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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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

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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In The Court of Appeals

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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' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. DID THE RELEASES SIGNED BY THE OREMUSES BAR THIS ACTION?

II. DID THE TRIAL COURT CORRECTLY GRANT VALARIA DEVINE SUMMARY JUDGMENT AS TO THE FRAUD CLAIM WHERE NO EVIDENCE WAS PRESENTED THAT SHE PARTICIPATED IN THE ALLEGED MISCONDUCT, THAT THE ALLEGED MISREPRESENTATIONS WERE MATERIAL, OR THAT THE OREMUSES HAD A RIGHT TO RELY ON THE ALLEGED MISREPRESENTATIONS?

III. DID THE TRIAL COURT CORRECTLY HOLD THAT THE UNFAIR TRADE PRACTICE CLAIM MUST BE DISMISSED BECAUSE THERE IS NO EVIDENCE THAT THE ALLEGED UNFAIR AND DECEPTIVE ACTS AFFECT THE PUBLIC INTEREST OF SOUTH CAROLINA?

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. (R., pp. 522-524.) 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. (R., pp. 525-526)

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. (R., p. 150.) 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. (R., pp. 305-306.)

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. (R., pp. 198; 207-281.)

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

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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.

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. (R. pp. 563-760.)

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. (R., pp. 493-496.) 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. (R., pp. 499-510; 519-520.)

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. (R., pp. 535-538; 550-551.) 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. (R., pp. 506-507.)

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

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right and claim to the property. We also hereby release Grand Estates Auction Co. from all claim rights for any actions performed.

(R., p. 550.)

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.

(R., p. 551.)

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. (R., pp. 510-511.) 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. (R., pp. 543-546.) 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. (R., pp. 511-513.) 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. (R., pp. 347-349; 353-355; 381-385.) 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. (R., pp. 563-564.)[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. (R., pp. 517-518; 548-549.)

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

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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.

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." (R., p. 544.) 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.

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. (R., pp. 161-162; 167-168; 169-170; 175.) 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. The

[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).

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. (R., pp. 499-509.)

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." (R., pp. 127-129.) 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." (R,. pp. 127-129.) These alleged statements

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.

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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. (R., p. 506.)

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." (R., p. 509.) 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

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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
March 3, 2015

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Respondents' Final Brief complies with Rule 211(b), SCACR.

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I certify that I have served a copy of Respondents' Final Brief by regular U.S. Mail, postage prepaid, on March 3, 2015, addressed to their attorneys of record as follows:

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STATEMENT OF ISSUES ON APPEAL

I. DID THE PRESIDING JUDGE ERR IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE PLAINTIFFS' CAUSE OF ACTION FOR FRAUD AGAINST VALARIA DEVINE?

II. DID THE PRESIDING JUDGE ERR IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE PLAINTIFFS UNFAIR TRADE PRACTICES ACT CAUSE OF ACTION AGAINST ALL DEFENDANTS?

STATEMENT OF THE CASE

In November 2009 Karl and Erin Hirschhorn, the owners of historically significant, improved real estate located in the City of Aiken, South Carolina, and known as "The Balcony", entered into an agreement with Grand Estates Auction Company ("GEA") for GEA to sell the Balcony by absolute auction. (Amended Complaint filed November 13, 2013, paragraphs 6, 7 (R.p.32) and Defendants' Answer to Amended Complaint filed February 28, 2014, paragraphs 6, 7). (R. p. 45) 4K&D Corporation, a North Carolina corporation, does business as GEA. (Amended Complaint filed November 13, 2013, paragraph 2 (R. p. 31), and Defendants' Answer to Amended Complaint filed February 28, 2014, paragraph 2). (R. p. 44) The auction occurred at the Balcony on February 9, 2010.

Melissa J. Lacky-Oremus and James T. Oremus ("the Oremuses")), did not acquire the property, notwithstanding their high bid at the auction of $1,875,000.00. Matters related to their high bid and their failure to acquire the property constitute the issues in this lawsuit.

On December 17, 2010, the Oremuses filed this lawsuit for damages against 4K&D Corporation, d/b/a GEA, Grand Estates Advertising, LLC ("Grand Estates

Advertising"), Stacy Kirk, Scott Kirk, Valeria Devine,[1] Karl Wesley Hirschhorn and Erin Francis Hirschhorn, Individually and as Trustees of the Karl Wesley Hirschhorn and Erin Francis Hirschhorn Revocable Trust Dated May 24, 1993, alleging multiple causes of action. The defendants denied the material allegations, and subsequently William Higgins, the auctioneer, was added as a third-party defendant.

The plaintiffs' conspiracy cause of action was withdrawn early in the lawsuit, and for reasons and at times not relevant to this appeal, Defendants Grand Estates Advertising, Scott Kirk, Karl Wesley Hirschhorn and Erin Francis Hirschhorn, Individually and as Trustees of the Karl Wesley Hirschhorn and Erin Francis Hirschhorn Revocable Trust Dated May 24, 1993, and Third-Party Defendant William Higgins were dismissed as parties. Valaria Devine, Stacy Kirk and GEA (collectively "the GEA Defendants") remained as defendants in the case.

An Amended Complaint was filed November 13, 2013, which the GEA Defendants timely answered on February 28, 2014. The plaintiffs allege, *inter alia,* they are entitled to damages from Valaria Devine, Stacy Kirk and GEA, who acted as authorized agents and as the alter ego of each other in committing fraud and unfair trade practices in conducting the auction, to include events occurring subsequent to the auctioneer hammering down the Oremuses high bid, by falsely representing to the plaintiffs that the GEA Defendants had improperly excluded an agent for a properly registered bidder who had made a written opening bid of $2,000,000.00, to convince the plaintiffs they had actually been outbid, and to cause the plaintiffs to sign releases for no consideration and to walk away from the auction without acquiring the property. The plaintiffs further allege that, as a result, the GEA Defendants avoided having to sell the

[1] The correct spelling of Ms. Devine's first name is Valaria.

property to the plaintiffs, whose high bid was less than satisfactory or desirable, and they sold the property shortly thereafter for a higher price and a larger sales commission, at a private sale, to parties who had not participated in the auction. (Amended Complaint, November 14, 2013.) (R. pp. 31-43) The GEA Defendants filed an answer to the amended complaint on February 28, 2014, in which they denied the material allegations of the amended complaint and raised the affirmative defenses of failure to state a claim, release, laches, estoppel, failure to mitigate damages, waiver, and accord and satisfaction. (Answer to Amended Complaint, February 28, 2014.) (R. pp. 44-50)

The GEA Defendants' motion for summary judgment was argued on June 2, 2014. By order filed June 11, 2014, the trial court granted summary judgment to Defendant Valaria Devine on all causes of action, and granted summary judgment to all GEA Defendants on all causes of action except for fraud. (R. pp. 1-7) The effect of the order is that the plaintiffs are entitled to proceed to trial only on the fraud cause of action against only GEA and Stacy Kirk.

