THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Presiding 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 RESPONDENTS

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Attorneys for Respondents

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Presiding Judge

Case No. 2010-CP-07-062674
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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURTS BELOW ERR IN CONCLUDING THAT APPELLANT SHOULD BE LIABLE FOR A BREACH OF FIDUCIARY DUTIES TOWARD RESPONDENTS?

2. IS THERE EVIDENCE SUPPORTING THE FINDINGS OF FACT MADE BY THE COURTS BELOW?

3. DID THE CIRCUIT COURT ERR IN CALCULATING DAMAGES SUFFERED BY RESPONDENTS?

4. DID THE COURTS BELOW ERR IN APPORTIONING DAMAGES AMONG ALL OF THE BENEFICIARIES OF THE ESTATE?

STATEMENT OF THE CASE

A. Facts

Respondents sued Defendant E. LeGrand Lowther, Jr. ("LeGrand") for breach of fiduciary duty and other causes of action. (R. p. 68-105) Respondents, who are the beneficiaries of the Estate of C.E. Lowther, alleged that LeGrand, a Personal Representative of the Estate, violated his fiduciary duties by: (1) entering into a contract to sell Estate land to a third party for $810,000, and (2) then – without disclosing this pending sale to the Estate's beneficiaries – purchasing this land from them for $511,000, and (3) then selling this land to the third party for $810,000, thereby recognizing a $299,000 profit. (R. p. 71-72)

C.E. Lowther (the "Decedent") died on June 11, 2004. At the time of his death, the Decedent owned, among other assets, a 40.81 acre parcel of unimproved real property on Bees Creek Road in Jasper County (the "40-acre parcel"). The Decedent's Will left his estate to Respondents, in equal shares. (R. p. 587-589)

LeGrand and his brother Mark were appointed as the Personal Representatives of the Estate by the Jasper County Probate Court on June 17, 2004. LeGrand and Mark are still the Personal Representatives of the Estate, which remains open to this day.

In the summer and fall of 2005, LeGrand negotiated for a sale of the 40-acre parcel to International Society of Investors ("ISI"). These negotiations eventually resulted in a written contract, dated October 12, 2005, between LeGrand and ISI, for the sale of the 40-acre parcel to ISI for $810,000. (R. p. 577-582) This contract was originally made out as the "Seller" being "Lagrande Lowther, Mitchell Lowther, et al.", but LeGrand changed "Seller" to just himself. (R. p. 577) At the time of this contract, the 40-acre parcel belonged to the Estate.

After reaching agreement with ISI, LeGrand approached Respondents to solicit the purchase by LeGrand himself of their interests in 40-acre parcel. LeGrand never disclosed to any of them that he had "pre-sold" the 40-acre parcel for $810,000. All of the Respondents did agree to sell their interests in the 40-acre parcel to LeGrand, for a total price of $511,000. (R p. 604-609, 675-689, 702-707) On December 20, 2005, LeGrand closed on his purchase of the 40-acre parcel from Respondents, for $511,000 in cash. (R. p. 555-556)

Just a few weeks later, on February 14, 2006, LeGrand closed on his sale of the 40-acre parcel to Amberwinds, LLC ("Amberwinds") – the assignee of ISI and virtually the same entity with the same owners – for $810,000. (R. p. 626-627)

Also involved in these transactions were two other properties: (1) the Decedent's 25% title interest in an unimproved 226.35 acre parcel of land in the Wellington Plantation area of Jasper County, South Carolina ("Wellington"), which Respondents sold to LeGrand in exchange for promissory notes, (R. p. 637-655, 672-674) and (2) the Decedent's 50% equitable interest in certain lots in the Echo Tango subdivision of Beaufort County, South Carolina ("Echo Tango"), which Respondents gave to LeGrand for zero additional consideration. But LeGrand later defaulted on the Wellington notes, which resulted (under the notes) in Respondents getting back their interests in Wellington and becoming entitled to a "return penalty" of 50% of the net proceeds from Echo Tango. (R. p. 711-723)

B. Procedural Background

Respondents sued LeGrand for breach of fiduciary duty and other causes of action. (R. p. 68-105) This matter was tried before The Honorable Kenneth E. Fulp, Jr., Associate Beaufort County Probate Judge, without a jury, on June 23 and 26, 2009. (R. p. 196-547) On

December 21, 2010, Judge Fulp rendered judgment against LeGrand for breach of fiduciary duty, and awarded damages to all of the beneficiaries of the Estate of a total of $69,051.15. (R. p. 22-41)

Both sides appealed Judge Fulp's Order to the Circuit Court, pursuant to S.C. Code Ann. § 62-1-308. (R. p. 125-166, 167-186) 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 (R. p. 731-820) and September 22, 2011.

