THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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SC Court of Appeals

Case No. 2010-CP-02-03055
Appellate Case No. 2014-001579

Melissa J. Lackey-Oremus and James T. Oremus ..... Appellants

v.

4 K&D Corporation, d/b/a Grand Estates Auction Company,
Stacy Kirk and Valaria Devine ..... Respondents.

RESPONDENTS' INITIAL BRIEF

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FACTS[1]

Jim and Melissa Oremus (the "Oremuses") live in Aiken, South Carolina, and describe themselves as "business owners." They own MLO Real Estate, LLC, which owns ten or eleven rental houses in South Carolina and Georgia. Additionally, they own and operate three Monkey Joe's businesses. Monkey Joe's is a commercial, indoor, inflatable playground for entertainment of children. In addition, they own a trucking company, and Mrs. Oremus owns a "paint your own pottery studio in Aiken." Mrs. Oremus worked in the banking industry for approximately ten years until she had children in 2006. (M. Oremus Deposition, pp. 8-10.) She recently ran for County Treasurer of Aiken County, South Carolina. The Plaintiffs built the house in which they have resided in Aiken since 2010 for $2 million and have no mortgages on it. (M. Oremus Deposition, pp. 14-15.)

4K&D Corporation d/b/a Grand Estates Auction Company ("Grand Estates"), sells valuable real properties at auction. The individuals, Valaria Devine and Stacy Kirk, are mother and daughter. Ms. Devine owns all of the voting shares in Grand Estates. (Devine Deposition, p. 26.) Ms. Kirk is an employee of the company and was President at the time of the auction at issue in this matter in February of 2010. (Kirk Deposition, pp. 18-19.)

In November of 2009, Grand Estates contracted with Karl Wesley and Erin Frances Hirschhorn to market and ultimately sell "The Balcony," an Aiken, South Carolina, horse farm and estate, at absolute auction on or before February 9, 2010. (K. Hirschhorn Deposition, p. 17 and Exhibit 1.)

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[1] Because this involves the granting of a motion for summary judgment, the facts set forth herein are primarily those asserted by the Oremuses and are assumed to be undisputed for the purposes of the motion only.

Grand Estates provided a "Property Purchase Package" to potential purchasers and their brokers. In the next to last section of that package, entitled "Contract," there was an Exhibit D entitled "Preliminary Terms and Conditions of Sale" and an Exhibit E entitled "Bidder's Statement." The Table of Contents provided that "Final Terms & Conditions will be issued on Auction Day." In Exhibit D, at page 22 of 27, in section "F. Bidder Registration and Terms of Sale," it states in pertinent part:

> 1) Bidders must register and have received a Property Purchase Package and a bidder's number in order to bid on the Property. This number must be presented when a bidder is declared the high bidder. To register to bid, the bidder must present a certified check (made payable to the bidder), personal check with a bank letter of guarantee (made payable to Richard M. Koch, Attorney Trust Account) in the amount of $50,000 at registration ("Bid Deposit").

Registration for the auction was scheduled to take place on February 9, 2010, from 12 PM – 1:30 PM. (Affidavit of Stacy Kirk, Exhibit 1.)

On February 9, 2010, a number of registered bidders appeared to participate in the auction. Because Grand Estate had not received all of the necessary paperwork from potential bidders Mark and Marianne Blazar, Ms. Kirk informed their broker that they were not eligible to bid.

The auction proceeded with the registered bidders and did not include the Blazars. After a number of bids, the auctioneer declared that the Oremuses were the high bidder with a bid of $1,875,000. (J. Oremus Deposition, pp. 18-21.) Because the terms of the auction provided for a 7.5% Buyer's Premium, the total contract price for the purchase of the property was going to be $2,015,625.

