PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Unpublished Opinion No. 2016-UP-485
(S.C. Ct. App. filed on November 23, 2016)

Johnson Koola,..~~Appellant~~, Petitioner

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 A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner/petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 7, 2016.

QUESTIONS PRESENTED

I A DID THE COURT OF APPEALS ERR IN RULING THAT THE RESPONDENTS WERE NOT LIABLE TO KOOLA TO DELIVER HPA-MANDATED DISCLOSURE REPORT BECAUSE THE COURT MISAPPREHENDED THE AGENCY LAWS AND INTERPRETED SOUTH CAROLINA HORIZONTAL PROPERTY ACT WITHOUT DETERMINING THE LEGISLATIVE INTENT?

I B. DID THE COURT OF APPEALS ERR IN RULING THAT THE RESPONDENTS WERE NOT LIABLE TO KOOLA FOR VIOLATION OF SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT?

II A. DID THE COURT OF APPEALS ERR IN RULING THAT THE RESPONDENTS WERE NOT JOINT TORTFEASORS?

II B. DID THE COURT OF APPEALS FAIL TO FIND THAT THE RESPONDENTS BREACHED FIDUCIARY DUTY TO KOOLA?

II C. DID THE COURT OF APPEALS FAIL TO HOLD THE RESPONDENTS LIABLE TO KOOLA FOR NEGLIGENCE?

STATEMENT OF THE CASE

Appellant-Petitioner Johnson Koola ("Koola") seeks *certiorari* regarding the Court of Appeals' decision in *Johnson Koola v. Cambridge Two, LLC et al.*, Unpublished Opinion No. 2016-UP-485 filed on November 23, 2016; reh'g denied, March 7, 2017. (A. pp. 465-468, pp. 500-501).

There are special and important reasons why *certiorari* should be granted: this Court has not yet interpreted the South Carolina Horizontal Property Act ("SCHPA"), S.C. Code Ann. § 27-31-430, to determine whether the real estate licensees/brokers/agents who are selling converted condominiums[1] on behalf of and under the actual authority of the developers/sellers/owners ("owners") had the duty to deliver S.C. Code Ann. § 27-31-430-mandated Disclosure Report ("HPA-mandated Disclosure Report") to propsective buyers of converted condominiums.

In the case at bar filed in November 2010, Koola brought claims against Trademark Properties, Inc. ("Trademark") and Carolina One Real estate ("Carolina One") (collectively, "respondents") alleging *inter alia* that they did not deliver HPA mandated-Disclosure Report to Koola when he purchased a condominium in 2004. (A. pp. 086-092). In 2004, Koola: (i) Entered into a Buyer Representation Agreement (A. pp. 068-069) with Carolina One, (ii) Signed a Consent to Dual Agency agreement (A. pp. 076-077); and (iii) Signed a contract to purchase a condominium in Cambridge Lakes in Mount Pleasant, South

[1] Condominiums converted from apartments under the provisions of S.C. Code Ann. § 27-31-10 *et seq.* are known as converted condominiums.

Carolina, from owners, Cambridge Two, LLC and Albert Estee. (A. pp. 075). Before purchase, Carolina One delivered a copy of the Master Deed (A. p. 081) and Residential Property Condition Disclosure Statement under S.C. Code Ann. §§ 27-50-40, 50 ("Code §§ 27-50-40, 50-mandated disclosure Report") to Koola.

In June/July 2008, Koola was attempting to sell his condominium to enable him to pay off his mortgage related debts. In June 2008, several Cambridge Lakes homeowners and the Homeowners Association ("HOA") initiated a construction defects lawsuit[2] against Trademark and other parties. In 2010, the plaintiffs in the case amended their complaint twice alleging *inter alia* violation of S.C. Code Ann. § 27-31-430. Thus, only in 2010, Koola learned that the condominium he purchased was a converted condominium, and he had the right to receive HPA-mandated Disclosure Report before purchase. Because of the lawsuit alleging massive defects and SCHPA violations, he could not sell his unit in 2008 and thereafter. As a result, Koola suffered irreparable damages; currently, he faces imminent foreclosure.

In November 2010, Koola initiated a civil action against Trademark and Carolina One *inter alia* for: (i) Their failure to provide HPA-mandated Disclosure Report; (ii) Breach of Fiduciary Duty; (iii) Fraud; and (iv) Negligence. In 2014, the Trial Court ruled that respondents were not liable to deliver HPA-mandated Disclosure Report to Koola. On Appeal, the Court of Appeals affirmed the Trial

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

The lawsuit claimed $8 million as damages, which is pro-rated to $92,307 damages in a three-bedroom condominium.

