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IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

HONORABLE MARVIN H. DUKES, III
MASTER IN EQUITY AND SPECIAL CIRCUIT COURT JUDGE

CASE NO.: 2010-CP-07-06274
2010-CP-07-06284

EFFIE SANDRA L. TURPIN, C.E. LOWTHER, JR., CLAYTON CLARK LOWTHER, and MITCHELL SAXON LOWTHER, INDIVIDUALLY AND REPRESENTING AS A CLASS OF BENEFICIARIES OF THE ESTATE OF C. E. LOWTHER, SR., Respondents,

vs.

E. LEGRAND LOWTHER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF C.E. LOWTHER, SR., and MARK ALLEN LOWTHER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF C. E. LOWTHER SR.

OF WHOM E. LEGRAND LOWTHER IS Appellant.

PETITION FOR REHEARING
(OPINION NO. 5152 FILED JULY 3, 2013)

TO: HARLEY D. RUFF, ESQUIRE, CAROL C. RUFF, ESQUIRE and R. THAYER RIVERS, Jr., ESQUIRE, ATTORNEYS FOR THE RESPONDENTS:

The Appellant, E. Legrand Lowther, hereby petitions the Court of Appeals for the State of South Carolina pursuant to Rule 221, SCACR, to rehear its Opinion No. 5152, filed July 3,

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SC Court of Appeals

2013. This Petition for Rehearing is made upon the ground that the South Carolina Court of Appeals, with all due respect, erred in issuing its Opinion in one or more of the following particulars, to-wit:

1. The South Carolina Court of Appeals erred in entering judgment against Appellant on the breach of fiduciary duty cause of action, where the Appellant was not acting as a fiduciary in connection with the challenged transaction.

A personal representative, of course, is a fiduciary. S.C. Code Ann. §62-3-703(a) (2010). [1]The fiduciary is required to observe the standards of care applicable to trustees. *Id.* "A personal representative has the duty to settle and distribute the estate of the decedent in accordance with the terms of a probated and effective Will and (the South Carolina Code of Laws), as expeditiously and efficiently as is consistent with the best interest of the estate." *Id.* If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons who are damaged or who suffer a loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust. S.C. Code Ann. §62-3-712 (2010).

The party asserting the existence of a fiduciary relationship has the burden of establishing such by clear and convincing evidence. Once the fiduciary relationship is established, the law presumes that any transaction between the parties by which the fiduciary has profited is fraudulent. When it is alleged that a fiduciary has breached such duty by fraud, self-dealing, or conflict of interest, the burden of proof shifts to the fiduciary to prove fair dealing by clear and convincing evidence. The burden is then upon the fiduciary to establish the honesty of the transaction, or to show that he or she acted fairly and informed the other party of all material facts relating to the challenged transaction. This burden is generally met if the fiduciary shows

[1] The sections of the South Carolina Probate Court Code cited herein were amended effective June 7, 2010. The operative language, however, is the same both before and after the amendment.

that the principal acted with full knowledge and intent or with advice of independent legal counsel. Other significant factors in meeting that burden include showing that the fiduciary made frank disclosure of available information, he paid adequate consideration, and the principal had competent and independent advice. See generally, *Am.Jur Fraud*, §472 (2010) (footnotes omitted).

The first question, accordingly, is whether the Respondents have satisfied their burden of proving that the Appellant was acting as a fiduciary in connection with the challenged transaction. It is clear in this case that Appellant was not acting as a fiduciary when he purchased the land from his siblings. The transaction took place completely outside the Estate, and did not involve the exercise of any fiduciary powers by the Appellant. The Respondents' position seems to be that all they need show is that the Appellant was one of the Personal Representatives of their father's Estate, and the challenged transaction involves real estate which they inherited from their father's Estate. Such a showing, however, is inadequate. In order for a fiduciary duty to apply, the challenged transaction must somehow involve "the exercise of (fiduciary) power concerning the Estate." S.C. Code Ann. §62-3-712 (2010). As a fiduciary, a Personal Representative has a fiduciary duty to settle and distribute the Estate of the decedent in accordance with the terms of the Will, as expeditiously and efficiently as is consistent with the best interest of the Estate and its interested parties, including beneficiaries. S.C. Code Ann. §62-3-703(a) (2010).

