

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

Case No.: 2010-CP-10-9158

Court of Appeals Case No.: 2015-000111

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SC Court of Appeals

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.

**MOTION FOR CERTIFICATION**

Appellant Johnson Koola, pursuant to Rule 204(b), SCACR, and S.C. Code Ann. § 14-8-210(b), and in accordance with Rule 240, SCACR, hereby moves for certification of the above-captioned appeal, currently docketed in the Court of Appeals, for review by this Honorable Court. Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance. Rule 204(b), SCACR.

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SOUTH CAROLINA CODES

- S.C. Code Ann. § 27-50-10 *et seq.* (1976), § 27-50-40(A), § 27-50-50(A),  
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**I. A SUMMARY OF ISSUES OF SIGNIFICANT PUBLIC INTEREST OR LEGAL PRINCIPLES OF MAJOR IMPORTANCE**

The appeal under reference includes the following issues of public interest and/or legal principles of major importance:

- I. Determination of Legislative Intent and Statutory interpretation of S. C. Horizontal Property Act, S.C. Code Ann. § 27-31-430
  - (i) S.C. Code Ann. § 27-31-430
  - (ii) Legislative Intent of S.C. Code Ann. § 27-31-430
  - (i) Statutory Interpretation of S. C. Horizontal Property Act, S.C. Code Ann. § 27-31-430
  - (iii) Express, Apparent and/or Implied Authority conferred on the Agent
  - (iv) Public Policy and/or Issue of Significant Public Interest related to S.C. Code Ann. § 27-31-430
- II. A Broad Interpretation of the Law of the Case
- III. Reaffirmation of certain Case Laws and their applicability to the Questions of Law raised in the appeal
  - (i) Joint Tortfeasor
  - (ii) Fiduciary Duty owed by the Real Estate Agent to a Client Buyer

The appellate courts of South Carolina have not yet reviewed and interpreted S.C. Code Ann. § 27-31-430. The appeal has been fully briefed, and the Briefs and the Record on Appeal have been filed and served on the counsels of record for the respondents. For this reason, this Motion for Certification is not accompanied by any exhibits; appropriate references to the Record on Appeal have been made in the Motion.

## STATEMENT OF FACTS

In August 2002, Cambridge Two, LLC and Albert Estee ("Developers/sellers") hired Trademark Properties, Inc. ("Trademark") as an exclusive sales agent under Exclusive Right to Sell Listing Agreement ("exclusive listing agreement") for marketing and selling Cambridge Lakes condominiums for a period from August 9, 2002 to August 31, 2004. (R. pp. 033-035). They hired Trademark in 2002 well before they purchased the apartments in 2003 and converted the apartments to condominiums also in 2003. They wanted to hire a real estate agent/broker who has experience and expertise in conversion of apartments and marketing of converted apartments. (R. pp. 039-040). Trademark represented itself to developer/sellers as experts in conversion of apartments and marketing and sale of converted condominiums. (R. pp. 044-045; p. 048).

The developers/sellers recorded the Master Deed under S. C. Horizontal Property Act, S.C. Code Ann. § 27-31-10 *et seq.* (1976) ("SCHPA"), established Cambridge Lakes Horizontal Property Regime in February 2003, and thereby completed the conversion. (R. p. 081). In a letter entitled "Notice of Condominium Conversion and Offer to Purchase" sent to all the tenants in possession of the Cambridge Lakes apartments, they: (i) advised the tenants that the "Disclosure of the Physical Condition of the Building" report mandated by S.C. Horizontal Property Act, S.C. Code Ann. § 27-31-430 ["HPA § 27-31-430-mandated disclosure report"] would be *forwarded* to them in due course; and (ii) advised them to *contact* Trademark for assistance in making an offer and to buy the converted condominiums. (R. pp. 036-037; p. 037, lines 8-18, lines 18-22). Trademark sold or presold approximately thirty (30) converted condominiums between February 2003 and May 2003. (R. p. 096, lines 19-20).

In May 2003, the developers/sellers *prematurely* terminated Trademark's services as the exclusive real estate agent stating, *inter alia*, in an affidavit that Trademark failed to deliver statutorily required disclosure statements ["HPA § 27-31-430-mandated disclosure report] to buyers and prospective buyers of converted condominiums. (R. p. 040, lines 10-14). Upon termination and in May 2003, Trademark sent a letter to developers/sellers, which stated, *inter alia*: (i) "Trademark Properties was hired for the sole purpose of converting your existing Apartment community....into a viable condominium sales project"; (ii) "You hired us for our expertise to convert your apartment community"; and (iii) "*demand to be paid in full for all apartments, which we successfully converted into Condominiums, which can be identified by the issuance of a new tax map number.*" (R. pp. 44-45, p. 044, lines 18-20, p. 45, lines 13-14, lines 24-25).

