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 R. Markley Dennis, Jr., Circuit Court Judge

Circuit Court Case No.: 2010-CP-10-9305
Appellate Case No.: 2013-001632

Unpublished opinion No.: 2015-UP-391 (S.C. Ct.App. filed Aug. 5, 2015)

Cambridge Lakes Homeowners Association,.....Respondent,

v.

Johnson Koola,.....Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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Petitioner *pro se*

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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 October 23, 2015.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in dismissing petitioner's Claim for Conspiracy ruling that the respondent's Management Company and its attorneys are its agents?

II. Did the Court of Appeals rule erroneously that the petitioner first raised the issue of enforceability of an *ab initio* invalid Master Deed in his Motion to Reconsider and denied petitioner's appeal?

III Did the Court of Appeals err in affirming the Trial Court's Order granting Summary Judgment to respondent despite the respondent's Breach of Fiduciary Duty and acted in Bad Faith, Dishonesty, or Incompetence?

IV Did the Court of Appeals err when the Court decided on questions of Fact – Jury Questions, and the Court affirmed the Trial Court's Order granting Summary Judgment to respondent?

STATEMENT OF THE CASE

Pursuant to Rule 242, SCACR, Petitioner-Appellant Johnson Koola ("petitioner") seeks *certiorari* regarding the Court of Appeals' Decision in *Cambridge Lakes Homeowners Association v. Johnson Koola*, Unpublished Opinion No. 2015-UP-391 filed Aug. 5, 2015, rehearing denied Oct. 23, 2015.

Upon being informed of his regime dues to the Respondent Cambridge Lakes Homeowners Association, Inc. ("respondent) and notwithstanding the claims of the respondent and the counterclaims of the petitioner, in April/May 2010 petitioner offered to pay off his dues through a short sale of his condominium. The respondent obstructed the short sale of his condominium by filing multiple civil actions against him and thereby rejected his offer to pay off the dues through the short sale. Through a Petition for Certiorari, petitioner seeks to redress the claims and counterclaims of both parties.

There are special and important reasons that *certiorari* should be granted: (i) certain Decisions of the Court of Appeals are in direct conflict with prior Decisions of the Supreme Court; (ii) petitioner has raised constitutional violation – right to a fair trial/appeal when the Court below raised questions of law and findings of fact neither argued nor presented by the respondent; and (iii) petitioner has raised novel questions of law regarding successor liability and whether petitioner's voluntary offer to pay off the regime dues through a short sale of his condominium is a legally valid tender.

In January 2004, petitioner contracted to purchase a condominium (converted from apartments through condo conversion) in Cambridge Lakes subdivision in Mt. Pleasant, South Carolina, from Cambridge Two, LLC and Albert Estee ("developers/sellers"). The Master Deed for Cambridge Lake[s] Horizontal Property Regime ("Regime") stated that the Regime (the "Condominium") was established according to the provisions of South Carolina Horizontal Property Act, § 27-31-10 et seq. (1976) ("SCHPA"). (A. p. 201, lines 6-12). The "Builder's Certification" (A. p. 015, lines 39-40) issued by the developers/sellers stated: "For Condo Conversions: The structural, health and safety repairs and remodeling have been completed". Based on the statements in the Master Deed and the Builder's Certification, he purchased the condominium in February 2004. In or around October 2004, respondent took over the control of the Cambridge Lakes Regime from the developers/sellers.

In June/July 2008, petitioner attempted to sell his condominium to enable him to pay off his mortgage related debts, as his income then was only limited Social Security benefits. In June 2008, the respondent initiated a construction-defects litigation[1] against

[1]Summons and Complaint, *Cambridge Lakes HOA, Inc. v. Bostic Bros.*, Case No.: 2008-CP-10-3506, June 8, 2008.

the builder and related entities, developers/sellers and one of two real estate agents. After initiating the lawsuit the respondent, through a letter dated June 25, 2008, informed the homeowners that there are defects "in the buildings at Cambridge Lakes in the foundation, main walls,...roofs, trusses,...or any other part of the structure or building envelope". (A. p. 018, lines 5-8). Further, it asked the homeowners to assign their claims and rights of action to it and to agree to collection of regular or special assessments on its behalf. (A. p. 018, lines 3-4, lines 11-13).

