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**THE STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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APPEAL FROM CHARLESTON COUNTY
Court of the Master in Equity

The Honorable Mikell R. Scarborough, Master in Equity
Case No.: 2010-CP-10-6060

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APPELLATE CASE No.: 2014-001323

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Bank of America, N.A.,.....Respondent,

v.

Johnson D. Koola, First Citizens Bank and Trust Company, Inc., f/k/a First Citizens Bank and Trust Company of South Carolina, and Cambridge Lakes Condominium Homeowners Association, Inc., f/k/a Cambridge Lakes Horizontal Property Regime, Defendants,

Of whom Johnson D. Koola is the.....Appellant.

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**PETITION FOR REHEARING**

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V. THE COURT OF APPEALS ERRED BECAUSE THE COURT DID NOT RULE WHETHER THE MASTER'S NONCONSIDEARTION OF FEDERAL STATUES AND THE ADMINISTRATIVE ORDER OF THE CHIEF JUSTICE OF SUPREME COURT OF SOUTH CAROLINA WHILE CONSIDERING KOOLA'S CLAIMS VIOLATES CONSTITUTIONAL PROVISIONS.

Appellant *pro se*, Johnson D. Koola ("Koola" or "petitioner"), files this Petition for Rehearing of the Court of Appeals' Unpublished Opinion No. 2016-UP-071 filed on February 17, 2016 in the appellate case, *Bank of America v. Johnson D. Koola*, No. 2014-001323.

Petitioner files this Petition for Rehearing stating with particularity the points misapprehended or overlooked by the Court as provided under Rule 221 (a), SCACR.

## ARGUMENTS

**I DID THE COURT OF APPEALS ERR IN AFFIRMING THE ORDER OF THE MASTER-IN-EQUITY BECAUSE THE COURT MISAPPREHENDED THE FACT THAT KOOLA REGAINED STANDING AND EXCLUSIVE RIGHT TO ASSERT COUNTERCLAIMS AGAINST RESPONDENT UNDER THE PROVISIONS OF BANKRUPTCY CODES, 11 U.S.C.A. § 350(b) AND § 554(b)?**

**A The Court of Appeals misapprehended the fact that Koola regained standing and exclusive right to assert counterclaims against respondent.**

In his Brief and Reply Brief Koola argued that he regained his standing and exclusive right to assert counterclaims against respondent Bank of America ("BOA") after: (i) he filed a Motion to Reopen his Chapter 7 Bankruptcy case to amend the Schedule B of his original Bankruptcy petition under the provisions of 11 U.S.C.A. § 350(B) (2004); (ii) the Bankruptcy Court ordered the reopening of the Chapter 7 Bankruptcy case; (iii) later, the Court closed the reopened Chapter 7 case after the trustee certified that the estate of the debtor (Koola) has been fully administered under the provisions of 11 U.S.C.A. § 554(c) (2004) and did not retain any asset in the trust for the sake of the debtors.

In its Unpublished Opinion filed on February 17, 2016, this Court reached the following conclusions of law that: (i) once a bankruptcy case closes through administration of the estate, the debtor loses his rights in a cause of action he had at the time he sought bankruptcy protection but nevertheless failed to list on his schedule; (ii) the property stays with the bankruptcy estate if it was listed in the schedule but not formally abandoned by the trustee; and (iii) the formal abandonment requires notice and opportunity for a hearing. Based on these conclusions of law, this Court denied Koola's appeal.

This Court's conclusions of law are ambivalent, ambiguous, inconsistent, and erroneous for two reasons. First, the Court concluded that Koola failed to list his legal and equitable interests in Schedule B of his Bankruptcy petition and hence lost his rights in a

cause of action he had at the time he sought bankruptcy petition. Then the Court concluded that if Koola had, indeed, listed his claims in the schedule, he lost his rights because the trustee did not formally abandon the assets in the bankruptcy estate. Failure to list the claims in the Schedule B of the Bankruptcy petition and the abandonment of the claims in the estate by the trustee are mutually exclusive and cannot take place simultaneously. This Court did not determine whether Koola listed the claims in the amended Schedule B after reopening the Chapter 7 case, and whether the trustee indeed abandoned the claims. If Koola never listed the claims in the Schedule, then the trustee cannot abandon them.

Failure of this Court to consider substantive Bankruptcy laws – 11 U.S.C.A. § 350(b), reopening of the closed bankruptcy action and 11 U.S.C.A. § 554(c), deemed abandonment or informal abandonment of the estate by operation of law – to review Kola's appeal caused this Court to deny Koola's appeal.

