

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 WRIT OF CERTIORARI

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SC Court of Appeals

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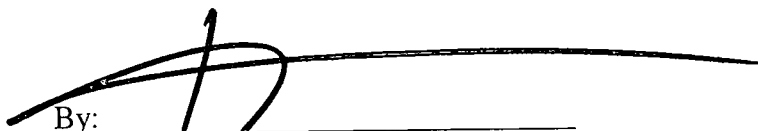
RULE 242(d)(1) CERTIFICATION BY COUNSEL

The undersigned counsel for Petitioner hereby certifies in accordance with Rule 242(d)(1), SCACR, as follows:

1. The South Carolina Court of Appeals filed its Opinion No. 5152 in this matter on July 3, 2013;
2. The Petitioner petitioned the Court of Appeals for the State of South Carolina pursuant to Rule 221, SCACR, to rehear its Opinion No. 5152 on or about July 15, 2013; and
3. The Court of Appeals for the State of South Carolina filed its Order on July 24, 2013 denying the Petition for Rehearing.

As stated above, counsel for Petitioner certifies that a Petition for Rehearing or Reinstatement was made and finally ruled on by the Court of Appeals.

Respectfully submitted,


By: _____

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QUESTIONS PRESENTED FOR REVIEW

I. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT AGAINST THE PETITIONER ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION IN FAVOR OF INDIVIDUALS WHO ARE NOT PARTIES.

II. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN ENTERING JUDGMENT AGAINST PETITIONER ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THE PETITIONER WAS NOT ACTING AS A FIDUCIARY IN CONNECTION WITH THE CHALLENGED TRANSACTION.

III. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT AGAINST THE PETITIONER ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THERE WAS NOT A BREACH OF ANY FIDUCIARY DUTY.

IV. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT AGAINST THE PETITIONER ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THE RESPONDENTS RATIFIED THE TRANSACTION.

STATEMENT OF THE CASE

C. E. Lowther, Sr. died on June 11, 2004. At the time of his death, he was a citizen and resident of Jasper County, South Carolina. Mr. Lowther, a widower, was survived by his eight (8) children. Three (3) of his children are the Respondents herein, to-wit: Effie Sandra L. Turpin ("Sandra"), C. E. Lowther, Jr. ("Bube"), and Mitchell Saxon Lowther ("Mitchell"). Two (2) of Mr. Lowther's children are the Defendants herein, to-wit: E. Legrand Lowther ("Legrand") and Mark Allen Lowther ("Mark"). His other three (3) children are Vivian Gene Lowther Tillotson ("Gene"), Rita Elizabeth Lowther Rogers ("Rita") and Clayton Clark Lowther ("Clark").

At the time of his death, Mr. Lowther owned a 40.81 acre parcel of unimproved property on Bees Creek Road in Jasper County, South Carolina (hereinafter the "40 acre" parcel) and he owned an undivided 25% interest in an unimproved 226.35 acre parcel of land in the Wellington Plantation area of Jasper County, South Carolina (hereinafter "Wellington Plantation"). The other owners of the Wellington Plantation parcel were Legrand, who owned an undivided 50% interest, and Mitchell, who owned an undivided 25% interest.

Mr. Lowther's Last Will and Testament, which was executed on the day he died, was duly filed with the Jasper County Probate Court on June 17, 2004. [ROA, pp. 587-589]. In his Will, Mr. Lowther left the 40 acre parcel and his undivided 25% interest in the Wellington Plantation property to all of his children, in equal shares, excluding Legrand. Legrand was excluded from taking an equal share along with his brothers and sisters in his father's Estate at his own request.

On June 17, 2004 Legrand and Mark were appointed as Personal Representatives of the Estate.

After their father died, the beneficiaries of the Estate agreed that the land inherited by them from their father should be sold as expeditiously as possible. Some of the beneficiaries, including the Respondents herein, were in dire financial need and needed cash. Sandra was retired and living on social security and helping to raise her daughter and granddaughter, while neither Mitchell nor Bube were employed.