Court's Order. Petitioner now seeks a writ of certiorari to review the Court of Appeals' denial of his appeal.

ARGUMENT

I a. Because the Court of Appeals misapprehended the Agency Laws and interpreted South Carolina Horizontal Property Act without determining the Legislative Intent, the Court ruled that respondents are not liable to deliver HPA-mandated Disclosure Report to Koola.

In the Court of Appeals and the Circuit Court (A. p. 490, line 22-p. 496, line 21; p. 443, line 9-p. 450; p. 396-p. 401, line 16; p. 340, line 21-p. p. 349, line 18; p. 306, line 7-p. p. 311, line 5; p. 127, line 10-p. 132, line 23), Koola argued that:

(i) The *preparation* of the HPA-mandated Disclosure Report through a State licensed architect or engineer is the sole responsibility of the lessee or sole owner under all circumstances;

(ii) The *delivery* of the HPA-mandated Disclosure Report is the duty of the lessee or sole owner when he sells the converted condominium himself; and

(iii) The *delivery* of the HPA-mandated Disclosure Report is the duty of the licensee/broker/agent when: (a) The lessee or sole owner as Principal has authorized the real estate licensee/broker/agent to deliver HPA-mandated Disclosure Report to prospective buyers and (b) The licensee/broker/agent is acting as intermediary between seller and buyer because of the stipulation in the Listing Agreement which bars direct contact between seller and buyer. (A. p. 034, lines 62-63).

Duty to Deliver Disclosure Reports in the conveyance of converted condominiums

Converted condominiums include *units/apartments individually and*

exclusively owned by the condominium owners (just as conventional residential real property) as well as *common elements owned collectively by all the condominium owners*, and are conveyed as residential real property. *Prima facie*, South Carolina laws mandate that seller of converted condominiums should provide Code §§ 27-50-40, 50-mandated Disclosure Report and *additionally*, HPA-mandated Disclosure Report to prospective buyers.

(i) "The *owner* of the real property shall *furnish* to a purchaser a written disclosure statement...." S.C. Code Ann. § 27-50-40. "The *owner* of real property...shall deliver to the purchaser the disclosure form...before a real estate contract is signed by the purchaser and owner...." S.C. Code Ann. § 27-50-50.

(ii) "Whenever the lessee, sole owner, or 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 the recordation to all prospective purchasers...as to the physical condition of the building...." S.C. Code Ann. § 27-31-430. These statutes, S.C. Code Ann. §§ 27-50-40, 50 and S.C. Code Ann. § 27-31-430, do not address who has the duty to deliver disclosure reports when a real estate licensee/broker/agent sells the converted condominium on behalf of the lessee/owner.

However, S.C. Code Ann. § 27-50-50(C) provides: "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 licensees, as provided by [Real Estate] Commission...." Thus, the duties of a real estate

licensee/broker/agent selling converted condominium are governed by: (i) The Agency Laws (Principal & Agent); and (ii) By Real Estate Brokers, Salesmen, and Property Managers [Act], S.C. Code Ann. §§ 40-57-137(A), 137(F), 137(H).

This Court has established real estate broker's duties as follows:

> 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 business entered to him; and that he will be responsible for any loss resulting from his failure to do so.

Lowrance v. Swaffield, 123 S.C. 331, 333; 116 S.E. 278 (1923); *Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 518-19; 334 S.E.2d 834, 836 (1985). Thus, if the lessee/owner has expressly conveyed his actual authority to the agent, then it becomes the duty of the agent to deliver Code §§ 27-50-40, 50-mandated Disclosure Report and HPA-mandated Disclosure Report to prospective buyers of converted condominiums.

S.C. Code Ann. § 40-57-137(A) establishes fiduciary duty on the part of a real estate brokerage company to the buyer client, which extends to buyer agency as well as disclosed dual agency. S.C. Code Ann. § 40-57-137(H) provides *inter alia* that a buyer's agent shall disclose to the buyer 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.

Additionally, S.C. Code Ann. § 27-50-70(A) mandates, "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 [to provide mandatory disclosure information to prospective buyers] prescribed in this article...."

Duties of Trademark and Carolina One in the sale of Cambridge Lakes condominiums

1. The developers/sellers hired Trademark and Carolina One as exclusive real estate agents to sell converted Cambridge Lakes condominiums to prospective buyers. (A. pp. 033-035). Thus, as State licensed real estate licensees/agents, they had *constructive knowledge* that: (i) They were selling converted condominiums; and (ii) The potential buyers had to be provided with mandatory disclosure reports[3].

