

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

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

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

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

Respondents,

vs.

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

OF WHOM E. LEGRAND LOWTHER IS

Appellant.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	iv
STATEMENT OF THE CASE.....	1
A. HISTORY OF THE PROCEEDINGS	1
B. STATEMENT OF THE FACTS.....	3
I. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW IN RESPONDENTS' FAVOR ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THE APPELLANT WAS NOT ACTING AS A FIDUCIARY IN CONNECTION WITH THE CHALLENGED TRANSACTION	16
A. BREACH OF FIDUCIARY DUTY	16
B. DISCUSSION	17
II. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW IN RESPONDENTS' FAVOR ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THE APPELLANT DID NOT PROFIT FROM THE CHALLENGED TRANSACTION	19
III. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW IN RESPONDENTS' FAVOR ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THERE IS NOT A BREACH OF ANY FIDUCIARY DUTY	22
IV. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW IN RESPONDENTS' FAVOR ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THE BREACH OF FIDUCIARY DUTY DID NOT PROXIMATELY CAUSE ANY DAMAGES	25
V. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW IN RESPONDENTS' FAVOR ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THE PLAINTIFFS RATIFIED THE TRANSACTION.	26
VI. THE COURT OF COMMON PLEAS ERRED IN FINDING AS A MATTER OF FACT THAT "ALL THE TRANSACTIONS COMPLAINED OF BY THE BENEFICIARIES OCCURRED DURING THE PROCESS OF ESTATE ADMINISTRATION" WHERE THIS FINDING IS CONTRARY TO THE FINDING BY THE PROBATE COURT AND NOT SUPPORTED BY THE EVIDENCE	28

A. STANDARD OF REVIEW	28
B. ARGUMENT	29
VII. THE CIRCUIT COURT ERRED IN FINDING AS A MATTER OF FACT THAT ON OCTOBER 12, 2005 LEGRAND ENTERED INTO A CONTRACT TO SELL THE 40 ACRE PARCEL TO INTERNATIONAL SOCIETY OF INVESTORS FOR \$810,000.00, WHERE THIS FINDING IS CONTRARY TO THE EXPRESS FINDING OF FACT MADE BY THE PROBATE COURT AND, ADDITIONALLY, IS NOT SUPPORTED BY ANY EVIDENCE.	30
VIII. THE CIRCUIT COURT ERRED IN FINDING AS A MATTER OF FACT THAT ISI AND AMBERWINDS WERE VIRTUALLY THE SAME ENTITY, WITH THE SAME INDIVIUDAL OWNERS, AND THE CLOSING PROCEEDED EXACTLY AS SCHEDULED UNDER CONTRACT WITH LEGRAND, WHERE THIS FINDING IS CONTRARY TO THE FINDINGS MADE BY THE PROBATE COURT AND IS NOT SUPPORTED BY ANY EVIDENCE.	32
IX. THE PROBATE COURT ERRED IN FINDING AS A MATTER OF FACT THAT AMBERWINDS, LLC WAS AN ASSIGNEE OF INTERNATIONAL SOCIETY OF INVESTORS, LLC WHERE THIS FINDING IS NOT SUPPORTED BY THE EVIDENCE ..	33
X. THE CIRCUIT COURT ERRED IN FINDING AS A MATTER OF FACT THAT THE ECHO TANGO REAL ESTATE WAS OWNED BY THE DECEDENT WHERE THIS FINDING IS NOT SUPPORTED BY THE EVIDENCE.	34
XI. THE CIRCUIT COURT ERRED IN RELYING UPON EXHIBITS ATTACHED TO ITS ORDER WHICH ARE NOT PART OF THE SUBSTANTIVE RECORD IN THIS CASE.	35
XII. THE CIRCUIT COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW THAT THE PROBATE COURT ERRED IN ITS CALCULATION OF DAMAGES AND IN OVERTURNING THE PROBATE COURT’S FINDING REGARDING DAMAGES, WHERE THE PROBATE COURT CORRECTLY FOUND THAT THE ECHO TANGO PROCEEDS RECEIVED BY THE RESPONDENTS WERE PAID TO THEM AS PART OF THE TRANSACTION.	35
XIII. THE PROBATE COURT AND THE CIRCUIT COURT ERRED IN GRANTING JUDGMENT AGAINST THE APPELLANT IN FAVOR OF INDIVIDUALS WHO ARE NOT PARTIES.	37
XIV. THE PROBATE COURT AND THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE DAMAGES SUFFERED BY EACH OF THE RESPONDENTS WAS EQUAL. ..	39

TABLE OF AUTHORITIES

Cases

<i>Café Associates, Ltd. v. Gerngross</i> , 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991).....	20
<i>Duckett v. Goforth</i> , 374 S.C. 446, 464-56, 649 S.E.2d 72, 81-82 (Ct. App. 2007).	39
<i>Ellie v. Miccichi</i> , 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004)	36
<i>Ellie, Inc. v. Miccichi</i> , 358 S.C. 78, 92, 594 S.E.2d 485, 492 (Ct. App. 2004)	20
<i>In Re Estate of Pallister</i> , 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005)(citations omitted)	28
<i>Klutts Resort Realty, Inc. v. Down-Round Development Corporation</i> , 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).....	20
<i>Kurschner v. City of Camden Planning Commission</i> , 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008).....	38
<i>Matter of Howard</i> , 315 S.C. 356, 360, 434 S.E.2d 254, 256-57 (1993)	30
<i>Matter of Howard</i> , 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993)(citations omitted)	28
<i>Sheffield v. Grieg</i> , 105 S.C. 219, 89 S.E. 664, 666 (1916).....	38
<i>Tisdell v. Central Savings Bank & Trust Co.</i> , 90 CO 114, 130, 6 P2d 912, 917-18 (1931) (emphasis added)	28

Statutes

S.C. Code Ann. §62-3-703(a) (2010).....	16
S.C. Code Ann. §62-3-712 (2010).....	16,17

Other Authorities

<i>Am.Jur Fraud</i> , §472 (2010) (footnotes omitted)	17
<i>Am.Jur2d, Executors and Administrators</i> , §726 (2010)	22
<i>Am.Jur2d, Fraud and Deceit</i> , §472 (2010).....	17,22
<i>CJS Contracts</i> , §172 (2010).....	27

STATEMENT OF ISSUES ON APPEAL

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XI. THE CIRCUIT COURT ERRED IN RELYING UPON EXHIBITS ATTACHED TO ITS ORDER WHICH ARE NOT PART OF THE SUBSTANTIVE RECORD IN THIS CASE.

XII. THE CIRCUIT COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW THAT THE PROBATE COURT ERRED IN ITS CALCULATION OF DAMAGES AND IN OVERTURNING THE PROBATE COURT'S FINDING REGARDING DAMAGES, WHERE THE PROBATE COURT CORRECTLY FOUND THAT THE ECHO TANGO PROCEEDS RECEIVED BY THE RESPONDENTS WERE PAID TO THEM AS PART OF THE TRANSACTION.

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STATEMENT OF THE CASE

A. HISTORY OF THE PROCEEDINGS

This is an action by three (3) of the beneficiaries of the Estate C.E. Lowther, Sr. against the Personal Representatives, alleging the breach of fiduciary duties in connection with a real estate transaction. It was commenced by the filing of a Summons and Complaint in the Beaufort County Probate Court on February 15, 2008. [ROA, pp. 68-105]. In their Complaint, the Respondents allege that the Appellant E. Legrand Lowther ("Legrand"), who is one of the Personal Representatives of the Estate of C. E. Lowther, Sr., violated his fiduciary duties owed to the estate's beneficiaries by: (1) converting and defrauding the estate's beneficiaries out of \$299,000.00 by purchasing a 40.81 acre parcel of land belonging to the estate for \$511,000.00 and then selling this land to a third party for \$810,000.00, without disclosing the pending third party sale, and (2) by converting and misappropriating estate income from timber sales.¹ The Complaint alleges causes of action for constructive trust, breach of fiduciary duty, fraud, constructive fraud, fraud in the inducement, negligent misrepresentation, conversion, and unjust enrichment. The Complaint also requests an accounting and the removal of the Personal Representatives.

On April 11, 2008, the Appellant filed his Answer to the Complaint. [ROA, pp. 106-115]. The Answer consists of a qualified general denial, and asserts the affirmative defenses of the statute of limitations and laches.

