

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III Circuit Court Judge

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S.C. SUPREME COURT

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.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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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 (Appendix 000035) and Defendants’ Answer to Amended Complaint filed February 28, 2014, paragraphs 6, 7). (Appendix000048) 4K&D Corporation, a North Carolina corporation, does business as GEA. (Amended Complaint filed November 13, 2013, paragraph 2 (Appendix 0000034), and Defendants’ Answer to Amended Complaint filed February 28, 2014, paragraph 2). (Appendix 000047) The auction occurred at the Balcony on February 9, 2010 and at the conclusion of the auction, the auctioneer hammered down the bid of Melissa J. Lackey-Oremus and James T. Oremus of \$1,875,000.00 as the winning bid.¹

Mr. and Mrs. Oremus did not acquire the property, notwithstanding their high bid at the auction. 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,² 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 Petitioners denied

¹ It should be noted that, as explained in the bidding instructions, bids submitted by auction participants were not to include a 7.5% Buyer’s Premium, which would later be added to the high bid to determine the total contract selling price for the property. (Appendix 000362; 000365; 000369; 000374; 000378)

² The correct spelling of Ms. Devine’s first name is Valaria.

the material allegations, and subsequently William Higgins, the auctioneer, was added as a third-party defendant.

The Respondents' 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 Petitioners") remained as defendants in the case.

An Amended Complaint was filed November 13, 2013, which the Petitioners timely answered on February 28, 2014. The Respondents 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 Respondents that the Petitioners 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 Respondents they had actually been outbid, and to cause the Respondents to sign releases for no consideration and to walk away from the auction without acquiring the property. The Respondents further allege that, as a result, the Petitioners avoided having to sell the property to the Respondents, whose high bid was less than satisfactory or desirable, and they sold the property shortly thereafter for a higher price of \$2,500,000.00 and a larger sales commission, at a private sale, to parties who had not participated in the auction. (Amended Complaint, November 14, 2013.) (Appendix 000034 - 000046) The Petitioners 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.) (Appendix 000047 - 000053)

The Petitioners' motion for summary judgment was argued on June 2, 2014. By order filed June 11, 2014, the trial court granted summary judgment to Petitioner Valeria Devine on all causes of action, and granted summary judgment to all Petitioners on all causes of action except for fraud (Appendix 000004 - 000010). Thereafter, the Respondents appealed the trial court's dismissal of Valeria Devine as a defendant as well as the trial court's dismissal of the Respondents' cause of action brought pursuant to the South Carolina Unfair Trade Practices Act. In Unpublished Opinion No. 2016-UP-253 filed on June 8, 2016, the South Carolina Court of Appeals reversed the trial court in both respects. (Appendix 001026 – 001031).

ARGUMENTS

I.

In responding to the Petition for Writ of Certiorari, the Respondents would note that neither of the questions presented in the Petition appear to fall within the character of reasons for which review may be granted that are set forth in Rule 242 of the South Carolina Appellate Court Rules. While it is understood that the five considerations set forth in the Rule are not controlling, the Respondents are at a loss to understand how it could be argued that the questions presented involve either a novel question of law or a decision of the Court of Appeals that is in conflict with a prior decision of the Supreme Court in that both questions presented simply address issues regarding the sufficiency of evidence contained within the record.³

³ Given that this case does not involve a dissent in the decision of the Court of Appeals, a constitutional issue or a federal question, the other three considerations set forth in Rule 242 are clearly not applicable.

The first question presented by the Petitioners for review is whether the Court of Appeals erred in reversing the Circuit Court and holding that there was sufficient evidence that the Petitioner Devine, even though she was not at the auction when the fraudulent representations were made by Petitioner Stacy Kirk, could be liable for fraud. As this Court is aware, South Carolina follows the “scintilla of the evidence” rule which requires submission of an issue to the jury whenever there is competent and relevant evidence tending to establish the issue in the mind of a reasonable juror. See Turner v. American Motorists Insurance Company, 176 S.C. 260, 180 S.E. 55 (S.C. 1935) et seq. . In the case at hand, as the Respondents argued to the Court of Appeals, there is, in fact, a plethora of such evidence requiring submission of this issue to the jury.

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]⁴ 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

⁴ “Neeltec cites the doctrine of *qui facit per alium facit per se*, ‘He who acts through another, acts himself.’ ”

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 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 Respondents 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, Appendix 000323 and 325); (Steven Jadael Deposition, pp. 7-8, Appendix 000293 and 000294); Valaria Devine Deposition, pp. 64-65, Appendix 000156-000157, 000162-000163, and 000166-000168); William Higgins Affidavit dated April 5, 2012 at paragraph 13, Appendix 000123).