On June 23, 2014, 2014, the plaintiffs filed and served a motion to alter or amend the judgment in the particulars of granting the plaintiffs a trial against all GEA Defendants on both the fraud and the unfair trade practice causes of action. By order dated July 10, 2014 and filed July 16, 2014, the trial court denied the plaintiffs' motion to alter or amend. (R. p. 10) The plaintiffs served their notice of appeal on July 18, 2014.

With respect to the amount involved in the appeal, the plaintiffs seek actual damages in the range of $493,750.00 to $993,750.00. The plaintiffs also seek appropriate punitive damages.

FACTS

Jim and Melissa Oremus live in Aiken South Carolina. Together, Jim and Melissa own and operate several businesses, and they own some real estate investment property. However, prior to the subject auction, neither had attended or participated in a real estate auction. (Deposition of Melissa Oremus, p. 25, line 15 – p. 26, line 2; R. pp. 527 - 528; Deposition of Jim Oremus, p. 41, lines 9-14; R. p. 514).

The Defendant GEA is a real estate auction company handling high-end properties throughout the United States. The individual Defendants, Valaria Devine and Stacy Kirk, are mother and daughter. Ms. Devine owns and controls one hundred percent of the common shares (all the issued, outstanding and voting shares of GEA). (Deposition of Valaria Devine, p. 26, lines 7-10, R. p. 150, lines 7-10; GEA Income Tax Returns Produced In Discovery by GEA, Exhibit "C" to Plaintiffs' Memorandum In Opposition to Defendants' Motion for Summary Judgment, R. pp. 389-448). At the time of the auction in February of 2010, Stacy Kirk, the daughter of Valaria Devine, was employed by and president of GEA. (Stacy Kirk Deposition, pp. 16 -19, R. pp. 303-306; GEA Income Tax Returns Produced In Discovery by GEA, Exhibit "C" to Plaintiffs' Memorandum In Opposition to Defendants' Motion for Summary Judgment, R. pp. 389-448). As noted below with appropriate citations to the record, Stacy Kirk and Valaria Devine were actively involved in the auction of The Balcony.

In November of 2009, Defendant Grand Estates contracted with Karl Wesley and Erin Frances Hirschhorn, owners of "The Balcony", to market and sell the old Aiken estate at absolute auction on or before February 9, 2010. (Karl Hirschhorn Deposition, p. 17, R. p. 19; and Exhibit 1 thereto, R. pp. 207-281).

Grand Estates provided a "Property Purchase Package" to potential purchasers and their brokers. Included within the package were the "Final Terms and Conditions of Sale" and the "Bidder's Statement." (Deposition of Stacy Kirk, pp. 113-117, R. pp. 326-330, and Deposition Exhibit 10, R. pp. 373-379). The Final Terms and Conditions expressly provide: "Any person bidding on behalf of another person or entity must have a valid, legally enforceable, unexpired, recordable Power of Attorney approved by Seller prior to the auction." Stacy Kirk Deposition, Exhibit 10, at paragraph F(4), R. pp. 375-376.

On January 25, 2010, potential bidder, Marc Blazar, faxed the Buyer Broker Registration Form to GEA identifying Randy Wolcott, a realtor, as his broker. The same form included Marc Blazer's opening bid amount of $750,000.00. (Deposition of Stacy Kirk, pp. 94-95, R. pp. 319-320, Deposition Exhibit 6, R. pp. 371-372).

On February 9, 2010, GEA held an absolute auction in Aiken to sell The Balcony. At an absolute auction the property will sell regardless of price to the highest bidder. There is no reserve. (Deposition of Stacy Kirk, p. 32, lines 15–21, R. p. 312).

The auction had been widely advertised as an absolute auction. Stacy Kirk was present at The Balcony. It is clear from the record that Valaria Devine was actively involved in the auction despite the fact that she was not present at The Balcony. On February 9, 2010, before the auction began, Karl Hirschhorn emailed both Valaria Devine and Stacy Kirk authorizing them to proceed with the auction. (Deposition of Karl Wesley Hirschhorn, Exhibit 2, R. pp. 282-283). As CEO of the company, from her home in Naples, Florida, Valaria Devine was involved in multiple telephone calls regarding the auction to Stacy Kirk and to the auctioneer, William Higgins, both prior to and after the

auction. She also talked by phone with a bid assistant, Marc Morris, at The Balcony. (Deposition of Valaria Devine, pp. 64-65, R. pp. 153-154; pp. 70-71, R. pp.159-160; pp. 81-83, R. pp. 163-165). Ms. Devine was also the primary point of contact with the Hirschhorns, who were not present at The Balcony. (Deposition of Valaria Devine, p. 67, line 8, R. p. 156; Deposition of Karl Hirschhorn, p. 21, lines 9-15, R. p. 199; p. 22, line6 – p.23, line 5, R.pp. 200 – 201; p.23, line 23 – p.24, line15, R. pp.201 – 202; p.27, line 11 – p.28, line 12, R.pp.205-206; p.21, lines 13 – 15, R. p. 199). Ms. Devine talked by phone with the company attorney after the auction about the auction. (Deposition of Valaria Devine, p. 83, R. p. 165). In addition, Ms. Devine talked by telephone with Desiree Watson, the auction coordinator who was in GEA's Charlotte office, at least twice after the auction, about the auction. (Affidavits of Desiree Watson dated January 4, 2012 (R.pp.127-129) and May 29, 2014, R.pp.130 – 132.).

At the beginning of the auction, Stacy Kirk determined that one of the potential bidders (Marc Blazar) was not a qualified bidder because the GEA personnel operating the auction in Aiken, South Carolina, were not in possession of the Final Terms and Conditions of Sale executed by Mr. Blazar. Neither had they received the required Specific Power of Attorney. She asked Blazar's representative (Randy Wolcott) to leave. (Deposition of Stacy Kirk, pp. 90-91, R. pp. 317-318.). The Plaintiffs Jim and Melissa Oremus were the high bidder in the auction with a bid of $1.875 Million, and the auctioneer hammered down their bid as the winning bid. (Deposition of Bill Higgins, p. 19, R. p. 184, Exhibit 1 to the Higgins Deposition, R. p. 120, paragraph 10). After the auction concluded, Ms. Kirk, realizing the owners would be very unhappy, called Valaria Devine to discuss the situation. (Deposition Stacy Kirk, p. 98, R. p. 322; also pp. 101-

102, R. pp. 323-324; Deposition of William Higgins, pp. 18-19, R. pp 183-184; Higgins Deposition, Exhibit 1, R. p. 120, paragraphs 11-15).