Shortly after the auction, Stacy Kirk approached the Oremuses and their broker friend, Nancy Cerra, to tell them that there was a problem because the Blazars should not

have been excluded from the auction, their pre-opening bid was $2 million, and both the Hirschhorns and the Blazars were threatening to sue. Mr. Oremus did not question any of Ms. Kirk's statements and immediately responded that, because the Blazars had outbid them, they would let the Blazars have the house. Ms. Kirk then asked them if they would sign a release of their rights to purchase the property, as well as releasing the owners and auction company from any claims. Ms. Kirk hand drafted a release, and the Oremuses discussed, read and then signed two versions of the release ultimately releasing the Hirschhorns, Grand Estates and the auctioneer from any and all claims that they might have against any of these people/entities. The Oremuses understood what the releases meant before they signed them. The Oremuses were not forced to sign the releases. They knew that they could go forward with the purchase based on their high bid. Mr. Oremus and his wife knew that they could buy the house for their bid amount, but they also knew that the Balcony was "post-crash real estate" and it would take a while for the property to increase in value. (J. Oremus Deposition, pp. 24-35; Exhibits 1 and 2.)

Mrs. Oremus did ask her husband prior to agreeing to give up her right to buy the property, "Well, how do we know, you know, what his bid was?" All pre-opening bids had to be in writing, but the Oremuses did not ask Ms. Kirk to provide a copy of the $2,000,000 pre-opening bid. Instead, Mr. Oremus said to his wife, "They outbid us; we lost. Then, just give it to them." Mrs. Oremus signed the two releases after reading them. (M. Oremus Deposition, pp. 38-41; Exhibits 1 and 2.) The Oremuses agreed to release their bid and signed the releases on the spot immediately after the auction even though they knew that they could have gone through with the auction purchase as the high bidder. (J. Oremus Deposition, pp. 31-32.)

The first release provided:

> We, James and Melissa Oremus hereby agree to release seller from all obligations of selling us property located at 836 Whiskey Road, Aiken, SC that sold to us at Absolute Auction on February 9th, 2010. We forfeit all right and claim to the property. We also hereby release Grand Estates Auction Co. from all claim rights for any actions performed.

(M. Oremus Deposition, Exhibit 1.)

The second release provided:

> We, James and Melissa Oremus release Grand Estates Auction, the auctioneer and the real estate broker for any claim for damages monetary or otherwise regarding the auction sale of 836 Whiskey Road, Aiken, SC.

(M. Oremus Deposition, Exhibit 2.)

After the Oremuses signed the releases, they shook hands and left. They were not distressed at the time and may have been smiling when they left. (J. Oremus Deposition, pp. 35-36.) A day or two after the auction, the local newspaper called Mrs. Oremus to ask her for comments, and she made sure that the paper knew that their failure to purchase the property was not because they did not have enough money to make the purchase. Within a couple of weeks, the Oremuses learned that the excluded bidder had not purchased the property and that a couple who had not been present at the auction had a contract to buy the property for $2,500,000.00. Mrs. Oremus did not contact Grand Estates after she learned about this contract. (M. Oremus Deposition, pp. 49-52.) Mr. Oremus called Stacy Kirk the day after the auction to tell her that something did not seem right. He left her a voicemail, and she never called him back. He made no further attempts to contact her. (J. Oremus Deposition, pp. 36-38.) On February 15, 2010, Brad Boni, a lawyer for the Oremuses, talked with Stacy Kirk and requested that she provide him with a copy of the releases signed by the Oremuses, and she did that. (Kirk

Deposition, pp. 148-150, 168-170; Exhibits 18 and 19.) At that time, Ms. Kirk told Mr. Boni that the Blazars had not purchased the property and that it was still on the market if the Oremuses were interested in purchasing it. (Affidavit of Stacy Kirk.[2]) In any event, the Oremuses made no efforts to purchase the property after signing the releases and leaving the property on the day of the auction.

The Hirschhorns sold "The Balcony" to Hornor and Frederica Davis for $2,500,000.00 in March of 2010.

