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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM JASPER COUNTY
COURT OF COMMON PLEAS

DARRELL THOMAS JOHNSON, JR., SPECIAL REFEREE

2008-CP-27-547

MITCHELL S. LOWTHER and
CARMON B. LOWTHER,

Respondents

v.

E. LEGRAND LOWTHER,

Appellant.

RETURN TO MOTION TO DISMISS

The Respondents have filed a motion to dismiss this appeal on the ground that this case was previously appealed and the Appellant cannot appeal the same case twice. This return is respectfully submitted on behalf of the Appellant in opposition to said motion.

In their Motion to Dismiss, the Respondents correctly note that there is a prior, currently pending, appeal before the South Carolina Court of Appeals in Case Number 2008-CP-27-547, captioned *Mitchell S. Lowther and Carmon B. Lowther v. E. Legrand Lowther*. This prior appeal was heard by a panel of the Court of Appeals on April 9, 2012, and the parties are awaiting a decision.

The Respondents also correctly note in their Motion to Dismiss that the instant appeal was commenced by filing a Notice of Appeal on April 4, 2012. This second appeal bears the same caption as the first appeal, but it is, in fact, a different case, involving a different Order, and

involving similar, but not identical, parties. The confusion arises from the fact that the Special Referee, in issuing the Order involved in the appeal *sub judice* erroneously placed the caption from the previously appealed case on his Order. In order to understand the Special Referee's mistake in miscaptioning the Order which is the subject of this appeal, it is helpful to set forth the sequence of events.

A. THREE SUITS ARE COMMENCED

On March 7, 2008 nearly identical Summonses and Complaints were filed in both the Beaufort and Jasper County Courts of Common Pleas. The Beaufort County case bore Case Number 08-CP-07-151 and the Jasper County case bore Case Number 08-CP-27-150. Both cases were captioned *C.E. Lowther, Jr., Clayton Clark Lowther, Mitchell S. Lowther, and Effie Sandra Turpin, Plaintiffs v. E. Legrand Lowther, Defendant.* In their Complaints, the Plaintiffs alleged that the Defendant defaulted on certain promissory notes given to them, which were attached to the Complaints as exhibits, and that as a result of said default they were entitled to the delivery to them of an escrowed deed for property in Jasper County known as Wellington Plantation, as well as an accounting for the sales and expenses incurred in connection with property in Beaufort County known as Echo Tango, together with an immediate distribution to them of any sums owed to them as a result of said accounting, plus attorney's fees. A copy of the Jasper County Complaint is attached as Exhibit A.

Since the Beaufort County case (08-CP-07-151) was identical to the Jasper County case (08-CP-27-150) the Beaufort County case was consolidated with the Jasper County case and only the Jasper County case (08-CP-27-150) remained pending.

On August 28, 2008, a third suit was filed. This suit was filed in the Jasper County Court of Common Pleas. It was assigned Civil Action Number 2008-CP-27-547 and was captioned

Mitchell S. Lowther and Carmon B. Lowther, Plaintiffs v. E. Legrand Lowther, Defendant. This is an action to foreclose a mortgage given to secure one of the notes involved in the earlier lawsuits. A copy of this Complaint is attached hereto as Exhibit B.

These cases were then referred to D. Thomas Johnson, Jr., Esquire, as Special Referee to hear the cases and issue a final order.

These matters were tried sequentially before Special Referee Johnson on April 29, 2009 and May 11, 2009.

B. ORDERS ON THE FORECLOSURE CASE – 2008-CP-27-547

On July 24, 2009, Special Referee Johnson issued an Order in the foreclosure action brought by Mitchell and Carmon Lowther against Legrand Lowther, Case Number 2008-CP-27-547, in which he held that the foreclosure demand was moot, and voided a deed for a 3 acre, more or less, parcel of land. A copy of this Order is attached as Exhibit C. Both parties filed motions requesting that Special Referee Johnson reconsider his July 24, 2009 Order, with the Defendant Legrand Lowther filing his Motion to Reconsider on August 3, 2009 (Exhibit D) and the Plaintiffs Mitchell and Carmon Lowther filing their Motion to Reconsider on August 7, 2009 (Exhibit E).

On October 21, 2009 Special Referee Johnson denied the Defendant Legrand Lowther's Motion to Reconsider (Exhibit F).

The Defendant Legrand Lowther then appealed the Orders of the Special Referee dated July 24, 2009 and October 14, 2009 to the South Carolina Court of Appeals, and on April 11, 2011 the Court of Appeals remanded the appeal back to Special Referee Johnson, finding the appeal was premature inasmuch as Special Referee Johnson had never ruled on the Plaintiffs' pending Motion to Reconsider (Exhibit G).

On June 15, 2011, Special Referee Johnson issued an Order denying both the Plaintiffs' and the Defendant's Motions to Reconsider in Case Number 2008-CP-27-547 (Exhibit H).

On July 18, 2011 the Defendant Legrand Lowther filed his Notice of Appeal of Special Referee Johnson's Orders. This appeal was assigned Case Tracking Number 2011195810. This appeal has been fully briefed and oral argument was heard by a panel of the South Carolina Court of Appeals on April 9, 2012. The parties are awaiting a decision on this appeal.

C. ORDERS ON THE ACCOUNTING AND OTHER RELIEF – CASE -2008-CP-27-150

In the other Jasper County case, bearing Case Number 08-CP-27-150 and captioned *C.E. Lowther, Jr., Clayton Clark Lowther, Mitchell S. Lowther and Effie Sandra Turpin, Plaintiffs v. E. Legrand Lowther, Defendant,* the Special Referee did not issue an Order until March 18, 2010 (Exhibit I). For some reason, the Special Referee double captioned this Order. Although this Order clearly has nothing to do with the previously decided mortgage foreclosure action, i.e., case number 08-CP-27-547, *Mitchell S. Lowther and Carmon B. Lowther v. E. Legrand Lowther*, which at that time was on appeal, the caption for that case was placed on this Order. Additionally, the Special Referee misnumbered Case Number 08-CP-27-150 between *C.E. Lowther, Jr., Clayton Clark Lowther, Mitchell S. Lowther and Effie Sandra Turpin, Plaintiffs v. E. Legrand Lowther, Defendant*, referencing it as Case Number 08-CP-27-151.

On April 1, 2010 the Defendant/Appellant Legrand Lowther filed a Motion to Reconsider the March 18, 2010 Order and, out of an abundance of caution, copied the Special Referee's double-captioning of the case, and attempted to correct the numbering error (Exhibit J).

Nearly two years later, on March 19, 2012 the Special Referee issued an Order denying Legrand Lowther's Motion to Reconsider (Exhibit K). For some reason, the Special Referee completely miscaptioned this Order, which bears only the caption for Case Number 2008-CP-27-

547. Perhaps due to the long passage of time between the Motion to Reconsider and the decision, as well as the similarity of parties, the Special Referee erroneously captioned this Order as Case Number 2008-CP-27-547, *Mitchell S. Lowther and Carmon B. Lowther v. E. Legrand Lowther*, instead of the correct caption 2008-CP-27-150 involving *C.E. Lowther, Jr., Clayton Clark Lowther, Mitchell S. Lowther and Effie Sandra Turpin, Plaintiffs v. E. Legrand Lowther, Defendant*.

Special Referee Johnson's Order of March 19, 2012 clearly addresses the Appellant's Motion to Reconsider of April 1, 2010, and the Appellant's Motion to Reconsider of April 1, 2010 clearly relates to the Special Referee's Order of March 19, 2010. These Orders and motion clearly relate to Case Number 2008-CP-27-150 and, have absolutely nothing to do with Case Number 2008-CP-27-547, which had already been decided. Placing the 2008-CP-27-547 caption on the Orders of March 18, 2010 and March 19, 2012 was clearly a ministerial or clerical error on the part of the Special Referee.

CONCLUSION

In summary, the earlier appeal involves Case Number 08-CP-27-547, a mortgage foreclosure action brought by Mitchell S. Lowther and Carmon Lowther against Legrand Lowther which is presently pending a decision by the South Carolina Court of Appeals. The appeal *sub judice*, on the other hand, relates to Case Number 08-CP-27-150, which was brought by C.E. Lowther, Jr., Clayton Clark Lowther, Mitchell S. Lowther and Effie Sandra Lowther against E. Legrand Lowther, as is evident from the body of the Orders of March 18, 2010 and March 19, 2012. In short, these are two (2) different appeals of two (2) different cases involving different Orders and similar, but not identical, parties.

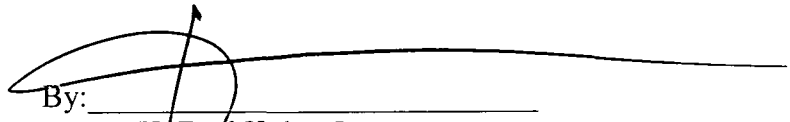
Clearly, the Orders involved in this appeal are erroneously captioned. The issue remains

as to how to correct the error. The Appellant had intended to raise this issue in his brief. By their Motion to Dismiss, however, the Respondents have brought the issue to a head. The Appellant respectfully suggests that there are two (2) appropriate remedies. First, the Court of Appeals could correct the erroneous caption and the appeal could proceed in its normal course and fashion. Alternatively, the Court of Appeals could remand the appeal back to Special Referee Johnson to correct the caption.

It is, accordingly, respectfully requested that the Respondents' Motion to Dismiss be denied and that the Court either correct the caption and allow the appeal to proceed, or alternatively, remand the case back to Special Referee Johnson with instructions to correct the caption, if appropriate.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.