Ms. Kirk had received on February 8, 2010, the day before the auction, a faxed document from the Charlotte office showing Blazar's opening bid to have been $750,000.00, not $2,000,000.00. (Stacy Kirk Deposition, pp. 95-96, R. pp. 320-321 and Exhibit 6 thereto, R. p. 371). After speaking with Valaria Devine, Ms. Kirk represented to Jim and Melissa Oremus, in the presence of other witnesses,[2] that a qualified bidder who had been excluded from the auction had made an opening bid of $2,000,000.00, WHICH MS. KIRK KNEW TO BE FALSE. She also represented that both the seller and the excluded bidder had threatened to sue as a result of the situation. (Deposition of Nancy Cerra, Exhibit 1, R. p. 147; Deposition of James Oremus, p. 25, R. p. 500, lines 10-19).

Ms. Kirk represented to James Oremus and the auctioneer on February 9, 2010, that the documentation confirming the qualified, higher bidder was in the Charlotte office. (Affidavit of James Oremus dated May 29, 2014, R. p. 125, paragraphs 3 and 4; Affidavit of William Higgins dated May 28, 2014, R. p. 123, paragraph 7). However, Ms. Kirk knew that Blazar was not a qualified bidder. Stacy Kirk was clearly aware when the auction began that neither the required Final Terms and Conditions nor the required Power of Attorney had been received from Blazer. In fact, the executed Final Terms and Conditions and the fatally defective specific power of attorney (unwitnessed and un-notarized) were not sent by Blazer to the Charlotte office until 2:03 p.m. and 2:07

[2] Ms. Kirk's representations were made to the Oremuses openly in the presence of at least Bill Higgins, the auctioneer, and Nancy Cerra, a realtor, both of whom heard Ms. Kirk say to the Oremuses that a qualified bidder had submitted an initial bid of $2,000,000.00. (Deposition of Bill Higgins, pp. 23–28, R. pp. 185-190; Deposition of Nancy Cerra, pp. 23–28, R. pp. 139-144).

p.m., respectively, on the day of the auction. (Deposition of Stacy Kirk, pp. 119-125, R. pp. 332-338, and Stacy Kirk Deposition Exhibit 10, R. pp. 373-374; Stacy Kirk Deposition Exhibit 13, R. p. 380). Even if, for the sake of argument, the power of attorney had been timely faxed to The Balcony prior to the auction, it would have shown Blazar was unqualified to have his agent, Wolcott, appearing in his stead and bidding for him because the power of attorney signed by Blazar was not witnessed or notarized. S.C. Code Ann. §30-5-30 (1994). Thus, Ms. Kirk knew Blazar was not a qualified bidder and she was well within her rights to exclude him under the contractual terms of the auction.

Believing they had lost to a higher bidder, and hearing that lawsuits were being threatened, the Oremuses agreed to sign, and they did sign the documents that Ms. Kirk asked them to sign. (Deposition of James Oremus, pp. 24–26, R. pp 499-501; pp. 29–31, R. pp. 504-506, and Exhibits 1 and 2 thereto, R. pp. 519-520). The Oremuses received nothing in exchange for signing the documents. On the afternoon of the auction, Valaria Devine called the Charlotte office and instructed Desiree Watson, the GEA Auction Coordinator, "to refer any calls regarding what had transpired at the auction of The Balcony to her or to [Valaria] Devine's daughter, Stacy Kirk, and that 'If anyone asks, the high bid we received on The Balcony was $2,000,000.00, nod nod, wink wink.' " (Affidavit of Desiree Watson dated January 4, 2012, R. p. 128, paragraph 7; Deposition of Desiree Watson, pp. 53-56, R. pp. 553-556). Later the same day, Valaria Devine called Ms. Watson again and "advised her that the auction had almost been a disaster but that she and Stacy Kirk had done some 'quick thinking on their feet' and had 'saved the day'." (Watson Affidavit, January 4, 2012, R. p. 128, paragraph 9). Ms. Watson testified she was told by Valaria Devine in the phone call that she [Valaria Devine] and Stacy had

found a way to get out of selling the property to the people who had won the auction. (Deposition of Desiree Watson, p. 55, line 17–p. 56, line 15, R. p. 555 - 556, line). Also in this second call, Valaria Devine instructed Ms. Watson to call Lori, another GEA employee, and to tell Lori to delete the names out of the data base for the Aiken auction. (Watson Affidavit, May 29, 2014, R. p. 131, paragraph 8).

On February 17, 2010, eight days after the auction, GEA negotiated a contract of sale with respect to the property between the owners and a couple who were not bidders at the auction in the amount of $2.5 million. (Deposition of Stacy Kirk, pp. 160-162, R. pp. 350-352). The sale closed in March 2010. GEA made $50,000.00 more than they would have based on the Oremuses' bid. (Deposition of Stacy Kirk, p. 48, R. p. 314; pp. 53-54, R. pp. 315-316).

On the day of the auction, James Oremus believed The Balcony to be worth at least $3,000,000. (Deposition of James Oremus, pp. 42-43, R. pp. 515-516).

ARGUMENTS

I.

DID THE PRESIDING JUDGE ERR IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE PLAINTIFFS' CAUSE OF ACTION FOR FRAUD AGAINST VALARIA DEVINE, CEO OF GEA?

In his order granting summary judgment to the Defendant Valaria Devine, as to the cause of action for fraud, the only grounds or justifications for such dismissal cited in the court's order were (a) Valaria Devine was not at the auction, and (b) the plaintiffs have admitted they had no interactions with her concerning the auction. (See order filed June 11, 2014, R. pp. 1-7.) In the same order, however, the court ruled there are material

issues of fact that preclude summary judgment as to the fraud cause of action against the remaining defendants. The plaintiffs strenuously argue that there is a plethora of material issues of fact which should likewise preclude summary judgment on the fraud cause of action against Valaria Devine.

Under South Carolina law an officer or director of a corporation can incur personal liability for a tort committed by the corporation where " 'he has participated in the wrong.' " *Hunt v. Rabon*, 275 S.C. 475, 477, 272 S.E.2d 643, 644 (1980) (quoting 19 Am.Jur. 2d *Corporations,* 4, Liability for Torts § 1382) (holding "[t]he allegations in the complaint linking the members of the board of trustees with the tortious act are legally insufficient to hold them liable for the wrong alleged.") " 'A director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character; he is not liable for torts committed by or for the corporation unless he has participated in the wrong. Accordingly, directors not parties to a wrongful act on the part of other directors are not liable therefor. If, however, a director or officer participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby, and it does not matter what liability attaches to the corporation for the tort ....' " *Id.*. " 'A director, officer, or agent is not liable for torts of the corporation or of other officers or agents merely because of his office. He is liable for torts in which he has participated or which he has authorized or directed.' " *Id,* 275 S.C. at 478 (quoting 19 C.J.S. *Corporations* § 845-Torts).

