

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

The Honorable A. Victor Rawl, Special Referee

Case No. 06-CP-15-461

RECEIVED

AUG 02 2012

SC Court of Appeals

Neeltec Enterprises, Inc. d/b/a Fireworks Supermarket. Appellant.

v.

Willard Long d/b/a Foxy's Fireworks, and d/b/a Fireworks Superstore Respondent

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

IN THE COURT OF COMMON PLEAS
C/A NO.: 2006-CP-15-461

Neeltec Enterprises, Inc., d/b/a
Fireworks Supermarket,

Plaintiff,

v.

Willard Long d/b/a Foxy's Fireworks,
and d/b/a Fireworks Superstore,

Defendant.

ORDER

2008 AUG 28 AM 11:12
PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

This matter came before me on June 12, 2008 for a hearing on Defendant's Motion to Dismiss or, in the alternative, for Summary Judgment or, in the alternative, to Substitute Parties.

Based upon my review of this file and the arguments of counsel, it is clear that Plaintiff's claims are against the business known as "Fireworks Superstore" which is a corporation.¹ The Complaint does not contain any allegation of a conspiracy between the individual Defendant and the corporation. Moreover, the Complaint does not allege failure to follow corporate formalities or any other basis for piercing the corporate veil of the corporate owner of Fireworks Superstore.

Accordingly, I find that the individual Defendant is not the proper Defendant for the claims presented. Instead, the action should proceed against the two corporations which have owned and operated Fireworks Superstore at the times relevant to the Plaintiff's claims.

IT IS THEREFORE ORDERED that, while I am not granting Defendant's Motion to Dismiss or, in the alternative, for Summary Judgment, I am granting Defendant the alternative relief sought in his motion; that is, I am ordering that the corporations Hobo Joe's, Inc. and Foxy's Firework Superstore, Inc., shall be substituted as Defendants instead of Willard Long.

¹ Defendant acknowledges that, at the time of the commencement of this action, the corporate name was Hobo Joe's, Inc.; however, Defendant formed a separate corporation for "Fireworks Superstore" in November 2006. The new corporate name is Foxy's Firework Superstore, Inc.

Moreover, to the extent Plaintiff wishes to articulate a conspiracy claim against Willard Long, individually, along with the subject corporations, Plaintiff shall submit to the undersigned, no later than thirty (30) days from the date of this Order, a proposed Amended Complaint setting forth any such claims as well as a short Memorandum of Law explaining the legal bases for asserting the claims. If Plaintiff does so, Defendants shall have ten (10) days thereafter within which to file a response Memorandum of Law. The Court will thereafter rule, without further hearing, whether Plaintiff has the right to amend its Complaint as requested.



A. Victor Rawl, Special Referee

August 24, 2008
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON)
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

Case No.: 2006-CP-15-461

Neelteck Enterprises, Inc., et al.

versus

Willard Long, et al.

Plaintiff(s)

Defendant(s)

CHECK ONE:

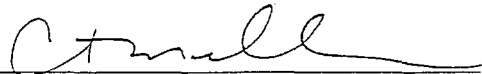
- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.
- DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. nonsuit) Rule 43(k), SCRPC (Settled); Other -
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding Arbitration, Subject to right to restore to confirm, vacate or modify arbitration award; Other

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by Court

Case is referred to Victor A. Rawl as special referee with finality.

Beaufort, South Carolina,

May 6, 2008
Date

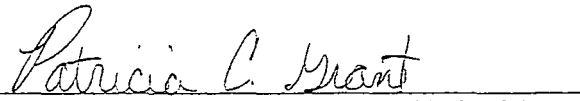

Judge

This judgment was entered on the 12 Day of May, 2008, and a copy mailed first class this 16 Day of May, 2008, to attorneys of record or to parties (when appearing pro-se) as follows:

Attorney(s) for Plaintiff(s)

Attorney(s) for Defendant(s)

SCR Form 4 (Rev. 2/96)


Clerk of Court

2008 MAY 12 AM 8:14
PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

000003

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON)

06-CP-15-461

Neeltec Enterprises, Inc. d/b/a Fireworks)
Supermarket,)

Plaintiff,)

vs.)

Willard Long d/b/a Foxy's Fireworks, and)
d/b/a Fireworks Superstore,)

Defendant.)

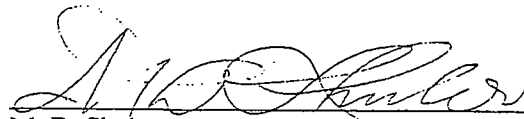
ORDER

PATRICIA C. GRANT
CLERK OF COURT
COLLETON COUNTY
COMMON PLEAS
2008 APR 21 AM 9:51

This matter came to me by way of Order of Reference executed by Honorable Howard H. King, dated February 14, 2007, and a hearing on a temporary injunction has been held.

The undersigned now finds himself with a conflict of interest, and the plaintiff has requested the undersigned to recuse himself from this matter.

Accordingly, the Special Referee does now recuse himself from further hearing of this matter.


M. D. Shuler
Special Referee

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF COLLETON) C/A NO.: 06-CP-15-461

Neeltec Enterprises, Inc. d/b/a Fireworks)
 Supermarket,)
)
 Plaintiff,)
)
 v.)
)
 Willard Long d/b/a Foxy's Fireworks, and d/b/a)
 Fireworks Superstore,)
)
 Defendant.)

COMPLAINT
 (Jury trial)

06 JUN 30 PM 2:30

PATRICIA C. GRANT
 COLLETON COUNTY
 COMMON PLEAS

Plaintiff alleges:

1. Plaintiff is the owner and operator of a retail establishment known as "FIREWORKS SUPERMARKET" and since April of 1982 has been located at 1289 Snyder's Highway in Walterboro, South Carolina, near exit 53 from Interstate Highway I-95. Plaintiff engages in outdoor advertising along the northbound portion of Interstate Highway I-95 to attract prospective customers coming out of Florida and Georgia.
2. Sometime ago, Defendant opened and began operating a competing retail establishment known as "FOXY'S FIREWORKS" located next door to Plaintiff's store. Defendant's store is located between Interstate I-95 and Plaintiff's store as a consequence of which a vehicle exiting I-95 at exit 53 would encounter Defendant's store before seeing Plaintiff's store.
3. In the early part of 2006, Defendant changed the sign on its retail establishment to read "FIREWORKS SUPERSTORE" thereby attempting to

capitalize, and in fact capitalizing upon Plaintiff's brand name "FIREWORKS SUPERMARKET" posted in outdoor advertisements along I-95.

4. Further, on June 28, 2006, after Plaintiff had redecorated the outside wall of its store closest to traffic exiting I-95 at exit 53 with advertising display, Defendant placed a large storage container on his property substantially blocking the view of said redecorated wall advertising display from persons exiting I-95 via exit 53. The storage container is approximately 45 feet in length, and approximately 9 feet in height, but the height is slightly elevated by supports for another foot approximately.

5. Defendant's actions constitute unfair trade practices in violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") by employing unfair and deceptive acts or practices and unfair methods of competition, all of which have damaged, threaten to damage, and continue to damage Plaintiff's business by reducing the sales of Plaintiff's merchandise.

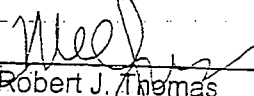
6. By reason of the foregoing, Plaintiff is informed and believes that Plaintiff is entitled actual, punitive and statutory treble damages, and Plaintiff's attorneys' fees and costs.

WHEREFORE Plaintiff prays that Plaintiff have judgment against Defendant for actual, punitive and statutory treble damages, and Plaintiff's attorneys' fees and costs.

{Signature Page to Follow}



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(803) 771 7900
Fax (803) 343-7017

June 30, 2006

Attorneys for Plaintiff

7/14/06

STATE OF SOUTH CAROLINA)
)
 COUNTY OF COLLETON)
)
 Neeltec Enterprises, Inc., d/b/a)
 Fireworks Supermarket,)
)
 Plaintiff,)
)
 v.)
)
 Willard Long d/b/a Foxy's Fireworks,)
 and d/b/a Fireworks Superstore,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 C/A NO.: 2006-CP-15-461
 ANSWER AND COUNTERCLAIM
 (Jury Trial Demanded)

06 JUL 14 PM 2:12
 PATRICIA C. GRANT
 COLLETON COUNTY
 COMMON PLEAS

Defendant answers Plaintiff's Complaint and counterclaims against the Plaintiff as follows:

1. He admits, upon information and belief, the allegations of paragraph one (1).
2. Answering the allegations of paragraph two (2), he admits that Hobo Joe's, Inc., a South Carolina corporation, some time ago opened and began operating a competing retail establishment known as "Foxy's Fireworks" located next door to Plaintiff's store between Interstate 95 and Plaintiff's store, as a consequence of which a vehicle exiting I-95 at Exit 53 would encounter the store before seeing Plaintiff's store; however, he denies the remaining allegations of paragraph two (2).
3. Answering the allegations of paragraph three (3), he admits that in the early part of 2006, Hobo Joe's, Inc., changed the sign on its retail establishment to read "Fireworks Super Store"; however, he denies the remaining allegations of paragraph three (3).

