THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William E. Lawson, Special Referee

CASE NO: 2011-CP-26-4758

Monroe E. Cook and Lynn S. Cook ..... Appellants

v.

Nealy Lynn Taylor .....Respondent

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On August 28, 2008, the Appellants recorded a deed conveying 18.78 acres, more or less, to the Respondent. The purpose of the conveyance was because the Appellants learned that they owned too much property to continue receiving Social Security benefits for two (2) adopted children, and because they may have to pay back Social Security benefits already received. The conveyance was made without the Respondent's knowledge and without any discussion regarding the reason or purpose of the conveyance at the time the conveyance was made. Approximately eight or nine months after the conveyance, the Respondent discovered the property had been transferred to her. Shortly thereafter, the Appellants learned that the conveyance was not sufficient for them to continue receiving Social Security benefits, and they also learned that they would have to pay approximately Forty Thousand ($40,000.00) Dollars back to the Social Security Administration for benefits already received. During that same time, the Appellants began having marital problems. They also learned at some point that the proposed I-73 corridor crossed the 18.78 acres and that condemnation proceeds might be forthcoming.

Thereafter, approximately one (1) year after the conveyance, the Appellant Lynn Cook requested that the Respondent deed the property back to the Appellants after explaining to the Respondent why the property was conveyed and the reasons she wanted it reconveyed to the Appellants. The Respondent refused to reconvey the property to the Appellants and the Appellants initiated this lawsuit in June of 2011 to force the Respondent to reconvey the property to the Appellants, or in the alternative, to enter judgment against Respondent in the amount the Appellants purchased the property for in 2007. The matter was referred to the Special Referee by the Clerk of Court for Horry County by order dated

February 11, 2013, and the Special Referee found that Respondent did not have to reconvey the property to the Appellants. This appeal followed.

STANDARD OF REVIEW

This action includes claims and defenses that are both legal and equitable in nature. In an action at law on appeal of a case tried by a jury, the findings of fact of the Judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the Judge's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). On appeal in an action in equity, the appellate court may find facts in accordance with its views of the preponderance of the evidence. *Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). This does not require the appellate court to disregard the findings of the trial court, which saw and heard the witnesses and was in better position to evaluate their credibility, and does not relieve the Appellant of the burden of convincing the appellate court that the trial court committed error in its findings. *Town of Kingstree v. Chapman*, 405 S.C. 282, 300, 747 S.E.2d 494, 503 (Ct. App. 2013) (internal citations omitted).

ARGUMENT

I. The Special Referee did not abuse his discretion by allowing the Respondent to amend her pleadings to add the defenses of lack of consideration, illegality and unclean hands at the close of the trial.

At the close of the case, Respondent moved to amend her answer to conform to the evidence under Rule 15(b), SCRCP, to include the defenses of lack of consideration, illegality and unclean hands, arguing that those defenses, although not originally pled in her Complaint, had been tried without objection, meaning that the parties had consented to the issues being tried. (R. p. 230, line 14-p. 231, line 1). Rule 15(b), SCRCP, provides:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they should be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The Court shall upon motion grant a continuance reasonably necessary to enable the objecting party to meet such evidence. Upon allowing any such amendment or evidence the Court shall state in the record the reason or reasons for allowing the amendment or evidence. In the event the Court should try issues not raised by the pleadings, it shall state in the record all such issues tried and the reason therefore."

