- p. 48 A, line 8);

(iii) the respondent's **predecessor** Cambridge Lakes Horizontal Property Regime and Cambridge Two, LLC sold a condominium to the petitioner on the basis of a legally void Master Deed and a fraudulent "Builder's Certification" implying that they complied with the mandates of S.C. Code Ann. § 27-31-430 and committed fraud, (R. p. 48-A, line 14-27);

(iv) the petitioner purchased the condominium on the express representation that the Master Deed complied with the provisions of SCHPA and Cambridge Lakes Horizontal Property Regime complied with the mandates of S.C. Code Ann. § 27-31-430, (R. 049, line 28-p. 050, line 4);

(v) the petitioner has a legal right to rescind the purchase of his condominium because it was conveyed to him through fraudulent means and because of code violations, (R. p. 050, lines 7-11);

(vi) the respondent HOA is the true **successor** of Cambridge Lakes Horizontal Property Regime and inherited the assets and liabilities of its **predecessor**, Cambridge Lakes Horizontal Property Regime, (R. p. 049, lines 4-28);

(vii) the respondent HOA has no legal right to use the provisions of an *ab initio* invalid Master Deed to take legal actions against the petitioner, (R. p. 050, lines 4-6).

This Court's ruling, that "because a condominium is a creature of a statute, strict compliance with Horizontal Property Act is required to create horizontal property regime", *Harrington v. Blackstone*, 319 S.C. 1; 459 S.E.2d 309, 312 (Ct.App. 1955), validates petitioner's arguments presented herein. A successor is a "person who succeeds to the office, rights, and responsibilities or place of another". *Holly Woods Association of Residence Owners v. Hiller*, 392 S.C. 172, 188, 708 S.E.2d 787, 796 (Ct.App. 2011). If [the successor] takes the benefit, it must, as has so often been said, take the burden, which equitably attaches with it. *Simmons v. Mark Lift Industries, Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005).

Since the petitioner has shown here that he has raised the enforceability of the Master Deed in his Reply to plaintiff/respondent's Motion for Summary Judgment, he respectfully requests this Court to reverse its Order affirming the grant of Summary Judgment to the respondent by stating that an issue may not be raised for the first time in a motion to reconsider.

III. THIS COURT ERRED IN AFFIRMING THE TRIAL COURT'S ORDER IN GRANTING SUMMARY JUDGMENT TO RESPONDENT DESPITE PETITIONER'S SHOWING THAT RESPONDENT BREACHED FIDUCIARY DUTY AND ACTED IN BAD FAITH, DISHONESTY OR INCOMPETENCE.

A. Fiduciary Duty

Petitioner has pled claims for Breach of Fiduciary Duty against the respondent, *inter alia*, in that: (i) it failed to investigate construction defects in Cambridge Lakes **diligently**; (ii) the BOD did not authorize attorney John C. Hayes, IV, to file the construction defects lawsuit<sup>3</sup>; (iii) it initiated the construction defects lawsuit without getting approval from two-thirds majority of the homeowners; and (iv) the breach of fiduciary duty in violation of the provisions of the Master Deed is an *ultra vires* act. (R. p. 057, line 10-p.058, line23; p. 059-line 4-p.63; p. 070, lines 6-17; p. 086, line 20-p. 091-14; p. 096, lines 9-17; Bf. p. 19, line 19-p. 24; Reply Bf. p. 9-p. 15, line 2).

S.C. Non-profit Corporation Act, S.C. Code Ann. § 33-31-830(a) (1976) and the Supreme Court have determined that directors of homeowners associations have a duty to exercise judgment reasonably and in good faith. *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 632 (1992); *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990). "[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, 369, 345 S.E.2d 709, 710 (1986). Restatement (2d) of Torts, 874 § (1979).

