THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
COURT OF COMMON PLEAS

Dale E. Van Slambrook, Circuit Court Judge

Appellate Case No. 2018-001993

Ronald E. Price and Diana R. B. Price, ... Respondents,

v.

Belinda Fox and Gerry Fox, ... Appellants.

FINAL REPLY BRIEF OF APPELLANTS

June 5, 2019

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ARGUMENT IN REPLY

I. THE STANDARD ON APPEAL IS DE NOVO AS THERE ARE NOVEL QUESTIONS OF INTERPRETATION OF S.C. CODE 39-5-110 AS TO A GENERAL PARTNER.

The Respondents' initial brief argues that the standard on appeal is merely to correct errors of law and the "any evidence standard" to support the damages awarded by the Master-in Equity. Respondents' Initial Brief at p.17-18. The Respondents' assertion that this Court should only correct errors of law and review the trial court's decision under the "any evidence" standard is incorrect. This Court should adopt a de novo standard of review because this case involves a novel question of law regarding S.C. Code 39-5-110. Petitioner's review of South Carolina case law did not reveal any cases where a general partner's actions, of a de facto partnership, were imputed to another partner in order to satisfy the elements under the SCUTPA or specifically S.C. Code 39-5-110. "In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." *Sloan v. South Carolina Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 466-67, 636 S.E.2d 598, 605-06 (2006) (stating the appellate court is free to decide the question based on its consideration of law, public policy, and the court's sense of justice). Thus, imputing a general partner's actions to another partner to satisfy elements under SCUTPA is a novel question of law in South Carolina and a de novo standard should apply. This court should be free to decide the standard of review based on: 1) consideration of law; 2) public policy concerns and 3) the court's sense of justice. Each point is articulated below.

A. SOUTH CAROLINA LAW SHOULD NOT IMPUTE LIABILITY TO GENERAL PARTNERS FOR SCUPTA VIOLATIONS BASED SOLELY UPON AGENCY PRINCIPLES.

The law in South Carolina does not allow liability to be imputed to general partners where the scope of agency has been exceeded. In the present matter, the Master-in-Equity held, pursuant to S.C Code 39-5-110 that the actions of Daniel Gilbert, as a general partner of the de facto partnership for the development group, be imputed to Belinda Fox and Gerry Fox to make them liable for violations of the SCUTPA based upon S.C. Code Ann. 33-41-350. In this case, there are no disputed facts concerning the conduct of Belinda Fox and Gerry Fox as it relates to the claim under the SCUTPA. The Court stated in its Order "While the Foxes. . . **may not have directly made these misrepresentations in violation of the Act,** Gilbert as their marketing agent did so and the partnership and other partners are liable for his acts in the scope of his agency." (R.A. 48 and 52). In this case, the Master used agency and partnership principles to satisfy the willful conduct element under SCUTPA. Moreover, while the Respondents may have met their burden for Danny Gilbert, they failed as a matter of law as to Gerry Fox and Belinda Fox. While our Supreme Court has not issued a ruling that wrongful acts of a general partner can not be imputed to another partner without a specific finding that the non-participating partner condoned the conduct, it has made a finding of such specific facts must be made before an officer or director is held liable for wrongful acts of a corporation. The South Carolina Supreme Court has held that "A director or officer is not liable for wrongful acts of a corporation unless they commit, participate in, direct, or authorize the commission of a tort." *See Hunt v. Rabon*, 275 S.C. 475, 272 S.E.2d 643 (1980) Here, although the Petitioners were in a de facto partnership rather than a corporation, the same reasoning as *Hunt* should be used. The trial court's order in this matter did not find that the

Petitioners personally violated the SCUTPA, nor did it find that Petitioners instructed, engaged in, or even knew of the fraudulent actions of Danny Gilbert. Mr. Gilbert was acting as a rogue agent and his actions were not for the benefit of the de facto partnership, but rather for the benefit of himself and his own interests.