By:_____

H. Fred Kuhn, Jr.
1501 North Street (29902)
Post Office Drawer 507
Beaufort, South Carolina 29901-0507
(843)524-3373
(843)524-1302 – facsimile

Attorneys for the Appellant

Beaufort, South Carolina
June 21, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF Jasper)
)
C. E. Lowther, Jr., et al.)
Plaintiff(s))
)
vs.)
)
E. Legrande Lowther)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

08 - CP - 27 - 151

(Please Print)
Submitted By: R. Thayer Rivers, Jr. SC Bar #: 4754
Address: P.O. Box 6008 Telephone #: 726-8126
Ridgeland, SC 29936 Fax #: 726-4401
Other:
E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (*Check One Box Below*)

Contracts	Torts - Professional Malpractice	Torts – Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	☐ Notice/ File Med Mal (230)	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	☐ Other (299)	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)		☐ Personal Injury (350)	☐ Possession (450)
		☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)

Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Sexual Predator (510)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Mandamus (520)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Habeas Corpus (530)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
☐ Other (599)	☐ Transcript Judgment (740)	☐ Forfeiture (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Other (899)	☐ SCDOT (950)
	☐ Other (799)		☐ Worker's Comp (960)
			☐ Zoning Board (970)
			☐ Administrative Law Judge (980)
			☐ Public Service Commission (990)
			☐ Employment Security Comm (991)
			☐ Other (999)

Special/Complex /Other

☐ Environmental (600)	☐ Pharmaceuticals (630)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)
☐ Medical (620)	☐ Out-of State Depositions (650)
☐ Other (699)	

Submitting Party Signature: R. Thayer Rivers Date: 3-10-08

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTIES OF BEAUFORT AND JASPER	)	CASE NUMBER: 08-CP-07- CASE NUMBER: 08-CP-27-
C. E. LOWTHER, JR., CLAYTON CLARK LOWTHER, MITCHELL S. LOWTHER AND EFFIE SANDRA TURPIN,	)	
Plaintiffs,	)	
v.	)	COMPLAINT Non-Jury
~~E. LEGRAND LOWTHER,~~	)	
Defendant.	)	

The Plaintiffs complaining of the Defendant herein allege and says as follows:

1. The Plaintiffs are devisees of the Estate of C. E. Lowther and the Plaintiff Mitchell S. Lowther is an individual mortgage holder as well as a devisee.

2. By deeds recorded in Deed Book 2292 at Page 1752 in Beaufort County on or about December 27, 2005, the Plaintiffs, amongst other family members, deeded the premises shown as the Beaufort Property in the Lis Pendens herein, by Quit Claim Deed did deed the premises to the Defendant.

3. By deed recorded in Deed Book 337 at Page 10 in the Office of the Register of Deeds for Jasper County, the Plaintiffs did deed their ownership in the premises described in the Lis Pendens as the Jasper County Parcel to the Defendant on 12-28-05

4. That the Plaintiffs, C. E. Lowther, Clayton Clark Lowther and Effie Sandra Turpin were indebted by the Defendant in the amount of $252,000.00 each and the Plaintiff Mitchell S. Lowther was indebted by the Defendant in the amount of $952,000.00.

5. In order to further secure the payment of said monies, the Defendant executed a certain Promissory Note to each Plaintiff which are attached hereto as Exhibits A through D and made a part hereof.

6. That the Promissory Note provides for payment in full to the Plaintiffs on or before December 31, 2006. That the Note waived presentment, notice of dishonor and protest.

7. That on December 31, 2006, the Note had not been paid and by its own terms and conditions automatically entitled the Plaintiffs to the return of their deeds which were held in escrow by Fred Kuhn, Esquire, and to share the proceeds from sales on lots in the Echo Tango property located in Beaufort County, South Carolina, which is described in the Lis Pendens.

8. The Plaintiffs are informed and believes that the Defendant has sold two parcels of Echo Tango for a total sales price in excess of $770,000.00. That no accounting has been made to the Plaintiffs for any costs involved therein, nor has any distribution of proceeds been made to the Plaintiffs in violation of the terms and conditions of the note.

WHEREFORE, the Plaintiffs pray as follows:

1. That this court issue an Order mandating Fred Kuhn, Esquire, to give the escrowed deeds to the Plaintiffs for the ownership interest in the Jasper County Property known as Wellington Plantation.

2. That the Defendant make an immediate verified accounting of the costs of the Echo Tango development and make an immediate distribution to the Plaintiffs for any sums owed them at that time.

3. For the costs and disbursements of this action, including reasonable attorney fees.

4. For such other and further relief as this Court may deem just and proper.

LAW OFFICE OF R. THAYER RIVERS, JR.

R. THAYER RIVERS, JR.
Post Office Box 668
Ridgeland, South Carolina 29936
843-726-8136

March 7, 2008.

03

STATE OF SOUTH CAROLINA COPY

IN THE JRT OF COMMON PLEAS

COUNTY OF JASPER)

MITCHELL S. LOWTHER AND CARMON B. LOWTHER Plaintiff(s))

vs.)

E. LEGRAND LOWTHER)

Defendant(s))

CIVIL ACTION COVERSHEET

2008 -CP - 27 - 547

(Please Print)
Submitted By: R. THAYER RIVERS, JR. SC Bar #: 4754
Address: P O Box 668, (304 Russell St) Ridgeland, SC 29936
Telephone #: 843 726 8136
Fax #: 843 726 4401
Other:
E-mail: rtrivers@excite.com

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☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
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- ☐ Medical Malpractice (220)
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- ☐ Condemnation (410)
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- ☐ Partition (440)
- ☐ Possession (450)
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- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Administrative Law Judge (980)
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- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Sexual Predator (510)

Submitting Party Signature: R. Thayer Rivers **Date:** 8/28/2008

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STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2008-CP-27-547

MITCHELL S. LOWTHER and
CARMON B. LOWTHER,

Plaintiffs,

vs.

E. LEGRAND LOWTHER,

Defendant.

SUMMONS

NON JURY MATTER

YOU ARE HEREBY SUMMONED and required to appear and defend the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber R. Thayer Rivers, Jr., P. O. Box 668, 304 Russell Street, Ridgeland, South Carolina 29936, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to Answer the Complaint within the time aforesaid, the Court will render judgment by default against you for the relief demanded in the Complaint.

LAW OFFICE R. THAYER RIVERS, JR.

R. THAYER RIVERS, JR.-SC BAR 4754
P O BOX 668, 304 RUSSELL STREET
RIDGELAND, S.C. 29936
TEL: 843 726 8136
FAX: 843 726 4401

ATTORNEY FOR PLAINTIFF

Dated:August 28, 2008
Ridgeland, SC

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF JASPER)
) CIVIL ACTION NO.: 2008-CP-27-547

MITCHELL S. LOWTHER and)
CARMON B. LOWTHER,)
)
Plaintiffs,)
vs.) COMPLAINT
)
E. LEGRAND LOWTHER,) NON JURY MATTER
)
Defendant.)

The plaintiffs, complaining of the defendant above-named, would respectfully show unto this Honorable Court:

1. That the plaintiffs and the defendant are citizens and residents of Jasper County, South Carolina.

2. That the real property hereinafter described which is the subject of this action, is situated and located in Jasper County, South Carolina.

3. That on or about the 20th day of December 2005, for value received, the said E. Legrand Lowther executed and delivered to Mitchell S. Lowther and Carmon B. Lowther, the plaintiffs herein, a certain promissory note in writing, a copy of which is attached hereto and which is incorporated in and made a part hereof by reference, by which, according to the terms and conditions set out therein, said maker promised to pay to Mitchell S. Lowther and Carmon B. Lowther, the sum of Nine Hundred Fifty

Two Thousand and 00/100ths ($952,000.00) Dollars.

4. In order to better secure the payment of the said note and debt, in accordance with the terms and conditions thereof, the said defendant, E. Legrand Lowther, did execute and deliver on December the 28th, 2005, recorded February 15, 2006, in the Register of Deeds for Jasper County, in Deed Book 402 at Pages 24-36, unto the plaintiffs, Mitchell S. Lowther and Carmon B. Lowther, their heirs and assigns, a mortgage covering the following described property:

SEE PROPERTY DESCRIPTION ATTACHED AS EXHIBIT "A"

5. As part and parcel of the same transaction the plaintiffs did transfer to the defendant, an additional following described property, being 3.84 acres, which comprises additional collateral for the mortgage.

SEE PROPERTY DESCRIPTION ATTACHED AS EXHIBIT "B"

6. According to the terms and conditions of the note and mortgage, it is provided that in the event of default in the payment of any installment when due, and if such default is not made good prior to the due date of the next such installment, the entire principal and accrued interest shall at once become due and payable without notice, at the option of the holder, and if the same should be placed in the hands of an attorney for collection, all costs of collection, including a reasonable attorney's fee, shall become an obligation of the defendant, to be secured by the said mortgage as a part of the debt secured thereby.

7. That under the terms and conditions of said mortgage, it is provided that, together with, and in additional to the monthly payments of principal and interest payable under the terms of the note secured thereby, the mortgagor will pay to the mortgagee, on the first day of each month until the said note is fully paid, certain additional sums, including but not limited to certain amounts for fire and other hazard insurance and taxes and assessments due on the mortgaged premises.

8. Further, under the terms and conditions of said mortgage, it was agreed that the mortgagor would pay all taxes, assessments, water rates and other governmental or municipal charges, fines or impositions for which provisions were not otherwise made, and if he failed to do so, the mortgagee might pay same, which amount, together with interest thereon, would be secured by said mortgage.

9. The monthly payments due on said note and mortgage are in default since December 31, 2006 (at the present time the plaintiffs are owned the amount of Nine Hundred Fifty Two Thousand ($952,000.00) Dollars, with interest after date with the legal interest rate in South Carolina).

10. Plaintiffs demand no personal or deficiency judgment and any right to same is specifically waived.

WHEREFORE, having fully set forth its complaint, the plaintiffs pray that this Honorable Court inquire into the matters set forth herein said;

That the amount due upon the said note and mortgage held by the plaintiff be ascertained and determined under the direction of this Court, together with attorney's fees and costs of this action.