The respondent claimed $8 million as the cost to repair the construction defects[1], which translates into defects worth $92,307[2] in the 3-bedroom condominium petitioner purchased. Agreeing to collection of unspecified amounts of regular or special assessments at a future date amounts to signing a promissory note; therefore, he did not sign documents agreeing to collection of regular and special assessments.

Because of the ongoing construction-defects litigation[1], massive construction defects, (A. p. 018, lines 5-8), and the potential liability of homeowners due to the anticipated collection of special assessments[2], the real estate transactions during 2008-2010 in Cambridge Lakes were nearly frozen except for short sales[3] and foreclosure sales[3]. Petitioner could not sell his unit in 2008. In 2009 he became insolvent and filed for Chapter 7 Bankruptcy. After discharge from Bankruptcy, he made another attempt to sell his condominium, but he could not.

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[2] The total claim of $8 million for 104 units is initially prorated between fifty-two (52) three- and fifty-two (52) two-bedroom units by multiplying with 3/5 or 2/5; the resulting figure is divided by 52 or multiplied by 1/52. Thus, for a three-bedroom unit: $8,000,000 x 3/5 x 1/52 = 92,307.69.

[3] Between 2006 and 2010, the market price of a three-bedroom condominium in Cambridge Lakes fell from approximately $245,000 to $125,000 (A. p. 86, lines 9-11).

By November 2009, petitioner became irreversibly insolvent. In April/May 2010, he voluntarily listed his unit for short sale as a means to pay off any dues to the respondent. When informed of his attempt to pay off any unpaid regime dues through a short sale of his condominium, the respondent filed Lien (A. p. 019) on his unit followed by a civil action[4] against him alleging failure to pay monthly assessments (A. p. 109-113) and a foreclosure action[5]. The Notice of Lien prompted the mortgagees to file foreclosure actions[6,7] against petitioner. Because of these multiple adversarial and judicial actions petitioner cancelled his efforts to sell his condominium through short sale. The respondent, through its multiple civil actions, obstructed petitioner's short sale of his condominium and rejected his offer to pay off any regime dues after short sale.

In March 2013, the respondent received a Summary Judgment in its civil action against petitioner. (A. pp. 003-013). The Court of Appeals denied respondent's Motion to Dismiss petitioner's appeal on December 4, 2013, but affirmed the grant of Summary Judgment to the respondent on August 5, 2015 (A. pp. 346-348) and denied petitioner's Petition for Rehearing on October 23, 2015. (A. p. 387).

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[4] *Cambridge Lakes HOA v. Johnson Koola*, Case No.: 10-SC-87-1646, Aug. 10, 2010; after transfer to Court of Common Pleas, Case No.: 2010-CP-10-9305; on Appeal to Court of Appeals, Case No.: 2013-001632.

[5] Summons on Crossclaim of Defendant Cambridge Lakes Condominium Homeowners Association, Inc., *BAC Home Loans Servicing, LP et al v. Johnson D. Koola et al*, Case No. 2010-CP-10-6060, Dec. 15, 2010.

[6,7] First Mortgagee foreclosure action: *BAC Home Loans Servicing, LP et al. v. Johnson D. Koola et al.*, Case No. 2010-CP-10-6060, Sep. 1, 2010; Second Mortgagee foreclosure action: Crossclaim of Defendant First Citizens Bank and Trust Company, Inc., *BAC Home Loans Servicing, LP et al. v. Johnson D. Koola et al.*, Case No. 2010-CP-10-6060, Sep. 30, 2010.