2. After conversion of the Cambridge Lakes apartments to condominiums, the owners sent a letter entitled "Notice of Condominium Conversion and Offer to Purchase" (A. pp. 036-037) to all the Cambridge Lakes tenants in possession[4] stating *inter alia* that the owners would provide them with the HPA-mandated Disclosure Report before they buy the unit. Interested tenants were advised to contact Trademark to execute a purchase and sales agreement. Thus, Trademark and Carolina One had actual knowledge that the Cambridge Lakes condominium buyers had to be provided with HPA-mandated Disclosure Report.

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[3] Mandatory disclosure reports in the conveyance of converted condominiums include: (i) the Master Deed; (ii) Code §§ 27-50-40, 50-mandated Disclosure Report; and; (iii) HPA-mandated Disclosure Report.

[4] Prospective buyers like Koola, who were not tenants in possession, did not receive the letter under reference and were unaware of the fact that the condominium offered for sale was a converted condominium, and they should have received HPA-mandated Disclosure Report before they buy the condominium.

3. In an Affidavit filed in the Court (A. p. 040), owners affirmatively stated, "[Owners] relied upon Trademark [and Carolina One who followed Trademark] to handle all required communication with the prospective purchasers, and relied further upon Trademark [and Carolina One] to convey information that was required to be conveyed to prospective purchasers of the Cambridge Lakes Condominiums[5]." Thus, owners expressly conveyed their actual authority to Trademark and Carolina One to deliver: (i) The Master Deed; (ii) Code §§ 27-50-40; 50-mandated Disclosure Report; and: (iii) HPA-mandated Disclosure Report to prospective buyers.

4. "The Exclusive Right to Sell Listing Agreement for Residential Multiple Listing" (A. p. 034, lines 62-63) signed between owners and Trademark [and Carolina One] stipulated, "Owner shall not deal directly with propsective buyers of this property during the period of this agency...." Because of this stipulation, owners were barred from contacting prospective buyers, and hence, Trademark and Carolina One had the duty to deliver statutorily required disclosure information[5] to all prospective buyers.

Breaches of Duty by Trademark and Carolina One

During the period August 2012 to May/June 2003, Trademark pre-sold/sold nearly thirty (30) units in Cambridge Lakes. Trademark delivered the Master Deed and Code §§ 27-50-40, 50-mandated Disclosure Report but not HPA-mandated Disclosure Report to any of the condominium buyers. In

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[5] Mandatory disclosure reports in the conveyance of converted condominiums include: (i) the Master Deed; (ii) Code §§ 27-50-40; 50-mandated Disclosure Report; and: (iii) HPA-mandated Disclosure Report.

May/June 2003, the owners terminated the listing agreement with Trademark stating that it did not provide statutorily required Disclosure information – HPA-mandated Disclosure report in the present context – to condominiums buyers. (A. pp. 044-045). This would confirm to this Court that: (i) The owners had expressly conveyed to Trademark and [Carolina One] their actual authority to deliver HPA-mandated Disclosure Report to prospective buyers; and (ii) Trademark breached its duty to deliver HPA-mandated Disclosure Report. Immediately after terminating Trademark's listing agreement, owners hired Carolina One as the exclusive listing agent to continue the sale of the converted Cambridge Lakes condominiums.

In January 2004, Koola signed an agreement to buy a Cambridge Lakes condominium. (A. p. 070-075). Either before the signing the agreement to buy, or at the time of signing the agreement to buy, Carolina One never informed Koola that it was selling a converted condominium to him. The MLS Listing for the sale of Cambridge Lakes condominiums just stated that the buyers were buying a condominium; it did not state that they were buying a converted condominium – a misrepresentation. It also claimed, "Excellent Price for Quality Product." Shortly after signing the agreement to buy, Carolina One delivered Master Deed (A. p. 081) and Code §§ 27-50-40, 50-mandated Disclosure Report but not HPA-mandated Disclosure Report to Koola. (A. pp. 082-085). Carolina One also breached its duty to deliver HPA-mandated Disclosure Report to Koola and all other buyers. Being a first time homebuyer, Koola was not aware that he had the right to receive the HPA-mandated Disclosure Report in 2004. As Koola's

fiduciary and Carolina One's client, Carolina One failed in its statutory duty under S.C. Code Ann. § 40-57-137(H)(2)(c) to disclose to Koola all relevant facts concerning the transaction, which were actually known to Carolina One – specifically to inform Koola that he was buying a converted condominium, and he had the right to receive the HPA-mandated Disclosure Report. Carolina One also failed in its duty under S.C. Code Ann. § 27-50-70(A) to inform the developers/sellers of their obligations to prepare the HPA-mandated Disclosure Report and deliver it through Carolina One to Koola.