That the said plaintiffs' mortgage be declared a first lien and that plaintiffs have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due, with a reasonable sum as attorney's fees, and for the cost of this action.

That the mortgaged premises be sold under the direction of this Court, the equity of redemption be barred, and that the proceeds of the sale be applied as follows:

1. To the costs and expenses of the within action and sale;

2. To the payment and discharge of the amount due on plaintiffs' note and mortgage, together with attorney's fees as aforesaid, and;

3. The surplus, if any, be distributed according to law;

4. And for such other and further relief as may be just and proper.

LAW OFFICE R. THAYER RIVERS, JR.

R. THAYER RIVERS, JR.-SC BAR 4754
P O BOX 668, 304 RUSSELL STREET
RIDGELAND, S.C. 29936
TEL: 843 726 8136
FAX: 843 726 4401

ATTORNEY FOR PLAINTIFFS

Dated:August 28, 2008
Ridgeland, SC

STATE OF SOUTH CAROLINA
NOTE

$952,000.00
AMOUNT

Beaufort, South Carolina
Due Date: **December 31, 2006**
Note Date: December 20, 2005

FOR VALUE RECEIVED, the undersigned ("Borrower") promise(s) to pay in lawful money of the United States of America in the principal sum of Nine Hundred Fifty Two Thousand and No/100 Dollars to **Mitchell Saxon Lowther** ("Note holder"):

This sum shall draw no interest. Principal shall be payable at the residence of the Note holder or such other place as the Note holder may designate. Borrower may prepay the principal in such amounts as in Borrower's discretion Borrower can afford, except that any remaining indebtedness, if not sooner paid, **shall be due and payable in full on December 31, 2006.**

If this Note is not paid when due, the entire principal amount outstanding shall at once become due and payable at the option of the Note holder. If suit is brought to collect this Note, the Note holder shall be entitled to collect all reasonable costs and expenses of suit, including but not limited to, reasonable attorney's fees.

Borrower may prepay the principal amount outstanding in full or in part without penalty. Prepayment in full may be made at any time. Any partial prepayment shall be applied against the principal amount outstanding and shall not postpone the due date, unless the Note holder shall otherwise agree in writing. Borrower is giving Notes of even date to siblings of Note holder, and the amount owed to each Note holder shall be treated as a separate and distinct obligation and any one Note holder shall not be able to bind any other Note holder.

Presentment, notice of dishonor, and protest are hereby waived by Borrower. This Note shall be binding upon Borrower, his heirs, successors and assigns, as well as upon Note holder, his heirs, successors and assigns. This Note is not assignable without the written consent of all parties.

Any material failure by Borrower to perform any obligation under this Note to Note holder shall constitute a default. Additionally, Borrower shall be in default if Borrower should fail to pay the Note in full on or before the due date, should Borrower die or be declared incompetent, should Borrower declare bankruptcy or be declared insolvent.. Unless Borrower has paid this Note in full, Borrower will also be in default on this Note should Borrower default on any of the Notes of even date to the siblings of Note holder.

L.L. MSL

Borrower shall execute a General Warranty Deed conveying an undivided 25% interest plus an additional 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 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, attorneys 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%.

Any notice to Borrower provided for in this Note shall be given by mailing such notice by certified mail addressed to Borrower at his residence, or to such other address as Borrower may designate by notice to the Note holder. Any notice to the Note holder shall be given by mailing such notice by certified mail, return receipt requested, to the Note holder at his residence, or at such other address as may have been designated by notice to Borrower.

Borrower shall not increase the indebtedness or obligation owed under the first Mortgage on the property which secures the payment of this Note and that Mortgage shall be kept current. Borrower shall take no action which impairs the rights of the Note holders.

The indebtedness evidenced by this Note is secured by a Mortgage, dated December _____, 2005, and reference is made to the Mortgage for other obligations of the Borrower.

Signed, sealed and delivered this 20th day of December, 2005.

Borrower:

_____(Seal)
Legrand Lowther

Note Holders:

_____ _____ _____ _____ _____ _____

_____(Seal)
Mitchell Saxon Lowther

Instrument Volume Page
200600000637 402 36

Exhibit A

ALL that certain piece, parcel or tract of land, situate, lying and being in Jasper County, South Carolina, containing (226.35) acres, more or less, known as Wellington Plantation and being bounded and described as follows: On the North by Wellington road, a dedicated Jasper County road; on the East by lands now or formerly of Pittman; on the South by lands now or formerly of Westvaco; and on the West by lands now or formerly of Westvaco and lands now or formerly of South Carolina Electric and Gas Co.. For a more particular description of metes, bounds, courses and distances, reference is made to that certain boundary survey prepared by Richard Kesselring, RLS for E Legrand Lowther and C. E. Lowther dated February 20, 1997, and recorded in the Office of the Clerk of Court for Jasper County South Carolina Book 22 at Page 293. The metes, bounds and distances appearing on the aforementioned plat are incorporated herein by reference.

LESS AND EXCEPT (3.84) acres thereof conveyed by C. E. Lowther to Mitchell S Lowther and Carmon B Lowther by deed recorded in the Office of the Clerk of Court for Jasper County, South Carolina in Deed Book 156 at Page 157 and more particularly described as Lot No (34) on that certain preliminary subdivision plat prepared by Connor & Associates, Inc., a copy of which is attached to said Deed and made a part of Deed Book 156 at Page 157.

ALSO LESS AND EXCEPT, any out conveyances as recorded in the Office of the Clerk of Court for Jasper County, South Carolina prior to the date of this deed.

This being the same property conveyed as 50% undivided interest to E Legrand Lowther, 25% undivided interest to Mitchell S Lowther and 25% undivided interest to C E Lowther by Deed of Albert L Kleckley recorded on September 18, 2003 in Book 282 at Page 154 in the Office of the Clerk of Court for Jasper County, South Carolina.

TMP 069-00-07-003

EXHIBIT "B"

"ALL that certain piece, parcel or lot of land, situate, lying and being in Jasper County, South Carolina described as 3.84 acres, more or less, and shown on that certain preliminary subdivision plat prepared by Connor & Associates, Inc. as Lot No. 34 which is attached to a deed recorded in Bok 156 at Page 157 in the Office of the Clerk of Court for Jasper County, South Carolina.

This being the identical property conveyed to E. Legrand Lowther the by Warranty Deed of Mitchell S. Lowther and Carmon B. Lowther dated May 8,2006 and recorded in Deed Book 425 at Pages 32-34 Office of the Clerk of Court for Jasper County, South Carolina.

EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C/A NO.:
COUNTY OF JASPER	)	
	)	
MITCHELL S. LOWTHER and CARMON B. LOWTHER.	)	Case No.: 2008-CP-27-547
	)	
Plaintiff,	)	
vs	)	**ORDER**
	)	
E. LEGRAND LOWTHER,	)	
	)	
Defendant	)	

This matter of the 3+ acres, and others, are before me on Order of Reference. It is my task to forge a business result out of a decades-long family transaction that was not managed for exclusively business reasons.

C.E. Lowther had a large family that included two sons that participated with him in his construction and real estate activities. It is inferable that these sons, Mitchell and LeGrande, signed whatever he told them to sign. The titles were moved around between the three of them as circumstances, or credit, might suggest. The parties all agree that the true ownership was LeGrande fifty percent, Mitch twenty five percent, and C.E. (now his estate) twenty five percent.

The gravamen of my decision comes from two questions which were not explicitly answered:

(1) Why were the two different "Exhibit A's" ostensibly executed on the same date?

(2) If the transfer of the 3+ acres was a business transaction, as recited by Defendant, what was the consideration"?

Whether the remedy is reformation of the mortgage, failure of consideration, default under an ambiguous note, or some other legal theory, the only equitable basis for denying relief

would be that it was a gift. Defendant specifically negates the idea that this was anything but an arm's length business deal.

Defendant relies entirely upon the burden of proof, and the evidentiary objections. I would note that Defendant was a sibling, a partner, and an executor. I do not hold that a recital in a document can per se relieve a party of a fiduciary duty. I further hold that the note has ambiguities, in that there are several paragraphs about remedies, but yet a provision that the escrowed deed was the sole remedy.

I hold that there was a total failure of consideration and Order that the 3+ acres be re-vested in Carmon Lowther. This is the most direct route to the correct result, and the lawyers can argue about additional sustaining grounds, if that stage is reached.

Because the remedy as to the 3+ acres is equitable, the note does not control, therefore the attorney fee provision does not apply.

The balance of the foreclosure was mooted by the March 17 tender of the deed-in-lieu. Attorney fees to that point are awarded.

IT IS NOW THEREFORE ORDERED that the deed to Legrande for the 3+ acres is voided, and title restored to Carmon Lowther. Attorney fees of Plaintiff incurred prior to March 17, 2008, may be awarded in that aspect of the case.

Darrell Thomas Johnson, Jr., Special Referee

July 24, 2009

EXHIBIT D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	CASE NO: 2008-CP-27-547
MITCHELL S. LOWTHER and CARMON B. LOWTHER, Plaintiff,	)	
vs.	)	MOTION TO RECONSIDER AND FOR OTHER RELIEF (RULE 59(a) and (e), SCRCP)
E. LEGRAND LOWTHER, Defendant.	)	

TO: R. THAYER RIVERS, JR., ESQUIRE, ATTORNEY FOR THE PLAINTIFFS:

PLEASE TAKE NOTICE that the Defendant, E. Legrand Lowther, through his undersigned attorneys, hereby moves before the Honorable Darrell Thomas Johnson, Special Referee, pursuant to Rules 59(a) and (e) of the South Carolina Rules of Civil Procedure for a new trial, or alternatively, for a reconsideration of his Order dated July 24, 2009, and hereby moves to alter or amend said Order, upon the following grounds:

1. The finding of fact that "it is inferable that these sons, Mitchell and Legrand, signed whatever he ©. E. Lowther) told them to sign" is not supported by the greater weight or preponderance of the evidence.

