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SC Court of Appeals

**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

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.

PETITION FOR REHEARING

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TABLE OF CONTENTS

Table of Authorities..... iii

Questions Presented.....vi

Arguments.....1

I. This Court has not yet made a determination whether Trademark and Carolina are Joint Tortfeasors.....1

II a. The Court erred in dismissing Koola’s Breach of Fiduciary Duty claim against the respondents after denying the violation of Horizontal Property Act because Fiduciary Duty and the duty to provide HPA-mandated Disclosure Report arise under different statutes; they are not dispositive to each other...6

II b. The Court erred in dismissing Koola’s Fraud claims against the respondents after denying the violation of Horizontal Property Act; respondents are liable to Koola for Fraud upon Breach of Fiduciary Duty and not for violation of SCHPA.....10

III a. This Court erroneously ruled that the Law of the Case is inapplicable to Koola’s case stating interlocutory orders are not appealable; the Court applied irrelevant Authorities and misapprehended Review of Intermediate Orders, S.C. Code Ann. 14-3-430 (1976).....13

III b. This Court erred in its statutory interpretation of South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-410, because the Court failed to determine the legislative intent and relied on a literal interpretation of the statute.....16

III c. If this Court, upon review, determines that the respondents are liable to Koola for failure to provide HPA-mandated Disclosure report, they would be held liable to Koola for violation of SCUPTA.....22

III d. If this Court, upon review, determines that the respondents are liable to Koola for failure to provide HPA-mandated Disclosure report, they would be held liable to Koola for Negligence and Breach of Contract and warranty.....23

CONCLUSION.....25

TABLE OF AUTHORITIES

<i>Baldwin Constr. Co. Inc. v. Graham</i> , 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004).....	16
<i>Barker v. Sauls</i> , 289 S.C. 121, 122, 345 S.E.2d 244 (1986).....	5
<i>Baber v. Greenville City</i> , 327 S.C. 31, 40, 488 S.E.2d 314, 319 (1997).....	14
<i>Bone v. U.S. Food Serv.</i> , 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012).....	15
<i>Crout v. South Carolina National Bank</i> , 278 S.C. 120, 124, 293 S.E. 2d 422, 424 (1982).....	15
<i>Edwards v. SunCom</i> , 369 S.C. 91, 94, 530631 S.E.2d 529, 530 (2006).....	16
<i>Ex parte: Capital U-Drive-It, Inc. Wallace v. Beaver</i> , 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006).....	16
<i>Gilbert v. Mid-South Mach. Co. Inc.</i> , 267 S.C. 211, 221, 227 S.E.2d 189, 193 (1976)	9
<i>Hollifield v. Keller</i> , 238 S.C. 584, 590, 121 S.E.2d 213, 215 (1961).....	6
<i>Home Bldg. & Loan Ass'n v. City of Spartanburg</i> , 185 S.C. 313, 321, 194 S.E. 139, 142 (1937).....	20
<i>JKT Co., Inc. v. Hardwick</i> , 274 S.C. 413, 417-18, 265 S.E.2d 510, 512-13 (1980).....	6
<i>Kennedy vs. Columbia Lumber and Mfg. Co., Inc.</i> , 299 S.C. 335, 344, 345, 384 S.E.2d 730, 736 (1989).....	5, 21
<i>Lane v. Trenholm Building Co.</i> , 267 S.C. 497, 229 S.E.2d 728 (1976).....	21
<i>Lawlor v. Scheper</i> , 232 S.C. 94, 98-99, 101 S.E.2d 269, 271 (1957).....	9, 13
<i>Lengel v. Tom Jenkins Realty, Inc.</i> , 286 S.C. 515, 518-19, 334, S.E.2d 834, 836 (Ct.App. 1985).....	8, 13
<i>Lowrance v. Swaffield</i> , 123 S.C. 331, 333, 116 S.E. 278 (1923).....	8, 13
<i>May v. Hopkinson</i> , 289 S.C. 549, 559, 347 S.E.2d 508, 513 (Ct. App. 1986).....	9, 13
<i>Meddin v. Southern Ry.-Carolina Division</i> , 218 S.C. 155, 165, 62 S.E. 2d 109, 112 (1950).....	9

<i>Pascoe v. Wilson and Pascoe v. Parks</i> , 416 S.C. 628, 644-647, 788 S.C.2d 686, 695-696 (2016).....	21, 22
<i>Plaza Dev. Serv. V. Joe Harden Builder, Inc.</i> , 296 S.C. 115, 118, 370 S.E.2d 893, 895 (S.C. Ct.App. 1988).....	15
<i>Regions Bank v. Schmauch</i> , 354 S.C. 648, 672, 582 S.E.2d 432, 444 (2003).....	10
<i>Rickborn v. Liberty Life Ins. Co.</i> , 321 S.C. 291, 297, 468 S.E.2d 292, 296 (1996).....	8
<i>Roberson v. Southern Finance of S.C., Inc.</i> 365 S.C. 6, 10-11, 615 S.E.2d 112, 115 (2005).....	8
<i>Scott by McCure v. Fruehauf Corp.</i> , 302 S. C. 364, 370, 371, 396 S.E.2d 354, 357, 358 (1990)	6, 25
<i>Shirley's Iron Works, Inc. v. City of Union</i> , 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).....	22
<i>Sloan Const. Co. v. Southco Grassing</i> , 395 S.C. 164, 169, 717 S.E.2d 603, 606 (2011).	14
<i>Stuck v. Pioneer Logging Mach., Inc.</i> , 279 S.C. 22, 25, 301 S.E.2d 552, 554 (1983).	7
<i>Terlinde v. Neely</i> , 275 S.C. 395, 397-99, 271 S.E.2d 768, 769 (1980).....	6
<i>Thomas v. Delta Enterprises, Inc.</i> , 302 S.C. 351, 352, 396 S.E.2d 122, 123 (Ct.App. 1990).....	9, 13
<i>Vacation Time of Hilton Head Island, Inc. v. Lighthouse realty, Inc.</i> , 286 S.C. 261, 267-68, 332 S.E.2d 781,785 (Ct.App. 1985).....	9, 13
<i>Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.</i> , 336 S.C. 53, 57-58, 518 S.E.2d 301, 304 (Ct.App. 1999).....	6
<i>Vinson v. Hartley</i> , 324 S.C. 389, 400, 477 S.E.2d 715, 720-21 (Ct.App. 1996).....	24
<i>Wieters v. Bon-Secours St. Francis Xavier Hosp., Inc.</i> , 378 S.C. 160, 167, 170, 662 S.E.2d 430, 434-436 (Ct.App. 2008).....	19
<i>Winters v. Fiddie</i> , 394 S.C. 629, 716 S.E.2d 317 (Ct.App. 2011).....	13

