THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis Jr., Circuit Court Judge

Appellate Case No. 2017-000822
Common Pleas Case No. 2010-CP-10-9158

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.

RESPONDENT TRADEMARK PROPERTIES, LLC'S RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Court of Appeals properly hold Respondent Trademark was not required to provide Petitioner with any disclosure pursuant to the South Carolina Horizontal Property Act?

(This encompasses Petitioner's Questions I(A) and I(B)).

II. Did the Court of Appeals properly affirm the Circuit Court's ruling Respondent Trademark was not a "joint tortfeasor" with Carolina One, and, as such, not liable to Petitioner for breach of fiduciary duty or negligence?

(This encompasses Petitioner's Questions II(A), II(B), and II(C)).

COUNTER-STATEMENT OF THE CASE

Petitioner Johnson Koola ("Petitioner") filed this action against Respondent Trademark Properties, Inc. ("Respondent Trademark") and other named defendants, arising out of Petitioner's purchase and ownership of a condominium unit ("the Unit") in the Cambridge Lakes condominium development. The Complaint alleged Petitioner relied upon misrepresentations made to him during his purchase of the Unit. Petitioner further claimed he suffered damages from these misrepresentations and other non-disclosures when he subsequently attempted to sell the Unit and learned it was "virtually worthless" because of certain violations of the South Carolina Horizontal Property Act ("the HPA"). Among the other defendants, Petitioner named O'Shaughnessy Real Estate, Inc. d/b/a Prudential Carolina Real Estate n/k/a Carolina One Real Estate ("Carolina One"), the real estate office/agency involved in Petitioner's purchase of the Unit in February 2004.

Respondent Trademark timely answered the Complaint, then moved for summary judgment on the ground it was not involved in Petitioner's acquisition of the Unit. Respondent Trademark's motion was supported by the affidavit of Richard Davis, a Memorandum in Support of Summary Judgment, a Supplemental Memorandum in Support of Summary Judgment, and

Petitioner's Complaint. On October 13, 2014, Petitioner filed a Consent Order for William Jung, Esq. to withdraw as counsel, then, proceeding *pro se*, filed his memoranda and evidentiary exhibits in opposition to Respondent Trademark's Motion for Summary Judgment.

On October 22, 2014, The Honorable R. Markley Dennis, Jr. heard Respondent Trademark's Motion for Summary Judgment. On October 28, 2014, Judge Dennis issued a Form 4 Order, and, on November 3, 2014, signed a formal order granting summary judgment to Respondent Trademark based on the undisputed fact it was not involved Petitioner's purchase of the Unit. Petitioner moved to reconsider on November 12, 2014, submitting additional memoranda in support of his positions. Judge Dennis issued a Form 4 Order denying the Motion to Reconsider, finding no need for oral argument and declining to modify his previous ruling.

Petitioner filed a Notice of Appeal with the Court of Appeals on January 2, 2015. On April 2, 2015, Petitioner filed his Initial Brief and Designation of Matter to be included in the Record on Appeal. On May 1, 2015, Respondent Trademark filed its Initial Brief and Designation of Matter to be included in the Record on Appeal. On May 11, 2015, Petitioner filed a Reply Brief. The Record on Appeal was subsequently prepared, and all parties submitted final briefs. On or around July 9, 2016, Petitioner improperly filed a Motion for Certification before the Court of Appeals could consider or enter an opinion regarding the merits of his appeal. The Supreme Court denied this motion on August 18, 2016.

On November 23, 2016, the Court of Appeals affirmed the Circuit Court's Order granting Respondent Trademark's Motion for Summary Judgment. The case was decided without oral argument pursuant to Rule 215, SCACR. On or around December 22, 2016, Petitioner filed a Petition for Rehearing with the Court of Appeals. On March 7, 2017, the Court of Appeals entered an Order denying Petitioner's Petition for Rehearing, determining there was "no material

fact or principle of law" overlooked or disregarded when considering the merits of Petitioner's arguments.