Hunt was recently cited with approval in the case of *Neeltec Enterprises, Inc. v. Long,* 402 S.C. 524, 741 S.E.2d 767 (Ct. App. 2013). In *Neeltec Enterprises, Inc.*, a special referee substituted a corporate entity for its sole shareholder, the named defendant

in a lawsuit alleging a violation of the South Carolina Unfair Trade Practices Act. "Neeltec argues Long should be personally liable for commanding or inducing the corporation to commit a harmful act.[fn 3][3] We agree." *Id.*, 402 S.C. 528. "Although Neeltec's action is for the violation of the SCUTPA, the supreme court has found in tort cases: " '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. 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.,* 402 S.C. 529 (Citations Omitted).

Fraud is provable by circumstantial evidence. *Cook v. Metropolitan Life Insurance Company,* 186 S.C. 77, 194 S.E. 636, 639 (1938), and *Blackmon v. United Insurance Company*, 245 S.C. 335, 111 S.E.2d 552, 555 (1959). "Of course fraud is never presumed ... but it may, and ordinarily can only, be established by circumstantial evidence." *Gary v. Jordan,* 236 S.C. 144, 113 S.E.2d 730, 735 (1960). "Evidence covering a wide range is admissible to prove or disprove fraud when it is at issue. In fact, circumstantial evidence may constitute the only evidence to support a finding of fraud." 37 Am.Jur. 2d *Fraud and Deceit*, § 479 (2001).

"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). "Great latitude is allowed in

[3] "Neeltec cites the doctrine of *qui facit per alium facit per se,* 'He who acts through another, acts himself.'"

admitting evidence on the issue of a parties' alleged fraud and undue restriction should not be placed on the introduction of evidence which has probative value, however slight, on this issue." 37 Am.Jur.2d *Fraud and Deceit* § 479 (2001).

"Fraudulent intent is 'a condition of the mind beyond the reach of the senses,' which is 'usually kept secret, and can only be proved by unguarded expressions, conduct and circumstances generally.'" *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, supra.,* 186 S.C. at 84).

"Evidence of a defendant's past dealings is relevant to establish the element of intent in a fraud action, and it also relevant to show a scheme, design, or motive to engage in fraudulent activity." 37 Am.Jur. 2d. *Fraud and Deceit*, § 479 (2001). "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eye witnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Rule 406, South Carolina Rules of Evidence.

In the context of this settled law, the evidence presented by the plaintiffs include the following:

(1) Prior to the auction, Valaria Devine, the sole shareholder, CEO and controlling person of GEA, had conversations with Stacy Kirk, her daughter and president of the company, and the auctioneer, Bill Higgins, who were physically present at The Balcony, to discuss matters related to the auction. (Stacy Kirk Deposition, p. 101,

p. 109, R. p. 323 and 325; Steven Jadael Deposition, pp. 7-8, R. pp. 290-291; Valaria Devine Deposition, pp. 64-65, R. pp. 153-154, 70-71, R. pp. 159-160 and 81-83, R. pp. 163.165; William Higgins Affidavit dated April 5, 2012 at paragraph 13, R. p. 120).

(2) Immediately after the auction, Stacy Kirk told the auctioneer: "The owner is going to be pissed." (William Higgins Affidavit dated April 5, 2012, paragraph 12, R. p. 120; William Higgins Deposition, p. 18, lines 8-21, R. p. 183; Stacy Kirk Deposition, p. 98, lines 19-25, R. p. 322).

(3) Stacy Kirk then called her mother, Valaria Devine, to tell her the results of the auction, and to ask her what to do. (Stacy Kirk Deposition, p. 101, line 23–p. 102, line 6, R. p. 323 - 324; Affidavit of William Higgins dated April 5, 2012, paragraph 13, R. p. 120).

(4) Valaria Devine then called the Hirschhorns, the sellers, to tell them the results of the auctions, and the Hirschhorns were "shocked." (Deposition of Karl Hirschhorn, pp. 23-25 and p. 27, lines 11-19, R. pp. 201-203 and R.p. 205).

(5) Valaria Devine told Mr. Hirschhorn that "there was another bidder we didn't let in the auction. His paperwork wasn't right or whatever and it's a shame ... I think the house would have brought more ... this person should have been allowed in." (Deposition of Karl Hirschhorn, p. 27, line 21 - p.28, line 4, R. p. 205 - 206).

(6) After speaking to Valaria Devine, Stacy Kirk told the Oremuses that a qualified bidder who had submitted an original written bid of $2,000,000.00 had been improperly excluded from the auction, and the owners and the excluded bidder were threatening to sue them. (William Higgins Deposition, p. 24, lines 3-6, R. p. 186; James

Oremus Deposition., p. 25, lines 1-13, R. p. 500; Nancy Cerra Deposition, p. 27, line 22–p. 28, line 21 and Exhibit 1 thereto, R. p. 143 – 144 and R. pp. 147-148).

(7) Based upon the representations of Stacy Kirk, the Oremuses agreed to sign releases as it was their understanding that they, in fact, had been outbid by a qualified bidder. Deposition of James Oremus., p. 29, lines 15-24, R p. 504; p. 31, lines 17-21, R. p. 506).

(8) Valaria Devine then called Desiree Watson, the Auction Coordinator and Document Specialist who was working in the Charlotte office, and stated the following: "If anyone asks, the high bid we received on The Balcony was $2000,000.00, nod, nod, wink, wink." Affidavit of Desiree Watson, January 4, 2012, paragraph 7, (R. p. 128).

(9) Later in the afternoon Valaria Devine called Desiree Watson and advised her that the auction has almost been a disaster, but that she and Stacy Kirk (emp. added) had done some "quick thinking on their feet" and had "saved the day." (Affidavit of Desiree Watson, January 4, 2012, paragraph 9, R. p. 128). Further, Valaria Devine told Desiree Watson in that conversation how she [Valaria Devine] and Stacy Kirk had found a way to get out of selling the property to the people who won the auction. (Desiree Watson Deposition, p. 55, line 17–p. 56, line 15, R. p. 555 - p. 556). In addition, Ms. Devine instructed Ms. Watson to have Lori delete the Aiken database. (Affidavit of Desiree Watson, May 28, 2014, paragraph 8, R. p. 131).

As further evidence of Valaria Devine's individual, direct participation in and/or her direct authorization of the fraud, the plaintiffs have submitted the testimony of Steven Jedael, the Marketing Director from September 2004 until July 2009, evidencing that the defendants, including Valaria Devine, 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. Mr. Jedael testified as follows:

> A. The process with Grand Estates - because the only auctions that we got enough participants were absolute auctions after that 2007 point. So that was the push to make all auctions absolute auctions. And the policy was to tell the seller, that, you know, mechanisms are in place so we're not going to give the property away.
>
> Q. All right. And do you know what those mechanisms were that were in place?
>
> A. Yes, They were the use of shills within the auction.
>
> Q. And what is a shill?
>
> A. A shill is essentially a fake bidder.
>
> Q. Okay.
>
> A. They are not intended to purchase the property based on their bids.
>
> Q. Well, let me ask you, this use of shills, was this - who directed or instituted or instigated the use of shills at an auction that Grand Estates conducted?
>
> A. It would be the major sales people, Valaria Devine, Stacy Kirk, anyone who was, you know, half of that particular auction.