CODES

S.C. Code Ann. § 1-23-390 (1976).....	15
S.C. Code Ann. § 14-3-430.....	15
S.C. Code Ann. § 14-7-1630(B) (Supp. 2015).....	21
S.C. Code § 27-31-10 et seq., §27-31-430 (1976)	in passim
S.C. Code Ann. §§ 27-50-1, 27-50-40(A), 27-50-40(C), 27-50-50(C), 27-50-70, 27-50-70(A),	in passim
S.C. Code Ann. § 39-5-10, <i>et seq.</i> ,	in passim
S.C. Code Ann. §§ 40-50-137(A), 40-50-137(B)(2), 40-50-137(F)(K)	in passim
S.C. Code Ann. § 40-57-5 <i>et seq.</i>	in passim
S.C. Code Ann. §§ 40-57-30(A), 40-57-137(A); 40-57-137(F).....	in passim

OTHERS

Restatement (Second) of Agency § 1 (1958).....	8
Restatement (Second) of Torts § 874.....	8, 10

QUESTION PRESENTED

- I. This Court has not yet made a determination whether Trademark and Carolina are Joint Tortfeasors.
- II a. Did the Court err in dismissing Koola's Breach of Fiduciary Duty claim against the respondents after denying the violation of Horizontal Property Act because Fiduciary Duty and the duty to provide HPA-mandated Disclosure Report arise under different statutes; they are not dispositive to each other?
- II b. Did the Court err in dismissing Koola's Fraud claims against the respondents after denying the violation of Horizontal Property Act; respondents are liable to Koola for Fraud upon Breach of Fiduciary Duty and not for violation of SCHPA?
- III a. Did this Court rule erroneously that the Law of the Case is inapplicable to Koola's case stating interlocutory orders are not appealable; the Court applied irrelevant Authorities and misapprehended Review of Intermediate Orders, S.C. Code Ann. 14-3-430 (1976)?
- III b. Did this Court err in its statutory interpretation of South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-410, because the Court failed to determine the legislative intent and relied on a literal interpretation of the statute?
- III c. Would this Court, upon review, determine that the respondents are liable to Koola for failure to provide HPA-mandated Disclosure report, hold them liable to Koola for violation of SCUPTA?
- III d. Would this Court, upon review, determine that the respondents are liable to Koola for failure to provide HPA-mandated Disclosure report, hold them liable to Koola for Negligence and Breach of Contract and warranty?

Appellant pro se Johnson Koola ("Koola" or "petitioner") files this Petition for Rehearing of the Court of Appeals' November 23, 2016 Unpublished Opinion No. 2016-UP-485. The Court granted an extension of time until December 23, 2106 to file the Petition for Rehearing.

In its November 23, 2016 Unpublished Opinion, the Court determined that respondents were not required to provide HOA-mandated Disclosure Report to Koola and dismissed the remaining issues stating that it is unnecessary to address remaining issues when disposition of a prior issue is dispositive to other issues. Nevertheless, Koola represents to this Court that only the claims under Law of the Case, Unfair Trade Practices Act and Negligence and Breach of Contract/Warranty are dispositive to the Court's determination under the Horizontal Property Act clam. Claims for Breach of Fiduciary Duty and Fraud arise under different statutes; these claims are not dispositive to the Court's determination under the Horizontal Property Act claim. Arguments supporting a joint tort would link the respondents, Trademark Properties, Inc. ("Trademark") and Carolina One Real Estate ("Carolina One") as joint tortfeasors.

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

ARGUMENTS

I. This Court has not yet made a determination whether Trademark and Carolina are Joint Tortfeasors.

Koola 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 and Carolina One (“respondents”) in violation of various South Carolina statutes caused harm to Koola, which cannot practically be divided and is a joint tort. Respondents Trademark and Carolina One are joint tortfeasors. (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).

Koola details the material facts related to Trademark, which make it a joint tortfeasor.

(i) On August 9, 2012, Albert Estee and Cambridge Two, LLC, (collectively, “developers/sellers”) hired Trademark as an exclusive sales agent for converting the Cambridge Lakes apartments into condominiums in compliance with SCHPA and marketing the converted Condominiums to public. (R. pp. 033-035). On February 24, 2003, they established Cambridge Lakes Horizontal Property Regime and recorded the Master Deed. (R. p. 081)

(ii) Albert Estee stated in an affidavit filed with the Court that the developers/sellers hired Trademark: (a) To convert all the apartments into condominiums and to market them because of Trademark’s proven prior expertise in the conversion and marketing of converted condominiums; and (b) To convey statutorily required Disclosure information, including South Carolina Horizontal Property Act (SCHPA), S. C. Code Ann. § 27-31-430-mandated Disclosure report, (“the HPA-mandated Disclosure report”) to prospective purchasers of the condominiums. (R. p. 039, line 32-p. 040).

