

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SEP 10 2015

SC Court of Appeals

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No.: 2010-CP-10-9158

APPELLATE CASE No.: 2015-000111

Johnson Koola,.....Appellant,

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 Lakes 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 Trademark Properties, Inc., and Carolina One Real Estate are theRespondents.

FINAL REPLY BRIEF OF APPELLANT
TO RESPONDENT CAROLINA ONE REAL ESTATE

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

Appellant *pro se*

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STATEMENT OF ISSUES ON APPEAL

1. THE TRIAL COURT GRANTED SUMMARY JUDGMENT TO CAROLINA ONE WITHOUT ADJUDICATING ON QUESTIONS OF LAW.
 - A. DID THE TRIAL COURT ERRONEOUSLY RULE THAT TRADEMARK AND BY PROXY, CAROLINA ONE COULDN'T BE LIABLE TO APPELLANT AS JOINT TORTFEASORS?
 - B. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO CAROLINA ONE BASED ON A MISREPRESENTATION IT MADE TO THE COURT, AND THE COURT'S FAILURE TO DETERMINE THE LEGISLATIVE MANDATE AND INTENT OF SCHPA?
 - C. DID THE TRIAL COURT ERR IN DENYING THE FIDUCIARY DUTY THAT CAROLINA ONE, THE AGENT, OWED TO APPELLANT, THE PRINCIPAL AND THE BREACH OF THAT FIDUCIARY DUTY?
 - D. DID THE TRIAL COURT FAIL TO APPLY LAW OF THE CASE IN HOA'S JUNE 2008 LAWSUIT TO THE CASE AT BAR AS LAW OF THE CASE, OR MANDATORY AND/OR PERSUASIVE AUTHORITY, OR AS COLLATERAL ESTOPPEL?
 - E. DID THE TRIAL COURT ERR IN DISMISSING CAROLINA ONE'S VIOLATIONS OF SCUTPA?
 - F. DID THE TRIAL COURT ERR IN DENYING CAROLINA ONE'S LIABILITY TO APPELLANT FOR NEGLIGENCE, BREACH OF CONTRACT AND/OR WARRANTY AND FRAUD?

In response to respondent Carolina One's Initial Brief, appellant pro se, Johnson Koola ("appellant" or "Koola") files and serves appellant's Reply Brief.

ADDENDUM TO STATEMENT OF FACTS

Appellant has presented Statement of Facts and Procedural History in his Initial Brief filed on April 2, 2014. (Appellant's Initial Brief, pp. 4-10).

In its Initial Brief, Carolina One argues that appellant did not explain the mathematics how appellant determined the pro rata \$92,307 damage figure

attributable to his condominium unit from Cambridge Lakes Homeowners Association's (the "HOA")¹ lawsuit (the "HOA's June 2008 lawsuit") claiming eight million damages. (Carolina One's Initial Brief, p. 1, line 22-p. 2, line 1).

The total cost is initially prorated between fifty-two (52) three- and fifty-two (52) two-bedroom units by multiplying the total cost with 3/5 or 2/5. The resulting figure is divided by 52 (or, multiplied by 1/52) to get the final result; thus, for three bed room units: $\$8,000,000 \times 3/5 \times 1/52 = \$92,307.69$ and for two-bedroom units: $\$8,000,000 \times 2/5 \times 1/52 = \$61,538.46$. Multiplying the results with 52 and adding them together can verify the results: thus, $\$92,307.69 \times 52 = \$4,800,000$ and $\$61,538.46 \times 52 = \$3,200,000$; and $\$4,800,000 + \$3,200,000 = \$8,000,000.00$.

ARGUMENT

1. THE TRIAL COURT GRANTED SUMMARY JUDGMENT TO CAROLINA ONE WITHOUT ADJUDICATING ON QUESTIONS OF LAW.

Carolina One received Summary Judgment for a Misrepresentation it made to the Court during hearing of Motion for Summary Judgment, which is discussed at length in this Reply Brief. (Appellant's Reply Brief, *infra*, pp. 6-10). Further, the Trial Court did not adjudicate on questions of law presented by South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-10 *et seq.* (the "SCHPA") and S.C. Code Ann. § 27-31-430, Residential Property Condition Disclosure Act, S.C. Code Ann. 27-50-1 *et seq.*, Real Estate Brokers, Salesmen, and Property Managers Act, S.C. Code Ann. § 40-57-10 *et seq.* (R. p. 155, line 10-p.167; pp. 278-289; p. 298 line 27-p. 317, line 6).

¹ Summons and Complaint, Cambridge Lakes HOA v. Bostic Bros. Construction, Inc. et al., Case No. 2008-CP-10-3506, June 6, 2008, Charleston County.

The Trial Court did not address whether Carolina One: (i) owed appellant fiduciary duty, and if yes, whether Carolina One breached this duty; (ii) did not address whether Carolina One is a joint tortfeasor as alleged by appellant; (iii) did not adjudicate whether the Law of the Case in the HOA's June 2008 Lawsuit is applicable to the appellant's case at bar as Law of the Case or as Mandatory and/or Persuasive Authority or as Collateral Estoppel; and (iv) is liable to appellant for violation of South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq. (the "SCUTPA"), and for Negligence, Breach of Contract/(Express and Implied) Warranty and Fraud. The November 18 Order of the Court granting Summary Judgment to Carolina One does not even mention these questions of law. *Bowen v. Lee Process Systems Co.*, 342 S.C. 232, 236-38, 536 S.E.2d 86, 88-89 (Ct.App. 2000).

"[An appellate] court undertakes *de novo* review of all issues of law, and is free to decide matters of law with no particular deference to the trial court." *Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 530, 744, S.E.2d 178, 182 (2013).