On November 22, 2011, Judge Dukes issued his Order on appeal, affirming in part and reversing in part. (R. p. 3-21) Judge Dukes affirmed the Probate Court's finding that the LeGrand breached his fiduciary duty, but found that the Probate Court erred by using an improper measure of damages and giving LeGrand unwarranted credits, and accordingly modified and increased the judgment in favor of the beneficiaries of the Estate to $289,923.65. (R. p. 3)

On December 9, 2011 LeGrand filed a motion requesting that Judge Dukes reconsider, alter, or amend his Order. (R. p. 114-119) Following another hearing, on March 21, 2012 Judge Dukes denied LeGrand's motion. (R. p. 1-2)

This appeal by LeGrand followed. (R. p. 44-46)

STANDARD OF REVIEW

Appeals from the probate court are governed by the provisions of the Probate Code. Matter of Howard, 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993). The circuit court must hear and determine an appeal from the probate court "according to the rules of law." Id. (citing S.C. Code Ann. § 62-1-308(d)). "As used in [section 62-1-308], the phrase 'according to the rules of law' means according to the rules of governing appeals." Id. On appeal from the final order of the probate court, the circuit 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). Consequently, 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 findings of fact unless a review of the record discloses there is no evidence to support them." Neely v. Thomasson, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005). "On the other hand, if the probate proceeding is equitable in nature, [an appellate court] may make factual findings according to its own view of the preponderance of the evidence." Matter of Howard, 315 S.C. 356, 361-62, 434 S.E.2d 254, 257-58 (1993).

"To determine whether this suit is legal or equitable, we must lot to the 'main purpose' of the action as reflected by the nature of the pleadings and proof, and the character of relief sought under them." Gordon v. Drews, 358 S.C. 598, 604, 595 S.E.2d 864, 867 (Ct.App.2004). A claim of breach of fiduciary duty is an action at law and the trial judge's findings will be upheld unless without evidentiary support. [381 S.C. 554] Jordan v. Holt, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). However, a "breach of fiduciary duty [claim] may sound in equity if the relief sought is equitable." Givens v. Watkins, 313 S.C.

228, 230 n. 3, 437 S.E.2d 132, 133 n. 3 (Ct.App.1993). If the probate proceeding is equitable in nature, an appellate court may make factual findings according to its own view of the preponderance of the evidence. In re Howard, 315 S.C. 356, 362, 434 S.E.2d 254, 257-58 (1993). Therefore, "[b]eing an equity case, the circuit court, sitting as an appellate court, had jurisdiction to make findings in accordance with its own view of the preponderance of the evidence." Eagles v. S.C. National Bank, 301 S.C. 402, 408, 392 S.E.2d 187, 191 (Ct. App. 1990).

The two-judge rule applies to appeals from the probate court to the circuit court. Dean v. Kilgore, 313 S.C. at 259-60, 437 S.E.2d 154, at 155 (Ct. App. 1993). Pursuant to this rule, the standard of review in equity cases in which the circuit court concurs with the probate court is whether there is any evidence which reasonably supports the findings of the court below. Id. at 260, 437 S.E.2d at 155-56).

ARGUMENTS

I. THE COURTS BELOW CORRECTLY CONCLUDED THAT APPELLANT SHOULD BE LIABLE FOR A BREACH OF FIDUCIARY DUTIES TOWARD RESPONDENTS.

Both courts below properly found that LeGrand was a fiduciary, that he owed fiduciary duties to Respondents, that he breached these duties, and that his breach caused financial damage to Respondents. (R. p. 10-11, 32-36) While these conclusions seem obvious under the facts, LeGrand remains defiant in his insistence that he did no wrong. Respondents offer the following rebuttals to LeGrand's Arguments I through V:

A. LeGrand was (and is) a fiduciary, and owed (and owes) Respondents the duty of acting in their best interests.

"A personal representative is a fiduciary... A personal representative has a duty to settle and distribute the estate of the decedent ...as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him...for the best interests of successors to the estate." S.C. Code Ann. §62-3-703(a).