(iii) Trademark assumed the following duties (Duty of Care): (i) To convert the apartments to condominiums in compliance with SCHPA; and (ii) To convey statutorily required Disclosure information, including HPA-mandated Disclosure report to

condominiums buyers. Trademark has admitted these allegations (R. pp. 044-045; p. 066, p. 67; also Affidavit and Deposition of developer/seller, R. pp. 038-060).

(iv) The developers/sellers sent a letter entitled "Notice of Condominium Conversion and Offer to Purchase" to the tenants in possession of the apartments which stated that they will be provided with a copy of the HPA-mandated Disclosure report before they buy the units (R. pp. 036-037). The tenants were advised to contact Trademark for assistance in making the offer and to buy the condominiums. (R. p. 037, lines 18-22). Thereby, *Developer/sellers delegated the duty of care to provide the HPA-mandated Disclosure report to prospective buyers of the condominiums to Trademark. This also confirms that Trademark had actual and constructive knowledge about its duty to convey HPA-mandated Disclosure report to prospective buyers.*

(v) Trademark assumed the following specific duty of care to sell a condominium to Koola: (i) Converted the apartment into condominium which appellant bought subsequently which marked the beginning of the assumption of Duty of Care by Trademark to Koola; (ii) Negotiated listing agreement and priced appellant's unit at \$126,900; (iii) On April 17, 2003, effected a price change to an average price of \$134,500 on Koola's unit as well as all other unsold units; and (iv) Received Tax Map Number for Koola's Unit. (R. pp. 044-045; p. 045, lines 24-29; p.66; p. 067).

(vi) In May/June 2003, the developer/seller terminated the listing agreement with Trademark stating that it did not provide statutorily required Disclosure information, including HPA-mandated Disclosure report to condominiums buyers (R. pp. 044-045; also the deposition of developer/seller, p. 043, pp. 044-045; p. 051). Trademark's failure to challenge its termination of the listing agreement is a *per se* admission that it had an oral

contract/agreement with developer/seller or a legal duty to provide HPA-mandated Disclosure report to Condominium buyers (R. p. 045, lines 30-33). Trademark failed in its duty of care demonstratively.

(vii) On May 28, 2003, Trademark wrote a letter to the developers/sellers, which stated: "Trademark Properties was hired for the sole purpose of converting your existing Apartment community....into a viable condominium sales project.... You hired us for our expertise to convert your apartment community.... [W]e successfully converted into Condominiums, which can be identified by the issuance of tax map number. You hired us for our expertise to convert your apartment community.... If Trademark Properties is not paid in full by July 15th 2003, we will file a lawsuit ... I look forward to seeing you in court." (R. p. 045, lines 24-32).

(viii) Trademark did not file the lawsuit against developer/seller. In hindsight, Trademark realized that it had an oral, contractual duty to provide HPA-mandated Disclosure report to Condominiums buyers upon conversion. (R. p. 040; p. 045).

(ix) During the period August 2012 to June 2003, Trademark pre-sold/sold nearly thirty (30) units to Condominium buyers. Trademark did not provide HPA-mandated Disclosure report to any of the Condominium buyers

(x) There is no need for this Court to determine whether Trademark converted all the apartments to condominiums or not. It is an undisputed Statement of Facts as stated by developer/seller and as admitted by Trademark. (R. p. 040; pp. 044-045).

(xi) Immediately after the termination of Trademark's Listing Agreement, developers/sellers hired Carolina One as the exclusive agent to complete the marketing of the condominiums. Carolina One sold a condominium to Koola and nearly fifty (50) other

buyers and did not provide statutorily required HPA-mandated Disclosure report to anyone including Koola in violation of SCHPA.

(xii) Conversion of the apartments into condominiums by Trademark without full compliance with SCHPA and sale of the converted Condominiums by Trademark to public without providing the HPA-mandated Disclosure report are the initial torts that Trademark committed. Carolina One, which followed Trademark, completed the marketing of the rest of the Condominiums in violation of SCHPA, but did not provide HPA-mandated disclosure report to any condominium buyers including Koola. Carolina One perpetuated the tort initiated by Trademark in the sale of the converted Condominiums; thereby they are joint tortfeasors.

Trademark denies Koola's allegations stating that it did not sell a condominium to Koola. Carolina One also argues that it is not a joint tortfeasor. The Supreme Court has abolished privity requirements as a defense in the State of South Carolina. *Kennedy vs. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 344-345, 384 S.E.2d 730, 736 (1989). In the absence of privity requirements, Trademark and Carolina One are liable to Koola as joint tortfeasors.

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

The key inquiry is what duty, if any, is owed by the tortfeasor to the third part. It is essential to liability for negligence that the parties have some relationship recognized by law to support the duty owed by the tortfeasor. This duty may be derived from the tortfeasor's contractual relationship with another..."

(Internal citations omitted.)

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

Authorities in the following Appellate Courts Decisions support Koola's arguments that: (i) There is no privity requirements as a defense in the State of South Carolina; and (ii) Trademark and Carolina One are joint tortfeasors: *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, 518 S.E.2d 301, 304 (Ct.App. 1999); *Hollifield v. Keller*, 238 S.C. 584, 590, 121 S.E.2d 213, 215 (1961).

From the statements made here and after review of the records as cited, this Court should make an independent decision whether respondents are joint tortfeasors.

II a. The Court erred in dismissing Koola's Breach of Fiduciary Duty claim against the respondents after denying the violation of Horizontal Property Act because Fiduciary Duty and the duty to provide HPA-mandated Disclosure Report arise under different statutes; they are not dispositive to each other.