I. 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.

A. The Court of Appeals erred because respondent's Management Company and its attorneys are not its agents by law.

In his multiple Court filings, petitioner has pled a claim against the respondent for civil conspiracy among the members of the Board of Directors ("BOD") of the respondent, its Management Company (Ravenel Associates) and its attorneys for their obstruction of petitioner's short sale of his condominium alleging injury and special damages. (A. p. 036, line 20-p. 037, line 23; p. 051, line 25-p. 055, line 2; p. 080, line 8-p. 084, line 22; p. 277-p. 283, line 7; p. 339-p.343; p. 352-p. 356, line 11). However, the Court of Appeals, citing *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886-87 (2006), 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."

According to the statement of facts in *McMillan*, McMillan and his practice ("McMillan", Respondents/Appellants) and Anesthesiology Consultants of the Upstate, P.A. ("Upstate", Respondent/Appellant) performed *contractual anesthesiology services* at Oconee Memorial Hospital ("Oconee", Appellant/Respondent) and received compensation for their contractual services from third parties. In or around 2002, Oconee awarded an exclusive contract to Upstate to continue anesthesiology services at Oconee and terminated the services of McMillan. McMillan filed suit against Oconee and Upstate alleging, *inter alia*, civil conspiracy. The jury's verdict was only against Oconee. *As a consequence*, McMillan alleged civil conspiracy against one party only – Oconee, and his civil action became redundant. *Id.* at 562-623, 626 S.E.2d at 885-86.

On appeal, the *McMillan* Court reversed the findings of the Trial Court after finding that McMillan's civil conspiracy claim failed because: (1) a civil conspiracy involves two or more persons; (2) Upstate performed contractual services to third parties and was an agent of Oconee; and (3) McMillan alleged an Oconee only conspiracy; A civil conspiracy did not exist since the alleged acts arose in the context of a principal-agent relationship which are not separate entities. *Id.* at 564-65, 626 S.E.2d at 886-87. In the Appeal at bar, the Court of Appeals denied petitioner's civil conspiracy claim stating that respondent's Management Company and attorneys were its agents.

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...***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 are not its agents. Moreover, "[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, 518 (1940).

The ruling of the Court of the Appeals in the current appeal clearly contradicts the definition of an agent provided by the Supreme Court in *Goble*, *McMillan, and Pridgen*. It was a manifest error for the Court to dismiss petitioner's claim for conspiracy ruling that respondent's Management Company and its attorneys are its agents.

B. Whether the respondent's Management Company and its attorneys are its agents is a question of fact – a jury question.

An action for conspiracy is an action at law. *McMillan* at 564, 626 S.E.2d 884, 886, (2006). The determination of who is an agent is a question of law. But determination of whether the respondent's Management Company and its attorneys are its agents is a question of fact – a jury question. The Court of Appeals erred while making a factual determination on its own. The Court should have remanded this jury question to the Trial Court for a factual determination by a jury.

C. The Court of Appeals' impermissible findings of fact and conclusions of law denied the petitioner his constitutional right for a fair review of his appeal.

In the case at bar the respondent has never claimed that its Management Company and its attorneys are its agents. However, the Court of Appeals made a factual determination that the respondent's management company and its attorneys are its agents, denied petitioner's appeal and affirmed the grant of Summary Judgment to the respondent. This factual determination was an error of law as established in *Goble, McMillan*, and Pridgen, because respondent's management company and its attorneys were not performing contractual services on behalf of the respondent to third parties. The Court of Appeal's Opinion in the appeal at bar prejudiced the petitioner.

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 (Ct.App. 2009); *David v. McLeod Reg'l Med. Ctr.,* 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). In *Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 499-500, 730 S.E.2d 328, 335 (Ct.App. 2012), the Court of Appeals has determined, *inter alia,* that: (i) impermissible findings of fact and conclusions of law are prejudicial to [an affected party]; and (ii) a reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it. (*Internal citations omitted*).