LeGrand tries to evade his fiduciary responsibilities by arguing, in effect, that – even though he was a Personal Representative of the Estate and even though the 40-acre parcel was an Estate asset – since he technically deeded the 40-acre parcel out to the Estate's beneficiaries before purchasing it from them (albeit after entering into the contracts with them), that this means that he was no longer acting as a fiduciary.

LeGrand was appointed as a Personal Representative of the Estate on June 17, 2004. LeGrand was a Personal Representative of the Estate when he entered into the contract to "presell" the 40-acre tract for $810,000. (R. p. 571-582) LeGrand was a Personal

Representative of the Estate when he entered in to the contracts with Respondents to buy the 40-acre parcel from them for $511,000. (R p. 604-609, 675-689, 702-707) LeGrand also was a Personal Representative of the Estate when deeded the 40-acre parcel out to the Estate's beneficiaries (R. p. 610-612), before closing on his contracts to buy the 40-acre parcel from them for $511,000. And LeGrand also was a Personal Representative of the Estate when he closed on his sale of the 40-acre parcel for $810,000. (R. p. 626-627) He is still a Personal Representative of the Estate to this day. All during this time, under law he has owed fiduciary duties toward Respondents as beneficiaries.

The law does not allow LeGrand to "suspend" his fiduciary duties during the time when he wants to personally purchase property from the Estate's beneficiaries, by technically deeding the property out to them. In fact, these are the times when conflicts of interest arise and when following the fiduciary duties of good faith and fair dealing are most needed. Once LeGrand accepted his appointment as Personal Representative, he took on a legal duty of acting in the best interests of the Estate's beneficiaries. He remained so obligated at the time of these transactions, and he remains so obligated now.

The fact that the 40-acre parcel was distributed out of the Estate to the beneficiaries, before LeGrand closed on its purchase, was due to the fact that that was the only way to accomplish LeGrand's transaction without Probate Court approval. Had LeGrand gone the route of purchasing the 40-acre parcel directly from the Estate, the transaction would have required Probate Court approval under S.C. Code Ann. §62-3-713(2). Obviously, LeGrand would not have wanted the transaction to be scrutinized; the Court may have found out about his pending $299,000 profit!

B. LeGrand absolutely profited from the transaction.

The record in this case shows that LeGrand "presold" the 40-acre parcel for $810,000 (R. p. 577-582), that he then purchased the 40-acre parcel from Respondents for $511,000 (R. p. 555-556), and that shortly thereafter he closed on the sale of it to Amberwinds for $810,000. (R. p. 626-627) LeGrand's clear profit from the transaction, then, was $299,000 ($810,000 minus $511,000).

LeGrand, in his Initial Brief, appears to concede – finally – that he made a profit of $299,000 on the transaction. However, he now asserts that this profit should be "equitably offset" by distributions made to Respondents from sales of the Echo Tango properties.

1. Echo Tango background

Respondents deeded their combined 50% equitable interest in Echo Tango to LeGrand, as part of these transactions, for zero additional consideration. The only caveat was that if LeGrand were to default on his promissory notes to Respondents for the Wellington property, then Respondents would then be entitled to a "return penalty" of 50% of the net proceeds from Echo Tango. LeGrand later did default on these Wellington notes.

Echo Tango was long owned by the Decedent. Legal title to Echo Tango changed over the years for various reasons. At the time of Decedent's death, legal title to Echo Tango was in LeGrand's name. However, the evidence shows, and it has been repeatedly admitted and conceded by LeGrand, that LeGrand equitably owned a 50% interest in Echo Tango, with the other 50% interest owned by the Decedent. (R. p. 120-122)

At the trial, in LeGrand's opening statement, counsel stated:

> "It was their contention – and some legitimacy to the contention

> because Mr. Lowther had reached this agreement with his father before he passed – that they would have a one-half interest in that property and would share the profits of that of that property…"
> (R. p. 205-206)

Later at the trial, when asked what would have happened with Echo Tango had none of the transactions taken place, LeGrand answered as follows:

> A. I would've given them 50 percent of the proceeds out of the sale of it.
>
> Q. Why would you have done that?
>
> A. Because it was my dad's wishes.
>
> Q. Would you characterize as an understanding and agreement that you had with your father?
>
> A. Agreement, understanding. That's what he wanted and I…
> (R. p. 510)

Decedent's Will, signed very shortly before his death, leaves to Respondents what he no doubt understood to be his 50% equitable interest in Echo Tango:

> "I give, devise, and bequeath the following money or personal property:…One-half (1/2) of acreage on waterfront at Chechessee River in the settlement known as Barri-Terri (Echotango) …
>
> to:
> Vivian Gene Lowther Tillotson
> Effie Sandra Lowther Turpin
> Charles Eugene Lowther, Jr.
> Rita Elizabeth Lowther Rogers
> Clayton Clark Lowther
> Mitchell Saxon Lowther
> Mark Allen Lowther
>
> Edward LeGrande Lowther, my son and partner in business shall receive the sum of $1.00 and shall not share in my estate. This fulfills his desire to be excluded from further inheritance."
> (R. p. 587)

LeGrand testified at trial that he had significant involvement in the preparation of this Will:

> "A. Before my dad passed away and some months before he had been trying to get his will made out, Last Will and Testament, and I'd made a couple of appointments with different attorneys to help him get it straightened out ...
>
> And he's also asked Sandra to see if she could help him out. And Sandra would ask me a couple of questions from time to time on it and had a packet. I don't know. It was like a Last Will and Testament, a standard form type thing that –
>
> Q. Go on.
>
> A. And so, anyhow, Sandra had been working on it and we had talked about what had to go in the will.
>
> Q. Okay.
>
> A. Okay. And, basically, that's how the will came about. I'd had conversations with my dad and he had wanted me to be the executor, the personal representative and I told him I really didn't want to but finally I conceded that I would be but I didn't want to be an heir to any of the property.
>
> ...
>
> Q. Who actually typed or drafted this will?
>
> A. I think, I believe Sandra did this.
>
> ...
>
> Q. And were you there at the same time?
>
> A. Yes
>
> (R. p. 367-368)

The deeds themselves of Echo Tango from Respondents to LeGrand are further proof that the Decedent owned a 50% equitable interest in Echo Tango. If the Decedent (and accordingly Respondents as his heirs) did not own any interest in Echo Tango, why would LeGrand have bargained for these deeds from Respondents, and why would these deeds have

even been necessary?

All this is consistent with additional testimony of LeGrand, all a legitimate part of the record, having been submitted to the Circuit Court in response to its inquiries about Echo Tango, and never objected to by LeGrand:

> A. ...There never was any question that they were going to get fifty percent of the proceeds of Echo Tango. I made it clear to them. I made it clear to the attorneys.
>
> ...
>
> A. They were getting it. It was entitled to them. Okay? In my opinion.
>
> Q. You admit it is entitled to them now, since you defaulted on the note.
>
> A. It was entitled to them before. I was going to give it to them. I felt like I owed it to them. I think I verified that with Mr. Rivers this morning, didn't I Mr. Rivers?
>
> MR. RIVERS: You haven't seen that, but we verified that that was legally binding.
> (R. p. 191-192)

And yet more additional testimony of LeGrand, all a legitimate part of the record, having been submitted to the Circuit Court in response to its inquiries about Echo Tango, and never objected to by LeGrand:

> Q. Now, while the title to Echotango was in your name, it's undisputed that you and your dad owned it together 50/50; is that right?
>
> A. Yes, Uh-huh.
> (R. p. 193-194)

Finally, this is also consistent with a 2002 "Agreement" signed by LeGrand (R. p. 195), a legitimate part of the record, having been submitted to the Circuit Court in response to its

inquiries about Echo Tango, and never objected to by LeGrand, reading in relevant part as follows:

> "This is to acknowledge that the following individuals are the equitable and true owners of the below-described interest in Echo Tango property located in the Chechessee Community in Beaufort County. Acknowledgeing this ownership interest, title, however, shall be in the name of E. LeGrand Lowther for business purposes.
>
> E. LeGrand Lowther 50% ownership
> C.E. Lowther 50% ownership
>
> All net proceeds from any sales shall be divided according to the above interests."
> (R. p. 195)

2. <u>Argument</u>

First, Echo Tango is not relevant to this case. Respondents deeded their combined 50% equitable interest in Echo Tango to LeGrand, as part of these transactions, for <u>zero</u> additional consideration. The only caveat was that if LeGrand were to default on his promissory notes to Respondents regarding the Wellington property, then Respondents would then be entitled to a "return penalty" 50% of the net sales proceeds from Echo Tango. LeGrand later did default on these Wellington notes. But by that time, LeGrand had already bought the 40-acre parcel from Respondents, had already paid Respondents $511,000 cash for it, and had already sold it for $810,000. The Echo Tango deeds from Respondents to LeGrand, and then the later return penalty transfers by LeGrand to Respondents, do not change the fact that LeGrand made a $299,000 profit on the 40-acre parcel. In fact, had LeGrand not later defaulted on the Wellington notes, then LeGrand would have made a much, much higher profit in these transactions by in effect taking Echo Tango from

Respondents for free.

