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

Case No. 2010-CP-02-03055

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.

INITIAL REPLY BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. DID THE RELEASES BAR THE OREMUSES' ACTION?

II. DID THE TRIAL COURT OVERLOOK EVIDENCE OF VALARIA DEVINE'S INVOLVEMENT IN THE FRAUD, THE MATERIALITY OF THE MISREPRESENTATIONS, AND THE OREMUSES' RIGHT TO RELY?

III. DID THE TRIAL COURT OVERLOOK EVIDENCE THAT THE UNFAIR AND DECEPTIVE ACTS OF THE RESPONDENTS IMPACTED THE PUBLIC INTEREST?

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Kirk and Valaria Devine Respondents.

DESIGNATION OF MATTER INCLUDED IN THE REPLY BRIEF

Appellants propose the following be included in the Reply Brief:

1. TITLE PAGE

2. INDEX

3. ORDERS: None

4. PLEADINGS:

   a) Amended Summons and Amended Complaint, filed November 13, 2013

5. TRANSCRIPTS:

   a) Argument of Defendants' Motion for Summary Judgment, June 2, 2014

6. AFFIDAVITS:

a) Affidavit of William A. Higgins dated April 5, 2012
b) Affidavit of William A. Higgins dated May 28, 2014
c) Affidavit of James T. Oremus dated May 29, 2014
d) Affidavit of Desiree Watson dated January 4, 2012
e) Affidavit of Desiree Watson dated May 29, 2014

7. DEPOSITIONS:

a) Melissa J. Lackey-Oremus pp. 25, 26, 28-31, 36-37, 38, 41, 43-45, 47, 67, 50, 52-53
b) James T. Oremus pp. 41, 21, 22, 23, 24-34, 14, 18, 19, 36, 37, 38
c) Stacy Kirk pp. 2-4, 32-33, Depo. Exhibits 5, 6, 13, 25,
d) Nancy Cerra pp. 12, 66, 67
e) Valaria Devine pp. 67-68, 136-138, 64, 125, 66, 127, 63, 133, 138
f) Steven Jedael pp. 6-7, 8, 9, 10
g) Desiree Watson pp. 77-80

We certify that this designation contains no matter which is irrelevant to this appeal.

January 14, 2015

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FACTS

Though the Oremuses have acquired assets through the years, they had never participated in a real estate auction prior to the auction of The Balcony. (M. Oremus Deposition, p. 25, line 16 – p. 26, line 2; J. Oremus Deposition, p.)

The Oremuses were very excited to have won the auction with their bid of $1,875,000. They understood they had acquired the property for a great price. (M. Oremus Deposition, p. 28, line 16 – p. 31, line 6; J. Oremus Deposition, p. 21, lines 11-19; p. 22, lines 17 – p. 23, line 2; p., 23, line 24 – p. 25, line 10.) Shortly after the auction Ms. Kirk told Mr. Oremus that there was a problem, and Mr. Oremus then told Mrs. Oremus there was a problem. (J. Oremus, p. 24, line 13 – p. 34, line 1.) Then Stacy Kirk told Mr. and Mrs. Oremus: "Someone outbid you. Someone else won the auction, and he was not allowed in. He had his paperwork in order. And he outbid you. He won. His opening bid was higher than yours." (M. Oremus Deposition, p. 36, lines 4-12.)[1] Ms. Kirk reminded them that she had excluded a person from the auction related to paperwork,[2] but she stated to the Oremuses' that the excluded, higher bidder's paperwork was actually in order. (M. Oremus Deposition, p. 36, line 13 – p. 37, line 16.) Ms.Kirk indicated that the property would be sold to the excluded bidder who had made the $2,000,000 opening bid. (M. Oremus Deposition, p. 38, lines 2-24.)

Though the Oremuses were not afforded an opportunity to increase the amount of their bid, they were unwilling to increase the amount of their bid in any event. (M. Oremus Deposition, p. 38, lines 10-24; J. Oremus Deposition, pp. 29-30.) As noted by

[1] The Oremuses were familiar with the opening bid. They had been required to submit their opening bid in writing at the time they completed the paperwork to be eligible to participate at the auction. (J. Oremus Deposition, p. 14, lines 1-10.)