During its tenure as the exclusive listing agent, Trademark, as stated *in its own written words*, undertook the following assignments in Cambridge Lakes: (i) it converted all the apartments into condominiums, (R. p. 045, lines 24-25); (ii) it negotiated listing agreement and priced all converted condominiums including the one that Koola bought in 2004 for marketing and sale, (R. p. 066); (iii) in April 2003, it increased the sales price of all condominium, (R. p. 067); (iv) it received Tax Map Number for all converted condominiums, (R. p. 045, line 25); and (v) it claimed sales commission for all presold and sold condominiums as well as for all the unsold condominiums, (R. p. 045, line 24-25). But for its premature termination, it would have sold a condominium to Koola.

*Immediately after the premature termination* of Trademark, developers/sellers hired Carolina One Real Estate ("Carolina One") as the exclusive real estate selling agent to complete the marketing of the converted Cambridge Lakes condominiums. In January 2004, Koola: (i) entered into a Buyer Representation Agreement with Carolina One (Agent)

to represent Koola [Principal/buyer] in the acquisition of real property as an Exclusive Buyer's Agent, (R. pp. 068-069, p. 068, lines 3-6); (ii) agreed to pay Carolina One 3% of the purchase price as compensation if the seller does not offer it compensation, (R. p. 068, lines 34-45); and (iii) signed a contract to purchase a converted Cambridge Lakes condominium from developers/sellers, (R. pp. 070-075).

Carolina One provided Koola with: (i) a copy of the Master Deed for Cambridge Lakes Horizontal Property Regime, (R. p. 081); and (ii) a copy of the State of South Carolina Residential Property Disclosure Statement under S.C. Code Ann. § 27-50-10 et seq., (R. pp. 082-085). Neither the contract to buy the condominium nor Koola's exclusive buyer's agent Carolina One did ever disclose to Koola that he was buying a converted condominium under the purview of SCHA. Carolina One withheld information that Koola has a statutory right to receive the HPA § 27-31-430-mandated disclosure report. Koola purchased the condominium in February 2004 after paying 10% down payment.

In June/July 2008, Koola was unemployed and attempting to sell his condominium to enable him to pay off his mortgage related debts. In June 2008, the Cambridge Lakes Homeowners Association, Inc. (the "HOA") initiated a lawsuit against Trademark and others alleging, *inter alia*, massive construction defects, (R. pp. 020-025) and in 2010 included claims against Trademark for violation of SCHA. The HOA claimed \$8 million as the cost to repair the construction defects in the common elements of Cambridge Lakes. (R. p. 025, lines 8-10). This translates into defects worth \$92,307 in the 3-bedroom condominium Koola purchased. Because of the lawsuit alleging massive construction defects and SCHA violations, Koola could not sell his unit in 2008. In March 2009, Koola became insolvent and filed for Chapter 7 Bankruptcy. By the end of 2009, Koola fell behind his mortgage related payments. Currently, Koola is subject to two foreclosure actions, one

from the HOA and the other from mortgagee, which marked the termination of ownership of his condominium, and which caused him heavy damages.

In 2010, Koola initiated this proceeding against Trademark and Carolina One for, *inter alia*, the failure to provide HPA § 27-31-430-mandated disclosure report. The Trial Court dismissed claims against Trademark stating that Trademark is not liable to Koola as a joint tortfeasor and did not sell a converted Cambridge Lakes condominium to Koola. The Trial Court, without determining the Legislative Intent of S.C. Code Ann. § 27-31-430, dismissed claims against Carolina One stating that it has no duty to provide HPA § 27-31-430-mandated disclosure report to Koola.

## DISCUSSION

- (I) **Determination of Legislative Intent and Statutory Interpretation of S. C. Horizontal Property Act, S.C. Code Ann. § 27-31-430**
- (i) **S.C. CODE ANN. § 27-31-430**

S.C. Code Ann. § 27-31-430 states in pertinent part that:

(i) Whenever the lessee, sole owner, co-owner of a building declares the undertaking of a conversion of rental units to condominium ownership through the recordation of a master deed or master lease, written disclosure shall be made within thirty days of the date of recordation to all prospective purchasers....as to the physical condition of the building; (ii) the disclosure shall contain a written report prepared by an independent registered architect or engineer licensed to practice his profession in this State, describing the present condition of all general common elements; and (iii) a failure to make the disclosure required by this section shall constitute a violation of the South Carolina Unfair Trade Practices Act.

- (ii) **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 of South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.* (1976) (SCUTPA). No other violation of real estate conveyances in South Carolina constitutes an automatic violation of SCUPTA.

Through this Motion for Certification, Koola requests that this Court determine who has the duty to *convey* [*deliver*] HPA § 27-31-430-mandated disclosure report to prospective buyers when the owner/principal/developer/seller sells a converted condominium *through* an exclusive real estate agent/broker. (R. pp. 033-035). Koola has presented Carolina One's and his own arguments so that this Court could determine the Legislative Intent and interpret S.C. Code Ann. § 27-31-430 objectively. (This document, *infra*, pp. 6-11, 11-13). Trademark's arguments are presented under "Law of the Case" and "Joint Tortfeasor". (This document, *infra*, pp. 17-18, 19-20).