2. The finding of fact that "the titles (to the subject real estate) were moved around between the three of them ©. E. Lowther, Mitchell Lowther, and Legrand Lowther) as circumstances, or credit, might suggest) is not supported by the greater weight or preponderance of the evidence.

3. The finding of fact that "the parties all agree that the true ownership was Legrand fifty percent, Mitch twenty-five percent, and C. E. (now his estate) twenty five

percent." Insofar as this finding may have been intended to relate to the "3+ acres" is not supported by the greater weight or preponderance of the evidence. This finding is accurate only with respect to what the parties refer to as the "Wellington property" prior to Legrand Lowther's purchase of the same from his brothers and sisters.

4. The Court erred in granting relief under the theory of "reformation of the mortgage" where this relief was not requested in the pleadings.

5. The Court erred in granting relief under the theory of "failure of consideration" where this relief was not requested in the pleadings.

6. The Court erred in granting relief under the theory of "default under an ambiguous note" where this relief was not requested in the pleadings.

7. The Court erred in granting equitable relief to the Plaintiffs where no equitable relief was sought in the pleadings, inasmuch as the Complaint is a straight forward action for the foreclosure of an alleged Mortgage.

8. The Court erred in finding as a matter of fact and concluding as a matter of law that there was a failure of consideration with respect to the "3+ acres" inasmuch as the greater weight or preponderance of the evidence demonstrates that there was adequate, legal consideration for the transaction.

9. The Court erred in finding as a matter of fact and concluding as a matter of law that the Mortgage should be reformed where this finding is not supported by greater weight or preponderance of the evidence.

10. The Court erred in finding as a matter of fact and concluding as a matter of law that the Note has ambiguities, where this finding is contrary to the greater weight or preponderance of the evidence.

11. The Court erred in finding that the Defendant was "a partner" of the Plaintiffs (inferably at the time of the subject transaction) where this finding is not supported by the greater weight or preponderance of the evidence.

12. The Court erred in finding as a matter of fact that the Defendant was "an executor" where, while the Defendant was a co-Personal Representative of the Estate of C.E. Lowther, the "3+acres" was never part of the Estate of C.E. Lowther.

13. The Court erred in finding as a matter of fact and concluding as a matter of law (if it did so) that the Defendant owed any fiduciary duty to the Plaintiffs with respect to the "3+ acres", inasmuch as said parcel was never a part of the Estate of C. E. Lowther there was no basis for finding a fiduciary duty with respect to this parcel of property.

14. The Court erred in allowing into evidence parol evidence and testimony to contradict the terms of the Note, Deed and Mortgage where these documents were not ambiguous, in violation of the parol evidence rule.

15. The Court erred in allowing parol evidence and testimony to contradict or alter the terms of the Note, Mortgage and Deed, in violation of the Statute of Frauds.

16. The Court erred in awarding attorney's fees to the Plaintiffs incurred prior to March 17, 2008 inasmuch as the Plaintiffs' request for foreclosure has been denied.

17. The Court erred in awarding attorney's fees to the Plaintiff incurred prior to March 17, 2008 where the Defendant has prevailed on the issue of whether the Plaintiffs' remedy is foreclosure or a deed in lieu of foreclosure.

18. The Court erred in failing to award attorney's fees to the Defendant where the Defendant has successfully defeated the foreclosure request by the Plaintiffs.

19. The Court erred in failing to find as a matter of fact and conclude as a matter

of law that the Plaintiffs' have failed to join in this action persons who are needed for a just adjudication, inasmuch as the mortgage upon which this lawsuit is based contains additional mortgagees, to-wit: Vivian Gene L. Tillotson, Rita Elizabeth L. Rodgers, Mark Allen Lowther, Effie Sandra L. Turpin, Clayton Clark Lowther and C. E. Lowther, Jr., where said additional mortgagees are subject to service of process, the joinder will not deprive this Court of jurisdiction, and in the absence of the above-named additional mortgagees complete relief cannot be accorded among those already parties.

20. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the above-named additional mortgagees have an interest, under the mortgage, which relates to the subject of this action and as a result they are so situated that the disposition of this action in their absence may as a practical matter impair or impede their ability to protect their interest, or may leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interests.

21. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Plaintiffs cannot proceed with this action without also joining as necessary parties their co-mortgagees.

22. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Plaintiff Carmon Lowther has instituted this action against the Defendant without any legal or factual basis, inasmuch as she is not a party to the Note or Mortgage.

23. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Plaintiff Carmon Lowther has instituted this action against this Defendant for the ulterior purpose of forcing the Defendant to pay to her money which he does not

owe her.

24. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Plaintiff Carmon Lowther has willfully abused the process of this Court by instituting this action, which is ostensibly for the foreclosure of a Mortgage, when in truth and fact she is not a party to any Mortgage, nor to any Note, and the Defendant is not indebted to her.

25. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Plaintiff Carmon Lowther has falsely and fraudulently represented that the Defendant is indebted to her in the sum of $952,000.00, that he has executed a Note in her favor, and has granted to her a Mortgage on his property, and said representations are blatantly false.

26. The Court erred in failing to find as a matter of fact and conclude as a matter of law that as a direct and proximate result of the aforesaid acts and conduct of the Plaintiff Lowther the Defendant has incurred attorney's fees for which the Plaintiff Carmon Lowther is responsible.

27. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Plaintiff Mitchell S. Lowther has instituted this process with the ulterior motive of forcing the Defendant to pay to him funds to which he is not entitled.

28. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Plaintiff, Mitchell S. Lowther, has instituted this action ostensibly for the foreclosure of a Mortgage, with actual knowledge that the sole remedy available to him in the event of default is an alternative remedy, in lieu of foreclosure, with which the Defendant has already complied.

29. The Court erred in failing to find as a matter of fact and conclude as matter of law that as a direct and proximate result of the Plaintiffs' abuse of process, this Defendant has incurred damages, including the cost and attorneys fees incurred in the defense of this action.

30. The Court erred in failing to find as a matter of fact and conclude as a matter of law that each of the Plaintiffs have acted maliciously in instituting this action against the Defendant.

31. That the Court erred in failing to find as a matter of fact and conclude as a matter of law that the Plaintiffs lack probable cause to initiate this action against the Defendant.

32. That the Court erred in failing to find as a matter of fact conclude as a matter of law that each of the Plaintiffs has actual knowledge of the terms of the Note, to which the Plaintiff Carmon Lowther is not even a party, and pursuant to said terms, the Plaintiff Mitchell Lowther has accepted remedies in the event of default in lieu of foreclosure, and has maliciously instituted this action, contrary to the direct terms of his agreement, seeking a foreclosure to which he knows or should know he is not entitled.

33. That the Court erred in failing to find as a matter of fact and conclude as a matter of law that as a direct and proximate result of the malicious actions of the Plaintiffs, the Defendant has suffered injuries and damages in that he has been forced to defend this action, he has incurred costs and attorneys' fees, his credit has been damaged, all to his great detriment and damage.

34. That the Court erred in failing to find as a matter of fact and conclude as a matter of law that by virtue of the Lis Pendens and the Complaint the Plaintiffs have

published, with malice, false statements that are derogatory to the Defendant's claim of title, which has directly and proximately resulted in damage to the Defendant.

35. That the Court erred in failing to find as a matter of fact and conclude as a matter of law that the Plaintiffs have falsely, fraudulently and maliciously alleged that the 3.84 parcel of real estate owned by the Defendant and conveyed to him by the Plaintiffs pursuant to the Deed attached to the Complaint is encumbered by the Mortgage, when in truth and fact, the Plaintiffs are aware, pursuant to the express terms of the Mortgage, said parcel is excluded from the Mortgage, which is plain on the face of the Mortgage attached to the Complaint.

36. The Court erred in failing to find to find as a matter of fact and conclude as a matter of law that as a direct and proximate result of the Plaintiffs' wrongful acts and conduct the Defendant has had to defend his title, thereby incurring costs and attorneys' fees, and he has been deprived of full use and benefit of his property.

MOSS, KUHN & FLEMING, P.A.

By:_____

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(843)524-1302 (FX)

Attorney for the Defendant

Beaufort, South Carolina
July 31, 2009

CERTIFICATE OF SERVICE

Undersigned certifies that the **Motion to Reconsider and for Other Relief (Rule 59(a) and (e), SCRCP)**, 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:

The Honorable Margaret Bostick
Clerk of Court for Jasper County
Post Office 248
Ridgeland, South Carolina 29936

The Honorable Darrell Thomas Johnson, Jr.
Post Office Box 1125
Hardeeville, South Carolina 29927

R. Thayer Rivers, Esquire
Post Office Box 668
Ridgeland, South Carolina 29936

FILED
2009 AUG -3 AM 9:52
MARGARET BOSTICK
CLERK OF COURT
JASPER COUNTY SC

in a post office or official depository under the exclusive care and custody of the United States Postal Service, on July 31, 2009

By: Sue Radford
Sue Radford
Secretary for H. Fred Kuhn, Jr.

EXHIBIT E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF JASPER	)	CASE NUMBER: 08-CP-27-547
MITCHELL S. LOWTHER and CARMEN B. LOWTHER,	)	
Plaintiffs,	)	
v.	)	**RULE 59(e) MOTION FOR RECONSIDERATION**
E. LEGRAND LOWTHER,	)	
Defendant.	)	

FILED
2009 AUG -7 PM 2:10
MARGARET BUSTICK
CLERK OF COURT
JASPER COUNTY SC

TO: H. FRED KUHN, ESQUIRE

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs MITCHELL S. LOWTHER and CARMEN B. LOWTHER, will move before the Honorable Darrell Thomas Johnson, Jr., Special Referee with Finality, on the tenth day after the service hereof or as soon thereafter as this matter may be heard, for a hearing on our Motion, pursuant to Rule 59(e), to reconsider the Order dated July 24, 2009. The perceived error being that the Special Master apparently has confused the Deed in lieu of foreclosure that was proffered in the matter of the Wellington foreclosure. In the instant case, the Defendant refused to re-convey the premises and after a circuit hearing the only solution was for the Plaintiffs to prosecute fully a mortgage foreclosure on the 3.84 acres.