Court proceedings

Carolina One argued in the Court that its statutory duty was limited to provide only Code §§ 27-50-40, 50-mandated Disclosure Report and not HPA-mandated Disclosure Report to Koola – a misrepresentation. (A. p. 165). State of South Carolina Residential Property Condition Disclosure Statement (A. p. 082), which was produced before the Court, stated in pertinent parts, "If you [owner] are assisted in the sale of your property by a licensed real estate broker or salesperson, *you remain solely responsible for completing and delivering*[6] this statement to the purchaser... (A. p. 082, lines 26-27). Without verifying the veracity of Carolina Ones' assertion, the Trial Judge ruled that Carolina One was not liable to deliver HPA-mandated Disclosure Report to Koola.

Trademark took the position that it did not sell a condominium to Koola, and therefore, it was not liable to Koola for the delivery of HPA-mandated disclosure report. Without determining whether Trademark was a joint tortfeasor,

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[6] Agents' duty to deliver residential property disclosure reports is derived from agency laws and not from S.C. Code Ann. §§ 27-50-40, 50.

and whether defense of privity was applicable to joint tortfeasor Trademark, the Trial Judge ruled that Trademark was also not liable to provide HPA-mandated Disclosure Report to Koola.

In its November 23, 2016 unpublished Opinion, the Court of Appeals affirmed the Trial Court's finding on Koola's HPA-claims: the Court did not interpret S.C. Code Ann. §§ 27-50-40, 50, the Agency Laws provided by *Lowrance* and *Lengel*, and the significance of the stipulation in the listing agreement (A. p. 034, lines 62-62) barring any contact between owners and buyers.

Pascoe v. Wilson sets the Precedent for the Statutory Interpretation of S.C. Code Ann. § 27-31-430.

The Court of Appeals interpreted S.C. Code Ann. § 27-31-430, "*the lessee, sole owner, or co-owner* of a building being converted into a condominium is required to provide a written disclosure of the building's condition to all prospective purchasers." The literal interpretation of S.C. Code Ann. § 27-31-430 would imply that only the lessee, sole owner, or co-owner shall *sell* a converted condominium and *should* deliver HPA-mandated Disclosure Report. No one else shall sell a converted condominium. By literal interpretation, an agent is prohibited from selling the converted condominium. But the fact that the agent was selling the converted condominium should have alerted the Court to determine the legislative intent and a broader statutory interpretation of S.C. Code Ann. § 27-31-430.

The principles of statutory interpretation provides in pertinent part: (i) The cardinal rule of statutory interpretation is to determine the intent of the legislature;

(ii) If the language of an act is uncertain as to legislative intent, the construing court may search for the that intent beyond the borders of the act itself; and (iii) A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Wieters v. Bon-Secours-St. Francis Xavier Hospital, Inc.*, 378 S.C. 160, 170; 662 S.E.2d 430, 435-36 (Ct.App. 2008); Reh'g denied, 2008 S.C. App. LEXIS 330 (Ct.App. (2008). (Internal citations omitted). Had the Court of Appeals adopted a broader interpretation of S.C. Code Ann. § 27-31-430, it would have come to the conclusion that: (i) Protection of the condominium buyers is the legislative intent of S.C. Code Ann. § 27-31-430; and (ii) The agents – Carolina One and Trademark in the case at bar – acting under the actual authority of the owners and acting as intermediaries between owner and buyer because of the stipulation in the Listing Agreement, which barred direct contact between owner and buyer, had the duty to deliver HPA-mandated Disclosure Report to Koola.

In *Pascoe v. Wilson* and *Pascoe v. Parks*, 416 S.C. 628, 644-47; 788 S.C.2d 686, 695-96 (2016), respondent Wilson argued before this 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." This Court, then, concluded, "[T]he General Assembly intended that *the*

individual acting with the authority of the Attorney General may lawfully seek to impanel a state grand jury.

This Court, upon review, should reverse the Court of Appeals and determine that the agents – Carolina One and Trademark in the case at bar – acting under the actual authority of the owners and acting as intermediaries between seller and buyer because of the stipulation in the Listing Agreement had the duty to deliver HPA-mandated Disclosure Report to Koola.

