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
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' PETITION FOR REHEARING

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Respondents petition this Court for a rehearing of the Per Curiam Opinion filed on June 8, 2016.

On June 11, 2014, Circuit Judge Doyet Early, III, issued an Order granting summary judgment to all Respondents on all but one cause of action (fraud) and to Respondent Valaria Devine on all causes of action, including fraud. Judge Early determined that the Appellants had no interactions with Ms. Devine, so she could not be liable to them for fraud except under a piercing the corporate veil theory which they had not proved, and that they had not met the requirements of Schnellmann v. Roettger, 627 S.E.2d 742, 745-746 (Ct. App. 2006), aff'd as modified, 645 S.E.2d 239 (2007) (no evidence that seller of property had previously misrepresented square footage or that "any procedure regularly employed by" the seller would cause the misstatement to be made again."). The Appellants appealed the granting of summary judgment to Ms. Devine for fraud and the granting of summary judgment as to all Respondents under the SCUTPA.

On June 8, 2016, the South Carolina Court of Appeals reversed Judge Early with regard to the fraud cause of action against Ms. Devine, finding that there was more than a scintilla of evidence to show that she may have participated in the fraud, and the SCUTPA claim as to all Respondents, finding that there was evidence that the act complained of could be repeated.

Appellants' fraud claim was basically that Respondent Stacy Kirk had made a false representation to the Appellants in order to coerce them to withdraw their high bid for certain real estate property at an absolute auction in Aiken, South Carolina. Ms. Devine was not present at the auction and made no representations to the Appellants. For the fraud claim against Ms. Devine, this Court relied primarily on testimony of Desiree Watson, a former employee of Respondents, whose testimony was that Ms. Devine called her after the auction and told her that:

(a) "luckily Stacy and herself were quickly thinking on their feet, and that if anyone should ask, that I was in receipt of a $2 million written opening bid...;" (b) questions about the bid should be directed to Stacy Kirk or Ms. Devine; (c) the Oremuses were the high bidders but "they ... got them to withdraw the property... They found a way not to sell the property to the people who had won the auction;" and (d) that another employee should remove the names of contact persons and bidders at the Aiken auction from the computer. Out of this testimony and Ms. Devine's admissions that she had talked to Ms. Kirk and the sellers about what happened at the auction, this Court determined that there was more than a mere scintilla of evidence that Ms. Devine had personally participated in the alleged fraudulent conduct. There is no evidence that Ms. Devine participated in, or directed Ms. Kirk to make, any false statements to Appellants, and the summary judgment to Ms. Devine should be affirmed. See Moseley v. All Things Possible, 388 S.C. 31, 38, 694 S.E.2d 43, 47 (Ct. App. 2011), aff'd, 395 S.C. 492, 719 S.E.2d 656 (2011) ("Here, there was no evidence Hampton personally committed fraud. Lot 45 was owned by All Things Possible, not Hampton. Whitehead, acting as an agent of All Things Possible, provided the Moseleys with the falsified plat. There was no evidence Hampton faxed the falsified plat to Whitehead. All representations made to the Moseleys concerning Lot 45 were made by Whitehead. Accordingly, we reverse the circuit court's determination that Hampton committed fraud."). Respectfully, as this Court held in Moseley, Ms. Devine could not have committed fraud as she did not make any false statements to the Appellants and was not aware that any false statements had even been made to the Appellants.

With regard to the SCUTPA claim, the Court held that "Respondents' alleged acts had the potential for repetition and affected the public interest." The Court determined that "Respondents used [an erroneous story] to coerce Appellants into releasing their winning bid"

and subsequently "sold the property to a different buyer who was never involved with the auction for an additional $625,000," out of which "Respondents netted an extra $50,000 in fees by employing this scheme," with the Court finding that "Respondents intentionally committed these acts for economic gain." There is no evidence that Respondents coerced Appellants into releasing their bid, and there is no evidence that Respondents knew that they would sell for more money after the auction, so there is no basis for the finding that Respondents committed the alleged acts for economic gain. In addition, there was no evidence to support that the actions of Respondents had a negative impact on the public or even that Appellants suffered damages. Respectfully, the Court of Appeals erroneously determined that Appellants had proved the elements of the SCUTPA claim. See Schnellmann v. Roettger, 627 S.E.2d 742, 745-746 (Ct. App. 2006), aff'd as modified, 645 S.E.2d 239 (2007) (no evidence that seller of property had previously misrepresented square footage or that "any procedure regularly employed by" the seller would cause the misstatement to be made again.").

I. THE COURT OF APPEALS PANEL ERRED BY REVERSING THE CIRCUIT COURT AND HOLDING THAT THERE WAS MORE THAN A SCINTILLA OF EVIDENCE THAT RESPONDENT DEVINE, WHO WAS NOT AT THE AUCTION AND HAD NO INTERACTIONS WITH THE APPELLANTS, HAD PARTICIPATED IN, AND/OR DIRECTED THE FRAUD, SO THAT SHE COULD BE LIABLE TO APPELLANTS.