LAW OFFICE OF R. THAYER RIVERS, JR.

R. Thayer Rivers

R. THAYER RIVERS, JR.
Post Office Box 668
Ridgeland, South Carolina 29936
843-726-8136

8-7-09

EXHIBIT F

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER) C/A NO.: 2008-CP-27-547
)
MITCHELL S. LOWTHER and)
CARMON B. LOWTHER.)
)
Plaintiff,)
vs) ORDER
) DENYING DEFENDANT'S
E. LEGRAND LOWTHER,) RULE 59 MOTION
)
Defendant)

FILED
2009 OCT 21 PM 2:20
MARGARET BROWN
CLERK OF COURT
JASPER COUNTY SC

Defendant's erudite Rule 59 Motion is respectfully denied. The reference to obedient sons was mere dicta, and perhaps by way of "apology" for having to rule against one side or the other.

The balance of the Motion relates to the form of relief. Plaintiff's attorneys' famous case of Jones vs Bennett was later codified in Rule 54(c). The Court is not limited to the Plaintiff's perceived entitlement, but may grant such relief as required by the facts and the law.

22.09

Darrell Thomas Johnson, Jr., Special Referee

October 14, 2009

EXHIBIT G

The South Carolina Court of Appeals

Mitchell S. Lowther and Carmon B. Lowther — Respondents,

v.

E. Legrand Lowther, — Appellant.

Darrell Thomas Johnson, Special Referee
Jasper County
Trial Court Case No. 2008-CP-27-547

ORDER

PER CURIAM: Appellant E. Legrand Lowther appeals the order of the special referee finding that the deed from Respondent Carmon B. Lowther to Appellant was void due to a total failure of consideration and restoring title to the property to Carmon Lowther. Both Appellant and Respondents filed post trial motions pursuant to Rule 59(e), SCRCP. On October 14, 2009, the special referee issued an order denying Appellant's Rule 59(e), SCRCP motion. Respondents' brief indicates that their Rule 59(e), SCRCP motion was never addressed by the court, nor does the record demonstrate any ruling by the court on Respondents' motion. Based upon our finding that the Rule 59(e), SCRCP motion filed by the Respondents on August 7, 2009, was permissible and was timely, we dismiss the appeal without prejudice as being premature, and remand the matter to the special referee for consideration of Respondents' outstanding motion. See Rule 203(b)(1), SCACR ("When a timely motion . . . to alter or amend

the judgment. . . has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."); Rule 59(f), SCRCP ("The time for appeal for all parties shall be stayed by a timely [Rule 59(e), SCRCP motion] and shall run from the receipt of written notice of entry of the order granting or denying such motions."); S.C. Code Ann. § 14-3-330(1) (1977) (stating "no appeal [may] be taken until final judgment is entered"); Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) ("As a general rule, only final judgments are appealable . . . . Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final.") (internal citation omitted); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) ("There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.").

Thomas E. Huff, J.

Paul G. Short, Jr., Short, J.

D. Pieper, Pieper, J.

Columbia, South Carolina

cc: H. Fred Kuhn, Jr., Esquire
R. Thayers River, Jr., Esquire

FILED
April 11, 2011

EXHIBIT H

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

MITCHELL S. LOWTHER and
CARMON B. LOWTHER.

Plaintiff,

vs

E. LEGRAND LOWTHER,

Defendant

IN THE COURT OF COMMON PLEAS
C/A NO.: 2008-CP-27-547

ORDER DENYING
ALL RULE 59 MOTIONS

This matter is before me on Order for Rule 59 Motions filed by both parties.

Any and all Rule 59 Motions are denied. I have considered all issues, and my prior Order represents my best efforts to do equity and apply the law.

Darrell Thomas Johnson, Jr.
Special Referee

6.23-11

Dated: June 15, 2011.

EXHIBIT I

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF JASPER	)	CASE NUMBER: 08-CP-27- 547
	)	
MITCHELL S. LOWTHER and CARMEN B. LOWTHER,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**REPORT OF SPECIAL REFEREE**
	)	
E. LEGRAND LOWTHER,	)	
	)	
Defendant.	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
5-23-10 COUNTY OF JASPER	)	CASE NUMBER: 08-CP-27- 151
	)	
C. E. LOWTHER, JR., CLAYTON CLARK LOWTHER, MITCHELL S. LOWTHER AND EFFIE SANDRA TURPIN,	)	
	)	
Plaintiffs,	)	**REPORT OF SPECIAL REFEREE**
	)	
v.	)	
	)	
E. LEGRAND LOWTHER,	)	
	)	
Defendant.	)	

2010 MAR 19 AM 11:04
MARGARET BOLLICK
CLERK OF COURT
JASPER COUNTY SC

This is the second matter referred to me by the Honorable Carmen T. Mullen to hear as Special Master and issue a final Order. An initial hearing was held on April 29, 2009. We were unable to finish everything at that time and a further hearing was held on May 11, 2009. Present at the hearing were Clayton Clark Lowther, Mitchell S. Lowther and Effie Sandra Turpin together with their attorney, R. Thayer Rivers, Jr. Also present was E. LeGrand Lowther together with his attorney, H. Fred Kuhn, Jr.

The Complaint of the Plaintiffs allege that they deeded certain properties in both Beaufort and Jasper Counties to the Defendant E. LeGrand Lowther and C. E. Lowther, Jr., Clayton Clark Lowther and Effie Sandra Turpin received Notes and Mortgages in the amount of $252,000.00 and the Plaintiff Mitchell Lowther received a Note and Mortgage in the amount of $952,000.00. These were dated December 20, 2005 with a due date of December 31, 2006. As of December 31, 2006, the Notes had not been paid and the Defendant had not turned over the deeds to the Plaintiffs. The lawsuit in question was apparently drafted March 7, 2008, filed on March 10, 2008, and served on E. LeGrand Lowther who by and through his attorney, H. Fred Kuhn, Jr., proffered the deeds along with a mortgage satisfaction on March 17, 2008. The issues in front of me are as follows:

1. The return of deeds to the Wellington premises to the various parties.

2. An accounting of all funds and profits derived from the Echo Tango property located on the Chechessee River in Beaufort County.

3. Determining other properties not listed in the Lis Pendens that are to be returned to the Plaintiffs as part of this action.

4. Determining the sums owed to the parties as part and parcel of Wellington, Echo Tango and business loans and advances (as opposed from personal loans) by and between the parties.

5. A determination of the appropriateness, if at all, of attorney fees in favor of the Plaintiffs.

To the Summons and Complaint the Defendant through his attorney, proffered the deeds. I will take this as a General Denial of the allegations of the Complaint. The issue of the 40 acre transaction by and between the parties and certain specific complaints about the handling of the Estate of E. LeGrand Lowther and Mark Allen Lowther as Personal Representatives of the Estate of Eugene Lowther, Sr. are before the Probate Court for Beaufort County and are not being heard by me.

WELLINGTON PROPERTY. The title to Wellington, as well as the Echo Tango property, apparently has passed back and forth between Mitchell S. Lowther, E. LeGrand Lowther and C. E. Lowther, Sr., on several occasions. As of the date of C. E. Lowther, Sr.'s death, his one-half undivided interest in Echo Tango was held by E. LeGrand Lowther, but the ownership by Mr. Lowther, Sr., was recognized by all. At the time of the death of Mr. Lowther in June of 2004, the title to Wellington was C. E. Lowther, Sr., now the Estate of C. E. Lowther, Sr., (25%), Mitchell S. Lowther (25%), and E. LeGrand Lowther (50%). As far as the Echo Tango properties go, each of the Lowther siblings (four of whom are parties to this action) owned one-seventh of fifty percent of the Echo Tango property or 7.14%. As to the Wellington property, the Plaintiff Mitchell S. Lowther owned twenty-five percent plus one-seventh of twenty-five percent or 3.571 percent bring his total to 28.571 percent. The other siblings (Clark Lowther, C. E. Lowther, Jr., and Sandra Turpin) own 3.571 percent each of the Wellington property. From the Mims accounting and the Tedder spreadsheet (Plaintiff's Exhibit 12 and Plaintiff's Exhibit 2 of the May 11, 2009, hearing) it appears that the total of the net proceeds of the Wellington sales are

Reid Sanders	$ 31,168.00
Lance Sanders	$ 30,631.94
Barrientos	$ 21,185.04
John Henry Lowther	$ 50,000.00
	$ 132,984.98

I realize there is a dispute by the parties as to the value of the John Henry Lowther lot. John Henry Lowther is the son of the Defendant E. LeGrand Lowther and during the time E. LeGrand Lowther owned this property, he deeded it as a gift to his son John Henry Lowther. An appraisal was done by Randy Waite, a local appraiser, with whose work I am familiar, and it appraised at $67,500.00. LeGrand Lowther testified that in his opinion that it is worth less than

that because he tried to sell and could not get an offer of anything near that. He further stated that instead of the lot being .9 acres as shown on the appraisal, it was actually only three-fourths of an acre. I note that on Mr. Waite's three comparables, two of them were three-quarter acre lots and all three comparable sales were located in Wellington. In any event, having reviewed both the Waite appraisal and Mr. Lowther's testimony, I note that Mr. Waite as a more neutral professional, who does have substantial evidence to back his valuation of the property. Of this amount, the Plaintiffs would be entitled to 82.1 percent (14.286 x 4 {their share of the Estate of C.E. Lowther} and the 25% of the share of Mitchell S. Lowther). I am puzzled by the lack of a mortgage release, which would have involved an agreed upon figure. I doubt that the Aunts and Uncles would have driven a hard bargain at that time. Out of an abundance of caution, I attribute a value of $50,000.00 to this lot.