On June 23 and 26, 2009, this case was tried in the Beaufort County Probate Court before the Honorable Kenneth E. Fulp, Jr., Associate Judge of the Beaufort County Probate Court,

¹ The Special Referee ruled in favor of the Personal Representatives, including Appellant, on this cause of action involving timber sales, dismissing it. It is not involved in this appeal.

sitting without a jury. Testimony was taken from Effie Sandra L. Turpin, C.E. Lowther, Jr., Mitchell Saxon Lowther, E. Legrand Lowther, and Michael Jones.

On December 21, 2010 the Honorable Kenneth E. Fulp, Jr. issued his Order.[ROA, pp. 22-38]. In his Order, Judge Fulp rendered judgment against the Appellant Legrand for breach of fiduciary duties and awarded damages for such breach in the amount of \$69,051.15, apportioning this judgment equally among the Respondents as well as the other three (3) children and beneficiaries of the Estate of C.E. Lowther, Sr. Additionally, Judge Fulp dismissed the Complaint against the Co-Defendant and Co-Personal Representative, Mark Allen Lowther.

All parties, excluding only the Defendant Mark Allen Lowther, appealed Judge Fulp's Order to the Beaufort County Court of Common Pleas. These cross-appeals were heard by the Honorable Marvin H. Dukes, III, Special Circuit Court Judge and Master in Equity for Beaufort County, on June 28, 2011.

On November 22, 2011, Judge Dukes issued his Order on appeal, affirming in part and reversing in part the Order of the Beaufort County Probate Court. [ROA, pp. 3-21]. In his Order on appeal, Judge Dukes affirmed the Probate Court's finding that the Appellant Legrand breached his fiduciary duty, but found that the Probate Court erred by using an improper measure of damages and giving unwarranted credits, and accordingly modified and increased the judgment against the Appellant Legrand Lowther to \$289,923.65.

On December 9, 2011 the Appellant Legrand Lowther filed a motion requesting that Judge Dukes reconsider, alter, or amend his Order. [ROA, pp. 114-119].

On March 21, 2012 Judge Dukes issued his Order denying the Appellant Legrand Lowther's Motion to Reconsider, Alter or Amend the judgment. [ROA, pp. 1-2]. On April 4,

2012 the Appellant Legrand Lowther filed his Notice of Appeal to the South Carolina Court of Appeals. [roa, pp. 44-67]/

B. STATEMENT OF THE FACTS

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

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

Mr. Lowther's Last Will and Testament, which was executed on the day he died, was duly filed with the Jasper County Probate Court on June 17, 2004. [ROA, pp. 587-589]. In his Will, Mr. Lowther left the 40 acre parcel and his undivided 25% interest in the Wellington Plantation property to all of his children, in equal shares, excluding Legrand. Legrand was excluded from taking an equal share along with his brothers and sisters in his father's Estate at his own request. Legrand testified that he felt that his brothers and sisters were more in need, and Sandra, who drafted the Will, confirmed that it was Legrand's request not to be included in

his father's Estate...The Will expressly recites that it was Legrand's desire to be excluded from any inheritance.

On June 17, 2004 Legrand and Mark were appointed as Personal Representatives of the Estate, which bore Jasper County Probate Case Number 2004ES2700068. On March 8, 2007, the Honorable Joseph N. Malphrus, Jr., Jasper County Probate Court Judge, struck the case pursuant to Rule 4, South Carolina Rules of Probate Court. [ROA, pg. 43].

The Estate was subsequently transferred by Judge Malphrus to the Beaufort County Probate Court, and as a result of a hearing held on October 15, 2007 the Estate was re-opened and restored to active status, with Legrand and Mark continuing to serve as Personal Representatives.

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

Clark approached a local developer, John Tilton, about buying the 40 acre parcel. Mr. Tilton submitted an offer to buy this parcel for either \$240,000.00 or \$250,000.00. Some of the beneficiaries were in favor of accepting this offer, but others believed the offer was too low, and it was eventually refused. Mr. Tilton later orally increased his offer to \$400,000.00, but this offer was never reduced to writing and he did not pursue it.

In the meantime, Legrand contacted a realtor, Jennifer Bergman, about selling the 40 acre parcel. As a result of Mrs. Bergman's efforts, Donnie Wall on behalf of Bear Creek Partners offered \$600,000.00 to purchase the 40 acre parcel. This offer was accepted by the beneficiaries,

a contract was executed, and a closing set. Bear Creek, however, defaulted on the contract and a closing never took place.

In February or March of 2006 a developer, International Society of Investors, LLC (“ISI”) contacted Legrand about purchasing the Wellington Plantation property. One of ISI’s principals, Michael Jones, had learned about the Wellington Plantation property through his father, Howell Jones, who was a good friend of Legrand and who had worked with Legrand when Legrand served on the Jasper County Planning Commission. Legrand showed the Wellington Plantation property to Mr. Jones and his partner, Monte Perry, explaining that he owned a 50% interest in the property, and the remaining 50% was owned by his brothers and sisters. Mr. Jones and Mr. Perry explained that they would check out the property and get back with Legrand if they were interested in purchasing it. Mr. Jones explained that ISI was interested in purchasing Wellington in order to develop it into a residential subdivision, and they needed time in order to perform “due diligence,” that is, to ensure electricity, water and sewer were available and to see what density was allowable. Mr. Jones subsequently contacted the local electrical utility regarding the provision of electrical service to the property, and upon learning that there was no water or sewer available to the property, began negotiating with the nearby Town of Ridgeland regarding annexing the property into the Town in order to obtain water and sewer at a cost savings.

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

Mitchell's wife, Carmen. After the Bear Creek closing fell through, Legrand started talking to each of his brothers and sisters individually about buying these properties, and made an initial offer to each of his brothers and sisters, except Mitchell, of \$275,000.00. This offer was not acceptable to all of the brothers and sisters, and it was accordingly declined.

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

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

In the meantime, Legrand had continued his discussions with his brothers and sisters regarding purchasing their interest in the 40 acre parcel and Wellington Plantation which they had inherited from their father, and also continued discussing with Mitchell purchasing Mitchell's undivided 25% interest in Wellington Plantation and the 3.84 acre parcel from Mitchell's wife, Carmen. During the course of these discussions a fourth parcel of real estate, known as Echo Tango, was brought into play. Echo Tango is a small subdivision located in Beaufort County that Legrand had owned for many years. It originally consisted of 6 lots.

These lots are located on deep water, but they are low lying and originally did not have access to sewer. Without sewer, these lots had little to no value. In 1997, Legrand had sold one of these lots for \$110,000.00 to Mr. Kolberg on the hope that sewer would be made available. After a nearly 10 year legal battle and spending hundreds of thousands of dollars on sewer and other improvements, Legrand had succeeded in supplying sewer to these lots, and had recently sold a second lot to Mr. Malphrus for \$700,000.00. The remaining four (4) lots are comparable to the lot sold to Mr. Malphrus. While his father was alive, out of love and affection for his father, Legrand had promised his father that he would share the profits of the Echo Tango Subdivision with his father. Although the Echo Tango Subdivision was owned by Legrand individually, and was not part of their father's estate, Legrand's brothers and sisters, as part of the sale of their interest in the 40 acre parcel and Wellington Plantation, wanted Legrand to make the same promise regarding Echo Tango to them.

On October 16 and 17 Legrand delivered individual proposed contracts to each of his brothers and sisters, for their consideration in follow up to their discussions about his buying their land from them. Sandra's personal calendar reflects that she discussed the proposed sale with Legrand on October 6, and that she received the proposed contract from Legrand on October 17. [ROA, pg. 551]. None of these proposed contracts were signed by Legrand. Each of these proposed contracts, except for the contract delivered to Mitchell, was identical. The proposed contract for each brother or sister, excluding Mitchell, called for him or her to sell to Legrand his or her interest in the Wellington Plantation property, which was a 1/7th of a 25% interest, and his or her interest in the 40 acre parcel, which would have been a 1/7th interest. The proposed purchase price was \$325,000.00, payable \$500.00 as an earnest money deposit, \$74,500.00 paid at closing and the \$250,000.00 balance to be paid no later than December 31,

2006. Each proposed contract recites that this balance due would be secured by a first mortgage on the Wellington Plantation property only, and sets a closing date of no later than December 5, 2005.