[2] Ms. Kirk had announced to the group of auction participants immediately prior to the auction that a person had been asked to leave. (J. Oremus Deposition, p. 18, line 23 – p. 19, line 4.)

the Respondents, with the addition of their buyers' premium, which was not a part of the bid, their total price was going to be a little over $2,000,000. As a result, Mr. Oremus told Mrs. Oremus: "They outbid us; we lost. Then, just give it to them[.]" (M. Oremus Deposition, p. 41, lines 11-12.) Though the Oremuses were sympathetic to the predicament Ms. Kirk described herself to be in, the "driving force" of the Oremuses' decision to sign the releases and move on is their understanding that they had been outbid by a legitimate bidder, and they had lost the property to the higher bidder. (M. Oremus Deposition, p. 43, line 13 – p. 45, line 9; p. 67, lines 1-11.) They were sad and disappointed. (M. Oremus, p. 47, lines 18-21.)

The Oremuses read and signed the releases without a gun being held to their heads, but they were not aware of the lies that caused them to believe they had been outbid and that they had lost the property to the fake $2,000,000 bidder. Nor could they have discovered them. Ms. Ms. Kirk had in her possession the $750,000 opening bid of Blazer but stated to the Oremuses that the corroborating documentation of the $2,000,000 opening bid of Blazer was in the Charlotte office. And Ms. Devine instructed the Charlotte office to delete the database after speaking with Ms. Kirk, who had called her to find out what to do. (Affidavit of William Higgins dated April 5, 2012; Affidavit of Desiree M. Watson dated May 29, 2014.)

Mr. Oremus called Ms. Kirk the next day. She neither talked to him nor returned the call. (J. Oremus Deposition, p. 36, lines 14-25.) In fact, Mrs. Oremus did not know the property had been sold to someone who did not participate in the auction until after the sale of the property to the subsequent purchasers. (Melissa depo. , p. 50, line 7 – 17; p. 52, line 2 - p. 53, line 4.) Mr. Oremus, likewise, did not know until after the property

sold that it had been sold to someone other than the $2KK bidder. (J. Oremus Deposition, p. 37, line 17 – p. 38, line 5.)

ARGUMENT

I. THE RELEASES EXECUTED BY THE OREMUSES DO NOT BAR THIS ACTION.

The first argument presented by the Respondents, to the effect that the releases executed by the Oremuses bar this action, is being presented as an additional sustaining ground because in the lower court's ruling, there was no finding that the Plaintiffs' claims against GEA were barred by the releases. In fact, the lower court's ruling permitted the Plaintiffs to proceed against GEA and Stacy Kirk, the president of GEA, on the fraud cause of action. Given the fact that the Judge's order was silent as to the issue of the validity of the releases, the Respondents failed to preserve that issue by failing to file a 59(e) motion.

In reply to this additional sustaining ground raised by the Respondents, the Appellants would note that the releases do not bar the Plaintiffs' claims for two principal reasons:

a) The releases fail for lack of consideration, and
b) The releases were obtained through misrepresentation upon which the Oremuses had a right to rely as shall be argued further herein.[3] [4]

Consideration typically consists of the surrender of a claim or course of action in exchange for the payment of funds or surrender of an offsetting claim, although it may also consist of either a forbearance or detriment. 66 Am.Jur.2d, *Release* § 13 (2001). In

[3] The question of whether the Oremuses had a right to rely upon the misrepresentations of Stacy Kirk are, at the very least, a question for the jury to determine as has been argued previously and further herein.
[4] Even if the releases are deemed to be enforceable despite appellant's arguments to the contrary, on their very face the releases would only be effective as to GEA, the auctioneer, and the real estate broker as these releases, which were drafted by the respondents, do not name Stacy Kirk or Valeria Devine as releasees. See *Lackey v. McDowell*, 262 Ga. 185, 186, 415 S.E.2d 902 (1992).

the case at hand, none of these elements that may form consideration are present. A failure of consideration will result in the voiding of a release and may affect causes of action which were barred by the release. (See Am. Jur. 2d, *Release* § 13 (2001).

Respondents would note that the releases are totally silent with respect to a) the Oremuses not being required to go forward with the transaction and b) having their $50,000.00 returned to them. The Respondents now want to argue that there was valid consideration for the releases due to the fact that a) the Oremuses were not required to go forward with the transaction and b) GEA returned to the Oremuses the $50,000.00 that they put up as an auction requirement. The respondents proffer these as elements of consideration in spite of the fact that Stacy Kirk advised the Oremuses and all others present in the room that the Oremuses had been outbid by a two million dollar bid (a position that must be accepted as true at this stage of the proceedings).