AgSouth payment reimbursements: This matter also comes from a loan to AgSouth (formerly known as the Federal Land Bank) that was in the name of E. LeGrand Lowther but was historically paid by Mitchell S. Lowther, E. LeGrand Lowther and C. E. Lowther, Sr., who at some point during the '90s comprised a business called C. E. Lowther and Sons and the accounting apparently came from rebates from a lender that were generated by sales of land and timber that were owned by the parties and comprising Wellington Plantation. As mentioned above, the parties owned the property in various percentages, i.e., 50% to E. LeGrand Lowther, 25% to C. E. Lowther, Sr., and 25% to Mitchell S. Lowther. It appears that the payments have been made one-third each, and I use that formula as its basis. It appears that based on the Tedder spreadsheet, which has been represented to me as being more or less accurate (save the question of capital costs on Echo Tango and the John Henry lot), that the combination of the Estate of C. E. Lowther and Mitchell S. Lowther are owed $9,087.12 as their share of the AgSouth rebates which apparently have all been received by E. LeGrand Lowther.

Mims accounting: There is further in the record an agreed upon accounting by David Mims, a CPA from Beaufort, who determined in regard to various matters with the Estate involving lot sales and other transactions with E. LeGrand Lowther as Personal Representative that there is a figure of $21,157.97 owed by E. LeGrand Lowther to the Estate.

There is a further issue of the Sauls funeral bill having been double claimed by E. LeGrand Lowther. While Exhibits 4 and 13 from the second hearing held on May 11, 2009, seem to indicate that E. LeGrand Lowther may have been paid twice, this is a matter for the Probate Court, and I would not presume to rule on it while the Probate is still ongoing.

Closings costs and closing on December 28, 2005: The contract by and between the parties over the sale of these various properties, which is Defendant's Exhibit 1, pages 4 – 29, was for each to get $75,000.00 at closing and that Mitchell S. Lowther was to get a note of $950,000.00, Effie Sandra Turpin, Clayton Clark Lowther, and C. E. Lowther, Jr., were to get Notes in the amount of $250,000.00. Mr. Kuhn has again ably and forcefully argued that I should be bound by the terms and conditions of the closing statement which shows E. LeGrand Lowther paying all the closing costs (some $14,000.00) by himself. I do not consider a closing statement to be a document to which the parol evidence rule applies. Furthermore, there is an ambiguity created by the contract which calls for Notes of $250,000.00 and $950,000.00, and the actual Notes which show that the figures were $252,000.00 and $952,000.00. It was presented from several witnesses that the difference was that each of the siblings advanced $2,000.00 to Mr. Lowther to pay the buyer's closing costs. While it has been again ably argued by Mr. Kuhn that they got repaid in the form of getting a Note for $2,000.00, this does not pursuade me. The Note wasn't paid and the only remedy for his default is return of the property. This would have, and did have, the effect of depriving each of them of $2,000.00 of their down payment. Based

on the foregoing I have determined that each of the four Plaintiffs is entitled to $2,000.00. ($8,000.00)

I have further determined that the Lowther children (Mitchell S. Lowther 28.571%, Effie Sandra Turpin, Clark Clayton Lowther and C. E. Lowther, 3.571% each) are entitled to have a deed from this Court conveying to them their percentage interest in the Haydon repossessed property as well as the remaining unsold lot (Lot 12) that was deeded from Mitchell to LeGrand which has not been sold out. The Haydon lot was sold prior to the contract and foreclosed afterward, in the name of E. LeGrand Lowther. If E. LeGrand Lowther was the property party to regain title, his interest came from the defaulted purchase. If E. LeGrand Lowther was not the proper party to regain title, equity deems done what ought to be done.

Echo Tango: E. LeGrand Lowther and the Estate of C. E. Lowther, Sr. own some six lots on the Chechessee River in Beaufort County known as Echo Tango Plantation. These were held solely in the name of E. LeGrand Lowther but it was always recognized that C. E. Lowther, Sr., owned a one-half undivided interest in the premises. There are in the record several different versions of an accounting of the Echo Tango monies. While I am sure they were done in good faith, there are in fact a few discrepancies in each version. The first one is called Echo-Tango Draft Interim Accounting. It shows total lot sales from all sources of $889,606.71. The testimony shows this is incorrect. There was a 1997 deposit of $20,000.00 paid by Mr. Colburg which is not reflected on that. E. LeGrand Lowther testified that he and his father took that money and spent it on other things, but it is in fact a receipt of monies for Echo Tango that it is not in the accounting. I also have some confusion about some of the deductions claimed. As an example, there is a 1998 payment to Richard Kesselring, a local surveyor, in the amount of $5,270.00 and there is also a payment to Beaufort Jasper Water and Sewer Authority for

$16,680.00. There was also mention made of some $4,000.00 paid to an engineer for initial engineering work. These total slightly less than $25,000.00 and the testimony was by Mitchell Lowther that he had borrowed that money from First National Bank to cover those amounts. E. LeGrand Lowther testified that he at some point had taken over that note. This leads to the second problem with the accounting. The original First National Bank Note which both Mitchell S. Lowther and E. LeGrand Lowther admitted was in existence and was a source of the money to pay the Kesselring bill, the sewer bill and the engineering work, has been subsumed by a note of some $35,000.00 also to First National Bank. E. LeGrand Lowther could not produce any receipts of what these tax deductible expenses were. He likewise could not remember a single expenditure of the $35,000.00. I have to infer that the $35,000.00 First National Bank Note included in it the original $25,000.00 that was borrowed from First National Bank to pay the above mentioned expenses. For that reason, I deduct $25,000.00 from the claimed expenses on the accounting.

Cost of Capital: It has also been presented to me, which I accepted into evidence, a calculation by E. LeGrand Lowther of what his cost of capital was for this project. While the Tedder spreadsheet shows this is approximately $40,000.00, Mr. Lowther has revised it, and asserts some $95,000.00. I have struggled with the doctrine of merger, and made several false starts. I have, however, resolved that the agreement as to expenses survives the closing and the reconveyance. It seems ludicrous to me to suggest that a defaulting mortgagor is entitled to interest from the mortgagee. I hold that any implied right to capital cost or interest merged with the conveyance, and would be extinguished through the date of the reconveyance. I make no ruling as to any claim which might arise subsequent to the Plaintiffs being fully restored to the status quo ante.

Remedy: I am somewhat troubled as to the remedy on the escrow balance and otherwise. E. LeGrand Lowther has made it very clear from his testimony that he intends to put no further funds into finishing the development of the other four lots at Echo Tango. He further has not listed them for sale, and apparently has not even determined a sales price if a willing buyer sought to buy one of the lots. He has likewise indicated the same in regard to Wellington, i.e., that he is not going to put any further money into developing the other lots for sale until some distant point in the future, and the lots that are there are not listed with any realtor, nor is there any apparent effort to sell those lots. This is of special concern in regard to Echo Tango, as there is apparently ample money sitting in escrow to finish those lots for sale.

This is a classic example of an impasse. I have the general equitable authority to effectuate a remedy, but no one has sought a partition, in kind or by sale, to end this impasse. As Mr. Lowther has indicated no desire to expend any further funds from Echo Tango, I see no reason not to order the escrow agent to disburse the escrow. Four-sevenths of one-half of this balance (the Estate of C. E. Lowther owns 50%, the Plaintiffs are four of the seven children) belongs to the Plaintiffs, Mitchell S. Lowther, Effie Sandra Lowther, Clayton Clark Lowther and C. E. Lowther, Jr. This is $45,805.57. The balance shall be applied as a credit to any judgment rendered herein.

Attorney fees: As noted in the prior order, the Contract between the parties provides for attorney fees, the Mortgage between the parties provides for attorney fees, the Note which certainly covers Echo Tango even if there is no mortgage on it, also provides for attorney fees. Again, as noted in the prior Order, the Note by its own terms when into default on December 31, 2006. As of December 31, 2007, nothing had been done. Only when the parties sought legal counsel who in turn made a formal demand for the return of the deeds and an accounting, and in turn filed suit and served the Defendant, did the Defendant proffer the deeds, but not an

accounting. I think it is both appropriate and the law that they are entitled to recover attorney fees against the Defendant E. LeGrand Lowther, LMITED TO THE TIME AFTER DEFAULT AND PRIOR TO THE DELIVERY OF THE DEED. I find that the accounting and other matters are governed by the "American Rule" by which each party bears their own attorney fees. Mr. Rivers, attorney for the Plaintiffs, within ten days shall present affidavits as to the amount and value of such services.

Based upon the foregoing, it is hereby ordered as follows:

1. That the Plaintiffs are granted judgment against the Defendant E. LeGrand Lowther in the amounts aforesaid.

2. The issue of attorney fees will be held in abeyance pending documents to be furnished by attorney Rivers and supplemental order will be issued.

3. It appears that an appropriate fee for the Special Referee should be $4,000.00 and should be borne equally by the parties.

4. That should the parties not agree upon the mathematical computations aforesaid, I retain jurisdiction to clarify same.

IT IS SO ORDERED.

DARRELL THOMAS JOHNSON, JR.
Special Referee with Finality

March 15, 2010.

EXHIBIT J

IN THE STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MITCHELL S. LOWTHER and CARMEN B. LOWTHER,

Plaintiffs,

vs.

E. LEGRAND LOWTHER,

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2008-CP-27-547

IN THE STATE OF SOUTH CAROLINA

COUNTY OF JASPER

C. E. LOWTHER, JR., CLAYTON CLARK LOWTHER, MITCHELL S. LOWTHER and EFFIE SANDRA TURPIN,

Plaintiffs,

v.

