

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.

**APPELLANTS' RETURN TO RESPONDENTS'
PETITION FOR REHEARING**

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June 29, 2016

I. INTRODUCTION

The auction of The Balcony had a strange beginning, but it ended in what the evidence shows was typical fashion for a Grand Estates absolute auction in which a satisfactory bid had not been received.

The absolute auction resulted in a disappointingly low winning bid, causing Stacy Kirk to remark: “The owner is going to be pissed.” R. at 120. Mrs. Kirk then called her mother Valaria Devine, the owner and CEO of Grand Estates, to “ask her what to do.” R. at 120.

Following Mrs. Kirk’s conversation with Mrs. Devine, Mrs. Kirk talked to the Oremuses. Mrs. Kirk asked: “Remember the guy in the beginning of the auction that we didn’t allow in?” R. at 500; see also R. at 141. “Well,” Mrs. Kirk continued, “turns out...that his paper work had been proper, and we should not have excluded him.... And...worse...his opening bid was \$2million.” R. at 500. Mrs. Kirk told the Oremuses they had been outbid and the excluded bidder, whose paper work was in order, had won the auction. R. at 533. As a result, Mr. Oremus ultimately said: “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. at 500-501.

The evidence shows that, contrary to the Respondents’ position, Mrs. Devine was actively involved in the auction by (a) communicating with her daughter when asked by her Mrs. Kirk what to do in view of the low bid (in which she told her daughter to ask Mr. Oremus to withdraw his bid), R. at 163, (b) communicating with the auctioneer, R. at 153; R.at 154; and R. at 159, (c) communicating with the owners, R. at 156, (d) communicating with the company’s lawyer, R. at 167, (on the basis of which she dictated

releases to Mrs. Kirk) and (d) communicating with Desiree Watson, the auction coordinator – all by phone from her home in Naples, Florida.

With respect to the auction coordinator, Mrs. Devine instructed her to refer all calls about the auction of the Balcony to herself or to Mrs. Kirk, R. at 128; she instructed her to say, if asked, that there was a \$2 million bid for The Balcony (which representation Ms. Watson knew to be false), R. at 128; she bragged to the auction coordinator that she and daughter had done some “quick thinking” and “had saved the day.” R. at 128. Later the same day, she instructed Ms. Watson to have another employee remove the names of all the contact persons and bidders associated with the Aiken auction from the computer database of Grand Estates Auction Company. R. at 131.

To put this evidence into context, prior to the auction of The Balcony there is substantial evidence that the historical *modus operandi* of Grand Estates repeatedly involved plans to escape the consequences of winning bids that were not sufficiently high enough through the use of a “safety mechanism” that involved the creation of fake bids designed to render such auctions a nullity. R. at 291- 293. Valaria Devine was always involved. R. at 291-292. In the past, GEA, through the direction of Valaria Devine and Stacy Kirk, created false documentation to support the illusion of the existence of bidders. R. at 131.

II. ANALYSIS

A. **Is there evidence from which a jury may conclude that Valaria Devine is liable for fraud?**

The general rule is that an officer or director of a corporation can be individually liable for a tort if the officer or director participates in the tort in some way. *Rowe v. Hyatt*, 321 S.C. 366, 369, 468 S.E.2d 649,650 (1996). *See Sturm v. Harb Dev., LLC*, 2

A.3d 859, 866-67 (Conn. 2010); also *White v. Collins Bldg., Inc.*, 704 S.E.2d 307, 310 (N.C. Ct. App. 2011); also *Brown v. Rentz*, 441 S.E.2d 876, 878 (Ga. Ct. App. 1994). “Fraud may be inferred. To prove knowledge of the falsity of a representation of the seller, quite a wide latitude is permitted in regard to the admission of evidence as it is a matter which is ordinarily not the subject of direct proof but is to be inferred from the circumstances surrounding the transaction.” *Halsey v. Minnesota-South Carolina & Timber Company*, 174 S.C. 97, 116, 177 S.E. 29 (1934). *State v. Pace*, 337 S.E. 407, 415, 523 S.E.2d 466, 470 (Ct. App. 1999) (Citations Omitted). “Fraud may be deduced not only from deceptive or false representations, but from facts, incidents and circumstances which may be trivial in themselves, but decisive in a given case of fraudulent design.” *Id.*, 337 S.C. at 415 (quoting *Cook, infra.*, 186 S.C. at 84).