In his Briefs, Koola claimed that the respondents breached Fiduciary Duty, which the respondents owed Koola. (Brief, p. 18, line 21-p. 21, line 9; Reply Brief to Trademark, R. p. 13 line 13-p.15, line 6 and to Carolina One, p. 14-p. 17, line 3).

In January 2004, Koola: (i) Entered into a Buyer Representation Agreement (with Carolina One (Agent) to represent Koola (Principal/Buyer-client) in the acquisition of real property as an exclusive Buyer's Agent (R. pp. 068-069); (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). Thus, there is a Principal (Koola) and Agent (Carolina One) relationship between the parties. These agreements,

therefore, established a fiduciary relation between the parties and established fiduciary duty on the part of Carolina One to Koola. Because Trademark is a joint tortfeasor with Carolina One, both owe Fiduciary Duty to Koola.

Carolina One's Initial Brief does not even acknowledge whether: (i) Koola 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 Koola. Koola chose to buy the condominium as a client of Carolina One rather than a customer, because Koola can expect: (i) fiduciary duties from Carolina One; and (ii) expert advice from Carolina One. As a first time homebuyer, Koola could 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).

The fiduciary duty that the respondents owed Koola is statutorily established:

A real estate brokerage company that provides services through an agency agreement for a client is bound by the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting as set forth in this chapter. The following are the permissible agency relationships a licensee may establish: (1) seller agency; (2) buyer agency; (3) disclosed dual agency; or (4) subagency.

S.C. Code Ann. § 40-57-137(A). It is readily seen that S.C. Code Ann. § 40-57-137(A) establishing Fiduciary Duty is operational irrespective of whether the real estate transaction involves a converted condominium or a regular real estate transaction. It is also readily seen that S.C. Code Ann. § 40-57-137(A) is neither limited nor preempted by Horizontal Property Act, S.C. Code Ann. § 27-31-430. Thus, this Court erred in dismissing Fiduciary Duty owed by the respondents to Koola because Fiduciary Duty and the duty to provide HPA-mandated Disclosure Report arise under different statutes, and therefore, they are not dispositive to each other.

One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation. A fiduciary, who commits a breach of his duty as a fiduciary, is guilty of tortious conduct to the person, for whom he should act. Restatement (Second) of Torts § 874 Violation of Fiduciary Duty (1979) and Comment b thereto. An Agent is endowed with Express, Implied and Apparent Authority from the Principal to perform certain acts on behalf of the Principal to the third parties and acts as a de facto Principal in performing the duties to the third party. The Agent stands in the shoes of the Principal. Agency is the fiduciary relation, which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to act. Restatement (Second) of Agency § 1 (1958); *Roberson v. Southern Finance of S.C., Inc.*, 365 S.C. 6, 10-11, 615 S.E.2d 112, 115 (2005); *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 297, 468 S.E.2d 292, 296 (1996).

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 tortuous 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 *May v. Hopkinson*, 289 S.C. 549, 559, 347 S.E.2d 508, 513 (Ct. App. 1986), this Court ruled that a purchaser of real estate who is induced to buy may affirm the contract, retain the property received under the contract, and sue at law for fraud and deceit to recover the damages sustained by reason of the fraud and affirmed the award of damages and reinstated the Master's punitive damages.

In *Vacation Time of Hilton Head Island, Inc. v. Lighthouse realty, Inc.*, 286 S.C. 261, 267-68, 332 S.E.2d 781,785 (Ct.App. 1985), this Court ruled that a broker owes a duty to its principal to keep it fully informed of all material facts that come to the broker's knowledge with respect to the transaction in which the broker is engaged, affect the principal's interest, and might influence the principal's action and affirmed the judgment against the agent.

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.”

Koola has shown here that the respondents owed Koola Fiduciary Duty, and they breached that Fiduciary Duty. Koola requests this Court to rule in favor of him for his Breach of Fiduciary Duty claims.

II b. The Court erred in dismissing Koola’s Fraud claims against the respondents after denying the violation of Horizontal Property Act; respondents are liable to Koola for Fraud upon Breach of Fiduciary Duty and not for violation of SCHPA.

Koola has argued that respondents are liable to Koola for Fraud (R. p. 136, line 4-p. 138, line 9, Brief, p. 26, line 5-p. 30, line 10; Reply Brief to Trademark, p. 22-p. 25, line 14 and to Carolina One, p. 22-p. 25, line 14-17). One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation. A fiduciary, who commits a breach of his duty as a fiduciary, is guilty of tortious conduct to the person, for whom he should act. Restatement (Second) of Torts § 874 Violation of Fiduciary Duty (1979) and Comment b thereto. 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 Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (2003).

The nine elements of fraud are:

- (i) A **representation**: Conversion of the Apartments into Condominiums by Trademark without full compliance with SCHPA and sale of the converted Condominiums by

Trademark to public without providing HPA-mandated Disclosure report are the initial torts that Trademark committed. Carolina One, which followed Trademark, completed the marketing of the rest of the Condominiums in violation of SCHPA, because it also did not provide HPA-mandated disclosure report to any Condominium buyers including Koola. Carolina One perpetuated the tort initiated by Trademark in the sale of the converted Condominiums, thereby their torts became a joint tort and they are joint tortfeasors.

Respondents had actual and constructive knowledge that they were marketing converted condominiums, which failed to meet the legal requirements of SCHPA, failed to convey HPA-mandated Disclosure report, and failed to comply with the provisions of S.C. Code Ann. §§ 27-50-40(C),70(A) and S.C. Code Ann. §§ 40-50-137(A),(B)(2),(F)(K). They provided copies of the Master Deed which had explicitly, but falsely, stated that the conversion was completed under the strict guidelines of SCHPA (R. 081, lines 9-19). Thus, they sold the condominiums representing that the converted condominiums complied with SCHPA.