A. THE TRIAL COURT ERRONEOUSLY RULED THAT TRADEMARK AND BY PROXY, CAROLINA ONE COULDN'T BE LIABLE TO APPELLANT AS JOINT TORTFEASORS.

Appellant's has alleged that (i) sale of the Cambridge Lakes apartments by Cambridge Lakes, LP and Stephen Heape to Cambridge Two, LLC and Albert Estee; (ii) conversion of the apartments into condominiums; and (iii) subsequent sale of the converted condominiums to the general public by Trademark Properties, Inc. ("Trademark") and Carolina One in violation of various South Carolina statutes caused harm to appellant, which cannot practically be divided and is a joint tort. ***All the defendants named herein*** are joint tortfeasors. Trademark and Carolina One

are the respondents in the appeal at bar. (Appellant's Initial Brief, pp. 4-8; R. p. 272, line 2-line 20; p. 274, line 12-p. 276, line 6; p. 278, line 5-21; p. 292, line 3-p. 295, line 18; p. 298, line 27-p. 301, line 6).

In its Initial Brief, Carolina One argues, *inter alia*: (i) only if the defendants own the same duty of care to the injured party can they be joint tortfeasors; (ii) there can be no tort in the first instance unless the actor owes a duty to the injured party; (iii) Trademark owed no duty to Appellant, with whom it never had any contact of any kind; and (iv) each of the respondents stands alone. (Carolina One's Initial Brief, pp. 4-6, p. 4 line 17-18).

Appellant quotes from *Scott by McClure v. Fruehauf Corp.*, 302 S.C. 364, 367, 396 S.E.2d 354, 355-56 (1990) [*Scott* also cited by Carolina One]:

"The jury awarded respondent Scott \$125,000 actual damages against appellant-respondent (Fruehauf) and respondent-appellant (Piedmont), and an additional \$1,125,000 in punitive damages against Fruehauf alone....The defective wheel assembly [which injured Scott] consisted of a multipiece rim and a side ring both **manufactured by Firestone Tire and Rubber Company** and sold to a trailer manufacturer....The trailer manufacturer sold Fruehauf the trailer in question in a used condition. **Fruehauf repaired and reconditioned the trailer**, including the tires...Fruehauf sold the trailer to **Piedmont who then leased it** to Scott's employer, a cement company....Scott settled his claim against Firestone for \$675,000 with a guarantee of an additional \$200,000 if he did not recover against other parties. (Emphasis added).

Id.

Appellant also quotes from *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 57-58, 518 S.E.2d 301, 304 (Ct.App. 1999) [*Vermeer Carolina's, Inc.* also cited by Carolina One]:

"Wood/Chuck [**respondent**] manufactured....Heavy Duty Chipper. On January 31, 1991, Causey [**injured party**] purchased a used chipper from Vermeer [**appellant**]. Causey was using the machine to chip logs.... on August 21, 1992. At some point,the rotor [of the machine] amputated [Causey's] right hand....In his complaint, Causey alleged **against Vermeer causes of action for breach of express and implied warranties, strict**

liability, and negligence. Causey pleaded **strict liability and negligent design against Wood/Chuck.** On June 26, 1995,....., Causey requested a “nonsuit with prejudice for all claims....against Wood/Chuck Chipper Corporation.”....[T]he court issued an order granting Causey’s motion....Instead of proceeding with the trial, Vermeer and Causey settled the case.” (Emphasis added).

Id.

In *Hollifield v. Keller*, 238 S.C. 584, 590, 121 S.E.2d 213, 215 (1961), the Supreme Court **affirmed** the Order of the Trial Court in an action brought by respondent against a **shop owner**, a **shop lessee** and the **City of Columbia**, when respondent got injured on skidding on a sheet of ice, formed on the street by the alleged negligence of the defendants and struck a telephone pole, after determining that:

“That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tortfeasors, even in the absence of community of design or concert of action, to a liability which is both joint and several; is a proposition recognized and approved in this state....” (Internal citations omitted).

Id.

In *Barker v. Sauls*, 289 S.C. 121, 122, 345 S.E.2d 244, (1986), the Supreme Court **reversed** the Trial Court’s decision that denied appellant’s **fraud and negligence** claims in a worker’s compensation case against the respondent, an insurance **agent**, after determining that:

“A tort-feasor may be subjected to tort liability for injury to a third party arising out of the tort-feasor’s relationship with another, despite the absence of privity between the tortfeasor and third party. The tort-feasor’s liability exists independently of contract, and rests upon the tort-feasor’s duty to exercise due care.”

The key inquiry is what duty, if any, is owed by the tort-feasor to the third party....This duty may be derived from the tort-feasor’s contractual relationship with another”. (Internal citations omitted).

Id.

In *JKT Co. Inc. v. Hardwick*, 274 S.C. 413, 417-18, 265 S.E.2d 510, 512-13 (1980) and *Terlinde v. Neely, Sr.*, 275 S.C. 395, 397-99, 271 S.E.2d 768, 769-70 (1980), the Supreme Court ruled that a joint tortfeasor is liable to a third party with whom he or she did not have a contractual or privity relationship.

It is a question of law whether Carolina One is a joint tortfeasor with other defendants in the case at bar.

It is respectfully submitted that this Court undertakes *de novo* review of all issues of law and come to a just, beneficial, and equitable Opinion.

B. THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT TO CAROLINA ONE BASED ON A MISREPRESENTATION IT MADE TO THE COURT, AND THE COURT FAILED TO DETERMINE THE LEGISLATIVE MANDATE AND INTENT OF SCHPA.