Amendments to the pleadings are left to the sound discretion of the Court. *Duncan v. CRS Sirrine Engineers, Inc.*, 337 S.C. 537, 524 S.E.2d 115 (Ct. App. 1999). Courts have wide latitude in amending pleadings and the decision of the Court to allow the amendment of pleadings will rarely be disturbed on appeal. *Berry v. McCleod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997) (rehearing denied; cert. denied). Amendment of the pleadings should

be freely and liberally allowed when no prejudice will result. *Kelly v. South Carolina Farm Bureau Mutual Insurance Company*, 316 S.C. 319, 450 S.E.2d 59 (Ct. App. 1994) (rehearing denied). If a party does not object to the evidence when presented at trial, the issue is considered tried by consent. *Upchurch v. Upchurch*, 367 S.C. 16, 624 S.E.2d 643 (2006); *Blackburn & Co. v. Dudley*, 298 S.C. 538, 381 S.E.2d 918 (Ct. App. 1989); *Woods v. Rabon*, 295 S.C. 343, 368 S.E.2d 471 (Ct. App. 1988). When issues not raised in the pleadings are tried by consent, they will be treated as if they had been raised in the pleadings. *McCurry v. Keith*, 325 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997) (rehearing denied; cert. denied). When issues are not raised by the pleadings but are tried by consent, amendments to the pleading are desirable because they bring the pleadings in line with the issues actually developed at trial. *Sunvillas Homeowners Association v. Square D Company*, 301 S.C. 330, 391 S.E.2d 868 (Ct. App. 1990). For the Court to deny a motion to amend the pleadings there must be evidence of prejudice. *Hardaway Concrete Company, Inc. v. Hall Contracting Corporation*, 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007). Prejudice is a lack of notice that the new issue is going to be tried and a lack of opportunity to refute it. *Collins Entertainment, Inc. v. White*, 363 S.C. 546, 611 S.E.2d 626 (Ct. App. 2005)(rehearing denied; cert. denied). The party opposing the motion has the burden of establishing prejudice. *Collins Entertainment, Inc.*

On cross examination, the Appellant Monroe Cook testified that he signed the deed conveying the property to the Respondent upon the terms that the Respondent would sign it back over to him at his request and then had the deed recorded. (R. p. 100, lines 7-12). Mr. Cook also testified that he did not pay the Respondent any money to hold that property for him, and that it wasn't going to cost her anything because he was going to continue

paying the taxes on it. (R. p. 100, lines 13-16). The Appellant Lynn Cook also testified that she did not pay the Respondent anything for the Respondent to hold the property for her. (R. p. 164, lines 10-12). After the Appellants rested their case in chief, the Respondent moved for a directed verdict on several grounds, one of which was that there had been no testimony that any consideration was paid by the Appellants in exchange for the Respondent taking title so that any alleged agreement for the Respondent to temporarily hold title to the property for the Appellants was void for lack of consideration. (R. p. 190, lines 4-8). Nowhere in the record is there any objection whatsoever by the Appellants to the questioning on this issue by the Respondent at the time the Appellants were questioned on this issue, or in response to the Respondent's motion for a directed verdict. The Appellants did not even address those issues in their arguments against Respondent's motion for a directed verdict. (R. p. 193, line 8-p. 196, line 13). Therefore, this issue is not preserved for appeal.

With regards to illegality and unclean hands related to the alleged contract between the Appellants and Respondent that the Respondent hold title to the subject property so that the Appellants could unlawfully obtain Social Security benefits, Mr. Cook testified on cross examination that the reason he conveyed the property to Respondent was to get around the Social Security requirements. (R. p. 106, lines 19-23). Mr. Cook also testified that the transfer did not work because he was not able to get the Social Security benefits and had to pay money back to Social Security for benefits previously received. (R. p. 108, lines 13-16). The Appellant Mrs. Cook testified on cross examination that she believed it was necessary to transfer other property to her son so that her children could continue drawing Social Security income. (R. p. 129, lines 6-8). Mrs. Cook also testified that she

did that because persons at Social Security told her that the Appellants had too much property in their name. However, Mrs. Cook testified that the folks at Social Security did not tell her to convey any property. (R. p. 129, lines 9-15; R. p. 132, lines 10-15). Mrs. Cook also testified that the Appellants deeded the property to Respondent in order to get around the Social Security requirements and to receive benefits from Social Security (R. p. 157, lines 9-12) and that no one at Social Security ever told her to make those transfers (R. p. 157, lines 22-25). Mrs. Cook also testified that Social Security could not legally tell her to transfer property, and that she believed that it would be illegal to do so. (R. p. 158, line 16- p. 159, line 4). Mrs. Cook went on to testify that the reason she transferred the property was to get around a rule or requirement that Social Security had in order to receive Social Security benefits. (R. p. 168, lines 20-23).