**B Annotation of key Bankruptcy codes relevant for this Petition for Rehearing**

A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause. 11 U.S.C.A. § 350(b) (2004); In re Daniel, 205 B.R. 346, 348 (Bankr. N.D.Ga. 1977); In re Bruzzese, 214 B.R. 444, 449 (Bankr. E.D.NY. 1977).

The Bankruptcy Rules accord debtors the right to amend their bankruptcy schedules "as a matter of course". Bankruptcy Rule 1009. In re Daniel, 205 B.R. at 348.

After notice and hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate. 11 U.S.C.A. § 554(a) (2004). § 554(a) abandonment is also known as proposed abandonment method. C.J.S. Bankruptcy § 649 at 591 (2006).

On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of consequential value and benefit to the estate. 11 U.S.C.A. § 554(b) (2004). § 554(b) abandonment is also known as compelled abandonment method. C.J.S. Bankruptcy § 649 at 591 (2006).

Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title. 11 U.S.C.A. § 554(c). § 554(c) abandonment is also known as deemed abandonment method or abandonment by operation of law. C.J.S. Bankruptcy § 650 at 592 (2006). If the trustee does nothing to administer the scheduled property before the case closes, i.e. does nothing to pursue the action, it will then be deemed abandoned by operation of law; 11 U.S.C. 554(c); *Wissman v. Pittsburgh National Bank*, 942 F.2d 867, 873.

In re Reed, 89 B.R. 100, 103 (Bankr. C.D.Cal. 1988), subsequently aff'd, 940 F.2d 1317 (9th Cir. 1991); In re Paolella, 58 B.R. 974, 977 (Bankr. E.D.Pa. 1988); *Morlan v. Universal Guar. Life Ins. Co.*, 298 F.3d 609, 618 (9th Cir. 2002); *Catalano v. C.I.R.* 279 F.3d 682 (9th Cir. 2002).

**C Koola's Chapter 7 Bankruptcy case reopening and closing**

(i) On April 20, 2012, Koola filed a Motion to Reopen his Chapter 7 Bankruptcy case and an amended Schedule B in the Bankruptcy Court. (R. p. 022; p. 023-024).

(ii) On April 25, 2012, the Bankruptcy Court sent a Notice of Hearing scheduled for May 22, 2012 to all the debtors to file a response to petitioner's Motion to Reopen. (R. p. 025).

(iii) On May 22, 2012, the Court ordered that the case is reopened. The Court also appointed a trustee to protect the interests of the creditors and the debtor and to ensure the efficient administration of the case. (R. p. 012).

(iv) On November 6, 2013, the Court ordered that the case trustee is discharged as trustee of the estate after the trustee certified to Court that the estate of debtor has been fully administered and closed the previously reopened case. (R. p. 014). The trustee did not otherwise administer the estate at the time of the closing of the case by pursuing any legal action to protect the interests of the creditors. The trustee did not report to the Court that he has retained certain assets of the estate for any future action to protect the interests of the creditors. Thus, the trustee abandoned petitioner's bankruptcy estate under the deemed abandonment method as provided under 11 U.S.C.A. § 554(c). This Court misapprehended the provisions of 11 U.S.C.A. § 554(c) with those of 11 U.S.C.A. § 554(a). After abandonment of the estate by trustee under the provisions of 11 U.S.C.A. § 554(c) and the closing of the Chapter 7 case, the bankruptcy estate was reverted to the debtor (Koola). Koola has now standing and exclusive right to assert claims against BOA.

**D This Court's Unpublished Opinion is erroneous on multiple grounds.**

This Court did not determine whether the Bankruptcy Court allowed Koola to reopen his previously closed Chapter 7 case and to amended the Schedule B of his Bankruptcy petition as provided in 11 U.S.C.A. § 350(b). This Court's Unpublished Opinion filed on February 17, 2016 is based on the erroneous presumption that Koola has not reopened his Chapter 7 case and has not amended the Schedule B of his original Bankruptcy petition to include causes of action against BOA. Thus this Court's Unpublished Opinion is erroneous.

This Court did not determine whether the trustee abandoned the bankruptcy estate by the deemed abandonment method, and whether the abandoned estate is returned to Koola as provided under 11 U.S.C.A. § 554(c). This Court's Unpublished Opinion is based on the erroneous presumption that Koola's claims against BOA stays with the Bankruptcy estate even after the Court closed the Chapter 7 case. The Court presumed that the trustee did not formally abandon the Bankruptcy estate. Thus this Court's Unpublished Opinion is erroneous.