4. Answering the allegations of paragraph four (4), he admits that Hobo Joe's, Inc. has placed a storage container in front of its store; however, he denies the remaining allegations of paragraph four (4).

5. He denies the allegations of paragraphs five (5) and six (6), being all the remaining allegations of Plaintiff's complaint.

6. He denies each and every allegation of Plaintiff's complaint which is not hereinabove admitted.

FURTHER ANSWERING THE PLAINTIFF'S COMPLAINT
AND AS AN ADDITIONAL DEFENSE DEFENDANT ALLEGES:

7. Plaintiff has sued the wrong party. Willard Long does not personally operate the Fireworks Super Store. That retail establishment is operated by Hobo Joe's, Inc. Therefore this action should be dismissed as to Defendant. Defendant will consent to the substitution of the proper Defendant.

FURTHER ANSWERING THE PLAINTIFF'S COMPLAINT
AND AS AN ADDITIONAL DEFENSE DEFENDANT ALLEGES:

8. Plaintiff's complaint fails to state facts sufficient to constitute a cause of action and should therefore be dismissed pursuant to SCRCP 12(b)(6).

FURTHER ANSWERING THE PLAINTIFF'S COMPLAINT
AND AS AN ADDITIONAL DEFENSE DEFENDANT ALLEGES:

9. Plaintiff's claims should be barred by Plaintiff's unclean hands and/or other wrongful acts.

FURTHER ANSWERING THE PLAINTIFF'S COMPLAINT AND AS AN ADDITIONAL
DEFENSE AND BY WAY OF COUNTERCLAIM DEFENDANT ALLEGES:

10. Plaintiff has been operating and continues to operate its retail establishment on Sundays in violation of applicable state and local laws.

11. Plaintiff's conduct as described above constitutes unfair and deceptive acts or practices in the conduct of trade or commerce.

12. Plaintiff's actions are capable of repetition, have been repeated, adversely affect the general public, and are in violation of the South Carolina Unfair Trade Practices Act ("UTPA"), S.C. Code Ann. §39-5-10 *et seq.* (1976, as amended).

13. Hobo Joe's, Inc. has suffered damages as a direct and proximate result of Plaintiff's violation of the UTPA.

14. Given the intentional, willful and knowing nature of Plaintiff's conduct, Hobo Joe's, Inc. is entitled to an award of not only actual damages, but also treble damages, attorney's fees, and costs pursuant to the UTPA.

FURTHER ANSWERING THE PLAINTIFF'S COMPLAINT AND AS AN ADDITIONAL DEFENSE AND BY WAY OF COUNTERCLAIM DEFENDANT ALLEGES:

15. Defendant realleges the foregoing allegations of the Counterclaim as if fully set forth herein.

16. Plaintiff's conduct as described above constitutes a public nuisance in that it unreasonably interferes not only with the use and enjoyment of land by Hobo Joe's, Inc., but also the public in general; moreover, it has directly and proximately caused damages to Hobo Joe's, Inc., as well as the general public.


17. Plaintiff should be enjoined from its further violation of applicable laws and engaging in a public nuisance as described above.

18. Hobo Joe's, Inc. is also entitled to an award of actual and punitive damages against Plaintiff for this nuisance.

WHEREFORE, having fully answered the Plaintiff's complaint, Defendant prays that the same be dismissed and that judgment be entered on the Counterclaim.

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.
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Tel.: 843-549-9544
Fax: 843-549-9546

By: _____


BERT G. UTSEY, III
Email: butsev@pmped.com

Attorneys for Defendant

July 14, 2006
Walterboro, South Carolina

f-23-06

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

IN THE COURT OF COMMON PLEAS
06-CP-15-461

Neeltec Enterprises, Inc. d/b/a Fireworks
Supermarket,

Plaintiff,

vs.

Willard Long d/b/a Fox's Fireworks, and d/b/a
Fireworks Superstore,

Defendants.

PLAINTIFF'S MOTION FOR
TEMPORARY INJUNCTION AND
FOR EXPEDITED HEARING

06 AUG 24 AM 11:27

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

(712.8)

TO: BERT G. UTSEY, III, ESQ., ATTORNEY FOR THE DEFENDANT:

YOU WILL PLEASE TAKE NOTICE that at such time and place as is set by the court,
the Plaintiff will move the court for a temporary injunction:

a) restraining the Defendant, his agents, servants, and others under his control from using
the name Fireworks Super Store or any other name deceptively similar to the Plaintiff's
servicemark of Fireworks Supermarket;

b) restraining the Defendant, his agents, servants, and others under his control from using
trade dress deceptively similar to that used by the Plaintiff in its business known as Fireworks
Supermarket; and

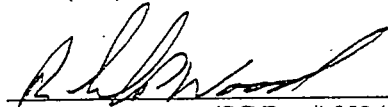
c) restraining the Defendant, his agents, servants, and others under his control from
blocking the view of the traveling public of the Plaintiff's store, whether by shipping container,
fence, or any other means.

This motion is based on the Affidavit of G. Dennis Neeley to be filed with the court forthwith, Rule 65 of the South Carolina Rules of Civil Procedure, and such other and further matters as may be presented to the court.

I certify that I attempted to resolve this matter with counsel for the Defendant, but to no avail.



for
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Robert J. Thomas (SC Bar # 5534)
Robert P. Wood (SC Bar # 6206)
Rogers Townsend & Thomas, PC
700 Gervais Street, Suite 100 (29201)
PO Box 100200
Columbia, SC 29202-3200
803/744-1275
wood@rtt-law.com

Attorneys for the Plaintiff

August 23, 2006.

CERTIFICATE OF MAILING
Civil Action # 06-CP-15-0461

I, Robert P. Wood, attorney for the Plaintiff, do hereby certify that I have on August
23, 2006, served the following document upon counsel of record by mailing a copy thereof to
him, with proper postage, at the address indicated below.


Document served:

Motion for Temporary Injunction and Expedited Hearing

Counsel served:

Bert G. Utsey, III, Esq.
Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.
P.O. Box 1164
Walterboro, SC 29488

PATRICIA E. GRANT
COLLETON COUNTY
COMMON PLEAS
06 AUG 24 AM 11:27


Robert P. Wood (SC Bar # 6206)

This Motion will be supported by the pleadings and record herein, previous hearing testimony by the Defendant, public records of the South Carolina Secretary of State, the applicable law and rules of civil procedure, the arguments of counsel, and such other matters as may be received by the Court prior to any hearing hereon.

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.
123 WALTER STREET
POST OFFICE BOX 1164
WALTERBORO, SC 29488
(843) 549-9544

BY:


BERT G. UTSEY, III

Attorneys for Defendant

August 7, 2007
Walterboro, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

IN THE COURT OF COMMON PLEAS
C/A NO.: 2006-CP-15-461

Neeltec Enterprises, Inc., d/b/a
Fireworks Supermarket,

Plaintiff,

v.

Willard Long d/b/a Foxy's Fireworks,
and d/b/a Fireworks Superstore,

Defendant.

CERTIFICATE OF SERVICE

07 AUG - 7 PM 4:05

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

The undersigned certifies that she served a true and correct copy of NOTICE AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUBSTITUTION OF PARTIES in the above referenced matter upon the Plaintiff by mailing same via U.S. First Class Mail, postage prepaid, addressed to counsel as follows:

Robert P. Wood, Esquire
Rogers, Townsend & Thomas, PC
Post Office Box 100200
Columbia, SC 29202-3200

on the 7th day of August, 2007.

Hildegard L. Davis
Hildegard L. Davis, Legal Assistant

Walterboro, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF COLLETON

06-CP-15-461

Neeltec Enterprises, Inc. d/b/a Fireworks
Supermarket,

Plaintiff,

vs.