At no time during the questioning on the issues of illegality and unclean hands did the Appellants object to the questioning or the raising of those issues. The issues of illegality and unclean hands were also argued by the Respondent in her motion for a directed verdict at the close of the Appellants case in chief. (R. p. 189, line 10-p. 190, line 3; R. p. 191, lines 4-9). Once again, the Appellants made no argument in opposition to the motion for a directed verdict on the issues of illegality and unclean hands. (R. p. 193, line 8- p. 196, line 13). Therefore, these issues have not been preserved for appeal, but were tried by consent and were discussed extensively at trial. *Fraternal Order of Police v. South Carolina Department of Revenue*, 352 S.C. 420, 574 S.E.2d 717 (2002).

Additionally, the only argument made by the Appellants against the Respondent's motion to amend her answer to include the defenses of unclean hands, lack of consideration and illegality is a conclusory statement that it would be prejudicial to the Appellants. (R.

p. 231, lines 7-8). However, Appellants' counsel allowed cross examination of the Appellants on those issues, did not object to them at the time they were being questioned on those issues, and had the opportunity to refute the issues on redirect and in opposition to Respondents motion for directed verdict, but failed to do so. *Collins Entertainment, Inc.*, supra. Therefore, the Appellants have not met their burden of establishing prejudice. Appellants also did not move for a continuance to enable them to meet the evidence pursuant to Rule 15(b), SCRCP. The Court took the motion to amend the pleadings to add these three defenses under advisement. Then, after discussing all of the issues in the case, the Special Referee stated in his Order of March 20, 2013:

> "Based upon the foregoing, I find and conclude that Defendant's Motion to amend the complaint to conform to the evidence to allege the additional defenses of lack of consideration, illegality and unclean hands is granted pursuant to Rule 15(b), SCRCP as those issues were tried without objection and by consent of the parties." (R. p. 14)

Therefore, the Special Referee satisfied the requirement that he give reasons for granting the motion to amend.

Thus, based upon the Appellants failure to contemporaneously object to the raising of these issues during the trial, the issue is not preserved for appeal. In addition, the Appellants did not meet their burden by establishing prejudice by failing to make any attempt to refute the issues on direct examination or in responses to Respondent's motion for directed verdict, and by failing to move for a continuance. The Special Referee stated the reasons for allowing the amendment in his order after taking the motions under consideration. Simply stated, the issues were tried by consent. Therefore, the decision of the Special Referee should be affirmed.

II. The Special Referee correctly held that the Respondent was not unjustly enriched.

To prevail on the unjust enrichment claim, the Plaintiff must establish (1) a benefit conferred upon the Defendant; (2) the Defendant realized the benefit; and (3) retention of the benefit by the Defendant under circumstances that makes it inequitable for the Defendant to retain it without paying its value. *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012). The Appellants argue that the property was conveyed to the Respondent as a benefit to the Respondent in Appellants' Initial Brief. (Initial Brief of Appellants, pp. 7-8). However, this is contrary both to the allegations contained in their Complaint and their testimony. The Appellants alleged in their Complaint "that the transfer was conducted for the sole purpose of Plaintiff Lynn S. Cook to continue to be eligible to receive benefits under Social Security supplement for two of the adopted children who are physically and mentally handicapped." (R. p. 389-390, paragraph 7). The Appellants consistently testified that was the reason they conveyed the property to the Respondent during the trial. (R. p. 106, lines 19-23; R. p. 108, lines 13-16; R. p. 129, lines 6-8; R. p. 134, lines 20-25; R. p. 157, lines 9-12; R. p. 158, line 21- p. 159, line 4; R. p. 168, line 20- p. 169, line 2; R. p. 185, lines 7-13). Thus, the property was not transferred to the Respondent as a benefit to the Respondent, but as a benefit to the Appellants. Therefore, unjust enrichment does not apply to this situation because the transfer was for the benefit of the Appellants, not the Respondent.