By raising a legal and a factual issue in the review, which was not raised by the respondent, which was erroneous as it contradicts Supreme Court's prior Decisions, and which favored the respondent, the Court of Appeals denied the petitioner his constitutional right for a fair review of his appeal. U.S. Const. amend V and amend VII.

D. 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 (A. pp. 019-021), a civil action and a foreclosure action – was to injure the petitioner by precluding his ability to short sell his condominium, which was the only means for him to clear off any dues to the respondent. (This Petition, *supra*, p. 4, lines 3-12; A. pp. 019-021; p. 278, lines 8-17; p. 340, lines 17-20; p. 353, line 20-p. 354, line 2). This injury would render the petitioner liable for civil judgment to the respondent. **The short sale would have eliminated this injury while simultaneously paying off the dues owed to the respondent**.

To meet the third element of conspiracy claim – special damages, petitioner has alleged that the objective of the conspiracy was to destroy his life and to destroy him financially. (A. p. 053, lines 15-25; p. 082, lines 7-15; p. 278, line 18-p. 15, line 22; p. 340, line 21-p. 341, line 23). A short sale in 2010 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 which would destroy the petitioner financially. The psychological pressure of this imminent, potential judgment and its consequences destroy petitioner's life. 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.22d 711, 713 (1988); *Gynecology Clinic, Inc. v. Cloer*, 334 S.C. 555, 556, 514 S.E.2d 592 (1999).

The infliction of special damage upon the petitioner would have the following adverse, detrimental effects on the petitioner: (i) because of poor credit resulting from foreclosure and civil judgments and no income and other resources, petitioner would have a very difficult time to rent an apartment; (ii) 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; and (iii) the resulting damage from these civil actions is enormous, and the cost of litigation is unaffordable. These are the aftereffects of the special damage that the respondent inflicted on the petitioner due to conspiracy. The only goal of the respondent in litigating against petitioner is to inflict special damage – destruction of his life and financial life – on him even at the risk of not collecting any dues.

In considering the degree of reprehensibility in a conspiracy case, a Court should consider, *inter alia,* whether: (i) the tortuous conduct evinced an indifference to or a reckless disregard for the health or safety of others; and (ii) the target of the

conduct had financial vulnerability. *Jenkins v. Few*, 391 S.C. 209, 222, 705 S.E.2d 457, 464 (Ct.App. 2010).

Under S.C. Code Ann. § 27-31-200 and Paragraph 16(1)(c) of the Master Deed, upon the sale of a condominium after foreclosure the respondent is mandated to satisfy and release its assessment lien of record for any unpaid share of the annual and special assessments due from the petitioner[8]. (A. p. 211, lines 18-21). **Litigation to collect dues in lieu of short sale would not bring any good to the respondent**. As a law-abiding citizen, petitioner voluntarily offered to pay off any dues to the respondent, but the respondent obstructed the short sale and chose to pursue multiple legal actions against petitioner forcing him to foreclosure.

Petitioner respectfully submits to this Court to reverse the Court of Appeal's Order denying petitioner's Claim for Conspiracy and remand the case to the Trial Court.

II. THE COURT OF APPEALS RULED ERRONEOUSLY THAT PETITIONER FIRST RAISED THE ISSUE OF ENFORCEABILITY OF THE *AB INITIO* INVALID MASTER DEED IN HIS MOTION TO RECONSIDER AND DENIED PETITIONER'S APPEAL.

In his appeal, petitioner has raised the question whether the Master Deed of the respondent is legally valid and enforceable with respect to the petitioner. (A. p. 47, line 22-p. 050, line 24; p. 076, line 3-080, line 7; p. 273, line13-p. 274, line 21; p. 329, line 10-p.331, line 8p. 356, line 12-p. 358, line 22).