The situation presented in this case is not unlike that present in *Vallone v. Lee, F.* 3d 196 (11th circuit, 1993). In *Vallone*, a release executed by a jail detainee purporting to absolve a sheriff from liability with respect to the detention was deemed void for lack of consideration where the sheriff promised to release the detainee from jail, but at the time the release was signed, the detainee was already entitled to be released.

In the case at hand, if Stacy Kirk was telling the truth about the existence of a two million dollar bid, there would have been no forbearance or surrender of an offsetting claim (i.e. requiring the Oremuses to consummate the transaction at $1.87 million) nor would there have been any sort of payment of funds or detriments to GEA as the Oremuses would have already then been entitled (as every other non-winning bidder

would have been entitled) to the return of their $50,000 that all bidders were required to deposit with GEA to be properly registered as a bidder.

A release is a contract and contract principles are invoked to determine the validity of a release. *Bowers v. South Carolina Department of Transportation* 360 S.C 149, 600 SE 2d 543 (Ct. App. 2004) at 153. The same principles of adequacy of consideration which apply to other contracts govern as to releases. *Id.*at 153. As the case of *Anderson v. The Citizens Bank*, 294 S.C. 387, 365 SE 2d 26 (Ct. App. 1987), makes clear, if there are factual questions as to whether a release is invalid for failure of consideration, the question should be submitted to the jury for determination. *Id.* at 396.

It is not "consideration" if it is not accepted or regarded as acceptance by both parties. Whether consideration has been consciously accepted by the parties as consideration is a question of fact to be determined by the jury. 17A Am. Jur. 2d *Contracts* § 114 (2001).

In the case at hand, it is patently obviously that there is a factual question as to whether the consideration argued by the Respondents was accepted or regarded by the Appellants as consideration. There is absolutely no recitation within either of the purported releases with respect to the return of the $50,000 nor of the Oremuses being released of any obligation to proceed with the transaction. Given that it is the settled law in this state that any ambiguity in a contract (release) must be construed against the drafter, the absence of any recitations of the elements of consideration argued by the Respondents must be construed against them. (See *Time Warner Cable v. Condo Services Inc.*, 381 S.C. 275, 672 S.E. 2d 816 Ct. App. 2009) at 285.

As noted in 17A Am.Jur 2d *Contracts* § 114 (2001), "The fortuitous presence in a transaction of some possibility of detriment, latent but unthought of, is not enough to furnish consideration for a contract."

The United States Supreme Court stated the same legal principle in the case of *Fire Insurance Association v. Wickham*, 141 U.S. 564, 12 S.Ct. 84 (1891) as follows: "The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract. To give it that effect, it must have been offered by one party and accepted by the other as one element of the contract" Id. at 579.

Accordingly, whether the Oremuses intended for the elements of consideration argued by the Respondents to be considered as valid consideration is at the very least, a question for the jury, particularly in the absence of an recitations within the purported releases of the consideration proffered by the Respondents.

As previously noted, if the Oremuses had been outbid as represented by Stacy Kirk, the elements of consideration suggested by the Respondents would fail for the simple reason that there was nothing that would have been *given to* the Oremuses or *given up* by the Respondents in exchange for the release of the parties specified.

If Stacy Kirk made the misrepresentation regarding the two million dollar bid (as the Appellants argue is overwhelmingly supported by the evidence), the Respondents should be bound by the implications of that misrepresentation with respect to whether there was consideration that was accepted and regarded as consideration by the Oremuses. Moreover, if there was a misrepresentation as alleged, the respondent should not be rewarded by now permitting them to argue *at this juncture* elements of

consideration that would have only been present in the event that the Oremuses were not outbid and did, in fact, present the highest bid. Hence, the foregoing clearly demonstrates not only the legal necessity but also the practical necessity of the jury to make the determination of whether there was a misrepresentation before any determination of the validity of the consideration (which is also the province of the jury) can be made.