Neither of the Oremuses has ever met or talked to Valaria Devine. At the auction, they had no interactions with her and did not know of her existence. They only named her as a Defendant because they later learned that she was an officer and director of Grand Estates. (J. Oremus Deposition, pp. 46-47; M. Oremus Deposition, pp. 54 and 58.)

The Oremuses instituted this lawsuit on December 17, 2010. They filed an Amended Complaint on November 13, 2013, asserting the following claims: (1) Fraud; (2) Negligence, Recklessness, and Willfulness; (3) Intentional Interference with Contract; (4) Unfair Trade Practice; (5) Declaratory Judgment; and (6) Promissory Estoppel. Subsequently, the Respondents filed a Motion for Summary Judgment as to all claims and all Defendants, asserting that the claims should be

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[2] Although Mr. Boni was not listed as a witness during the discovery process, the Oremuses submitted his affidavit in opposition to the motion for summary judgment. He admitted talking to Ms. Kirk, denied that she asked him if the Oremuses were interested in buying the property or having knowledge that the excluded bidder did not purchase the property. Mr. Boni further stated that, "[p]rior to the sale of the Balcony to Mr. and Mrs. Davis, the undersigned never had any factual basis upon which to advise the Oremuses to file a Lis Pendens in connection with the property in question..." Of course, if the Oremuses still claimed a right to purchase the property, they would have had to file a Lis Pendens **before** the property sold, so Mr. Boni's statement makes no sense, because the Oremuses testified that they knew that the property was being sold to persons who had not bid before the sale was consummated. In any event, if the Oremuses claimed that they were somehow entitled to buy the property, they should have put the sellers on notice of that fact, which they did not.

dismissed based on the releases given as well as based on the Oremuses' failure to have sufficient evidence to support each claim.

After reviewing the motions, the evidence and the law and considering the arguments of counsel, by Order, dated June 4, 2014, Judge Doyet Early granted the motion as to all claims against Valaria Devine, without prejudice for the Oremuses to renew their claim for piercing the corporate veil/alter ego should they obtain a verdict against Grand Estates. The judge also granted summary judgment to all Defendants as to the Second Cause of Action alleging Negligence, Recklessness and Willfulness, the Third Cause of Action alleging Intentional Interference with Contract, the Fourth Cause of action alleging Unfair Trade Practice and the Sixth Cause of Action alleging Promissory Estoppel. The sole remaining cause of action for trial was the First Cause of Action alleging fraud against Stacy Kirk and Grand Estates.

The Oremuses made a motion to alter or amend the Order, and Judge Early, after a hearing, denied the motion. The Oremuses appealed the Court's granting of the motion for summary judgment as to the fraud cause of action against Ms. Devine and the granting of summary judgment as to the Unfair Trade Practices Act claim as to all Defendants.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether 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 nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

"In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.... In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). "[T]he fraud claim requires proof by clear and convincing evidence; thus, more than a mere scintilla of evidence must be presented to withstand a motion for summary judgment." Id., 392 S.C. at 124-25, 708 S.E.2d at 770.

In an appeal, "a respondent – the 'winner' in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." I'On LLC v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

ARGUMENT

I. THE RELEASES EXECUTED BY THE OREMUSES BAR THIS ACTION.

On the date of the auction, the Oremuses voluntarily agreed in writing to release Grand Estates from any claims relating to the auction and to forfeit their rights to purchase the Balcony. In exchange for this release, Grand Estates returned the $50,000 deposit to the Oremuses and did not require them to consummate the purchase of the property. The parties had an agreement, and the Oremuses are bound by that agreement. The Oremuses never pled any action to rescind the releases, which remain valid and

enforceable and require that all of the Oremuses' claims be dismissed. They are asking for the speculative benefit that they would have been able to sell the property at a profit without taking the risks of actually investing in the "post-crash real estate."