(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, Appendix 000123; William Higgins Deposition, p. 18, lines 8-21, Appendix 000186; Stacy Kirk Deposition, p. 98, lines 19-25, Appendix 000325).

(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, Appendix 000326-000327; Affidavit of William Higgins dated April 5, 2012, paragraph 13, Appendix 000123).

(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, Appendix 000204-000206 and Appendix 000208).

(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, Appendix 000208 and 000209).

(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, Appendix 000189; James Oremus Deposition., p. 25, lines 1-13, Appendix 000506; Nancy Cerra Deposition, p. 27, line 22–p. 28, line 21 and Exhibit 1 thereto, Appendix 000146-000147, 000150-000151).

(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, Appendix 000510; p. 31, lines 17-21, Appendix 000512).

(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, Appendix 000131.

(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, Appendix 000131). 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, Appendix 000561- 000562). In addition, Ms. Devine instructed Ms. Watson to have Lori delete the Aiken database. (Affidavit of Desiree Watson, May 28, 2014, paragraph 8, Appendix 000134).

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, Appendix 000292-000293).

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, Appendix 000293-000294).

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, Appendix 000294-000295).

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, Appendix 000295-000296).

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, Appendix 000134); Deposition of Desiree Watson, p. 77, line 8 – p. 80, line 18, Appendix 000563-000566).

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 Petitioners, 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 Respondents would specifically commend to the Court's attention the first affidavit of Desiree Watson dated January 4, 2012, (Appendix 000130-000132) 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 Respondents 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 Respondents 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 Respondents 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 Jedaël makes it clear that the practice of using fake bids to either stimulate bidding or render the auction a nullity to avoid an undesirable result was a *routine* practice of the Petitioners that was engineered by Valaria Devine. See Steven Jedaël

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).

Respondents 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.

The second question presented by the Petitioners is whether the Court of Appeals erred in reversing the Circuit Court in holding that the Respondents had, in fact, stated a claim for violation of the South Carolina Unfair Trade Practices Act. In presenting this question, the Petitioner’s argue that the Respondents had no evidence of an adverse public impact. Again, as argued to the Court of Appeals, the record contains ample evidence of an adverse public impact which requires submission of this issue to the jury.

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. More recently, the South Carolina Court of Appeals stated, “Each case must still be analyzed to determine whether the wrongful conduct impacts the public , whether through the circumstances of the transaction *or through evidence of other similar acts.*” [Emphasis added.] *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21, 23 (Ct. App. 1994). The

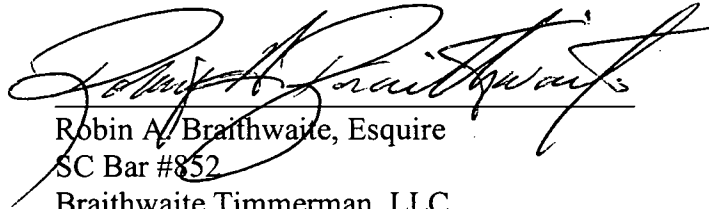
common theme existing in the Petitioners' past practices and what transpired in the case at hand is the fact that in all of these instances Petitioners sought to create the illusion of a higher bid that enabled the entire auction to become a nullity so as to avoid an undesirable result. The testimony of Jedaël and Watson demonstrates that the Petitioners *routinely* employ this kind of deception to manipulate the outcome of an auction and accordingly, untold numbers of the public have been impacted by their conduct. 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 Jadaël and Desiree

CONCLUSION

In conclusion, the Petitioners 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. As argued to the Court of Appeals, 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 Jadaël, 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 Respondents urge this Court to affirm the rulings of the Court of Appeals in denying the Petition for Writ of Certiorari, thereby allowing the submission of the pertinent causes of action to the jury when this case is ultimately tried.

Respectfully submitted,



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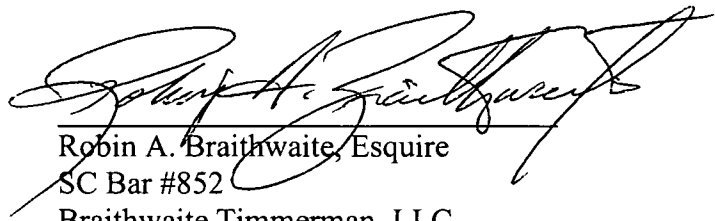
4 K&D Corporation, d/b/a Grand Estates Auction Company,
Stacy Kirk and Valaria Devine Petitioners

PROOF OF SERVICE

I certify that I have served a copy of **Respondents' Return to Petition for Writ of Certiorari** by regular U.S. Mail, postage prepaid, on 7 October, 2016; addressed to all attorneys of record as follows:

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