The proposed contract delivered to Mitchell called for Legrand to purchase Mitchell's entire interest in the Wellington Plantation property, which was the 1/7th of a 25% interest inherited from their father as well as the 25% interest which he owned outright, Mitchell's interest in the 40 acre parcel, and also the 3.84 acre parcel owned by Carmen. On Mitchell's proposed contract, the purchase price was left blank, and none of the amounts for the earnest money, the amount paid at closing, or the balance due, were filled in. [ROA, pp. 702-704].

Each of the proposed contracts contains the following clauses:

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

CONTINGENCY. Purchaser's obligation to perform is contingent upon all owners of the conveyed property entering into agreements to sell the subject property to Purchaser upon mutually agreeable terms so that Purchaser acquires a sole, undivided interest.

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

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

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

Sandra did not immediately sign the contract, but rather retained the contract overnight in order to “pick it apart.” She explained that there were some terms set forth in the contract with which she did not agree, and there were other things that she felt needed to be added to the contract. The next day, October 18, 2005, she met with Mitchell, who had also been given a proposed contract, and together they discussed their contracts, and made some changes. Her calendar reflects that she also met with Bube and they discussed the proposed contract. [ROA, pg. 551]. Sandra made several changes on the proposed contract and then signed it and returned it to Legrand. [ROA, pp. 687-689].

Mitchell’s proposed contract was given to him by Legrand with a blank for the purchase price. Mitchell filled in a price of \$1,025,000.00 as the price he was willing to sell all of his interest in the 40 acre parcel and the Wellington Plantation property (both that 1/7th of the 25% interest inherited from his father as well as his individual 25% interest which he owned outright), as well as the 3.86 acres owned by his wife Carmen. Mitchell also wrote into the contract that the purchase price would be paid \$500.00 as earnest money, \$74,500.00 at closing, and a \$950,000.00 balance due to be paid no later than December 31, 2006. Mitchell also made several handwritten changes to the proposed contract, after which he and Carmen both signed it and returned it to Legrand. [ROA, pp. 705-707].

Eventually, all of the brothers and sisters signed the proposed contracts, with Clark, Rita and Gene, like Sandra and Mitchell, making various handwritten changes or alterations to the contract that had been proposed by Legrand. The only two (2) who did not make alternations to the proposed contract were Mark and Bube. Legrand never signed the proposed contracts tendered back to him by his brothers and sisters.

The brothers and sisters were aware that Legrand did not have the money to pay them on their proposed contracts, and that his plan was to sell, or “flip,” the properties so that he could pay them. At the time that Sandra, Mitchell, and Bube either received or delivered the proposed contracts back to Legrand, they asked Legrand if he had a contract or sale for the properties, and he accurately told them that he did not. Legrand did not volunteer any information regarding the interest previously expressed in the properties by ISI.

A few days later, Legrand received in the mail proposed unsigned contracts from ISI regarding both the 40 acre parcel and the Wellington Plantation property. Legrand reviewed these proposed contracts and was not in agreement with the proposed terms. Legrand accordingly made some substantive changes to both contracts. On the proposed contract for the 40 acres, he changed the closing date from an indefinite date to not later than January 27, 2006. The proposed contract for the Wellington property contained a blank for the purchase price, and Legrand inserted a proposed purchase price of \$5,450,000.00. He also added a clause that, in essence, required ISI to reconvey back to him three (3) lots out of Wellington Plantation. On both contracts, he shifted the responsibility for most of the closing costs from himself to ISI. The proposed contract for the Wellington Plantation property did not require payment of any of the purchase price until December 31, 2006. Both contracts from ISI referenced the sellers, in addition to Legrand, as “Mitchell Lowther, et al.” Since, by that time, Legrand had received the proposed contracts from his brothers and sisters, he struck through the reference to his brothers and sisters as sellers. [ROA,pp. 690-699].

Legrand was not entirely comfortable with either contract because, as he expressed it, neither contract had any “teeth.” Each contract contained numerous conditions precedent that, in essence, would allow ISI to walk away from closing if the property turned out not to be suitable

for ISI's intended development. Nonetheless, with no other interest in the properties being expressed, Legrand elected to assume the risk of ISI electing not to close and, after making the above noted changes, signed the contracts. He signed the contracts on October 24, 2005 and mailed them back to ISI, which was located in North Carolina.

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

During this time, the parties also discussed closing immediately on the 40 acre parcel, inasmuch as some of the brothers and sisters, particularly Sandra, Mitchell, and Bube, were in dire financial need. One of the changes to the proposed written contracts made by most of the brothers and sisters, including Sandra and Mitchell, shifted the burden of the closing costs from themselves to Legrand. Legrand, however, did not have the money to pay the closing costs. To get around this impasse, they agreed to reduce the amount of money paid up front to each brother

and sister from \$75,000.00 to \$73,000.00, and add this \$2,000.00 difference to the amount being financed, thereby freeing \$14,000.00 (7 x \$2,000) to pay closing costs.

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

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

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

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

with SCB&T on the 40 acres. Again, the topic of whether or not Legrand had a contract or a buyer was discussed and he informed them that he did not have a contract or sale.

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

On December 20 or 21, 2005, the second half of the transaction between Legrand and his brothers and sisters closed. At that time, they executed a deed to Legrand conveying all of their interest in Wellington Plantation², each brother and sister conveying the interest which they inherited from their father, and Mitchell also conveying the 25% interest which he had owned since before his father's death. [ROA, pp. 628-636]. This deed recites a consideration of \$2,464,000.00. In exchange, Legrand gave Notes to his brothers and sisters. The Note to each brother and sister, excluding Mitchell, was for \$252,000.00. Mitchell's Note was for \$952,000.00. Each Note called for a balloon payment no later than December 31, 2006. Reflecting the agreement of the parties reached during their discussions following the delivery of the proposed contracts by the brothers and sisters back to Legrand, each Note³ contains the following clause:

Borrower shall execute a General Warranty Deed conveying an undivided one-seventh of a 25% interest to Note holder in the Wellington Plantation property, a copy of which is provided with this Note. The original of this Deed shall be held in escrow by the closing attorney and shall be voided if Borrower shall pay in full the amount due the Note holder. In the event that Borrower should be in default or should fail to pay the Note holder in full when due, then said Note holder agrees to accept as his sole remedy, in lieu of foreclosure, the property conveyed to him pursuant to said Deed and said Deed shall then be delivered and recorded. In that event, said Note holder agrees to manage, develop, market, encumber, or

² Which they had received in the December 8, 2005 distribution.

³ Mitchell's Note also provides for re-conveying back to him the 25% interest that he owned prior to his father's death.

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, attorney's fees, and marketing expenses. The Note holder's "share" shall be a pro rata share equal to one-seventh of a fifty (50%) percent share, or 7.14%.

[ROA, pp. 637-658].

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

Sandra was represented in the closings by her own attorney.

Legrand's contract with ISI for the 40 acre parcel called for a closing no later than January 26, 2006. As noted earlier, Legrand was concerned about these contracts with ISI because, in his opinion, the conditions precedent were so broad and discretionary as to allow ISI to walk away from the contracts, leaving him without any recourse. When the closing deadline

of January 26, 2006 came and went without any closing, Legrand became frantic, calling Monte Perry with ISI “day and night.” He not only did not have the money to pay his brothers and sisters for the Wellington Plantation property, but he also did not have the money to pay SCB&T on the mortgage he had just taken out. As he testified, if he was unable to sell the 40 acres quickly, he would have been “bankrupt.”