Petitioner's Brief and Reply Brief had provided appropriate citations to the Bankruptcy codes, 11 U.S.C.A. § 350(b) and 11 U.S.C.A. § 554(c) and relevant case laws, *Fedotov v. Peter T. Roach and Associates, P.C.*, 354 F.Supp.2d 471 (S.D.N.Y. 2005); *In re Paolella*, 85 B.R. 974 (Bank. E.D.Pa., 1988); *In re Educators Group Health Trust, 25 F. 3d 1281, 1283-1284 (5th Cir. 1994); Management Investors v. United States Mine Workers of America*, 610 F.2d 384, 392,393 (6th Cir. 1979); *Richards v. D.R. Horton, Inc.*, 320 Ga.App. 771, 740 S.E.2d 732 (Ga.App. 2013), and *Tyler House Apartments, Ltd. v. U.S.*, 38 Fed. Cl. 1,6 (1997) (citing 11 U.S.C. §554(c). This Court failed to review these Authorities before the Court reached the conclusions of law and denied Koola's appeal.

It is a cardinal rule of construction that when a Rule impermissibly restricts, is inconsistent with, or contradicts the provisions of the Bankruptcy Code, the Rule is invalid. *In re Bruzzese*, 214 B.R. at 449. The Findings of this Court in its Unpublished Opinion contradict the provisions of 11 U.S.C.A. § 350(b) and 11 U.S.C.A. § 554(c) and are therefore invalid.

In reviewing a decision to grant summary judgment, the appellate court applies the same standard as the circuit court. The standard that is relevant to this appeal are questions of law whether: (i) Koola reopened his Chapter 7 case and included his causes

of action against BOA in the amended Schedule B under the provisions of 11 U.S.C.A. § 350(b), whether the trustee abandoned Koola's bankruptcy estate under the provisions of 11 U.S.C.A. § 554(c), and whether the abandoned estate is returned to Koola. An appellate court undertakes a *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). This Court failed to review questions of law relevant to this appeal according to law. There were no triable issues of fact in the appeal. Determination of any issues of fact was limited to determination whether Koola's arguments that he regained standing and exclusive right to assert counterclaims against BOA appear in the Record on Appeal. This Court failed to determine these issues of fact. Because of these errors this Court's Unpublished Opinion is erroneous.

In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case. Rule 220(b), SCACR. This Court reached conclusions of law, which are erroneous. Consequently, this Court's Unpublished Opinion is erroneous.

It is respectfully submitted to this Court that this Court reached conclusions of law in its Unpublished Opinion which contradict key provisions of Bankruptcy code, 11 U.S.C.A. § 350(b) and 11 U.S.C.A. § 554(c). Koola prays to this Court to correct the errors of law and reverse this Court's Order affirming the grant of Summary Judgment to respondent.

## II. DID THE COURT OF APPEALS ERR BECAUSE THE COURT DID NOT RULE ON KOOLA'S "MOTION TO SANCTION" RESPONDENT BECAUSE THE UNDERLYING CAUSE OF ACTION WAS A POST-BANKRUPTCY DISCHARGE CLAIM?

In his Brief and Reply Brief, Koola argued that BOA repeatedly denied his mortgage loan modification applications in noncompliance with "Hope for Homeowners Program", 12 U.S.C.A. §1715z-23 *et seq.* and "Administrative Order of the Chief Justice of South Carolina Koola, Administrative Order No.: 2011-05-02-01 dated May 2, 2011, Chief Justice of South Carolina Supreme Court ("Administrative Order").

The Court of Appeals erred in not ruling on Koola's "Motion to Sanction" BOA for its failure to comply with provisions of "Hope for Homeowners program" and "Administrative Order" while considering Koola's application for a mortgage loan modification. This Court erred because the underlying causes of action for the Motion to Sanction were post-bankruptcy petition claims and not pre-bankruptcy petition claims.

In July 2009 and after discharge from his Chapter 7 Bankruptcy, Koola applied to BOA for a mortgage loan modification. In August 2009, BOA and Koola signed a three-month special forbearance agreement – a Trial Period Plan agreement. During the trial period, the forbearance payment was limited to $243 per month. BOA agreed to make a decision on the final loan modification before the end of the three-month period. Only in February of 2010, BOA offered a purported "*loan modification*", changing the monthly payment from $838.69 at the beginning of 2009 to $797.14 after loan modification. (R. p. 180, line 31). There was *no reduction in the interest rate and the principal balance* and *no change in the original maturity date*. Koola could not accept this unaffordable and unfavorable loan modification, because his total mortgage related payments would far exceed his monthly income from Social Security benefits. Koola fell behind his mortgage

related payments and shortly thereafter, BOA initiated foreclosure proceedings against him.

Koola applied for mortgage loan modification on four other occasions, April 28, July 8, Sep. 2, 2011 and July 7, 2013 under "HOPE for Homeowners Program", 12 U.S.C.A. § 1715z-23 *et seq.*; all applications were denied/unsuccessful. In August 2012, Koola filed a Motion to Sanction BOA for its repeated bad-faith denial of Koola's mortgage loan modification applications. All of Koola's loan modification applications were post-bankruptcy petition claims.