In his Initial Brief and Court filings, appellant argued that Carolina One was required to convey or provide S.C. Code Ann. § 27-31-430-mandated Disclosure report to appellant when he bought a converted Cambridge Lakes condominium in 2004 from Cambridge Two, LLC and Albert Estee [developers/sellers] because Carolina One was employed as the real estate licensee/broker/agent of developers/sellers to sell the converted condominium. (Appellant's Initial Brief, pp. 14-21; R. p. 162, line 18-p.167; p. 278, line 22-p. 282; p. 306, line 7-p. 308). Carolina One argues, *inter alia*, that the developer/seller [lessee, sole owner, or co-owner] of a converted condominium has the sole responsibility to convey or provide S.C. Code Ann. § 27-31-430-mandated Disclosure report to appellant. (R. p. 165-p. 167, line 27; Carolina One' Initial Reply, pp. 6-7).

(a) Carolina One received Summary Judgment for a Misrepresentation it made to the Court during Hearing of Motion for Summary Judgment

Prima facie, it is the absolute duty of the seller of the real estate to provide all statutorily mandated disclosure reports to prospective buyers.

(i) The owner of the real property shall furnish to a purchaser a written disclosure statement.

S.C. Code Ann. § 27-50-1 *et seq.*, S.C. Code Ann. § 27-50-40(A), S.C. Code Ann. § 27-50-50(A).

(ii) Whenever the owner/developer/seller undertakes the conversion of rental apartments to condominium ownership through the recordation of a master deed, written disclosure shall be made within thirty days of the date of recordation to all prospective buyers.

S.C. Code Ann. § 27-31-430.

The language of the two codes is very clear; the owner of real property has to provide all required disclosure reports to a prospective purchaser. However, when a real estate licensee/broker/agent sells a real property on behalf of the owner of real property, the statutory duty to convey or provide or deliver all statutorily required disclosure reports, without any exclusions, falls on real estate licensee/broker/agent as provided by Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-1 *et seq.* and Real Estate Brokers, Salesmen, and Property Managers Act, S.C. Code Ann. § 40-57-10 *et seq.* The statutes provide:

(i) A real estate licensee acting as a listing agent or a selling agent is subject to regulations governing his license and performance of his responsibilities as licensee, as provided by the Real Estate Commission.

S.C. Code Ann. § 27-50-50(C).

S.C. Code Ann. § 27-50-50(C) directs a real estate broker/agent to the control and authority of Real Estate Commission.

(ii) A real estate brokerage company that provides service through an agency agreement for a client is bound by the duties of loyalty,

obedience, **disclosure**, confidentiality, reasonable care, diligence, and accounting.

S.C. Code Ann. § 40-57-137(A).

S.C. Code Ann. § 40-57-137(A) does not make any exclusions and implies that Carolina One, the real estate selling agent of developer/seller, is statutorily duty bound to provide all disclosure reports mandated by S.C. Code Ann. § 27-50-1 *et seq.*, S.C. Code Ann. § 27-50-40(A), S.C. Code Ann. § 27-50-50(A) and S.C. Code Ann. § 27-31-430-mandated Disclosure report to appellant.

Carolina One argued in the Court that its statutory duty is limited to provide only ***South Carolina Residential Disclosure Act*** and not S.C. Code Ann. § 27-31-430-mandated Disclosure report to appellant when he bought the converted Cambridge Lakes condominium. [The correct title is "State of South Carolina Residential Property Condition Disclosure Statement, S.C. Code Ann. § 27-50-1 *et seq.*"] Carolina One handed over a copy of State of South Carolina Residential Property Condition Disclosure Statement, S.C. Code Ann. § 27-50-1 *et seq.* to the Trial Judge (R. p. 165, line 5-p. 166, line 11), and the Trial Judge read it. Immediately thereafter, the Trial Judge declared that Carolina One complied with statutorily required disclosures and granted Summary Judgment to Carolina One. (R. p. 166, line 13-p. 167, line 21).

The very opening sentence of State of South Carolina Residential Property Condition Disclosure Statement, S.C. Code Ann. § 27-50-1 *et seq.* stated:

"South Carolina Code of Laws Title 27 Chapter 50 Article 1 requires that beginning January 1, 2003, an owner of residential real estate (single-family homes and buildings with up to four dwelling units) shall provide to a purchaser this property condition disclosure statement which must be completed prior to signing a contract of sale...." (R. p. 082, lines 1-10).

The language S.C. Code Ann. § 27-50-1 *et seq.* is very clear: the owner of the residential real estate, not a real estate licensee/broker/agent, shall provide to a purchaser S.C. Code Ann. § 27-50-1-mandated disclosure report to the buyer of real property. It did not impose any statutory duty on Carolina One, the agent, to provide any disclosure report to appellant or any prospective buyer. This is the same language found in S.C. Code Ann. § 27-31-430 that the lessee, sole owner, or co-owner of a converted condominium shall provide written disclosure to all prospective purchasers as to the physical condition of the building. The language of these codes addresses the scenario when the owner of the property sells the real property himself. When a real estate licensee/broker/agent sells the real property on behalf of the owner, S.C. Code Ann. § 27-50-50(C) and S.C. Code Ann. § 40-50-137(A) **supersede** the language of S.C. Code Ann. § 27-50-1 *et seq.* and S.C. Code Ann. § 27-31-430. These had been appellant's arguments all the time.