Willard Long d/b/a Foxy's Fireworks, and
d/b/a Fireworks Superstore,

Defendant.

PLAINTIFF'S BRIEF
ON THE STATUS OF THE CASE AND THE
OUTSTANDING ISSUES

(712.8)

PROCEDURAL HISTORY OF CASE

This action was filed June 30, 2006, in Colleton County. In the first-filed Complaint, Plaintiff alleged a violation by Defendant ("Long") of the Unfair Trade Practices Act ("UTPA"). In an Amended Complaint, Plaintiff also sought an injunction against Long in addition to damages. Long answered and asserted a counterclaim for lost sales on Sundays when his fireworks stores were closed and Defendant's store was open.

The case was referred to retired Court of Appeals Judge M. Duane Shuler as Special Referee by Orders of Judges Howard P. King and Perry M. Buckner pursuant to Rule 53, SCRCF, with half of Judge Shuler's fees to be paid by Plaintiff and half by Defendant.

Judge Shuler heard Plaintiff's motion for temporary injunction on June 18, 2007, and advised the parties that he would not grant a preliminary injunction, but he never issued a formal Order. Thereafter, Judge Shuler recused himself, and Administrative Chief Judge (for the 14th Judicial Circuit) Carmen T. Mullen appointed retired Circuit Judge A. Victor Rawl to succeed Judge Shuler as Special Referee.

FACTS THAT PLAINTIFF EXPECTS TO PROVE

By sometime in the 1970s, two fireworks stores had opened off of Exit 53 (Snider's Highway) on I-95 just outside Walterboro, South Carolina. In April of 1982, Dennis Neeley and his brother, Bruce, bought a lot across the street from these two stores (1289 Snider's Highway) and opened their own fireworks store. They preferred another lot of the same owner, closer to I-95, that was vacant, but the owner, Mr. Fishburne, felt that it was the more valuable of the two lots and did not wish to sell it at that time. The Neeleys incorporated Plaintiff, Neeltec Enterprises, Inc., built the store and named it "Fireworks Supermarket." Their store was the first business in South Carolina to use that name. They painted their store white, with "Fireworks Supermarket" painted in red. Sometime thereafter, Defendant, Willard Long, bought the two stores across the street from Fireworks Supermarket. In the meantime, another individual negotiated a purchase of the vacant lot next to Fireworks Supermarket that the Neeleys previously tried to purchase, and built a third fireworks store.

For many years the Neeleys advertised "Fireworks Supermarket" with a number of billboards along I-95 to attract customers traveling out of Florida and Georgia where fireworks are not sold. The billboards are simple, distinctive signs divided into three horizontal sections, the top reading, "**FIREWORKS**", the middle section reading, "**SUPERMARKET**", and the bottom section reading either "**EXIT 53**" or "**Exit Now**". The top section consists of white letters in Arial font on a red background. The middle section consists of black letters in Arial font on a yellow background. The bottom section consists of white letters in Arial font on a black background. So the signs look like this:

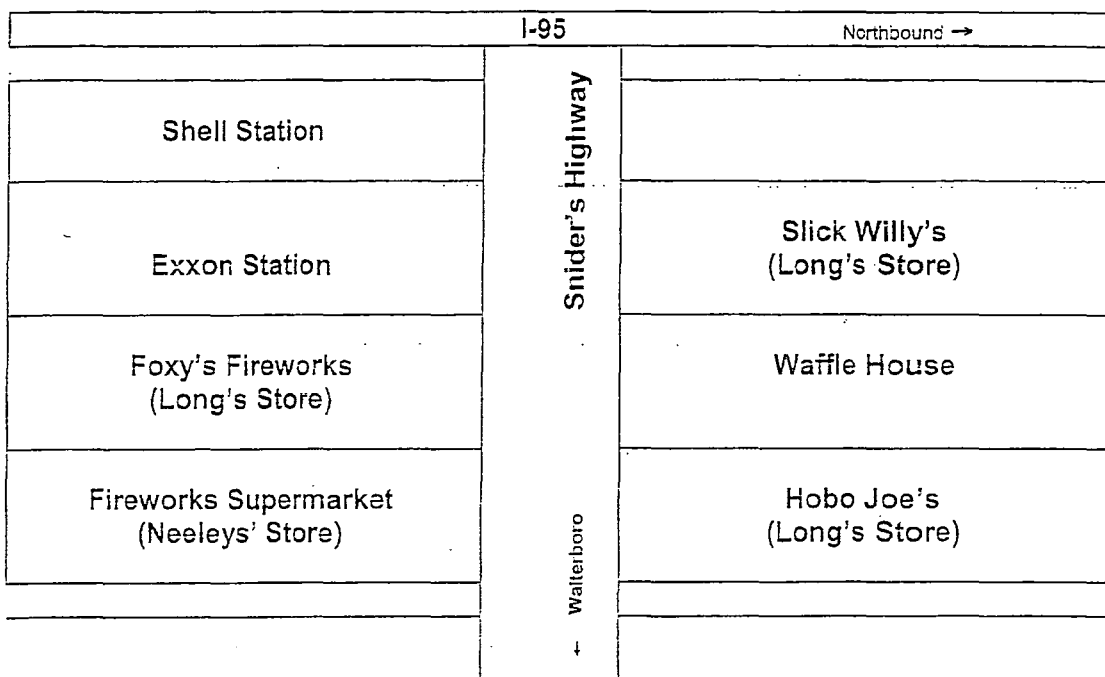


The Neeleys also advertised their store with signs at their store and a sign out front and also with business cards of the same design.

Long, in addition to his two stores across the street from Fireworks Supermarket, eventually purchased the store next to Fireworks Supermarket and named it "Fox's Fireworks."

Travelers exiting I-95 come to it before they reach Fireworks Supermarket.

The stores are arranged roughly like this:



Competition between Long's stores and the Neeleys' store was fair and peaceful, mostly because the Neeleys were not full-time businessmen. Bruce was a practicing physician, and Dennis's main source of income was from his fireworks wholesale business.

ALJ

Bruce Neeley died on January 4, 2003, and over the next year Dennis Neeley bought out Bruce's estate's interest in the business that owned the store (Neeltec Enterprises, Inc.) and took over its management. Most significantly, Dennis stepped up billboard advertising for the store at this intersection. Between the July 4, 2003, sales period and early 2005, Fireworks Supermarket had become a thriving business and a competitor to Long and his stores.

In the spring of 2005, the City of Walterboro began asking merchants if they'd like to annex their property into the interstate commercial district of the city. The initiative was successful, and the City advised them that their buildings and signs would be grandfathered-in effective July 1, 2005. But the City also advised them that any changes after that date would have to meet the City's zoning ordinance.

The annexation went forward as planned, without any of the stores being changed. And the all-important July 4 fireworks sales period came and went without incident.

After the July 4 sales period Long began renaming and repainting his stores in a flagrant attempt to capitalize on the Neeleys' billboards. It is significant that of his three stores at that intersection, he chose the one next to Plaintiff's Fireworks Supermarket to change the name from "Fox's Fireworks" to "Fireworks Superstore." The new sign across the front of his store looks like this:



One issue in the case (beside the "blocking" issue discussed below) is whether Long is unfairly piggybacking on Plaintiff's trade name (Fireworks Superstore) and its billboard advertising. Plaintiff spends huge amounts for billboard advertising. In 2007, for example,



Plaintiff spent \$43,354 for billboard advertising. In contrast, Long has never invested in billboard advertising for "Fireworks Superstore."¹

Parenthetically, one of the authorities on which Plaintiff intends to rely is United States Circuit Judge Donald Russell opinion in the case of *Pizzeria Uno Corporation v. Temple*, 747 F.2d 1522 (4th Cir. 1984). A copy of this decision is attached.

Plaintiff has photographs of its billboards, of the line of sight at the intersection, and of the stores in question, to show that the name of Long's "Superstore" store and the store's overall appearance is deceptively similar to Plaintiff's store and billboards: It resembles the top third of Plaintiff's billboards and sign on the front of Plaintiff's store in that it is red and white in bold, capital letters in Arial font, and, of course, the name is so similar to that of Plaintiff's store that the traveling public is led to believe this is the store advertised on I-95.