This Court found it unnecessary to address this issue when disposition of a prior issue is dispositive; this Decision was an error because all of Koola's loan modification applications were post-bankruptcy petition claims. These claims could be asserted against BOA as independent claims, independent of other claims which were pre-bankruptcy petition claims.

In order to preserve this claim for the Petition for Rehearing and a potential Appeal, Koola repeats the claim here. Koola also incorporates fully by reference all of his arguments and evidences contained in the Brief and Reply Brief to the Court of Appeals.

"HOPE for Homeowners Program", 12 U.S.C.A. §1715z-23 et seq., is the specific law that requires BAC to provide Koola with a good faith loan modification. The most relevant sections of the program are:

(i) The purpose of the HOPE for Homeowners Program is to avoid foreclosures by reducing the principal balance outstanding, and interest rate charged, on mortgages; 12 U.S.C.A. §1715z-23(b)(2) and (4);

(ii) The principal obligation amount of the refinanced eligible mortgage shall (A) be determined by the reasonable ability of the mortgagor to make his or her mortgage

payments; and (B) not exceed 90% of the appraised value of the property to which such mortgage relates. 12 U.S.C.A. §1715z-23(e)(2)(A)and (B);

(iii) All penalties for refinancing the eligible mortgage, and all fess and penalties related to default or delinquency on the eligible mortgage, shall be waived or forgiven. 12 U.S.C.A. §1715z-23(e)(3);

(iv) Any appraisal conducted in connection with a mortgage insured under this section shall (A) Be based on the current value of the property; and (B) Be conducted in accordance with Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. 12 U.S.C.A. §1715z-23(e)(8)(A),(B);

(v) The term eligible mortgage means (A) the mortgagor of which (i) occupies such property as his or her principal residence and (ii) cannot afford his or her mortgage payments and (B) originated on or before January 1, 2008. 12 U.S.C.A. §1715z-23(s)(3)(A)(i),(ii),(B).

Courts have held that BOA and other mortgagees would be held liable for breach of the contractual terms of the Trial Period Plan agreement between the respondent and a mortgage loan modification applicant. *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation*, U.S. Dist. Lexis 72079 (2011); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012); *Corvello v. Wells Fargo bank, N.A.*, 728 F.3d 878 (9th Cir. 2013); *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224 (1st Cir. 2013); *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, U.S. Dist. Lexis 65274 (2012); *West v. J.P Morgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 154 Cal. Rptr.3d 285.

When BOA agreed to participate in the "HOPE for Homeowners Program", it assumed a Duty of Care to petitioner to offer a good faith loan modification within the guidelines of 12 U.S.C.A. §1715z-23 *et seq.*

> *"An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special relationship. Ordinarily, the common law imposes no duty on a person to act. When an act is voluntarily undertaken, however, the actor assumes the duty to use due care.*

*Johnson v. Robert E. Lee Academy, Inc.* 401 S.C. 500, 504, 737 S.E.2d 512, 514 (2012) (internal citations omitted).

The Chief Justice of the Supreme Court of South Carolina has ordered that:

> *"[I]n the event the Court, having jurisdiction over the foreclosure action, determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this Order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances, including without limitation, the assessment* of reasonable attorneys' fees and costs against the culpable party."

Administrative Order No.: 2011-05-02-01 dated May 2, 2011, Chief Justice of South Carolina Supreme Court ("Administrative Order"). (R. p. 163, lines 21-24, p. 051, lines 8-17).

Koola represents to this Court that his Motion to Sanction BOA for its repeated bad-faith denial of Koola's mortgage loan modification applications under the provisions of Hope for Homeowners Program, 12 U.S.C.A. §1715z-23 et seq., is a post-bankruptcy petition claim. Koola prays to this Court to rule formally on his Motion to Sanction.

## III. DID THE COURT OF APPEALS ERR IN RULING THAT PETITIONER'S COUNTERCLAIMS AGAINST RESPONDENT ARE BARRED BY STATUTE OF LIMITATIONS?

In his Initial Brief and Reply Brief, Koola argued that his counterclaims against BOA are not barred by the Statute of Limitations because. This Court found it unnecessary to address this issue when disposition of a prior issue is dispositive. Koola has argued in the previous section, (this Petition, *supra*, pp. 2-7) that this Court's finding that he has no

standing to assert claims against BOA is erroneous because it contradicts key provisions of Bankruptcy codes, 11 U.S.C.A. § 350(b) and 11 U.S.C.A. § 554(c).