The Law of the Case Doctrine is applicable to Koola's case.

In the Court of Appeals and the Trial Court, Koola presented the Law of the Case Doctrine in support of his SCHPA claim. (A. p. 487, line 12-p. 16, line 21; p. 454, line 4-p. p. 455; p. 400, line 6-p.401, line 16; p. 347, line 9-p. 349, line 18; p. 309-p. 311, line 5; p. 131, line 9-p.132, line 24). In the Cambridge Lakes homeowners' lawsuit[7] against Trademark ("*Lawsuit I*") and other parties, the Trial Judge denied Trademark's arguments *inter alia* that It had no duty to provide HPA-mandated Disclosure Report to any Cambridge Lakes condominium buyers; (ii) Trademark was not liable for violation of SCUTPA to homeowners; and (iii) Trademark was not liable for Negligence, Breach of Duty and Contract/Warranty. (A. pp. 026-032). The Trial Judge also issued a written Order. (A. pp. 015-019). Trademark did not file a Motion for Reconsideration of the Order. It also did not file an Appeal. Thus, the Order of the Trial Judge in *Lawsuit I* became the Law of the Case. *Sloan Const. Co. Inc. v. Southco Grassing, Inc.,* 395 S.C. 164, 169; 717 S.E.2d 603, 606 (2011). Both *Lawsuit I* and Koola's litigation against

[7] 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.

Trademark involved the Cambridge Lakes Homeowners as plaintiffs and Trademark as a defendant, and both cases involved the same primary issue – violation of S. C. Horizontal Property Act, S.C. Code Ann. § 27-31-430. The Law of the Case in *Lawsuit I should be available to Koola*. In its November 23, 2016 Opinion, the Court of Appeals *erroneously determined* that the law of the case doctrine is inapplicable to Koola's case because the denial of summary judgment to Trademark in *Lawsuit I* is "interlocutory" and "is not a final order".

First, the Trial Judge in *Lawsuit I* issued a written Order, and hence it is an appealable Order. *Woodson v. DLI Properties, LLC,* 406 S.C. 517, 528; 743 S.E.2d 428, 433-34 (2014). Second, the Order in *Lawsuit I* denied Trademarks argument that it was not liable to provide HPA-mandated Disclosure Report to Cambridge Lakes homeowners and hence, involved certain merits, which finally determined some substantial matter forming the whole defense under S.C. Code Ann. § 14-3-330(1). *Thornton v. South Carolina Electric & Gas Cp.*, 391 S.C. 297, 306; 705 S.E.2d 475, 480 (Ct.App. 2011). Third, the Order in *Lawsuit I* had the effect of striking out "an answer" and Trademark could not continue its defense thereby affecting a substantial right under S.C. Code Ann. § 14-3-430(2). *Hagood v. Sommerville*, 362 S.C. 191, 195; 607 S.E.2d 707, 709 (2005). 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." Trademark did not file a Motion for Reconsideration or an appeal. Instead, it settled the case with the homeowners and the HOA 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).

For the reasons stated, this Court should reverse the Court of Appeals' finding that the Law of the Case in Lawsuit I is not applicable to Koola's case.

Public Policy

"Our legislature continues to place South Carolina in the vanguard of consumer protection". *Lane v. Trenholm Building Co.*, 267 S.C. 497, 504; 229 S.E.2d 728, 731 (1976). This Court also abolished Privity of contract as a defense to an implied warranty action. *Kennedy v. Columbia Lumber and Mfg Co., Inc.*, 299 S.C. 335, 344; 384 S.E.2d 730, 736 (1989). The public policy of the State demands that buyers of converted condominiums should receive the same protection as the buyers of any other residential real property.

I B. Trademark and Carolina One are liable to Koola for violation of SCUTPA.

Koola had argued that Trademark and Carolina One are liable to Koola for violation of South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.* ("SCUTPA") (A. p. 496, line 22-p. 497, line 11; p. 456, lines 1-17; p. 401, line 17-p. 402, line 16; p. 349, line 19-p. 350, line 14; p. 089, lines14-24).

A real estate licensee's/agent's duty to deliver Code § 27-31-430-mandated Disclosure Report to prospective buyers of converted condominiums is derived from Agency Laws found in *Lowrance* and *Lengel*. A failure to make the disclosure statement under S.C. Code § 27-31-430 automatically constitutes a violation of the SCUTPA, which is the legislative mandate of SCHPA. Koola has no duty to prove that respondents violated SCUTPA. For this reason, Trademark

and Carolina One are automatically liable to Koola for violation of SCUTPA. In Cambridge Lakes, thirty percent (30%) of the homeowners lost their condominiums to foreclosure and short sales.