(ii) Its falsity: The respondents' *representation* that the conversion of the apartments into Condominiums *complied* with SCHPA by providing the Master Deed was absolutely *false*; for none of the Condominium buyers received a copy of the HPA-mandated Disclosure report.

(iii) Its materiality: The misrepresentations made by Trademark and Carolina One were *material*;

(iv) **Knowledge of the falsity or reckless disregard of its truth or falsity:** Respondents had *actual and constructive knowledge* of the truth that HPA-mandated Disclosure report was not provided to Koola and any Condominium buyers. They sold the

Condominiums to all the buyers as if S.C. Code Ann. § 27-31-430 has been complied with;

(v) **Intent that the representation be acted upon:** Respondents worked diligently so that the unwary condominium buyers would act on the representations made to them in the Master Deed;

(vi) **The hearer's ignorance of its falsity:** Koola was absolutely ignorant of the fact that the sale of Condominiums did not comply with the mandate of S.C. Code Ann. § 27-31-430 at the time he bought the condominium;

(vii) **The hearer's reliance upon its truth:** Koola absolutely believed and relied upon the representation made in the Master Deed (R. p. 81, lines 9-19; p. 080) and the Builder's Certification (R. p. 080, lines 35-36) that the sale of Condominiums complied with S.C. Code Ann. § 27-31-430.

(viii) **The hearer's right to rely on:** The condominium buyers can interact only with the real estate agents and not with the seller. (R. p. 034, lines 62-63). Therefore, the hearer has the right to rely on the representations made by respondents; and

(ix) **The hearer's consequent and proximate injury:** Because of the massive construction defects (R. p. 025, lines 8-10) in Cambridge Lakes and the lawsuit (R. pp. 020-025), Koola could not sell his condominium when he tried to sell it *four times* during 2008-2010. *Koola was forced to file Ch. 7 Bankruptcy and now faces imminent foreclosure, which would result in the termination of ownership of his condominium. The defendants' actions were a proximate cause of harm that Koola suffered.* At 71 years of age and no resources to live on except limited Social Security benefits, Trademark and Carolina One inflicted serious damages upon Koola.

Real estate agents had been found guilty of fraud in the following litigations: *Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 518-19, 334, S.E.2d 834, 836 (Ct.App. 1985); *Lowrance v. Swaffield*, 123 S.C. 331, 333, 116 S.E. 278; *Lawlor v. Scheper*, 232 S.C. 94, 98-99, 101 S.E.2d 269, 270-71 (1957); *May v. Hopkinson*, 289 S.C. 549, 559, 347 S.E.2d 508, 513 (Ct. App. 1986); *Vacation Time of Hilton Head Island, Inc. v. Lighthouse realty, Inc.*, 286 S.C. 261, 267-68, 332 S.E.2d 781,785 (Ct.App. 1985); *Thomas v. Delta Enterprises, Inc.*, 302 S.C. 351, 396 S.E.2d 122 (Ct.App. 1990); and *Winters v. Fiddie*, 394 S.C. 629, 716 S.E.2d 317 (Ct.App. 2011).

Koola has shown to this Court that respondents are liable to Koola for Fraud. Koola requests this Court to make a favorable determination in his fraud claims against respondents.

III a. This Court erroneously ruled that the Law of the Case is inapplicable to Koola's case stating interlocutory orders are not appealable; the Court applied irrelevant Authorities and misapprehended Review of Intermediate Orders, S.C. Code Ann. 14-3-430 (1976).

In June 2008, Cambridge Lakes homeowners and Homeowners Association filed a lawsuit¹ against Trademark ("Lawsuit I") and other parties alleging, *inter alia*, violation of SCHPA, Negligence, Breach of Warranty and violation of Unfair Trade Practices ("SCUTPA"). (R. pp. 020-025). In 2010, Trademark filed a Motion for Summary Judgment arguing, *inter alia*: (i) It has no duty to provide HPA mandated Disclosure Report to any condominium buyers; (ii) The HOA is not a prospective purchaser of the condominium under S.C. Code Ann. § 27-31-430; (iii) Trademark is not liable for SCUTPA to homeowners; and (iv) Trademark is not liable for Negligence, Breach of Duty and Contract/Warranty. (R. pp. 026-032).

¹ Summons and Complaint, *Cambridge Lakes HOA v. Bostic Bros. Constr. Inc.*, Case No. 2008-CP-10-3506, June 8, 2008; Second Amended Complaint, June 28, 2010, and Third Amended Complaint, July 14, 2010.

The Trial Judge denied Trademark's Motion for Summary Judgment in the Lawsuit I *in toto*, (R. pp. 015-019). Trademark did not file a Motion for Reconsideration of the denial of its Motion for Summary Judgment. It also did not file an Appeal. It settled the case with the homeowners and the HOA. Thus, the Order of the Trial Judge became the Law of the Case. Under the law of the case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Sloan Const. Co. Inc. v. Southco Grassing, Inc.*, 395 S.C. 164, 169, 717 S.E.2d 603, 606 (2011). Thus, under the Principle of the Law of the case, Trademark is prohibited to argue that it is not liable to provide HPA-mandated disclosure reports to Cambridge Lakes homeowners including Koola. Since Koola is also a Cambridge Lakes homebuyer, the Law of the Case in the Lawsuit I is also applicable to Koola's litigation against Trademark. Both Lawsuit I and Koola's litigation against Trademark involved the same Cambridge Lakes Homeowners as plaintiffs and Trademark as a defendant and both cases involved the same issues.