Developers/sellers and Cambridge Lakes Horizontal Property Regime sold a condominium to petitioner in violation of SCHPA, S.C. Code Ann. § 27-31-430,

[8] Circuit Court records show that on January 22, 2009, the respondent filed a lien on another condominium owner at 1579 Cambridge Lakes Dr (CHS County RMC Record No.: BP0030939). Eventually after foreclosure, the first mortgagee dismissed the action against the said onwer (Case No.: 09-CP-10-6891, Dec. 17, 2010); the respondent's lien has not yet been satisfied (Case No. 2010CP1009146, dated November 3, 2010).

("SCHPA § 27-31-430"). "Because a condominium is a creature of the statute, strict compliance with Horizontal Property Act is required to create horizontal property regime". *Harrington v. Blackstone*, 319 S.C. 1, 6, 459 S.E.2d 309, 312 (Ct.App. 1995); vacated because the parties settled the case and the case became redundant. Petitioner bought the condominium in 2004 on the express assurance that Cambridge Lakes condominiums were created in strict compliance with SCHPA. In the case at bar, strict compliance with SCHPA was not met. Therefore, the Master Deed of the Cambridge Lakes Horizontal Property Regime is statutorily invalid and unenforceable.

The respondent took over the control of the Cambridge Lakes Horizontal Property Regime in or around October 2004 and inherited the assets and liabilities of its predecessor. It is liable to petitioner under successor liability provisions. It cannot employ provisions of the legally invalid and unenforceable Master Deed to collect unpaid assessments, if any, from him.

The Court of Appeals, without considering the merits of petitioner's argument and citing *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009), denied petitioner's appeal and 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.** *Prima facie*, this is an erroneous ruling from the Court, because petitioner had, indeed, raised the issue of enforceability of the Master Deed ***first*** in his Reply to plaintiff/respondent's Motion for Summary Judgment (A. p. 47, line 22-p. 050, line 24) and ***additionally*** in Motion to Reconsider (A. p. 076, line 3-p. 080, line 7), Appellant's Initial Brief (A. p. 273, line 10-p. 274, line 21), and Reply Brief (A. p. 329-p. 331, line 8).

The Court of Appeals misapprehended the *gravamen* of the Supreme Court's Opinion in *Sonoco Prods. Co.* in which the Supreme Court, on appeal, found that the respondent raised the subject matter of the issue [the Authority of the circuit court to award interest and assess the ten percent penalty under S. C. Code Ann. § 42-9-90 (1976)] in the circuit court, but appellant Sonoco's pre-hearing written responses to respondent's motions did not raise the § 42-9-90 challenge. Only because of that the Supreme Court ruled that an issue may not be raised for the first time in a motion to reconsider when that issue should have been raised and answered during the trial stage. *Id.* at 177, 672 S.E.2d at 570. Allegations made in a complaint that are not denied in the answer are deemed admitted. Rule 8(d), SCRCP; *Motors Ins. Corp. v. Willing & B&W*, 313 S.C. 279, 281, 437 S.E.2d 555, 556-57 (Ct.App. 1993).

For review by this Court, petitioner reiterates his argument which he first raised in his Reply to plaintiff/respondent's Motion for Summary Judgment:

(i) The Master Deed is registered according to the provisions of SCHPA, (A. p. 047, line 22-p. 048, line 7);

(ii) The said Master Deed is invalid and unenforceable because it violated a key provision of SCHPA, SCHPA § 27-31-430, (A. p. 048, line 8-p. 48 A, line 8);

(iii) The respondent's ***predecessor*** sold a condominium to the petitioner using a legally void Master Deed and a fraudulent "Builder's Certification" misrepresenting compliance with SCHPA § 27-31-430, (A. p. 48-A, line 14-27);

(iv) The petitioner purchased the condominium on the express representation that the Master Deed complied with the mandates of SCHPA § 27-31-430, (A. 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, (A. p. 050, lines 7-11);

(vi) The respondent is the true ***successor*** of Cambridge Lakes Horizontal Property Regime, (A. p. 049, lines 4-28); and

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

This Court's ruling that "strict compliance with Horizontal Property Act is required to create horizontal property regime" in *Harrington* 319 S.C. at 6, 459 S.E.2d at 312 (Ct.App. 1995) 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 Ass'n 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, 318, 622 S.E.2d 213, 218 (2005). That the respondent employs the same Master Deed registered by its predecessor is the best evidence that the respondent is the true successor.