Given the evidence of Valaria Devine’s participation in the events of the auction of the Balcony, particularly in the context of her similar habitual and routine business practices in other auctions, this record presents more than a scintilla of evidence that she was involved in the fraud. See *Turner v. Milliman*, 392 S.C. 116, 124-25, 708 S.E.2d 766, 770 (2011). Under these circumstances, see *Cook v. Metropolitan Life Ins. Co.*, 186 S.C. 77, 84, 194 S.E. 636, 639 (1938), a jury can find that Mrs. Devine and her daughter, Mrs. Kirk, hatched a plan to convince the Oremuses that they had been outbid and had lost the auction.

The Court was correct in finding that a jury can determine that Valaria Devine participated “in some way” in the alleged fraud.

B. Is there evidence from which a jury can conclude that Valaria Devine, Stacy Kirk and Grand Estates are liable for an unfair trade practice?

The record is replete with evidence that these defendants engaged in a scheme and regular practice of using fake bids or fake bidders or both as a means of escaping an unsatisfactory result of an absolute auction where the high bid was disappointingly low. Having such a purpose and plan for rendering the auction a nullity is unfair and deceptive, and it obviously adversely affects the public interest. All that is required for submission to a jury of the UTPA claims against these defendants is evidence from which a jury can find these defendants engaged in unfair or deceptive practices that have the potential for repetition. See *Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996). Respectfully, the record in this case presents evidence from which a jury may conclude that there were unfair and deceptive acts or practices. Moreover, the evidence shows not only a potential for repetition, but actual repetition.

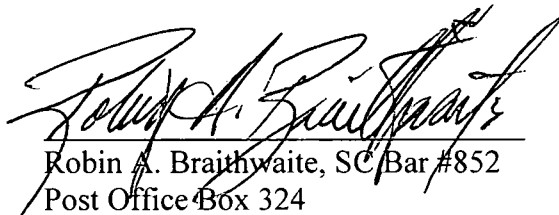
The Respondents' reliance on *Schnellmann v. Roettger*, 627 S.E. 2d 742 (Ct. App. 2006), and affirmed as modified, 645 S.E.2d 239 (2007), in their Petition for Rehearing is misplaced. In *Schnellmann*, the plaintiffs brought an action under the SCUTPA, alleging that the defendant seller of property had misrepresented the square footage of that property. In dismissing that cause of action the basis of the Court of Appeal's ruling was that there was no evidence that the 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. In the case at hand, not only does the evidence show a long-standing course of deceptive conduct through the creation of fake bids, the evidence also shows that this auction involved a "procedure regularly employed by" GEA to ensure a satisfactory result at the absolute auction of The Balcony.

As stated, the testimony of Steven Jedael and Desiree Watson clearly demonstrates a proclivity on the part the Respondents, including Valaria Devine, to resort to the use of deceptive practices (through the creation of fake bids) in order prevent an unsatisfactory result. Given such a proclivity, in combination with the opportunity for economic gain such as that realized by GEA in the auction of The Balcony, there is more than enough evidence for a jury to find a potential for repetitive conduct.

The Court was correct in reinstating the UTPA cause of action against these defendants.

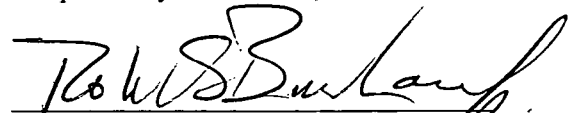
III. CONCLUSION

There are clearly jury questions regarding whether Mrs. Devine's participated in the alleged fraud and whether all defendants committed an unfair trade practice. For the reasons and upon the grounds set forth above, the Appellants respectfully submit that the Respondents' Petition for Rehearing should be denied in all particulars.



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Respectfully Submitted,



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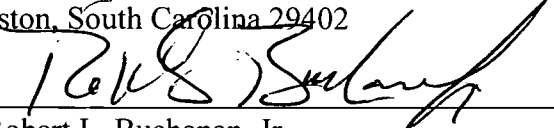
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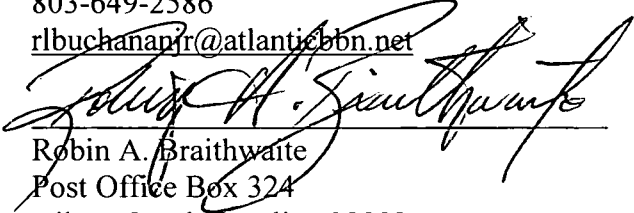
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PROOF OF SERVICE

I certify that I have served a copy of Appellants' Return to Respondents' Petition for Rehearing 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 June 29, 2016, addressed to its/their attorney of record, Alice F. Paylor, Rosen Rosen & Hagood, LLC, Post Office Box 893, Charleston, South Carolina 29402

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