Though the Court appropriately cites *Fisher v. Shipyard Vill. Council of Co-owners, Inc.*, 409 S.C. 164, 180, 760 S.E.2d 121, 129-30 (Ct.App. 2014) and Petition for Writ of Certiorari granted, 2015 S.C. Lexis 135 (2015) in its Unpublished Order, the

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<sup>3</sup> Cambridge Lakes HOA, et al. v. Bostic Brothers Construction, et al, Case No. 2008-CP-10-3506, June 19, 2008; ditto, Third Amended Complaint, July 14, 2010

Court failed to apply this Court's Holdings to the petitioner's Breach of Fiduciary Duty claims. In *Fisher* this Court: (i) **affirmed** the Trial Court's Order granting of summary judgment to the respondents on the issue of duty to investigate, **who** is responsible for the damages to the common elements; (ii) **reversed** the Trial Court's Order granting of summary judgment to the respondents because the Council dutifully investigated **what** was causing the water problems; and (iii) **reversed** the Trial Court's Order that business judgment rule did not apply. *Id.* at 177-179, 760 S.E.2d at 128-129.

Petitioner enumerates respondent's three serious breaches of Fiduciary Duty.

### **Duty to Investigate**

On November 20, 2004, petitioner informed Mr. Stephen Fisher, Member, BOD, about the rumors of construction defects in Cambridge Lakes. Petitioner's immediate neighbor, who was working for the architect firm, which oversaw the construction of Cambridge Lakes, told him that some of the construction defects might be for real. Petitioner conveyed this information to Mr. Fisher. Mr. Fisher denied any construction defects in Cambridge Lakes, did not act further on the information, and did not refer the matter to the Board. When the respondent filed the construction defects litigation in June 2008, the architecture firm was one of the defendants in the said case. Mr. Fisher was grossly negligent because fiduciary relationship required Mr. Fisher to act on petitioner's information. (R. p. 058, line 1-23; p. 087, line 16-p. 088, line 13; Bf. p. 20, line 3-18; Reply Bf. p. 20, lines 8-21).

In the case at bar, the respondent maintains that the BOD first learned of potential construction defects during March-April 2008, filed the construction defects lawsuit in June 2008 pleading construction defects, and amended the Complaint in 2010

to include violation of SCHPA. (R. p. 152, lines 13-14, lines 21-22; p. 153, lines 9-12; p. 184, lines 14-16; p. 187 lines 19-20; p. 191, 13-15).

In early 2003, the developers/sellers of Cambridge Lakes condominiums (Cambridge Two, LLC and Albert Estee) sent a letter<sup>4</sup> (Affidavit 5-6) entitled "Notice of Condominium Conversion and Offer to purchase" to all the tenant/apartment residents of Cambridge Lakes stating that the developers/sellers will provide them with the "Disclosure of the physical condition building report" as mandated by S.C. Code Ann. § 27-31-430 before they buy the condominium, but did not provide it to them. They did not provide this letter to anyone, including petitioner, who bought the condominiums in late 2003 and later.

Charleston County RMC records show that at least three members of the BOD, Stephen Fisher, John Martin, and Margel S. Henning bought their units in early 2003 and should have received the said letter, and they were fully aware of the violation of SCHPA § 27-31-430 by the developers/sellers and by implication they were aware of construction defects in Cambridge Lakes as early as 2003. ***The BOD took control of Cambridge Lakes in the fall of 2004***, (R. p. 152, lines 11-12), and ***then in 2004, they should have investigated any potential construction defects and violation of SCHPA § 27-31-430***. They failed in their duty to investigate construction defects in Cambridge Lakes and violated Fiduciary Duty.

"A property regime has standing to bring an action for construction defects in common elements that the regime has duty to maintain....Should the Regime not uphold its duty to pursue a recovery for any alleged construction defects in the common elements, which it maintains, it may be liable to the homeowners for its omissions."

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<sup>4</sup> Trademark Properties, Inc., a defendant in the respondents construction defects litigation, filed the letter under reference under the Caption "**Affidavit of Richard C. Davis**" as **Exhibit "B"**, Case No. 2008-CP-10-3506, Nov. 2, 2010.