Second, even if Echo Tango were relevant, the "return penalty" on Echo Tango was purely the result of LeGrand's own doing, specifically, his default on the Wellington notes. There was no trickery, fraud, or failure to disclose by Respondents regarding Echo Tango. If LeGrand had paid the Wellington notes as promised, then there would have been no issue of any "equitable offset" because Respondents would not have been entitled to anything from Echo Tango. LeGrand, then, is arguing for an ultimately bizarre result: that he should receive a huge financial benefit in "equity" as a result of his own default on the Wellington notes. Of course, this defies any logic.

Third, the doctrine of "unclean hands" prevents any "equitable offset" here. The doctrine of unclean hands precludes one from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the other party. Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010); First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct.App.1998). LeGrand's conduct regarding the 40-acre parcel – as found by both courts below – was grossly unfair to Respondents and prejudiced them greatly. Accordingly, even if Echo Tango were relevant, LeGrand may not take advantage of any "equitable offset".

C. LeGrand breached his fiduciary duties toward Respondents.

LeGrand now tries to assert that he had no contract in place with the third party buyer for sale of the 40-acre parcel, at the time he closed on his purchase of this property with Respondents. This is completely untrue.

LeGrand closed on his purchase from Respondents on December 20, 2005. (R. p.

555-556) The contract between LeGrand and ISI is dated October 12, 2005 (R. p. 577-582), more than two (2) months earlier. LeGrand apparently signed this contract on October 24, 2005 – still about two (2) months earlier. LeGrand's failure to disclose his presale of the 40-acre parcel for $810,000 continued over this entire period, through (and beyond) December 20, 2005.

The record actually shows that LeGrand had an agreement to sell the 40-acre parcel for $810,000 well before October 2005. Mike O. Jones, a principal for the buyer, testified:

> Q. When did you start negotiating with Mr. LeGrande Lowther regarding the 40 acres?
>
> A. I don't know the exact date but it was very, very early in the negotiation process.
>
> Q. Which you said started in June or July?
>
> A. June or July, best of my recollection, yes, sir.
> (R. p. 340)
> ----
> Q. And when was that due diligence done date wish in relation to that date of October 12?
>
> A. In order for us to get a contract on October 12 on the property I would have at least had to have a verbal that those items met our criteria enough that we would be willing to go forward. So, you know, there again, without knowing the exact date I would - - I would guess several weeks.
>
> Q. Okay.
>
> A. You know, several weeks.
>
> Q. Would you go - - Would your company typically go through that due diligence process without an oral deal as to the price and terms with the seller?
>
> A. No, sir. No,sir.

(R. p. 347)

Q. So it would not be true for someone to assert that that property came along at the last minute?

A. Oh, was certainly not a last minute, no, sir.
(R. p. 352)

LeGrand's other argument that he did not breach his fiduciary duties is that his agreements with Respondents for the purchase of the 40-acre parcel were "heavily negotiated", and that Respondents are "not neophytes". There is truth in those assertions, but LeGrand completely misses the point that he failed to disclose the presale and thereby breached his fiduciary duties to Respondents. Failure to disclose is failure to disclose, regardless of the status of the party suffering from the nondisclosure. Respondents could have been ultra-sophisticated and ultra-wealthy real estate dealers – which they are not – and the fact would remain that LeGrand took advantage of them in these transactions.

D. <u>LeGrand's breach of fiduciary duty did cause damages to Respondents.</u>

The proper way to measure damages for breach of fiduciary duty is to determine the profit the fiduciary made by reason of the breach, or stated differently, what the fiduciary entity and/or beneficiaries would have earned but for the breach. See S.C. Code Ann. §62-7-1002(a); Restatement (Third) of Trusts: Prudent Investor Rule §205 (1992).

The record in this case shows that LeGrand (1) entered into a contract to sell the 40-acre parcel to a third party for $810,000 (R. p. 577-582), and (2) then – without disclosing this pending sale to Respondents – purchased the 40-acre parcel from them for $511,000 (R. p. 555-556), and (3) then sold the 40-acre parcel to the third party for $810,000. (R. p. 626-627) LeGrand's clear profit from the transaction, then, was $299,000 ($810,000 minus

$511,000). This profit, made by LeGrand and withheld from the Estate's beneficiaries, is the correct measurement of actual damages in this case.