Fortunately, after ISI walked away from the contract for the 40 acres, Legrand was able to negotiate a sale of the 40 acres to another developer, Amberwinds, LLC, for the same price. The 40 acres was sold by Legrand to Amberwinds on February 17, 2006 for \$810,000.00. [ROA, pp. 583-585]. In connection with the closing Legrand received a credit of \$6.24 for prorated taxes, and incurred settlement charges of \$1,250.00. The payoff of the mortgage to SCB&T was \$593,872.50. In order to convey good title, he also had to pay off a judgment against Clark in the amount of \$6,575.98, and pay a creditor’s claim that had been filed against his father’s estate in the amount of \$1,256.61. He accordingly received \$207,051.15 in proceeds from the sale.⁴

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

Unfortunately, ISI, just as it had with the 40 acre contract, walked away from the contract on Wellington Plantation. Unlike with the 40 acre parcel, Legrand was not able to find a substitute buyer for Wellington Plantation and he was, accordingly, unable to pay to his brothers and sisters the \$2,464,000.00 that he owed them. Pursuant to the terms of the Notes, Legrand

⁴ The same attorney who represented Amberwinds in that transaction is one of Respondents’ attorneys.

delivered to his brothers and sisters the escrowed deed in lieu of foreclosure, reconveying to them their interests in Wellington Plantation. [ROA, pp. 711-714]. Also in accordance with the terms of the Notes, Legrand began providing to his brothers and sisters interim accountings as to the receipts and expenses incurred in connection with Echo Tango. [ROA, pp. 724-728]. At the request of some of his brothers and sisters, including the Respondents herein, who remained in financial need, Legrand began making advance distributions of Echo Tango profits, beginning in May of 2007 and continuing through December of 2008. From the Echo Tango sales, Mitchell has received \$36,000.00, Sandra has received \$22,000.00 and Bube has received \$16,000.00. Clark, Rita, Gene and Mark have also received \$16,000.00 each. In all, \$138,000.00 from the Echo Tango lot sales has been distributed to his brothers and sisters in accordance with the terms of their agreement as set forth in the Notes.

I. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW IN RESPONDENTS' FAVOR ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THE APPELLANT WAS NOT ACTING AS A FIDUCIARY IN CONNECTION WITH THE CHALLENGED TRANSACTION.

A. BREACH OF FIDUCIARY DUTY

A personal representative, of course, is a fiduciary. S.C. Code Ann. §62-3-703(a) (2010).

⁵The fiduciary is required to observe the standards of care applicable to trustees. *Id.* “A personal representative has the duty to settle and distribute the estate of the decedent in accordance with the terms of a probated and effective Will and (the South Carolina Code of Laws), as expeditiously and efficiently as is consistent with the best interest of the estate.” *Id.* If the exercise of power concerning the estate is improper, the personal representative is liable to

⁵ The sections of the South Carolina Probate Court Code cited herein were amended effective June 7, 2010. The operative language, however, is the same both before and after the amendment.

interested persons who are damaged or who suffer a loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust. S.C. Code Ann. §62-3-712 (2010).

The party asserting the existence of a fiduciary relationship has the burden of establishing such by clear and convincing evidence. Once the fiduciary relationship is established, the law presumes that any transaction between the parties by which the fiduciary has profited is fraudulent. When it is alleged that a fiduciary has breached such duty by fraud, self-dealing, or conflict of interest, the burden of proof shifts to the fiduciary to prove fair dealing by clear and convincing evidence. The burden is then upon the fiduciary to establish the honesty of the transaction, or to show that he or she acted fairly and informed the other party of all material facts relating to the challenged transaction. This burden is generally met if the fiduciary shows that the principal acted with full knowledge and intent or with advice of independent legal counsel. Other significant factors in meeting that burden include showing that the fiduciary made frank disclosure of available information, he paid adequate consideration, and the principal had competent and independent advice. See generally, *Am.Jur Fraud*, §472 (2010) (footnotes omitted).

B. DISCUSSION

The first question, accordingly, is whether the Respondents have satisfied their burden of proving that the Appellant was acting as a fiduciary in connection with the challenged transaction. It is clear in this case that Appellant was not acting as a fiduciary when he purchased the land from his siblings. The transaction took place completely outside the Estate, and did not involve the exercise of any fiduciary powers by the Appellant. The Respondents' position seems to be that all they need show is that the Appellant was one of the Personal Representatives of their father's Estate, and the challenged transaction involves real estate which

they inherited from their father's Estate. Such a showing, however, is inadequate. In order for a fiduciary duty to apply, the challenged transaction must somehow involve "the exercise of (fiduciary) power concerning the Estate." S.C. Code Ann. §62-3-712 (2010). As a fiduciary, a Personal Representative has a fiduciary duty to settle and distribute the Estate of the decedent in accordance with the terms of the Will, as expeditiously and efficiently as is consistent with the best interest of the Estate and its interested parties, including beneficiaries. S.C. Code Ann. §62-3-703(a) (2010).

The challenged transaction in this case simply does not involve the Appellant's fiduciary duties. In other words, the challenged transaction did not involve the Appellant exercising any of the powers conferred upon him by virtue of his appointment as one of the Personal Representatives of the Estate. The subject real estate, in accordance with the terms of the Will, was distributed and deeded to the rightful beneficiaries. The beneficiaries then sold their property to the Appellant. The Estate was not involved in this subsequent transaction. The Estate was neither the buyer nor the seller. This was a transaction between individuals which took place entirely outside the Estate.

Significantly, this is not a case in which the Personal Representative, exercising his power as Personal Representative, sells property belonging to the Estate to himself as an individual, and then disburses the sales proceeds to the beneficiaries. In such a case, the transaction, taking place within the confines of the Estate, involves the Personal Representative utilizing the powers conferred upon him in his capacity as Personal Representative to accomplish the transaction. The case now before the court is completely different. Legrand purchased from his brothers and sisters real estate that they owned outright. The transaction was neither facilitated by nor made possible by the fact that Legrand was serving as the Personal

Representative of his father's Estate. In closing on the subject transaction, Legrand did not exercise any of the powers which he had acquired by virtue of his position as Personal Representative of his father's Estate. There is simply no causal connection between Legrand's position as Personal Representative, and the challenged transaction. The simple fact that his brothers and sisters had acquired title to the property by inheritance does not render their subsequent decision to sell this property subject to the scrutiny of a fiduciary transaction. Legrand did not use his position as Personal Representative to force or influence the sale. Conversely, the Respondents were fully aware that they owned this property individually and negotiated the sale individually.

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

II. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW IN RESPONDENTS' FAVOR ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THE APPELLANT DID NOT PROFIT FROM THE CHALLENGED TRANSACTION.

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

The next question, accordingly, is whether Legrand has profited from the subject transaction. In determining whether Legrand has “profited” from the challenged transaction, the Probate Court ignored the totality of the circumstances and focused instead solely upon the 40 acres. The Probate Court seems to have concluded that Legrand’s profit was obvious, inasmuch as he purchased the 40 acres for \$511,000.00 from his siblings, and later sold the 40 acres to a third party for \$810,000.00. This view of what actually took place, however, is overly simplistic and contrary to the evidence. The sale of the 40 acres was clearly only one subpart of a much larger transaction.

As the Probate Court correctly noted [ROA, pg. 35], “(t)he general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the Court will consider and construe them together.” *Café Associates, Ltd. v. Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991). “Moreover, where the instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole.” *Klutts Resort Realty, Inc. v. Down-Round Development Corporation*, 268 S.C. 80, 88, 232 S.E.2d 20, 24

(1977). “In South Carolina, two (2) contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one (1) contract and considered as a whole.” *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 92, 594 S.E.2d 485, 492 (Ct. App. 2004). “This rule applies even where the parties are not the same, if the several instruments were known to all the parties and were delivered the same time to accomplish an agreed purpose.” *Id.*, 358 S.C. at 93, 594 S.E.2d at 493.

The evidence in this case establishes that the 40 acre transaction was simply a subpart to a larger transaction that involved Wellington Plantation and the Echo Tango Subdivision, as well as, from Mitchell and Carmen’s point of view, the 3.84 acres. The proposed contracts between the parties contain a single, lump sum price for **all** the properties. Each proposed contract was expressly contingent upon **all** brothers and sisters agreeing to sell and Legrand acquiring **all** the property. The 40 acres closed separately only because some of the brothers and sisters were in dire financial circumstances and could not wait to receive cash. When cash for closing was needed, \$2,000.00 from the “down payment”, from each brother and sister was freely shifted to the amount financed. The purchase and sale of one property was clearly contingent upon and inter-related with the purchase and sale of the other properties.