*Queen's Grant Villas Horizontal Property Regime I-IV v. Daniel Internat'l Corp.*, 286 S.C. 555, 556, 335 S.E.2d 365, 366 (1985). This Court affirmatively determined: "[T]he duties created by the Bylaws and S.C. law also support a duty to investigate [by the Council] who is responsible for damage to the common elements". *Fisher*, 409 S.C. at 179, 760 S.E.2d at 129.

This Court erred because the Court failed to apply its own Decision in *Fisher* to petitioner's appeal. This is despite the facts that petitioner has demonstratively shown that: (i) the respondent had actual and constructive knowledge in 2004 that there are construction defects and SCHA violations in Cambridge Lakes; (ii) the respondent failed in its duty to investigate diligently construction defects and violation of SCHA § 27-31-430 in Cambridge Lakes in 2004; (iii) and both the Court and petitioner have cited *Fisher* in the Court's Order and in petitioner's Brief.

Petitioner respectfully requests this Court to determine whether the respondent breached Fiduciary Duty as it failed in its duty to investigate construction defects and SCHA violations in 2004, as this Court has determined in *Fisher*.

**The respondent's BOD did not authorize its attorney to file the construction defects lawsuit.**

The respondent maintains that the BOD: (i) first learned of potential construction defects in Cambridge Lakes during March-April 2008, (R. p. 152, lines 13-14); (ii) immediately upon learning of the defects, it retained attorney John C. Hayes, IV, to file a construction lawsuit on its behalf, (R. p. 152, lines 21-22; p. 184, lines 14-16); and (iii) filed the construction defects lawsuit in June 2008, (R. p. 153, lines 9-12; p. 187, lines 19-20; p. 191, lines 13-15). Petitioner has categorically stated (R. p. 057, lines 15-31; p.

087, lines 5-15) that the minutes for the months of April, May and June 2008 make no references that the HOA authorized Mr. Hayes to file the construction defects litigation. (R. p. 102, lines 8-13; Affidavit 7-10). The respondent has not produced minutes of any of the BOD meetings to show that that BOD, indeed, authorized Hayes to file construction defects lawsuit on its behalf. Petitioner represents to this Court that Hayes was not *officially* authorized by the BOD to file the lawsuit. The BOD might have met in a private meeting and outside the domain of HOA and requested Hayes to file the lawsuit; this is a private affair and there are no documentation. This is a serious breach of Fiduciary Duty by the HOA.

It is a question of fact to be determined by jury whether the BOD authorized attorney John Hayes, IV, to file the construction defects litigation.

**The respondent's BOD filed the construction defects lawsuit without the approval of two-thirds majority of the Cambridge Lakes Homeowners.**

The HOA breached fiduciary duty when it initiated the construction defects litigation without the approval of two-thirds majority of the homeowners (R. p. 059, lines 4-22; p. 089, line 3-p. 090, line 12; Bf. p. 21, line 11-p. 22; Reply Bf. p. 11, line p. 13-20). This duty arose because construction defects litigation involved collection of special assessments. After filing the lawsuit, the respondent sent a letter to the homeowners and asked them: (i) to join the lawsuit; (ii) agree to assign their rights and claims to it; and (iii) to agree to any collection of **regular and special assessments** together with late fees. (R. p. 018, lines 3-5, lines 11-16). The homeowners, who assigned their rights to the HOA, agreed to pay on demand unspecified amount of future special assessments, which is signing of a 'promissory note'. The collection of special

assessments is governed by Paragraph (16)(6) of the respondent HOA's Master Deed, which states:

*"[T]he Association may levy, in any fiscal year, special assessments..... provided that any such assessment shall have the **assent of two-thirds (2/3) of the vote of the Co-Owners voting in person** or by proxy at a meeting duly called for this purpose,.....".* (emphasis added).