E. LEGRAND LOWTHER,

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2008-CP-27-151 (sic,08-CP-27-150)

IN THE STATE OF SOUTH CAROLINA COUNTY OF JASPER C. E. LOWTHER, JR., CLAYTON CLARK LOWTHER, MITCHELL S. LOWTHER and EFFIE SANDRA TURPIN, Plaintiffs, v.	IN THE COURT OF COMMON PLEAS CASE NO. 2008-CP-07-151
E. LEGRAND LOWTHER, Defendant.	

NOTICE OF MOTION AND MOTION TO RECONSIDER, ALTER OR AMEND JUDGMENT OR FOR A NEW TRIAL (RULE 59, SCRCP)

TO: R. THAYER RIVERS, ESQUIRE, ATTORNEY FOR THE PLAINTIFFS:

PLEASE TAKE NOTICE that the Defendant, E. Legrand Lowther, through his undersigned attorneys, hereby moves before the Honorable Darrell T. Johnson, Special Referee, pursuant to Rule 59 of the South Carolina Rules of Civil Procedure for an Order reconsidering, altering or amending that Report of Special Referee dated March 15, 2010 and filed on March 18, 2010, or alternatively for a new trial, on the following grounds:

1. The Court erred in failing to give the Defendant credit for payments he made on the AgSouth Loan. Prior to his death, C. E. Lowther, Sr., along with the Defendant Legrand Lowther and the Plaintiff Mitchell Lowther borrowed money for their business. The parties have referred to this loan as the AgSouth loan. Mr. Lowther, Sr., Legrand Lowther, and Mitchell Lowther are jointly responsible for this loan, and between them they are each

responsible for one-third of the loan payment. When Mr. Lowther, Sr. died, this loan was still outstanding. This loan is payable in quarterly installments. The Defendant Legrand Lowther has made payments, since the death of C. E. Lowther, Sr., towards this loan totaling $13,310.28. This AgSouth loan was acquired through the membership of Legrand Lowther in AgSouth. The Special Referee should have found that, with respect to this loan, Legrand Lowther owed $4,436.76, but paid $13,310.21, and accordingly is owed $8,873.45 from Mitchell and the Estate. Mitchell Lowther owed $5,070.58 on this loan (his one-third plus his one-seventh of one-third owed through the Estate), he paid nothing towards the payments, and accordingly he owes $5,070.58. The Plaintiff C. E. Lowther, Jr., Clayton Clark Lowther and Effie Sandra Turpin each owe $633.82 (their one-seventh of one-third share) they each paid nothing, and they accordingly each still owe $633.82 to the Defendant with respect to this loan.

2. The Court erred in finding as a matter of fact and concluding as a matter of law that the combination of the Estate of C. E. Lowther and Mitchell S. Lowther are owed $9,087.12 as their share of the AgSouth rebates where this finding is not supported by the greater weight or preponderance of the evidence and there is no evidence that Legrand Lowther agreed to give, gift, or share any funds received by him as a result of his membership in or investment in AgSouth.

3. The Court erred in finding as a matter of fact and concluding as a matter of law that Legrand Lowther owed $21,157.97 to the Estate of C. E. Lowther, where this finding is apparently based upon the accounting performed by David Mims, which shows that the Estate should have $21,157.97 in the Estate checking account, so that Legrand Lowther would actually owe whatever difference is between $21,157.97 and what the

balance is in the Estate checking account.

4. The Special Referee erred in finding that C. E. Lowther, Sr. owned, or that any beneficiary of the Estate of C. E. Lowther owned, an ownership interest in the Echo Tango property. The evidence in this case shows that the Defendant Legrand Lowther and C. E. Lowther, Sr. entered into a development agreement whereby Legrand Lowther owned by the Echo Tango Subdivision, and C. E. Lowther, Sr., pursuant to a contract entered into between the two of them, surrendered any ownership rights that he had, and following the death of C. E. Lowther, Sr., the Defendant and the Plaintiffs entered into a contractual agreement whereby the Plaintiffs surrendered any ownership rights or equitable interest which they may have inherited from their father pursuant to quit-claim deeds and, upon default, acquired certain rights to share in the "net profits", received from the Echo Tango Subdivision pursuant to a formula and agreement expressly set forth in writing in the Notes signed by each of them.

5. The Special Referee erred in finding as a matter of fact and concluding as a matter of law that a closing statement is not a document to which the parol evidence rule applies.

6. The Special Referee erred in finding as a matter of fact that there is any ambiguity created by a contract that calls for Notes of $250,000.00 and $950,000.00, and the actual Notes which were subsequently signed by each of the Plaintiffs for $252,000.00 and $952,000.00. The evidence in this case shows that all the parties agreed that $2,000.00 of the consideration being paid in connection with the subject transactions was moved from cash up front to seller financing so that the Defendant would have sufficient cash available to him to pay the closing costs being incurred.

7. The Special Referee erred in finding as a matter of fact and concluding as a matter of law that Legrand Lowther owed $2,000.00 to each of the Plaintiffs, where it is clear from the documents in this written, real estate transaction, that each of the Plaintiffs agreed to reduce the price that was being paid for the 40 acre parcel of land by $2,000.00 each, and to increase the price that was being paid for the Wellington Plantation property, which was 100% seller financed, and there was no agreement that this $2,000.00 would be owed over and above the other remedies available to the Plaintiffs expressly set forth in the written documents, in the event of default.

8. The Court erred in finding as a matter of fact and concluding as a matter of law that the Plaintiffs are entitled to have a deed conveying to them any interest in the Haydon repossessed property where this finding is unsupported by the evidence, is contrary to the greater weight or preponderance of the evidence, and is beyond the scope of the pleadings. The evidence in this case shows that the Haydon property was purchased by E. Legrand Lowther, individually, for the sum of $25,000.00 as a result of being the successful bidder at a mortgage foreclosure sale.

9. The Court erred in finding as a matter of fact and concluding as a matter of law that the Plaintiffs are entitled to have a deed conveying to them an interest in Lot 12 which was deeded from Mitchell to Legrand Lowther inasmuch as this finding is contrary to the greater weight or preponderance of the evidence and beyond the scope of the pleadings.

10. The Court erred in finding as a matter of fact and concluding as a matter of law that the Estate of C. E. Lowther owned or owns any interest in the Echo Tango lots. Echo Tango was owned 100% by the Defendant at the time of the death of C. E. Lowther,

Sr. Legrand Lowther and C. E. Lowther, Sr. had entered into a loose development agreement regarding Echo Tango. After the death of C. E. Lowther, Jr. a new contract was entered into between Legrand Lowther and each of the beneficiaries of the Estate of C. E. Lowther and the only interest which these beneficiaries have in the Echo Tango development is governed by the terms of their agreement, which is set forth in writing in the Contracts (Notes) signed by each of them.

11. The Court erred in finding as a matter of fact and concluding as a matter of law that it was always recognized that C. E. Lowther, Sr. owned a one-half interest in the Echo Tango Subdivision. The interest of C. E. Lowther, Sr. in the Echo Tango Subdivision was an equitable interest governed by the written agreement between Legrand Lowther and C. E. Lowther, Sr. and this agreement was re-negotiated between the Plaintiffs and the Defendant following the death of C. E. Lowther, Sr. as evidenced by the written Contracts (Notes) executed by the parties.

12. The Court erred in finding as a matter of fact that there was a 1997 deposit of $20,000.00 paid by Mr. Colberg (sig Kohlberg) which is not reflected on the Echo Tango Draft Interim Accounting, where this finding is not supported by and is contrary to the greater weight or preponderance of the evidence. The aforesaid Draft Interim Accounting shows that $92,135.06 was received from Mr Kohlberg as the total amount from the sale of the Echo Tango lot and, additionally, another $54,625.00 was received from Mr. Kohlberg as a contribution towards the sewer expenses. There is no evidence to suggest that the $20,000.00 down payment received on Mr. Kohlberg is not reflected in the Accounting.

13. The Court erred in finding as a matter of fact and concluding as a matter of

law that $25,000.00 should be deducted from the Echo Tango expenses shown on the Echo Tango Draft Interim Accounting where this finding is not supported by the greater weight or preponderance of the evidence. The Court's finding is based upon the "inference" that the $35,000.00 First National Bank Note included in it the original $25,000.00 that was borrowed from First National Bank to pay certain expenses, and this inference is likewise not supported by or is contrary to the greater weight or preponderance of the evidence, which is that $25,000.00 was borrowed to pay some of the aforesaid expenses, but that the $35,000.00 Note is an entirely separate, distinct Note.

14. The Court erred in finding as a matter of fact and concluding as a matter of law that Legrand Lowther was not entitled to reimburse any of his "cost of capital" or interest expense or lost interest expense for monies advanced in the development of Echo Tango. In so holding, the Court confused the $500,696.05 which Legrand Lowther spent in developing the Echo Tango Subdivision with the Mortgage given by Legrand Lowther to the Plaintiffs on the Wellington Plantation property.

15. The Court erred in failing to give Legrand Lowther interest on these funds advanced to the development of Echo Tango at the pre-judgment rate of 8 3/4% per annum.

16. The Court erred in finding as a matter of fact that Legrand Lowther would put no further funds into developing the Echo Tango Subdivision where this finding is not supported by the greater weight or preponderance of the evidence.

17. The Court erred in finding that Legrand Lowther is not interested in selling the lots in the Echo Tango Subdivision where this finding is against the greater weight or preponderance of the evidence.

18. The Court erred in finding that Legrand Lowther is not interested in selling any lots in Wellington Plantation where this finding is not supported by the greater weight or preponderance of the evidence.

19. The Court erred in finding that there is ample money sitting in escrow to finish the development of the Echo Tango lots where this finding is not supported by the greater weight or preponderance of the evidence.

20. The Court erred in ordering funds from an escrow account to be disbursed to the Plaintiffs where this finding is not supported by the greater weight or preponderance of the evidence.