In June 2006, in an attempt to mitigate the losses Plaintiff was incurring from Long's unfair use of Plaintiff's trade name, Plaintiff repainted the outside wall of its store to increase the likelihood that interstate travelers would associate Plaintiff's store with the billboards along I-95. Specifically, Plaintiff painted its wall closest to the interstate in the distinctive 3 sections, with the top section being white letters on a red background (reading, "**LARGEST SELECTION**"), the middle section being black letters on a yellow background, and the bottom section being white letters on a black background.

On June 28, 2006, at the height of the July 4 sales period, in retaliation for Plaintiff's efforts to mitigate its losses, Long placed a green, 45'-long, 9'-tall shipping container on the lot of his "Fireworks Superstore" so that travelers exiting I-95 would not be able to see Plaintiff's store. *Please see the first attached photograph.* To make matters worse, Long soon painted the shipping container white and added large, red letters in bold Arial type reading, "**FIREWORKS**

¹ Long depo p 67, lines 1-3.

SUPER STORE". As a result of the size and color of the shipping container, not only was the traveling public led to believe that Long's store was what was being advertised on the billboards but that Long's store has the "Largest Selection" (a part of Plaintiff's advertising, but now apparently part of Long's). With Long's only competition blocked out from public view, all three of his stores at this intersection stood to benefit. This was the point in time when the Neeleys sought legal counsel and filed this action on behalf of their company, Neeltec Enterprises, Inc., on June 30, 2006.

Shortly thereafter City officials told Long that his container violated the zoning ordinance and that he would have to remove it in 30 days. His response was to vow to replace it with a tall fence.

On Monday, August 21, 2006 (after this lawsuit was filed), Long began erecting his threatened 14'-tall fence, and a few days later he removed the shipping container to avoid the City's threatened fine. *Please see the second attached photograph*). The fence, however, continued to serve the same purpose as the shipping container in terms of blocking the public's view of Plaintiff's store and suggesting that Long's "Superstore" is the business advertised on the billboards. It blocked the public's view of Plaintiff's store except for the part of Plaintiff's wall reading, "Largest Selection," leading the traveling public to believing that Long's store had the "largest selection."

Long would not have removed the shipping container but for the actions of the City. He built the fence for the sole purpose of blocking the traveling public's view of Plaintiff's store and would not have removed the fence but for his landlord's insistence that he do so. There is significant risk that Long will seek to block the view again.

In December, Long finally took down the fence, but that was only because his landlord required the removal of the fence before he would renew Long's lease.



But as Long was removing the fence, he was putting up portable signs using Plaintiff's colors (red, yellow, and black) to announce that "All of our stores will be closed New Year's Eve," thereby suggesting to the public that all fireworks stores would be closed that day.

Since Long began these practices, a number of persons have been misled about the relationship between the billboards advertising Fireworks Supermarket and Long's re-named store, Fireworks Supermarket. Specifically:

- UPS has delivered paychecks to Fireworks Superstore that should have gone to Fireworks Supermarket;
- the Internal Revenue Service has addressed mail for Fireworks Superstore to Fireworks Supermarket;
- the South Carolina Department of Revenue has addressed mail for Fireworks Supermarket to Fireworks Superstore;
- the City of Walterboro has sent Fireworks Supermarket's business license listing Long as owner of Fireworks Supermarket; and
- the U.S. Postal Service has sent bank statements meant for Long to Fireworks Supermarket.

Members of the traveling public have reported their confusion to Fireworks Supermarket store manager Shirley Crosby. Even a fireworks distributor, Les Price, who was familiar with both stores, was confused by the similar names and trade dress.

After the Neeleys took over the management of Fireworks Supermarket in 2003 and began their marketing campaign, gross profits increased. But once Long changed the name of his store, gross profits began to decline, and since that time, Plaintiff has suffered a substantial decline in gross profits.



OUTSTANDING ISSUES TO BE RESOLVED

Issue 1

Long has claimed that Plaintiff brought suit against the wrong party and has made a motion to substitute defendants. Numerous Supreme Court decisions hold that an individual who commands or incites another to do a harmful act is liable as having done the act himself under the theory or doctrine called *qui facit per alium facit per se*. See e.g. *Sams v. Arthur*, 135 S.C. 123, 133 S.E. 205 (1926) ("An individual is charged with the consequences of an act done directly by himself or indirectly by another at his command. *Qui facit per alium facit per se*; and it is none the less his own act that it has been done by his agent thereunto specially authorized"). See also Judge Randall Bell's discussion in *South Carolina Insurance Company v. James C. Greene and Co.*, 290 S.C. 171, 179, 348 S.E.2d 617, 621-22 (Ct. App. 1986) a part of which follows:

The modern doctrine of *respondeat superior* makes a master liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment. ... In its origins, however, the doctrine concerned those cases in which the master commanded the servant to do the tortious act. ... See Stat. 27 Edw. III, st. 2, c. 19 (1353) (no man shall forfeit his goods for the trespass of his servant unless he do it by the command or procurement of his master); Y.B. 11 Edw. IV, 6, pl. 10 (1472), cited in Wigmore, *Responsibility for Tortious Acts: Its History-II*, 7 Harv.L.Rev. 383, 386 (1894) (where master enters an undertaking with third party and servant carries out undertaking at master's command whereby third party is injured, he shall not have an action against the servant but against the master). Although the tortious act was that of the servant, liability was imposed on the master on the principle "*qui facit per alium facit per se*" (he who acts through another acts himself). The maxim applied only where the tortious act had been commanded by the master; it did not apply to the case of negligence, since the master does not ordinarily direct his servant to be negligent. ...

In the present case, Long admitted in his deposition that he is the sole shareholder of the several fireworks stores owned by him and that he is the sole decision maker. He testified at the June 18, 2007, hearing:

Q. [by Mr. Utsey] What's your relationship to the Fireworks Superstore?

A. I'm sole owner of the Fireworks Superstore.

Tr p 195, lines 9-11.

Long also testified on cross examination:

Q. [by Mr. Wood] ... There is one person who is in charge of Fireworks Superstore and that is Willard Long; is that -

A. That's exactly right.

Q. All right. I got the right man in front of the judge, don't I?

A. You do.

Tr p 203, lines 1-7.

He also testified:

Q. Now, how many total fireworks stores - individual stores - do you own in the Walterboro area, not just right here at this exit?

A. Five.

Q. All right. Now, what are the names of those stores?

A. Hobo Joe's Megastore, Fireworks Superstore, Will Willy's Fireworks Warehouse, Hobo Joe's No. 2, and Lucky's Fireworks.

Tr p 196, lines 14-22.

Therefore, Long cannot evade personal liability for actions that he commanded.

Issue 2 - Discovery

Presently, there are outstanding issues pertaining to each party's discovery of the other party's financial information. In addition to Plaintiff's claim for damages (as well as an injunction), Long has a counterclaim for lost Sunday sales which he attributes to Plaintiff's store's remaining open on Sundays.

On May 30, 2007, Plaintiff served Long with PLAINTIFF'S REQUEST FOR PRODUCTION which is now the subject of Plaintiff's pending Motion to Compel. On August 24, 2007, Long responded with objections to some of Plaintiff's Requests to Produce, to wit:

Plaintiff's Request No. 5. Copies of the profit and loss statements or similar Documents that show the revenues and expenses of Your Client's three stores near the Plaintiff's store in Walterboro. This request is limited to the period of January 1, 2000 to the present.

Long's response. Defendant objects to this request on the ground that it seeks privileged information not relevant to the issues herein.

Plaintiff's Request No. 6. Copies of Your Client's most recent annual report to shareholders or partners (if applicable), financial statement, tax returns, or other Documents that best demonstrate Your Client's current net worth and current financial condition.

Long's Response. Defendant objects to this request on the ground that it seeks privileged information not relevant to the issues herein.

Plaintiff's Request No. 13. Copies of any financial statements, tax returns, or any other Documents that best demonstrate the current net worth of any corporations owned in whole or part by Your Client.

Long's Response. See Response to Request No. 6 above.

Plaintiff has likewise objected to giving Long Plaintiff's financial information. On August 24, Long served REQUESTS FOR PRODUCTION on Plaintiff, and on November 27, 2007, Plaintiff responded with objections to some of Long's requests, to wit:

Defendant's Request No. 5. Copies of Plaintiff's profit and loss statements, revenue statements, and all other financial records relating in any way to the income of Plaintiff's store adjacent to Defendant's store for the period of January 1, 2005, to the present.

Plaintiff's Objection and Response: Plaintiff will submit this pursuant to a reciprocity and nondisclosure agreement.