The Legislature did not express its Intent in S.C. Code Ann. § 27-31-430 because: (i) the Legislature has already determined the duties of real estate agents and brokers in Real Estate Brokers, Salesman, and Property Managers [Act], S.C. Code Ann. § 40-57-5 *et seq.* (1976) and additionally in Article 1 of The Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-10 *et seq.* (1976), and (ii) the Legislature was also aware of numerous case laws established by the appellate courts of South Carolina upholding the duties of real estate agents.

**(iii) STATUTORY INTERPRETATION OF S.C. HORIZONTAL PROPERTY ACT, S.C. CODE ANN. § 27-31-430**

**Carolina One's arguments**

Carolina One made the representation to the Court that: (i) the language of S.C. Code Ann. § 27-31-430 implies that only the developer/seller, but not his agent, has the duty to *provide or deliver* HPA § 27-31-430-mandated Disclosure report to buyers under all

circumstances whether the developer/seller sells himself or through an agent; and (ii) the language of Article 1 of The Residential Property Condition disclosure Act, S.C. Code Ann. § 27-50-10 *et seq.* (1976), implies that Carolina One's *only duty* is to provide disclosure report as stated in S.C. Code Ann. § 27-50-10 *et seq.* to Koola – a buyer of converted condominium under the purview of S.C. Code Ann. § 27-31-430.

To support and confirm its argument, Carolina One handed over an edited copy of Article 1 of The Residential Property Condition disclosure Act, S.C. Code Ann. § 27-50-10 *et seq.* (1976), to the Court. (R. p. 082). The Court read the document, ruled *sua sponte* from the Bench that Carolina One has no duty to provide HPA § 27-31-430-mandated disclosure report to Koola, and immediately granted Summary Judgment to Carolina One.

The document presented to the Court (R. p. 082) states in paragraph 1 and 4 that an owner of residential real estate shall provide to a purchaser the property condition disclosure statement mandated by S.C. Code Ann. § 27-50-40(A) and § 27-50-50(A), which must be completed prior to signing a contract of sale. (R. 082, lines 4-10, lines 32-25). Paragraph 2 deals with the nature of representation made in the disclosure report. (R. p. 082, lines 12-25). Paragraph 3 states that owner is solely responsible for providing the disclosure statement to the buyer. (R. p. 082, lines 26-31). It states further that the agent of the owner must disclose any *material facts* about the property, which he/she knows or reasonably should know, regardless of owner's responses in the disclosure statement. (R. p. 082, lines 27-29). Nowhere *it has been stated that an agent has a duty to provide the residential property condition disclosure statement.*

The appellate Courts of South Carolina have determined that "if the language of an act give rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself." (Internal citations omitted.) *Wieters v.*

*Bon-Secours-St. Francis Xavier Hosp. Inc.*, 378 S.C. 160, 170, 662 S.E.2d 430, 435 (Ct.App. 2008). Thus, S.C. Code Ann. § 27-50-50(C) instructs that the duties of a real estate agent are governed by Real Estate Brokers, Salesman, and Property Managers [Act], S.C. Code Ann. § 40-57-5 *et seq.* (1976). Further, S.C. Code Ann. § 27-50-70(A) mandates that a real estate agent must inform in writing each owner covered by the listing agreement of the owner's obligations if the owner fails in his duties. If the Trial Court had reviewed the provisions of S.C. Code Ann. § 40-57-5 *et seq.* and S.C. Code Ann. § 27-50-70(A) before ruling on Carolina One's Motion for Summary Judgment, it would have found that Carolina One had duties to provide disclosure information under S.C. Code Ann. § 27-31-430 to Koola.

To emphasize the natural contradictions in Carolina One's arguments, Koola cites the statutes under reference verbatim:

Whenever the lessee, sole owner, co-owner of a building declares the undertaking of a conversion of rental units to condominium ownership through the recordation of a master deed or master lease, written disclosure shall be made within thirty days of the date of recordation to all prospective purchasers, including tenants in possession, as to the physical condition of the building.

S.C. Code Ann. § 27-31-430.

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

S.C. Code Ann. § 27-50-40(A)

*The owner of real property subject to this article [S.C. Code Ann. § 27-50-10 et seq. (1976)] shall deliver to the purchaser the disclosure form required by this article before a real estate contract is signed by the purchaser and owner or as otherwise agreed in the real estate contract.*

S.C. Code Ann. § 27-50-50(A)

All the three codes under reference make it mandatory for the owner/developer/seller to provide the *appropriate residential property condition disclosure*

reports to prospective buyers. The three codes, *per se*, have not assigned any duty to an agent to provide any *residential property condition disclosure reports* to prospective buyers. Carolina One's statement in the Court that it has a duty – the only duty – to provide residential property condition disclosure statement S.C. Code Ann. § 27-50-10 *et seq.* (1976) to buyers of converted condominiums under the purview of SCHPA is a false statement. Carolina One received the Summary Motion Judgment based on a false statement made in the court.