The Court of Appeals erred when the Court ruled that the petitioner first 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 the Order of the Court of Appeals affirming the grant of Summary Judgment to the respondent and remand the case to the Trial Curt for its adjudication.

III. THE COURT OF APPEALS 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

In his multiple Court filings, Petitioner has pled claims for Breach of Fiduciary Duty against the respondent. (A. p. 057, line 10-p. 058, line 23; p. 059-line 4-p. 63, line 32; p. 070, lines 6-17; p. 086, line 20-p. 091, line 14; p. 096, lines 9-17; p. 283, line8-p. 288, line 19; p. 333, line 1-p. 338, line 23; p. 359, line 1-p.368, line 11).

The Supreme Court has 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). Petitioner enumerates respondent's three serious breaches of Fiduciary Duty.

(i) Duty to Investigate construction defects and violation of SCHPA

On November 20, 2004, petitioner conveyed to Mr. Steven Fisher, Member, BOD, what he learned about construction defects in Cambridge Lakes from his immediate neighbor, who was working for the architect firm, which oversaw the construction of Cambridge Lakes. 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. In June 2008, the respondent filed the construction-defects lawsuit[1]; 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. (A. p. 058, line 1-23; p. 087, line 16-p. 088, line 13; p. 284, line 3-18; p. 334, lines 8-21; p. 360, lines 10-20).

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[1] in June 2008 pleading construction defects, and amended the Complaint in 2010 to include violation of SCHPA[9]. (A. p. 152, lines 13-14, lines 21-22; p. 184, lines 14-16; p. 187 lines 19-20; p. 191, 13-15).

In early 2003, the developers/sellers sent a letter (A. pp. 377-378) entitled "Notice of Condominium Conversion and Offer to Purchase" to all the tenant residents of Cambridge Lakes stating that the developers/sellers will provide them with the "Disclosure of the physical condition building report" as mandated by SCHPA § 27-31-430 before they buy the condominium, but did not provide it to them. Those who bought the condominiums in late 2003 and later, including petitioner, did not receive this letter. Charleston County RMC records show that 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 (A. p. 361, line3-19, pp. 377-378), and they were fully aware of the violation of SCHPA § 27-31-430 by the developers/sellers and by implication they were aware of potential construction defects in Cambridge Lakes as early as 2003. ***The BOD took control of Cambridge Lakes in the fall of 2004***, (A. p. 152, lines 11-12), and ***then in 2004, they should have investigated any potential construction defects and violation of SCHPA § 27-31-430,*** but they failed in their duties 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."

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).

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[9] Second and Third Amended Complaint, *Cambridge Lakes HOA v. Bostic Bros.*, Case No.: 2008-CP-10-3506, June 28, 2010 and July 14, 2010 respectively.

"[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 v. Shipyard Vill. Council of Co-owners, Inc.,* 409 S.C. 164, 179, 760 S.E.2d 121, 129 (Ct.App.2014). "[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).

The Court of Appeals 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 SCHPA violations in Cambridge Lakes; (ii) the respondent failed in its duty to investigate diligently construction defects and violation of SCHPA § 27-31-430 in Cambridge Lakes in 2004.