As previously discussed herein, contract principles are invoked to determine the validity of a release. See *Bowers* infra. This being the case, upon a showing of fraud, a release may be avoided as releases may not be used as instruments of fraud. 66 Am.Jur. 2d, *Release* § 23 (2001). In the instant case, the question as to whether the releases were invalid as being obtained through Stacy Kirk's misrepresentation are also clearly questions for the jury. Accordingly, as will be discussed herein, for purposes of this reply brief, the Appellants would argue that it necessarily follows that if the releases were obtained through material misrepresentations upon which the Oremuses had a right to rely, all of which are factual determinations to be made by the jury, the Appellants causes of action should not be barred by the purported releases.

II. VALARIA DEVINE SHOULD NOT HAVE BEEN DISMISSED FROM THE FRAUD CAUSE OF ACTION ON THE FACTS OF THIS CASE.

A. THERE IS EVIDENCE THAT VALARIA DEVINE PARTICIPATED IN OR DIRECTED THE FRAUDULENT CONDUCT.

The fraud perpetrated by Valaria Devine, GEA and others in relation to the auction of The Balcony had nothing to do with future events or unfulfilled promises. All documents related to potential bidder Mark Blazer were received by Ms. Kirk at The Balcony either the day before the auction or on the day of the auction about the time of

the auction or just after it began. The document showing Blazer's opening bid of $750K was received at The Balcony on the day before the auction. (S. Kirk Deposition, Exhibit 6; R at .)[5] The specific power of attorney required of Mr. Blazer to authorize Mr. Wolcott, a realtor, to participate in the auction on his behalf was never completed as required. (S. Kirk Deposition, Exhibit 5, pp. 2-4; Exhibit 13; Exhibit 25, pp. 32-33, R. at .) The power of attorney had to be a sworn, recordable power of attorney, and it was not. S. Kirk Deposition, Exhibit 13.) Thus, the statement that the Oremuses had been outbid by a qualified bidder who had submitted a bid of $2,000,000 was untrue, and known by Ms. Kirk to be untrue when made.

Ms. Kirk correctly and properly excluded Mr. Wolcott from the auction as Mr. Wolcott lacked the authority to participate, but she made it a point to announce to the auction participants prior to the auction that she had excluded a bidder whose paperwork was not complete.

Realizing the $1,875,000 winning bid would upset the sellers, Ms. Kirk called Ms. Devine to find out what to do. (Affidavit of William Higgins dated April 5, 2012.)

Then Ms. Kirk misrepresented to the Oremuses, in the presence of others,[6] that she had excluded a qualified bidder who had submitted an opening bid of $2,000,000. These misrepresentations were based on previous events and preexisting facts, not future events, and not at all related to unfulfilled promises; these misrepresentations were consistent with Ms. Devine's, Ms. Kirk's and GEA's traditional *modus operandi*, i.e.,

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[5] This is, of course, contrary to Ms. Kirk's statement to Mr. Oremus immediately after the auction that the documentation confirming that excluded bidder's opening bid of $2KK was in the Charlotte office. (Affidavit of J. Oremus dated May 29, 2014; see Affidavit of W. Higgins dated May 28, 2014.)

[6] The others hearing this misrepresentation included the auctioneer, who was hired by GEA. (W. Higgins Affidavits of 2012 and 2014, R.). The "hearers" also included Nancy Cerra, a realtor who was available to the Oremuses as a friend who did not expect to be remunerated, even if the Oremuses succeeded in acquiring the property. (N. Cerra Deposition, p. 12, R. .)

using a false or fake bid and/or false or fake bidder in whatever way needed to nullify the auction and to extricate themselves from a disappointingly low high bid at an absolute auction. (Affidavits of Desiree M. Watson dated January 4, 2012, and May 29, 2014; Jadael deposition testimony quoted in Appellants' Initial Brief.)

The case of *Moseley v. All Things Possible, Inc.,* 388 S.C. 31, 694 S.E. 2d 43 (Ct. App. 2010) is more supportive of the Appellants' claims than the Respondents'.

First, *Moseley* cites and quotes from an earlier Court of Appeals decision as follows: "Fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to her or to surrender a legal right." *Id.,* 388 S.C. at 35. A jury can conclude this is exactly what occurred at The Balcony. The Oremuses relied on the misrepresentations to part with a right to buy the property for the amount of their bid, believing they had been outbid based on the misrepresentations and the attendant circumstances.

Second, the *Moseley* court cited and quoted from *Rowe v. Hyatt,* 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996), as follows: "To incur liability , the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act." *Moseley*, 388 S.C. at 38 (emphasis added).