The challenged transaction in this case simply does not involve the Appellant's fiduciary duties. In other words, the challenged transaction did not involve the Appellant exercising any of the powers conferred upon him by virtue of his appointment as one of the Personal Representatives of the Estate. The subject real estate, in accordance with the terms of the Will,

was distributed and deeded to the rightful beneficiaries. The beneficiaries then sold their property to the Appellant. The Estate was not involved in this subsequent transaction. The Estate was neither the buyer nor the seller. This was a transaction between individuals which took place entirely outside the Estate.

Significantly, this is not a case in which the Personal Representative, exercising his power as Personal Representative, sells property belonging to the Estate to himself as an individual, and then disburses the sales proceeds to the beneficiaries. In such a case, the transaction, taking place within the confines of the Estate, involves the Personal Representative utilizing the powers conferred upon him in his capacity as Personal Representative to accomplish the transaction. The case now before the court is completely different. Legrand purchased from his brothers and sisters real estate that they owned outright. The transaction was neither facilitated by nor made possible by the fact that Legrand was serving as the Personal Representative of his father's Estate. In closing on the subject transaction, Legrand did not exercise any of the powers which he had acquired by virtue of his position as Personal Representative of his father's Estate. There is simply no causal connection between Legrand's position as Personal Representative, and the challenged transaction. The simple fact that his brothers and sisters had acquired title to the property by inheritance does not render their subsequent decision to sell this property subject to the scrutiny of a fiduciary transaction. Legrand did not use his position as Personal Representative to force or influence the sale. Conversely, the Respondents were fully aware that they owned this property individually and negotiated the sale individually.

"If, in the course of administering an Estate, a Personal Representative undertakes to sell property of the Estate, the Representative's fiduciary obligation requires him to secure the best

price obtainable under the circumstances." *Am.Jur2d, Executors and Administrators*, §726 (2010). See also, S.C. Code Ann. §62-3-713 (2010). In the case now before the court, the challenged transaction did not take place "in the course of administering an Estate." The property that was being sold was not "property of the Estate" but property that had been distributed to and belonged to the individual sellers, and it was not the Personal Representative who was undertaking to sell the property, but rather, it was being sold by its individual owners. In short, the challenged transaction took place outside the Estate, not within it. The exercise of fiduciary powers was simply not involved.

2. The South Carolina Court of Appeals erred in affirming the judgment against the Appellant on the breach of fiduciary duty cause of action, where the Appellant did not profit from the challenged transaction.

Assuming, *arguendo*, that the Respondents have proven by clear and convincing evidence that the challenged transaction somehow involved the exercise of a fiduciary duty, the next step in the analysis is to determine whether the fiduciary profited from the subject transaction. As previously noted, the law presumes that any transaction involving a fiduciary duty in which the fiduciary has profited is fraudulent, and if it is alleged that the fiduciary has breached such duty by fraud, self-dealing, or conflict of interest, the burden of proof shifts to the fiduciary to prove fair dealing by clear and convincing evidence.

The next question, accordingly, is whether Legrand has profited from the subject transaction. In determining whether Legrand has "profited" from the challenged transaction, the Court ignored the totality of the circumstances and focused instead solely upon the 40 acres. The Court seems to have concluded that Legrand's profit was obvious, inasmuch as he purchased the 40 acres for $511,000.00 from his siblings, and later sold the 40 acres to a third party for

$810.000.00. This view of what actually took place, however, is overly simplistic and contrary to the evidence. The sale of the 40 acres was clearly only one subpart of a much larger transaction.

As the Probate Court correctly noted [ROA, pg. 35], "(t)he general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the Court will consider and construe them together." *Café Associates, Ltd. v. Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991). "Moreover, where the instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole." *Klutts Resort Realty, Inc. v. Down-Round Development Corporation*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). "In South Carolina, two (2) contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one (1) contract and considered as a whole." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 92, 594 S.E.2d 485, 492 (Ct. App. 2004). "This rule applies even where the parties are not the same, if the several instruments were known to all the parties and were delivered the same time to accomplish an agreed purpose." *Id.*, 358 S.C. at 93, 594 S.E.2d at 493.