The defendant HOA has the duty to maintain, repair, replace and operate the common elements" of Cambridge Lakes. Queen's Grant Villas Horizontal Property Regimes I-IV, 286 S.C. at 556, 335 S.E.2d at 366. In the present case, the HOA has to receive the approval of two-thirds majority of the homeowners to initiate the construction defects lawsuit as it involved collection of special assessment. (R. p. 018, lines 3-5, lines 11-16). In *Lovering v. Seabrook Island Property Owners Ass'n*, 291 S.C. 201, 202-03, 352 S.E.2d 707, 708 (1987), the Supreme Court affirmed as modified this Court's Holding stating: "It is undisputed that the Association had no express power to impose [special] assessment at issue...Based on the foregoing, the Court of Appeals correctly held that the imposition of the special assessment was *ultra vires*". In *Seabrook Island Property Owners Ass'n v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct.App. 1987), this Court *reversed* the Decision of the Trial Court that allowed the Association to collect annual maintenance charges from property owners in contravention of its Bylaws and Restrictive covenants after determining that Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract and *affirmed* other grounds in the appeal.

*"The rights and authority of the Regime must be gleaned from the Horizontal Property Act and from the master deed."* *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 421, 321 S.E.2d. 46, 49 (1984). In *Harrington v. Blackstone*, 319

S.C.1, 459 S.E.2d 309 (Ct.App.1995), this Court determined that the rights of condominium unit owners must be determined by examining all relevant provisions of Horizontal Property Act, master deed and allied documents and harmonize them if possible.

This Court erred because the Court failed to apply its own decision and that of the Supreme Court in *Lovering (supra)*, *Seabrook Island Property Owners Ass'n (supra)*, *Roundtree Villas Ass'n, Inc. (supra)*, and *Harrington (supra)* that a regime of a homeowner's association is duty bound to act by its Bylaws and S.C. laws, to petitioner's claims that respondent filed the construction defects lawsuit without the approval of two-thirds majority of the Cambridge Lakes Homeowners and made the homeowners agree to pay future special assessments in contravention of the provisions of its Master Deed, an *ultra vires* act.

It is respectfully submitted that this Court makes a determination whether the respondent breached Fiduciary Duty for initiating construction defects lawsuit without the approval of two-thirds majority of the homeowners and not following the protocol in the Master Deed for collection of special assessment, and whether the action of the respondent was an *ultra vires* action.

#### **B. Business Judgment Rules**

S.C. Code Ann. § 33-31-830 *et seq.* defines business judgment rules applicable to a non-profit corporation. Petitioner has claimed that by S.C. Laws, business judgment rules did not apply to respondent's *ultra vires* acts, and by S.C. Laws, respondent cannot justify its *intra vires* acts when it acted in bad faith, dishonesty or incompetence.

(R. p. 065; p. 096, lines 9-23; Bf. p. 24; Reply Bf. p. 13, line 21-p. 5, line 2)

In *Fisher*, 409 S.C. at 180-81, 760 S.E.2d at 130, this Court has determined that: (i) the business judgment rule applies to actions allowed by the Master Deed, Bylaws and SCHA, *intra vires* acts, but does not extend to actions not allowed by the Master Deed, Bylaws and SCHA, *ultra vires* acts; (ii) if the Bylaws, and Master Deed specified how duties should be performed, the ***business judgment rule would not allow the Council to deviate from those rules***. Nevertheless, this Court did not apply its own Decisions in *Fisher* to petitioner's claims that in its *intra vires* actions, respondent acted in bad faith, dishonesty or incompetence.

Petitioner enumerates respondent's three actions where it acted in bad faith and incompetence and possibly fraudulently. In its construction defects lawsuit filed in June 2008, the respondent held the developers/sellers liable for construction defects and violation of SCHA § 27-31-430. The lawsuit claimed eight million dollars in damages; triple damages are allowed for violation of SCHA and SCUTPA. The registration document filed with the South Carolina Secretary of State shows that: (i) Albert Estee (the developer/seller) registered Cambridge Lakes Condominium Homeowners Association, Inc. ("HOA") as an Eleemosynary Incorporation on April 4, 25, 2003 and continued to remain as the registered agent till 2010; (iii) on July 6, 2010, he registered Edward Pritchard III as the new agent. (Affidavit 11<sup>5</sup>). Pritchard III and respondent's construction defects litigation attorney John Hayes were members or partners of the law firm Pritchard and Elliot, LLC and are thus connected. Sometime after 2009, John Hayes formed the Hayes Law Firm. Thus, in the construction defects litigation in 2011,

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<sup>5</sup> Trademark Properties, Inc., a defendant in the respondents construction defects litigation filed the registration document under reference under the Caption "**Affidavit of Richard C. Davis**" as **Exhibit "C"**, Case No. 2008-CP-10-3506, Nov. 2, 2010.