Further, the *Hunt* court held that scope of agency does not extend to unlawful conduct. *See id.* In this matter, the SCUTPA declares that a deceptive or trade practice is "unlawful". *See* S.C. Code Ann. 39-5-20(a). Therefore, as the complained of conduct is deemed unlawful or illegal, it naturally follows that there must be a specific finding of fact that each partner must be found to have committed, participated in directly, or authorized the commission of a tort prior to liability attaching. Otherwise, the scope of agency analysis is unnecessary when holding a general partner liable for acts of other partners. The above concept that a general partner is always liable for the acts of all partners, regardless of scope of agency, is not what our general assembly intended when it enacted S.C. Code Ann. 33-41-450 and S.C. Code Ann. 39-5-10 et. seq. Thus, this Court should be free to decide the standard of review to address the interplay between agency and partnership when determining liability for general partners under the SCUTPA.

B. PUBLIC POLICY DISFAVORS TREBLE DAMAGES FOR PARTNERS WHO DID NOT PARTICIPATE IN UNLAWFUL CONDUCT FOR VIOLATION OF SCUTPA.

Notwithstanding the above discussion, public policy should prevent the punitive award of treble damages as to a party who has not personally committed a violation of the SCUTPA. *See Ex parte Dibble* SCUTPA provides treble damages and an award of attorney's fees if the Court finds the conduct was willful. Public policy should disfavor awarding treble damages when one has not actually committed the unlawful act. To hold

otherwise would be unfair and unjust. Public policy does not favor subjecting non-participating partners to civil liability where the conduct complained of was only attributable to one partner.

Although Gerry Fox and Belinda Fox were in a partnership rather than a corporation, the same reasoning should be used. Gerry Fox and Belinda Fox are not liable under the South Carolina Unfair Trade Practices Act because the final order did not sufficiently establish that their individual conduct met the three elements of the SCUTPA. Specifically, Gerry Fox and Belinda Fox did not personally violate the SCUTPA because they did not instruct, engage in, or even know of the fraudulent actions of Danny Gilbert. Gerry Fox and Belinda Fox should not be liable for the actions of Danny since the Fox's did not have any knowledge of Danny's actions and did not help, order, or approve the fraudulent conduct of Danny. Danny Gilbert was acting as a rogue agent and his actions were not for the benefit of the partnership, but rather for the benefit of himself and his own interests.

C. THE COURT'S SENSE OF JUSTICE DISFAVORS IMPUTED LIABILITY FOR GENERAL PARTNERS FOR CONDUCT PURSUANT TO S.C. CODE 39-5-110 WITHOUT THE REQUISITE PARTICIPATION OF EACH PARTNER.

The Court's sense of justice allows the standard of review to be de novo. Justice is not served by the trial court's order dated June 29, 2018. Appellant's are unjustly subjected to liability under the SCUTPA if the trial court's order is not reversed. S.C Code Ann. 39-5-110 and 39-5-10 were not enacted to address this case at hand.

In this case, Respondents have asserted that they unknowingly purchased a residential lot based upon the material misrepresentations of Mr. Gilbert. However, Petitioners have asserted the SCUTPA does not apply in this real estate action only involving the sale of one lot in a residential neighborhood because the matter is a private one and does not affect the public

interest. Moreover, the legislature and our common law has held that the SCUTPA "is not available to redress a private wrong where the public interest is unaffected." *See Noack* at 350. An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction should be beyond the act's embrace as the intent of the legislature is to protect individuals from "matters that affect the public interest." *See* S.C. Code Ann. 39-5-10. Simply put, this transaction is not the type of transaction that the General Assembly sought to protect against. To hold otherwise would be unjust to the Petitioners.