E. Respondents did not ratify the transaction.

LeGrand argues that Respondents "ratified" the transaction. This is not true.

By the time Respondents became aware of LeGrand's breach of fiduciary duties and wrongful profit, the deal was done. LeGrand had already closed on his "flip" sale of the 40-acre parcel to Amberwinds. Amberwinds, an innocent purchaser at fair market value, was now the owner of the 40-acre parcel. There was nothing Respondents could do legally to unwind the transactions and recover the 40-acre parcel.

LeGrand argues that Respondents later accepted payments under promissory notes from their sale of Wellington to LeGrand. However, LeGrand did not make any such note payments. But even if LeGrand had made such payments, this would not change the facts that LeGrand breached his fiduciaries duties to Respondents regarding the 40-acre parcel, and that Respondents suffered financial damage as a direct result.

LeGrand did make some payments to Respondents with respect to the Echo Tango "return penalty". But, as discussed above, this was caused solely by LeGrand's own default on the Wellington notes. Also, LeGrand essentially was paying this "return penalty" with the Respondents' own money, as they had a combined 50% equitable interest in Echo Tango from the outset, and they were giving away their interest in Echo Tango to LeGrand for free, as long as he paid the Wellington notes. This was in no way a waiver or ratification regarding LeGrand's conduct on the 40-acre parcel.

LeGrand proposes that, when there is a breach of fiduciary duties, one's financial

receipts from a transaction must be at absolute zero, before one has any rights to take action. This is not correct and not the law.

II. THERE IS AMPLE EVIDENCE TO SUPPORT THE FINDINGS OF FACT MADE BY THE COURTS BELOW.

A. <u>The transactions did occur during the process of Estate administration.</u>

LeGrand argues that the transactions did not occur during the process of Estate administration. This argument, in addition to being untrue, demonstrates how little regard LeGrand has for his fiduciary duties as Personal Representative of the Estate.

Estate administration began when LeGrand and his brother Mark were appointed as Personal Representatives of the Estate, on June 17, 2004. Estate administration has not yet ended; the Estate remains open to this day. The transactions in this case all occurred in late 2005 and early 2006. And the transactions all involved real property owned by Decedent and included in his probate estate at the time of his death.

Again, LeGrand tries to evade his fiduciary responsibilities by arguing, in effect, that -- even though he was a Personal Representative of the Estate and even though the 40-acre parcel was an Estate asset – since he technically deeded the 40-acre parcel out to the Estate's beneficiaries before purchasing it from them (albeit after entering into the contracts with them), that this means that he was no longer acting as a fiduciary.

Again, the law does not allow LeGrand to "suspend" his fiduciary duties during the time when he wants to personally purchase property from the Estate's beneficiaries, by technically deeding the property out to them. In fact, these are the times when conflicts of interest rise and when following the fiduciary duties of good faith and fair dealing are most needed. Once LeGrand accepted his appointment as Personal Representative, he took on a legal duty of acting in the best interests of the Estate's beneficiaries. He remained so

obligated at the time of these transactions, and he remains so obligated now.

B. Evidence supports that LeGrand did enter into the ISI contract during October 2005, and in any event long before the closing of his purchase from Respondents.

As discussed in I.C. above, LeGrand did enter into a contract with ISI during October 2005. (R. p. 577-582) The contract itself is dated October 12, and LeGrand claims to have signed it on October 24, and testimony from a buyer principal was that there was an oral agreement between LeGrand and the buyer in place well before October 12. (R. p. 352) Still, LeGrand did not close on his purchase from Respondents until December 20, 2005 (R. p. 555-556), about two (2) months after LeGrand claims to have signed the ISI contract. Whether LeGrand had pre-sold the 40-acre parcel two months, two days, or two years prior to buying it from Respondents makes no difference. His failure to disclose the pending sale, regardless over how long a period of time, is still a gross breach of fiduciary duty.

In arguing this fact, LeGrand also implies, incorrectly, that his breach of fiduciary duty would have been acceptable as long as he did not directly lie to Respondents about the existence of the pending sale. LeGrand misses the point, that his failure to disclose the very existence of this pending deal constitutes a breach. Such a breach does not require an actual lie to someone's face. A failure to disclose important financial information may constitute a breach of fiduciary duty. Corley v. Ott, 326 S.C. 89, 485 S.E.2d 97 (1997).