A. Appellants presented no evidence that Ms. Devine participated in, or directed, Ms. Kirk to tell the Oremuses that there was a $2 million opening bid made by an excluded bidder who should have been allowed to participate and/or that she was concerned that the sellers of the property would sue her.

As set forth above, this Court relied on the testimony of Desiree Watson to determine that Appellants had presented more than a scintilla of evidence that Ms. Devine had participated in, or directed, the alleged fraud. As the Appellant Mr. Oremus testified, the alleged false

representations were made by Stacy Kirk, the President of Grand Estates Auction, and consisted of:

> "Remember the guy in the beginning of the auction that we didn't allow in? Well, turns out, we should have, that his paperwork had been – had been proper, and we should not have excluded him from the bid. And worst – more worse that that is – is that his bid," which everybody had to have an opening bid on – you know, documented on paper. "His opening bid was $2 million. And the homeowner is furious." ... "The homeowner is furious; the buyer is furious, and they're both threatening to sue."

R., p. 500. Mr. Oremus then testified that he felt sorry for Ms. Kirk and decided to walk away from the auction without buying the property:

> Well, I looked at Stacy and – I felt for her. I'm not just making this up when I say that – maybe it's a guy thing, you know, with a – you know, with a female-type thing, You know, but I – I mean, I – I felt for her. I mean, you know, somebody's threatening – not just one person, but two people are threatening to sue and that you – you screwed up, and you didn't let somebody in. I can appreciate that. I've messed up things in my life, and that was – it was like, "Okay. This person outbid us. We understand that. That's fine. Let's just let him – let him have the house. He – he outbid us."

R., pp. 500-501. This testimony does not suggest that Mr. Oremus was coerced into releasing his bid. To the contrary, this testimony suggests that Mr. Oremus immediately agreed to release the bid and told Ms. Kirk that. In fact, Mr. Oremus testified that he could have walked away from the auction owning the home and "We – we were not forced to – to sign these documents [releases.]" R., pp. 506-507.

When asked why he named Ms. Devine, who was not at the auction and with whom he had no interactions, as a Defendant, Mr. Oremus testified that the reason that he named her was: "She's the owner of the company." When asked if that was his only reason, he further testified: "I – yeah. I -- I think so. I mean, what other reason would there be?" R., p. 518. Mr. Oremus gave his deposition on August 8, 2013, after Ms. Watson had given her deposition on July 30,

2013, and an affidavit on January 4, 2012. R., pp. 127, 491, 552. Yet, he did not claim that Ms. Devine either participated in, or directed, the alleged fraudulent conduct.

Ms. Watson's testimony is that Ms. Devine called her **after** the auction had concluded and the Oremuses had released their bid. Even accepting everything that Ms. Watson testified as the truth, there is no evidence that Ms. Devine participated in, or directed Ms. Kirk to make, false statements concerning the excluded bidder and a $2 million opening bid. Instead, Ms. Watson testified that at approximately 5 p.m., several hours after the auction, which started at 2 p.m., was over, Ms. Devine called her:

> Val called me on the phone and she had started to explain to me the things that occurred at the auction. ... After the auction she had told me that luckily Stacy and herself were quickly thinking on their feet, and that if anyone should ask, that I was in receipt of a $2 million written opening bid. And that if anyone should ask about those – that written open bid or ask me any questions with regard to the outcome or who won the auction, that I was to direct all those phone calls to Stacy and Val. And she said – you know, that nod, nod, wink, wink, that I was to pretty much say that I was in receipt of these documents and that I had them and that that $2 million opening bid existed. Nod, nod, wink, wink.

R., p. 554-555. After another question, Ms. Watson stated that she deduced from the statement, "Luckily, Stacy and I were thinking quickly on our feet," that "[t]hey found a way not to sell the property to the people who had won the auction." R., p. 556.

Both Ms. Devine and the seller, Mr. Hirschhorn gave very similar testimony as to the telephone calls that occurred after the auction. Ms. Devine testified that she talked to Ms. Kirk after the auction about the excluded bidder and that there could be big trouble if he was properly registered, but Ms. Devine had no knowledge as to whether he was properly registered. R., pp. 162, 167. Ms. Devine then called her attorney and called Ms. Kirk back after that. During that conversation, Ms. Kirk told her that she was not sure that the high bidder really wanted the property, because "this buyer was building another house in Aiken at a certain large sum of