In February or March of 2006 a developer, International Society of Investors, LLC ("ISI") contacted Legrand about purchasing the Wellington Plantation property. One of ISI's principals, Michael Jones, had learned about the Wellington Plantation property through his father, Howell Jones, who was a good friend of Legrand and who had worked with Legrand when Legrand served on the Jasper County Planning Commission. Legrand showed the Wellington Plantation property to Mr. Jones and his partner, Monte Perry, explaining that he owned a 50% interest in the property, and the remaining 50% was owned by his brothers and sisters. Mr. Jones and Mr. Perry explained that they would check out the property and get back with Legrand if they were interested in purchasing it. Mr. Jones explained that ISI was interested in purchasing Wellington in order to develop it into a residential subdivision, and they needed time in order to perform "due diligence," that is, to ensure electricity, water and sewer were available and to see what density was allowable.

During the Summer of 2005, Legrand began talking to his brothers and sisters about his purchasing from them all of the property that they had inherited from their father, i.e., the 40 acre parcel and the jointly held 25% interest in Wellington Plantation. Legrand and Mitchell also discussed Legrand's purchasing the 25% interest which Mitchell owned outright in Wellington Plantation, as well as a 3.84 acre parcel of land that adjoined Wellington and was owned by Mitchell's wife, Carmen. Legrand made an initial offer to each of his brothers and sisters, except

Mitchell, of \$275,000.00. This offer was not acceptable to all of the brothers and sisters, and it was accordingly declined.

In early September 2005, Mike Jones on behalf of ISI contacted Legrand and indicated that ISI had performed its due diligence on Wellington and it was interested in purchasing Wellington. Legrand told Mr. Jones that the 40 acre parcel was available and if ISI wanted to purchase Wellington, it also had to purchase the 40 acre parcel. Legrand showed the 40 acre parcel to Mr. Jones, who indicated that he would talk to his partner, Monte Perry, and get back with Legrand.

Around the end of September or beginning of October, Mr. Perry called Legrand and indicated that ISI was interested in purchasing both the Wellington Plantation parcel and the 40 acre parcel. They discussed a price of \$800,000.00 for the 40 acre parcel, and they ended the conversation with Mr. Perry stating that he would prepare a proposed contract and send it to Legrand to review. Several days passed and Legrand did not receive the expected contract, despite calling Mr. Perry several times to check on its status.

In the meantime, Legrand had continued his discussions with his brothers and sisters regarding purchasing their interest in the 40 acre parcel and Wellington Plantation which they had inherited from their father, and also continued discussing with Mitchell purchasing Mitchell's undivided 25% interest in Wellington Plantation and the 3.84 acre parcel from Mitchell's wife, Carmen. During the course of these discussions a fourth parcel of real estate, known as Echo Tango, was brought into play. Echo Tango is a small subdivision located in Beaufort County that Legrand had owned for many years. It originally consisted of 6 lots. These lots are located on deep water, but they are low lying and originally did not have access to sewer. Without sewer, these lots had little to no value. In 1997, Legrand had sold one of

these lots for \$110,000.00 to Mr. Kolberg on the hope that sewer would be made available. After a nearly 10 year legal battle and spending hundreds of thousands of dollars on sewer and other improvements, Legrand had succeeded in supplying sewer to these lots, and had recently sold a second lot to Mr. Malphrus for \$700,000.00. The remaining four (4) lots are comparable to the lot sold to Mr. Malphrus. While his father was alive, out of love and affection for his father, Legrand had promised his father that he would share the profits of the Echo Tango Subdivision with his father. Although the Echo Tango Subdivision was owned by Legrand individually, and was not part of their father's estate, Legrand's brothers and sisters, as part of the sale of their interest in the 40 acre parcel and Wellington Plantation, wanted Legrand to make the same promise regarding Echo Tango to them.