The evidence in this case establishes that the 40 acre transaction was simply a subpart to a larger transaction that involved Wellington Plantation and the Echo Tango Subdivision, as well as, from Mitchell and Carmen's point of view, the 3.84 acres. The proposed contracts between the parties contain a single, lump sum price for **all** the properties. Each proposed contract was expressly contingent upon **all** brothers and sisters agreeing to sell and Legrand acquiring **all** the property. The 40 acres closed separately only because some of the brothers and sisters were in

dire financial circumstances and could not wait to receive cash. When cash for closing was needed, $2,000.00 from the "down payment", from each brother and sister was freely shifted to the amount financed. The purchase and sale of one property was clearly contingent upon and inter-related with the purchase and sale of the other properties.

Looking at the transaction as a whole, it cannot be said that Legrand has "profited" from the transaction. Indeed, the evidence suggests that the brothers and sisters made a favorable deal by virtue of the fact that they now have an interest in the Echo Tango Subdivision's profits. Any "profit" which they may have lost on the up front sale of the 40 acres, they are going to recoup many times over by virtue of their acquired one-half (½) interest in the Echo Tango Subdivision profits. The last lot that sold in Echo Tango brought a purchase price of $700,000.00. The brothers and sisters have already received $138,000.00 collectively from Echo Tango, and the four (4) lots remaining to be sold are comparable to the one that last sold. The potential interest which the brothers and sisters have collectively acquired in the Echo Tango Subdivision is, accordingly, worth $1,400,000.00. The up-front "profit" which Legrand made on the 40 acres is being offset by a nearly five-fold loss on Echo Tango. Conversely stated, the brothers and sisters are in a position to make a profit of nearly $1,100,000.00[2] on this transaction, over and above the $138,000.00 in cash which they have already pocketed. The evidence is clear that the "fiduciary" has not profited from this transaction where, at best, he made $300,000.00 up front, but has since paid out $138,000.00 in cash and has given up half the profits which he will receive on four (4) lots valued at $700,000.00 each, which he owned free and clear. Looking at the transaction as a whole, which is required, it is the siblings who will come out on top, not Legrand.

[2] The net profit resulting from the difference between the $1,400,000.00 potential profit in Echo Tango less the $300,000.00 "loss" on the 40 acres.

3. The South Carolina Court of Appeals erred in affirming the judgment against the Appellant on the breach of fiduciary duty cause of action, where there was not a breach of any fiduciary duty.

Assuming that the challenged transaction involved the exercise of a fiduciary duty, and that the fiduciary profited from the transaction, the next step in the analysis is to determine whether there was a breach of the fiduciary duty. The Respondents allege that Legrand breached his fiduciary duty either actively, by misrepresenting that there was no contract or sale pending with ISI, or passively, by failing to disclose the interest expressed by ISI in the 40 acres and the contemplated purchase price.

As previously noted, if the transaction involves the exercise of fiduciary duties and the fiduciary profits from the transaction, then the fiduciary must prove "fair dealing" which would include a full disclosure of all material facts relating to the fiduciary transaction. *Am.Jur2d, Fraud and Deceit*, §472 (2010). The simple fact is that Legrand did not have a contract with ISI at the time that the 40 acres closed, although negotiations had taken place. A price of $800,000.00 for the 40 acres had been discussed, but no price on Wellington Plantation had been discussed or agreed to, and the 40 acre purchase was expressly conditioned upon the purchase of Wellington Plantation. In looking at the materiality of Legrand's failure to disclose the ongoing negotiations with ISI, one of the things the Court should consider is Legrand's intent or state of mind. The real estate market at that time was highly speculative, as borne out by the fact that two (2) prior deals on the 40 acres had fallen through. The deal with ISI also eventually fell through. In the existing market, even a signed and sealed contract was no guarantee of a closing taking place. Some of the brothers and sisters had been in favor or selling the 40 acres at a

substantially lower price, and there was no evidence that the $511,000.00 was an unfair price.

Most significantly, ISI did not end up purchasing the 40 acre parcel, and also walked away from the Wellington Plantation contract. Amberwinds did not even enter the picture until much later, and the eventual sale to Amberwinds occurred completely after the fact.