C. Evidence supports that ISI and Amberwinds were virtually the same entity, with the same individual owners, and that Amberwinds was an assignee of ISI.

According to extensive trial testimony, LeGrand at all times dealt with Mike Jones and Monty Perry, both of whom were principals of the buyer. Mike Jones also testified at

trial, that he and Monty Perry handled and negotiated the transaction for the buyer. LeGrand further testified that the contract for the 40-acre parcel did eventually close, with Amberwinds as the Buyer:

> Q. Now, the $800,000 contract, that went through eventually, correct?
>
> A. Eventually.
>
> Q. With ISI.
> And it went through another company called Amber Winds?
>
> A. Amber Winds, yes.
>
> Q. All right. And did you ever figure out what the connection between Amber Winds and ISI was?
>
> A. Monty may have told me but I don't know.
>
> Q. That wasn't material to you? You just wanted to close?
>
> A. Yeah, yeah, I just wanted to close.
> (R. p. 450-451)

Also, the closing statement from the Amberwinds purchase shows the buyer as "Monte Perry for Amberwinds, LLC". (R. p. 627) Thus it is clear that the transaction closed as provided under the original contract with ISI, with Amberwinds being the assignee of ISI and virtually the same entity with the same owners.

D. Evidence supports that the Decedent owned a 50% equitable interest in Echo Tango, and the exhibits documenting this fact are a legitimate part of the record in this case.

LeGrand now argues – completely contradicting the evidence and his own testimony in the record and described at I.B.1. above – that the Decedent did not own a 50% interest in Echo Tango; and LeGrand takes issue with various exhibits in the record. But the fact is that

the record of this case – as more fully described at I.B.1. above – shows that the Decedent did own a 50% equitable interest in Echo Tango. The lower courts had much more than ample evidence to reach this conclusion.

As to the record from the courts below, it speaks for itself. All of the testimony and exhibits now questioned by LeGrand were submitted to the Circuit Court in response to its inquiries about Echo Tango, were copied to LeGrand, were subjects of extensive discussions and argument during multiple hearings, and were never objected to by LeGrand. The Circuit Court had three (3) separate hearings on this case – an initial appeal hearing, a follow-up hearing to more fully address Echo Tango, and a hearing on LeGrand's Motion to Reconsider. These three hearings took place over a period of nine (9) months. At no time along the way did LeGrand ever question or object to any of these testimony and exhibits. Accordingly, LeGrand has waived any right to object to these items. See State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."); State v. Burton, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct.App.1997) (" Failure to object when the evidence is offered constitutes a waiver of the right to object.").

Even had LeGrand objected to these items, these items should not have made any difference in the outcome of this case. Again, there was more than ample evidence for the courts to conclude that the Decedent equitably owned a 50% interest in Echo Tango. Neither court below found otherwise. (The Probate Court, while erroneously allowing an "equitable offset", made no finding at all regarding the ownership of Echo Tango.) The items now objected to by LeGrand merely supplemented and amplified existing evidence.

III. THE CIRCUIT COURT CORRECTLY DISREGARDED ECHO TANGO IN CALCULATING DAMAGES SUFFERED BY RESPONDENTS.

The proper way to measure damages for breach of fiduciary duty is to determine the profit the fiduciary made by reason of the breach, or stated differently, what the fiduciary entity and/or beneficiaries would have earned but for the breach. See S.C. Code Ann. §62-7-1002(a); Restatement (Third) of Trusts: Prudent Investor Rule §205 (1992).

LeGrand tries to pose "damages" and "profits" as two separate issues, when under the law, in breach of fiduciary duty cases, they are one and the same.

Therefore, Respondents' discussion at I.B. and I.D. above completely and accurately addresses the issue of calculation of damages.

IV. THE COURTS BELOW CORRECTLY APPORTIONED DAMAGES AMONG ALL OF THE BENEFICIARIES OF THE ESTATE.

A. LeGrand did not preserve this issue for appellate review.

The "parties" issue now raised by LeGrand was not preserved for appellate review. Respondents clearly brought their action for themselves "and a class of beneficiaries of the Estate of C.E. Lowther, Sr." (R. p. 69) The Probate Court granted its judgment in favor of all seven (7) beneficiaries of the Estate. (R. p. 38) LeGrand never raised the "parties" issue with the Probate Court, and did not file a SCRCP Rule 59 motion over the "parties" issue. Accordingly, this issue is not preserved for review. Ulmer v. Ulmer, 369 S.C. 486, 632 S.E. 2d 858 (S.C. 2006), In the Interest of Michael H., 360 S.C. 540, 602 S.E. 2d 729 (S.C. 2004).