Carolina One **contradicted itself** in its arguments when it argued:

(i) the plain language found in S.C. Code Ann. § 27-31-430 that the **lessee, sole owner, or co-owner** of a converted condominium shall provide S.C. Code Ann. § 27-31-430-mandated Disclosure report to a prospective buyer, **does impose** a duty to provide S.C. Code Ann. § 27-31-430-mandated Disclosure report on the owner of real property, and not on his real estate licensee/broker/agent;

(ii) the plain language found in S.C. Code Ann. § 27-50-1 *et seq.* that the owner of the real property shall provide S.C. Code Ann. § 27-50-1 *et seq.* mandated disclosure report to a prospective buyer, **does not impose** a duty to provide S.C. Code Ann. § 27-50-1-mandated disclosure report on the owner of the real estate, but impose a duty on the agent.

Alternatively expressed, Carolina One insists that when it sells a converted condominium under the mandate of S.C. Code Ann. § 27-31-430, it has a statutory duty to provide disclosure reports mandated by S.C. Code Ann. § 27-50-1 only and no statutory duty to provide disclosure reports mandated by S.C. Code Ann. § 27-31-430. This is a legal conundrum. The legally valid statement should have been that when a real estate licensee/broker/agent sells a converted condominium under the mandate of S.C. Code Ann. § 27-31-430, it is statutorily duty bound to provide disclosure statements under **both** S.C. Code Ann. § 27-50-1. *and* S.C. Code Ann. § 27-31-430.

Carolina One made a misrepresentation to the Court, possibly an intentional, perjurious misrepresentation; S.C. Code Ann. § 16-9-10(A)(2). Carolina One knew that it made a misrepresentation to the Court when it stated that it has a statutory duty to provide S.C. Code Ann. § 27-50-1-mandated disclosure report while the document stated that owner of real property should provide it. The Trial Judge also realized that Carolina One was making a false legal claim in the Court because the Trail Judge read the document, [S.C. Code Ann. § 27-50-1], that Carolina One handed over to him. Nevertheless, the Trial Judge granted Summary Judgment to Carolina One. The Trial Judge did not use his legal discretion in the adjudication of law. A judge shall uphold the integrity of the judiciary and a judge shall be faithful to the law. Canon 1 and Canon 3, CJC, Rule 501, SCACR.

It is respectfully submitted that this Court determine the liability who has to provide S.C. Code Ann. § 27-31-430-mandated Disclosure report when lessee, sole owner or co-owner employs a real estate licensee/broker/agent to sell a converted condominium on his behalf.

(b) Determination of The Mandate of S.C. Code Ann. § 27-31-430

The question that arises before this Court is who is mandated to convey or provide, but not to prepare, S.C. Code Ann. § 27-31-430-mandated Disclosure report to prospective buyers when the lessee, sole owner, or co-owner employs a real estate licensee/broker/agent to sell the condominium on his behalf. To determine the mandate of S.C. Code Ann. § 27-31-430 conclusively, appellant undertakes a fair analysis of the Duties of Real Estate brokers/agents and Duties of Real Estate Licensee.

Duties of Real Estate brokers/agents, S.C. Code Ann. 27-50-1 et seq.

(i) S.C. Code Ann. § 27-50-50(C) directs a real estate broker/agent to Real Estate Commission to determine regulations governing his license and performance of his responsibilities as licensee.

(ii) S.C. Code Ann. § 27-50-70 provides that a listing agent or any real estate licensee operating for any party in a residential real estate transaction **must inform in writing each owner** covered by the listing agreement of the owner's obligations.

Carolina One had a statutory duty to inform in writing of the owner's obligations to provide S.C. Code Ann. § 27-31-430-mandated Disclosure report to appellant because Carolina One had actual knowledge that developer/seller did not provide S.C. Code Ann. § 27-31-430-mandated Disclosure report to appellant. Carolina One breached its duty to perform as mandated by law. Carolina One failed in its statutory duty to comply with S.C. Code Ann. § 27-50-70.

Duties of Real Estate licensee, S.C. Code Ann. § 40-57-10 et seq.

(i) A real estate brokerage company that provides service through an agency agreement for a client is bound by the duties of loyalty, obedience, **disclosure**, confidentiality, reasonable care, diligence, and accounting.

S.C. Code Ann. § 40-57-137(A)

S.C. Code Ann. § 40-57-137(A) imposes a duty on Carolina to provide all statutorily required disclosure reports including S.C. Code Ann. § 27-31-430-mandated Disclosure report to appellant. Carolina One failed in its statutory duty to comply with S.C. Code Ann. § 40-57-137(A).

(ii) A licensee who represents a seller shall treat all prospective buyers honestly and may not knowingly give them false or misleading information about the condition of the property. S.C. Code Ann. §§ 40-50-137(F),(K).

S.C. Code Ann. §§ 40-57-137(F),(K)

Carolina One sold a converted condominium on behalf of the developer/seller to appellant under negligent misrepresentation that the developer/seller and his agent, Carolina One, have complied with the provisions of SCHPA. Carolina One failed in its statutory duty to comply with S.C. Code Ann. § 40-57-137(F),(K).

(iii) A seller's agent is not obligated to discover latent defects in property. S.C. Code Ann. § 40-57-137(F)

This places a duty on the seller of converted condominium ***to prepare, but not to convey***, the S.C. Code Ann. § 27-31-430-mandated Disclosure report under all circumstances.

(iv) A buyer's agent shall *promote* the interest of the buyer by performing the buyer's agents' duties.

S.C. Code Ann. § 40-50-137(H)

Carolina One failed in its statutory duty to comply with S.C. Code Ann. § 40-50-137(H).