John Hayes was representing the respondent HOA of which registered agent was or still is Pritchard III. On November 15, 2010, shortly after Pritchard III was made the registered agent of the HOA, Albert Estee filed a Motion for Summary Judgment<sup>6</sup> to dismiss respondent's claims against him. Shortly thereafter in 2011, respondent's attorney John Hayes quietly dismissed all the claims against Albert Estee and Cambridge Two, LLC; they walked away from the lawsuit free. Petitioner should not speculate what role the relationship between John Hayes and Pritchard III played in the dismissal of claims against the developers/sellers in 2011. What is certain is that the respondent defrauded the homeowners for several million dollars, which they would have received after successful completion of the litigation for construction defects and SCHA violations.

As real estate agents, Trademark Properties, Inc. sold nearly one-third of the condominiums and Carolina One sold nearly two-thirds of the condominiums in Cambridge Lakes. Petitioner bought his condominium through Carolina One. Nevertheless, the respondent filed construction defects lawsuit against Trademark Properties, Inc, but not Carolina One. Because Carolina One was not sued, homeowners lost substantial amount of recovery money.

In the construction defects litigation, the respondent claimed eight million dollars as damages. In June 2011, the respondent settled the case against all defendants and received nearly \$1.815 million as damages. After paying attorney fees, the respondent received approximately net \$1.2 million. This implies that the respondent either exaggerated the damages in the construction defects litigation, or the respondent did

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<sup>6</sup> "Albert Estee and Cambridge Two, LLC's Motion for Summary Judgment and to Compel Discovery" in respondent's construction defects litigation, No. 2008-CP-10-3506, Nov. 15, 2010.

not do repair work of all defects as it received a far less settlement at the end. Either way, the homeowners were losers. In a recent Charleston County action<sup>7</sup>, a jury awarded East Bridge Lofts Property Owners Association, Inc. *et al.* actual damages of \$22 million and punitive damages of \$33 million for construction defects and violation of SCHPA. Competence matters.

The respondent's liability insurance (Affidavit 12) covers the BOD for their actions, which is an affirmative proof that the BOD might or would act in bad faith, dishonesty and incompetence, but it does not require them to act that way. "[T]he [business judgment] rule will not apply if the directors have engaged in self-dealing, fraud, or other unconscionable conduct". *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 603, 538 S.E.2d 15, 27 (Ct.App. 2000).

**IV. THE COURT OF APPEALS ERRED IN DECIDING ON QUESTIONS OF FACT AND AFFIRMED THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENT.**

"It is the duty of the Court, on motion for summary judgment, not to try issues of fact, but only to determine whether there are genuine issues to be tried; and once having found that triable issues exist, must leave those issues for determination at trial. *Title Insurance Company of Minnesota v. Christian, III*, 267 S.C. 71, 77, 226 S.E.2d 24, 243 (1976).

**A. The respondent obstructed petitioner's short sale of his condominium, which was the only means for him to clear off any regime related dues.**

In 2010, when petitioner offered to pay off his dues, if any, to the respondent through a voluntary short sale of his condominium, it filed a Lien (R. p. 019-021) on

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<sup>7</sup> East Bridge Town Lofts Property Owners Association, Inc. v. East Bridge Lofts, LLC, Case No. 2010-CP-10-10204, June 10, 2014.