(Deposition of Steven Jedael, p. 6, line 22 - p. 7, line 17, R. p. 289 - 290).

Mr. Jedael also testified as to the all - encompassing role that Valaria Devine played with respect to every auction that took place. He testified as follows:

> Q. All right, sir. And let me ask you, during the time that you worked at Grand Estates Auction Company, how would you describe Valarai Devine's role?
>
> A. She was – I mean, she's the CEO of the company.
>
> Q. Was she active?

A. Absolutely. All – in fact, all decisions as to whether an auction moved

forward or not or whether we took a deal was pretty much based on Val's decision. It had to meet with her approval.

(Steven Jedael Deposition, p. 7, line 18 – p. 8, line 2, R. p. 290 – 291).

With respect to the use of fake bid/bidders, Mr. Jedael was asked how he knew that Valaria Devine or Stacy Kirk had anything to do with that. He responded, "That was common -they're in charge of all the auctions. They know exactly what's going on in all the auctions."

(Steven Jedael Deposition, p. 8, line 22 –p. 9, line 1, R. p. 291 – 292).

Mr. Jedael also provided further explanation as to how the use of fake bids/bidders served as a safety mechanism in absolute auctions to ensure that a property was not "given away":

Q. Let's talk about this safety mechanism, if you will. Explain that.

A. Well, absolute auctions are, of course, very risky. So you want to tell the seller that essentially, just as a reserve auction, a shill may be used to bid up to a certain price. This is the exact same way we're going to use it in an absolute auction and then once it gets to a satisfactory level, then the shill will, you know, cease bidding, or that's supposedly how it's supposed to work.

Q. You described a shill as a fake bidder?

A. Correct.

Q. Is that fake bidder present at an auction?

A. Sometimes they are and sometimes they are over the phone.

Q. All right sir. And so I'm still trying to understand what their function is. What do they do? How do they serve as the safety mechanism?

A. They serve as a sort of impetus to drive bids higher than they

normally would be to encourage a counterbid. That's their essential function within an auction.

Q. All right, sir. And what if there are no counterbids?

A. Then the property would quote/unquote be sold to that bidder, but in actuality, you know, the seller would just be out of their marketing fees and the seller would just keep the property.

Q. The fake bidder, would the fake bidder ever be the highest bidder at an auction?

A. Yes, absolutely. That would occur.

Q. OK. If that's a fake bidder, does that fake bidder purchase the property?

A. No. They do not. Essentially the whole transaction is ignored for the most part, like the auction never happened.

(Steven Jedael Deposition, p. 9, line 8 – p. 10, line 16, R. p. 292 – 293).

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, R. p. 131); Deposition of Desiree Watson, p. 77, line 8 – p. 80, line 18, R. p. 557 - 560).

The case law cited previously herein makes it abundantly clear that fraud can, and usually is, proven by circumstantial evidence. It is likewise clear that if Valaria Devine participated in or authorized Stacy Kirk's false representations with respect to the existence of a qualified bidder who made a $2,000,000.00 bid, she is personally liable

under the fraud cause of action. Contrary to the assertions of the defendants, the mere fact that Valaria Devine did not personally communicate the false representations to the Oremuses is of no legal import.

Previously herein, we have itemized the various respects and circumstances which could lead the jury to reasonably find that Ms. Devine participated in, authorized and perhaps even master-minded the scheme involving the use of a false bid that led the Oremuses to believe that they had been outbid. The plaintiffs would specifically commend to the Court's attention the first affidavit of Desiree Watson dated January 4, 2012, (R.pp. 127-129) in which she testified that on the afternoon following the auction, Valaria Devine, not Stacy Kirk, instructed her to essentially misrepresent to anyone who asked that there had been a $2,000,000.00 bid. Moreover, and perhaps more importantly, the affidavit makes it clear that Valaria Devine told her that she [Valaria Devine] and Stacy Kirk had done "some quick thinking on their feet" and had "saved the day" and prevented the auction from being a disaster. The plaintiffs respectfully submit these are the very kind of "incidents and circumstances" that the court referred to in *Cook, supra.,* 186 S.C. at 84, as well as in the more recent case of *State v. Pace, supra.,* 337 S.C. at 415.

The plaintiffs would also reiterate that evidence of a defendant's past dealings is relevant to show a scheme, design, or motive to engage in fraudulent activity. Again, the plaintiffs have submitted testimony by affidavit and deposition of Desiree Watson, the Auction Coordinator and Document Specialist, who makes it clear that Valaria Devine had previously directed that false documentation be created to support the existence of fake bidders. Once again, the testimony of Steven Jedael makes it clear that the practice

undesirable result was a *routine* practice of the defendants that was engineered by Valaria Devine. See Steven Jedael Deposition in its entirety. In light of the foregoing testimony, "When the evidence is viewed as a whole, it supports the conclusion that Frank Berry [Valaria Devine] took active measures, by conduct and by expression, to deceive Satcher [the Oremuses] about the fitness of the land to grow peaches [about the existence of a higher bidder]." *Satcher v. Berry,* 299 S.C. 381, 384, 385 S.E.2d 41 (Ct.App. 1989).

Plaintiffs would strenuously argue that there is more than enough circumstantial evidence to warrant the submission of the issue of Valaria Devine's involvement to the jury with respect to the fraud cause of action.

II.

DID THE PRESIDING JUDGE ERR IN GRANTING THE DEFENDEANTS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE PLAINTIFFS' UNFAIR TRADE PRACTICES ACT CAUSE OF ACTION AGAINST ALL DEFENDANTS?

As pointed out by the court in *Crary v. Djebelli,* 329 S.C. 385, 388, 496 S.E.2d 21 (1998), the impact on public interest requirement of the SCUTPA is satisfied when there is a potential for repetition and plaintiffs have generally shown that potential by "(1) showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) showing the company's procedures create a potential for repetition of the unfair and deceptive acts." At the risk of being redundant, the plaintiffs would argue that the testimony of Steven Jedael and Desiree Watson, in addition to serving as evidence of Valaria Devine's participation in/authorization of the fraudulent conduct, also demonstrates that the fraudulent and deceptive conduct on the part of the defendants in the case at hand was simply another example of the "same kind of action that occurred in the past." Moreover, this testimony also establishes that the

defendants' "procedures" create a potential for repetition of the kind of conduct that had been perpetrated many times in the past by the defendants. As discussed above, as in tort cases, both a participating agent and the corporation can be liable for a violation of the SCUTPA. *Neeltec Enterprises, Inc. v. Long,* 402 S.C. 524, 529, 741 S.E.2d 767 (Ct. App. 2013).