In summary, a careful legal analysis of the Residential Property Condition Disclosure Act, S.C. Code Ann. 27-50-1 *et seq.* and Real Estate Brokers, Salesmen, and Property Managers Act, S.C. Code Ann. § 40-57-10 *et seq.* leads to

the conclusion that Carolina One, a real estate licensee/broker/agent, has to convey or provide S.C. Code Ann. § 27-31-430-mandated Disclosure report to appellant when Carolina One was employed by the developer/seller to sell a converted Cambridge Lakes. This is the **Legislative Mandate** of S.C. Code Ann. § 27-31-430 which Carolina One did not disclose to the Court, and the Trial Court failed to determine on its own.

It is respectfully submitted that this Court **determine the Mandate of S.C. Code Ann. § 27-31-430** through a fair analysis of the Duties of Real Estate brokers/agents and Duties of Real Estate Licensee enumerated in S.C. Code Ann. 27-50-1 *et seq.* and S.C. Code Ann. § 40-57-10 *et seq.*

(c) Determination of the Legislative Intent of S.C. Code Ann. § 27-31-430

A plain reading of the S.C. Code Ann. § 27-31-430 reveals that protection of buyers of converted condominiums is the **Legislative intent** of S.C. Code Ann. § 27-31-430. This Legislative intent is revealed because the Legislature has already determined that a failure to make the disclosure required by S.C. Code Ann. § 27-31-430 shall constitute an automatic violation SCUTPA which is not available to any other violations of real estate conveyances. The Trial Judge did not determine the **Legislative intent** of S.C. Code Ann. § 27-31-430 before granting Summary Judgment to Carolina One.

The appellate courts have not ruled on the provisions of S.C. Code Ann. § 27-31-430.

It is respectfully submitted that this Court undertakes *de novo* review of all issues of law and come to a just, beneficial, and equitable Opinion.

C. THE TRIAL COURT DID NOT RULE WHETHER CAROLINA ONE, THE AGENT, OWED FIDUCIARY DUTY TO APPELLANT, THE PRINCIPAL AND BREACHED THAT FIDUCIARY DUTY.

In January 2004, Appellant: (i) entered into a Buyer Representation Agreement (R. pp. 068-069) with Carolina One (Agent) to represent appellant [Principal/Buyer Client] in the acquisition of real property as an Exclusive Buyer's Agent; (ii) agreed to pay 3% of the purchase price as compensation to Carolina One for its services, if it does not receive any compensation from the developer/seller (R. p. 068, lines 34-37); and (iii) signed a Consent to Dual Agency agreement with Carolina One, (R. pp. 076-077). Consequently, there is a Principal (appellant) and Agent (Carolina One) relationship between the parties, which created a fiduciary relationship between them, and Carolina One owed fiduciary duty to Appellant. S.C. Code Ann. § 40-57-137 et seq. (Appellant's Initial Brief, pp. 10-11, R. p. 292, line 21-p. 293, line 4, p. 301, line 7-p. 303).

The November 18, 2014 Order of the Court also does not address the alleged fiduciary duty of Carolina and breach of that duty One to appellant. (R. p. 007-012). Carolina One's Initial Brief does not even acknowledge whether: (i) appellant and Carolina One signed the Buyer Representation Agreement (R. pp. 068-069) and the Dual Agency Agreement (R. pp. 076-077) and (ii) Carolina One owed and breached its fiduciary duty to appellant. Instead, Carolina One argues in its Initial Brief: "Furthermore, although Appellant contends the mere existence of an agency relationship between Respondent Carolina One and developers of Cambridge Lakes automatically makes Carolina One an agent for all purposes, this is simply not a correct statement of the law." (Respondent's Initial Brief, p. 8, lines 3-6).

Appellant chose to buy the condominium as a client of Carolina One rather than a customer, because appellant can expect: (i) fiduciary duties from Carolina One; (ii) expert advice from Carolina One; and (iii) as a first time homebuyer, to rely on the skill of Carolina One. *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 25, 301 S.E.2d 552, 554 (1983).

“An agent’s authority is composed of his or her actual authority, whether express or implied, together with the apparent authority, which the principal by his or her conduct is precluded from denying.”

Roberson v. Southern Finance of S. C., Inc., 365 S.C. 6, 10, 615 S.E.2d 112, 115 (2005). Developer/seller conveyed his express authority to Trademark and to Carolina One, which explains why he terminated the services of Trademark as his sales agent when Trademark failed to provide all statutorily required disclosure reports to any prospective buyers. (R. p. 039, line 32-p. 040; p. 043/68, lines 19-25). In *Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 518-19, 334, S.E.2d 834, 836 (Ct.App. 1985), this Court **affirmed** the award of damages against a **real estate broker** who did not perform according to the **express authority** conferred on him by the seller and failed to disclose as stipulated in the authority given. *Lengel* quotes *Lowrance v. Swaffield*, 123 S.C. 331, 333, 116 S.E. 278 (1923) with regard to express authority conferred on an agent by a seller of real property.

“[W]here the contract creates a certain relationship between the parties, and certain duties arise by operation of law, irrespective of the contract, because of this relationship, then the breach of such duties warrants an action in tort.”

Meddin v. Southern Ry.-Carolina Division, 218 S.C. 155, 165, 62 S.E. 2d 109, 112 (1950).

In *Thomas v. Delta Enterprises, Inc.*, 302 S.C. 351, 352, 396 S.E.2d 122, 123 (Ct.App. 1990), this Court **reversed** the Order of the Trial Court which dismissed the

appellant's action against the respondents, **an agent and his secretary**, for fraud and negligence, after determining that an agent's liability for his own tortious acts is unaffected by fact that he acted in his representative capacity.

In *Lawlor v. Scheper*, 232 S.C. 94, 98-99, 101 S.E.2d 269, 270-71 (1957), the Supreme Court **affirmed** the decision of the Trial Court that awarded actual and punitive damages to respondent for the **alleged fraudulent misrepresentation by the vendor and his agent in a real estate transaction**.