petitioner's condominium, which triggered a series of legal actions against Petitioner, a Lien (R. p. 19-21), a Lis Pendens, HOA's civil action<sup>7</sup>, and three foreclosure actions<sup>7</sup>. Petitioner was then forced to cancel his short sale efforts in late 2010. In a short sale, the homeowners associations will be paid out in full in preference to mortgagees. In a foreclosure action, the mortgagees will be paid out in full first; usually, the HOAs collect nothing or very little after foreclosure sale. S.C. Code Ann. § 27-31-200. The policy of the HOA was/is to collect any unpaid regime dues from insolvent homeowners through short sale as recorded in August 2009 BOD meeting. (R. p. 099, lines 21-30):

"If the bank wants to pursue "short sales" in which the bank obtains real estate brokers to sell the property while still in the name of the delinquent owner it works to our benefit. All parties including the bank have to negotiate a settlement to affect the sale. Normally the homeowner's association only has to forgive the late fees".

Nevertheless, the respondent chose to pursue legal action to collect any dues and forced petitioner to foreclosure.

The rejection of petitioner's offer of short sale to clear off any regime related dues was the result of a conspiracy between the members of BOD, the Management Company (Ravenel Associates) and the HOA attorneys. They were motivated by these factors: (i) all parties were infuriated with petitioner as he did not join the HOA's construction defects litigation; (ii) all parties wanted to take revenge against petitioner as he asked them to provide him with the financial statements of the HOA to discover any financial irregularities; (iii) petitioner once pinpointed to a member of the BOD that the annual budgets of the HOA presented to the homeowners are manipulated; and (iv)

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<sup>7</sup> BAC Home Loans Servicing, LP. v. Johnson D. Koola, Amended Complaint, Case No. 2010-CP-10-6060, Sep. 1, 2010; Ditto, Crossclaim of First Citizens Bank and Trust Co., Sep. 30, 2010, Ditto, Cross claim of Cambridge Lakes Condominium Association, Inc., Dec. 15, 2010.

petitioner once questioned the HOA about the HOA's new policy regarding renting the condominiums, which infuriated all the parties. Here, petitioner expressly plead that all the parties conspired to injure Koola, maliciously singling him out for disparate treatment. Petitioner has alleged that the actions of the respondent toward him were discriminatory and prejudiced based on race, color and national origin. Two members of the BOD know petitioner personally.

The respondent has not responded to petitioner's claims that: (i) it allowed his neighbor two doors down (#1583 Cambridge Lakes Dr) to short sell his unit in February/March 2010 and did not collect regime dues. (R. p. 053, lines 26-p. 054, line 2; p. 082, lines 18-23; Bf. p. 16, line22-p. 17, line 4; Reply Bf. p. 15, lines8-17) and (ii) it has not pursued any action to collect several thousand dollars in dues from three homeowners at 1423, 1455, and 1491 Cambridge Lakes Dr (R. p. 054, lines 6-11 p. 083, lines 6-11; p. 083, lines 6-11;Bf. p. 17, lines 9-12; Reply Bf. p. 15, line12-17 ). Instead, the respondent argues that it obtained judgments against five homeowners (R. p. 133, lines 3-12). It is verified from court records that respondent has not collected the judgments from them.

It is a question of fact to be determined by a jury whether: (i) petitioner's voluntary offer of payment of any regime related dues through short sale is a legitimate and legal means to clear off respondent's claims against petitioner; (ii) forcing the petitioner to foreclosure and to write off all dues after foreclosure as provided in Master Deed Paragraph 16(1)(c) is a good faith and competent business judgment decision; and (iii) whether the respondent treated petitioner discriminatorily.

**B. The Annual Budgets presented by the respondent to the homeowners show no dues from any homeowners, and hence the respondent has no legal standing to sue petitioner for regime related dues.**

Petitioner has presented to the Courts that the annual budgets of the respondent presented to the homeowners for approval during annual meetings show no dues outstanding from any homeowners, which include petitioner. (R. p. 065, line 23-p. 067, line 1; Bf. p. 11, line 7-p. 12, line 20; Reply Bf. p. 7, 9-p. 10, line 3). The relevant sections of the annual budget for 2009 and 2013 (Affidavit 13-14) are presented below:

CAMBRIDGE LAKES PROJECT RECAP						
9 MONTHS ACTUAL		3 MONTHS PROJECTION		YEAR ENDING DECEMBER 31, 2009		
		INCOME/ EXPENSE	3 MOS PROJECTION	TOTAL PROJECTED	ANNUAL BUDGET	BUDGET VARIANCE
	Cambridge Lakes	9/30/2009	Oct-Dec 09	12/31/2009	2009	PROJ 2009
ACTUAL INCOME						
4100	REGIME REVENUE	210,600	70,200	280,800	280,800	0

APPROVED OPERATING BUDGET 2013			
INCOME	2011 ACTUALS	2012 8 Months Actual	2013 Approved
		4 Months Forecasted	
OPERATING			
Regular Assessments	\$284,880.00	\$136,200	\$284,880

The sum total of actual regime revenue for nine months from January 1, 2009 through September 30, 2009 and the projected revenue for three months from October

1 through December 31, 2009 exactly equal the annual budget for 2009. The actual 2011 operating income is \$284,880.00, which is exactly equal to the budget approved for 2013. These statements imply that there are no dues from any homeowners.

If the financial statement presented to the homeowners is true, then there are no regime related dues from any homeowner and petitioner; hence the respondent has no legal standing to sue petitioner for collection of dues. If the financial statement presented to the homeowners is false, then the respondent made fraudulent misrepresentation and is liable to homeowners for fraud. "[T]he [business judgment] rule will not apply if the directors have engaged in self-dealing, fraud, or other unconscionable conduct." *Kuznik*, 342 S.C. at 603, 538 S.E.2d at 27.

Any inconsistency in the budgets is not a matter of law, but a question of fact. This Court erred when it failed to remand the matter to a jury trial and affirmed the Order of the Trial Court granting Summary Judgment to the Respondent.

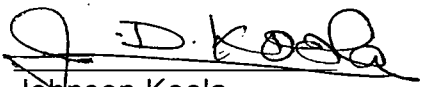
### CONCLUSION

For the reasons stated above, petitioner respectfully submits that this Court grant the Petition for Rehearing and remand the case to Trial Court for a jury trial after reversing its Order affirming the grant of Summary Judgment to the respondent.

Respectfully submitted,

August 19, 2015

**RECEIVED**  
AUG 20 2015  
SC Court of Appeals

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

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,

v.

Johnson Koola,.....Appellant.

PROOF OF SERVICE

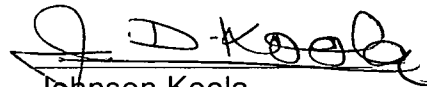
I, appellant pro se, under penalty of perjury, certify that on August 19, 2015, I served a copy of appellant's Petition for Rehearing with an Affidavit and additional documents (ten pages) by mailing a true copy of the same to the following counsels of record for the respondent:

Eugene P. Corrigan III, Esq.  
Corrigan & Chandler, LLC  
16, Charlotte St., St. B  
Charleston, SC 29403

Lydia P. Brooks, Esq.  
Krawcheck and Davidson, LLC  
9 State Street  
Charleston, SC 29401

Dated: Mt. Pleasant, SC  
August 19, 2015

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AUG 20 2015  
SC Court of Appeals



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Appellant pro se

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AUG 20 2015  
SC Court of Appeals

JOHNSON D KOOLA  
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Phone: (843) 849-9241

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AUG 20 2015

SC Court of Appeals

August 19, 2015

The Hon. Jenny Abbott Kitchings  
Clerk of Court  
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 Petition for Rehearing

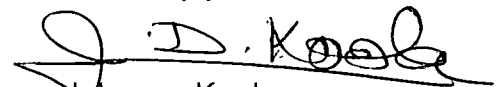
Dear Honorable Kitchings:

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 Petition for Rehearing in the above Appeal. I have also attached an Affidavit and additional documents (ten pages) to each Petition. Enclosed please find seven copies of the appellant's Petition and a check in the amount of \$25.00 toward the filing fee. 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.

I thank you in advance for your kind efforts to accept the appellant's Petition for Rehearing

Sincerely yours,

  
Johnson Koola

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

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



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