Further, the Special Referee found that the unjust enrichment claim was barred by the doctrine of unclean hands and that the purpose for which the Appellant's conveyed the property to the Respondent was illegal. (R. p. 8). One who seeks equity must do equity.

Regions Bank v. Winguard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011). The Appellants are seeking the equitable claim or remedy of unjust enrichment. They cannot do so because they come into the Court with unclean hands in that they made a transfer of property to the Respondent for an unlawful purpose, and without her knowledge of the transfer at the time it was made. (R. p. 208, lines 8-11). "The law will never impute a promise to pay for a benefit conferred where it would be unjust to the party to whom it would be imputed and contrary to equity. The law never implies a promise to pay, unless duty creates the obligation to pay, and more especially, it never implies a promise to do an act contrary to duty or contrary to law." *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 474, 366 S.E.2d 12, 14 (Ct. App. 1988), citing 66 Am. Jur. 2d., Restitution and Implied Contracts § 2 (1973). The transfer of the property by the Appellants to the Respondent and the reasons therefore are circumstances which bars the Appellants' claim for unjust enrichment.

Additionally, in a claim for unjust enrichment, the benefit conferred must be non-gratuitous. *JASDIP Properties, LLC v. Estate of Richardson*, 395 S.C. 633, 720 S.E.2d 485 (Ct. App. 2011). Assuming, arguendo, that the transfer of the property was a benefit to the Respondent, the Respondent testified that she did not find out that the property had been deeded to her until May or June of 2009, which was nine or ten months after the property was actually conveyed to her (R. p. 204, lines 15-18), that she never had any discussions about the transfer of the property with anyone before August of 2009 (R. p. 208, lines 8-11), that she considered it to be hers since her brother had already been given property (R. p. 213, lines 15-21), that she accepted the property as being hers (R. p. 213, lines 22-23), and that she believed that the transfer of the property was a gift to her (R. p. 214, lines 19-

24; R. p. 215, lines 5-7). Accordingly, the Special Referee correctly found that the Appellants' claim for unjust enrichment was barred by the doctrine of the unclean hands and illegality, and that no benefit flowed to the Respondent since the conveyance was gratuitous. The Appellants have argued in their Initial Brief that they were entitled to a directed verdict on the claim of unjust enrichment. (Initial Brief of Appellants, p. 7). However, the Appellants never made a motion for a directed verdict either at the close of their case in chief or at the close of the Respondent's case in chief. (R. p. 193, line 8- p. 196, line 13; R. p. 235, line 4- p. 236, line 25).

III. The Special Referee correctly held that the Appellants attempted to make an illegal contract.

The Appellants, in their argument that the Special Referee erred in holding that the Appellants made an illegal contract, argue that there is no evidence in the record supporting the Special Referee's finding that the Appellants transferred the property to circumvent the Social Security requirements. However, the record is replete with evidence supporting the Special Referee's decision. First, and contrary to Appellant's argument, the Appellant Monroe Cook never talked to anyone at the Social Security Administration. (R. p. 83, lines 3-8). Therefore, any statements by the Appellants in their Initial Brief that Monroe Cook talked to anyone at the Social Security Administration are untrue. Second, the Appellants initiated this action by filing their Complaint with a verification attached wherein the Appellants swore that the Complaint was true and correct. (R. p. 393). The allegation contained in paragraph 7 on page 1 of the Complaint states "that the transfer was conducted for the sole purpose of the Plaintiff Lynn S. Cook to continue to be eligible to receive benefits under Social Security supplement for two of the adopted children who are