In *Moseley,* the corporation owned a property which was sold to the Moseleys. The corporation (the person being unknown) faxed a falsified plat to the listing realtor. There was no evidence the individually named defendant (who was an officer, director or controlling person of the corporate property owner) faxed the falsified plat to the listing realtor. Moreover, all representations made to the Moseleys were made by the listing realtor, who was unaware of an easement.

Unlike in *Moseley*, however, Valaria Devine was very much involved in the auction of The Balcony in at least the following ways: (1) Ms. Devine talked with the property owners (sellers) by telephone before the auction (Devine Deposition, pp. 67-68); (2) Ms. Devine talked with the property owners by telephone after the auction Devine Deposition pp. 136-138; (3) Ms. Devine talked with the auctioneer by telephone prior to the auction (Devine Deposition, p. 64; p. 125); (4) Ms. Devine talked to the auctioneer by telephone after the auction (Devine Deposition, p. 66; p. 127); (5) Ms. Devine may have talked to her daughter, Ms. Kirk, by telephone before the auction (Devine Deposition, p. 63); (6) Ms. Devine talked with Ms. Kirk the first time by telephone after the auction immediately before Ms. Kirk made the material misrepresentations to the Oremuses (just after the auction Ms. Kirk said to the auctioneer, "the owner is going to be pissed," and she called Ms. Devine "to ask her what to do") (Devine Deposition, p. 63; Affidavit of W. Higgins dated April 5, 2012. (emphasis added)); (7) Ms. Devine talked again to Ms. Kirk when Ms. Devine dictated releases to be signed by the Oremuses (Devine Deposition, p. 133; p. 138); (8) Ms. Devine initiated a telephone conversation with the Auction Coordinator and Documents after the auction in which she said, "[if anyone asks, the high bid we received on The Balcony was $2,000,000, nod, nod, wink, wink" (Affidavit of Desiree M. Watson dated January 4, 2012)[7]; and (9) Ms. Devine talked again by telephone to the Auction Coordinator and Documents Specialist when she

[7] Ms. Devine egregiously misrepresented material facts to Ms. Watson. Desiree Watson testified that she knew there was not a $2KK bid when Ms. Devine told her to say there had been a $2KK bid made. Moreover, the "contract price" and the "bid" were not one and the same. The bids were made by the auction participants. The contract price included a buyer's premium, which was a percentage of the high bidder's bid - added to the bid. S. Kirk Deposition, Exhibit 5, Page 2. Ms. Devine did not tell the Auction Coordinator to say that the "contract price" was $2KK, she told her to say the "high bid" was $2KK.

instructed the Auction Coordinator to have the Aiken database deleted. (Affidavit of Desiree M. Watson dated May 29, 2014.)

Clearly, in light of this evidence of Ms. Devine's participation in the auction of The Balcony, as well as the evidence of Ms. Devine's consistent past business practices, a jury can reasonably infer that Ms. Devine "in some way participated in or directed the [use of the fake bid ($2KK) and fake bidder (Blazer) to ultimately nullify the auction by convincing the Oremuses to walk away, consistent with her previous business experience.]" *Moseley*, 388 S.C. at 38. (emphasis added).

The Oremuses sued for damages for the fraud and for the unfair trade practice. They are entitled to recover damages as argued in Appellants' Initial Brief. The fact that the Oremuses did not sue for rescission of the releases is irrelevant.[8] A cause of action for rescission is not simply an alternative, inconsistent cause of action to be propounded with an action for damages under Rule 8, SCRCP, rather it seeks a remedy so incompatable with their cause of action for damages that the Oremuses are required to elect whether to pursue the remedy of rescission or damages. *Keeter v. Alpine Towers Intern., Inc.*, 399 S.C. 179, 197, 730 S.E. 2d 890 (Ct. App. 2012). And rescission was not available. Rescission requires that a plaintiff be restored to the status quo ante. Within days of the "nullified" auction, the defendants arranged for the owners to be contractually obligated to sell the property to others, who were not auction participants. As noted above, the Oremuses were unaware that the fake bidder had not purchased the property until it was already sold (closed). Had the Oremuses filed a Lis Pendens or lawsuit for

[8] The Amended Complaint does not affirm the releases; on the contrary, it characterizes the releases as "purported releases" and alleges they were entered into for "no consideration". The Amended Complaint simply cannot be read to affirm the releases; it can only be read to challenge the releases as being fraudulently induced and otherwise unenforceable due to a lack of consideration.

rescission without having more information, they would have faced potential liability under a slander of title theory.