**Why Carolina One insists that it has a duty to provide a disclosure report under S.C. Code Ann. § 27-50-10 *et seq.* when it sells a condominium under S.C. Code Ann. § 27-31-430?**

The *disclosure mandates* under S.C. Code Ann. § 27-50-40(A) codified in Article 1 of The Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-10 *et seq.* (1976) are easy to comply with. The disclosure report is prepared by answering 'Yes or No' questions or by stating "No representation." In another words, report is made on the basis of *personal knowledge* of the owner/seller. Failure to provide the disclosure report does not: (i) void the contract; (ii) create a defect in title; or (iii) present a valid reason to delay or otherwise interfere with the closing of a real estate transaction. S.C. Code Ann. § 27-50-50(B). If a material inaccuracy is discovered in the disclosure report after delivery of it to the buyer, the owner can *promptly correct* the inaccuracy, and the owner will incur no liability. S.C. Code Ann. § 27-50-60. An onwer is liable only if the owner made false, incomplete or misleading information, S.C. Code Ann. § 27-50-65; however, the owner can escape liability by arguing that the owner didn't have personal knowledge at the time the report was provided, or he stated "No representation" affirmatively. Finally, if any liability *were* established, the damage award would be very limited and easily affordable.

In contrast, HPA § 27-31-430-mandated disclosure report is prepared by a South Carolina licensed architect or engineer. The report should describe the present condition of all general common elements, shall contain a good faith estimate for the remaining useful life to be expected for each item reported on, together with a list of any notices of uncured violations of building codes or other county or municipal regulations, together with the estimated cost of curing those violations. The architect or engineer does not prepare the report based on the personal knowledge of the owner/developer/seller, but through an engineering inspection of the property. A failure to make the disclosure required by S.C. Code Ann. § 27-31-430 shall constitute [an automatic] violation of SCUPTA. S.C. Code Ann. § 27-31-430. Very harsh, damaging *triple damage awards* are usually granted under SCUPTA. This is why Carolina One insisted in the Court that it has a duty – the only duty – to provide a disclosure report under S.C. Code Ann. § 27-50-10 *et seq.* when it sells a condominium under S.C. Code Ann. § 27-31-430.

On January 24, 2004, Carolina One and Koola reviewed the Agreement to Buy and Sell Real Estate in Cambridge Lakes and signed them. (R. pp. 082-085). Seller ratified the agreement on January 26, 2006 (R. p. 075). The Agreement stated that a Seller's Property Condition Disclosure statement, as required under South Carolina Code of Laws, as amended in, Section 27-50-10, *et seq.* would be provided to Buyer prior to ratification of the Agreement by the seller. (R. p. 072, lines 14-26). The Agreement did not state anywhere that the owner or the agent on behalf of the owner is selling a converted condominium to Koola. The Agreement withheld the *material information* that the owner or the agent on behalf of the owner is selling a converted condominium under the purview of SCHPA, and the buyer has a statutory duty to receive HPA § 27-31-430-mandated disclosure report. Koola's agent Carolina One also did not inform Koola that it was selling a

converted condominium to him, and that Koola has a statutory right to receive the HPA § 27-31-430-mandated disclosure report.

### **Koola's arguments**

The mandate of S.C. Code Ann. § 27-31-430 has two elements: (i) preparation of the HPA § 27-31-430-mandated disclosure report; and (ii) timely delivery of the disclosure report to prospective purchasers. Koola argued that: (i) the developer/seller, irrespective of whether he sells the converted condominium himself or through an agent, has the duty to *prepare* HPA § 27-31-430-mandated Disclosure report *at all times* with the help of a qualified engineer. Because S.C. Code Ann. § 40-57-137(F) has provided that “*a seller's agent is not obligated to discover latent defects in property*”; (ii) the developer/seller has to provide or convey or *deliver* the § 27-31-430-mandated disclosure report when he sells the converted condominium by himself; and (iii) when developer/seller sells the converted condominium through an exclusive sales agent, then, the agent has the duty to *deliver* HPA § 27-31-430-mandated disclosure report to prospective purchasers.

Koola's arguments that the exclusive sales agent has the duty to *deliver* HPA § 27-31-430-mandated disclosure report to Koola are based on the following considerations:

(i) A real estate licensee acting as a listing agent or a selling agent is subject to the regulations governing his license and performance of his responsibilities as licensee, as provided by the commission. This article does not limit any other remedy available to the purchaser under law. S.C. Code Ann. § 27-50-50(C).

(ii) The agent has signed buyer representation agreement thereby the buyer became a client, (R. p. 069).

(iii) The real estate agent/broker had a fiduciary relationship with the client buyer, S.C. Code Ann. § 40-57-137(A).