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

The respondent maintains that its BOD: (i) first learned of potential construction defects in Cambridge Lakes during March-April 2008, (A. p. 152, lines 13-14); (ii) retained attorney John C. Hayes, IV, to file a construction defects lawsuit on its behalf immediately upon learning of the defects, (A. p. 152, lines 21-22; p. 184, lines 14-16); and (iii) filed the construction defects lawsuit in June 2008, (A. p. 153, lines 9-12; p. 187, lines 19-20; p. 191, lines 13-15). **Petitioner has categorically stated that the minutes for the months of April, May and June 2008** (A. pp. 101-102, pp. 379-380; pp. 381-382) **make no references that the BOD authorized Mr. Hayes to file the construction defects litigation**. (A. p. 057, lines 26-31; p. 086, line 20-p. 087, line15; p. 284, line 21-p. 285, line 10; p. 335, lines 4-17; p. 362, line 17-p. 363, line 11). The

respondent has not produced minutes of any of the BOD meetings to show that its 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. This is a very serious breach of Fiduciary Duty by the respondent.

(iii) The respondent's construction-defects lawsuit without the approval of two-thirds majority of the Cambridge Lakes Homeowners is an *ultra vires* act.

The respondent breached fiduciary duty when it initiated the construction-defects lawsuit without the approval of two-thirds majority of the homeowners (A. p. 059, lines 4-22; p. 089, line 3-p. 090, line 12; p. 285, line 11-p. 22, line 24; p. 33518-p.337, line 11, p. 363, line 12-p.364, line 22). This duty arose because respondent's construction-defects litigation involved collection of special assessments. After filing the lawsuit, the respondent asked the homeowners to agree to collection of **regular and special assessments** together with late fees at a future date, which amounts to signing a promissory note. (A. p. 018, lines 3-5, lines 11-16). The collection of special assessments is governed by Paragraph (16)(6) of the respondent's Master Deed (A. 212, line 43-p. 213, line 8), 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 respondent has the duty to maintain, repair, replace and operate the common elements of Cambridge Lakes. This authority found in Queen's Grant Villas Horizontal Property Regimes I-IV, 286 S.C. at 556, 335 S.E.2d at 366 is subject to the qualification in *Lovering v. Seabrook Island Property Owners Ass'n*, 291 S.C. 201, 202-03, 352 S.E.2d 707, 708 (1987), wherein the Supreme Court affirmed: "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), the Court of Appeals *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.

"*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,* 319 S.C. at 4, 459 S.E.2d at 311 (Ct.App.1995), the Court of Appeals 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.

The Court of Appeals 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.

Petitioner respectfully requests this Court to determine whether the respondent breached Fiduciary Duty as it: (i) failed in its duty to investigate construction defects and SCHPA violations in 2004; (ii) filed the construction-defects lawsuit without authorization

from the BOD, an ***ultra vires*** act; and (iii) initiated 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, an *ultra vires* act.

B. Business Judgment Rules

Petitioner has claimed that under S.C. Laws respondent cannot justify its *intra vires* acts when it acted in bad faith, dishonesty or incompetence. (A. p. 065, lines 21-22; p. 096, lines 9-23; p. 288, lines 8-15; p. 337, line 20-p.338, line 23; p. 365, line 18, line p. 365, line 18-p. 368, line 11). "[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). Petitioner enumerates respondent's three actions where it acted in bad faith and incompetence and possibly fraudulently.

(i) Dismissal of Claims against Developers/sellers in the Construction-Defects Lawsuit

In its construction-defects lawsuit[1,9] filed in June 2008, the respondent held the developers/sellers liable for construction defects and violation of SCHPA § 27-31-430. The registration document[10] filed with the South Carolina Secretary of State shows that Albert Estee (the developer/seller): (i) 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, although the respondent took control of the HOA in or around October 2004; and (ii) registered Edward Pritchard III as the new agent on July 6, 2010. (A. p. 383). Pritchard III and

[10] 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.

respondent's lead 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 and continued the litigation. Thus, in the construction defects litigation in 2011, John Hayes was representing the respondent HOA of which registered agent was or still is Pritchard III – the former colleagues or partners. On November 15, 2010, shortly after Pritchard III was made the registered agent of the HOA, Albert Estee filed a Motion for Summary Judgment[11] 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 – innocent or fraudulent – 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 SCHPA violations.