money and that they had not really intended on winning this auction. And she wasn't sure how much they really wanted this property." R., pp. 167-168. Ms. Devine and Ms. Kirk discussed why excluding a valid bidder could be a problem, including the fact that both the excluded bidder and the seller might have lawsuits against them. R., p. 169. Ms. Devine testified that she told Ms. Kirk: "'Stacy, we got a problem because the seller could sue us if this guy was willing to pay more; the buyer could sue us if he was willing to pay more, so just go find out if this – since you believe that this buyer doesn't really want this property.' ... I said, 'Go find out if he would be willing to sign releases.'" R., p. 170. Ms. Devine denied that she told Ms. Kirk to tell the Oremuses that she had turned away an authorized proper bidder. R., p. 175. Ms. Devine testified that she contacted Mr. Hirschhorn and he wanted them to ascertain whether the Oremuses would release their bid. R., p. 180. None of this testimony is disputed.

Mr. Hirschhorn testified that the first time he ever talked to Ms. Devine was after the auction when she called and told him the amount of the high bid, which was much less than what he expected. Ms. Devine told him that there was an excluded bidder who should have been allowed in. "And then Stacy made a comment, 'The winning bidder, I'm not sure they want the house. They don't seem real happy.' And I believe then Val said, 'Well, go see if – if they want to get out.' And she said to me, 'It might cost you some money.' I said, 'Well, let's find out." R., pp. 200-206.

There is absolutely no evidence that Ms. Devine directed Ms. Kirk to make false statements relative to an opening bid or the threat of lawsuits. Similarly, there is no evidence that any actions taken by the Respondents were done so in order to receive more money. In fact, if there was no sale, the Respondents were not entitled to any more money. As all witnesses recognized, the interest of the actual buyers was not known until after several days after the

auction. Ms. Devine is entitled to have the grant of summary judgment as to the fraud action affirmed because: 1) there is no evidence that she made any misrepresentation to Appellants; 2) there is no evidence that she knew that the alleged misrepresentations were false; and 3) there is no evidence that she directed anyone to make misrepresentations to Appellants.

II. THE COURT OF APPEALS PANEL ERRED BY REVERSING THE CIRCUIT COURT AND HOLDING THAT APPELLANTS STATED A CLAIM FOR A SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT VIOLATION EVEN THOUGH APPELLANTS DID NOT SUBMIT ANY EVIDENCE OF AN ADVERSE PUBLIC IMPACT.

This Court rightfully stated that, in order to show an impact on the public interest, "a plaintiff must show only that the acts have the potential for repetition." In this case, the alleged unfair acts were the statements made by Ms. Kirk that she had improperly excluded a bidder who had submitted an opening bid of $2 million and that the bidder and the sellers were threatening legal action against Grand Estates Auction Company. Thus, in order for these acts to be repeated, Grand Estates would have to be performing another auction at which a bidder was excluded, and the sellers were not happy with the high bid.

As this Court held in Schnellman v. Roettger, 368 S.C. 17, 23, 627 S.E.2d 742, 746 (Ct. App. 2007), "[a]n impact on the public interest may be shown by proving that the same kind of actions occurred in the past or by showing that the procedures employed by the defendant create a potential for repetition of the deceptive practices." Appellants failed to show that the same kind of misrepresentations were made in the past, so they were required to show that the procedures employed by the Respondents created a potential for repetition of the alleged misrepresentations. Appellants have failed to show any likelihood of the repetition of the facts that were present in this case. See Jefferies v. Phillips, 316 S.C. 523, 529, 451 S.E.2d 21, 24 (Ct. App. 1994) ("In the course of human endeavor, every action has some potential for repetition.

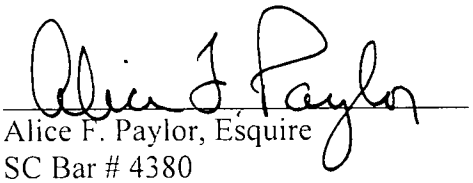
The mere proof that the actor is still alive and engaged in the same business is not sufficient to establish this element."). Instead, they have irrelevant testimony that the Respondents used other allegedly unfair acts in past auctions. Those acts, if they occurred, have no bearing on the repetition of misrepresenting that an excluded buyer was qualified to participate and had submitted an opening bid higher than the high bid at the auction.

Appellants have failed to show that the alleged misrepresentations have an impact on the public. Therefore, Respondents are entitled to have summary judgment as to the SCUTPA claim affirmed.

CONCLUSION

For all of the reasons stated hereinabove, Petitioners-Respondents respectfully request this Court to grant a rehearing or, in the alternative, to issue a revised opinion affirming the Circuit Court's Order granting summary judgment to Respondent Devine as to the fraud claim and as to all Respondents as to the SCUTPA claim.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served a copy of ***Respondents' Petition for Rehearing*** by regular U.S. Mail, postage prepaid, on **June** 21, **2016**, addressed to their attorneys of record as follows:

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