This matter is now before this Court on Petitioner's Petition for Writ of Certiorari. It appears that Petitioner presents several issues for review. First, Petitioner contends the Court of Appeals misinterpreted the HPA and its purported application to Respondent Trademark. Similarly, Petitioner contends a proper interpretation of the HPA creates "automatic" liability against Respondent Trademark for violation of the South Carolina Unfair Trade Practices Act. Next, Petitioner argues the Court of Appeals failed to characterize Respondent Trademark as a "joint tortfeasor" or consider the prospect of liability in this alleged capacity. Specifically, Petitioner suggests Respondent Trademark breached a fiduciary duty it owed to Petitioner and was negligent in its alleged capacity as a "joint tortfeasor" with Carolina One.

For the reasons discussed below, Petitioner is incorrect and has failed to show any "special and important reasons" for this Court to grant a Writ of Certiorari. See Rule 242, SCACR. The Court of Appeals appropriately interpreted and applied the plain language of the HPA, 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. See S.C. Code Ann. § 27-31-430. As the Court of Appeals correctly noted in its Opinion, the plain language of the HPA renders moot any analysis of Petitioner's primary allegations because they are premised on the mistaken belief the HPA applied to Respondent Trademark. Given the absence of any "special" or "important" reason to grant a writ of certiorari, this Court should deny Petitioner's Petition.

STATEMENT OF FACTS

This lawsuit arises from Petitioner's purchase of the Unit in February 2004. The Unit is located within the Cambridge Lakes complex in Mount Pleasant, South Carolina. Cambridge Lakes was originally an apartment complex before being converted to a condominium development and sold as individual condominium units. This conversion process began in 2002. At that time, Cambridge Two, LLC was the sole owner of Cambridge Lakes. In August 2002, Cambridge Two, LLC hired Respondent Trademark as the marketing and listing agent for the condominium conversion process. Respondent Trademark never leased, owned, or co-owned any unit in Cambridge Lakes.

Respondent Trademark acted as the listing and marketing agent for Cambridge Lakes until May 2003. Between August 2002 and May 2003, Respondent Trademark completed approximately thirty (30) pre-sales of the converted condominiums. None of these pre-sales involved Petitioner or the Unit. In May 2003, Carolina One became the marketing and listing agent for Cambridge Lakes, and Respondent Trademark ceased any further involvement with the condominium conversion process.

In January 2004, Petitioner entered into a Buyer Representation Agreement with Carolina One, authorizing Carolina One to serve as Petitioner's exclusive agent. On January 24, 2004, Carolina One provided a Consent to Dual Agency and Relationship Disclosure to Petitioner, which Petitioner signed, granting Carolina One approval to act as a dual agent. In February 2004, Petitioner purchased the Unit. William E. Jenkinson, IV, from Carolina One, served as the listing agent for the transaction, and Steve Hayes, also from Carolina One, served as the seller's agent for the transaction. Respondent Trademark was not involved in any capacity with

Petitioner's purchase of the Unit, never communicating or interacting with Petitioner regarding the Unit or the Cambridge Lakes complex.

As further detailed below, a portion of Petitioner's argument relies upon the "law of the case" doctrine. As a matter of brief, but relevant background, on June 16, 2008, the Cambridge Lakes Condominium Homeowners Association, Inc. ("the HOA"), on behalf of itself and individual condominium unit owners, filed a lawsuit against Respondent Trademark and other parties, alleging defects in the construction and conversion of the condominium buildings ("the HOA lawsuit"). Out of approximately 104 unit-owners in Cambridge Lakes at that time, Petitioner was one of approximately ten (10) owners who refused to join the HOA lawsuit. In 2011, the HOA lawsuit settled against Respondent Trademark and other parties on the eve of trial.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD RESPONDENT TRADEMARK WAS NOT REQUIRED TO PROVIDE THE WRITTEN DISCLOSURE REPORT MANDATED BY S.C. CODE ANN. § 27-31-430.