Defendant's Request No. 6. Copies of Plaintiff's most recent annual report to shareholders or partners (if applicable), financial statement, tax returns, or other documentation which best demonstrates Plaintiff's current net worth.

Plaintiff's Objection and Response: Plaintiff will submit this pursuant to a reciprocity and nondisclosure agreement.

The parties obtained a Consent Protective Order from Judge Shuler allowing them to exchange financial information solely for purposes of this case and without allowing the information to become public knowledge.² However, they have not been able to agree upon the scope of the financial information each is to provide the other or the procedure for exchanging such information. No agreement has been reached, and a ruling is needed on these issues.

There are two ways to exchange the financial information each party is reluctant to disclose: (1) Plaintiff prefers that the parties simultaneously exchange financial information through the Special Referee who can review it and determine if there has been good faith compliance. However, even the Special Referee cannot know for sure that each party has complied; or (2) Defendant prefers that Plaintiff disclose its financial information first, and Long follow with the disclosure of his financial information within a few days thereafter.

Even if agreement could be reached on the method of disclosure, there is still disagreement on the scope. Plaintiff stands ready to disclose the financial information requested by Long if Plaintiff is assured that Long will fully reciprocate and give all the information requested in Plaintiff's Requests Numbers 5, 6, and 13. Long has indicated that he will disclose financial information concerning the one store that he calls "Fireworks Superstore," but exclude his two stores nearby. This is insufficient because Long testified in his deposition that he does not keep separate sales records for each store. He testified in his deposition:

² Judge Shuler's Order "ORDERED that the parties and their attorneys are required to keep strictly confidential and to disclose to no one, other than as necessary to the attorneys and expert witnesses, or tax advisors, or as required by law, the financial information that each receives from the other by Interrogatories or Requests to Produce and responses thereto, or by depositions. Upon disclosure being made to expert witnesses and tax professionals, such expert witnesses and tax professionals shall be advised of the existence of this Order and the consequences of a violation of the Order."

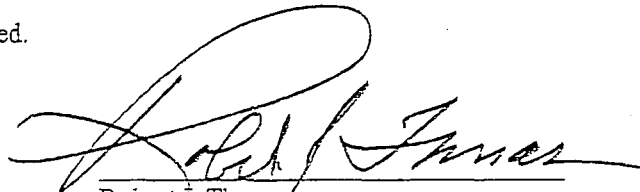
Q. [by Mr. Wood]. ... I guess your accountants keep track of which store produces which amount of money?
A. No. We don't keep up. We put it all in one pot.

Long depo p 60, lines 21-24.

Long has also suggested that his obligation would be satisfied by simply producing his sales tax returns for "Fireworks Superstore" as filed with the S.C. Department of Revenue, Profit and Loss Statements prepared by his accountant, and summaries of sales and sales charts. This offer seems to be an offer to turn over documents that have been or will be compiled by Long's accountant assigning sales figures to stores as directed by Long. What Plaintiff seeks are documents that already exist.

CONCLUSION

All of which is respectfully submitted.



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Email: bthomas@rtt-law.com

June 2, 2008

Attorney for Plaintiff

CERTIFICATE OF SERVICE BY MAIL

Case 06-CP-15-461

I, the undersigned employee of Rogers Townsend & Thomas, PC, do hereby certify that I served a copy of the foregoing document upon the Special Referee and counsel for Defendant by U.S. Mail, postage prepaid, on June 2, 2008, at the following addresses:

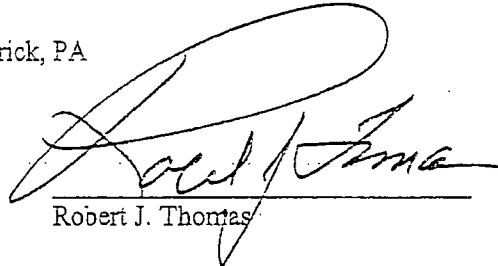
Document:

PLAINTIFF'S BRIEF ON THE STATUS OF THE CASE AND THE OUTSTANDING ISSUES

Persons Served:

Hon. A. Victor Rawl
Circuit Judge (Retired)
2835 Preakness Stakes
Charleston, SC 29414

Bert Glenn Utsey, III, Esquire
Peters Murdaugh Parker Eltzroth & Detrick, PA
PO Box 1164
Walterboro, SC 29488



Robert J. Thomas

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June 16, 2008

OF COUNSEL
J. ROBERT PETERS, JR.

The Hon. A. Victor Rawl
2835 Preakness Stakes
Charleston, SC 29414

Re: Neeltec Enterprises, Inc. d/b/a Fireworks Supermarket v. Willard Long
d/b/a Foxy's Fireworks, and d/b/a Fireworks Superstore
C/A No.: 2006-CP-15-461

Dear Judge Rawl:

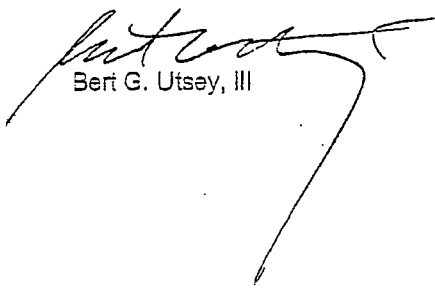
Per your instructions at the June 12, 2008 hearing in the above referenced matter, I am forwarding proposed Orders for your consideration.

If the enclosed meets with your approval, please sign the Orders and return same to me in the provided self-address stamped envelope for filing and service. If you desire changes to the enclosed, please do not hesitate to contact me and I shall be happy to make the requested modifications.

By copy to counsel, I am advising all parties of this transmittal.

Thank you in advance for your attention and kind consideration.

Sincerely,


Bert G. Utsey, III

BGU,III/hd
Enclosures

cc: Robert P. Wood, Esquire

STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON) IN THE COURT OF COMMON PLEAS
Nealtac Enterprises, Inc., d/b/a)
Fireworks Supermarket,)
Plaintiff,)
v.) ORDER
Willard Long d/b/a Foxy's Fireworks,)
and d/b/a Fireworks Superstore,)
Defendant.)

This matter came before me on June 12, 2008 for a hearing on Defendant's Motion to Dismiss or, in the alternative, for Summary Judgment or, in the alternative, to Substitute Parties.

Based upon my review of this file and the arguments of counsel, it is clear that Plaintiff's claims are against the business known as "Fireworks Superstore" which is a corporation.¹ The Complaint does not contain any allegation of a conspiracy between the individual Defendant and the corporation. Moreover, the Complaint does not allege failure to follow corporate formalities or any other basis for piercing the corporate veil of the corporate owner of Fireworks Superstore.

Accordingly, I find that the individual Defendant is not the proper Defendant for the claims presented. Instead, the action should proceed against the two corporations which have owned and operated Fireworks Superstore at the times relevant to the Plaintiff's claims.

IT IS THEREFORE ORDERED that Defendant's Motion is granted to the extent that Willard Long shall be dismissed individually from this action and the corporations Hobo Joe's, Inc. and Foxy's Firework Superstore, Inc., shall be substituted as Defendants in his stead. Moreover, to the extent Plaintiff wishes to articulate a conspiracy claim against Willard Long,

¹ Defendant acknowledges that, at the time of the commencement of this action, the corporate name was Hobo Joe's, Inc.; however, Defendant formed a separate corporation for "Fireworks Superstore" in November 2006. The new corporate name is Foxy's Firework Superstore, Inc.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON)	C/A NO.: 2006-CP-15-461
Neeltec Enterprises, Inc., d/b/a Fireworks Supermarket,)	
Plaintiff,)	
v.)	ORDER
Willard Long d/b/a Foxy's Fireworks, and d/b/a Fireworks Superstore,)	
Defendant.)	

This matter came before me on June 12, 2008 for a hearing on both parties' Motions to Compel. Based upon my review of the file, the arguments of counsel, and the applicable law, I grant both Motions subject to the parameters set forth below.

IT IS THEREFORE ORDERED:

1. Each party's financial information is relevant (at least for discovery purposes, if not for trial) to the parties' claims and defenses;
2. Because some time limits must be placed upon the scope of the discovery of this financial information, I find that both parties shall be entitled to financial information from the other for the period of January 1, 2003 through July 31, 2008;
3. Inasmuch as Defendant owns several fireworks businesses and, at least at one point in time, maintained consolidated financial information for all of these businesses, Plaintiff is entitled to the requested discovery of financial information with respect all of the fireworks businesses in Walterboro in which Defendant has an ownership interest;
4. Not later than July 31, 2008, the parties shall supplement their written discovery responses to each to provide all up-to-date financial information responses to those discovery requests;

5. Not later than August 31, 2008, the parties shall supplement their written discovery responses to include all additional responsive financial information through July 31, 2008; and

6. All financial information produced consistent with this Order shall be governed by the Confidentiality Order dated September 26, 2007 entered in this action.