In discussing the requirements for a cause of action under the UTPA the South Carolina Supreme Court held: "Evidence of *similar* acts, transactions, or happenings is admissible where there is some special relation between them which would tend to prove or disprove some fact in dispute. *Reed v. Clark,* 277 S.C. 310, 286 S.E.2d 284 (1982)(emphasis added). In *Barnes v. Jones Chevrolet Company, Inc.,* 292 S.C. 607, 358 S.E.2d 156 (Ct.App. 1987), the court expounded upon the issue of what constitutes a special relation between the similar acts, transactions or happenings as follows: "We hold that there is a special relation between the proffered testimony and Barnes' action under the U.T.P.A. We hold this because in an action under the U.T.P.A., a material issue to be proved is that the unfair practice or act affects persons other than the parties to the transaction. *Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.,* 290 S.C. 475, 351 S.E.2d 347, 349, 350 (Ct.App. 1986). "Manifest injustice" would then result if Barnes were not allowed to introduce evidence of similar acts because of the relevance of these acts to the cause of action for the violation of the U.T.P.A." *Id.,* 292 S.C. at 612-613. The common theme existing in the GEA Defendants' past practices and what transpired in the case at hand is the fact that in all of these instances GEA Defendants sought to create the illusion of a higher bid that enabled the entire auction to become a nullity so as to avoid an undesirable result. Accordingly, there is a special

relation between what occurred at this particular auction and what had transpired at previous auctions conducted by GEA, as detailed by witnesses Steven Jadael and Desiree Watson.

CONCLUSION

In conclusion, the plaintiffs would strenuously argue that they have demonstrated there is overwhelming direct and circumstantial evidence of Valaria Devine's direction and/or participation in the fraudulent conduct on the part of GEA and Stacy Kirk that led to the plaintiffs, as the winning bidders of the auction, not becoming the owners of The Balcony. To take the position that there are material issues of fact that precludes summary judgment as to the fraud cause of action against GEA and Stacy Kirk, while at the same time maintaining that there is insufficient evidence to warrant the fraud cause of action going forward as to Valaria Devine, is to completely overlook and ignore the affidavits and deposition testimony of Desiree Watson, GEA's Auction Coordinator, and Steven Jadael, GEA's former Director of Marketing, regarding Ms. Devine's participation and role in both the auction in question as well as the practices employed under her direction as CEO to avoid undesirable results at auctions in the past. Moreover, the same witnesses clearly establish in their affidavits and depositions that under the current state of the law, there is sufficient evidence to preclude the court's dismissal of the Unfair Trade Practices Act cause of action and to allow that cause of action to go forward as to GEA, Stacy Kirk and Valaria Devine. Accordingly, the plaintiffs urge this court to overturn the rulings of the lower court with respect to the fraud cause of action as to Valaria Devine and the Unfair Trade Practices Act cause of action in its entirety.

Respectfully submitted,

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February 26, 2015.

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.

FINAL 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?

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, R. pp. 527-528; J. Oremus Deposition, p. 41, lines 9-14, R. p. 514.)

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, R. pp. 529-532; J. Oremus Deposition, p. 21, lines 11-19, R. p. 496; p. 22, lines 17 – p. 23, line 2, R. pp. 497-498; p., 23, line 24 – p. 25, line 10, R. pp. 498-500.) 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, R. pp. 499-509.) 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, R. p. 533.)[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, R. pp. 533-534.) 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, R. p. 535.)

[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, R. p. 492.)

[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, R. pp. 493-494.)

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, R. p. 535; J. Oremus Deposition, pp. 29-30, R. pp. 504-505.) As noted by 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, R. p. 538.) 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, R. pp. 539-541; p. 67, lines 1-11, R. p. 562.) They were sad and disappointed. (M. Oremus, p. 47, lines 18-21, R. p. 542.)

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, R. pp. 122-124; Affidavit of Desiree M. Watson dated May 29, 2014, R. pp. 127-129.)

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, R. p. 511.) 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 Oremus Depo., p. 50, line 7 – 17, R. p. 544; p. 52, line 2 - p. 53, line 4, R. 546-547.) Mr. Oremus, likewise, did not know until after the property sold that it had been sold to someone other than the $2,000,000 bidder. (J. Oremus Deposition, p. 37, line 17 – p. 38, line 5, R. pp. 512-513.)

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 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 66 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

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[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).

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. pp. 371-372.)[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, R. pp. 366-368; Exhibit 13, R. p. 380.) The power of attorney had to be a sworn, recordable power of attorney, and it was not. (S. Kirk Deposition, Exhibit 13, R. p. 380.) 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, R.

[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, R. pp. 125-126; see Affidavit of W. Higgins dated May 28, 2014, R. pp. 122-124.)

pp. 119-121.) 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., 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, R. pp. 127-132; Jadael Deposition testimony quoted at pp. 14-16 of the Brief of Appellants, R. pp. 289-293.)

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

[6] The others hearing this misrepresentation included the auctioneer, who was hired by GEA. (W. Higgins Affidavits of 2012 and 2014, R. pp. 119-121; 122-124). 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. p. 134.)

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, R. pp. 156-157); (2) Ms. Devine talked with the property owners by telephone after the auction Devine Deposition pp. 136-138, R. pp. 179-181; (3) Ms. Devine talked with the auctioneer by telephone prior to the auction (Devine Deposition, p. 64, R. p. 153; p. 125, R. p. 176); (4) Ms. Devine talked to the auctioneer by telephone after the auction (Devine Deposition, p. 66, R. p. 155; p. 127, R. p. 177); (5) Ms. Devine may have talked to her daughter, Ms. Kirk, by telephone before the auction (Devine Deposition, p. 63, R. p. 152); (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, R. p. 152; Affidavit of W. Higgins dated April 5, 2012, R. pp. 119-121 (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, R. p. 178; p. 138, R. p. 181); (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, R. pp. 127-129)[7]; and (9) Ms. Devine talked again by telephone to the Auction Coordinator and Documents Specialist when she instructed the Auction Coordinator to have the Aiken database deleted. (Affidavit of Desiree M. Watson dated May 29, 2014, R. pp. 130-132.)

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

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[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, R. pp. 366. Ms. Devine did not tell the Auction Coordinator to say that the "contract price" was $2,000,000.00, she told her to say the "high bid" was $2,000,000.

[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.

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 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.

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.

[9] Ms. Cerra, the Oremuses' realtor friend, was not familiar with the auction process. (Cerra Deposition, pp. 66-67, R. pp. 145-146.)

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

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 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 <u>and respective knowledge and means of knowledge of the parties</u>, 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 $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

[11] Ms. Cerra, the Oremuses' realtor friend, was not familiar with real estate auctions. Cerra Deposition, pp. 66-67, R. pp. 145-146.

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. pp. 289-290 ; p. 7, line 18 – p. 8, line 2, R. pp. 290-291 ; p. 8, line 22 –p. 9, line 1, R. pp. 291-292 ;p. 9, line 8 – p. 10, line 16, R. pp. 292-293). 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, R. p. 131; Deposition of Desiree Watson, p. 77, line 8 – p. 80, line 18, R. pp. 557-560). 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 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.