A. The Court of Appeals applied well-established rules and precedent regarding statutory construction.

In his Petition, Petitioner contends the Court of Appeals misapprehended agency laws and improperly interpreted the HPA without analyzing the legislative intent of the statute. It is Petitioner, however, who is misapprehending the clear, well-defined principles of statutory construction. If a statute's language is "plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Paschall v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) (citing Miller v. Doe, 312 S.C. 444, 441 S.E.2d 319 (1994)). When the terms of the statute are clear, the court must apply those terms according to their literal

meaning. Paschall at 436, 892 (citing Adkins v. Varn, 312 S.C. 188, 439 S.E.2d 822 (1993)). A court cannot "construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope." Paschall at 437, 892 (citing Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993)). Similarly, what the legislature says in the statute is considered the best evidence of the legislative intent or will. Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001).

Pursuant to S.C. Code Ann. § 27-31-430, upon undertaking the conversion of rental units to condominiums, the "*lessee, sole owner, or co-owner* of a building" is required to deliver, in writing, certain disclosures to all prospective purchasers. This written disclosure must include the following:

(1) A written report, prepared by an independent registered architect or engineer describing the present condition of all general common elements;

(2) A good faith estimate of the remaining useful life to be expected for each item reported on;

(3) A list of any notices of uncured violations of building codes or other county or municipal regulations; and

(4) The estimated cost of curing those violations listed above.

See S.C. Code Ann. § 27-31-430.

Petitioner's case, and subsequent appeal, hinges primarily on the court's interpretation of S.C. Code Ann. § 27-31-430. Noticeably, this section is void of any reference to a marketing/listing agent or any duty imposed upon an individual or entity in this capacity to deliver these written disclosures to potential purchasers. Rather, it is the duty of the *lessee, owner,* or *co-owner* to investigate and disclose the statutorily-mandated information to prospective purchasers. There is no language within the HPA suggesting the legislature intended to expand the scope of this statute beyond the individuals specifically identified therein (i.e.,

lessees, owners, and co-owners). Had the legislature wished to do so, it certainly could have included explicit language reflecting this intent. In fact, no court in South Carolina has ever found a listing agent liable under this provision of the HPA.

Ultimately, Petitioner's argument is premised on the notion this Court should engage in the unnecessary exercise of analyzing the legislative intent of the HPA, and more specifically, S.C. Code Ann. § 27-31-430, to determine whether a listing agent is bound by the disclosure requirements set forth in the section. As the trial court and Court of Appeals have correctly noted, such an exercise is improper when the language of the statute is plain and unambiguous.

In the present case, it is hard to fathom how the legislature could have drafted the statute any clearer. By its terms, the statute imposes upon the *lessee, owner,* or *co-owner* a duty to disclose certain information regarding the condition of the converted condominiums. Petitioner offers no statutory or case law support for his claim this duty also applied to listing agents like Respondent Trademark. Accordingly, this decision does not warrant further review.

B. The Court of Appeals properly limited the scope of S.C. Code Ann. § 27-31-430, rendering moot Petitioner's argument Respondent Trademark violated the South Carolina Unfair Trade Practices Act.

Petitioner alleges Respondent Trademark violated the South Carolina Unfair Trade Practices Act in failing to deliver the HPA-mandated written disclosure report to prospective purchasers. Petitioner notes "a failure to make the disclosure required by this section shall constitute a violation of the South Carolina Unfair Trade Practices Act." See S.C. Code Ann. § 27-31-440. However, as the Court of Appeals correctly held, liability pursuant to this section may only be imposed upon the individuals specifically identified in the statute (i.e, lessees, owners, and co-owners). Based on the Court of Appeals' well-reasoned interpretation of the statute, and the basis for this interpretation detailed above, Respondent Trademark – in its

capacity as a former marketing and listing agent – cannot be held liable for violating the South Carolina Unfair Trade Practices Act. Petitioner offers no alternative theory for Respondent Trademark's liability under the South Carolina Unfair Trade Practices Act. Therefore, the Court of Appeals' interpretation of the HPA is dispositive and there is no basis for granting certiorari to further review this issue.