Like other contracts, a release may be voided by a defrauded party through an action for rescission. Maw v. McAlister, 252 S.C. 280, 166 S.E.2d 203 (1969). While indirectly alleging that the releases were procured by fraudulent means, the Oremuses' Amended Complaint does not seek rescission of the agreement. It does not even use the words "void," "invalid," or similar words, when referring to the agreement. In fact, all claims are predicated on the agreement's effect of releasing the Oremuses' rights to purchase the Balcony. Because the release documents have been affirmed and not challenged, the Oremuses' claims are barred by the releases they gave.

The Oremuses failed to take any action to stop the sale of the property to the Davises. They had the ability to sue to rescind the release agreements they entered and consummate the purchase of the Balcony. In fact, Mrs. Oremus knew that the excluded bidder had not bought the property when she searched on the internet and learned that "Stacy Kirk and the Davises became fast friends at a fox hunt, and they were purchasing the Balcony." (M. Oremus Deposition, p. 50.) This information was learned by Mrs. Oremus well before the property was sold to the Davises on March 30, 2010.

Knowing that a sale was going to take place, the Oremuses took no action seeking to void the releases and demand the right to purchase the property. No lawsuit or lis pendens was filed seeking to block the sale and challenge the releases. Rather than taking some action seeking to stop the sale of the Balcony, the Oremuses stood by and permitted the sale of the Balcony to the Davises to take place.

Because the Oremuses failed to seek rescission of the release and forfeiture agreement, the agreement remains binding and the Oremuses' claims are barred by the release that they gave. Therefore, all of the Oremuses' claims should be dismissed.

II. THE DISMISSAL OF VALARIA DEVINE FROM THE FRAUD CAUSE OF ACTION WAS PROPER UNDER THE LAW AND FACTS OF THIS CASE.

A. VALERIA DEVINE IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE IS NO EVIDENCE THAT MS. DEVINE PARTICIPATED IN THE ALLEGED FRAUDULENT CONDUCT.

The trial court properly granted summary judgment as to Valaria Devine as to all causes of action, including fraud. The Oremuses specifically challenge her dismissal from the fraud cause of action in this appeal.

The only reason that James Oremus had for naming Valaria Devine as a Defendant was because "[s]he's the owner of the company." (J. Oremus Deposition, p. 47.) Neither he nor his wife have ever met or even talked to Ms. Devine. (J. Oremus Deposition, pp. 46-47; M. Oremus Deposition, pp. 54 and 58.) She was not at the auction, and she had no interactions with the Oremuses. The Oremuses did not even know of her existence at the time of the alleged misconduct.

The elements of a fraud claim in South Carolina must be proved by clear and convincing evidence and are: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity by the defendant; (5) intent that the representation be acted upon; (6) the hearer's ignorance of the falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. Kahn Construction Co. v. S.C. Nat'l Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980). Evidence as to each and every

element must be presented in order to survive summary judgment on a fraud claim. A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

The Oremuses have failed to prove any of the elements of fraud as to Ms. Devine, because she made **no** representations to them. In their brief, the Oremuses cite cases for the proposition that an officer or a director may be liable for torts of their companies in which they participate. However, none of the cases cited by the Oremuses stands for the proposition that an officer or director who makes no representations, does not otherwise participate in the alleged fraud, and is unknown to the hearer can be liable for fraud.

In Satcher v. Berry, 299 S.C. 381, 385 S.E.2d 41 (1989), a case cited by the Oremuses as support for their argument, the Defendant was the actual person who had made certain false statements and, even more important, had failed to make certain material statements regarding the sale of a peach farm. That case does not have a "missing actor" as the Oremuses seem to argue in their brief. In Hunt v. Rabon, 275 S.C. 475, 272 S.E.2d 643 (1980), another case cited by the Oremuses, the Supreme Court upheld the granting of a demurrer in favor of the trustees of a hospital corporation named as defendants in a medical malpractice complaint, because they had not participated in the alleged negligence. In Neeltec Enterprises, Inc. v. Long, 402 S.C. 524, 741 S.E.2d 767 (Ct. App. 2013), the Court of Appeals held that a corporate officer could be individually liable under the South Carolina Unfair Trade Practices Act if he participated in the unfair or deceptive acts. None of these cases stands for the proposition that a person can be liable for fraud based on the misrepresentations of another person.