In order to preserve the claim for the Petition for Rehearing and a potential Appeal, Koola repeats the claims here. Koola also incorporates fully by reference all of his arguments and evidences contained in the Brief and Reply Brief to the Court of Appeals.

Statute of Limitations "begins to run when the underlying cause of action reasonably ought to have been discovered." *Martin v. Companion Health Care Corp.*, 357 S.C. 570, 575, 593, S.E.2d 624, 627 (Ct.App. 2004). Statute of Limitations does not run from the date of the negligent act, but from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. *McClain v. Jarrad*, 354 S.C. 218, 220, 580 S.E.2d 763, 764 (Ct.App. 2003); *Holly Woods Ass'n of Residential Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 78, 793 (Ct.App. 2004).

In January of 2004, Koola contracted to buy a condominium ("condo") in the "Cambridge Lakes" subdivision in Mount Pleasant, SC, which had been converted from apartments to condominiums (a "condo conversion") under South Carolina Horizontal Property Act, S.C Code Ann. § 27-31-10 *et seq.* (1976) ("SCHPA") (R. p. 108), As part of the loan approval process, BAC's predecessor, Countrywide Home Loans Servicing, LP, completed an appraisal. By law BAC is required to appraise the condominium under the real estate appraisal guidelines of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA Federal Appraisal guidelines", 12 C.F.R. §§ 34.41, 34.43, 34.44, 34.45, 34.62, 564.1). Koola paid for the appraisal. BAC required that Koola produce a "Builder's Certification" from the developer/seller in a format prescribed and provided by the lender prior to loan approval. The developer/seller issued a "Builder's Certification" to Koola and BOA, which stated in pertinent part: "*For Condo Conversions:*

*The structural, health & safety repairs and remodeling have been completed".* (R. p. 114, lines 39-40). This Certification ensured that condo conversion complied with SCHPA and more specifically with S.C. Code Ann. § 27-31-430 ("SCHPA § 27-31-430") (the Disclosure of the Physical Condition of the [Condominium] Building). In South Carolina, BOA owed an *additional duty of care* to Koola to ensure that its appraisal of converted condominiums also complied with SCHPA § 27-31-430. Koola purchased the condominium on February 24, 2004 based on the assurances in the Master Deed, the Builder's certification and appraisal that the condo conversion has complied with all the requirements of law.

In June 2008, the Cambridge Lakes Homeowners Association (the "HOA") initiated a construction-defects litigation. In September 2010 petitioner learned that the HOA amended its Summons and Complaint in July and September 2010 to include violations of HPA and more specifically HPA § 27-31-430 (R. p. 116, lines 6-8, p. 118, lines 1-2, lines 5-7).

In September 2010 Petitioner reviewed the filings in the case docket of HOA's construction-defects litigation and learned that the developer/seller: (i) violated SCHPA, specifically SCHPA § 27-31-430; and (ii) falsified "Builder's Certification". He also learned that: (i) BOA's appraisal was based on a falsified "Builder's Certification"; and (ii) respondent violated FIRREA Federal Appraisal guidelines (12 C.F.R. §§ 34.41, 34.43, 34.44, 34.45, 34.62, 564.1) in its appraisal of Koola's condominium. BOA failed in its duty of care to petitioner in that it did not verify the accuracy and truthfulness of Builder's Certification and did not appraise the condominium according to the stipulations of FIRREA Federal Appraisal guidelines. Koola asserted these claims as counterclaims against BOA in his Amended Answer and Counterclaims filed in March 2011. (R. p. 094, lines 9-18, lines 26-46, p. 097, lines 12-17). Koola has demonstratively shown to this Court

that September 2010 is the date when he discovered the injury resulting from the wrongful conduct of respondent. Since he asserted these claims against respondent in March 2011, his claims are not barred by the three-year Statute of Limitations.

In the Master's Court BOA argued that Koola should have known of his claims against respondent in 2004 because he received the Builder's Certification in 2004. For respondent to argue that Koola knew in 2004 that the "Builder's Certification" was falsified implies that BAC also had this information 2004 and did not act on it in 2004 while completing the appraisal. Since then, BOA abandoned this argument. In its Brief to the Court of Appeals, BOA argues that Koola should have known about his claims against it in 2008 when the HOA initiated the construction defects litigation. A key element in the reasonable diligence test is "notice". BAC cites to *Grillo v. Speedrite Products, Inc.,* 340 S.C. 498, 503, 508, 532 S.E.2d 1, 3, 6 (Ct.App. 2000), to support its argument that petitioner received "notice" in 2008 about his injury from respondent's statute violations.

Whether the three-year Statue of Limitations began to run in June 2008 or September 2010, Koola asserted his claims against BOA in March 2011. Therefore, Koola's counterclaims against BOA are not barred by the three-year Statute of Limitations.