The fact that Ms. Kirk told the Oremuses that a qualified $2,000,000 bidder had won the auction, within minutes after asking Ms. Devine "what to do," combined with Ms. Devine's instruction to the Auction Coordinator to say, if asked, there was a $2 Million bid (not contract price) at the Aiken auction and to have the database on the Aiken auction deleted, constitute compelling evidence that Ms. Devine "in some way participated in or directed" the fraud and deceptive acts (the fake bid and fake bidder) that Ms. Watson and Mr. Jadael have testified so characterize the way in which Ms. Devine and her company have previously done business to nullify a disappointingly low high bid at an absolute auction.

B. THERE IS EVIDENCE THAT THE FALSE REPRESENTATIONS WERE MATERIAL.

Viewed objectively as between Ms. Devine and Ms. Kirk, who were experienced and sophisticated in every aspect of real estate auctions, and Mr. and Mrs. Oremus, who had no experience with real estate auctions,[9] a jury can find that these misrepresentations were material just because they persuaded the Oremuses, who were excited and happy to have won the auction, to sadly walk away from a property they liked and with respect to which they were convinced they would have an immediate equity of approximately $1,000,000 after closing. A jury will not be impressed that these defendants will characterize the Oremuses as foolish for walking away after they went to such lengths to convince them to do so.

[9] Ms. Cerra, the Oremuses' realtor friend, was not familiar with the auction process. (Cerra Deposition, pp. 66-67.)

As the U.S. Supreme Court noted in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), reversing an order granting summary judgment to the defendant in a securities case involving an analysis of a proxy solicitation under Rule 14a-9[10] promulgated under § 14(a) of the Securities Exchange Act of 1934: "The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts....Only if the established omissions are 'so obviously important to an investor, that reasonable minds cannot differ on the question of materiality' is the ultimate issue of materiality appropriately resolved 'as a matter of law' by summary judgment." *Id.*, 426 U.S. at 450 (citations omitted). To be generous to the Respondents in this case, reasonable minds can differ on the issue of materiality, and materiality is a jury issue.

C. THERE IS EVIDENCE FROM WHICH A JURY CAN DETERMINE THAT THE OREMUSES HAD A RIGHT TO RELY.

As pointed out by the Court in *Thomas v. American Workman*, 197 S.C. 178, 14 SE 2d 886 (1941),

> The policy of the Court is, on the one hand, to suppress fraud, and on the other, not to encourage negligence and inattention to one's interest. Either course has obvious dangers but the unmistakable drift is towards the just doctrine that a wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of the ignorant and unwary. Id. at 82.

The North Carolina Supreme Court clearly discussed this proposition of law in the case of *Cowart v. Honeycutt,* 257 N.C. 136, 125 S.E.2d 382 (1962)which involved the

[10] Rule 14a-9 is a rule of prophylaxis regarding the content of a proxy statement. *TSC Industries, Inc.*, 426 U.S. at 449.

issue of a party's right to rely in connection with a claim that a fraudulent misrepresentation was used to procure a release. In that case, the court stated as follows:

> "The law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract; that there must be a reliance on the integrity of man or else trade and commerce could not prosper." *Id.* 143.

As pointed out by Professors Hubbard and Felix in Chapter 5 of the *South Carolina Law of Torts*, 4th Edition (2011):

> Thus, South Carolina is in accord with the rule of many jurisdictions that the victim has the right to rely so long as he is not reckless or grossly negligent. Since the Defendant has engaged in either knowing or reckless misconduct, this rule has considerable appeal. *Id.* at 380 (emphasis added).

"The general rule is that questions concerning reliance and its reasonableness are factual questions for the jury." *Redwend Ltd. Partnership- v. Edwards,* 354 S.C. 459, 474, 581 S.E.2d 496, (Ct. App. 2003) (quoting *Unlimited Servs., Inc. v. Macklen Enters., Inc.,* 303 S.C. 384, 387, 401 S.E.2d 153, 156 (Ct. App. 1984)).