On October 16 and 17 Legrand delivered individual proposed contracts to each of his brothers and sisters, for their consideration in follow up to their discussions about his buying their land from them. [ROA, pg. 551]. None of these proposed contracts were signed by Legrand. Each of these proposed contracts, except for the contract delivered to Mitchell, was identical. The proposed contract for each brother or sister, excluding Mitchell, called for him or her to sell to Legrand his or her interest in the Wellington Plantation property, which was a 1/7th of a 25% interest, and his or her interest in the 40 acre parcel, which would have been a 1/7th interest. The proposed purchase price was \$325,000.00, payable \$500.00 as an earnest money deposit, \$74,500.00 paid at closing and the \$250,000.00 balance to be paid no later than December 31, 2006. Each proposed contract recites that this balance due would be secured by a first mortgage on the Wellington Plantation property only, and sets a closing date of no later than December 5, 2005.

The proposed contract delivered to Mitchell called for Legrand to purchase Mitchell's entire interest in the Wellington Plantation property, which was the 1/7th of a 25% interest inherited from their father as well as the 25% interest which he owned outright, Mitchell's interest in the 40 acre parcel, and also the 3.34 acre parcel owned by Carmen. On Mitchell's proposed contract, the purchase price was left blank, and none of the amounts for the earnest money, the amount paid at closing, or the balance due, were filled in. [ROA, pp. 702-704].

Each of the proposed contracts contains the following clauses:

SELLER'S TITLE. It is acknowledged that Seller may not presently hold record title to the conveyed property, but will acquire record title as a beneficiary of the Estate of C. E. Lowther, either by Will or through intestacy as an heir-at-law, and Seller agrees to convey title upon receipt of the same as set forth above in the Closing paragraphs.

...

QUIT CLAIM DEED. In consideration for the price paid herein, Seller, additionally agrees to release any right which Seller may have in that property and lots in the Echo Tango area of Beaufort County and will execute a Quit Claim deed to said property at closing.

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.

[ROA, pp. 675-689 and 702-707].

Sandra did not immediately sign the contract, but rather retained the contract overnight in order to "pick it apart." [ROA, pg. 551]. Sandra made several changes on the proposed contract and then signed it and returned it to Legrand. [ROA, pp. 687-689].

Mitchell's proposed contract was given to him by Legrand with a blank for the purchase price. Mitchell filled in a price of \$1,025,000.00 as the price he was willing to sell all of his interest in the 40 acre parcel and the Wellington Plantation property (both that 1/7th of the 25%

interest inherited from his father as well as his individual 25% interest which he owned outright), as well as the 3.86 acres owned by his wife Carmen. Mitchell also wrote into the contract that the purchase price would be paid \$500.00 as earnest money, \$74,500.00 at closing, and a \$950,000.00 balance due to be paid no later than December 31, 2006. Mitchell also made several handwritten changes to the proposed contract, after which he and Carmen both signed it and returned it to Legrand. [ROA, pp. 705-707].

Eventually, all of the brothers and sisters signed the proposed contracts, with Clark, Rita and Gene, like Sandra and Mitchell; making various handwritten changes or alterations to the contract that had been proposed by Legrand. Legrand never signed the proposed contracts tendered back to him by his brothers and sisters.

A few days later, Legrand received in the mail proposed unsigned contracts from ISI regarding both the 40 acre parcel and the Wellington Plantation property. Legrand reviewed these proposed contracts and was not in agreement with the proposed terms. Legrand accordingly made some substantive changes to both contracts. On the proposed contract for the 40 acres, he changed the closing date from an indefinite date to not later than January 27, 2006. The proposed contract for the Wellington property contained a blank for the purchase price, and Legrand inserted a proposed purchase price of \$5,450,000.00. He also added a clause that, in essence, required ISI to reconvey back to him three (3) lots out of Wellington Plantation. On both contracts, he shifted the responsibility for most of the closing costs from himself to ISI. The proposed contract for the Wellington Plantation property did not require payment of any of the purchase price until December 31, 2006. Both contracts from ISI referenced the sellers, in addition to Legrand, as "Mitchell Lowther, et al." Since, by that time, Legrand had received the proposed contracts from his brothers and sisters, he struck through the reference to his brothers

and sisters as sellers. [ROA,pp. 690-699]. He signed the contracts on October 24, 2005 and mailed them back to ISI, which was located in North Carolina.