In *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 475-76, 581 S.E.2d 496, 505 (Ct.App. 2004), this Court **reversed** the decision of the Trial Court granting Summary Judgment in a case involving, *inter alia*, **breach of fiduciary duty** between partners in a limited partnership.

In *Gilbert v. Mid-South Mach. Co., Inc.*, 267 S.C. 211, 221, 227 S.E.2d 189, 193 (1976), the Supreme Court **affirmed** the Decision of the Trial Court awarding actual and punitive damages to the respondents, **a principal and an agent** and determined that "an agent's liability for his own tortious acts is unaffected by the fact that he acted in his representative capacity."

In *State of South Carolina, ex rel. McLeod v. C&L Corp. Inc.*, 280 S.C. 519, 524, 528, 313 S.E.2d 334; 337, 339 (Ct.App. 1984), the Appellate Court affirmed the lower court's decision that the developer and its agent are liable for misrepresentations made by salesman during negotiation for sale of lots and confirmed civil penalty under SCUTPA after determining that developer and its agent had a **principal-agent relationship**.

It is respectfully submitted that this Court, after a review of the evidences in the Record and case laws presented, finds for the appellant for fiduciary duty and breach of fiduciary duty by Carolina One.

D. THE TRIAL COURT DID NOT APPLY THE LAW OF THE CASE IN HOA'S JUNE 2008 LAWSUIT TO THE CASE AT BAR AS LAW OF THE CASE, AS MANDATORY AND/OR PERSUASIVE AUTHORITY, OR AS COLLATERAL ESTOPPEL

During the progression of the HOA's June 2008 lawsuit¹, Trademark filed a Motion for Summary Judgment against the HOA (R. pp. 026-032) stating, among others: (i) Trademark has no duty to provide the S.C. Code Ann. § 27-31-430-mandated Disclosure Report to any Cambridge Lakes Condominium buyers and (ii) The HOA is not a prospective purchaser of the condominiums under the code section 27-31-430. (R. p. 028, line 18-p. 030, line 18).

The Trial Judge denied Trademark's Motion for Summary Judgment in the HOA suit and denied Trademark's argument that it is not liable to Cambridge Lakes condominium buyers and the HOA for violation of S.C. Code Ann. § 27-31-430 (R. pp. 015-019). Significantly, Trademark did not appeal the decision of the Court. The Trial Court's decision became the Law of the Case in the HOA's lawsuit. Subsequently, Trademark settled the HOA June 2008 lawsuit suit with many homeowners to whom Trademark did not sell a condominium directly.

The Trial Judge in HOA's June 2008 lawsuit ***denied*** Trademark's argument that Trademark has no duty to provide the S.C. Code Ann. § 27-31-430-mandated Disclosure Report to Condominium buyers. The Trial Judge in appellant's case at bar ***granted*** Trademark's argument that Trademark has no duty to provide the S.C. Code Ann. § 27-31-430-mandated Disclosure Report. In effect, the Trial Judge in

appellant's lawsuit overruled the Trial Judge in the HOA's lawsuit in the same circuit on the same subject matter jurisdiction.

"This State has a long-standing rule that one judge of the same court cannot overrule another." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).

The decision of the Trial Court in the HOA's June 2008 lawsuit is a *persuasive authority*, if not a *mandatory authority* for this Court for its consideration of this appeal because the appellate courts have not ruled on who has responsibility to convey or provide S.C. Code Ann. § 27-31-430-mandated Disclosure Report to prospective buyers when the developer/seller of converted condominiums employs a real estate licensee/broker/agent to sell the condominiums on his behalf.

The Motion for Summary Judgment filed by Trademark against the HOA in the HOA's June 2008 lawsuit and Motion for Summary Judgment filed by Trademark against appellant in Koola's case at bar involved the same questions of law: *Liabilities of Trademark in the sale of a converted condominium to a buyer with whom Trademark had no contractual or privity relationship.* The *pro se* appellant contends that the Law of the Case in the HOA's 2008 lawsuit is applicable to appellant's case at bar either as Law of the Case or, as *persuasive authority*, if not *mandatory authority*, or as *Doctrine of Collateral Estoppel*.

It is respectfully submitted that this Court renders a Decision whether the Law of the Case in the HOA's June 2008 lawsuit applies to appellant's case bar as Law of the Case, or as *persuasive authority*, if not a *mandatory authority*, or as *Doctrine of Collateral Estoppel*.

E. THE TRIAL COURT ERRED IN DISMISSING CAROLINA ONE'S VIOLATION OF SCUTPA

Appellant has argued that Carolina One is liable to Appellant for violation of SCUTPA on two counts for: (i) Violation of S.C. Code § 27-31-430 specifically and (ii) Unfair Trade Practices in general. (R. p. 283; p. 311, line 6-p.312, line 13).

A failure to make the disclosure statement under S.C. Code § 27-31-430 automatically constitutes a violation of the S.C. Unfair Trade Practices Act, which is the **legislative mandate** of S.C. Code § 27-31-430. For this reason, Carolina One is automatically liable to appellant for violation of SCUTPA.

Carolina One is also liable to appellant for unfair trade practices under SCUTPA generally, because: (i) Carolina made a misrepresentation while selling converted condominium to appellant; (ii) Carolina One's action affected all the Cambridge Lakes condominium buyers, which total about two hundred buyers and nearly thirty percentage of the homeowners lost their homes to foreclosures and short sales; and (iii) Carolina One's action has repetition.

Carolina One has not responded to appellant's allegations that it is liable to appellant for violation of SCUTPA.