Looking at the transaction as a whole, it cannot be said that Legrand has “profited” from the transaction. Indeed, the evidence suggests that the brothers and sisters made a favorable deal by virtue of the fact that they now have an interest in the Echo Tango Subdivision’s profits. Any “profit” which they may have lost on the up front sale of the 40 acres, they are going to recoup many times over by virtue of their acquired one-half (½) interest in the Echo Tango Subdivision profits. The last lot that sold in Echo Tango brought a purchase price of \$700,000.00. The brothers and sisters have already received \$138,000.00 collectively from Echo Tango, and the

four (4) lots remaining to be sold are comparable to the one that last sold. The potential interest which the brothers and sisters have collectively acquired in the Echo Tango Subdivision is, accordingly, worth \$1,400,000.00. The up-front “profit” which Legrand made on the 40 acres is being offset by a nearly five-fold loss on Echo Tango. Conversely stated, the brothers and sisters are in a position to make a profit of nearly \$1,100,000.00⁶ on this transaction, over and above the \$138,000.00 in cash which they have already pocketed. The evidence is clear that the “fiduciary” has not profited from this transaction where, at best, he made \$300,000.00 up front, but has since paid out \$138,000.00 in cash and has given up half the profits which he will receive on four (4) lots valued at \$700,000.00 each, which he owned free and clear. Looking at the transaction as a whole, which is required, it is the siblings who will come out on top, not Legrand.

III. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW IN RESPONDENTS’ FAVOR ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THERE WAS NOT A BREACH OF ANY FIDUCIARY DUTY.

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

⁶ The net profit resulting from the difference between the \$1,400,000.00 potential profit in Echo Tango less the \$300,000.00 “loss” on the 40 acres.

As previously noted, if the transaction involves the exercise of fiduciary duties and the fiduciary profits from the transaction, then the fiduciary must prove “fair dealing” which would include a full disclosure of all material facts relating to the fiduciary transaction. *Am.Jur2d, Fraud and Deceit*, §472 (2010). The simple fact is that Legrand did not have a contract with ISI at the time that the 40 acres closed; although negotiations had taken place. A price of \$800,000.00 for the 40 acres had been discussed, but no price on Wellington Plantation had been discussed or agreed to, and the 40 acre purchase was expressly conditioned upon the purchase of Wellington Plantation. In looking at the materiality of Legrand’s failure to disclose the ongoing negotiations with ISI, one of the things the Court should consider is Legrand’s intent or state of mind. The real estate market at that time was highly speculative, as borne out by the fact that two (2) prior deals on the 40 acres had fallen through. The deal with ISI also eventually fell through. In the existing market, even a signed and sealed contract was no guarantee of a closing taking place. Some of the brothers and sisters had been in favor of selling the 40 acres at a substantially lower price, and there was no evidence that the \$511,000.00 was an unfair price.

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

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

relying upon any representations made by Legrand. The contract signed by each sibling expressly states:

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

(some emphasis added).

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

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

ISI until November 24, 2005, and he did not learn of their acceptance until mid-December, well after the 40 acre transaction had closed.

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

IV. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW IN RESPONDENTS’ FAVOR ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THE BREACH OF FIDUCIARY DUTY DID NOT PROXIMATELY CAUSE ANY DAMAGES.

Finally, even if the evidence proved that the challenged transaction involved the exercise of a fiduciary duty, that the fiduciary profited from this transaction, and that the fiduciary breached his fiduciary duty in connection with this transaction, the next step is to determine whether the breach of that duty proximately caused the Respondent’s damages. In this respect, the Respondents blithely assert that if they had known about ISI’s involvement, they would have never agreed to the challenged transaction. This completely self-serving testimony, however, is unsupported and uncorroborated by any other evidence. Each of the Respondents stated, and emphasized, that they were in dire financial straits and needed cash immediately. It is not reasonable to conclude that they would have given up the guarantee of \$73,000.00 cash in hand

in exchange for the possibility that they might obtain a little more money at some indefinite point in the future. The \$299,000.00 difference between the two (2) sales prices (\$810,000.00 versus \$511,000.00) is certainly significant, but once you divide it into seven (7) shares and consider that the \$511,000.00 includes no closing costs or liens, while the \$810,000.00 involves paying closing costs, as well as the existing liens (judgment against Clark and a claim against the Estate [ROA, pp. 626-627]) the significance lessens. Additionally, the deal for Wellington Plantation, which involved millions of dollars, would have been taken off the table, and likewise, the proffered partnership in the Echo Tango profits would have been lost. To conclude that the brothers and sisters, if they had known about ISI, would have walked away from guaranteed immediate cash that they desperately needed, as well as a several million dollar deal for Wellington and more than a million dollars in potential profits on Echo Tango Subdivision, all in exchange for yet another unenforceable promise to purchase the 40 acres by an unknown entity, involves pure speculation.

V. THE COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW IN RESPONDENTS' FAVOR ON THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION, WHERE THE RESPONDENTS RATIFIED THE TRANSACTION.

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

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

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

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

“When one is induced through false and fraudulent representations to enter into an agreement, upon discovery thereof, he has an election to either rescind, in which he must tender back that which he has received, or he may affirm the agreement, and maintain his action in

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

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

VI. THE COURT OF COMMON PLEAS ERRED IN FINDING AS A MATTER OF FACT THAT “ALL THE TRANSACTIONS COMPLAINED OF BY THE BENEFICIARIES OCCURRED DURING THE PROCESS OF ESTATE ADMINISTRATION” WHERE THIS FINDING IS CONTRARY TO THE FINDING BY THE PROBATE COURT AND NOT SUPPORTED BY THE EVIDENCE.

A. STANDARD OF REVIEW

“The rules governing appeals at law and in equity are well settled. If the proceeding in the Probate Court is in the nature of an action at law, the Circuit Court may not disturb the Probate Court’s finding of fact unless a review of the record discloses there is no evidence to support them. The standard of review at law is the same whether the facts are found by a jury or the judge sitting without a jury.” *Matter of Howard*, 315 S.C. 356, 361, 434 S.E.2d 254, 257

(1993)(citations omitted). “If the proceeding in the Probate Court is in the nature of an action at law, the Circuit Court and the Appellate Court may not disturb the Probate Court’s finding of act unless a review of the record discloses there is no evidence to support them. Under the probate code, a Circuit Court hearing an appeal from the Probate Court must apply the same rules of law as an Appellate Court would apply on appeal.” *In Re Estate of Pallister*, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005)(citations omitted).

B. ARGUMENT

On appeal from the Probate Court, the Circuit Court made the following finding of fact:

“All of the transactions complained of by the beneficiaries occurred during this process of estate administration.”

Record on Appeal, pg. 4.

This finding of fact is not supported by any evidence, and is contrary to the express finding of fact made by the Probate Court, as follows:

“At the December 8 closing, Legrand and Mark, as Personal Representatives of Mr. Lowther’s Estate, and in accordance with the terms of his Will, executed a Deed of Distribution releasing to Gene, Sandra, Bube, Rita, Clark, Mitchell, and Mark all of the real property that Mr. Lowther had owned at death, including the 40 acre parcel and the decedent’s interest in the Wellington tract. Each of the seven (7) siblings then executed a deed conveying the 40 acre parcel to Legrand, for a stated consideration of \$511,000.00.00.”

Record on Appeal, pg. 28. The Probate Court also found:

“On December 20, 2005, a closing was held on the purchase by Legrand from his siblings of their respective interest in the Wellington tract, as well as the purchase by Legrand from Mitchell and his wife, Carmon, of the 3.84 acre parcel adjoining Wellington. At or in connection with this closing, Legrand’s siblings executed a deed conveying to Legrand their interest in the Wellington tract, for a stated consideration of \$2,464,000.00.”

In short, the Probate Court went to great lengths, and in great detail, to emphasize that the transactions complained of by the Respondents did not take place during the process of estate administration. [ROA, pp. 28-29]. It is clear from the Probate Court's finding of fact that the Personal Representatives executed a Deed of Distribution conveying to the Respondents, as well as the other beneficiaries of the estate, all of the real property owned by the decedent. This specifically included the 40 acre parcel and the decedent's interest in the Wellington tract. [ROA, pg. 28]. It was only after the Respondents, and the other beneficiaries, received their interest in the real property of the decedent, that the transactions complained of by Respondents took place. These transactions did not take place during the process of estate administration. Not only is this finding by the Circuit Court directly contrary to the detailed and express finding made by the Probate Court, but there is absolutely no evidence in the record to indicate that the Appellant's purchase of the 40 acres from the Respondents or his purchase of their interest in the Wellington tract took place as part of the process of estate administration.