Legrand continued to discuss with his brothers and sisters his proposed purchase of the 40 acre parcel and their interest in Wellington Plantation, as well as the 3.84 acre parcel from Carmen. During these discussions, the issue of Legrand's ownership of the remaining lots in Echo Tango resurfaced. Under the proposed contracts signed by the brothers and sisters, they had each agreed to execute quit claim deeds over to Legrand for any interest which they may have in the Echo Tango property, thereby extinguishing any claim they may have concerning this property. During these ensuing discussions the parties agreed that if Legrand defaulted on the mortgage for Wellington Plantation then, in lieu of foreclosure, he would simply re-convey back to his brothers and sisters their interest in the Wellington Plantation property, and additionally, he would give them a share in the profits, if any, that he eventually would make on the Echo Tango property. They further agreed he would retain control over the Echo Tango property, and that development of the Wellington Plantation property would be by a weighted vote.

During this time, the parties also discussed closing immediately on the 40 acre parcel, inasmuch as some of the brothers and sisters, particularly Sandra, Mitchell, and Bube, were in dire financial need. One of the changes to the proposed written contracts made by most of the brothers and sisters, including Sandra and Mitchell, shifted the burden of the closing costs from themselves to Legrand. Legrand, however, did not have the money to pay the closing costs. To get around this impasse, they agreed to reduce the amount of money paid up front to each brother and sister from \$75,000.00 to \$73,000.00, and add this \$2,000.00 difference to the amount being financed, thereby freeing \$14,000.00 (7 x \$2,000) to pay closing costs.

Additionally, they agreed that, rather than one unified price for all the property, they would allocate \$511,000.00 (or \$73,000.00 each) out of the total purchase price being paid by Legrand for all the properties, as attributable to the 40 acre parcel, so that a closing on the 40 acre parcel could proceed without delay.

Finally, Legrand agreed that rather than wait to see if he could re-sell or flip the properties, he would attempt to see if he could borrow the money for at least the 40 acre parcel so that the brothers and sisters who were in financial need could have some immediate relief. Accordingly, he contacted SCB&T and was successful in arranging a short term loan.

None of the foregoing agreements were ever reduced to writing or incorporated into the proposed contracts. Accordingly, Legrand never signed the contracts that had been modified and signed by his brothers and sisters.

The parties moved forward with their contemplated transaction and on December 8, 2005 Legrand and Mark, as Personal Representatives of Mr. Lowther's Estate and in accordance with the terms of his Will, executed a Deed of Distribution conveying to the brothers and sisters all of the real estate that had been owned by Mr. Lowther. [ROA, pp. 610-613]. Each of the brothers and sisters then executed a deed conveying the 40 acre parcel to Legrand, with a recited consideration of \$511,000.00. On that same date, Legrand closed on his loan from SCB&T, borrowing \$585,000.00, and securing this loan with a mortgage on the 40 acre parcel. [ROA, pp.614-622]. In accordance with their re-negotiated agreements, Legrand paid all the closing costs on each of these transactions, and paid each of his brothers and sisters \$73,000.00. All the parties were aware that Legrand needed to re-sell the 40 acres in order to pay off the mortgage with SCB&T on the 40 acres. Again, the topic of whether or not Legrand had a contract or a buyer was discussed and he informed them that he did not have a contract or sale.

Subsequently, Legrand received in the mail the proposed contracts which he had sent to ISI, duly executed by ISI. They had been signed by Monte Perry on behalf of ISI on November 24, 2005.

