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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

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 BRIEF OF APPELLANTS

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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. Lucky-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. Valeria 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 Valeria 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 Valeria.

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 Blazar'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, line 6 – p.23, line 5, R.pp. 200 – 201; p.23, line 23 – p.24, line 15, 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?

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

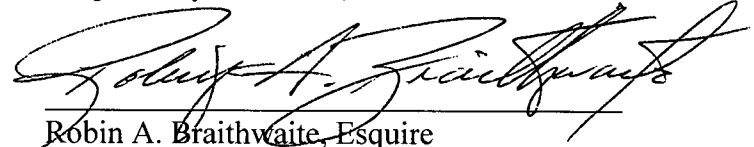
In discussing the requirements for a cause of action under the UTPA the South Carolina Supreme Court held: "Evidence of *similar* acts, transactions, or happenings is admissible where there is some special relation between them which would tend to prove or disprove some fact in dispute. *Reed v. Clark*, 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.

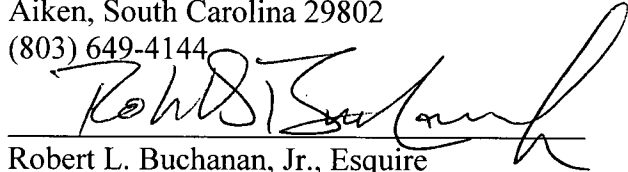
CONCLUSION

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

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SC Court of Appeals

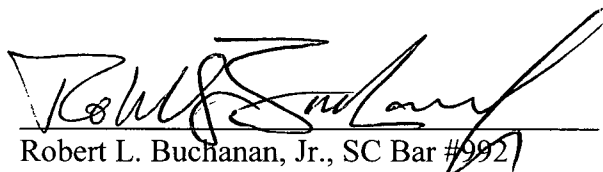
Melissa J. Lackey-Oremus and James T. Oremus Appellants

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Appellants complies with
Rule 211(b).



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March 3, 2015

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