(iv) S.C. Code Ann. 40-57-137(H) provides that a buyer's agent shall promote the interest of the buyer by performing the buyers' agent's duties.

(v) The agent has a duty to the client buyer to disclose all relevant facts concerning the transaction which are actually known to the licensee or, if acting in a reasonable manner, should have been known to the licensee, S.C. Code Ann. § 40-57-137(F).

(vi) Carolina One, the agent, had actual and constructive knowledge that it was selling a converted condominium under the purview of S.C. Code Ann. § 27-31-430 on behalf of the owner, and the owner had a statutory duty to provide HPA § 27-31-430-mandated disclosure report to Koola and other buyers. (R. pp. 036-037, p. 040, lines 10-14).

(vii) Carolina One has a duty to disclose all material information relevant for the sale of the converted condominium. S.C. Code Ann. 40-57-137(K).

(viii) *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.* S.C. Code Ann. § 27-50-70(A).

(ix) The agent had a duty to inform Koola, his client, that he has a statutory right to receive HPA § 27-31-430-mandated disclosure report. S.C. Code Ann. § 40-57-137(F).

(x) The express, apparent and implied authority conferred on the agent by the principal/owner/seller demands that the agent has the duty to *provide or deliver* HPA § 27-31-430-mandated disclosure report to Koola and all prospective buyers of converted condominium. (R. p. 040, lines 12-14); and finally,

(xi) Section P(7) of the exclusive listing agreement stipulates that "Owner shall not deal directly with propsective buyers of this property during the period of this agency." Therefore, only the agent, and not the owner, can deliver the HPA § 27-31-430-mandated disclosure report to Koola. (R. p. 034, lines 62-63).

The Agreement to Buy the Cambridge Lakes condominium did not reveal anywhere that the condominium being sold is a converted condominium. This is a fraudulent misrepresentation. The Agreement withheld the *material information* that the owner or the agent on behalf of the owner is selling a converted condominium under the purview of SCHPA, and the buyer has a statutory duty to receive HPA § 27-31-430-mandated disclosure report. Koola's agent Carolina One did not inform Koola that it was selling a converted condominium to him. Carolina One also did not inform Koola that he has a statutory right to receive the HPA § 27-31-430-mandated disclosure report.

The Court without any consideration of Koola's arguments granted Summary Judgment to Carolina One.

**(iv) Express, Apparent and/or Implied Authority conferred on the Agent**

In June 2003, the developers/sellers *prematurely* terminated Trademark's services as the exclusive real estate agent stating, *inter alia*, that Trademark failed to deliver statutorily required disclosure statements ["HPA § 27-31-430-mandated Disclosure report] to buyers and prospective buyers of converted condominiums. (R. p. 040, lines 12-14). This is the direct evidence that the principal/developer/seller conveyed his express and/or apparent authority to Trademark and Carolina One to act on behalf of him. The exclusive listing agreement is the direct evidence that the principal/developer/seller conveyed his implied authority to Trademark and Carolina One to act on behalf of him. (R. p. 033-035). Because of the authority conferred upon them and because of the stipulation in the exclusive listing agreement that "Owner shall not deal directly with prospective buyers of this property during the period of this agency," Trademark and Carolina One had a duty to

convey or deliver statutorily required disclosure statements [“HPA § 27-31-430-mandated Disclosure report] to prospective buyers of converted Cambridge Lakes condominiums.

“It is elementary that a broker is bound to act in compliance with the instructions of his principal and in conformity to the authority conferred; that he is bound to disclose all material facts and to exercise reasonable skill and diligence in the transaction of the business entrusted to him; and that he will be responsible for any loss resulting from his failure to do so.” *Lowrance v. Swaffiled*, 123 S.C. 331, 333, 116 S.E. 278 (1923). A [real estate] broker’s duties include “an obligation to disclose to the principal all facts within his knowledge which are or may be material, or which might influence the principal in deciding a course of action.” (Internal citations omitted.) *Lengel v Tom Jenkins Realty, Inc.* 286 S.C. 515, 519, 334 S.E.2d 834, 836 (1985).

**(v) Public Policy and/or Issue of Significant Public Interest related to S.C. Code Ann. § 27-31-430**

After the HOA initiated the lawsuit in June 2008 against Trademark and others alleging, *inter alia*, SCHPA violations (specifically, S.C. Code Ann. § 27-31-430 violation), thirty-three (33%) percent of the Cambridge Lakes homeowners lost their homes in Cambridge Lakes to foreclosures and short sales<sup>1</sup>; many more lost the appreciated value of their Cambridge Lakes homes. Koola faces two imminent foreclosure actions – one from

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<sup>1</sup> Review of Charleston County RMC records shows that since 2008, there were ten (10) foreclosures and twenty-one (21) short sales in Cambridge Lakes for a total of 33%. Deed numbers of foreclosure sales are: 0026-383, 0353-510, 0112-174, 0202-152, 0246-565, 0249-524, 0034-569, 0329-466, 0112-266 and petitioner’s imminent foreclosure. Deed numbers of short sales are: 0018-848, 0345-494, 0075-531, 0480-476, 0259-770, 0140-826, 0321-100, 0282-986, 0332-585, 0425-141, 0230-030, 0395-065, 0407-043, 0334-440, 0265-803, 0287-655, 0480-164, 0150-231, 0207-193, 0365-435, and 0199-971.

the HOA and the other from mortgagee. Public Interest is adversely affected significantly in Cambridge Lakes.