On December 20 or 21, 2005, the second half of the transaction between Legrand and his brothers and sisters closed. At that time, they executed a deed to Legrand conveying all of their interest in Wellington Plantation¹, each brother and sister conveying the interest which they inherited from their father, and Mitchell also conveying the 25% interest which he had owned since before his father's death. [ROA, pp. 628-636]. This deed recites a consideration of \$2,464,000.00. In exchange, Legrand gave Notes to his brothers and sisters. The Note to each brother and sister, excluding Mitchell, was for \$252,000.00. Mitchell's Note was for \$952,000.00. Each Note called for a balloon payment no later than December 31, 2006. Reflecting the agreement of the parties reached during their discussions following the delivery of the proposed contracts by the brothers and sisters back to Legrand, each Note² contains the following clause:

Borrower shall execute a General Warranty Deed conveying an undivided one-seventh of a 25% interest to Note holder in the Wellington Plantation property, a copy of which is provided with this Note. The original of this Deed shall be held in escrow by the closing attorney and shall be voided if Borrower shall pay in full the amount due the Note holder. In the event that Borrower should be in default or should fail to pay the Note holder in full when due, then said Note holder agrees to accept as his sole remedy, in lieu of foreclosure, the property conveyed to him pursuant to said Deed and said Deed shall then be delivered and recorded. In that event, said Note holder agrees to manage, develop, market, encumber, or sell said property in accordance with the majority vote of the joint owners thereof, with votes weighted according to ownership interest (e.g., a 10% owner casts 10 votes). Furthermore, in the event that Borrower should fail to pay the Note holder in full when due, then the Note holder shall additionally be entitled to receive a "share" of the "net proceeds" from the sale of any lot in the Echo Tango subdivision being developed by Borrower. "Net proceeds" are those proceeds

¹ Which they had received in the December 8, 2005 distribution.

² Mitchell's Note also provides for re-conveying back to him the 25% interest that he owned prior to his father's death.

received by Borrower from the sale of a lot or lots after Borrower has been reimbursed for all development expenses for the subdivision, including but not limited to taxes, maintenance, the cost of the sewer, the cost of litigating the sewer issue, attorney's fees, and marketing expenses. The Note holder's "share" shall be a pro rata share equal to one-seventh of a fifty (50%) percent share, or 7.14%.

[ROA, pp. 637-658].

In accordance with the foregoing provision in the Note, on December 20, 2005 Legrand executed a General Warranty Deed which reconveyed back to each of his brothers and sisters the interest that they had just conveyed to him in Wellington Plantation. This deed was held in escrow and not delivered. [ROA, pp. 711-714]. Legrand also executed a mortgage to his brothers and sisters, referencing each of the individual Notes, in the combined principal sum of \$2,464,000.00. This Mortgage encompassed all of Wellington Plantation. [ROA, pp. 658-671]. Legrand paid the closing costs incurred in connection with this transaction. As the parties had anticipated in their earlier discussions, the closing costs for all of these transactions totaled almost \$14,000.00, primarily documentary tax stamps (to be precise, \$14,050.50), which were paid using the excess SCB&T loan proceeds. [ROA, pp. 555-556 and 583-585].

Sandra was represented in the closings by her own attorney.

Legrand's contract with ISI for the 40 acre parcel called for a closing no later than January 26, 2006. Legrand was concerned about these contracts with ISI because, in his opinion, the conditions precedent were so broad and discretionary as to allow ISI to walk away from the contracts, leaving him without any recourse. When the closing deadline of January 26, 2006 came and went without any closing, Legrand became frantic, calling Monte Perry with ISI "day and night." He not only did not have the money to pay his brothers and sisters for the Wellington Plantation property, but he also did not have the money to pay SCB&T on the

mortgage he had just taken out. As he testified, if he was unable to sell the 40 acres quickly, he would have been "bankrupt."