(ii) Failure to bring Charges against Carolina One in Construction-Defects lawsuit

In its construction-defects lawsuit, the respondent brought charges against only one of the two real estate agents who sold condominiums in violation of SCHPA § 27-31-430. 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

[11] "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, filed Nov. 15, 2010.

Properties, Inc. only but not Carolina One. Because Carolina One was not sued, homeowners lost substantial amount of recovery money.

(iii) Incompetent Handling of the Construction-Defects Lawsuit

In the construction-defects litigation[1], the respondent claimed eight million dollars as damages. Since it involved SCHPA violation and Unfair Trade practices, the respondent, after successful litigation, could have received triple damages – actual and punitive damages – for $24 million. In June 2011, the respondent settled the case against all defendants and received nearly $1.815 million as damages. After paying attorney fees, it received approximately net $1.2 million. This implies that it could not have done all the repair works as it received far less settlement at the end. Either way the homeowners were the losers. In recent Charleston County action, [*East Bridge Town Lofts Property Owners Association, Inc. v. East Bridge Lofts, LLC*, Case No.: 2010-CP-10-10204, June 10, 2014], a jury awarded the Association actual damages of $22 million and punitive damages $33 million for construction defects and SCHPA violations while the respondent received net $1.2 million. The respondent and its attorneys handled the construction defects litigation incompetently.

The respondent's liability insurance (A. p. 384) covers the BOD for their actions, which is an affirmative proof that the BOD might or would act in bad faith, dishonesty and incompetence.

Petitioner respectfully requests this Court to determine whether the respondent breached Fiduciary Duty when it acted in bad faith, dishonesty and incompetence.

IV. THE COURT OF APPEALS ERRED WHEN THE COURT DECIDED ON QUESTIONS OF FACT – JURY QUESTIONS 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 240, 243 (1976).

A. Petitioner's voluntary offer to pay off any regime related dues through short sale to the respondent was a legitimate and legal tender.

In May/June 2010, petitioner offered to pay off his regime dues, if any, to the respondent through a voluntary short sale of his condominium, but it obstructed his short sale efforts; thereby, it rejected his offer to pay off the dues though short sale. (A. p. 368, line 20-p. 369, line 14). According to the lending policies of the mortgagees and Fannie Mae, the homeowners associations will be paid out in full in preference to mortgagees after a short sale. 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. (A. p. 099, lines 24-30):

> "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, even at the risk of collecting nothing from insolvent petitioner after foreclosure.

Under S.C. Code Ann. § 27-31-200 and Paragraph 16(1)(c) of the Master Deed, upon the sale of a condominium after foreclosure the respondent is mandated to satisfy and release its assessment lien of record for any unpaid share of the annual and special assessments due from the petitioner. (A. p. 211, lines 18-21).

Under S.C laws, a condominium owner's offer to pay off his or her homeowner association's assessments through a short sale of his or her condominium is a legally valid tender. But it is a question of fact to be determined by a jury whether petitioner's voluntary offer of payment of any regime related dues through short sale was a legitimate and legal tender to clear off respondent's claims against petitioner.

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. (A. p. 371, line 1-p. 372, line 13, pp. 385-386). The relevant sections of the annual budget for 2009 (A. p. 385) 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

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 equals the annual budget for 2009. 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 hence, the respondent has no legal standing to sue petitioner for regime related dues.

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

CONCLUSION

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

Respectfully submitted,

November 23, 2015

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Unpublished opinion No.: 2015-UP-391 (S.C. Ct.App. filed Aug. 5, 2015)

Cambridge Lakes Homeowners Association,.....Respondent,

v.

Johnson Koola,.....Petitioner.

Proof of Service

I, Johnson Koola, under penalty of perjury, certify that on November 23, 2015, I filed a copy of Petition for Writ of Certiorari with the Clerk of the Court of Appeals and served a copy of the Petition for Writ of Certiorari on the consuls of record for the respondent by mailing a true copy of the same.

The Clerk of the Court
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November 23, 2015

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