

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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Opinion No. 2016-UP-253 (S.C. Ct. App. filed June 8, 2016)

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Melissa J. Lackey-Oremus and James T. Oremus ..... Respondents,

v.

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

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**PETITION FOR WRIT OF CERTIORARI**

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S.C. SUPREME COURT

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## **CERTIFICATE OF COUNSEL**

The undersigned certifies that a petition for rehearing was made and finally ruled upon by the South Carolina Court of Appeals on the matters raised by this petition on August 18, 2016.

### **QUESTIONS PRESENTED**

1. Did the Court of Appeals err in reversing the Circuit Court and holding that there was evidence that Petitioner Devine, even though she was not at the auction when the alleged fraudulent representations were made by Petitioner Stacy Kirk, could be liable for fraud?
2. Did the Court of Appeals err in reversing the Circuit Court and holding that Respondents had stated a claim for a violation of the South Carolina Unfair Trade Practices Act even though Respondents had no evidence of an adverse public impact?

### **STATEMENT OF THE CASE**

This case concerns an auction for the sale of real property that took place on February 9, 2010, in Aiken, South Carolina. Petitioners are the auction company (4K&D Corporation d/b/a Grand Estates Auction Company (“Grand Estates”)), its President (Stacy Kirk) and CEO (Valaria Devine). Respondents were the high bidders (\$1,875,000 plus the buyer’s premium making a total purchase price of \$2,015,625) at the auction. Prior to signing the contract to purchase the property, Respondents voluntarily agreed to withdraw their bid and not purchase the property. Several weeks later, the property sold for \$2.5 million to a third party who was not a bidder at the auction.

Respondents brought this action claiming that, even though they knew that they could go forward with the purchase of the property, they withdrew their bid because Kirk falsely represented to them that there had been a \$2 million pre-opening bid, which was higher than their final bid, from a bidder who had been wrongfully excluded from bidding at the auction and that she could get sued by the property sellers and the excluded bidder. Respondents brought an action that included claims for fraud against Kirk and Devine, who was not present at the auction

and made no representations to the Respondents, and a violation of the South Carolina Unfair Trade Practices Act against all Petitioners. The Honorable Doyet A. Early, III, Circuit Court Judge granted summary judgment to Devine as to the fraud claim and to all Petitioners as to the SCUTPA claim.

In November of 2009, 4K&D Corporation d/b/a Grand Estates Auction Company ("Grand Estates") contracted with Karl Wesley and Erin Frances Hirschhorn ("Sellers") to market and ultimately sell "The Balcony," an Aiken, South Carolina, horse farm and estate, at absolute auction on or before February 9, 2010. (Appendix 201; 210-284) 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 Respondents, the Oremuses, were the high bidder with a bid of \$1,875,000. (Appendix 499-502) 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 calculated to be \$2,015,625.

Stacy Kirk, President of Grand Estates, was at the auction and conducted it along with the auctioneer. Valaria Devine, CEO of Grand Estates, was not present at the auction and had no interactions direct or indirect with the Respondents. After the auction, Kirk telephoned Devine to report the result of the auction. Devine and Kirk discussed that the price was lower than they and the sellers had hoped for. Kirk told Devine that the Respondents did not appear to be happy with having the high bid, and, after they discussed this with the Sellers, Devine instructed Kirk to ask the Oremuses if they wanted to withdraw their high bid and not buy the property. (Appendix 164-165; 170-171; 172-173; 178; 205-209)

Kirk hung up the phone and 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 her. 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 sellers, Grand Estates and the auctioneer from any and all claims that they might have against any of these people/entities. The Oremuses were not forced to sign the releases and knew that they could go forward with the purchase based on their high bid. (Appendix 505-516; 525-526)

At approximately 5:00 PM on February 9, 2010, Devine called Desiree Watson, an employee of Grand Estates and told her: "[I]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 ... that written opening bid or ask me any questions with regards to the outcome or who won the auction, that I was to direct all those phone calls to Stacy and Val." Devine also told her: "[Y]ou 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." (Appendix 558, 560) Devine stated to Watson that "[t]hey found a way not to sell the property to the people who had won the auction." (Appendix 562) Ms. Devine did not communicate this to anyone outside of Grand Estates. Grand Estates lost the commission on the sale when the Oremuses withdrew their bid.

The Hirschhorns sold "The Balcony" to Hornor and Frederica Davis for \$2,500,000.00 in March of 2010. Although Kirk had met with the Davises prior to the auction, they did not bid and actually contacted her after they found out that the Oremuses had withdrawn their bid. Grand Estates had no knowledge of any interest in the property at the time that the Oremuses withdrew their bid other than the excluded bidder. (Appendix 153-165; 462)

The Respondents subsequently brought this action alleging a variety of causes of action against the Petitioners, including fraud and a violation of the South Carolina Unfair Trade Practices Act. After hearing Petitioners' Motion for Summary Judgment, Judge Early granted judgment as to all claims except for fraud against Stacy Kirk and Grand Estates. Respondents appealed the granting of judgment to Devine as to the fraud claim and the granting of judgment as to all Petitioners as to SCUTPA.