Fortunately, after ISI walked away from the contract for the 40 acres, Legrand was able to negotiate a sale of the 40 acres to another developer, Amberwinds, LLC, for the same price. The 40 acres was sold by Legrand to Amberwinds on February 17, 2006 for \$810,000.00. [ROA, pp. 583-585]. Legrand accordingly received \$207,051.15 in proceeds from the sale.

Shortly thereafter, in March 2006 Sandra, Mitchell and Bube learned about Legrand's sale of the 40 acres to Amberwinds for \$810,000.00. Although they were upset, they elected not to take any action at that time. Instead, they waited to see if Legrand would be able to pay them the balance of the purchase price, i.e., \$2,464,000.00, which was due no later than December 31, 2006.

Unfortunately, ISI, just as it had with the 40 acre contract, walked away from the contract on Wellington Plantation. Unlike with the 40 acre parcel, Legrand was not able to find a substitute buyer for Wellington Plantation and he was, accordingly, unable to pay to his brothers and sisters the \$2,464,000.00 that he owed them. Pursuant to the terms of the Notes, Legrand delivered to his brothers and sisters the escrowed deed in lieu of foreclosure, reconveying to them their interests in Wellington Plantation. [ROA, pp. 711-714]. Also in accordance with the terms of the Notes, Legrand began providing to his brothers and sisters interim accountings as to the receipts and expenses incurred in connection with Echo Tango. [ROA, pp. 724-728]. At the request of some of his brothers and sisters, including the Respondents herein, who remained in financial need, Legrand began making advance distributions of Echo Tango profits, beginning in May of 2007 and continuing through December of 2008. From the Echo Tango sales, Mitchell has received \$36,000.00, Sandra has received \$22,000.00 and Bube has received \$16,000.00.

Clark, Rita, Gene and Mark have also received \$16,000.00 each. In all, \$138,000.00 from the Echo Tango lot sales has been distributed to his brothers and sisters in accordance with the terms of their agreement as set forth in the Notes.

ARGUMENT

I. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT AGAINST THE PETITIONER ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION IN FAVOR OF INDIVIDUALS WHO ARE NOT 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.E.2d 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).

II. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN ENTERING JUDGMENT AGAINST PETITIONER ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THE PETITIONER 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).

³The 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 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

³ 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.

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.

III. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT AGAINST THE PETITIONER 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 of 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 contracts 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.

IV. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT AGAINST THE PETITIONER 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.” *Tisdell 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).

CONCLUSION

It is accordingly respectfully requested that the South Carolina Supreme Court issue its Writ of Certiorari to the South Carolina Court of Appeals.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

By: _____

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August 22, 2013

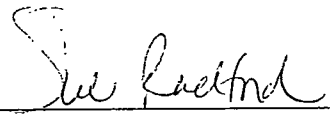
Attorney for the Plaintiff

CERTIFICATE OF SERVICE

Undersigned certifies that the **Petition for Writ of Certiorari** 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
Ruff & Ruff
17 Professional Village Circle
Beaufort, South Carolina 29907

in a post office or official depository under the exclusive care and custody of the United States Postal Service, on August 22, 2013.

By: 
Sue Radford

RECEIVED

AUG 26 2013

SC Court of Appeals

LAW OFFICES

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August 22, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: 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. v. 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.
Case Nos: 2010-CP-07-06274 and 2010-CP-07-06284

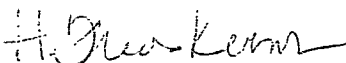
Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Petition for Writ of Certiorari, two (2) copies of the Appendix to Petition for Writ of Certiorari and Certificate of Service. Also enclosed is the \$100.00 filing fee. By copy of this letter and the enclosures, I am serving all counsel of record with a copy of the same.

With kindest regards, I am

Very truly yours,

MOSS, KUHN & FLEMING, P.A.


H. Fred Kuhn, Jr.

HFK:sr

Enclosures

cc: Honorable Jenny Abbott Kitchings
Harley D. Ruff, Esquire
Carol C. Ruff, Esquire

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AUG 26 2013

SC Court of Appeals