This erroneous factual finding by the Circuit, it is respectfully submitted, was crucial to the Circuit Court's conclusion that the Appellant breached his fiduciary duty to the Respondents. Obviously, if the transaction took place as part of the process of estate administration, then a fiduciary duty would exist. Conversely, if the complained of transaction took place outside the process of estate administration, then no fiduciary duty exists. This erroneous factual finding was crucial to the Circuit Court's erroneous legal conclusion that a fiduciary duty existed at the time the Appellant purchased from the Respondents the property that they had inherited from the decedent.

VII. THE CIRCUIT COURT ERRED IN FINDING AS A MATTER OF FACT THAT ON OCTOBER 12, 2005 LEGRAND ENTERED INTO A CONTRACT TO SELL THE 40 ACRE PARCEL TO INTERNATIONAL SOCIETY OF INVESTORS FOR \$810,000.00,

WHERE THIS FINDING IS CONTRARY TO THE EXPRESS FINDING OF FACT MADE BY THE PROBATE COURT AND, ADDITIONALLY, IS NOT SUPPORTED BY ANY EVIDENCE.

As previously noted, the Circuit Court cannot disturb a finding of fact made by the Probate Court unless there is no evidence to support the Probate Court's finding. E.g., *Matter of Howard*, 315 S.C. 356, 360, 434 S.E.2d 254, 256-57 (1993).

On appeal from the Probate Court, the Circuit Court in this case made the following finding of fact:

"On October 12, 2005, Legrand entered into a contract to sell the 40 acre parcel to International Society of Investors ("ISI") for \$810,000.00."

Record on Appeal, pg. 4. This finding of fact is contrary to the detailed finding of fact made by the Probate Court, which found as follows:

"Also in October 2005, ISI sent to Legrand two (2) proposed contracts prepared by ISI's attorneys: One for the purchase by ISI of the 40 acre parcel for \$810,000.00, but setting no firm closing date; the other for the purchase by ISI of the Wellington tract, leaving blank the purchase price amount, but providing for a closing date of "on or before December 27, 2006. Both proposed contracts were pre-dated October 12, 2005 After making several handwritten changes . . . Legrand signed both contracts . . . on or about October 24, 2005, and returned them to ISI for execution."

Record on Appeal, pp. 27-28. The Probate Court further found as a fact as follows:

"Legrand did not disclose to his siblings, at or in connection with the December 8 closing, that he had signed, and sent to ISI for execution, the two (2) proposed contracts for the sale to ISI, by Legrand alone, of the 40 acre parcel and Wellington tract, respectively. Legrand testified that, by mid-December 2005, he received those contracts by mail from ISI, both having been executed by ISI under date of November 21, 2005, apparently accepting the handwritten changes Legrand had made."

Record on Appeal, pg. 29.

The Circuit Court erroneously found that the Appellant had actually entered into a contract regarding the 40 acre parcel on October 12, 2005. [ROA, pg. 4]. This finding is

erroneous. As the Probate Court found, Legrand received proposed contracts which were predated October 12, 2005. [ROA, pg. 27]. The contract for Wellington did not even have a purchase price filled in. *Id.* Legrand made substantive changes to both contracts and inserted a purchase price for Wellington, and signed these counter offers on or about October 24, 2005, and subsequently sent these counter offers to ISI for its consideration. [ROA, pp. 27-28]. Legrand did not learn that his counter offer had been accepted until mid-December 2005, after the closing on the 40 acre parcel. ROA, pg. 28].

This erroneous factual finding by the Circuit Court is significant. The Respondents testified that before they signed their contracts agreeing to sell their property to the Appellant, which was in mid-October 2005, they asked if he had a contract and he replied that he did not. As the Probate Court correctly found, at the time the Respondents executed their contract this response would have been truthful, whereas the erroneous conclusion by the Circuit Court that the Appellant's contract with ISI was executed on October 12, 2005, would have rendered this representation false.

VIII. THE CIRCUIT COURT ERRED IN FINDING AS A MATTER OF FACT THAT ISI AND AMBERWINDS WERE VIRTUALLY THE SAME ENTITY, WITH THE SAME INDIVIDUAL OWNERS, AND THE CLOSING PROCEEDED EXACTLY AS SCHEDULED UNDER CONTRACT WITH LEGRAND, WHERE THIS FINDING IS CONTRARY TO THE FINDINGS MADE BY THE PROBATE COURT AND IS NOT SUPPORTED BY ANY EVIDENCE.

In its Order, the Circuit Court made the following finding of fact:

“Within two (2) months of that closing, on February 14, 2006, Legrand closed on his sale of the 40 acre parcel to Amberwinds, LLC (“Amberwinds”) for \$810,000.00. As revealed at trial in the testimony of Mike Jones, a principal in the transaction, ISI and Amberwinds were virtually the same entity, with the same individual owners, and the closing proceeded exactly as scheduled under contract with Legrand.”

Record on Appeal, pg. 5.

The Circuit Court's finding that ISI and Amberwinds were virtually the same entity with the same individual owners is contrary to the finding made by the Probate Court, and is supported by no evidence. The Probate Court actually found that Amberwinds as an assignee of ISI. Record on Appeal, pg. 31 (this finding by the Probate Court is not supported by any evidence, see Argument IX, *infra*). There is absolutely no evidence to suggest that ISI and Amberwinds are the same entity with the same owners. As the Appellant testified, he was not comfortable with the contracts with ISI because they had no "teeth" inasmuch as ISI was free to walk away if it determined that the parcels were not suitable for ISI's intended development purposes and, in fact, ISI never posted earnest money towards either contract and, in the end, walked away from both contracts.

Likewise, the Circuit Court's finding that the closing with Amberwinds proceeded exactly as scheduled under the contract between Appellant and ISI is contrary to the express findings made by the Probate Court and is not supported by any evidence. The contract on the 40 acres with ISI required that the closing occur on or before January 27, 2006. [ROA, pg. 27]. That date came and went and ISI did not close. The closing on the 40 acre sale to Amberwinds occurred on February 17, 2006. [ROA, pg. 31]. In summary, ISI did not perform on either contract with the Appellant, never posted earnest money on either contract, allowed the closing dates to pass, and walked away from both contracts without repercussions. The Appellant was able to arrange a comparable sale to another entity for the 40 acres, but was never able to sell the Wellington tract at any price.

IX. THE PROBATE COURT ERRED IN FINDING AS A MATTER OF FACT THAT AMBERWINDS, LLC WAS AN ASSIGNEE OF INTERNATIONAL SOCIETY OF INVESTORS, LLC WHERE THIS FINDING IS NOT SUPPORTED BY THE EVIDENCE.

The Probate Court found as a matter of fact that the Appellant closed on the sale of the 40 acre parcel to Amberwinds, LLC (“Amberwinds”) as assignee of International Society of Investors, LLC (“ISI”). This finding is not supported by any evidence. As previously noted (Argument VIII, supra), the sale to Amberwinds took place only after the closing deadline with ISI had passed and ISI had defaulted on its contract regarding the 40 acres.

X. THE CIRCUIT COURT ERRED IN FINDING AS A MATTER OF FACT THAT THE ECHO TANGO REAL ESTATE WAS OWNED BY THE DECEDENT WHERE THIS FINDING IS CONTRARY TO THE FINDING BY THE PROBATE COURT AND NOT SUPPORTED BY THE EVIDENCE.

The Circuit Court repeatedly found as a matter of fact that the Echo Tango property was owned by the decedent. [ROA, pg. 5 and pg. 9]. This finding is not supported by any evidence in the record. The Echo Tango real estate was owned by the Appellant and titled in the Appellant’s name only. While the Appellant was willing to share some of the profits made on the development of Echo Tango with his father, the decedent, he and his father had never formalized or finalized their agreement. The Respondents wanted the Appellant to honor the tentative agreement discussed with their father with them. No final agreement had ever been reached regarding this issue until the parties entered into the transaction which is the subject of this dispute, pursuant to which, this issue was laid to rest. As set forth in the express terms of their agreement, the Respondents, together with the other siblings, executed quitclaim deeds releasing and quitclaiming any right that they may have to the Echo Tango property to the Appellant, and the Appellant, in the event of default, agreed to share the net proceeds derived from the sale of the Echo Tango lots in accordance with the terms of the written note. [ROA, pg. 30].

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

Court was crucial to the Circuit Court's overruling of the Probate Court's determination of damages. See Argument XII, *infra*.