To the contrary, Moseley v. All Things Possible Inc., 388 S.C. 31, 38, 694 S.E.2d 43, 47 (Ct. App. 2010), is directly on point and supports the trial court's decision in this case. In Moseley, purchasers of a piece of property brought an action against the corporation that sold the property and its president alleging fraud because the purchase was based on an erroneous plat that the real estate agent received in an anonymous fax. Because there was no evidence linking the corporation president to the faxing of the incorrect plat, the South Carolina Court of Appeals determined that the president was not liable for fraud. The Court stated: "Here, there was no evidence [that the president] faxed the falsified plat to [the real estate agent]. All representations made to the Moseleys concerning Lot 45 were made by [the real estate agent]. Accordingly, we reverse the circuit court's determination that [the president] committed fraud."[3] Thus, the Court found that the president, who participated in the sale and was known to the purchasers but made no representations concerning the plat, could not be liable for fraud.

Similarly, in the instant case, the Oremuses have failed to present any evidence that Ms. Devine directed or authorized Ms. Kirk to make the alleged false statements. No witness testified that Ms. Devine instructed Ms. Kirk to make false representations to the Oremuses. The only evidence is that Ms. Devine talked to Ms. Kirk about the auction, the problem with the excluded bidder and whether Ms. Kirk thought that the Oremuses really wanted to buy the house. (Devine Deposition, pp. 75-80, 87-88, 92-94 and 122.) Ms. Kirk admits that she sought the Oremuses' agreement to release their right to buy the property at the absolute auction and denies that Ms. Devine directed her to do anything.

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[3] All Things Possible, Inc., which was found responsible for the fraud, petitioned for a writ of certiorari concerning the Court of Appeals' determination that it was liable. The Moseleys did not appeal the decision that the president had not committed fraud. The Supreme Court affirmed the Court of Appeals' decision and found that the unappealed ruling regarding the president was the law of the case. Moseley v. All Things Possible Inc., 395 S.C. 492, 495, fn 4, 719 S.E.2d 656, 658, fn 4 (2011).

(Kirk Deposition, pp. 134-147.) The Oremuses admit that they voluntarily agreed to give releases, that they knew that they could go forward with the purchase if they so desired, that they received back their deposit and that they left the auction with everything that they had prior to participating in the auction. (J. Oremus Deposition, pp. 24-34.)

The Oremuses argue in their brief that there is circumstantial evidence from which a jury could infer that Ms. Devine somehow participated in, or directed, the alleged fraudulent conduct they attribute to Stacy Kirk. This argument must fail because there is no direct or circumstantial evidence to support this position. The Oremuses are asking the Court and a jury to engage in total speculation. Just as in Moseley, where there was no evidence that the corporate president faxed the inaccurate plat to the agent, there is no evidence tying Ms. Devine to the statements attributed to Ms. Kirk.

The only "evidence" that Plaintiffs present is the Affidavit of Desiree Watson,[4] a former employee of Grand Estates. According to the affidavit, Ms. Devine telephoned Ms. Watson after the auction and told her that "if anyone asks, the high bid we received on The Balcony was $2,000,000.00, nod, nod, wink, wink." (Affidavit of Watson, January 4, 2012.) Indeed, when the 7.5% Buyer's Premium was added to the Oremuses' bid, the total contract price for the purchase of the property was $2,015,625, so that was a correct statement. In another telephone call between Ms. Watson and Ms. Devine, Ms. Devine told her that the auction had almost been a disaster and that she and Ms. Kirk had done "quick thinking on their feet" and had "saved the day." (Watson Affidavit.) These