The Trial Judge in Koola's lawsuit overruled the Trial Judge in Lawsuit I 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.*" (Emphasis added). *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).

In the November 23, 2016 Opinion, this Court did not determine the merits of Koola's Law of the case claim; the Court *erroneously determined* that the law of the case doctrine is inapplicable to this issue because "the denial of summary judgment is interlocutory" and "is not a final order" (citing *Baber v. Greenville City*, 327 S.C. 31, 40, 488 S.E.2d 314, 319 (1997)) and "whe[n] the party is not yet able to appeal due to lack of a

final judgment, the issue is not precluded by the law of the case doctrine....” (citing *Bone v. U.S. Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012)). Both Authorities are irrelevant in Koola’s case. In *Baber*, multiple claims were made against a single defendant and three different judgments were rendered in the case in three different trials. In this instance, the interlocutory orders are not immediately appealable. Supreme Court had ruled that when “multiple claims are made against a single defendant, an order adjudicating some but not all of them is not ordinarily appealable.” *Plaza Dev. Serv. V. Joe Harden Builder, Inc.*, 296 S.C. 115, 118, 370 S.E.2d 893, 895 (S.C. Ct.App. 1988). *Bone v. U.S. Food Serv.* involved a worker’s compensation claim. Claims under worker’s compensation claims are adjudicated under Administrative Procedures Act, S.C. Code Ann. § 1-23-390 (1976). Interlocutory orders arising from such cases are not immediately appealable under any circumstances; only final orders are appealable. Thus, the Supreme Court’s decision in *Bone v. U.S. Food Serv.* is also irrelevant in Koola’s case because Koola’s case is not adjudicated under Administrative Procedures Act.

Review of interlocutory orders in cases other than those determined by the Administrative Procedures Act is governed by S.C. Code Ann. § 14-3-430. Supreme Court has interpreted S.C. Code Ann. § 14-3-430 as follows:

There are only four basic situations from which a party may appeal: (1) intermediate judgments, orders or decrees involving merits, [S.C. Code Ann. § 14-3-430(1)]; (2) orders affecting substantial rights when such orders in effect determine the action and prevent a judgment from which an appeal may be taken or when the orders discontinue the action, [S.C. Code Ann. § 14-3-430(2)]; (3) a final order in special proceedings, [S.C. Code Ann. § 14-3-430]; and (4) interlocutory orders continuing, modifying or effusing injunctions, [S.C. Code Ann. § 14-3-430].

Crout v. South Carolina National Bank, 278 S.C. 120, 124, 293 S.E. 2d 422, 424 (1982).

An order which involves the merits is the one that “must finally determine some substantial matter forming the whole or part of some cause of action or defense. *Edwards v. SunCom*, 369 S.C. 91, 94, 530631 S.E.2d 529, 530 (2006). When the Trial Judge denied Trademark’s Motion for Summary Judgment in the Lawsuit I, the Court denied Trademarks argument that it was not liable to provide HPA-mandated Disclosure Report to Cambridge Lakes homeowners. Thus, this Order involved certain merits as defined by S.C. Code Ann. § 14-3-430(1), and therefore the denial of Motion for Summary Judgment was immediately appealable.

Denial of Trademark’s Motion for Summary Judgment in Lawsuit I discontinued the action against Trademark as defined by S.C. Code Ann. § 14-3-430(2). Once the Motion for Summary Judgment was denied, Trademark could not raise its arguments in the Trial Court again except for Motion for Reconsideration. Its defense was therefore immediately appealable, but it did not appeal. Instead, it settled the case with the homeowners and the HOA. Trademark settled the case because it “arrived at the end of the road [of litigation] as stated by the Supreme Court in *Baldwin Constr. Co. Inc. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004). The denial of Trademark’s Motion for Summary Judgment was immediately appealable because “there were no further acts that must be done by the trial court prior to a determination of the parties’ rights.” *Ex parte: Capital U-Drive-It, Inc. Wallace v. Beaver*, 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006).

For the reasons stated, this Court should reverse its finding that the Law of the Case is not applicable to Koola’s case.

III b. This Court erred in its statutory interpretation of South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-410, because the Court failed to determine the legislative intent and relied on a literal interpretation of the statute.

During hearing of Motion for Summary Judgment and through his Memoranda, Koola argued in the Circuit Court that: (i) Trademark and Carolina One were hired as exclusive agents for sellers of converted Cambridge Lakes condominiums (R. pp. 033-035); (ii) The Listing agreement stipulated that Owner [developer/seller] shall not deal directly with prospective buyers of this property during the period of this agency (R. p. 034, lines 62-63); (iii) The preparation of the HPA-mandated Disclosure Report is the sole responsibility of the developer/seller under all circumstances (Brief, p. 15- p. 17, line 7); (iv) The conveyance of the HPA-mandated Disclosure Report is the responsibility of the developer/seller only when the he sells the converted condominium himself (Brief, p. 15- p. 17, line 7); (v) When the developer/seller, (the Principal), authorizes a real estate licensee/broke/agent to sell the converted condominiums on behalf of the developer/seller (Principal), then he or she transfers or delegates these responsibilities to the real estate broker/licensee – the Agent. (R. p. 129, lines 12-24; p. 162 line 23-p. 163, line 23). (vi) The legislature did not spell out who has the duty to provide/convey the HPA-mandated Disclosure report to buyers when the developer/seller employs an exclusive real estate broker/agent to sell the converted condominiums, because the legislature is well aware of the time honored South Carolina Codes – Real Estate Brokers, Salesmen, and Property managers [Act], S.C. Code Ann. § 40-57-5 *et seq.* and The Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-10 *et seq.* – dealing with the duties of developers/sellers, real estate brokers/licensees. Thus, Trademark and Carolina One were mandated to provide S.C. Code Ann. § 27-31-430-mandated Disclosure Report to all prospective Cambridge Lakes condominium buyers.