In *Redwend Ltd. Partnership,* one partner sued another partner for misappropriation of a partnership opportunity, asserting the other partner had fraudulently concealed the truth about a certain property in order to have that property excluded from a partnership withdrawal agreement that they executed. The defendant argued the agreement contained a non-reliance clause and, as such, the plaintiff had no right to rely and could not justifiably rely on the defendant's statement that the relevant property was lost to other purchasers and should be stricken from the withdrawal

agreement. The defendant later acquired an interest in the property. The trial court, finding the plaintiff had contracted away his right to rely, granted summary judgment for the defendant. The Court of Appeals reversed and remanded the case for trial, noting that South Carolina precedent required a court to look to the "totality of circumstances to determine whether reliance was justified." *Redwend Ltd. Partnership,* 354 S.C. at 474. " 'What constitutes reasonable prudence and diligence with respect to reliance upon a representation in a particular case and the degree of fault attributable to such reliance will depend upon the various circumstances involved, such as the form and materiality of the representation, the respective intelligence, experience, age, and mental and physical condition of the parties, the relation and respective knowledge and means of knowledge of the parties, etc.' " *Redwend Ltd. Partnership,* 354 S.C. at 475, (quoting *Parks v. Morris Homes Corp.,* 245 S.C. 461, 467, 141 S.E.2d 563, 567 (Ct. App. 1985)) (emphasis added).

Here, the playing field was far from level: The Oremuses had no experience whatsoever with a real estate auction of any kind;[11] on the other hand, GEA, Ms. Devine and Ms. Kirk were experienced at conducting sophisticated auctions of high-end properties, which were complicated enough if legitimate, but especially complicated considering their regular, built-in concealed business practice of using a false or fake bid or a false or fake bidder to save the day by rendering the auction a nullity where there was an undesirable high bid at an absolute auction. And there was nothing the Oremuses could do learn otherwise: Ms. Kirk told the Oremuses the corroborating documentation was at the Charlotte office, though she possessed at the time Blazer's opening bid (of

[11] Ms. Cerra, the Oremuses' realtor friend, was not familiar with real estate auctions. Cerra Deposition, pp. 66-67.

$750K, not $2KK), and - in any event - Ms. Devine was instructing the Charlotte office to delete the database regarding the auction.

The cases cited by the Respondents are completely distinguishable. *DeHart v Dodge City of Spartanburg, Inc.,* 11 S.C. 135, 139, 427 S.E.2d 720, 722 (Ct. App. 1993), involved one who was capable of reading and understanding a contract, but who readily acknowledged that she had not read the contract prior to signing it, notwithstanding her duty to read. *Florentine Corp., Inc. v. PEDA I, Inc.,* 287 S.C. 382, 339 S.E.2d 112 (1985), involved one who was orally promised an exclusivity provision prior to signing a lease, but later, after reviewing the written lease with his lawyer, signed the lease with knowledge that it did not contain an exclusivity provision. *Schnellman*, 368 S.C. 17, 21, 727 S.E.2d 742, 745 (Ct. App. 2006), *aff'd as modified,* 645 S.E.2d 239 (2007), involved a couple complaining they had purchased a home containing less square footage than advertised by a realtor prior to their purchase, but who had signed a listing agreement that provided: "IF EXACT SQUARE FOOTAGE IS IMPORTANT TO YOU, MEASURE, MEASURE!" The purchasers did not measure. In these cases, the facts were practically at the hands of the plaintiffs, who chose to ignore them.

The Oremuses could not have possibly learned of the fraud. Ms. Kirk did not show them the $750,000 opening bid that was in her possession but instead referred them to the Charlotte office, and Mrs. Devine had instructed the Charlotte office to delete the database.

In the case at bar, Ms. Devine and Ms. Kirk had superior knowledge, and used it persuasively make the Oremuses understand they had been outbid. The Oremuses are entitled to have a jury determine the reasonableness of their reliance.

The Oremuses' right to rely is clearly a jury issue under the circumstances.

III. THERE IS EVIDENCE THAT THE UNFAIR OR DECPTIVE ACTS ALLEGED AFFECTED THE PUBLIC INTEREST.

There is evidence from which a jury can conclude that unfair and deceptive acts in this case affected the public interest.

"The potential for repetition may be shown in two ways: 1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or 2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Crary v. Djebelli,* 329 S.C. 385, 388, 496 S.E.2d 21 (1998). Proof of the potential for repetition constitutes proof of an adverse effect on the public interest. *Id. See also Daisy Outdoor Advertising v. Abbott,* 322 S.C. 489, 473 S.E.2d 47 (1996).