Additionally, the challenged transaction was heavily negotiated by the Respondents. Legrand's offer was not made on a take-it-or-leave-it basis, and they reviewed his proposed contract carefully, eventually rejecting it and making counter offers. After these counter offers were made, negotiations continued, the result of which was a substantially more favorable deal for the brothers and sisters, bringing into play the half (½) interest in the Echo Tango Subdivision. The proposed contracts contain an express disclaimer that the Respondents are not relying upon any representations made by Legrand. The contract signed by each sibling expressly states:

> **ARM'S LENTH (sic, LENGTH) TRANSACTION.** Although Purchaser and Seller are related, and although Purchaser is a co-Personal Represent of the Estate of C. E. Lowther, the Seller acknowledges that this is **an arm's length business transaction** and Purchaser has made **no promises, representations or statements,** except those set forth herein in writing, upon which Seller is relying, and Seller has conducted Seller's **own due diligence** prior to entering into this Agreement.

(some emphasis added).

Significantly, the brothers and sisters are not neophytes. Mitchell, for example, is a residential contractor and a real estate developer. Transactions such as the one here at issue are the focus of his profession. Sandra, a registered nurse, hired an attorney and was independently represented in connection with the challenged transaction. There is no evidence that any Respondent relied upon Legrand's advice or counsel in entering into the challenged transaction. Indeed, each Respondent actively negotiated to get the best deal that he or she could. The three

siblings who did not join in this suit - Rita, Gene and Clark are apparently satisfied with the transaction and did not even testify.

The Respondents each testified that they independently asked Legrand if he had a contract or sale for any of the subject properties and he told them that he did not. Although he had had discussions with ISI, and was negotiating with ISI, at the time he was asked about a contract or sale it was correct to state that he had neither. He had received proposed contracts from ISI, but the contracts were not acceptable to him and with respect to Wellington a price had not even been discussed. He made significant changes to the contracts, and returned them to ISI, proffering for the first time a price on Wellington. His counter offers to ISI were not accepted by ISI until November 24, 2005, and he did not learn of their acceptance until mid-December, well after the 40 acre transaction had closed.

It would be pure speculation to conclude that any of the Respondents would have done anything different even if Legrand had signed contracts with ISI in hand. The parties had had signed contracts on the 40 acres in hand previously, and those contacts had proven not to be worth the paper on which they were written. The contracts with ISI, likewise, had no "teeth" and ISI was free to walk away at any time, as it eventually did. The evidence is not "clear, convincing and cogent" that each Respondent would have walked away from the immediate guaranteed cash which they so desperately needed, in exchange for an unenforceable promise of a 1/7th share in more money, and given up the lucrative potential profits in Echo Tango, part of which they have already received.

4. The South Carolina Court of Appeals erred in affirming the judgment against the Appellant on the breach of fiduciary duty cause of action, where the breach of fiduciary duty did not proximately cause any damages.

Even if the evidence proved that the challenged transaction involved the exercise of a fiduciary duty, that the fiduciary profited from this transaction, and that the fiduciary breached his fiduciary duty in connection with this transaction, the next step is to determine whether the breach of that duty proximately caused the Respondent's damages. In this respect, the Respondents blithely assert that if they had known about ISI's involvement, they would have never agreed to the challenged transaction. This completely self-serving testimony, however, is unsupported and uncorroborated by any other evidence. Each of the Respondents stated, and emphasized, that they were in dire financial straits and needed cash immediately. It is not reasonable to conclude that they would have given up the guarantee of $73,000.00 cash in hand in exchange for the possibility that they might obtain a little more money at some indefinite point in the future. The $299,000.00 difference between the two (2) sales prices ($810,000.00 versus $511,000.00) is certainly significant, but once you divide it into seven (7) shares and consider that the $511,000.00 includes no closing costs or liens, while the $810,000.00 involves paying closing costs, as well as the existing liens (judgment against Clark and a claim against the Estate [ROA, pp. 626-627])the significance lessens. Additionally, the deal for Wellington Plantation, which involved millions of dollars, would have been taken off the table, and likewise, the proffered partnership in the Echo Tango profits would have been lost. To conclude that the brothers and sisters, if they had known about ISI, would have walked away from guaranteed immediate cash that they desperately needed, as well as a several million dollar deal for Wellington and more than a million dollars in potential profits on Echo Tango Subdivision, all in exchange for yet another unenforceable promise to purchase the 40 acres by an unknown entity, involves pure speculation.