A. Victor Rawl, Special Referee

June _____, 2008

Charleston, South Carolina



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(803) 227-2035

June 18, 2008

Honorable A. Victor Rawl
Circuit Judge (retired)
2835 Preakness Stakes
Charleston, SC 29414

Re: *Neeltec, Inc. v. Willard Long*
Civil Action 06-CP-15-461
RTT file 712.8

Dear Judge Rawl:

I have drafted and I enclose herewith two proposed Orders on the issues raised before you Thursday, June 12, as alternatives to the two proposed Orders submitted to you by Skip.

Order on discovery issues

I view Skip's proposed Order on the discovery issues as being insufficiently specific. It is not enough to say that each party is to provide up-to-date financial information. There were specific discovery requests that have not yet been answered, and I think those specific requests should be spelled out in the Order so that there can be no misunderstanding about what has been requested and what is being ordered. I have tried to do that in the enclosed proposed Order.

Order on Defendant's Motion for Summary Judgment
or in the alternative for a substitution of parties.

I earnestly request that you revisit this issue for the reasons stated in the proposed Order. I am at peace with the naming of Mr. Long as the defendant because he is the person who committed or orchestrated the acts that we contend are acts of unfair trade practice.

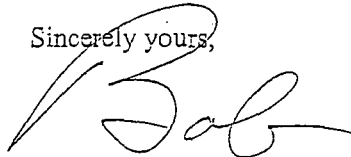
I make it a practice to read the published decisions of the South Carolina Supreme Court and the Court of Appeals on weekends, and this past weekend, I was reading the Supreme Court decision in *Cole v. Raut* (decided June 9, 2008), a medical malpractice case. I noticed a feature of that case that I ordinarily would not have noticed. The plaintiff in that action sued Dr. Raut individually (as well as the P.A. of which he is a member and inferentially an owner). The identity of the defendant was not an issue in the case and was not discussed in the court's opinion, but in that case, like this one, the physician who committed the alleged wrongful acts got sued, and no one argued that he should be sheltered by the P.A.

Another example that can be appreciated by lawyers who sue railroad companies in crossing cases is the practice of naming a local railroad employee, i.e. a South Carolina resident, as a defendant in some instances to defeat diversity of citizenship. I don't make that observation in a critical way; when the rules permit it, it can be good lawyering. The point is, the local railroad employee who allegedly failed to ring the bell or blow the whistle cannot get out of the case on summary judgment or a substitution of the railroad as the named defendant. I would add that if a superior, i.e. a manager, specifically instructed him to operate the locomotive in a way that was negligent, the superior could be named as a defendant and could not avoid liability by hiding behind the corporate structure.

I hope that I am not testing your patience on this issue, but I genuinely and earnestly believe that I am correct.

Best wishes!

Sincerely yours,



Robert J. Thomas

/jm

CC:

Bert Glenn Utsey, III, Esquire
Peters Murdaugh Parker Eltzroth & Detrick, PA
PO Box 1164
Walterboro, SC 29488

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF COLLETON

06-CP-15-461

Neeltec Enterprises, Inc. d/b/a Fireworks
Supermarket,

Plaintiff,

vs.

ORDER ON DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Willard Long d/b/a Foxy's Fireworks, and
d/b/a Fireworks Superstore,

Defendant.

(712.8)

After being appointed Special Referee, the undersigned held a status conference and considered among other matters Defendant's Motion for Summary Judgment or in the alternative for a substitution of parties. The motion asserts that Defendant Willard Long is not the owner of Fireworks Superstore; that Fireworks Superstore was owned by by Hobo Joe's, Inc. a South Carolina corporation, when this action was commenced; that Fireworks Super Store is now owned by Fox's Fireworks Superstore, Inc., a South Carolina corporation; that Plaintiff has not asserted a claim for piercing of the corporate veil as to either of these corporations; and that Plaintiff has sued the wrong party. In the alternative, Defendant asserts that Willard Long be dropped as a Defendant in this action and that Hobo Joe's, Inc. and Fox's Fireworks Superstore, Inc. be added as Defendants.

Standard for Summary Judgment

This Court reviews the grant of a summary judgment motion under the same standard as the trial court, pursuant to Rule 56 (c), SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *E.g., Burriss v. Anderson County Bd. of Educ.*, 369 S.C. 443, 633 S.E.2d 482 (2006);

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). When determining if any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Wilson v. Style Crest Products, Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006). Moreover, even if there is no dispute regarding the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Id.*

Montgomery v. CSX Transportation, Inc., 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008)

The Identity of the Defendant

This action was filed June 30, 2006, against the individual, Willard Long. The acts of unfair trade practice alleged in the complaint were allegedly committed or orchestrated by him. He does not deny that. In his testimony given on June 18, 2007, he testified: :

Q. [by Mr. Utsey] What's your relationship to the Fireworks Superstore?

A. I'm sole owner of the Fireworks Superstore.

Tr p 195, lines 9-11.

Long also testified on cross examination:

Q. [by Mr. Wood] ... There is one person who is in charge of Fireworks Superstore and that is Willard Long; is that -

A. That's exactly right.

Q. All right. I got the right man in front of the judge, don't I?

A. You do.

Tr p 203, lines 1-7.

He also testified:

Q. Now, how many total fireworks stores - individual stores - do you own in the Walterboro area, not just right here at this exit?

A. Five.

Q. All right. Now, what are the names of those stores?

A. Hobo Joe's Megastore, Fireworks Superstore, Wild Willy's Fireworks Warehouse, Hobo Joe's No. 2, and Lucky's Fireworks.

Tr p 196, lines 14-22.

Therefore, Long cannot evade personal liability for actions that he committed or orchestrated. Applicable here is the principle that "An individual is charged with the consequences of an act done directly by himself or indirectly by another at his command. *Qui facit per alium facit per se*; and it is none the less his own act that it has been done by his agent thereunto specially authorized." *Sams v. Arthur*, 135 S.C. 123, 133 S.E. 205 (1926). Long admittedly caused or commanded the acts that constitute the unfair trade practices alleged by Plaintiff.

The existence of a corporate entity

Moreover, there is testimony from Long himself that Fireworks Superstore, Inc. was not incorporated until November 2006 some five months after this action was filed against him. Tr of June 18, 2007, hearing, at pp 95 -196. Long argues that even before that date, it was owned by another corporate entity or an LLC totally owned by him, but no documentation showing ownership of "Fireworks Superstore" has been offered by Long to support that assertion. Rule 56, SCRCF, contemplates that a motion for summary judgment be supported by a showing that there is no genuine issue of fact.

Accordingly, Long's motion for summary judgment or a substitution of defendants is denied, and it is so

ORDERED.

June _____, 2008

A. Victor Rawl, Special Referee

00001

1 STATE OF SOUTH CAROLINA)
2)
3 COUNTY OF COLLETON)
4 NEELTEC ENTERPRISES, INC.,)
5 D/B/A FIREWORKS SUPERMARKET,) DOCKET NO.:
6) 2006-CP-15-461
7 PLAINTIFF,)
8) DEPOSITION
9 VS.)
10) OF
11 WILLARD LONG D/B/A FOXY'S)
12 FIREWORKS, AND D/B/A FIREWORKS). WILLARD LONG
13 SUPERSTORE,)
14)
15 DEFENDANT,)
16)

17 DEPOSITION OF WILLARD LONG, TAKEN BEFORE AMY GODLEY,
18 A NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA,
19 COMMENCING AT THE HOUR OF 12:28 P.M., TUESDAY, NOVEMBER 28TH,
20 2006, AT THE OFFICE OF PETERS, MURDAUGH, PARKER, ELTZROTH &
21 DETRICK, 123 WALTER STREET, WALTERBORO, SOUTH CAROLINA.

22 COPY
23 REPORTED BY
24 AMY GODLEY FREEMAN
25

WILLARD LONG

Page 1

000042

00014

1 warranty work and things like that.

2 Q Any other lawsuits?

3 A When we closed the business down, we had to make

4 payments to Polaris for what they said was the

5 difference when we went out of business.