The testimony of Steven Jedael, the Marketing Director from September 2004 until July 2009, evidences that Valaria Devine. Stacy Kirk and GEA previously and routinely introduced false or fake bids at auctions as a mechanism to prevent having to sell the property for an amount that was less than satisfactory. (Deposition of Steven Jedael, p. 6, line 22 - p. 7, line 17, R. ; p. 7, line 18 – p. 8, line 2, R. ; p. 8, line 22 –p. 9, line 1, R. ;p. 9, line 8 – p. 10, line 16, R.). Further in this regard, the Affidavit of Desiree Watson, the defendants' Auction Coordinator, dated May 29, 2014, states in pertinent part that in the past, Grand Estates Auction Company, through the direction of Valaria Devine, had created false documentation to support the illusion of the existence of fake bidders. In fact, she testified to that practice taking place at an auction in New York as recently as three months prior to the auction of The Balcony. (Affidavit of Desiree Watson dated May 29, 2014, paragraph 5; Deposition of Desiree Watson, p. 77,

line 8 – p. 80, line 18, R.). There is an abundance of evidence from which a jury can find that Ms. Devine, Ms. Kirk and GEA engaged in the same conduct with the unfair and deceptive business practices with the Oremuses as they had in the past, i.e., using a false or fake bid and/or bidder in some way to extricate themselves from an undesirable result at an absolute auction.

CONCLUSION

Valaria Devine owns and controls GEA, a high-end property auction company that has previously, regularly, systematically and repetitively utilized a fraudulent and deceptive business practice, which includes but is not limited to the making of material misrepresentations to innocent auction participants, to insure against an undesirable result at an absolute auction. The scheme or conduct involves the use of a fake bid and/or a fake bidder that either encourages and facilitates a desired bid by a legitimate bidder or renders the auction a nullity if the price is not right. The particulars of each sale may vary –a variation on a theme[12] – but the theme of the scheme is always the same – the use of a false bid or bidder to derail an absolute auction that results in a disappointingly low winning bid. That is exactly what the evidence shows occurred at the auction of The Balcony on February 9, 2010, in relation to the disappointingly low high bid made by the Oremuses. There is evidence from which a jury can find the fraudulent conduct actionable. *Satcher v. Berry*, 299 S.C. 381, 385 S.E.2d 41 (Ct. App. 1989).. The fraudulent misrepresentations that were a part of the fraudulent conduct are supported by evidence of Ms. Devine's involvement, the materiality of the misrepresentations and the

[12] See the Appellants' argument to the lower court on June 2, 2014. (Tr. June 2, 2014 Motion Hearing, p. 29 R. .)

Oremuses right to rely. The UTPA cause of action was written for what is alleged, and there is evidence of the public impact from which a jury can award damages.

Respectfully, the appellants urge the court to reverse the lower court and allow the fraud cause of action to proceed against Ms. Devine and allow the UTPA cause of action to proceed against Ms. Devine, Ms. Kirk and GEA.

January 14, 2015

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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 Appellants' Initial Reply Brief on 4 K&D Corporation, d/b/a Grand Estates Auction Company, Stacy Kirk and Valaria Devine by depositing a copy of it in the United States Mail, postage prepaid, on the 14th day of January, 2015 addressed to its/their attorney of record, Alice F. Paylor, Rosen Rosen & Hagood, LLC, Post Office Box 893, Charleston, South Carolina 29402.

January 14, 2015

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January 14, 2015

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

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

Dear Madame Clerk:

Enclosed herewith for filing please find the original and one copy of the Appellants' Initial Reply Brief, together with Proof of Service in the above case. Please return a "filed" copy for our records in the enclosed, stamped envelope.

By copy of this letter, we are serving a copy of the Appellants' Initial Reply Brief, together with Proof of Service on Alice F. Paylor, counsel for the Respondents.

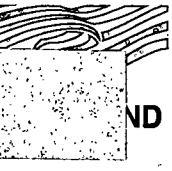
With best regards, I

Yours very truly,

Robert L. Buchanan, Jr.

ph

CC: Alice F. Paylor, Esquire w/encls.



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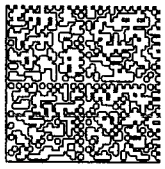

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