C. The "law of the case" doctrine is not applicable to the present case.

Petitioner cites the "law of the case" doctrine to support his assertion Respondent Trademark maintained a duty to provide to all prospective purchasers the HPA-mandated written disclosure report. In the HOA lawsuit, Respondent Trademark filed a Motion for Summary Judgment on all causes of action against it (Negligence, Breach of Warranty, Violation of the South Carolina Unfair Trade Practices Act). The Honorable Kristi L. Harrington denied this motion, and the lawsuit eventually settled before trial. Now, it appears as if Petitioner is attempting to use Judge Harrington's Order denying Respondent Trademark's motion as binding law for the present case. This argument, however, fails on several grounds.

First, the "doctrine of the law of the case applies to an order or ruling which finally determines a substantial right . . . . Ordinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits." Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (citing Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) (quoting 21 C.J.S. Courts Section 195 at 335 (1940)). The denial of a motion for summary judgment is interlocutory and is not a "final order on the merits" for purposes of the

law of the case doctrine. See Baber v. Greenville Cty., 327 S.C. 31, 40, 488 S.E.2d 314, 319 (1997).

Additionally, Petitioner cites Sloan Constr. Co. v. Southco Grassing, Inc. to improperly suggest Judge Harrington's previous Order must become the law of the present case. 395 S.C. 164, 717 S.E.2d 603 (2011). Sloan stands for the proposition a party is precluded from re-litigating, after an appeal, matters that were either not raised on appeal, or raised on appeal, but rejected by the appellate court. Id. at 170, 606. It appears Petition is now attempting to argue the Court in the present case is bound by an interlocutory decision made by the trial court in the HOA lawsuit. Not only does this argument fail to account for the distinction between an interlocutory decision and a final decision on the merits, only the latter of which triggers a possible application of the law of the case doctrine, but Petitioner also fails to account for many basic differences between the present case and the HOA lawsuit. For example, the HOA lawsuit involved different parties, different allegations, and different facts than the present case.

As the Court of Appeals correctly held, the "law of the case" doctrine is clearly inapplicable to the present case and Petitioner has offered no "special or important reason" why this Court should grant certiorari to further review this issue.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE CIRCUIT COURT'S RULING THAT RESPONDENT TRADEMARK WAS NOT A JOINT TORTFEASOR WITH CAROLINA ONE.

Joint tortfeasors are "two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party." Restatement (Second) of Torts § 875 (1979). Because it is undisputed Respondent Trademark was not the listing agent for Cambridge Lakes condominiums when Petitioner purchased the Unit, Petitioner generally relies on allegations Respondent Trademark is a "joint tortfeasor" with those parties involved in the transaction to

argue Respondent Trademark violated the HPA. Petitioner fails to explain what tortious conduct Respondent Trademark specifically committed to cause him harm. Instead, Petitioner merely asserts Carolina One "perpetuated the tort initiated by [Respondent] Trademark." Petitioner also cites two seemingly irrelevant decisions from this Court to support the conclusory position that a "review of the statements made here and after review of the records as cited, this Court should find that [Respondent] Trademark and Carolina One are joint tortfeasors." See Barker v. Sauls, 289 S.C. 121, 345 S.E.2d 244 (1986) (discussing a tortfeasor's liability to a third party arising out a contractual relationship); Hollifield v. Keller, 238 S.C. 584, 121 S.E.2d 215 (1961) (discussing the liability of multiple parties for a single personal injury). Petitioner offers no further explanation for the relationship between these cases and his claims against Respondent Trademark.

The Circuit Court correctly found, and the Court of Appeals properly affirmed, Respondent Trademark was not involved in the transaction out of which Petitioner's alleged damages arose. The Record on Appeal is void of any evidence suggesting Respondent Trademark and Carolina One acted in concert to cause a "single, indivisible" injury and Petitioner fails to offer any legitimate reason for further review of this issue.