6 Q How was that case resolved? Did you settle-up and pay

7 them?

8 A Making payments.

9 Q Still making payments?

10 A Uh-huh.

11 Q Was that a lawsuit in federal court or state court?

12 A State.

13 Q Any other lawsuits?

14 A Wait a minute, it never did go to court. We never went

15 to court.

16 Q I am just wondering about people suing you.

17 A No, we never went to court.

18 Q Any other lawsuits?

19 A No, sir.

20 Q Have you or any of your businesses ever filed

21 bankruptcy?

22 A No, sir.

23 Q In the last year, have you changed ownership of any of

24 your companies?

25 A No, sir.

00015

- 1 Q So HoBo Joe's, Inc --
- 2 A Other than Incorporated.
- 3 Q You've incorporated some new businesses?
- 4 A We incorporated all of our businesses.
- 5 Q When did you do that?
- 6 A It's been about four or five months ago, four months
- 7 maybe. My accountants handled all that.
- 8 Q Who is your accountant?
- 9 A Steve Murdaugh.
- 10 Q He is here in town?
- 11 A Yes, sir.
- 12 Q And he incorporated all of your businesses?
- 13 A Yes, sir.
- 14 Q And some of your businesses were not incorporated
- 15 before four or five months ago is what you are telling
- 16 me?
- 17 A We ran them under HoBo Joe's. HoBo Joe's is
- 18 incorporated.
- 19 Q I see. Now you've split them out into separate
- 20 companies?
- 21 A That's right.
- 22 Q Who owns HoBo Joe's?
- 23 A I do, sole owner.
- 24 Q Who owns these other little companies?
- 25 A I do.

00016

1 Q Are you married?

2 A No, sir.

3 Q Do you own the land where your stores are located?

4 A I own the land at HoBo Joe's and I own the land at
5 Fireworks Warehouse.

6 Q Which is kind of next to HoBo Joe's?

7 A Right. The Waffle House divides us.

8 Q Do you own any other land?

9 A That's all I own. I lease the other fireworks stores.

10 Q Speaking of leases, do you have a lease with Mr.
11 Fishburne?

12 A It's expired now.

13 Q So you have it on a week-to-week or day-to-day or
14 month-to-month basis?

15 A We had it for three years and it expired.

16 Q Do you have an understanding with him that if it were
17 to run - Do you have an understanding with him right
18 now that if you wanted to leave or if he wanted to run
19 you out, you or he would be entitled to so many days
20 notice?

21 A I am not sure. I'd have to look at that lease.

22 Q Okay. I just want to make sure you are the only
23 shareholder of HoBo Joe's, Inc?

24 A Yes, sir.

25 Q Who is your bank? Who do you bank with?

Neeltec Enterprises, Inc. v. Long

6/18/2007

APPEARANCES

The Court: M. Duane Shuler, Esq.
For the Plaintiff: Robert P. Wood, Esq.
Rogers Townsend & Thomas, P.C.
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For the Defendant: Bert G. Utsey, III, Esq.
Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.
Post Office Box 1164
(123 Walter Street)
Walterboro, South Carolina 29488

Also present:

Dennis Neeley Willard Long
Cornelia Neeley Sonya Herndon
Shirley Crosby Sean Foerster
Ben Brumfield Mike Windham

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Southern Reporting, Inc.

803-749-8100

www.southernreporting.net

Neeltec Enterprises, Inc. v. Long

6/18/2007

EXHIBITS

(All exhibits were retained by the Court.)

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P R O C E E D I N G

1
2 THE COURT: All right, sir. Well, we on the record now.
3 It's two o'clock. Kingstree. Motion by the
4 plaintiff today. This is the first of -- of, I
5 suppose, several motions that I'm to hear. My
6 understanding is that I have been -- this case has
7 been referred to me by Judge King and Judge
8 Buckner, and I think all of the -- of the issues
9 involved in this case have been referred to me to
10 be heard, and obviously, we are not here to hear
11 any of those on a permanent basis, but this day, my
12 understanding is it's a motion for a temporary
13 injunction. And there are two or three issues in
14 that regard. I'm willing to hear it.

15 Present is Mr. Wood from Columbia; his
16 clients; Mr. Utsey from Walterboro; his clients. I
17 suppose we're ready to go forward.

18 MR. WOOD: Okay. Thank you, your Honor.

19 THE COURT: Mr. Wood.

20 MR. WOOD: Already filed with the Court is our motion
21 for -- I'm sorry -- it's Dennis Neeley's affidavit,
22 and I just refer the Court to that. He filed that
23 with a motion for temporary injunction last fall,
24 and -- and some matters have occurred since that
25 affidavit was filed with the Court, but it is part

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1 A -- the interstate, I don't.

2 Q -- your testimony is that a customer would pay a
3 higher price for the same fireworks because of the
4 color of your sign as opposed to buying the cheaper
5 fireworks from Mr. Long's store?

6 A No. I wouldn't agree with that at all.

7 Q Okay. Now, you -- we've talked about Mr. Long.
8 But, in fact, Mr. Long is not the owner of
9 Fireworks Superstore, is he?

10 A I have no idea.

11 Q Well, isn't it true that you've been made aware, in
12 this case, the name of that store is "Foxy's
13 Fireworks Superstore, Incorporated, a South
14 Carolina Corporation"?

15 A No. It's -- it's definitely Fireworks Superstore.
16 It doesn't say "Foxy's" anywhere out there.

17 Q But -- but you haven't looked to see the official,
18 legal name of that store, have you? Are you
19 telling us you're not aware that the official,
20 legal name is "Foxy's" -- or rather "Foxy's
21 Fireworks Superstore, Incorporated, a South
22 Carolina Corporation"?

23 A No, I was not aware of that. I thought it was the
24 Fireworks Superstore.

25 Q Okay.

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1 Exhibit 24. Is it simply "Foxy's" or is it
2 "Foxy's Fireworks Superstore"? And that's
3 "Foxy's Fireworks Superstore, Inc." on the top
4 of Exhibit 24. And we can take a break.

5 Your Honor, just -- I want to point out
6 in my proposed temporary injunction -- I point
7 out something called a "anti-dissection
8 doctrine" or "theory," or something that says
9 as a matter of fact a judge -- a finder of
10 fact is not supposed to look at the individual
11 words, letters, colors; you look at everything
12 as a whole and you ask: Is there confusion as
13 a whole? I just want to point that out to the
14 Court.

15 THE COURT: All right.

16 MR. WOOD: We'll take a break.

17 THE COURT: Let's take about five minutes.

18 (Off the record from 3:47 p.m. until
19 3:56 p.m.)

20 MR. WOOD: Your Honor, my -- your Honor, my next witness
21 is going to be Shirley Crosby. And I'll ask her to
22 come up, but while she's coming up, your Honor, I
23 want to publish a couple things out of Mr. Long's
24 deposition, just to clear it up before anything
25 gets out of control or forgotten here.

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1 THE COURT: Okay.

2 MR. WOOD: On page 9 of his deposition -- that page --

3 THE COURT: Mr. Long, you say?

4 MR. WOOD: Yes, sir. The defendant. I asked him --

5 MR. UTSEY: (To Mr. Wood) Hang on, let me get -- if you
6 don't you mind.

7 MR. WOOD: I'm sorry. I'm going to page 9 of Mr. Long's
8 deposition.

9 MR. UTSEY: (To Mr. Wood) You didn't have any
10 designation. (To the Court) So to --

11 MR. WOOD: I didn't make it.

12 MR. UTSEY: -- the extent appropriate, your Honor, we'd
13 like an opportunity to do some counter
14 designations.

15 THE COURT: Sure. Sure.

16 MR. WOOD: I asked -- it reads:

17 "QUESTION: Have you now" -- it says no but --

18 "Have you now bought other firework stores at
19 that intersection?

20 "ANSWER: Yes, sir, I have.

21 "QUESTION: Which ones are they?"

22 "Fireworks Warehouse, Fireworks Superstore.

23 "QUESTION: And Hobo Joe's?

24 "ANSWER: Yes.

25 "So you own three?

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1 "ANSWER: On that exit.

2 MR. WOOD: And then on page 15 of his deposition, I ask
3 him, line 6, "When did you do that?" That is --
4 I'm sorry. Let me go back.

5 "QUESTION: You've incorporated some new
6 businesses?

7 "ANSWER: Yes. We incorporated all of our
8 businesses.