F. THE TRIAL COURT ERRED IN DENYING CAROLINA ONE'S LIABILITY TO APPELLANT FOR NEGLIGENCE, BREACH OF CONTRACT AND/OR WARRANTY AND FRAUD.

(a) Negligence and Breach of Contract and/or Warranty

Appellant has alleged in his Complaint that Carolina One is liable to appellant for Negligence and Breach of Warranty. (R. p. 089, line 25-p. 090).

To state a cause of action for negligence, the plaintiff must allege facts which demonstrate: (i) a duty of care owed by the defendant; (ii) a breach of that duty by a

negligent act or omission; (iii) a negligent act or omission resulted in damages to the plaintiff; and (iv) that damages proximately resulted from the breach of duty. A breach of duty exists when it is foreseeable that one's conduct may likely injure the person to whom the duty is owed. The damages allegedly sustained must be causally connected to the breach of duty in order to warrant a recovery. Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Legal cause is proved by establishing foreseeability. *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 720-21 (Ct.App. 1996).

Appellant has represented to the Court that Carolina One: (i) owed a duty to provide S.C. Code Ann. § 27-31-430-mandated Disclosure report to appellant, which was established by the provisions of S.C. Code Ann. § 27-31-430, S.C. Code Ann. 27-50-10 *et seq.* and S.C. Code Ann. § 40-57-10 *et seq.*; (ii) owed fiduciary duty to appellant; (iii) received developer/seller's express authority to provide all required disclosure reports to appellant; (iv) had actual knowledge that developer/seller did not provide S.C. Code Ann. § 27-31-430-mandated Disclosure report to any buyers; (v) did not inform the developer/seller in writing that he has to provide S.C. Code Ann. § 27-31-430-mandated Disclosure report to appellant; [Carolina One professes that it is the duty of developer seller to provide the S.C. Code Ann. § 27-31-430-mandated Disclosure report to appellant.] and (v) sold appellant a converted condominium claiming that appellant was buying a "Quality Product for Excellent Price", which complied with the provisions of SCHPA. (R. p. 078-line 38).

The condominium that Carolina One sold appellant was riddled with serious construction defects. Because of the ensuing HOA's June 2008 lawsuit, and because of the stated liability of appellant for \$92,307 (R. p. 025, lines 8-10;

appellant's this Reply Brief, supra, p. 2, lines 4-10), appellant could not sell his condominium during the 2008-2010 period, which rendered appellant insolvent. Consequently, appellant suffered serious damages and now faces imminent foreclosure. Carolina One's misrepresentation was the proximate cause of the harm that appellant suffered. Carolina One should have the foreseeability that certain damages will occur when it failed to comply with statutory requirements while selling a converted condominium. (R. pp. 284-285; p. 313, line 8-p. 315, line 14).

Carolina One defends its misrepresentations as "**classic puffery**". Carolina One's representation that appellant is buying a "Quality Product for Excellent Price" was **not the expression of an exaggerated opinion of a salesman during a sales conversation, but a written statement in MLS Listing**, which makes it a negligent misrepresentation. The contract to buy a real property is written based on the information provided in the MLS listing. (Carolina One' Initial Brief, p. 9, foot note; R. p. 078, line 38).

Violation of a statutory duty is *negligence per se*. "Punitive damages are recoverable in a negligence cause of action when the defendant's conduct rises to the level of a willful, wanton, or a malicious violation of plaintiff's rights, and a conscious failure to exercise due care constitutes willfulness." *Scott by McClure*, 302 S.C. at 370, 396 S.E. 2d at 357.

For the same arguments as for negligence, Carolina One is also liable to appellant for Breach of Contract/[Express and Implied] Warranty.

In *JKT Co., Inc.*, 274 S.C. at 417-418, 265 S.E.2d at 512-513, the Supreme Court **affirmed** the Trial Court's ruling that JKT Company, a corporate Plaintiff-Respondent, was not barred from recovery for **negligence, willfulness, and**

breach of warranties from Defendant-Appellant after determining that South Carolina permits a plaintiff to recover economic loss from a seller with whom he did not deal and who made no express warranties to him.

In *Terlinde*, 275 S.C. at 397-99, 271 S.E.2d at 769-770, the Supreme Court **reversed** the Order of the Trial Court that granted summary Judgment to respondent homebuilders in the subsequent homebuyer's action for **breach of the implied warranty of merchantability and negligence, recklessness, willfulness and fraud** in the construction of the house by the respondent builders after determining that "the key inquiry is foreseeability, not privity" and "the builder [by placing this product [home] into the stream of commerce] owes a duty of care to those who will use his product, so as to render him accountable for negligent workmanship."

In *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989), the Supreme Court held: "We have been steadfast in holding that privity of contract as a defense to an implied warranty action is abolished in this State."

(b) Fraud

Appellant has argued that Carolina One is liable to appellant for Fraud: "Fraud is an intentional misrepresentation of truth for the purpose of inducing another in reliance upon it to part with some valuable belonging to her or to surrender a legal right." *Regions Ban v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444, (Ct.App. 2003).

In its Initial Brief, Carolina One has not defended appellant's allegation that it committed the tort of fraud on appellant. Carolina One responds that: (i) it is

impossible to reply to appellant's fraud claims; (ii) appellant has claimed that appellant knows what was in the minds of the salesman with whom he dealt with; and (iii) the fact that appellant lost his unit to the bank in a foreclosure action does not demonstrate fraud on the part of Carolina One.

If this Court finds that Carolina One breached its duty of care to appellant by making a negligent misrepresentation, Carolina One committed the tort of fraud. Appellant has never claimed that mortgage bank's foreclosure of his condominium is the proof that Carolina One committed fraud. What appellant claimed is that Carolina One's breach of duty was the proximate cause for the damages that appellant suffered which rendered appellant insolvent and finally, appellant lost his condominium to bank foreclosure.