II A. The Court of Appeals did not determine whether Trademark and Carolina were Joint Tortfeasors.

Koola has alleged that: (i) Conversion of the Cambridge Lakes apartments into condominiums by owners and by Trademark; and (ii) Subsequent sale of the converted condominiums to the general public initially by Trademark and then by Carolina One after termination of Trademark without delivering the HPA-mandated Disclosure Report cannot practically be divided and is a joint tort. Carolina One perpetuated the tort initiated by Trademark in the sale of the converted Condominiums. Trademark and Carolina One are joint tortfeasors together with owners. (A. p. 475, line 18-p. 480, line 10; p. 440, line 16-p.p. 443; p. 390, line 5-p.395; p. 337, line 19-p. 340, line 20; p. 126-p. 127, line 9).

Trademark was hired to convert and market all the Cambridge Lakes condominiums to prospective buyers including Koola. Trademark assumed the following specific duty of care to sell a condominium to Koola: (i) Converted the apartment into condominium which Koola bought subsequently; (ii) Negotiated listing agreement and priced Koola'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. (A. p. 425, line 19-p. 480, line 10; p. 440, line 16-p. p. 443, line 8). But for its premature termination as the listing agent, Trademark could not sell a condominium to Koola. After termination of Trademark as the listing agent,

Carolina One continued the marketing of Cambridge Lakes condominiums; Carolina One continued from where Trademark was left off.

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. "Joint tortfeasor" refers to "*those* who act together in committing wrong, or *whose acts if independent of each other, unite in causing single injury*"; "*two or more persons jointly or severally liable in tort for the same injury to person or property.*" *Vermeer Carolina' Inc. v. Wood/Chuck Chipper Cp.*, 336 S.C. 53, 64; 518 S.E.2d 301, 307 (Ct.App. 1999) citing Black's Law Dictionary 839 (6th ed. 1990). (Emphasis added). Court of Appeals interpretation of "joint tortfeasors"" would make it abundantly clear to this Court that Trademark and Carolina One are joint tortfeasors.

The Supreme Court has abolished privity as a defense for joint tortfeasors in the State of South Carolina. *Kennedy,* 299 S.C. at 344; 384 S.E.2d at 736. (Internal citations omitted). In the absence of privity as a defense, Trademark cannot argue that it was not a tortfeasor because it did not sell a condominium to Koola.

> "A tortfeasor may be liable to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party....South Carolina Courts have "allowed the imposition of tort liability to a third party as a result of contractual obligations despite the absence of privity between the tortfeasor and the third party. The key enquiry is foreseeability, not privity."

Johnson v. Sam English Grading, Inc., 412 S.C. 433, 449; 772 S.E.2d 544, 552 (Ct.App. 2015), (internal citations omitted).

In *Hollifield v. Keller*, 238 S.C. 584, 590; 121 S.E.2d 213, 215 (1961), this Court affirmed the Order of the Trial Court in an action brought by *respondent* against as *shop owner*, a *shop lessee* and *the City of Columbia*, when respondent got injured on skidding on a sheet of ice, formed on the street by the alleged negligence of the defendants and stuck a telephone pole, after determining that single injury, which is the proximate result of separate and independent acts of negligence of two or more parties, subjects the tortfeasors, even in the absence of community...,to a liability which is both joint and several, is a proposition recognized and approved in this state...." (Internal citations omitted).

In *Barker v. Sauls*, 289 S.C. 121, 122; 345 S.E.2d 244 (1986), this Court reversed the Trial Court's decision that denied appellant's fraud and negligence claims in a worker's compensation case against the respondent after determining that a tortfeasor's liability exists independently of contract, and rests upon the tortfeasor's duty to exercise due care.

From the statements made here and after review of the records as cited, this Court should find that Trademark and Carolina One are joint tortfeasors and are jointly and severally liable to Koola.

II B. The Court of Appeals has not made a determination whether Trademark and Carolina One breached Fiduciary Duty, which they owed Koola.

In the Trial Court and the Court of Appeals, Koola claimed that Carolina One and Trademark breached Fiduciary Duty, which they owed Koola. (A. p.