9 "QUESTION: When did you do that?

10 "ANSWER: It's been about four or five months
11 ago.

12 MR. WOOD: And this deposition, your Honor, was taken in
13 -- in November of -- of 2006, about eight months
14 ago.

15 "It's been about four or five months ago --
16 four months, maybe. My accountants handled
17 all of that.

18 "Who's your accountant? And he incorporated
19 all of your businesses?

20 "ANSWER: Yes, sir.

21 "QUESTION: And some of your businesses were
22 not incorporated before four or five months
23 ago; is that what you're telling me?

24 "ANSWER: We ran them under Hobo Joe's; Hobo
25 Joe's is incorporated.

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1 "QUESTION: I see now. You split them out
2 into separate companies?

3 "ANSWER: That's right.

4 "QUESTION: Who owns Hobo Joe's?

5 "ANSWER: I do -- sole owner.

6 "QUESTION: Who owns these other little
7 companies?

8 "ANSWER: I do."

9 MR. WOOD: So I just want to let you -- we're suing
10 under the Unfair Trade Practices Act, which is a
11 court kind of a concept, and Mr. Long owns these
12 stores. This is my point; just want to bring that
13 to your attention at this point in the trial.
14 Could you swear Ms. Crosby?

15 (The witness is sworn in.)

16 EXAMINATION OF MS. CROSBY

17 BY MR. WOOD:

18 Q Ms. Crosby, how long have you been manager of
19 the -- how long have you been manager of Fireworks
20 Supermarket in Walterboro, South Carolina?

21 A About nine years.

22 Q Do you live in Walterboro?

23 A Yes, sir.

24 Q How many other employees generally work at the
25 store on any one given day?

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1 MR. UTSEY: I hope we make this fairly quick.

2 EXAMINATION OF MR. LONG

3 BY MR. UTSEY:

4 Q Give us your full name, please, sir.

5 A Thomas Willard Long.

6 Q All right. You've heard us talking about the
7 Fireworks Superstore.

8 A Yes, sir.

9 Q What's your relationship to the Fireworks
10 Superstore?

11 A I'm sole owner of the Fireworks Superstore.

12 Q All right. And now you have been named
13 individually as a defendant in this lawsuit. Do
14 you own that business as a sole proprietorship or
15 in an individual capacity or is it a corporation?

16 A It's a corporation.

17 Q And what is the current name of the corporation?

18 A Foxy's Fireworks Superstore.

19 Q And that's a South Carolina corporation?

20 A Yes, sir.

21 Q And you were permitted by the Secretary of State to
22 incorporate with that name?

23 A Yes, sir.

24 Q All right. When did you incorporate with that
25 name? I think Mr. Long -- I mean, Mr. Wood read

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1 something awhile ago that said November of 2006;
2 does that sound --

3 A Yeah.

4 Q -- right?

5 A It was in 2006.

6 Q All right. And I think he read something that said
7 before that it was under the overall name of Hobo
8 Joe's --

9 A Right.

10 Q -- which is also a South Carolina corporation --

11 A Right.

12 Q -- is that correct?

13 A Yes, it is.

14 Q Now, how many total fireworks stores -- individual
15 stores -- do you own in the Walterboro area, not
16 just right here at this exit?

17 A Five.

18 Q All right. Now, what are the names of those
19 stores?

20 A Hobo Joe's Megastore, Fireworks Superstore, Wild
21 Willy's Fireworks Warehouse, Hobo Joe's No. 2, and
22 Lucky's Fireworks.

23 Q Okay. Have those always been the names of all of
24 those stores?

25 A No, sir. Not always.

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1 Q Did you change the names?

2 A Yes, sir.

3 Q All right. Why did you change the names?

4 A Well, over a period of time the public changes and
5 they used to all be characters, named after
6 characters, and we getting away from the
7 characters. Now, we still got Hobo Joe's, but
8 we're trying to get away from the character name
9 and we changed all -- all four -- all three of
10 them.

11 Q Okay. Which three?

12 A Wild Willy's Fireworks Warehouse, Foxy's Fireworks
13 and -- Superstore -- and got one other --

14 Q Hobo Joe's Mega --

15 A Hobo --

16 Q -- store?

17 A -- Joe's Megastore.

18 Q How did you come up with those names -- mega store,
19 superstore and warehouse?

20 A We just sat down in the office one day and tried to
21 come up with some names other than characters and
22 we -- we tried to put it all like a warehouse or a
23 megastore or a superstore. We kind of --

24 Q Why was that?

25 A -- patterned after these big corporations, Wal-Mart

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1 Superstore and all, they're successful and we
2 wanted to be so and that's why we come up with the
3 megastore, superstore and warehouse.

4 Q Was it your experience that the public was
5 responding more to stores with names like that than
6 names such as cartoon characters and whatnot?

7 A I think they are now, yes, sir.

8 Q Okay. Now, there was some talk earlier about a
9 shipping container that was temporarily in front of
10 the superstore.

11 A Yes, sir.

12 Q Before you put that container there, did you go to
13 the Town of Walterboro?

14 A Yes, sir, I did.

15 Q And --

16 A I went --

17 Q -- and did you ask whether it was permissible for
18 you to put -- place it?

19 A They gave me permission to put it there.

20 Q All right. And what was your intention of using
21 that container for?

22 A Storage. I used it for storage.

23 Q All right. And the container got moved?

24 A Yes, sir.

25 Q Why did the container get moved?

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1 A The City came to me and said that they had a
2 complaint about it being there and they looked up
3 and there was an ordinance about it, but -- and
4 they wanted me to move it. So they gave me 30 days
5 and I tried to get moved. Couldn't find anybody.
6 And I finally got Neil Hudson's Towing to -- to
7 remove it for me.

8 Q Okay. And you got it moved within the 30 days?

9 A Oh, yes, sir.

10 Q Okay. All right. Last topic I want to talk to you
11 about, Mr. Long, is the request that I understand
12 the plaintiff was making here for an injunction to
13 prevent your business from using the name
14 "Fireworks Superstore." I guess to prevent Foxy's
15 Fireworks Superstore, Incorporated, from calling
16 itself "Fireworks Superstore." And I'd like for
17 you to talk -- explain to the judge what that would
18 do to Foxy's Fireworks Superstore, Incorporated, if
19 you had to stop using that name what would all the
20 effects of that be.

21 A Well, it'd be a lot of expense involved in it.
22 There'd be having to change the name, painting the
23 building, change all my brochures, reincorporate,
24 change all my signs, have to paint all them.
25 You're looking at -- guesstimate 12/\$15,000, I

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1 something. There is one person who is in charge of
2 Fireworks Superstore and that is Willard Long; is
3 that --

4 A That's exactly right.

5 Q All right. I got the right man in front of the
6 judge, don't I?

7 A You do.

8 Q And you're not trying to hide behind a corporation
9 for your personal acts, are you?

10 A No, sir.

11 MR. UTSEY: Objection.

12 Q And --

13 MR. UTSEY: It calls for legal conclusion.

14 THE COURT: I sustain. He doesn't know that.

15 He wouldn't know what it -- he wouldn't know
16 what . . .

17 Q The -- the decisions that were made regarding
18 painting the store, naming the store, putting the
19 container there, all that stuff, that was done all
20 by Willard Long, wasn't it?

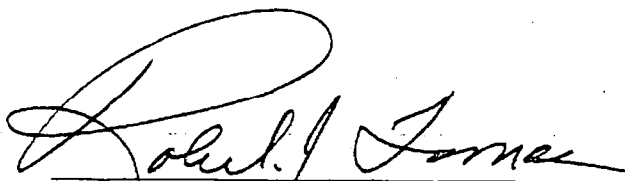
21 A My decision. Yes, sir.

22 Q Yes, sir. Okay. That's what I want. Now, you
23 testified that the purpose of the container was not
24 to block the view; is that what I hear you say?

25 A I didn't intend to block. I -- I -- my intention

Certificate of Appellant's counsel

The undersigned counsel for Appellant certifies that the foregoing Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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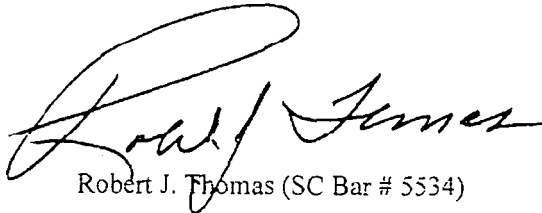
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