In this Rely Brief, appellant has argued that Carolina One intentionally breached the duty of care imposed on it by the provisions of S.C. Code Ann. § 27-31-430, S.C. Code Ann. 27-50-10 *et seq.*, S.C. Code Ann. § 40-57-10 *et seq.* and fiduciary duty, and Carolina One is liable to appellant for fraud. Carolina One admits that: "It maybe that, as appellant claims, he would not have purchased this unit had he received the disclosure." (Carolina One's Initial Brief, p. 11 line 3-4; R. p. 258).

Appellant's Initial Brief has cogently argued the nine elements of fraud to support his fraud claim. (Appellant's Initial Brief, pp. 27-29). For judicial economy, those arguments are not repeated here.

In *Lawlor*, 232 S.C. at 99, 101 S.E.2d at 271, the Supreme Court **affirmed** the decision of the Trial Court awarding actual damages in an action against a real estate agent appellant for the **false and fraudulent misrepresentations** made by the agent to the buyer.

In *Thomas*, 302 S.C. at 352, 396 S.E.2d at 123, this Court **affirmed** that the salesman (the agent) and his secretary, who sold a mobile home to a third person on behalf of the principal, were liable to the buyer of the mobile home for **fraud**.

In *Redwend Ltd. P'ship*, 354 S.C. at 473-475, 581 S.E.2d at 503-506, this Court **reversed** the Decision of the Trial Court that granted Summary Judgment to the respondent in an action for **fraud and misrepresentation**.

In *Gilbert*, 267 S.C. at 220-21, 227 S.E.2d at 193, the Supreme Court **affirmed** the Decision of the Trial Court awarding actual and punitive damages to the respondents in a **fraud and deceit action**.

In *May v. Hopkinson*, 289 S.C. 549, 555-60, 347 S.E.2d 508, 511-514 (Ct.App. 1986), this Court **reversed** the Trial Court's judgment that **reversed** the Master's finding that the **real estate agent defrauded the purchasers**, and **affirmed** the trial court's judgment that **affirmed** Master's judgment finding that the **seller had defrauded the home purchasers**, and **reinstated** the punitive damages.

In *Terlinde*, 275 S.C. at 397-99, 271 S.E.2d at 769-70, the Supreme Court **reversed** the Order of the Trial Court that granted summary Judgment to respondent homebuilders in the subsequent homebuyer's action for **willfulness and fraud** in the construction of the house by the respondent builders.

Supreme Courts' policy of protecting the new home buyer is evident in *Kennedy*, 299 S.C. at 344, 384 S.E.2d at 736, wherein the Court stated:

"We have made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce. The practical difficulties facing today's new home buyer mandate that we allow a buyer to ordinarily proceed against both the builder and seller, or either of them. The buyer may obtain a single satisfaction in accordance with his

determination of which of the parties can best respond to judgment.”
(Internal citations omitted).

Id.

The buyers of converted condominiums face similar difficulties because neither the developer/seller nor his real estate licensee agent owns duty to provide or convey HPA § 27-31-430-mandated Disclosure report to condominium buyers when real estate licensee agent sells converted condominiums on behalf of the developer/seller. Consequently, buyers of converted condominium suffer irreversible damages. Also, National Security is endangered when a terrorist entity Principal hires an Agent to perform an illegal activity endangering National Security and neither of them owes liability.

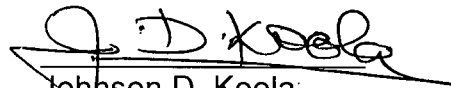
Appellant prays to this Court to fix liability for providing S.C. Code Ann. § 27-31-430-mandated Disclosure Report to a buyer when a real estate agent sells a converted condominium on behalf of the seller.

CONCLUSION

For the reasons stated, this Court should undertake *de novo* review of the Trail Court's Decision on questions of law and render a Decision on the merits of the case.

Respectfully submitted,

September 4, 2015



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SEP 10 2015

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No.: 2010-CP-10-9158

APPELLATE CASE No.: 2015-000111

Johnson Koola,.....Appellant,

v.

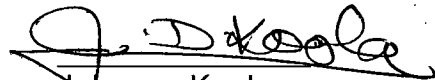
Cambridge Two, LLC, Albert V. Estee, Individually, Cambridge Lakes, LP, Stephen R. Heape, Individually and as General Partner of Cambridge Lakes LP, Cambridge Lakes Apartment Homes, a/k/a Cambridge Lakes Apartments, LP, a/k/a Cambridge Lakes Apartment Homes, LP, Classic Properties of Charleston, Inc., 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 Trademark Properties, Inc., and Carolina One Real Estate are the
.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Final Reply Brief of Appellant to Carolina One Real Estate complies with Rule 211(b), SCACR. Pursuant to this Court's Oder of July 24, 2015, appellant has added pinpoint citations to the Authorities cited.

September 4, 2015



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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

Case No.: 2010-CP-10-9158

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SEP 10 2015

SC Court of Appeals

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Johnson Koola,.....Appellant,

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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 Lakes 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 Trademark Properties, Inc., and Carolina One Real Estate are the
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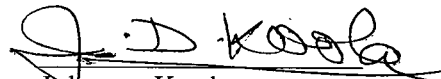
I, Johnson Koola, certify that, I have served a copy of *Final Reply Brief of Appellant to Carolina One Real estate* to the following Counsels of Record, by depositing a copy of the same, postage paid, in the US mailbox on Sep. 4, 2015:

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