480, line 11-p. 484, line 7; p. 451-p. 454, line 3; p. 398, line 13-p. 399, line 6; p. 344, line 21-p. 347 -p. 347, line 8; p. 301, line 7-p. 303).

In January 2004, Koola: (i) Entered into a Buyer Representation Agreement with Carolina One to represent Koola in the acquisition of real property as an exclusive Buyer's Agent (A. pp. 068-069); and (ii) Signed a Consent to Dual Agency Agreement with Carolina One, (A. pp. 076-077). These agreements established three types of closely related relationships between Koola and Carolina One: (i) Koola became the principal and Carolina One became the broker/agent; (ii) Koola became a client of Carolina One rather than a customer; and (iii) Fiduciary relation between the parties.

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), the Court of Appeals 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 a real estate transaction in which the broker is engaged, affect the principal's interest, and might influence the principal's action and affirmed the Trial Court's judgment against the agent. In *Gilbert v. Mid-South Mach. Co., Inc.,* 267 S.C. 211, 221, 227 S.E.2d 189, 193 (1976), this 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 became a client of Carolina One rather than a customer. Under S.C. Code Ann. § 40-57-137(F), (H), which establishes real estate

broker/agent/licensee's specific duties to client, a licensee/agent may not knowingly give false or misleading information about the condition of the property and should disclose to the buyer all relevant facts concerning the transaction which are known to the licensee or, when acting in a reasonable manner, should have been known to the licensee. Koola chose to buy the condominium as a client of Carolina One rather than a customer, because Koola, a first time homebuyer, could expect expert and reliable advice from Carolina One and 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). Koola established fiduciary relation with respondents after he signed buyer representation agreement with Carolina One. (A. pp. 068-069; pp. 076-077). Carolina One and Trademark could not deny their statutorily created fiduciary duty to Koola. 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 tortuous conduct to the person, for whom he should act. Restatement (Second) of Torts § 874 Violation of Fiduciary Duty (1979) and

Comment b thereto. 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)

In *May v. Hopkinson*, 289 S.C. 549, 559, 347 S.E.2d 508, 513 (Ct. App. 1986), the Court of Appeals 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 *Lawlor v. Scheper*, 232 S.C. 94, 98-99, 101 S.E.2d 269, 270-71 (1957), this Court *affirmed* the decision of the Trial Court that awarded actual and punitive damages to respondents for the alleged fraudulent misrepresentation by the vendor and his agent in a real estate transaction.

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.

In *Byrn v. Walker*, 275 S.C. 83; 267 S.E.2d 601 (1980), this Court reversed and remanded the Trial Court's Order after determining that the agent was liable for his tortuous misrepresentations, and the seller was liable for the misrepresentations the agents made to the buyer on behalf of the seller.

In *Lengel,* 286 S.C. at 518; 334 S.E.2d at 836, the Court of Appeals affirmed the decision from the trial court that awarded the purchasers actual damages for the negligence of their real estate broker for failure to disclose.

This Court, upon review, should confirm that Trademark and Carolina One owed fiduciary duty to Koola, and they breached that duty to Koola.

II C. The Court of Appeals did not hold Trademark and Carolina One liable to Koola for Negligence.

Koola had argued that Trademark and Carolina One are liable to Koola for Negligence. (A. p. 497, line 12-p. 499, line 4; p. 456, line 18-p. 458, line 19; p. 402, line 17-p. 404, line 20; p. 350, line 15-p. 352, line 2; p. 313, line 20-p. 315, line 14; p. 135, line 8-p. 136, line 3; p. 90, lines 5-37)

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 this Court that the respondents owed: (i) A duty to deliver HPA-mandated Disclosure Report to Koola (this document, *supra*, pp 4-15); (ii) Fiduciary Duty to Koola (this document, *supra*, pp. 18-21); and (iii) Duty to Disclose material information affecting the transaction (this document, *supra*, 4-15). They failed in their duty Under S.C. Code Ann. § 27-50-70(A) to inform the owners that they should prepare the HPA-mandated Disclosure Report and deliver it through them (Carolina One and Trademark) to Koola and other buyers.

The respondents sold a condominium to Koola stating "Excellent Price for Quality Product.) (A. p. 078, line 38). The condominium that respondents sold Koola was riddled with serious construction defects and SCHPA violations. (A. p. 025, lines 8-10; p. 202, lines 6-8; p. 206,lnes 5-7). Koola could not sell his condominium during the 2008-2010 period to clear off mortgage dues, 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 had the foreseeability that certain damages would 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).