5. The South Carolina Court of Appeals erred in affirming the judgment against the Appellant on the breach of fiduciary duty cause of action, where the Respondents ratified the transaction.

Finally, even if the evidence proved that the challenged transaction involved the exercise of a fiduciary duty, that the fiduciary profited from this transaction, that the fiduciary duty was breached in connection with this transaction, and that the breach proximately caused damages to the Respondents, this cause of action still must fail. This is because the Respondents, with full knowledge of all the facts, ratified the transaction and elected to receive benefits from the transaction.

"The right to avoid a contract for fraud may be lost through acts or conduct constituting waiver, ratification, estoppel, or laches, although there must be clear proof of such acts or conduct and that they occurred after the deceived party had secured knowledge of the fraud." *CJS Contracts*, §172 (2010).

The Respondents had full knowledge of all the facts as of March 2006. With full knowledge of the facts, they thereafter accepted repeated payments from Legrand pursuant to the terms of the Notes giving them an interest in the proceeds from Echo Tango lot sales. Rather than moving to void or set aside the transaction, they waited for nearly two (2) years before bringing this action in February of 2008, and in the meantime demanded and received payments from Legrand on Echo Tango, with Bube receiving $16,000.00, Sandra receiving $22,000.00, and Mitchell receiving $36,000.00. It is noteworthy that the brothers and sisters who are not Respondents in this lawsuit have likewise ratified the transaction, and a total of $138,000.00 in Echo Tango profits had been paid by the time of trial.

"Fraud inducing a contract may be waived. A contract obtained by fraud, which is voidable and not void, may be ratified by the party who was induced by the fraud to enter into the contract. Ratification or its equivalent is shown where, with actual or constructive knowledge of the true facts, a party by acts of commission or omission shows a clear intent to affirm the contract despite the fraud, as where he or she accepts the benefits thereof, or insists on performance of the contract by the other party, or otherwise acts in a manner inconsistent with repudiation." *CJS Contracts,* §172 (2010).

"When one is induced through false and fraudulent representations to enter into an agreement, upon discovery thereof, he has an election to either rescind, in which he must tender back that which he has received, or he may affirm the agreement, and maintain his action in damages for deceit, but **his election must be promptly made**, and, when once made, is final. If one elects to affirm the agreement, after full knowledge of the truth respecting the false and fraudulent representations, and thereafter continues to carry it out and receive its benefits, he may not thereafter maintain an action in damages for deceit, because this would constitute a ratification of the agreement and a condemnation of the fraud; otherwise one might, with knowledge of fraud, speculate upon the advantages or disadvantages of an agreement, receive its benefits, and thereafter repudiate all its obligations." *Tisdel v. Central Savings Bank & Trust Co.*, 90 CO 114, 130, 6 P2d 912, 917-18 (1931) (emphasis added). As noted above, the Respondents in this case waited nearly two (2) years before complaining about the subject transaction after learning all the facts, and in the meantime repeatedly demanded and received benefits from the subject transaction.

By electing to continue to receive benefits from the transaction subsequent to their obtaining full knowledge of all the facts, the Respondents have elected to affirm the transaction and have ratified the transaction. See generally, *Am.Jur, Fraud*, §331 (2010).

6. The South Carolina Court of Appeals erred in affirming the factual finding of the Circuit Court that the Echo Tango real estate was owned by the decedent, where this finding by the Circuit Court is contrary to the finding of fact by the Probate Court and the finding by the Probate Court, which acted as the finder of facts in this case, is supported by the evidence.

The Circuit Court repeatedly found as a matter of fact that the Echo Tango property was owned by the decedent. [ROA, pg. 5 and pg. 9]. This finding was affirmed by the Court of Appeals. This finding is contrary to the finding by the Probate Court, which acted as the finder of fact in this case. The Circuit Court, as affirmed by the Court of Appeals, erred in substituting its view of the facts for those of the Probate Court, which personally observed the witnesses as they testified, and made its own findings of fact.