XI. THE CIRCUIT COURT ERRED IN RELYING UPON EXHIBITS ATTACHED TO ITS ORDER WHICH ARE NOT PART OF THE SUBSTANTIVE RECORD IN THIS CASE.

In concluding as a matter of fact that the Echo Tango lots had long been owned by the decedent, the Circuit Court references "testimony" and "agreement" which is attached to its Order. [ROA, pg. 5, fn 3, and pg. 17]. These documents are not part of the record in this case. These documents are taken completely out of context, and are highly prejudicial. These documents are not part of the record in this case. It was clearly error for the Circuit Court, without notice or an opportunity to be heard, and without just cause or excuse to unilaterally reopen the record, and selectively attach snippets of documents and then rely upon these documents to make factual findings contrary to those of the Probate Court.

XII. THE CIRCUIT COURT ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW THAT THE PROBATE COURT ERRED IN ITS CALCULATION OF DAMAGES AND IN OVERTURNING THE PROBATE COURT'S FINDING REGARDING DAMAGES, WHERE THE PROBATE COURT CORRECTLY FOUND THAT THE ECHO TANGO PROCEEDS RECEIVED BY THE RESPONDENTS WERE PAID TO THEM AS PART OF THE TRANSACTION.

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

The evidence in this case is undisputed, and the Probate Court found, that after his default, and in accordance with the terms of the notes, the Appellant delivered to his siblings the escrow deed in lieu of foreclosure, reconveying to them their interests in the Wellington tract.

The Appellant also began making distributions to his siblings from the proceeds of the sale of the

Echo Tango lots, as follows:

Mitchell	\$ 36,000.00
Sandra	\$ 22,000.00
Bube	\$ 16,000.00
Clark	\$ 16,000.00
Gene	\$ 16,000.00
Mark	\$ 16,000.00
Rita	<u>\$ 16,000.00</u>
Total	\$138,000.00

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

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

In determining the damages to be awarded, the \$207,051.15 realized by Legrand from the Amberwinds closing should be reduced by the \$138,000.00 in distributions that he made subsequently to the siblings from her profits on the sale of two (2) Echo Tango lots. Those were payments that Legrand may have been obligated to make, by reason of his default on the promissory notes to his siblings. However, those obligations were incurred, and the payments made, pursuant to the overall deal negotiated between Legrand and the siblings for his purchase of their interest in the 40 acre parcel and Wellington tract. Therefore, the foregoing ET (Echo Tango) distributions equitably should offset damages awarded on the basis of profit retained by Legrand from the sale to Amberwinds.

Allowing an offset based on the “overall deal” between Legrand and his siblings is consistent with the rule of *Ellie v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004), viz, “two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole.” 358 S.C. at 92, 594 S.E.2d at 492.

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

In short, the Probate Court correctly noted that these transactions were all interrelated and were really subparts of one overall transaction. The Circuit Court, in overturning the Probate Court’s above calculation of damages treats the \$138,000.00 paid by Legrand to his siblings as if it either did not exist, or as if it was money to which they were entitled to in any event. Neither of these propositions, of course, is true, inasmuch as it is undisputed that they received the aforesaid \$138,000.00, and is likewise undisputed that Echo Tango was owned by Legrand free and clear, and while Legrand was willing, under certain terms and conditions, to share some of these profits with his father, there was never any such deal in place for his siblings, at least until they reached the agreement as set forth in the terms of the notes executed by Legrand and his siblings.

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

XIII. THE PROBATE COURT AND THE CIRCUIT COURT ERRED IN GRANTING JUDGMENT AGAINST THE APPELLANT IN FAVOR OF INDIVIDUALS WHO ARE NOT PARTIES.

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

Wherefore, it is ORDERED, ADJUDGED, and DECREED that:

...

2. Judgment is rendered for the Respondents against the Defendant Legrand for breach of fiduciary duties, as aforesaid, and the Respondents are awarded damages for such breach in the amount of \$69,051.15; provided, however, that such award is apportioned among and payable in equal shares to Gene, Sandra, Bube, Rita, Clark, Mitchell, and Mark.

AND IT IS SO ORDERED.

[ROA, pg. 38.]

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

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

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

Entering a judgment in favor of a nonparty violates fundamental principles of due process. The Appellant had no notice that a judgment might be rendered against him in favor of a nonparty, and had no opportunity to be heard regarding such a possibility. Conversely, the

nonparties had no notice or opportunity to be heard regarding this matter, and it is equally unfair that they may be bound by a decision rendered in a case in which they made no claims.

Kurschner v. City of Camden Planning Commission, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008) (“The fundamental requirements of due process include notice, and opportunity to be heard in a meaningful way, and judicial review”).

Additionally, the Order puts the Appellant in the untenable position of being forced to pay a judgment to nonparties, yet the nonparties are still theoretically free to pursue these exact same claims against the Appellant, since principles of res judicata and collateral estoppel do not apply to a nonparty. *Duckett v. Goforth*, 374 S.C. 446, 464-56, 649 S.E.2d 72, 81-82 (Ct. App. 2007). It was accordingly error for the Probate Court and the Circuit Court to enter judgments in favor of individuals who were not even parties to this action. If the Probate Court was correct in determining that the total damages were \$69,051.15 and were suffered equally by each of the seven (7) siblings, then the Court should have entered judgment in favor of each of the three (3) Respondents, to-wit, Sandra, Bube, and Mitchell, in the amount of \$9,864.45 each.

XIV. THE PROBATE COURT AND THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE DAMAGES SUFFERED BY EACH OF THE RESPONDENTS WAS EQUAL WHERE THE RESPONDENTS PREVIOUSLY RECEIVED PAYMENTS IN NON-EQUAL AMOUNTS.

The Probate Court determined that the total damages suffered by all seven (7) siblings was \$69,051.15, and this award was apportioned and payable in equal shares among the seven (7) siblings. [ROA, pg. 38]. The Circuit Court determined that the total damages suffered by all siblings was \$289,923.65, and retained the equal apportionment. As noted in Argument XII, *supra*, the Circuit Court erred in failing to offset the damages suffered in the transaction arising

from that part of the transaction involving the sale of the 40 acres with the gains realized by the siblings from that part of the transaction involving the sale of the Echo Tango lots.

The Probate Court first noted that the net proceeds received by Legrand from the sale of the 40 acres was \$207,051.15, explaining as follows:

On February 17, 2006, Legrand closed on the sale of the 40-acre parcel to Amberwinds, LLC ("Amberwinds"), as assignee of ISI, for contract price of \$810,000.00. From the gross amount due the seller, the following were paid at closing: payoff of the SCB&T mortgage in the amount of \$593,872.50; seller's attorney fee of \$1,250.00; a judgment against Clark Lowther in the amount of \$6,575.98; and a South Carolina Electric & Gas Company creditor's claim against the Decedent's Estate in the amount of \$1,256.61. After allowing a \$6.24 credit to the seller for prorated real estate tax paid in advance, the net proceeds of the sale paid to Legrand was \$207,051.15.

[ROA, pg. 31].

Next, the Probate Court then noted that Legrand, in accordance with the terms of their transaction, has made the following distributions to his siblings from his profits on the sale of Echo Tango lots:

Mitchell	\$ 36,000.00
Sandra	\$ 22,000.00
Bube	\$ 16,000.00
Clark	\$ 16,000.00
Mark	\$ 16,000.00
Gene	\$ 16,000.00
Rita	<u>\$ 16,000.00</u>
Total	\$138,000.00

[ROA, pp. 31-32].

Finally, the Probate Court concluded that, in determining the damages to be awarded, the \$207,051.15 realized by Legrand from the Amberwinds closing should be reduced by the

\$138,000.00 in distributions that he made subsequently to his siblings from his profits on the sale of two (2) Echo Tango lots. [ROA, pg. 35]. This is how the Probate Court arrived at the resulting judgment damages figure of \$69,051.15 (representing the remainder of \$207,051.15 minus \$138,000.00).

The Probate Court then concluded, however, that the \$69,051.15 should be apportioned equally among all seven (7) siblings, which would entitle them to \$9,864.45 each.

It is respectfully submitted that apportioning the \$69,051.15 judgment equally among the siblings was error, inasmuch as the \$138,000.00 which has already been paid towards the “damages” was not paid equally to all the siblings. If the \$138,000.00 had been paid equally to all the siblings, then it would have been correct to equally apportion the remaining balance of \$69,051.15. Since the damages were suffered equally by all the siblings, then the damages should have been calculated on an equal basis.