[4] The brief also refers to deposition testimony of another former Grand Estates employee, Steven Jedael, who talked about the alleged use of shills to get higher prices in another auction. That testimony has nothing to do with the claims of the Oremuses that they were somehow induced not to buy the property by Ms. Kirk telling them that she had made a mistake when she did not allow an excluded bidder with a $2 million pre-opening bid to participate in the auction. If Grand Estates had used a shill at this auction, the shill would have been the high bidder, not the Oremuses.

alleged statements attributed to Ms. Devine do not amount to admissions that Ms. Devine had participated in making any false statements to the Oremuses. Instead, these statements are consistent with the testimony of Mr. Hirschhorn, Ms. Devine and Ms. Kirk, all of whom were unhappy with the winning bid and wanted Ms. Kirk to ask the Oremuses whether they wanted to go through with the purchase or be allowed to walk away from it. As the Oremuses testified, they knew they had the right to purchase the property but voluntarily released their right to do so and walked away from the purchase without giving it a second thought. The Affidavit of Desiree Watson does not support Plaintiffs' argument that Ms. Devine participated or authorized the representations being sued upon in this case.

Because Ms. Devine did not make, authorize, or participate in making any representations to the Oremuses, Judge Early correctly granted summary judgment as to Ms. Devine as to the fraud and all other causes of action.

B. BECAUSE THE ALLEGED FALSE REPRESENTATIONS WERE NOT MATERIAL, THE OREMUSES FAILED TO PROVE ALL OF THE ELEMENTS OF A FRAUD CLAIM.

As a separate sustaining ground for the lower court's decision to grant summary judgment to Ms. Devine as to the fraud claim, the alleged false representation was not material. The alleged representation that the Oremuses claim as the driving basis for their fraud claim is that there was an improperly excluded bidder who had submitted a pre-opening bid of $2 Million.[5] Because that was not a material representation with regard to the sale of the property at auction to the Oremuses, the Oremuses have failed to prove all of the elements of fraud.

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[5] Although the Amended Complaint has three alleged false representations, Mr. Oremus testified that the only representation that drove him to release his right to buy the property was that they had been "outbid" by the previously submitted pre-opening bid. (J. Oremus Deposition, p. 31.)

The materiality of a representation is to be determined by an objective, or "reasonable man," standard. Restatement (Second) of Torts § 538 (1977) (stating that a representation is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question"); TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976) (holding in a securities case that the question of materiality is an "objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor").

The test of materiality in this case is whether a reasonable investor would attach importance to the alleged false representation concerning the existence of a $2,000,000 pre-opening bid when deciding whether to proceed with the purchase of the property after making the highest bid of $1,875,000. Rather than release his rights to sell the property, a reasonable real estate investor would have chosen to proceed with the purchase and tried to sell the property to the excluded bidder at a profit.

Considering the business sophistication and ventures of the Oremuses and their alleged desire to buy this property for an investment, it is curious that they contend this alleged representation to be the material, or driving, representation that led them to release their rights to purchase the property. Mr. Oremus stated in his deposition that he "is an investor" and "look[s] for opportunities to find deals." (J. Oremus Deposition, p. 34.) If Stacy Kirk told him that another bidder had made a pre-opening bid of $2,000,000, then Mr. Oremus was presented with a terrific opportunity to consummate the purchase agreement and immediately sell the home to the other bidder for a nice profit. This was clearly valuable information for an investor on the lookout for deals. If anything, the alleged misrepresentation should have only reinforced the Oremuses' desire to proceed

with the purchase. From an objective standpoint, such a representation could not have been a significant factor in electing to forfeit the right to purchase the property.

Because the alleged misrepresentation was not material, the lower court's decision to dismiss the fraud claim against Ms. Devine should be affirmed.