The developers/sellers made an affirmative statement in an affidavit that they “hired Trademark to convert Cambridge Lakes [apartments] [because] Trademark was just finishing up the conversion of another project, the Montclair Condominium Conversion.” (R. p. 040, lines 6-7). Trademark was the exclusive real estate agent in the sale of converted Montclair condominiums. The Montclair condominium conversion in Mt. Pleasant, Charleston County, South Carolina, also resulted in a lawsuit<sup>2</sup> filed by its HOA and homeowners alleging, *inter alia*, S.C. Code Ann. § 27-31-430. In Montclair, as in Cambridge Lakes, many homeowners lost their homes to foreclosures and short sales.

East Bridge Town Lofts conversion in Mt. Pleasant, Charleston County, South Carolina, also resulted in a lawsuit<sup>3</sup> filed by its Property Owners Association and homeowners alleging, *inter alia*, S.C. Code Ann. § 27-31-430. Public Interest is adversely affected significantly not only in Cambridge Lakes but also in many other subdivisions in the State.

South Carolina Legislature and the Supreme Court of South Carolina continue to place South Carolina in the vanguard of consumer protection, especially protection of homebuyers. In *Lane v. Trenholm Building Co.*, 267 S.C. 497, 501-02; 229 S.E.2d 728, 730 (1976), this Court ruled that: (i) [the sale of] a house is the sale of a product; (ii) the court in this State has consistently rejected *caveat emptor* and adopted the civil law rule of *caveat venditor* as part of the common law of South Carolina; and (ii) the law should not

---

<sup>2</sup> Montclair Property Owners Association *et al.* v. Bruce E. Kenney, *et al.*, Case No. 2008-CP-10-6897 (Charleston, S.C., Ct. Common Pleas, 2008)

<sup>3</sup> East Bridge Town Lofts Property Owners Association, Inc., *et al.* v. *East Bridge Lofts, LLC, et al.*, Case No. 2010-CP-10-10204 (Charleston, S.C., Ct. Common Pleas, 2010)

orphan the purchaser of a house...by operation of the doctrine of caveat emptor. Trenholm [builder] placed the house in the stream of commerce and exacted a fair piece for it...[I]t has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects.

While reversing the grant of summary judgment to builders in *Terlinde v. Neeley, Sr.*, 275 S.C. 395, 398, 271 S.E.2d 768, 769 (1980), this Court affirmed a previous ruling that the concept of privity is no longer viable in this jurisdiction. In *Kennedy v. Columbia Lumber and Mfg Co., Inc.*, 299 S.C. 335, 344, 383 S.E.2d 730, 736 (1989), this Court ruled: "We have made it clear that it would be *intolerable* to allow builders to place defective and inferior construction into the stream of commerce."

To safeguard the public interest and to protect buyers of converted condominiums from losing their homes to foreclosures and short sales, Koola requests this Court to interpret S.C. Code Ann. § 27-31-430 to determine who has the duty to convey or deliver HPA § 27-31-430-mandated Disclosure report to buyers of converted condominiums when the owner/developer/seller sells converted condominiums through an exclusive real estate agent. "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 policy of the law." (Internal citations omitted). *Wieters v. Bon-Secours-St. Francis Xavier Hosp. Inc.*, 378 S.C. 160, 170, 662 S.E.2d 430, 436. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. The determination of legislative intent is a matter of law." (Internal citations omitted). *Epstein v. Coastal Timber Co., Inc.*, 393 S.C. 276, 711 S.E.2d 912, 917 (2011).

## (II) A BROAD INTERPRETATION OF LAW OF THE CASE

In June 2008, the HOA and several Cambridge Lakes homeowners filed a lawsuit against Trademark and others alleging, *inter alia*, SCHPA violations (specifically, S.C. Code Ann. § 27-31-430 violation). (R. pp. 020-025). In January 2011, Trademark filed a Motion for Summary Judgment in the said case arguing, *inter alia*, that: (i) there are no requirements in the Act [SCHPA] that real estate agents or brokers obtain the report on the physical condition of the building [HPA § 27-31-430-mandated disclosure report]; and (ii) the HOA is not a prospective purchaser under the code Section 27-31-430. (R. p. 029). Therefore, Trademark denied any liabilities. The Court, however, *summarily rejected* Trademark's Motion for Summary Judgment. Trademark did not appeal the decision of the Court. (R. pp. 015-019). Therefore, the HOA's case became the Law of the Case. Later on the eve of trial set to hear the HOA's case, Trademark settled the case with the HOA and approximately ninety (90) Cambridge Lakes homeowners. Trademark did not sell a condominium to many of these ninety homeowners. The essence of the law is that Trademark settled the case with homeowners with whom it had no *privity relationship*.