The Echo Tango real estate was owned by the Appellant and titled in the Appellant's name only. While the Appellant was willing to share some of the profits made on the development of Echo Tango with his father, the decedent, he and his father had never formalized or finalized their agreement. The Respondents wanted the Appellant to honor the tentative agreement discussed with their father with them. No final agreement had ever been reached regarding this issue until the parties entered into the transaction which is the subject of this dispute, pursuant to which, this issue was laid to rest. As set forth in the express terms of their agreement, the Respondents, together with the other siblings, executed quitclaim deeds releasing and quitclaiming any right that they may have to the Echo Tango property to the Appellant, and

the Appellant, in the event of default, agreed to share the net proceeds derived from the sale of the Echo Tango lots in accordance with the terms of the written note. [ROA, pg. 30].

There is absolutely nothing in the record to support the Circuit Court's finding that Echo Tango was owned by the decedent at the time of his death. This erroneous finding by the Circuit Court was crucial to the Circuit Court's overruling of the Probate Court's determination of damages.

The Circuit Court overruled the Probate Court's determination that, in calculating the damages suffered by the Respondents the funds received by the Respondents from the sale of Echo Tango lots should be considered.

The evidence in this case is undisputed, and the Probate Court found, that after his default, and in accordance with the terms of the notes, the Appellant delivered to his siblings the escrow deed in lieu of foreclosure, reconveying to them their interests in the Wellington tract. The Appellant also began making distributions to his siblings from the proceeds of the sale of the Echo Tango lots, as follows:

Mitchell	$ 36,000.00
Sandra	$ 22,000.00
Bube	$ 16,000.00
Clark	$ 16,000.00
Gene	$ 16,000.00
Mark	$ 16,000.00
Rita	$ 16,000.00
Total	$138,000.00

Indeed, the bulk of these distributions, i.e., all except for the first $20,000.00 to Mitchell and $6,000.00 to Sandra, were made after this civil action was commenced on February 15, 2008. [ROA, pp. 31-32].

The Probate Court properly found that, in calculating the damages suffered by the Respondents as a result of this transaction, these funds from the Echo Tango lots, which they received as a result of this transaction, should be considered. The Probate Court explained as follows:

> In determining the damages to be awarded, the $207,051.15 realized by Legrand from the Amberwinds closing should be reduced by the $138,000.00 in distributions that he made subsequently to the siblings from her profits on the sale of two (2) Echo Tango lots. Those were payments that Legrand may have been obligated to make, by reason of his default on the promissory notes to his siblings. However, those obligations were incurred, and the payments made, pursuant to the overall deal negotiated between Legrand and the siblings for his purchase of their interest in the 40 acre parcel and Wellington tract. Therefore, the foregoing ET (Echo Tango) distributions equitably should offset damages awarded on the basis of profit retained by Legrand from the sale to Amberwinds.
>
> Allowing an offset based on the "overall deal" between Legrand and his siblings is consistent with the rule of *Ellie v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004), viz*, "two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole." *358 S.C. at 92, 594 S.E.2d at 492.*

[ROA, pg. 35]. The Probate Court further noted that "should further profit distributions, from the sale of ET lots, be made or become due to the siblings under the terms of the promissory note, Legrand should be allowed a credit against the respective distributions for damages paid to the respective distributees under this Order of judgment." [ROA, pg. 35, fn. 3].

In short, the Probate Court correctly noted that these transactions were all interrelated and were really subparts of one overall transaction. The Circuit Court, in overturning the Probate Court's above calculation of damages treats the $138,000.00 paid by Legrand to his siblings as if it either did not exist, or as if it was money to which they were entitled to in any event. Neither of these propositions, of course, is true, inasmuch as it is undisputed that they received the aforesaid $138,000.00, and is likewise undisputed that Echo Tango was owned by Legrand free and clear, and while Legrand was willing, under certain terms and conditions, to share some of

these profits with his father, there was never any such deal in place for his siblings, at least until they reached the agreement as set forth in the terms of the notes executed by Legrand and his siblings.

In calculating the damages suffered by the Respondents in this case, it makes absolutely no sense to simply add up what they lost pursuant to the transaction, without also offsetting what they gained pursuant to the transaction. The Probate Court correctly offset the Respondents' losses by their gains, and the Circuit Court erred in overruling the Probate Court in calculating damages.