Trademark took the position that it did not sell a condominium to Koola, and

therefore, it is not liable to Koola for the conveyance of HPA-mandated disclosure report. It did not state whether it had a duty to convey HPA-mandated Disclosure Report to the Cambridge Lakes condominium buyers to whom it sold the Cambridge Lakes condominiums. It also did not inform the Court that its argument in the Motion for Summary Judgment in Litigation I against Trademark that it is not liable to convey HPA-mandated disclosure report to prospective condominium buyers was denied by Court. (R. pp. 026-032; pp. 015-019)

Carolina One argued in the Court that its statutory duty is limited to provide only State of South Carolina Residential Property Condition Disclosure Statement mandated by S.C. Code Ann. § 27-50-1 *et seq.* and not HPA-mandated Disclosure Report to Koola. 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. 082; p. 165, line 5-p. 166, line 11), and the Trial Judge read it during the motion hearing. 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).

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 both of these codes addresses the scenario when the owner of the property sells the real property himself.

Carolina One was granted a Summary Judgment for a misrepresentation it made to the Court 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. For record, when a real estate licensee/broker/agent sells the real property on behalf of the owner, the duties of the agents are controlled by Real Estate Brokers, Salesmen, and Property managers [Act], S.C. Code Ann. § 40-57-5 *et seq.* and appropriate provisions of The Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-10 *et seq.*

Principles of statutory interpretation.

In a very remarkable Opinion in *Wieters v. Bon-Secours-St. Francis Hospital, Inc.*, 378 S.C. 160, 662 S.E.2d 430 (Ct.App. 2008), this Court interpreted the principles of statutory interpretation: (i) The issue of interpretation of a statute is a question of law for the court; (ii) The cardinal rule of statutory interpretation is to determine the intent of the legislature; (iii) The legislature's intent should be ascertained primarily from the plain language of the statute; (iv) When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning; (v) If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself; (vi) A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers; and (vii) 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. *Id.*, at 168-170, 662 S.E.2d at 434-436. (Internal citations omitted).

In its November 23, 2016 unpublished Opinion, the Court determined, "The circuit court correctly found Respondents were not required to provide the HPA disclosure to Koola. See S.C. Code Ann. § 27-31-430 (2007) (requiring "*the lessee, sole owner, or co-owner*" of a building being converted into a condominium to provide a written disclosure of the building's condition to all prospective purchasers (emphasis added); *Home Bldg. & Loan Ass'n v. City of Spartanburg*, 185 S.C. 313, 321, 194 S.E. 139, 142 (1937) ("Full effect must be given to each section [of a statute], and the words must not be added to or taken from the statute.")

This Court erred in its Opinion because: (i) the Court did not determine the intent of the legislature in S.C. Code Ann. § 27-31-430 (2007); (ii) the Court failed to recognize that the plain language of S.C. Code Ann. § 27-31-430 (2007) did not reveal the legislature's intent; (iii) the plain language of S.C. Code Ann. § 27-31-430 (2007) revealed only the duty of the lessee, sole owner, or co-owner of a building being converted into a condominium when he sells himself the converted condominium to the public, and it did not reveal the duty of an exclusive real estate agent when he sells the converted condominium on behalf of the lessee, sole owner or co-owner; (iv) the Court failed to search for the legislative intent beyond the borders of the act itself and limited itself to the plain language of the act; (v) this Court failed to interpret S.C. Code Ann. § 27-31-430 (2007) giving it a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.

Because of these failures, this Court's November 23, 2016 Opinion was so

erroneous that it led to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. The developer/seller argued that he hired Trademark and Carolina One to sell the converted condominiums and to convey statutorily required disclosure reports to prospective buyers, (R. p. 040, line 8-line 16). Trademark admitted to these claims, (R. pp. 044-045). Both agents, however, sold converted condominiums to prospective buyers, but did not convey HPA-mandated disclosure report to any one of them. The end result was that the prospective buyers bought substandard Cambridge Lakes condominiums. As a result, Koola suffered serious damages. Had this Court interpreted SCHPA under the strict principles of statutory interpretation, it would have come to the conclusion that: (i) Protection of converted condominium buyers is the sole legislative intent of SCHPA; (ii) The duties of Real Estate brokers/agents, when they are selling converted condominiums, are controlled by Real Estate Brokers, Salesmen, and Property managers [Act], S.C. Code Ann. § 40-57-5 *et seq.* and appropriate provisions of The Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-10 *et seq.*; and (iii) Respondents had the duty to provide HPA-mandated disclosure report to Koola. "Our legislature continues to place South Carolina in the vanguard of consumer protection". *Lane v. Trenholm Building Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976). South Carolina Appellate Courts' policy of protecting the home buyers from latent defects is evident in *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, at 384 S.E.2d at 736. (1989) and *Terlinde v. Neely*, 275 S.C. 395, 399, 271 S.E.2d 768, 770.

In *Pascoe v. Wilson and Pascoe v. Parks*, 416 S.C. 628, 644-647, 788 S.C.2d 686, 695-696 (2016), respondent Wilson argued before the Supreme Court that under the provisions of South Carolina Grand Jury Act, S.C. Code Ann. § 14-7-1630(B) (Supp.