21. The Court erred in finding as a matter of fact and concluding as a matter of law that attorney's fees are owed by the Defendant to the Plaintiffs where there is no basis for the award of attorney's fees in this case and this finding is not supported by the greater weight or preponderance of the evidence.

22. The Court erred in finding as a matter of fact that no accounting was proffered by the Defendant to the Plaintiffs where this finding is not supported by the greater weight or preponderance of the evidence.

23. The Court erred in determining that the Plaintiffs have an ownership interest in the funds sitting in an escrow account where this finding is not supported by the greater weight or preponderance of the evidence.

24. The Court erred in finding as matter of fact and concluding as a matter of law that the Plaintiffs are owed or entitled to $45,805.57 out of an escrow account where this finding is not supported by the greater weight or preponderance of the evidence.

25. The Court erred in finding as a matter of fact and concluding as a matter of

law that each of the Plaintiffs is entitled to one-seventh of one-half of the balance sitting in an escrow account where this finding is not supported by the greater weight or preponderance of the evidence.

26. The Court erred in finding as a matter of fact and concluding as a matter of law that the Plaintiffs are entitled to a disbursement of any funds received from the sale of any lot in Echo Tango Subdivision at this time, where there are no net proceeds in existence in accordance with the terms of the Contracts or Notes signed by the Plaintiffs.

27. The Court erred in finding as a matter of fact that Legrand Lowther intends to put no further effort into funding the development of the remaining four (4) lots of the Echo Tango Subdivision where this finding is not supported by the greater weight or preponderance of the evidence.

28. The Court erred in concluding that Legrand Lowther intends to put no further efforts into funding the development of the remaining lots at Wellington Plantation, where this finding is not supported by the greater weight or preponderance of the evidence.

29. The Court erred in implying that Legrand Lowther is not taking reasonable efforts to sell lots in the Echo Tango Subdivision where this finding is not supported by the greater weight or preponderance of the evidence.

30. The Court erred in finding by implication that Legrand Lowther is not taking reasonable efforts to sell lots located within Wellington Plantation, where this finding is not supported by the greater or preponderance of the evidence.

31. The Court erred in failing to apply, enforce, or recognize the agreement of the parties, as expressly set forth in the written Notes, regarding any parties' entitlement to "net proceeds" from the sale of lots in either Echo Tango or Wellington Plantation.

32. The Court erred in finding that as of December 31, 2007 nothing had been done regarding the default on the Notes where the deed in lieu of foreclosure had been tendered in March of 2007.

33. The Court has erroneously captioned its Report with Case Numbers 2008-CP-27-547 and 2008-CP-27-151, whereas the correct Case Numbers are 2008-CP-27-150 and 2008-CP-07-151.

34. The Court erred in finding as matter of fact and concluding as a matter of law that the percentage interest in unsold Lot 12 that was deeded from Mitchell to Legrand is Mitchell 28.571%, and Sandra, Clark and C.E., Jr. 3.571% each, said finding being contrary to the greater or preponderance of the evidence, which was that the Defendant, as a matter of "family honor" was willing to recognize this lot as being equitably owned one-half by his father's Estate, which would give each of the Plaintiffs a one-seventh of one-half interest, or a 7.1% interest in said unsold lot.

35. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Defendant is entitled to a credit for the advance disbursements already made by him to the Plaintiffs on the Echo Tango lot sale, consisting of $36,000.00 already advanced to the Plaintiff Mitchell, $22,000.00 already advanced to the Plaintiff Sandra, and $16,000.00 each already advanced to the Plaintiffs Clark and C. E., Jr.

36. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Defendant Legrand Lowther is entitled to be reimbursed for the $26,021.05 difference between what he has spent in developing Echo Tango ($500,696.05) and what he has been reimbursed ($474,675.00), and that this reimbursement should take place before any disbursement of "net proceeds" can be made from the sale of any Echo Tango

lots.

37. The Court erred in failing to enforce, recognize or apply the agreement of the parties as set forth in their Notes regarding the governance of the development of Echo Tango or Wellington.

The Defendant accordingly respectfully requests that the Court reconsider, alter, or amend its report to correct the foregoing errors, or alternatively, grant to the Defendant a new trial.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

By: _____

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(843)524-1302 (FX)

Attorney for the Defendant

Beaufort, South Carolina
March 31, 2010

CERTIFICATE OF SERVICE

Undersigned certifies that the Notice of Motion and Motion to Reconsider, Alter or Amend Judgment or For a New Trial (Rule 59, SCRCP) , 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:

The Honorable Darrell T. Johnson, Jr.
Special Referee
Post Office Drawer 1125
Hardeeville, South Carolina 29927

R. Thayer Rivers, Jr., Esquire
Post Office Box 668
Ridgeland, South Carolina 29936

in a post office or official depository under the exclusive care and custody of the United States Postal Service, on March 31, 2010

By: Sue Radford
Sue Radford
Secretary for H. Fred Kuhn, Jr.

EXHIBIT K

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C/A NO.: 2008-CP-27-547
COUNTY OF JASPER	)	
	)	
MITCHELL S. LOWTHER and CARMON B. LOWTHER.	)	
	)	ORDER
Plaintiff,	)	
vs	)	
	)	
E. LEGRAND LOWTHER,	)	
	)	
Defendant	)	
	)	

COPY

FILED
2012 MAR 19 PM 4:55
MARGARET BUSTIN
CLERK OF COURT
JASPER COUNTY SC

The testimony before me was that the Plaintiffs needed or wanted the money, sooner rather than later. Defendant' proposal was one-sided in favor of Defendant, but that was justified by the need of Plaintiffs to have money in the short term, even if it allowed their brother to profit in an immensely disproportionate manner.

3/22/12

I do not seek to redraw the parties' agreement, but I do seek to construe it in a way that makes some sense. Defendant's position that he had no obligation to proceed expeditiously, and no obligation to disburse funds, is clearly contrary to the intent of the contract, and clearly contrary to the implied covenant of good faith and fair dealing. Legrand had a position of trust and confidence, as the most capable and healthy member of the family. Legrand was Personal Representative of their father's estate. Legrand was something like a partner in one of the possible arrangements available under the contract. This simply was not an arm's-length transaction

Mr. Rivers' motion is primarily premised upon a proposition on which I respectfully disagree. While the matter involves a mortgage, the issues and the remedy were equitable. My

ruling is undoubtedly imperfect in this regard, but I am convinced that the bulk of his able representation falls under the American Rule wherein a party bears his own attorney fees.

As to the .15 acres, I hold that to be "de minimis non curat lex". I hold likewise as to the John Henry Lowther lot.

In regard to the accounting, both sides think my math is deficient. One or both may be correct, but I decline to change it.

Mr. Kuhn's erudite motion is also premised on a proposition with which I disagree. Mr. Kuhn's arguments are based on strict business reasoning. This is not just about words and numbers. Legrande had, not one, but several fiduciary relationship positions of trust and confidence, and implied duties of good faith and fair dealing. The least of his duties is the duty of good faith and fair dealing in the contract with his siblings. The contract was in the nature and spirit of a joint venture. I hold that Legrande had a duty to proceed competently and diligently, not at his personal whim. I note, specifically, that this arrangement preceded the current economic downturn.

Mr. Kuhn's argument #3 is denied, with the clarification that, if there is an estate account still open after eight years, he may apply it to the judgment.

Mr. Kuhn's argument #8 is denied, with the comment that it is illustrative of Legrand's misperception of the whole case. Legrande foreclosed an owner financing transaction predating his deed, and used the amount due as his bid. The idea that he should get the lot, for which he had not paid, is absurd. Again, sharp dealing on the paperwork cannot negate the various duties or obligations that existed.

The balance of Mr. Kuhn's arguments are also denied.

IT IS NOW THEREFORE ORDERED that the Rule 59 Motions of both parties are **DENIED**.

Darrell Thomas Johnson, Jr.
Special Referee

Dated: March 14, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C/A NO.: 2008-CP-27-547
COUNTY OF JASPER	)	
	)	
MITCHELL S. LOWTHER and CARMON B. LOWTHER.	)	
	)	CERTIFICATE OF SERVICE
Plaintiff,	)	
vs	)	
	)	
E. LEGRAND LOWTHER,	)	
	)	
Defendant	)	

I hereby certify that I have this 14th day of March, 2012, placed a copy of Order in the US Mail, with sufficient postage attached, and addressed to the following:

R. Thayer Rivers, Jr., Esquire
P.O. Box 668
Ridgeland, SC 29936

F. Fred Kuhn, Esquire
MOSS, KUHN & FLEMING, P.A.
P.O. Drawer 507
Beaufort, SC 29901-0507

Leanne Motes

CERTIFICATE OF SERVICE

Undersigned certifies that the **Return to Motion to Dismiss**, 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:

R. Thayer Rivers, Jr., Esquire
Attorney at Law
Post Office Box 668
Ridgeland, South Carolina 29936

in a post office or official depository under the exclusive care and custody of the United States Postal Service, on June 22, 2012.

By: Sue Radford
Sue Radford
Secretary for H. Fred Kuhn, Jr.

LAW OFFICES
MOSS, KUHN & FLEMING, P.A.

JAMES H. MOSS
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1501 North Street P.O. Drawer 507 - Beaufort, South Carolina 29901-0507
TELEPHONE 843-524-3373
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June 22, 2012

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Mitchell Lowther and Carmon B. Lowther v. E. Legrand Lowther
Case No.: 2008-CP-07-547

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Return to Motion to Dismiss and Certificate of Service regarding the above-referenced matter. I would appreciate it if you would return one (1) filed copy to me in the enclosed self-addressed stamped envelope. By copy of this letter and the enclosures, I am serving a copy of the same on R. Thayer Rivers, Jr., Esquire.

With kindest regards, I am

Very truly yours,

MOSS, KUHN & FLEMING, P.A.

H. Fred Kuhn, Jr.

HFK:sr
Enclosures