This Court's sense of justice is not served by allowing the trial court's Order to stand as the Order fails to identify that each element of the SCUTPA is attributable to the Petitioners. It is unjust to hold a general partner liable for the willful/tortious conduct of another partner without any conduct by the non-acting partner. The sense of justice analysis in this case must focus equally on the Price's ability to recover for an alleged wrong pursuant to the SCUTPA and the Foxes right to defend themselves from *ultra virus* conduct of Daniel Gilbert. The Courts of South Carolina have not made the distinction on whether the conduct of a general partner should be imputed to another partner for willful conduct for a violation of the SCUTPA. Although, it is clear that mere negligence will not support a claim for SCUTPA. *See State ex rel. McLeod v. V.I.P. Enterprises, Inc.*, 335 S.E.2d 243 (S.C. Ct. App. 1985). Further, the ends of justice are not served as the required elements of the SCUTPA were not directly or indirectly committed by the Petitioners as noted by the trial court. (R.A at 48 and 52). Justice must require that each of the three elements of the SCUTPA be met for each Defendant. Specifically, there must be evidence of willful conduct of each named Defendant. To do otherwise would allow the Respondents to circumvent the elements required for the SCUTPA by alleging that a general partner committed the wrong. Moreover, justice should not allow the Respondents a free pass on the burden of

proof of scope of authority of the alleged conduct and the requisite proof of willful and unlawful practices prohibited by the SCUTPA.

It is obvious that the appropriate remedy is to hold Daniel Gilbert culpable for his own conduct under the SCUTPA. That result would balance the sense of justice between the Respondents' claim and Petitioner rights to protect themselves from ultra virus conduct.

II. THE STATUTE OF LIMITATIONS ARGUMENT WAS NOT WAIVED BY PETITIONERS.

The Respondents claim that there was a waiver of the statute of limitations as to Gerry Fox; however, the statute of limitation defense is not waived because the issue was raised and ruled upon. The Appellants raised the statute of limitations defense on page 425 of the trial transcript when it asserted, at directed verdict that: "Your Honor, that my clients, either one of the Foxes, Belinda or Gerry or the Partnership, entered into any conduct, willful conduct, that would be capable of repetition and meet the three elements that's required for the plaintiff to meet her burden in this case." (R. A. 740 line 18- R. A.741 line 10 and R.A. 879, lines 3-10). Even though Petitioner's did not say the words statute of limitations, the argument was raised as a necessary element for the Plaintiff's to meet their burden. The complained of conduct must have occurred no earlier than three (3) years prior to being joined in this action, notwithstanding the discovery rule and relation back doctrine which will be addressed below. Here, Respondents' assert Gerry Fox's conduct occurred between the years 2004-2005; however, Gerry Fox was not added into the case until 2011. Thus, the statute of limitations ran by the time he was added as a new party in 2011. The record is replete with evidence that Respondents knew of Gerry Fox's existence and chose to not prosecute the matter as to Gerry Fox in a timely manner.

In this present matter the Appellants are not appealing the summary judgment order. Rather, the Appellants are appealing the finding in the final order that Gerry Fox's complained of conduct was outside the South Carolina statute of limitations.

As an additional ground to overrule Respondents' assertion that Gerry Fox's statute of limitations argument was waived, this Court should hold that Mr. Fox's statute of limitations argument was inadvertently forfeited rather than forever waived. Waiver is the intentional relinquishment or abandonment of a known right, while forfeiture is the failure to make the timely assertion of a right. Moreover, forfeited claims might be reviewed under "exceptional circumstances," such as when the public interest requires that the issue be heard or when a manifest injustice would otherwise result. *See, e.g., United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 658, 646) (1938)). Moreover, justice requires that a forfeited issue that is a pure question of law be addressed on appeal. In this case, the three (3) year statute of limitations is a pure question of law that should be addressed as it concerns the exceptional circumstance of the interplay between partnership liability, the relation back doctrine of Rule 15, and agency law as asserted infra and supra.

The statute of limitations argument was not waived but preserved as it was raised and ruled on. At a minimum, this Court should rule that Gerry Fox did not waive his legal rights but rather inadvertently forfeited the issue. As such, that matter is ripe for appellate review.

III. RULE 15(C) DOES NOT ALLOW GERRY FOX TO BE ADDED AS A PARTY BEYOND THE THREE YEAR STATUTE OF LIMITATIONS.

South Carolina Rules of Civil Procedure 15(c) relation back of Amendments states that whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.