physically and mentally handicapped." (R. p. 389-390, paragraph 7). Monroe Cook testified that he was worried that the government was going to make him pay back Social Security benefits if he didn't transfer some of his property (R. p. 40, lines 19-24), that he transferred property to his son Kenneth so that the two children could continue receiving Social Security income benefits (R. p. 41, lines 5-10), that the transfers did not prevent that, and not only were the benefits denied, but the Appellants were ordered to pay back Forty Thousand ($40,000.00) Dollars to Social Security (R. p. 43, lines 15-23). Mr. Cook testified that the reason why he wanted his son Kenneth and the Respondent to deed the property back to him (R. p. 43, line 24- p. 44, line 4), and the reason he conveyed the property to the Respondent, as well as another piece of property to his son Kenneth, was to get around the Social Security requirements (R. p. 106, lines 19-23).

The Appellant Lynn Cook testified that she thought it was necessary to transfer the property to her son Kenneth so that her children could continue drawing Social Security income (R. p. 129, lines 6-8), that she has been using her children's Social Security income checks to pay off the Forty Thousand ($40,000.00) Dollars that the Appellants owe back to Social Security (R. p. 148, lines 8-18), that she transferred the property to the Respondent in order to get the Social Security benefits for the children (R. p. 157, lines 9-12), that no one at Social Security ever told her to make these transfers (R. p. 157, lines 22-25; R. p. 158, lines 16-23), and that it would be illegal to transfer the property for the purpose of getting around the Social Security requirements (R. p. 158, line 24- p. 159, line 2).

The Appellants correctly stated the general rule in their Initial Brief that was cited by the court that:

> "The general rule, well established in South Carolina is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law or judicial decisions." *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004). (Initial Brief of Appellant, p. 8; R. p. 7-8)

The Appellants further correctly noted in their brief that the court found that the Appellants had:

> "clearly and unequivocally testified that the only reason they conveyed the property to the Defendant was to circumvent Social Security regulations concerning their right to receive and keep Social Security benefits for two (2) of their adopted children." (Initial Brief of Appellant, p. 8; R. p. 8).

The Special Referee then went on to state that "based on the Plaintiffs own testimony, I find that even if all elements of a contract had existed, the contract was illegal, making the contract void and unenforceable, and an action for its breach cannot be maintained." (R. p. 8). The Special Referee's holding that the contract, if it existed, was illegal is supported by the Appellants' Complaint and their own testimony, and the Special Referee's decision should be affirmed.

IV. The Special Referee correctly held that the Appellants assumed the risk.

The Appellants argue that assumption of the risk is not a defense to a claim for quantum meruit or unjust enrichment, but only a defense to a negligence action. While assumption of the risk is normally associated with negligence actions, it has also been applied to inverse condenation actions. *Cutchin v. South Carolina Department of Highways and Public Transportation*, 301 S.C. 35, 389 S.E.2d 646 (1990). Whether or not the defense of assumption of the risk applies to a claim for quantum meruit or unjust enrichment, it is clear from the record that the Appellants assumed the risk that by signing a deed

unconditionally conveying property to the Respondent that there was the risk that she could treat it as her own and never return it to the Appellants. "The defense of assumption of the risk is established when the Plaintiff freely and voluntarily enters into a known danger and is subsequently injured." *Cutchin*, supra., citing *Baker v. Clark*, 233 S.C. 20, 103 S.E.2d 395 (1958). The Appellant Monroe Cook testified that he knew that once he deeded the property to the Respondent that she was free at that point to give it away. (R. p. 100, lines 20-25). Mr. Cook also testified that he knew there was a danger that whenever he gave something to someone that they are free to do with it what they want. (R. p. 102, lines 13-17).

The Appellant Lynn Cook testified that she knew by conveying the property to the Respondent that the Respondent was free to do with it whatever she wanted. (R. p. 165, lines 3-25). Lynn Cook also testified that once she signed the deed that she gave up all rights to the property and that it was reasonable for the Respondent to believe it was her property. (R. p. 168, lines 7-19).