In the case at bar, Koola, a Cambridge Lakes homeowner, filed a lawsuit against Trademark and others alleging, *inter alia*, SCHPA violations (specifically, S.C. Code Ann. § 27-31-430 violation). (R. p. 088, line 29-p. 089, line 013). In 2013, Trademark filed a Motion for Summary Judgment in the said case arguing, *inter alia*, that: (i) nothing in SCHPA places a duty upon the listing agent to deliver HPA § 27-31-430-mandated disclosure report to potential purchasers; and (ii) Trademark was not involved in the sale of the converted condominium to Koola. (R. p. 100, p. 105). Trademark denied any liabilities. The Court granted Summary Judgment to Trademark.

The HOA's case and Koola's case involved *identical elements*: (i) Cambridge Lakes Homeowner(s) as plaintiff(s); (ii) Trademark as the defendant in both cases; and (iii) the same questions of Law in both cases: SCHA violations (specifically, S.C. Code Ann. § 27-31-430 violation). The *pro se* appellant argues before this Court that the Law of the Case in the HOA's lawsuit or, alternatively, the Doctrine of Collateral Estoppel and even *res judicata* are applicable to Koola's case at bar. "The law of the doctrine applied where a party does not challenge an issue on appeal when there has been an opportunity to do so." *Bone v. U.S. Food Service*, 399 S.C. 566, 733 S.E.2d 200, 205 (2012). The Doctrine of Collateral Estoppel bars a party from re-litigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one. Black's Law Dictionary, Ninth Ed. *Res judicata* is an affirmative defense barring the same parties from litigating a second lawsuit on the same claim. Black's Law Dictionary, Ninth Ed.

This Court may take notice that the Trial Judge in the HOA's lawsuit **denied** Trademark's argument that Trademark has no duty to provide HPA § 27-31-430-mandated disclosure report to buyers of converted condominiums. The Trial Judge in Koola's case **granted** Trademark's argument that Trademark has no duty to provide HPA § 27-31-430-mandated Disclosure report to buyers of converted condominiums. In effect, the Trial Judge in Koola'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).

It is respectfully submitted that this Court reviews the arguments and the case laws presented here to determine whether the Law of the Case in the HOA's case is applicable to Koola's case at bar and if yes, grant the Motion for Certification.

(III) REAFFIRMATION OF CERTAIN CASE LAWS AND THEIR APPLICABILITY TO QUESTIONS OF LAW RAISED IN THE APPEAL

(i) Joint tortfeasor

Presenting statement of facts of the case (this document, *supra*, pp. 3-6) and several case laws, Koola argued in the Trial Court that sale of the converted Cambridge Lakes condominiums to the public in violation of various South Carolina codes, specifically, S.C. Code Ann. § 27-31-430, by the principal/developer/seller and agents Trademark and Carolina One constituted a joint tort. Trademark, Carolina One and owner/developer/seller are joint tortfeasors and are liable to Koola.

Without reviewing the facts of the case and the case laws, the Trail Court refused to accept Koola's position and granted Summary Judgment to Trademark and to Carolina One on Joint Tortfeasor. To support his arguments here, Koola cites the following case laws: *Barker v. Sauls*, 289 S.C. 121, 122, 345 S.E.2d 244 (1986), *Hollifield v. Keller*, 238 S.C. 584, 590, 121 S.E.2d 213, 215 (1961). *JKT Co., Inc. v. Hardwick*, 274 S.C. 413, 417-18, 265 S.E.2d 510, 512-13 (1980); *Scott by McClure v. Fruehauf Corp.*, 302 S.C. 364, 371, 396 S.E.2d 354, 358 (1990); *Terlinde v. Neely*, 275 S.C. 395, 397-99, 271 S.E.2d 768, 769-70 (1980); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 57-58, 64, 518 S.E.2d 301, 304, 307 (Ct.App. 1999).

Koola quotes from two case laws.

"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).

*Hollifield v. Keller*, 238 S.C. 584, 590, 121 S.E.2d 213, 215 (1961).

"A tort-feasor maybe subjected to tort liability for injury to a third party arising out of the tortfeasor's relationship with another, despite the absence of privity between the tortfeasor and third party. The tortfeasor'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 tortfeasor to the third party... This duty may be derived from the tort-feasor's contractual relationship with another." (Internal citations omitted).

*Barker v. Sauls*, 289 S.C. 121, 122, 345 S.E.2d 244 (1986).