Koola represents to this Court that his Chapter 7 Bankruptcy petition is not a bar to assert his claims against respondent. When property of the bankrupt is abandoned, the title "reverts to the bankrupt, *nunc pro tunc*, so that he is treated as having owned it continuously. *Morlan v. Universal Guar. Life Ins. Co.*, *supra*, 298 F.3d at 617; *Catalano v. C.I.R.*, supra, 279 F.3d at 685.

Petitioner prays to this Court to rule that his claims are not barred by the Statute of Limitations because he asserted his claims against respondent in March 2011 irrespective of whether he received notice of his claims in June 2008 or September 2010.

## IV. DID THE COURT OF APPEALS ERR IN FAILING TO DETERMINE THAT RESPONDENT OWED KOOLA DUTY OF CARE, WHICH WAS CREATED THROUGH THE STATUTORY PROVISIONS OF FINANCIAL INSTITUTIONS REFORM, RECOVERY AND ENFORCEMENT ACT OF 1989 AND S.C. HORIZONTAL PROPERTY ACT?

In his Initial Brief and Reply Brief, Koola argued that BOA breached the Duty of Care it owed Koola, the said duty was created through the statutory real estate appraisal guidelines of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA Federal Appraisal guidelines", codified into 12 C.F.R. §§ 34.41, 34.43, 34.44, 34.45, 34.62, 564.1). In South Carolina, BOA owed an *additional duty of care* to Koola to ensure that its appraisal of converted condominiums also complied with SCHPA § 27-31-430.

This Court found it unnecessary to address this issue when disposition of a prior issue is dispositive. In order to preserve the claim for the Petition for Rehearing and a potential Appeal, Koola repeats the claims here. Koola also incorporates fully by reference all of his arguments and evidences contained in the Brief and Reply Brief to the Court of Appeals.

Koola's counterclaims arose from BAC's negligence stemming from its breach of statutorily created duty of care to Koola for noncompliance with FIRREA Federal Appraisal guidelines and SCHPA § 27-31-430.

FIRREA Federal Appraisal guidelines mandate: (i) Real estate appraisals by mortgagees are required to protect the interest of the public and Federal financial institutions; (ii) The Board of Directors of mortgagees shall maintain their own written Loan Policy establishing an effective real estate appraisal program consistent with the public interest requirements mandated by FIRREA Federal Appraisal guidelines; and (iii) The

Loan Policy should determine the appropriate type and content of appraisal for different lending transactions.

The legal mandates found in the FIRREA Federal Appraisal guidelines created a duty of care on the part of BAC to Koola to ensure that BAC's loan approval process of Koola's original mortgage loan met and followed the mandated FIRREA Loan Policy requirements and appraisal guidelines. In South Carolina, BAC owed an *additional duty of care* to Koola to ensure that its appraisal of converted condominiums also complied with SCHPA § 27-31-430. It was *only* for this reason that Countrywide/BAC asked the developer/seller to certify in the "Builder's Certification" whether the lending transaction is a "Condo Conversion" and if so, "whether the structural, health and safety repairs have been completed". Simply put, that Countrywide/BAC required a "Condo Conversion Builder's Certification" as a precondition to approving Koola's loan is the affirmative evidence that Countrywide/BAC owed Koola a duty of care to ensure compliance with HPA § 27-31-4

Negligence is the breach of a duty of care owed to the plaintiff by the defendant. 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. Countrywide/BAC's failure to appraise Koola's converted condominium in compliance with FIRREA Federal Appraisal guidelines and its failure to verify the accuracy and truthfulness of the "Builder's Certification" to comply with HPA § 27-31-430 and the subsequent damage resulted in a breach of duty of care to Koola. BAC is liable for negligence *per se*.

Whether a particular act is negligent depends on foreseeability and a person of ordinary reason and prudence standard. BAC should be held to a person of superior

knowledge, and it should have been foreseeable for BAC that if it failed to appraise Koola's condominium under the guidelines of FIRREA Federal Appraisal guidelines and to confirm compliance with HPA § 27-31-430, certain damages will result. BAC failed in both these tests.