In fact, the Respondent did believe that the property was hers (R. p. 213, lines 13-23), paid the taxes on it for the years 2009, 2010, 2011 and 2012 (R. p. 209, lines 11-20), deeded a ½ interest in the property to her husband (R. p. 209, lines 4-5), and used the property as collateral for a loan in August 2010 as a down payment on a home and moving expenses incurred in moving back to Horry County from Charleston. (R. p. 209, lines 21-23; R. p. 210, line 19- p. 211, line 1; R. p. 262-266).

Therefore, the record is clear that the Appellants knew there was a danger that once they deeded the property to the Respondent they would never be able to take title to the property again and that it was reasonable for the Respondent to believe the property was

hers. In fact, the Respondent did believe the property was hers to do whatever she wanted to do with it. Even if the Court finds that assumption of the risk doesn't apply to this claim of quantum meruit or unjust enrichment, these actions and testimony by the Respondents and Appellants certainly supports the Respondent's waiver and estoppel defenses.

V. The Special Referee correctly held that the Appellants had unclean hands.

The Appellants argue that the defense of unclean hands should not be allowed for two reasons. The first is that it was raised without notice in a motion to amend the Respondent's answer. Respondent has already detailed why that was not in error in the first argument. The second reason is that the Appellants simply state it has not been proven by the Respondent. However, that too has already been addressed above in conjunction with the illegal nature of the transaction attempted by the Appellants, but being unknown at the time of the transfer by the Respondent. This in itself shows that the Appellants acted unfairly. The prejudice to the Respondent was that she treated the property as her own by conveying a ½ interest in the property to her husband, using the property for collateral for a loan for a down payment on a home and moving expenses, paying the taxes on it, and if she had to give the property back to the Appellants, that would cause her to go into default on her loan. (R. p. 215, line 19- p. 216, line 2). The Respondent believed that she could do anything she wanted to with it, including keeping it forever, giving it to anyone she wanted to, selling it to anyone she wanted to and that it was a gift. (R. p. 214, line 2- p. 215, line 7). Therefore, the prejudice to the Respondent of having to deed the property back after the Appellants acted illegally and with unclean hands is evident from the record.

Last, the Appellants state in their Initial Brief that "finally, Appellants suggest that a constructive trust resulted over the real property when it became clear that the Cooks

wanted the property returned (and Nealy had paid nothing for it). (Initial Brief of Appellants, p. 11). However, the Appellants did not plead constructive trust as a cause of action. Therefore, that is an issue that is not preserved on appeal.

VI. The Special Referee correctly held that there was no breach of fiduciary duty between the Appellants and Respondent.

The Appellants argue that there was a fiduciary duty between the Appellants and Respondent based solely upon the fact that the Respondent is the biological daughter of the Appellants, that the Respondent knew at the time the transfer was made that it was being made by the Appellants to defraud Social Security and that the Respondent just "**took**" the property from "the handicapped children and a disabled man to buy a home by using the property as a down payment on a new home when their income was over $200,000.00." (Initial Brief of Appellants, p. 12). By these statements, the Appellants are twisting the facts to make it sound like the Respondent is some kind of greedy thief. However, nothing could be further from the truth as shown by the record. It is clear that the Appellants voluntarily and without request by or knowledge of the Respondent conveyed the property to the Respondent to defraud the Social Security Administration (R. p. 43, lines 11-14; R. p. 87, lines 5-13; R. p. 100, lines 7-14; R. p. 106, lines 19-23; R. p. 129, lines 6-8; R. p. 134, lines 20-25; R. p. 157, lines 9-12; R. p. 158, line 16- p. 159, line 4; R. p. 165, lines 23-25; R. p. 168, lines 20-23). The Respondent testified that she did not learn that the property had been deeded to her until May or June of 2009 (R. p. 204, lines 15-18), even though the property was transferred to her in August of 2008 (R. p. 250-252). The Respondent also testified that she never had any discussions with anyone, other than her husband, about this property and its conveyance until August of 2009, one year after the