**(ii) Fiduciary duty owed by the real estate agent to a client buyer**

The Statement of the Facts (this document, *supra*, p. 5) would show to this Court that because of: (i) the Buyer Representation Agreement signed between Carolina One (Agent) and Koola [Principal/buyer]; and (ii) the agreement to pay Carolina One 3% of the purchase price as compensation if the seller does not offer it compensation, (R. p. 068, lines 34-45), a fiduciary relationship existed between Koola (principal/buyer) and Carolina One (agent). S.C. Code Ann. § 40-57-137(A).

Real estate laws recognize two types of buyers: clients of the agent and customers. When an agreement exists between a buyer and an agent, then that buyer becomes the client of the agent. An agent owes fiduciary duty to a client. "[O]ne of three distinct classes upon which a duty to disclose arises includes when one party expressly reposes a trust and confidence in the other in a particular transaction, or the circumstances of that transaction or the nature of the parties' dealings imply such a trust and confidence." (Internal citations omitted). *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 529, 753 S.E.2d 428, 434 (2014).

Real estate agents occupy a fiduciary relationship with their clients and are under a legal obligation as well as a high moral duty to give loyal service to the principal. The duty of an agent to make full disclosure to his principal of all material facts relevant to the agency is fundamental to the fiduciary relationship of principal and agent. A broker owes a duty to

its principal to keep it fully and properly informed of all material facts. *Darby v. The Furman Co. Inc.*, 334 S.C. 343, 346-47, 513 S.E.2d 848, 849 (1999). It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority. (Internal citations omitted). *Dorman v. Campbell*, 331 S.C. 179, 185-86, 500 S.E.2d 786, 790 (1998).

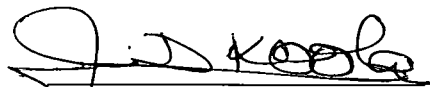
It is respectfully submitted that this Court reviews the statement of facts presented and the case laws to determine whether Trademark and Carolina One are joint tortfeasors, and owe fiduciary duty to Koola, and if yes, grant the Motion for Certification.

### CONCLUSION

For the reasons stated, appellant requests that the above-captioned appeal be certified for review by the Court, and that he be granted such other and further relief as is just and proper.

July 9, 2016

Respectfully submitted,



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

Appellant *pro se*

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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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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RECEIVED

JUL 13 2016

SC Court of Appeals

Court of Appeals Case No.: 2015-000111

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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.

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**Proof of Service**

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I, Johnson Koola, certify that, I have served a copy of Appellant's "Motion for Certification" on the following Counsels of Record for the respondents, by depositing a copy of the same, postage paid, in the US mailbox on July 11, 2016.

[continued on next page]

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Suzanne E. Hogg, Esq.  
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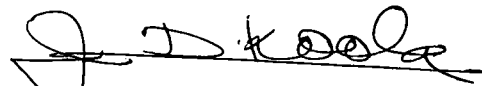
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Counsel for Carolina One Real Estate

July 11, 2016



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July 11, 2016

The Honorable Daniel E. Shearouse  
Clerk of the Court  
Supreme Court of South Carolina  
P. O. Box 11330  
Columbia, SC 29211

RECEIVED  
JUL 13 2016  
SC Court of Appeals

Sub: Motion for Certification  
Ref: Court of Appeals **Appellate Case No.: 2015-000111**  
Johnson Koola v. Cambridge Two, LLC et al.

Honorable Mr. Shearouse,

I am the appellant pro se in the above captioned appeal under reference. I am writing to you with regard to filing a Motion for Certification of the above appeal for Review by the Supreme Court.

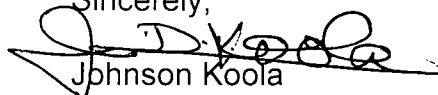
I am filing seven copies of the Motion. A copy of the Motion has also been filed with the Clerk of the Court of Appeals. Counsels of record for the respondents are also served with one copy of the Motion. Proof of service has been attached to each petition.

I am also filing one copy using a blinder clip.

I have also enclosed a check for \$25 as the filing fee.

Kindly inform me of any deficiencies in the filing of the Motion, so that I can take immediate corrective action. I thank you in advance for your kind action.

Sincerely,

  
Johnson Koola

Copy to:  
The Clerk of the Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

Continued on next page

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July 11, 2016

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

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JUL 13 2016

SC Court of Appeals

Sub: Motion for Certification  
Ref: Court of Appeals **Appellate Case No.: 2015-000111**  
Johnson Koola v. Cambridge Two, LLC et al.

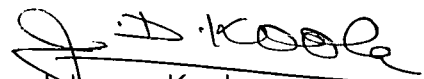
Dear Honorable Kitchings:

I wish to inform you that I have filed Motion for Certification for review of the above appeal by the Supreme Court.

I am enclosing herewith a copy of the Motion for Certification and Proof of service. All the counsels of the respondents have been served with copy of the Motion.

I thank you very much for your kind consideration.

Sincerely,

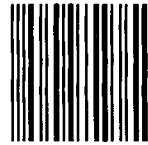
  
Johnson Koola

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