A. Respondent Trademark did not owe to Petitioner a fiduciary duty.

A fiduciary relationship exists when a person places a special trust or confidence in another. See, e.g., O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992). Generally, "a fiduciary relationship cannot be created by the unilateral action of one party. To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will act not on his own behalf but in the interest of the party so reposing. The evidence must show the entrusted party

actually accepted or induced the confidence placed in him." Moore v. Moore, 360 S.C. 241, 250-251, 599 S.E.2d 467, 472 (Ct. App. 2004) (internal citations omitted). Whether a fiduciary relationship exists between two people is an equitable issue for the judge to decide. Hendricks v. Clemson Univ., 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003) (internal citations omitted).

In the present case, the Record, and even the Petition, is void of any evidence suggesting the existence of a fiduciary duty between Petitioner and Respondent Trademark. It is undisputed Respondent Trademark was neither the buying nor listing agent, was not involved in any other capacity with Petitioner's purchase of the Unit, and never made any representations to Petitioner relevant to the same. In fact, the Petition itself specifically cites the Buyer Representation Agreement, between *Carolina One* and Petitioner, and the Consent to Dual Agency Agreement, also between *Carolina One* and Petitioner, as the documents giving rise to an alleged fiduciary duty. All allegations throughout this section of the Petition pertain exclusively to the relationship between Petitioner and Carolina One.

Inexplicably, Petitioner then alleges Respondent Trademark "could not deny its statutorily created fiduciary duty to [Petitioner]." Given Respondent Trademark's lack of involvement with Petitioner's purchase of the Unit, it is unclear what statute Petitioner is even referencing as the basis of his breach of fiduciary claim. Assuming Petitioner is referencing S.C. Code Ann. § 40-57-137(A), as quoted therein, the statute only applies to real estate brokerage companies that provide services through an agency agreement in any of the following capacities: (1) seller agency; (2) buyer agency; (3) disclosed dual agency; or (4) subagency. Again, there is no dispute Respondent Trademark was not involved in Petitioner's purchase of the Unit, and Petitioner has offered no "special or important reason" this Court should grant certiorari to further review such a clear issue.

B. Respondent Trademark is not liable to Petitioner for his claim of negligence.

In order to prevail on a cause of action for negligence, Petitioner must show: (1) a duty of care owed by the defendant to the plaintiff; (2) breach of that duty; and (3) damages resulting from the breach. Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998). A breach of duty exists when it is foreseeable that one's conduct may likely injure the person to whom the duty is owed." Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 720 (Ct. App. 1996). If there is no duty, then the defendant is entitled to judgment as a matter of law." Rule 56(c), SCRCP, see also Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990).

Again, Respondent Trademark was not Petitioner's agent and was not involved in any other capacity with Petitioner's purchase of the Unit. Ignoring these undisputed facts relative to the existence of a legally cognizable duty, Petitioner generally relies on his arguments Respondent Trademark was a "joint tortfeasor" with Carolina One who maintained certain fiduciary duties to him, and was also required to provide the HPA-mandated written disclosure report to prospective purchasers. As detailed in preceding sections of this Return, each allegation purportedly creating a duty is fatally flawed.

Furthermore, even assuming *arguendo*, Respondent Trademark owed to Petitioner any duty, there is no causal connection between the hypothetical duty and Petitioner's alleged damages. As Petitioner admits, and the Record on Appeal corroborates, Petitioner's alleged damages arise solely from the purchase of a Unit which he contends was "riddled with serious construction defects and SCHPA violations." As a result, Petitioner claims he was unable to sell the Unit, was rendered personally insolvent, and now faces "imminent foreclosure." It is clear all such damages – even if proven accurate – arise solely from a transaction to which Respondent

Trademark was never involved. Accordingly, the Court of Appeals appropriately affirmed the Circuit Court's Order granting Respondent Trademark's Motion for Summary Judgment, and there is no need for this Court to engage in further review of this issue.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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May 5 2017.

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

PROOF OF SERVICE

I certify that I have served ***Respondent Trademark Properties, LLC's Return in Opposition to Petition for Writ of Certiorari***, upon the parties below by depositing a copy of it in the United States Mail, postage prepaid, on May 5, 2017 addressed as follows:

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May 5, 2017

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