February 26, 2015

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[12] See the Appellants' argument to the lower court on June 2, 2014. (Tr. June 2, 2014 Motion Hearing, p. 29 R. p. 79.)

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Appellate Case No. 2014-001579

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Unpublished Opinion No. 2016-UP-253
Heard April 12, 2016 – Filed June 8, 2016

REVERSED

Robert L. Buchanan, Jr., of Buchanan Law Office, P.A., and Robin A. Braithwaite, of Braithwaite Law Firm, both of Aiken, for Appellants.

Alice F. Paylor and Russell Britton Kelly, both of Rosen, Rosen & Hagood, LLC, of Charleston, for Respondents.

PER CURIAM: Melissa J. Lackey-Oremus and James Oremus (Appellants) appeal the circuit court's partial grant of the motion for summary judgment filed by 4 K & D Corporation d/b/a Grand Estates Auction Company (Grand Estates), Stacy Kirk, and Valaria Devine (Respondents). Appellants argue the circuit court erred by granting summary judgment to Devine on their claim for fraud because they produced evidence that would allow a jury to reasonably find Devine, as the sole shareholder and chief executive officer of Grand Estates, participated in the incident and, thus, she can be held liable in her individual capacity. Appellants also claim the circuit court erred by granting summary judgment to Respondents on their claim based on the South Carolina Unfair Trade Practices Act (UTPA) because they produced evidence showing Respondents' alleged actions have the potential for repetition. We agree and reverse.

1. We find the circuit court erred by granting summary judgment to Devine on Appellants' fraud claim because Appellants produced more than a scintilla of evidence tending to show Devine was personally involved and participated in the acts leading to the fraud claim. *See Turner v. Milliman*, 392 S.C. 116, 124-25, 708 S.E.2d 766, 770 (2011) (noting a plaintiff must prove a fraud claim "by clear and convincing evidence; thus, more than a mere scintilla of evidence must be presented to withstand a motion for summary judgment"); *Rowe v. Hyatt*, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996) (finding an officer or director of a corporation "is not, merely as a result of his or her status as such, personally liable for the torts of the corporation. 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").[1] Here, Appellants produced more than a scintilla of

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[1] We note other jurisdictions follow a similar general rule regarding personal liability of corporate officers and directors. *See Sturm v. Harb Dev., LLC*, 2 A.3d 859, 866-67 (Conn. 2010) ("[A] director or officer who commits the tort or who directs the tortious act done, or participates or operates therein, is liable to third persons injured thereby, even though liability may also attach to the corporation for the tort."); *White v. Collins Bldg., Inc.*, 704 S.E.2d 307, 310 (N.C. Ct. App. 2011) ("It is well settled that one is personally liable for all torts committed by him, including negligence, notwithstanding that he may have acted as agent for another or as an officer for a corporation." (quoting *Strang v. Hollowell*, 387 S.E.2d 664, 666 (N.C. Ct. App. 1990))); *Brown v. Rentz*, 441 S.E.2d 876, 878 (Ga. Ct. App. 1994) (explaining "it is well established that an officer of a corporation who takes

evidence tending to show Devine personally participated in the alleged fraudulent conduct.

In the light most favorable to Appellants, Devine called Desiree Watson shortly after the auction and instructed her to refer any inquiries about the auction to her or Kirk. Devine also told her to report the winning bid for the property as $2,000,000 "nod nod, wink wink." Devine called Watson again later that day to inform her the auction "had almost been a disaster" but she and Kirk performed "quick thinking on their feet" and "saved the day." Devine also explained to Watson the process of convincing Appellants "to withdraw their winning bid." Devine instructed Watson to remove the names of the contact persons and bidders associated with the property from Grand Estates' computer system.

There was additional circumstantial evidence provided by Devine tending to show her personal involvement with the events following the auction. *See Cook v. Metropolitan Life Ins. Co.*, 186 S.C. 77, 84, 194 S.E. 636, 639 (1938) ("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 the fraudulent design. It is a state of mind, dependent on intent, which is provable by circumstantial evidence."). Devine admitted to speaking with William Higgins, the auctioneer, on the telephone twice after the auction. She also spoke with Grand Estates' attorney, Kirk, and the sellers after the auction. Devine acknowledged speaking with Kirk regarding the releases signed by Appellants and instructed Kirk to present the releases to Appellants. Devine dictated the language in the releases to Kirk based on her conversation with the attorney. Additionally, Karl Hirschhorn, one of the sellers, spoke with Devine shortly after the auction concluded, and she informed him of the results. It was a three-way telephone call with Devine and Kirk. Devine also informed him of the potential bidder who Kirk excluded, and they discussed the possibility of obtaining a release from Appellants. Although Devine offers plausible, innocent explanations for her actions after the auction, when viewed with other circumstantial evidence and in the light most favorable to Appellants, a jury could reasonably find Devine was participating in the alleged fraudulent conduct.

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part in the commission of a tort by the corporation is personally liable therefor" (internal quotation marks omitted)).

To the extent Devine argues the releases signed by Appellants bar this action, the releases do not mention Devine. Even if enforceable, the releases named only Grand Estates, the sellers, Higgins, and the real estate broker. Thus, Devine cannot claim immunity for personal liability based on the releases.

Furthermore, regarding Appellants' fraud claim, Respondents proffer multiple other grounds for affirming the grant of summary judgment for Devine and reversing the denial of summary judgment for Grand Estates and Kirk. Respondents claim the alleged misrepresentations were not material and Appellants had no reasonable right to rely on them. We believe this Court is foreclosed from considering these arguments with regard to Grand Estates and Kirk because the circuit court denied summary judgment to them on Appellants' fraud claim, and the denial of summary judgment is not appealable or reviewable. *See Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 167-68, 580 S.E.2d 440, 443-44 (2003) (finding the denial of summary judgment is not immediately appealable even when accompanied by a proper appeal of the grant of summary judgment on a separate issue); *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 167, 708 S.E.2d 218, 222 (Ct. App. 2011) ("Because the circuit court *denied* summary judgment, we are prohibited from reviewing that ruling pursuant to [*Olson*].").

With regard to Devine, we construe Respondents' arguments regarding materiality and reasonable reliance as additional sustaining grounds, which this Court has discretion to consider. The circuit court found genuine issues of material fact existed on the elements of materiality and reasonable reliance and we agree. We believe whether the alleged misrepresentation was material and whether Appellants reasonably relied upon the misrepresentation are questions properly submitted to a jury in this case. *See Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 475, 581 S.E.2d 496, 504 (Ct. App. 2003) ("The general rule is that questions concerning reliance and its reasonableness are factual questions for the jury.").

Because there was evidence from which a jury could find Devine was personally involved and participated in the events, Devine could be personally liable even though she may not have made the representations to Appellants. Furthermore, Devine's position as chief executive officer could not shield her from personal liability if she was personally involved and participated in the events. Accordingly, we reverse.