C. THE OREMUSES HAD NO RIGHT TO RELY ON THE ALLEGED FALSE REPRESENTATION.

There is no right to rely, as required to establish fraud, where there is no confidential or fiduciary relationship, and there is an arm's length transaction between mature, educated people. DeHart v. Dodge City of Spartanburg, Inc., 311 S.C. 135, 139, 427 S.E.2d 720, 722 (Ct. App. 1993). This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests. Florentine Corp., Inc. v. PEDA I, Inc., 287 S.C. 382, 339 S.E.2d 112 (1985).

With regard to the alleged misrepresentation about the $2 million pre-opening bid, the Oremuses knew that all of the pre-opening bids were made in writing and, yet, they did not request to look at the written bid to confirm that it had been made. Mrs. Oremus testified that she asked her husband how they were to know whether the bidder had actually made that pre-opening bid. All the Oremuses had to do was to ask Ms. Kirk to show them the written pre-opening bid in order to determine if she was telling them the truth. As the Oremuses testified, rather than ask for confirmation of this "material" representation, they instead immediately agreed to withdraw their bid relieving them from the obligation to buy the property, to sign a release, to recover their $50,000 deposit and to leave with smiles on their faces.

In Schnellmann v. Roettger, 368 S.C. 17, 21, 627 S.E.2d 742, 745 (Ct. App. 2006) aff'd as modified, 645 S.E.2d 239 (2007), the Court of Appeals determined that the

Schnellmanns' reliance on an approximation of square feet in a real estate listing was unreasonable as a matter of law, because they had the means to determine the accuracy of the statement:

> It is well established that "there can be no liability for casual statements, representations as to matters of law, or matter which plaintiff could ascertain on his own in the exercise of due diligence." [Citations deleted.] The Schnellmanns could have discovered the misstatement by simply requesting a copy of the appraisal or by having someone come in to measure the property.

In the instant case, the Oremuses had the means to determine the accuracy of the statement and, instead of asking for the proof, immediately gave up their right to buy the property and voluntarily signed a release.

The Oremuses are savvy business people. As Mr. Oremus testified, he was buying the property to hold onto it until the real estate market improved. But for the sale to the Davises for $500,000.00 over what the Oremuses had agreed to pay, there never would have been this lawsuit. Clearly, Mr. Oremus seized an opportunity to be relieved of the obligation to buy the property, because if he had wanted to buy it, he had every right to do that, and he voluntarily chose not to. There was clearly no right to rely on the alleged representation that the excluded bidder had made a written pre-opening bid of $2,000,000, so Ms. Devine was entitled to summary judgment on this ground as well.

III. BECAUSE THE OREMUSES PRESENTED NO EVIDENCE THAT THE ALLEGED UNFAIR OR DECEPTIVE ACT AFFECTED THE PUBLIC INTEREST OF SOUTH CAROLINA, RESPONDENTS WERE ENTITLED TO SUMMARY JUDGMENT AS TO THE UNFAIR TRADE PRACTICE CAUSE OF ACTION.

A claim is actionable under the South Carolina Unfair Trade Practices Act ("SCUTPA") if the plaintiff can show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected

[the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). Health Promotion Specialists, LLC v. S. Carolina Bd. of Dentistry, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013). In this case, the Oremuses have failed to present any evidence that the alleged unfair and deceptive act of falsely representing that there had been a pre-opening bid of $2 million from an improperly excluded bidder, has any impact on the public interest.

As the South Carolina Supreme Court has recently held:

> As to Petitioners' unfair trade practices claims, the SCUTPA is not available to redress a private wrong because an unfair or deceptive act that affects only the parties to the transaction is beyond the scope of the SCUTPA. Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 478–480, 351 S.E.2d 347, 349–351 (Ct. App. 1986). Here, the transaction only affected Petitioners, DLI, and Respondents, and therefore, Respondents' actions or inactions are not actionable under the SCUTPA, and Petitioners failed to present any evidence to the contrary. Id.; see also Health Promotion Specialists, L.L.C. v. S.C. Bd. of Dentistry, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013).