transfer. (R.. p. 208, lines 8-11). That conversation was initiated by the Respondent's mother, the Appellant Lynn Cook, when her mother requested that she deed the property back to the Appellants so that they would be able to pay back the Social Security benefits, so the Appellants could get a divorce and because Lynn Cook would need the money for the divorce because they would have to split up. (R. p. 208, lines 13-23). The Appellant, Lynn Cook confirmed this when she testified that she called the Respondent in August of 2009 and asked her to transfer the property back because she and Monroe Cook were having problems (R. p. 161, line 20- p. 162, line 2; R. p. 164, lines 7-9), and the proposed route for Interstate 73 went through this property (R. p. 162, line 25- p. 163, line 3). The Respondent has never had a conversation with Monroe Cook about the land. (R. p. 218, lines 24-25).

"As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. The other party must have actually accepted or induced the confidence placed in him." *Regions Bank v. Shmuach*, 354 S.C. 648, 670-671, 582 S.E.2d 432, 444 (Ct. App. 2003). As shown by the evidence referenced above, the decision to convey the property to the Respondent and the conveyance itself was the unilateral action of the Appellants. At the time of the transfer, the Respondent had no idea why the property was being transferred to her and did not even learn about the transfer until nine or ten months after the transfer. The Respondent could not have actually accepted or induced the confidence alleged by the Appellants if she in fact did not know any confidence was being placed in her by the transfer of the property to her for the Appellants to defraud the Social Security Administration. For that reason, the Special Referee's holding that there was no fiduciary duty should be affirmed.

VII. The Special Referee correctly held that estoppel applied to the Appellants in this case.

While it is true that the Respondent learned the property had been conveyed to her and that the Appellants wanted it conveyed back to them, that knowledge was only gained more than eight or nine months after the conveyance had been made. (R. p. 161, line 20- p. 162, line 2). The reasons why Lynn Cook wanted the property conveyed back to the Appellants was because Lynn Cook was having marital problems with Monroe Cook, the new I-73 corridor went through the property and she was thinking about getting a divorce from Monroe Cook. (R. p. 161, line 20- p. 162, line 2; R. p. 162, line 25- p. 163, line 3; R. p. 164, lines 7-9). These reasons were not made known to the Respondent until one (1) year after the conveyance.

Appellants' argument does not look to the time of the conveyance, but many months after the conveyance was made. The record is replete with evidence that the Respondent had no knowledge that the property had been conveyed to her until eight or nine months after the conveyance, had no knowledge of why the property had been conveyed to her until a year after the conveyance, and had relied on the conveyance as being hers outright. Therefore, the Special Referee's finding that estoppel applied should be affirmed.

VIII. This Court should affirm the Special Referee's decision on the additional sustaining ground that Appellants failed to appeal all defenses which were included in the Special Referee's order.

The Court should affirm the order of the Special Referee under the "two issue rule" since the Appellants failed to appeal the waiver defense. The Respondent raised the defense of waiver in her sixth defense contained in her answer. (R. p. 397). The Special Referee, in

his order, found that the Appellants waived all of their rights to the property. The Court cited the following for its position:

> "Waiver is a voluntary and intentional abandonment or relinquishment of a known right. It may be expressed or implied by a party's conduct." (citing *Skipper v. Perrone*, 382 S.C. 53, 62, 674 S.E. 2d 510, 514 (Ct. App. 2009)).

Further, the Court noted:

> The Plaintiffs testified that they voluntarily and intentionally signed the Deed conveying the property to the Defendant, giving up all legal rights to the property, and that they knew that once the property was titled in the Defendant's name, she was free to give it away, sell it or encumber it, thereby appreciating the nature and extent of that danger. Therefore, the Plaintiffs have waived all of their rights, title and interest in and to the property....