2015): (i) only the elected Attorney General is the sole individual authorized to initiate a state grand jury investigation; and (ii) the Attorney General's authority to initiate a state grand jury is non-delegable. The Supreme Court found that "the strict interpretation of the term 'Attorney General' – to require the personal signature of the elected official – would lead to an absurd result." The Supreme Court made the following findings:

"Were we to hold that only the elected office holder is authorized to initiate a state grand jury investigation, then even where the Attorney General himself became the subject of an investigation, only he could initiate a state grand jury proceeding in the case against him. We conclude such a holding would lead to an absurd result...([T]he court will construe a statute so as to escape an absurdity and carry the intention into effect). A similar absurd result would arise where the Attorney General resigned or was rendered incapacitated, the effect of which would be that no state grand jury would go forward pending the election of and qualification of, his successor. We find such absurd results could not have been intended by the General Assembly...." (Internal citations omitted).

Id., at 644-646, 788 S.E.2d at 695. The Court concluded that the General Assembly intended that the individual acting with the authority of the attorney General may lawfully seek to impanel a state grand jury.

Koola requests this Court to review its statutory interpretation of Horizontal Property Act and make a fresh determination whether the respondents are liable to convey HPA-mandated disclosure report to Koola.

III c. If this Court, upon review, determines that the respondents are liable to Koola for failure to provide HPA-mandated Disclosure report, they would be held liable to Koola for violation of SCUPTA.

Koola had argued that respondents are liable to Koola 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.23, line 19-p. 24, line 14).

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, S.C. Code Ann. § 39-5-10, *et seq.*, which is the legislative mandate of S.C. Code § 27-31-430. For this reason, respondents are automatically liable to appellant for violation of SCUTPA.

Respondents are also liable to Koola for unfair trade practices under SCUTPA generally, because: (i) They made a misrepresentation while selling converted condominium to Koola; (ii) Their 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) Their action has repetition.

If this Court rules favorable for Koola for his claims for violation of SCHPA, the respondents would also be held liable to Koola for violation of SCUPTA.

III d. If this Court, upon review, determines that the respondents are liable to Koola for failure to provide HPA-mandated Disclosure report, they would be held liable to Koola for Negligence and Breach of Contract and warranty.

Koola had argued that respondents are liable to Koola for Negligence and Breach of Contract/Warranty.

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).

Koola has represented to the Court that the respondents: (i) Owed a duty to provide HPA-mandated Disclosure report to Koola, which was established through 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 Koola; (iii) Had actual knowledge that developer/seller did not provide HPA-mandated Disclosure report to Koola; (v) Did not inform the develop/seller in writing that he has to provide HPA-mandated Disclosure report to Koola as mandated by S.C. Code Ann. § 27-50-70(A). Carolina One sold Koola a converted condominium claiming that appellant was buying a "Quality Product for Excellent Price", (R. p. 078-line 38).

The condominium that Carolina One sold Koola was riddled with serious construction defects. Because of the ensuing construction defects lawsuit (R. pp. 020-025), and because of the stated liability of appellant for \$92,307 (R. p. 025, lines 8-10; Koola's Reply Brief to Carolina One, p. 1, line 30-p. 2, line 10), Koola could not sell his condominium during the 2008-2010 period, which rendered Koola insolvent. Consequently, Koola suffered serious damages and now faces imminent foreclosure. Respondents' misrepresentation was the proximate cause of the harm that Koola suffered. They should have the foreseeability that certain damages will occur when they failed to comply with statutory requirements while selling a converted condominium. (R. pp. 284-285; p. 313, line 8-p. 315, line 14).

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.

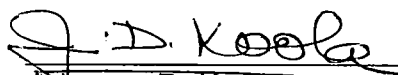
For the same arguments as for Negligence, respondents are also liable to Koola for Breach of Contract/[Express and Implied] Warranty.

If this Court rules favorably for Koola for his claims for violation of SCHPA, the respondents would also be held liable to Koola for Negligence and Breach of Contract and Warranty.

CONCLUSION

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

Respectfully submitted,



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

Appellant pro se

December 22, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
DEC 28 2016
SC 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

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.

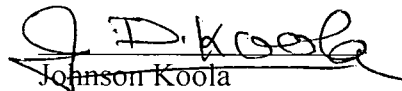
PROOF OF SERVICE

I, Johnson Koola, certify that, I have served a copy of appellant's Petition for Rehearing on the following Counsels of Record, by depositing a copy of the same, postage paid, in the US mailbox on Dec. 22, 2016:

R. Michael Ethridge, Esq.
Suzanne E. Hogg, Esq.
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40 Calhoun Street, Suite 400
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Carolina One Real Estate

December 22, 2016


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December 22, 2016

RECEIVED

DEC 28 2016

SC Court of Appeals

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

Re: Johnson Koola v. Cambridge Two, LLC. et al.
Case No.: 2015-000111

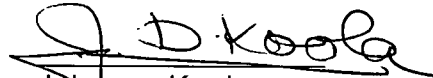
Sub: Appellant's Initial Petition for Rehearing

Dear Honorable Kitchings:

I am the appellant pro se in the above appeal. I am now filing appellant's Petition for Rehearing. Enclosed please find seven copies of the Petition with proof of service and a check for \$25 as filing fee. I have served copies of the same on the counsels of record for the respondents.

I thank you for your kind actions.

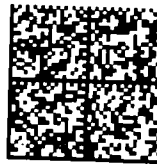
Sincerely yours,



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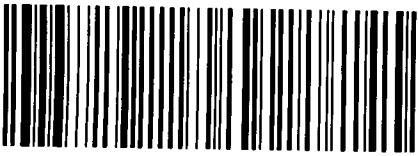


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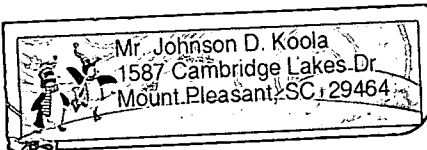
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