The Probate Court's factual findings are supported by the evidence. The Circuit Court erred in substituting its view of the evidence for that of the Probate Court, and the Court of Appeals accordingly erred in affirming the Circuit Court.

7. The South Carolina Court of Appeals erred in affirming the judgment against the Appellant on the breach of fiduciary duty cause of action in favor of non-parties.

The Order of Judgment issued by the Beaufort County Probate Court concludes as follows:

> Wherefore, it is ORDERED, ADJUDGED, and DECREED that:
>
> . . .
>
> 2. Judgment is rendered for the Respondents against the Defendant Legrand for breach of fiduciary duties, as aforesaid, and the Respondents are awarded damages for such breach in the amount of $69,051.15; provided, however, that such award is apportioned among and payable in equal shares to Gene, Sandra, Bube, Rita, Clark, Mitchell, and Mark.
>
> AND IT IS SO ORDERED.

[ROA, pg. 38.]

The Probate Court, accordingly, rendered judgment against the Appellant in favor of each of the Appellant's seven (7) siblings, in the amount of $9,864.45, (which equals a one-seventh equal share in the aggregate judgment of $69,051.15). The Circuit Court simply modified this amount, increasing the judgment award from $69,015.15 to $289,923.65, or $41,417.66 in favor of each of the seven (7) siblings. [ROA, pg. 12].

It is axiomatic that a judgment can be rendered in this case only in favor of the Respondents. Entering a judgment in favor of nonparties exceed the Court's powers and jurisdiction.

A Court has jurisdiction only over the parties involved in the case before it. A Court has no jurisdiction to affect the rights of a nonparty. See, e.g., *Sheffield v. Grieg, 105 S.C. 219, 89 S.E. 664, 666 (1916).*

Entering a judgment in favor of a nonparty violates fundamental principles of due process. The Appellant had no notice that a judgment might be rendered against him in favor of a nonparty, and had no opportunity to be heard regarding such a possibility. Conversely, the nonparties had no notice or opportunity to be heard regarding this matter, and it is equally unfair that they may be bound by a decision rendered in a case in which they made no claims. *Kurschner v. City of Camden Planning Commission, 376 S.C. 165, 172, 656 S.E2.d 346, 350 (2008)* ("The fundamental requirements of due process include notice, and opportunity to be heard in a meaningful way, and judicial review").

Additionally, the Order puts the Appellant in the untenable position of being forced to pay a judgment to nonparties, yet the nonparties are still theoretically free to pursue these exact same claims against the Appellant, since principles of res judicata and collateral estoppel do not apply to a nonparty. *Duckett v. Goforth, 374 S.C. 446, 464-56, 649 S.E.2d 72, 81-82 (Ct. App.*

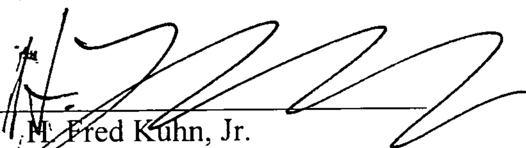
2007). It was accordingly error for the Probate Court and the Circuit Court to enter judgments in favor of individuals who were not even parties to this action. If the Probate Court was correct in determining that the total damages were $69,051.15 and were suffered equally by each of the seven (7) siblings, then the Court should have entered judgment in favor of each of the three (3) Respondents, to-wit, Sandra, Bube, and Mitchell, in the amount of $9,864.45 each.

The Court of Appeals sidestepped this clear commission of error by concluding that this argument was not preserved inasmuch as it was not raised to the Probate Court through Rule 59(e), SCRCP, motion. This reasoning, however, overlooks the fact that this is a jurisdictional issue, which may be raised at any time, or even *sua sponte* by the Court. See, e.g., *Town of Hilton Head Island v. Godwin, 370 S.C. 221, 222, 634 S.E.2d 59, 60 (Ct. App. 2006).*

Wherefore, the Appellant prays that the South Carolina Court of Appeals re-hear its Opinion No. 5152 filed July 3, 2013 in this case and reverse the Order of the Beaufort County Court of Common Pleas.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.



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Attorneys for the Appellant

July 15, 2013

CERTIFICATE OF SERVICE

Undersigned certifies that the **Petition for Rehearing** to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

Harley D. Ruff, Esquire
Carol C. Ruff, Esquire
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