(R. p. 12-13).

The Appellants have failed to raise or appeal the defense of waiver. Since this defense alone would be sufficient to deny the Plaintiff's claim for a return of the property or its value, it is unnecessary to consider all other issues raised on appeal by the Appellants under the two issue rule. *Anderson v. South Carolina Department of Highways and Public Transportation*, 322 S.C. 417, 472 S.E.2d 253 (1996) (Under the "two issue" rule, it is unnecessary for the appellate court to address all the grounds appealed where one requires affirmance). The "two issue" rule is "a procedural tool for upholding, not reversing, decisions." *Id.* at 420, 255. Accordingly, the Court should affirm the Special Referee's decision in this case under the "two issue" rule.

Furthermore, the scope of review with regards to equitable claims and defenses in this case "does not require the appellate court to disregard the findings of the trial court, which saw and heard the witnesses and was in a better position to evaluate their credibility."

Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000). The Special Referee was well aware that the Appellant Monroe Cook was not a credible witness. Mr. Cook testified that he paid for the Respondent's college education (R. p. 31, lines 5-6), then testified that he didn't on cross examination (R. p. 54, lines 5-10). His wife, the Appellant Lynn Cook, confirmed that. (R. p. 142, lines 16-18). Monroe Cook also testified that he would never testify to anything under oath that wasn't true. (R. p. 56, lines 22-24). However, when his deposition was taken on December 9, 2011, he testified that he had only been involved in three civil actions prior to the current action and two criminal actions, when in fact he had been involved in twenty-two additional civil actions and five additional criminal actions. (R. pp. 57-67; R. p. 311, line 9- p. 333, line 17). One of those criminal actions included a charge of assault and battery, intent to kill, criminal domestic violence of a high and aggravated nature as a result of shooting his refrigerator and a dresser mirror inside his house in July of 2009 with his wife and children in the home. (R. p. 92, line 2- p. 94, line 25). This was one month before Lynn Cook asked the Respondent to convey the property back to them. Monroe Cook also testified that he talked to the Respondent face-to-face about transferring the property back to him (R. p. 83, lines 14-23), but later admitted that he did not talk to her face-to-face, but talked to her on the phone when he was impeached with his deposition transcript (R. p. 85, lines 3-16; R. p. 298, lines 10-14). The Special Referee was also there to judge both of the Appellants' credibility with regards to their testimony and admissions of defrauding the Social Security Administration.

The Appellants are seeking relief of a self-inflicted problem. "This Court does not sit to relieve self-inflicted wounds." *Rish v. Rish*, 296 S.C. 14, 17, 370 S.E.2d 102, 104 (Ct. App. 1988).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court to affirm the Special Referee's order.

Respectfully submitted.

THOMPSON & HENRY, P.A.

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April 22, 2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

William E. Lawson, Special Referee

Appellate Case No. 2013-000926

MONROE E. COOK & LYNN S. COOK.....Appellants,

v.

NEALY LYNN TAYLOR .....Respondent.

PROOF OF SERVICE

I, Stephanie Hall, an employee for Thompson & Henry, P.A., attorneys for the Respondent, Nealy Lynn Taylor in the above-captioned action and/or actions, certify that I have this 22nd day of April, 2014 mailed a copy and/or copies of the following:

1. **Final Brief of Respondent**

to the undersigned at his/her/their address(es) of record, with

sufficient postage attached thereto, as follows:

Gene M. Connell, Jr., Esquire
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Surfside Beach, SC 29587-4547
Attorney for Appellants

Stephanie Hall
Stephanie Hall

SWORN AND SUBSCRIBED before me,
This 22nd day of April, 2014.

Notary Public for South Carolina
My Commission Expires: 1-10-2023 .

THE STATE OF SOUTH CAROLINA

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CERTIFICATE OF COUNSEL

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

April 22, 2014

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