Developers/sellers hired Trademark because of its proven expertise in the conversion and marketing of converted condominiums. (A. pp. 039-040; pp. 44-45). It had successfully converted and marketed converted Montclair Condominiums in Mt. Pleasant, SC, where it delivered HPA-mandated Disclosure Report to prospective buyers. (A. p. 040, lines 2-7). But, it failed to deliver HPA-

mandated Disclosure Reports to prospective buyers in Cambridge Lakes. Developers/sellers terminated the services of Trademark because of its failure to provide the HPA-mandated Disclosure Reports. (A. pp. 044-045). Carolina One was hired after the termination of Trademark. Therefore, it had actual knowledge that developers/sellers had terminated the services of Trademark because it had failed to provide statutorily required disclosure information to prospective buyers. Under these circumstances, Carolina One should have ensured that Koola and the new buyers were provided with HPA-mandated Disclosure Report. Carolina One failed in this duty. Carolina One sold condominiums to those who were not tenants in possession in Cambridge Lakes; they were "outsiders". They were unaware of what happened between developers/sellers/owners and Trademark; they were innocent condominium buyers. Carolina One took advantage of these innocent, outside buyers and breached its duty to disclose material information relevant for transaction and failed to deliver the HPA-mandated Disclosure Report. Respondents' conduct had risen to the level of a willful, wanton, or a malicious violation of its duties to prospective buyers in Cambridge Lakes.

Trademark claims that it did not sell a condominium to Koola. Koola has shown to this Court that Trademark was a joint tortfeasor. This Court has abolished privity as a defense. Trademark and Carolina One are liable to Koola for Negligence.

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.

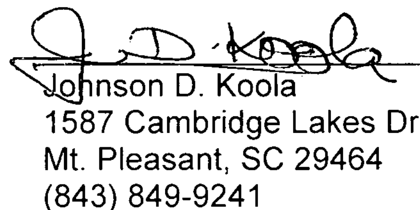
The Court of Appeals Decision in *May v. Hopkinson*, 289 S.C. 549, 559, 347 S.E.2d 508, 513 (Ct. App. 1986) that 'a purchaser of real estate who is induced to buy may affirm the contract, retain the property received under the contract, and sue at law for fraud and deceit to recover the damages sustained by reason of the fraud and affirmed the award of damages and reinstated the Master's punitive damages' is the best case law that supports Koola's contention that Trademark's and Carolina One's conduct had risen to the level of a willful, wanton, or a malicious violation of its duties to Koola.

This Court, upon review, should rule that Trademark and Carolina One are liable to Koola for Negligence and willful negligence.

CONCLUSION

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

Respectfully submitted,



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Petitioner

March 5, 2017

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
APR 06 2017
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Unpublished Opinion No. 2016-UP-485
(S.C. Ct. App. filed on November 23, 2016)

Johnson Koola,..~~Appellant,~~ Petitioner

v.

Cambridge Two, LLC, Albert V. Estee, Individually, Cambridge Lakes, LP, Stephen R. Heape, Individually and as General Partner of Cambridge Lakes LP, Cambridge Lakes Apartment Homes, a/k/a Cambridge Lakes Apartments, LP, a/k/a Cambridge Lakes Apartment Homes, LP, Classic Properties of Charleston, Inc., Cambridge Contracting, LP, Trademark Properties, Inc., Carolina One Charleston Home Team Properties, LLC, Charleston Home Team, LLC, Carolina One, and William E. Jenkinson, IV, individually,

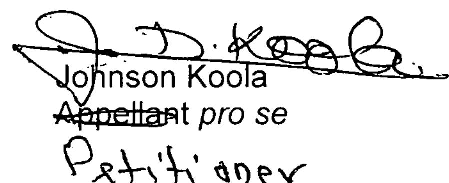
Of Whom Trademark Properties, Inc., and Carolina One Real Estate are the ....Respondents.

CERTIFICATE OF SERVICE

I, Johnson Koola, certify that on May 5, I filed a copy of appellant's Petition for Writ of Certiorari with the Clerk of the South Carolina Court of Appeals and served copies of the same on the counsels of record for the respondents:

Douglas W. MacKelcan, Esq., and Williams J. Farley, III, Esq., Carlock Copeland & Stair, LLP 40, Calhoun Street, Suite 400, Charleston, SC 29401 Counsel for Trademark Properties, Inc.

Michael C. Scarafile, Esq., Carolina One Real estate, 4024 Salt Pointe Parkway Charleston, SC 29405Counsel for Carolina One.



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~~Appellant~~ *pro se*
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