2. We find the circuit court erred by granting summary judgment to Respondents on Appellants' UTPA claim because the alleged unfair acts affected the public

interest by having the potential for repetition. *See Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996) ("Since 1986, South Carolina courts have required that a plaintiff bringing a private cause of action under UTPA allege and prove the defendant's actions adversely affected the public interest."); *id.* (explaining a plaintiff can satisfy the public interest requirement by showing the defendant's actions have "the potential for repetition"); *id.* ("The plaintiff need not allege or prove anything *further* in relation to the public interest requirement."); *id.* at 497, 473 S.E.2d at 51 (explaining "each case must be evaluated on its own merits," and there is no "rigid, bright line test that delineates in minute detail exactly what a plaintiff must show to satisfy" the potential for repetition requirement); *id.* at 496-97, 473 S.E.2d at 51 (noting examples of actions with no real potential for repetition include "unfair or deceptive acts in the sale of a business itself[] or in sales outside the ordinary course of business").

Our case law does not reveal a requirement that a plaintiff show a defendant's unfair acts have been repeated, rather a plaintiff must show only that the acts have the potential for repetition. In *York*, the plaintiff purchased a truck after the dealer represented the truck was "like new" and had never been titled to an individual. *York v. Conway Ford, Inc.*, 325 S.C. 170, 172, 480 S.E.2d 726, 727 (1997). The truck experienced mechanical trouble almost immediately, and a third-party mechanic told the plaintiff the truck had a bent frame from a previous accident. *Id.* At trial, the trial court directed a verdict in the defendant's favor on the plaintiff's UTPA claim after ruling the defendant's act did not impact the public interest. *Id.* at 173, 480 S.E.2d at 728. Our supreme court found the trial court erred because the defendant was "in the business of selling cars," and "[c]ertainly, the alleged acts or practices [had] the potential for repetition." *Id.* In *York*, there was no evidence tending to show any other occurrence of the defendant engaging in that type of unfair act, but our supreme court still found the defendant's actions had the potential for repetition.

We find Respondents' alleged acts had the potential for repetition and affected the public interest. Taken in the light most favorable to Appellants, Respondents held an absolute auction to sell real estate. When Respondents were disappointed with the amount of Appellants' winning bid, they quickly concocted an erroneous story about improperly excluding a bidder who had a higher opening bid. Respondents used this story to coerce Appellants into releasing their winning bid, and eight days later, Respondents sold the property to a different buyer who was never involved with the auction for an additional $625,000. Respondents netted an extra $50,000 in fees by employing this scheme.

We believe these facts showed the potential for repetition because Respondents marketed and sold high end real estate in the ordinary course of their business. Grand Estates was in the business of holding auctions to sell luxury properties. Also, Respondents intentionally committed these acts for economic gain. Thus, we find there is ample potential for Respondents to engage repetitively in this type of scheme. Accordingly, Respondents' alleged acts affected the public interest, and we reverse.

REVERSED.

SHORT and THOMAS, JJ., and CURETON, A.J., concur.

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JUN 22 2016

SC Court of Appeals

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.

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June 21, 2016

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.

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.

Respectfully Submitted,

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SC Court of Appeals

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' REPLY IN SUPPORT OF PETITION FOR REHEARING

Alice F. Paylor, Esquire
SC Bar # 4380
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Respondents filed a Petition for Rehearing, because Appellants had submitted no evidence that Respondent Devine had participated in, or directed, the alleged fraudulent conduct of Respondent Stacy Kirk, and Appellants had presented no evidence that the alleged fraudulent conduct would adversely impact the public interest as required by the South Carolina Unfair Trade Practices Act.

I. APPELLANTS HAVE NO EVIDENCE TO SUPPORT THEIR FRAUD CLAIM AGAINST VALARIA DEVINE.

In their Return, Appellants again cite to testimony about events that happened after the alleged fraudulent conduct. Appellants have presented no evidence that Ms. Devine directed, or even had knowledge that, Ms. Kirk was going to tell the Appellants that she had received a $2 million opening bid. The only evidence is that the sellers, the Hirschhorns, were not happy with the high bid made by the Appellants, and they asked Ms. Kirk to ask the Appellants if they wanted to release their bid. That is what the sellers testified, as well as Ms. Kirk and Ms. Devine. R., pp. 170, 175, 180, 200-206. There is no other evidence relating to Ms. Devine prior to the alleged misrepresentations being made by Ms. Kirk to the Appellants.

All testimony relied on by the Appellants related to conversations between Ms. Devine and a former employee of the auction company after the alleged fraudulent conduct. Appellants have presented no case law precedent that allows a party to proceed against an alleged joint tortfeasor simply because that person owned the company involved.

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), which involved the faxing of a falsified plat from a company owned by Mr. Hampton to its real estate agent who provided it to the purchaser of the real property, is directly on point:

> 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.

As this Court determined in Moseley, "there was no evidence [Devine] personally committed fraud.... [Kirk], acting as an agent of [Grand Estates Auction] provided [information] to the [Oremuses]. There was no evidence [Devine directed Kirk to make false representations.] All representations made to [the Oremuses concerning the auction] were made by [Kirk.]"

Respondents respectfully request that the Court grant this Petition for Rehearing and affirm the granting of summary judgment as to Ms. Devine with regard to the fraud claim.

II. APPELLANTS HAVE NOT PRESENTED ANY EVIDENCE OF AN ADVERSE PUBLIC IMPACT.

Appellants rely on testimony that, as some point in the past, Respondents allegedly used shills to get bidders to bid higher in an auction. That is not the conduct that Appellants claim happened in this matter. If Respondents had had shills bidding, the Appellants would not have been the high bidders. Instead, in this case, the facts were that the Respondents excluded a bidder who wanted to bid, and the high bid was not what the sellers wanted. In order for this alleged unfair trade practice to be repeated, the same facts would have to occur. There is no evidence that Respondents created the excluded bidder in order to have a means of coercing the Appellants to release their bid. The only evidence is that the excluded bidder was an independent person who wanted to participate in the auction. The alleged deceptive practice is telling the Appellants that the excluded bidder had made a $2 million opening bid. There is no evidence that this had ever happened in the past or any likelihood that it would happen in the future. There was no evidence that Respondents' procedures "create[d] a potential for repetition

of the deceptive practices." Schnellman v. Roettger, 368 S.C. 17, 23, 627 S.E.2d 742, 746 (Ct. App. 2007).

Appellants have failed to show the requisite adverse impact on the public, and Respondents are entitled to have summary judgment as to the SCUTPA claim affirmed.

CONCLUSION

For all of the reasons stated hereinabove and in the Petition for Rehearing, 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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July 7, 2016

The South Carolina Court of Appeals

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

v.

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ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_______________ C.J.

Paul E. Short, Jr. J.

_______________ J.

Columbia, South Carolina

cc:
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Alice F. Paylor, Esquire

FILED
August 18, 2016

Russell Britton Kelly, Esquire
The Honorable Doyet A. Early, III