### ARGUMENT

#### **I. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT, CONTRARY TO THE FINDING OF THE CIRCUIT COURT, THERE WAS MORE THAN A SCINTILLA OF EVIDENCE IN THE RECORD THAT PETITIONER DEVINE, WHO WAS NOT AT THE AUCTION AND MADE NO REPRESENTATIONS TO THE RESPONDENTS, COULD BE LIABLE FOR FRAUD.**

The evidence is clear that the Respondents had no knowledge of the existence of Devine at the time that Kirk allegedly made the false representations and Respondents decided to withdraw their high bid and not purchase the property. Mr. Oremus testified that Devine was named as a Defendant solely because she was the owner of Grand Estates. (Appendix 523-524) Devine made no representations, true or false, to the Respondents, so the question is whether there is any evidence that she directed Kirk to make false representations. There is no evidence that she did this.

The evidence argued by the Respondents is the testimony of former Grand Estates employee, Desiree Watson, who testified that Devine contacted her several hours after the auction and the alleged misrepresentations were made and told her that she and Kirk did some “quick thinking” and the high bidder withdrew his bid. There is evidence that the sellers were unhappy with the high bid and that they had asked Grand Estates to ask the Respondents if they would release their bid, and that is what occurred. There is absolutely no evidence that Devine directed Kirk to make any false representations in order to induce the Respondents to release their bid.<sup>1</sup>

In Rosemond v. Campbell, 288 S.C. 516, 343 S.E.2d 641 (Ct. App. 1986), a plaintiff had asserted liability against a party other than the declarant for fraud, and the South Carolina Court of Appeals held: “There is no evidence in the record that Harris made any representations whatsoever to the Rosemonds concerning the work to be performed by Campbell on their house. Thus, they failed to offer proof of an essential element of their [fraud] cause of action against Harris.” 288 S.C. at 521, 343 S.E.2d at 644. As the Court further stated, “[t]he Rosemonds adduced no evidence to show Campbell was acting at the direction or in the interest of Harris when he solicited the contract.” Id.

A plaintiff must prove by clear, cogent and convincing evidence each of the elements of fraud, which 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; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its 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.

Regions Bank v. Schmauch, 354 S.C. 648, 672, 582 S.E.2d 432, 444-45 (Ct. App. 2003).

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<sup>1</sup> Petitioners also question why a savvy real estate investor, Mr. Oremus, would have been induced to give up his high bid by a statement that another bidder had bid higher than he had bid.

In Moseley v. All Things Possible, Inc., 388 S.C. 31, 694 S.E.2d 43 (Ct. App. 2010), aff'd, 395 S.C. 492, 719 S.E.2d 656 (2011), the facts presented were very similar to those presented in this case. There were two defendants, a real estate company, All Things Possible, and its owner, James Hampton. The plaintiff dealt exclusively with Whitehead, an agent of All Things Possible. Whitehead made all of the representations concerning the property offered for sale. However, the crux of the fraud cause of action involved a plat that was faxed to Whitehead from All Things Possible's office where Hampton worked. In reversing the finding of the Circuit Court that Hampton had committed fraud, the Court of Appeals stated:

The Appellants also argue the circuit court erred in finding Hampton personally committed fraud by clear and convincing evidence. We agree. "An officer, director, or controlling person in a corporation is not, merely as a result of his or her status as such, personally liable for the torts of the corporation." Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996). "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." Id. 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.

Moseley, 388 S.C. at 38, 694 S.E.2d at 46. In the present case, there is no evidence Devine personally committed fraud. Grand Estates was directing the auction, not Devine. Kirk was acting as an agent of Grand Estates and allegedly made the false representations to Respondents. There is no evidence Devine instructed Kirk to make the false representations. The only evidence is that Kirk stated to Devine and the Hirschhorns that she did not believe that the Respondents really wanted to buy the property, and Devine and the Hirschhorns asked her to find out if they would withdraw their bid. There is no evidence that Devine made, or caused to be made, any false representation to the Respondents.

The Court of Appeals erred when it found that statements made by Devine to Watson that she and Kirk did some quick thinking and the Respondents withdrew their bid constituted evidence that Devine had directed that the false representations be made. This Court should reverse the Court of Appeals' opinion and affirm the lower court's decision that Devine was entitled to judgment as to the fraud cause of action.

**II. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT RESPONDENTS PRESENTED EVIDENCE OF AN ADVERSE PUBLIC IMPACT SUFFICIENT TO SUPPORT A CLAIM FOR A SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT VIOLATION.**

The Court of Appeals relied on the testimony of several former Grand Estates employees that Grand Estates had used a fake bidder in a prior auction in New York. There is absolutely no evidence that there was a fake bidder at the auction in Aiken.

As the Court of Appeals 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.*” [Emphasis added.] Respondents failed to show that Grand Estates had made a misrepresentation about an opening bid amount in the past, so they were required to show that the procedures employed by the Petitioners created a potential for repetition of the alleged misrepresentations. Respondents 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.”). Indeed, it would be very difficult to recreate the facts that led to the alleged misrepresentation being made – an excluded bidder who had made a pre-opening bid. There is absolutely no basis for

finding that the making of a misrepresentation about a pre-opening bid value could have an impact on the public.

This Court should reverse the Court of Appeals' opinion reversing the lower court's decision that Petitioners were entitled to judgment as to the SCUTPA cause of action.

**CONCLUSION**

For the reasons stated herein, this Court should reverse the Court of Appeals' opinion and, instead, affirm the trial court's order granting summary judgment to Devine for the fraud claim and to all of the Petitioners for the SCUTPA claim.

Respectfully submitted,



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**PROOF OF SERVICE**


I certify that I have served a copy of *Petitioners' Petition for Writ of Certiorari and Appendix-Volumes I, II and III* by regular U.S. Mail, postage prepaid, on September 9, 2016, addressed to all attorneys of record as follows:

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