Assuming arguendo that the total damages suffered by the siblings was \$207,051.15, then each sibling suffered damages of \$29,578.73 (one-seventh of \$207,051.15). Mitchell, however, has already received payment against the sum of \$36,000.00. Sandra has already received payments totaling \$22,000.00, which would leave a balance owed to her of \$7,578.73. Each of the other siblings has received payments totaling only \$16,000.00, leaving a balance of \$13,578.73 owed to each of them. The error committed by the Probate Court is that the \$138,000.00 setoff was not paid equally to each of the seven (7) siblings, but rather, the total setoff payments paid to Mitchell and Sandra were substantially higher than the total paid to the others. Since the damages were suffered equally, the set-offs should have been applied on an individual basis, as follows:

Name of Sibling	Total	Total Damages	Set-Offs	Balance Owed
Mitchell	\$29,578.73	\$207,051.15	\$36,000.00	-\$6,421.26
Sandra	\$29,578.73	\$207,051.15	\$22,000.00	\$7,578.73
Bube	\$29,578.73	\$207,051.15	\$16,000.00	\$13,578.73
Clark	\$29,578.73	\$207,051.15	\$16,000.00	\$13,578.73
Gene	\$29,578.73	\$207,051.15	\$16,000.00	\$13,578.73
Mark	\$29,578.73	\$207,051.15	\$16,000.00	\$13,578.73
Rita	\$29,578.73	\$207,051.15	\$16,000.00	\$13,578.73
Total			\$138,000.00	\$69,051.15

Accordingly, since only Mitchell, Sandra, and Bube are the Plaintiffs in this lawsuit, the judgment rendered by the Probate Court should only have been as to their interest (See Issue No.XIII, supra). As to Mitchell, no judgment should have been awarded, since his damages were \$29,578.73, and he has already been paid as a set-off against these damages the sum of \$36,000.00. He has already been paid in full, and no further payment is owed at this time.⁷ Sandra suffered the same damages, and has been paid \$22,000.00, so the judgment in her favor should have been for the remaining balance of \$7,578.73, which is slightly less than the \$9,864.45 to which she is entitled under the existing Order. Conversely, however, Bube, who also suffered the same damages has been paid only \$16,000.00, and the judgment in his favor

⁷ The Probate Court correctly noted that further distributions from sales of the remaining Echo Tango lots will be made to each of the siblings. The credit on Mitchell's account can be taken into account on these future distributions.

should have been for \$13,578.73, which is more than the amount to which he is entitled under the existing Order.

Accordingly, it is respectfully submitted that, since Mitchell, Sandra and Bube are the only Plaintiffs in this action, the judgment should have been zero in favor of Mitchell, \$7,578.73 in favor of Sandra, and \$13,578.73 in favor of Bube.

CONCLUSION

The Respondents freely and voluntarily entered into a relatively complex and multi-layered real estate transaction involving multiple properties. These properties were hardly “hot items.” The testimony was that their father had unsuccessfully tried to sell some of these properties prior to this death, and the beneficiaries themselves, particularly Clark, tried to sell some of these properties following his death, without success, and that potential purchasers, even when contracts were in hand, ultimately refused to close. Some of the brothers and sisters had an urgent need for cash, but even so, they rejected Legrand’s initial offer to purchase the properties. Extensive negotiations took place over a prolonged period of time. The brothers and sisters, rather than relying on Legrand, conducted their own due diligence. Sandra, for example, consulted with an accountant who specialized in real estate transactions and hired an attorney who assisted her in the negotiation, drafting, and closing of the subject transactions. Mitchell is a real estate developer who enters into transactions of this nature as part of his customary business. The Respondents have received everything for which they bargained. As a result of their hard bargaining, the brothers and sisters have received an interest in the Echo Tango Subdivision that will potentially overshadow by many times the amount of “profit” which they could have conceivably received on the 40 acres. No one component of this transaction can be

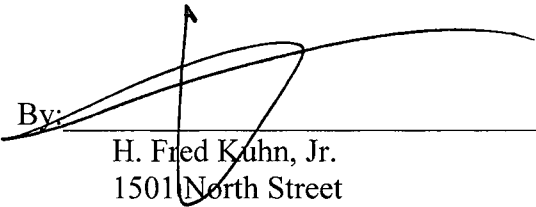
viewed in isolation, and when viewed as a whole, the transaction greatly favors the Respondents, not the Appellant Legrand.

The bottom line is that both sides of this transaction assumed certain risks. All parties knew that Legrand did not have sufficient funds to pay for the properties, and that he would have to “flip” these properties in order to fulfill his contractual obligations without defaulting. Legrand was hoping that he would be able to re-sell these properties, and thereby avoid default and forfeiting a half interest in his Echo Tango Subdivision to his brothers and sisters. The brothers and sisters, on the other hand, were willing to accept the sure thing of the immediate guaranteed cash, and then either receive another \$2,464,000.00 collectively in a year, or at worse, simply get back their Wellington Plantation property and start to collect half the profits from the Echo Tango subdivision. Legrand risked bankruptcy and the loss of half of Echo Tango if he was unable to sell either property, while his brothers and sisters risked relatively little. As it turned out, Legrand was able to sell one of the properties to a third party, and thereby avoid foreclosure by SCB&T and the resulting bankruptcy, but Wellington Plantation remained an albatross, which ended up costing him half the profits in Echo Tango. In the final analysis, Legrand was enriched by about \$300,000.00 on the 40 acre parcel portion of the transaction, but in exchange he has already paid \$138,000.00 in cash and lost another \$1,400,000.00 in potential profits on Echo Tango.

In the final analysis, this is a transaction in which both parties assumed risks that seemed reasonable at the time, and it appears that the Respondents made the better deal.

It is accordingly respectfully requested that the judgment entered against Appellant be reversed, or alternatively, that the judgment be modified to reflect a judgment in favor of Sandra and Bube, only, for \$7,578.73 and \$13,578.73, respectively.

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November 28, 2012

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

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

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

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

Respondents,

v.

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

OF WHOM E. LEGRAND LOWTHER IS

Appellant.

CERTIFICATE OF COMPLIANCE
WITH ORDER DATED AUGUST 13, 2008

Counsel for Appellant hereby certifies that the Final Brief filed with this Court is in
compliance with the Order of the South Carolina Supreme Court dated August 13, 2008.

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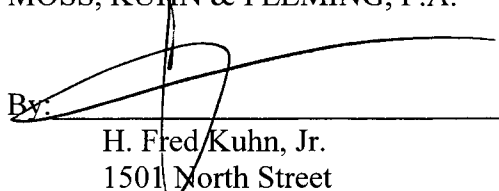
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MOSS, KUHN & FLEMING, P.A.

By: 

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(843)524-3373
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Attorney for the Appellant

Beaufort, South Carolina
November 28, 2012

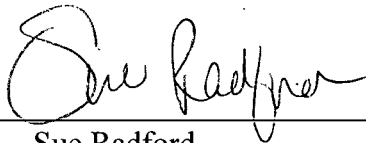
CERTIFICATE OF SERVICE

Undersigned certifies that the **Certificate of Compliance With Order Dated August 13, 2008**, to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

Harley D. Ruff, Esquire
Ruff & Ruff
17 Professional Village Circle
Beaufort, South Carolina 29907

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Sue Radford
Secretary for H. Fred Kuhn, Jr.

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IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

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

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

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

Respondents,

v.

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

OF WHOM E. LEGRAND LOWTHER IS

Appellant.

CERTIFICATE OF COUNSEL

Counsel for Appellant hereby certifies that the Appellant's Final Brief in the above-referenced matter complies with the requirements of Rule 211(b) of the South Carolina Appellate Court Rules.

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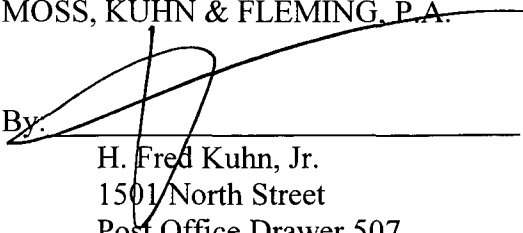
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November 28, 2012

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Undersigned certifies that the **Certificate of Counsel**, 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:

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Undersigned certifies that the **Final Brief of Appellant** 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:

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