B. LeGrand abandoned this issue on his appeal to the Circuit Court.

Also, LeGrand did not raise this "parties" issue at any of the hearings in his appeal to the Circuit Court. The Circuit Court has appellate jurisdiction over only those matters which are properly appealed. In re Estate of Cretzmeyer, 356 S.C. 12, 615 S.E. 2d 116 (S.C. 2005). "A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case." Austin v. Specialty Transportation Services, 358 S.C. 298, 594 S.E. 2d 867 (S.C. App. 2004). Accordingly, the inclusion of all seven (7) beneficiaries in the recovery is now the law of the case.

C. Even if this issue were appropriate for review now, the courts below properly apportioned damages among all of the beneficiaries of the Estate.

Further, even if this issue had been preserved for review by LeGrand and had been raised on appeal by LeGrand, LeGrand's objections are without merit. The Probate Court

has the power to address breaches of fiduciary duty by fiduciaries. S.C. Code § 62-3-712 states that if an exercise of power concerning an estate is improper, "the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust." (emphasis added) All seven (7) beneficiaries clearly are interested persons. As this statute incorporates the liability standards from the South Carolina Trust Code, S.C. Code § 62-7-101 et. seq, the statute gives the Probate Court broad authority to fashion relief:

> To remedy a breach of trust that has occurred or may occur, the court may:
>
> (1) compel the trustee to perform the trustee's duties;
>
> (2) enjoin the trustee from committing a breach of trust;
>
> (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
>
> (4) order a trustee to account;
>
> (5) appoint a special fiduciary to take possession of the trust property and administer the trust;
>
> (6) suspend the trustee;
>
> (7) remove the trustee as provided in Section 62-7-706;
>
> (8) reduce or deny compensation to the trustee;
>
> (9) subject to Section 62-7-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
>
> (10) order any other appropriate relief.

S.C. Code Ann. § 62-7-1001(b) (emphasis added).

Respondents brought this action for the benefit of all beneficiaries, and this action has resulted in a "common fund" for the benefit of all beneficiaries. "Common funds" previously have been recognized by courts in equity. See Peppertree Resorts, Ltd. v. Cabana Limited Partnership, 315 S.C. 36, 431 S.E.2d 598 (Ct. App. 1993); Petition of Crum, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941).

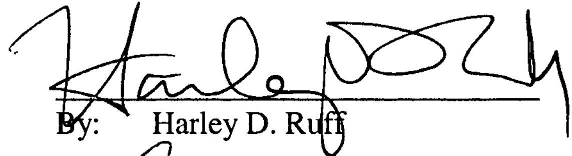
The Probate Court was within S.C. Code § 62-3-712 and its equitable powers in granting judgment to all interested persons.

CONCLUSION

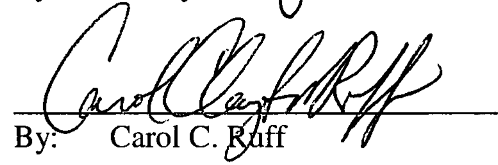
For the reasons stated, this Court should affirm the judgment of the circuit court.

Respectfully submitted,

RUFF & RUFF LLC



By: Harley D. Ruff



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November 16, 2012

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Presiding 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.

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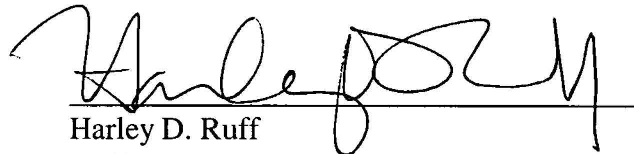
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

November 16, 2012



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CERTIFICATE OF SERVICE

I certify that I have served the Respondents' Final Brief on the Appellant, E. LeGrand Lowther, by depositing a copy of it in the United States Mail, postage prepaid, on November 20, 2012, addressed to his attorney of record, H. Fred Kuhn, Jr., Esquire, Post Office Drawer 507, Beaufort, South Carolina, 29901.

November 20, 2012

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