Woodson v. DLI Properties, 406 S.C. 517, 530, 753 S.E.2d 428, 435 (2014). Here, the transaction only affected the parties to the transaction, so any unfair or deceptive act is beyond the scope of the SCUTPA.

Also, in determining whether conduct affects the public interest, our courts have considered whether the party accused of wrongdoing has acted in the same way in the past or is likely to repeat the alleged wrongful acts in the future. Daisy Outdoor Advert. Co. v. Abbott, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996).

In Schnellmann, supra, in which the buyer of a home alleged that the seller violated the SCUTPA by making an allegedly false statement concerning the home's square footage, the trial court dismissed the claim finding, among other things, that the alleged wrongful conduct did not affect the public interest. The South Carolina Court of

Appeals affirmed the decision because no evidence was presented that the seller had previously misrepresented square footages or that "any procedure regularly employed by" the seller would cause the misstatement to be made again. Schnellmann, 368 S.C. at 23, 627 S.E.2d at 745-746.

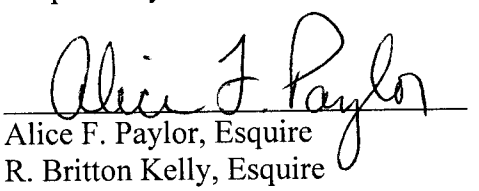
Like the buyer in Schnellman, the Oremuses have not produced any evidence that Respondents have ever misrepresented facts to induce winning bidders at auctions to release their rights to purchase the property being sold at auction. Instead, the Oremuses have proffered evidence suggesting that Grand Estates engaged in the use of shills at a previous auction. Such alleged misconduct is completely different from what the Oremuses contend were deceptive acts committed during the auction of the Balcony. The purported evidence does not show a pattern or history of deceptive conduct. Accordingly, the evidence does not help the Oremuses establish that the alleged deceptive acts at the Aiken auction affect South Carolina's public interest.

Therefore, the Order of the lower court with regard to the SCUTPA claim should be affirmed.

CONCLUSION

The Oremuses signed releases that barred this action. In addition, they have failed to prove the necessary elements of either fraud or a violation of SCUTPA. Therefore, the Order of the lower court should be affirmed.

Respectfully submitted,



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Charleston, SC
December 4, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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SC Court of Appeals

Case No. 2010-CP-02-03055
Appellate Case No. 2014-001579

Melissa J. Lackey-Oremus and James T. Oremus ..... Appellants

v.

4 K&D Corporation, d/b/a Grand Estates Auction Company,
Stacy Kirk and Valaria Devine ..... Respondents.

PROOF OF SERVICE

I certify that I have served a copy of Respondents' Initial Brief by regular U.S. Mail, postage prepaid, on December 4, 2014, addressed to their attorneys of record as follows:

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December 4, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Melissa J. Lackey-Oremus and James T. Oremus v.
4 K&D Corporation, d/b/a Grand Estates Auction Company, Stacy Kirk and Valaria DeVine
Appellate Case Number: 2014-001579

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of Respondents' Initial Brief as well as the original and one (1) copy of Respondents' Designation of Matter to be Included in Record on Appeal along with Proofs of Service for each.

I would appreciate it greatly if you would file the originals of each and return the filed copies to me in the self-addressed, stamped envelope provided.

Thank you for your consideration in this matter.

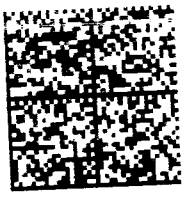
With kind regards, I am

Sincerely yours,

Shannon M. Skelly
Paralegal to Alice F. Paylor

/sms
Enclosures as stated

cc: Robin A. Braithwaite, Esquire (w/ enc.)
Robert L. Buchanan, Jr., Esquire (w/ enc.)



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