An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The language of Rule 15(c) clearly speaks to a change in party, not the addition of an entirely new party who would be joined to then existing Defendants. The addition of a party is not the same as a substitution of party and therefore the relation back rule 15 is not applicable.

IV. DANNY GILBERT EXCEEDED THE SCOPE OF HIS AGENCY AND AUTHORITY AND BELINDA FOX, NOR GERRY FOX SHOULD BE LIABLE FOR GILBERT'S ULTRA VIRES CONDUCT.

Danny Gilbert exceeded his scope of agency in his false misrepresentations. General partners can only make representations that were authorized by the partners. Acts that are not permitted by law are *Ultra Vires*. *See Seabrook Island Property Owners Assoc. v. Pelzer*, 292 S.C. 343, 348, 356 S.E.2d 411, 414 (Ct. App. 1987). Defendant's trial exhibit 1 evidences the entirety of the scope of authority that Danny Gilbert was authorized to make. There was no additional evidence at trial that authorized the unlawful conduct as found by the trial Court. All other acts, outside of Respondent's trial exhibit 2 would be *ultra vires*. (R. A. 1448-1449) Moreover, while it is true that apparent authority of Gilbert's representations may, in a vacuum, be imputed to the de facto partnership, this is not true when the person relying on the representations has a reason to know that the apparent authority does not exist. Here, the agreement between the Prices and the Foxes unambiguously and unequivocally sets out the responsibilities of the parties. Under Section 10 of the agreement, it states that Buyer, at Buyer's

expense, shall have the privilege and **responsibility** of inspecting; environmental concerns including but not limited to hazardous waste, wetland study, and radon gas... If Buyer fails to notify Seller or listing agent of the results of such inspection on or before day stipulated, Buyer shall be deemed to have waived the privilege of any inspections. Section 11 of the agreement states that Both Buyer and Seller hereby acknowledge that they have not received or relied upon any statements, which are not expressly stipulated herein. Finally, section 21 states that this agreement is contingent upon drain field site (soil test). Given the above, the Respondents can not use apparent authority and agency to circumvent their own notice, actual or inquiry, of the lack of Gilbert's authority to make false representations.

Given the above, it is clear that the Respondents know or should have known that Mr. Gilbert's representations were his own and not as an agent of Belinda Fox. Mr. Gilbert, once he deviated from the scope of his limited agency on behalf of Belinda Fox and the de facto partnership, was acting only in his own capacity to sell the land and build a home for the Respondents. Importantly, as the Trial Court has declared the complained of conduct unlawful per S.C. Code 39-5-20, the conduct was *ultra vires*. As such, specific evidence of unlawful conduct must be demonstrated prior to attaching liability to Petitioners.

For the above reasons, the Petitioners should not be liable for the actions of Danny Gilbert as his conduct was ultra vires and there was no evidence finding that the Petitioners acted in their own capacity.

V. RESPONDENTS FINALLY ELECTED THE REMEDY OF SCUTPA ONLY AFTER THIS ISSUE WAS APPEALED.

Respondents acknowledged in their brief that it should have elected its remedy after the Order on the Merits. The trial court issued its ruling on June 29, 2018 and the Respondents

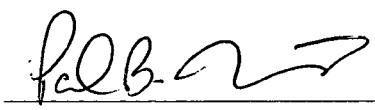
finally elected their remedy on February 15, 2019. (Respondent's Initial Brief p. 5). The Respondents, only after appeal was filed, now state "The Prices agree the Form 4 Order of judgment should be modified now that the election has been filed to delete the judgment for negligent misrepresentation." (Respondent's Initial Brief p. 48). Respondents have failed to appreciate that the Petitioners have a monetary judgment evidencing double recovery and incurred significant costs in appealing and briefing the issue of negligent misrepresentation that have now become moot as a result of Petitioner's election. At a minimum, this case should be remanded to the trial court to address the issues asserted in section VII of the Appellant's brief.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court issue an Order reversing the trial court's order and remand this case for a new trial.

June 5, 2019

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

I, the undersigned counsel, do hereby certify that the Reply Brief of Petitioner complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted this 5th day of June 2019.

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