To confirm the breach of duty for negligence, the burden or inconvenience caused by duty of care should be determined. To appraise Koola's condominium under the guidelines of FIRREA Federal Financial guidelines and to confirm compliance with SCHPA § 27-31-430, BAC ought to have: (i) Asked the developer/seller whether he provided the "Disclosure of the Physical Condition of the Building" report to Koola (SCHPA § 27-31-430); (ii) Or, alternatively, verified with Koola whether he received the "Disclosure of the Physical Condition of the Building" Report from the developer/seller; and/or (iii) Asked the appraiser to appraise the condominium (depending upon whether it has been converted from apartment) in compliance with SCHPA § 27-31-430. Asking any one of these questions and getting answers to them would have taken just a few minutes of time, hardly a burden or inconvenience. *Scott by McClure v. Fruehauf Corp.*, 302 S.C. 364, 369, 396 S.E.2d 354 357 (1990). Furthermore, the preparation of instruments necessary to effectuate real estate sales transactions and compliance with FIRREA Federal Appraisal guidelines and SCHPA § 27-31-430 require attorney supervision. *State v. Buyers Service Co. Inc.,* 292 S.C. 426, 430, 431, 357 S.E.2d 15, 17, 18 (1987). There are no evidences in record to confirm that an attorney supervised these activities related Koola's mortgage loan documentation. These failures proximately caused Koola significant damage when it became known that the condominium Koola purchased and Countrywide/BAC had appraised was materially overvalued due to uncompleted repairs falsely certified as having been completed in the "Builder's Certification".

In its reply to Koola's First Set of Requests for Admission, BAC has *admitted* that BAC is obligated to follow the FIRREA Federal Appraisal guidelines, and that Plaintiff has to order an appraisal appropriate for different lending transactions depending on whether the real estate being appraised is a condo conversion or a new condominium or a single family unit or a residential or non-residential unit. (R. p. 109, line 27-p. 110, line 3). These admissions, which cannot be denied during trial, confirm that Countrywide/BAC had a duty of care to ensure that the mandates of FIRREA Federal Appraisal guidelines were followed for the approval process of Koola's loan. *Bates v. City of Columbia, 301 S.C. 320, 322, 323,* 391 S.E.2d 733, 734 (Ct.App. 1999).

BAC did not produce: (i) Documents, which BAC provided to the appraiser when the appraiser was engaged by BAC to get the appraisal done; and (ii) Countrywide/BAC's written "Loan Policy" for real estate appraisal (R. p. 112, lines 9-24) which were requested in Koola's Request for Production. These objections are evidences of an effort by BAC to conceal its negligence.

The developer/seller falsified the Builder's Certification claiming compliance with HPA § 27-31-430. BAC perpetuated the fraud committed by the developer/seller. (R. p. 123, lines 23-26, p. 160, lines 14-23, pp. 170-171). BAC is a joint tortfeasor with the developer/seller. Furthermore, BAC financed a mortgage transaction, which was fraudulently conveyed to Koola by the developer/seller. Elements of actionable Fraud consist of (1) a representation, (2) its falsity, (3) its materiality, (4) speaker's knowledge of its falsity, (5) his intent that it should be acted upon by person, (6) hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his subsequent and proximate injury. *Regions Bank v. Schmauch,* 354 S.C. 648,671,582 S.E.2d 432, 444, 446 (2012). BAC's appraisal of Koola's condominium met all these elements of fraud.

In Motion for Reconsideration, Koola represented to the Master that Federal, and State authorities, various Federal Financial agencies and many private investors in mortgage-backed securities offered by BAC had filed numerous lawsuits against BAC alleging violations and fraudulent practices in lending transactions. BAC settled most of the cases and paid more than $50 billion in fines and settlements between 2010 and 2013. (R. p. 160 lines 14-23, pp. 170-171).

**In *United States ex rel. O'Donnell v. Bank of Am. Corp.***, 33 F.Supp.3d 494 (2014), a "*qui tam*" action[1], the jury found that the named defendants including respondent Bank of America are liable for fraud in violation of FIRREA, and the Court entered Judgment against, among others, Bank of America, N.A., to pay a sum of $1,267,491,770 ($1.27 billion). *Id.* at 502.

Respondent BAC's Brief does not address whether it had a Duty of Care created through the statutory provisions of FIRREA Federal Appraisal guidelines and SCHPA § 27-31-430. Failure of a party to address an issue raised by the opposing party in the briefs amounts to admission of fault.

Petitioner prays to this Court to rule formally on petitioner's claim that respondent breached Duty of Care it owed petitioner created through FIRREA Federal Appraisal guidelines", codified into 12 C.F.R. §§ 34.41, 34.43, 34.44, 34.45, 34.62, 564.1) and the *additional duty of care* to under the provisions of SCHPA § 27-31-430.

[1] An action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive. Black's Law Dictionary, Ninth Ed., 2009

## V. DID THE COURT OF APPEALS FAIL TO RULE WHETHER THE MASTER'S NONCONSIDEARTION OF FEDERAL STATUES AND THE ADMINISTRATIVE ORDER OF THE CHIEF JUSTICE OF SUPREME COURT OF SOUTH CAROLINA VIOLATED CONSTITUTIONAL PROVISIONS?

In his Brief and Reply Brief, petitioner argued that the Master violated constitutional provisions by failing to consider federal statues and the Administrative Order No.: 2011-05-02-01 dated May 2, 2011, Chief Justice of South Carolina Supreme Court ("Administrative Order"). (R. p. 163, lines 21-24, p. 051, lines 8-17).

This Court ruled that Koola failed to cite supporting authority for his position and made conclusory arguments and ordered that the issue is abandoned on appeal. Koola has cited the constitutional provision, U.S. Const. art. VI. and an Order of this Court regarding statutory interpretation by Courts, *Wieters v. Bon-Secours-St, Francis Xavier Hosp.*, 378 S.C. 160, 170, 662 S.E.2d 430, 436 (Ct.App. 2008). There are no cases, which have challenged the Administrative Order of the Chief Justice, and therefore Koola could not provide any case law citations. Koola prays to this Court to reinstate his claim and rule that it is mandatory for the courts to interpret and construct the statues presented to the courts' consideration.

In order to preserve the claim for the Petition for Rehearing and a potential Appeal, Koola repeats the claims here. Koola also incorporates fully by reference all of his arguments and evidences contained in the Brief and Reply Brief to the Court of Appeals.

In his Initial Brief and Reply Brief, Koola argued that the Master's Order did not consider any of the authorities stemming from Federal statutes presented by Koola: Bankruptcy codes, 11 U.S.C.A. §§ 350(b) 541(a), 521(a)(1)(A)-(B)(i) and 554(c); FIRREA Federal Appraisal guideline, 12 C.F.R. §§ 34.41, 34.43, 34.44, 34.45, 34.62, 564.1; and "HOPE for Homeowners Program", 12 U.S.C.A. §1752z-23 et seq. Thus, the Master's Order is in violation of Constitutional provisions. "This Constitution, and the Laws of the

United States which shall be made in Pursuance thereof;....shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. art. VI.

> "Courts will reject a statutory interpretation, which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law".

*Wieters v. Bon-Secours-St, Francis Xavier Hosp.*, 378 S.C. 160, 170, 662 S.E.2d 430, 436 (Ct.App. 2008). (Internal citations omitted).

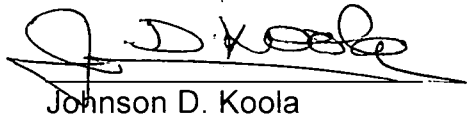
In an unprecedented action the Master's Order does not consider the "Administrative Order" of the Chief Justice of South Carolina while denying Koola's Motion for Sanction, thereby overruling the Chief Justice of South Carolina.

Rule 220(a), SCACR and Rule 52(a), SCRCP, provide that while adjudicating on cases, the court shall find the facts specially and state separately its conclusions of law thereon and judgment entered.

## CONCLUSION

For the reasons stated, petitioner asks the Court to grant the Petition for Rehearing.

Respectfully submitted,



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Appellant pro se

March 3, 2016

THE STATE OF SOUTH CAROLINA
**In the Court of Appeals**

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APPEAL FROM CHARLESTON COUNTY
Court of the Master in Equity

The Honorable Mikell R. Scarborough, Master in Equity
Case No.: 2010-CP-10-6060

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APPELLATE CASE No.: 2014-001323

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Bank of America, N.A.,.....Respondent,

v.

Johnson D. Koola, First Citizens Bank and Trust Company, Inc.,
f/k/a First Citizens Bank and Trust Company of South Carolina, and
Cambridge Lakes Condominium Homeowners Association, Inc.,
f/k/a Cambridge Lakes Horizontal Property Regime, Defendants,

Of whom Johnson D. Koola is the..... Appellant.

---

PROOF OF SERVICE

---

I, Johnson D. Koola, Appellant *pro se*, under penalty of perjury, certify that on March 3, 2016, I served a copy of the appellant's Petition for Rehearing by mailing a true and accurate copy thereto on the counsels of record for the respondent:

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Mr. Dean Anthony Hayes, Esquire
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March 3, 2016

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March 3, 2016



The Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, S.C. 29201

Re: **Appellate Case No.: 2014-001323; Bank of America, v. Johnson D. Koola**

Sub: Petition for Rehearing

Honorable Ms. Kitchings,

I am the appellant pro se in the above appeal under reference, Bank of America, v. Johnson D. Koola

I am writing to you to file appellant's Petition for Rehearing in the above Appeal. Enclosed please find seven copies of the appellant's Petition and a check in the amount of $25.00 toward the filing fee. Original Certificates of Service are attached to each document. I am serving a copy of this Petition on the counsels of record for the respondent.

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

Yours sincerely,

J. D. Koola

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

Copy to:
Mr. Robert Powell Jackman, Esquire
Mr. Dean Anthony Hayes, Esquire

Attorneys for Respondent

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