IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CA-00793

ROBERT COOPER, ET AL — APPELLANTS

V.

WINNIE GILDER, ET AL — APPELLEES

ON APPEAL FROM THE WASHINGTON COUNTY
CHANCERY COURT, MISSISSIPPI (No.(s) 05-344 and 05-0345)

BRIEF OF APPELLEES, WINNIE GILDER, ET AL and BRIEF IN SUPPORT OF CROSS APPEAL

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ORAL ARGUMENT REQUESTED

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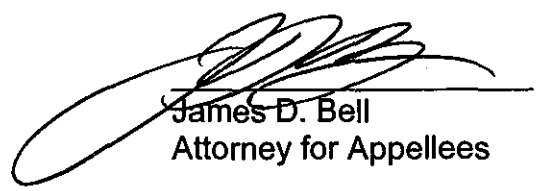
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification of recusal:

1. Robert D. Cooper, Appellant
2. Donald B. Dunaway, Appellant
3. Connie Burford, Appellant
4. Copper Gilder, Inc., Appellee
5. Winnie Gilder, Appellee
6. Estate of James Gilder
7. Marilyn C. Dunaway, Defendant in Cause No. 05-0345
8. Mildred Watson, Defendant in Cause No. 05-0345
9. John H. Daniels, III, Attorney for Appellants
10. James D. Bell, Attorney for Appellees
11. Honorable Marie Wilson, Chancellor, Washington County
12. Craig Geno, Bankruptcy Attorney for the Appellants



James D. Bell
Attorney for Appellees

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STATEMENT OF THE CASE

James Gilder and John Cooper each owned one half of Cooper Gilder, Inc., a very profitable business that reclaimed "waste" chemicals from Mississippi River barges, and re-sold the chemicals. Several members of Mr. Cooper's family worked in the business. When Mr. Cooper died, Mr. Gilder, pursuant to a Buy-Sell Agreement, used life insurance proceeds on the life of John Cooper to purchase Mr. Cooper's interest in the business from the Cooper heirs. A few months later Mr. Gilder died. By trick and subterfuge and by cutting and pasting a transfer of ownership form, the Cooper heirs were paid a second time for their interest in the business with life insurance proceeds that were intended to be paid to Mr. Gilder's widow, Winnie Gilder. Then, after being paid twice for the business, Cooper heirs and allies stole the business.

Winnie Gilder brought two inter-related unjust enrichment suits, one for the theft of insurance proceeds and the other for the theft of the business. After consolidating the cases for trial, the Chancellor dismissed the life insurance case, discharged two of the Defendants, and awarded a judgment of over $1.3 million for unjust enrichment in the business suit against the remaining Defendants.

The remaining Defendants appealed. In response, Ms. Gilder appealed the dismissal of her life insurance suit.

STATEMENT OF THE FACTS

In 1974, John H. Cooper and James A. Gilder, formed the business Waste Chemical Disposal, Inc., and began cleaning river barges, removing "waste" chemicals from the barges, and finding markets for those "waste" chemicals. (T 109-111) Later,

they changed the name of their company to Cooper Gilder, Inc. In 1976, to further their business, they acquired a lease for an easement from MP&L to provide river access for their operation. (T 28-30, Plaintiffs' Exhibit 3) Mr. Gilder and Mr. Cooper, together, owned between 20 to 40 acres of land on the river known as "Island 84", a strip of land that is officially part of Arkansas, but is now on the Mississippi side of the river. An easement that Cooper Gilder, Inc., leased from MP&L, later Entergy, provides access along a levy to Island 84. On the "Island," they operated a dock on the river, (T 395-396) and they operated a separate facility on Bayou Road in Greenville. At some point, they entered into the first of at least two Buy-Sell Agreements, which, in the event of the death of a partner, was to be funded by life insurance. (T 31-33)

In 1990, Mr. Cooper and Mr. Gilder met with New York Life agent Mike Garrett. At that time they already had an existing Buy-Sell Agreement that was funded by life insurance. They told Mr. Garrett that it was their desire to transfer their life insurance business to New York Life. They discussed their intentions with Mr. Garrett, informing him that they had a Buy-Sell Agreement that they funded with insurance. (T 184-185) Mr. Cooper owned a policy on Mr. Gilder's life, and Mr. Gilder owned a policy on Mr. Cooper's life. Proceeds from the life insurance policy covering the first to die would be used by the survivor to purchase the stock of the deceased.

Mr. Garrett suggested that the Buy-Sell Agreement should give the survivor the right to acquire the policy on his own life upon the death of the other partner. Once the Buy-Sell Agreement went into effect and the survivor purchased the stock of the other partner, there would be no reason for the heirs of the first to die to own insurance on the surviving partner. Mr. Garrett, who had sold insurance for Buy-Sell Agreements

about ten times before this occasion, explained that the survivor typically has the right to acquire the policy on his own life after the other partner dies.(T-184-186) Mr. Cooper and Mr. Gilder responded, "It's taken care of," thus advising Mr. Garrett of their belief and intent concerning their Buy-Sell Agreement. (T-189-190, MRE 803 (3)) Through Mr. Garrett, they each purchased approximately $650,000 of life insurance.

On December 21, 2001, Mr. Gilder and Mr. Cooper renewed their Buy-Sell Agreement. The agreement was typed at the office of their lawyer, Mr. Warrington, who used the previous Buy-Sell Agreement as his "form." The 2001 update of the Buy-Sell Agreement values the stock of each partner's ½ interest in the corporation at $650,000, for a total value of $1,300,000.[1]

Exhibit "B" to the Buy-Sell Agreement lists life insurance policies owned by Mr. Cooper and Mr. Gilder that were to be used to fund the purchase of stock. Mr. Cooper was the owner of two policies on the life of Mr. Gilder with a total value of approximately $650,000, and Mr. Gilder owned two policies on the life of Mr. Cooper with a total value of approximately $595,000.[2] Any portion of the purchase price not covered by insurance was to be paid with a promissory note.

The Buy-Sell Agreement allowed a living (surviving) stockholder to acquire the life insurance policy upon his life after the termination of the agreement. The death of Mr. Cooper and the subsequent purchase of his stock by Mr. Gilder was a terminating

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1

Plaintiffs' Exhibit 6. Exhibit "A" to the Buy-Sell Agreement shows that James Gilder and John Cooper each owned 400 shares of stock, and states; the "parties have agreed" that the value of their stock is $1,625 per share. $1,625 x 400 = $650,000.

2

Mr. Gilder had a loan against his policies, reducing their value to $595,000.

event that allowed Mr. Gilder the right to acquire the insurance policy on his life.[3]

Because of Mr. Gilder's advanced age and poor health, Mr. Gilder presumed that he would die first and that Mr. Cooper would be using insurance proceeds to buy out Mr. Gilder's interest from his widow.[4] Several of Mr. Cooper's family members were involved in the business, including Robert (Robin)Cooper (John Cooper's brother) and Donald Dunaway (husband of John Cooper's sister, Marilyn Dunaway, who is a Defendant in the life insurance case), so it seemed natural that the Cooper's would continue with the business. Both James and Winnie (whose nickname is Cookie) believed that the Cooper family would continue with the business after Mr. Gilder died. However, Mr. Cooper died first on October 29, 2003. Mr. Gilder received approximately $595,000 in insurance proceeds as a result of the death of Mr. Cooper. As required by the Buy-Sell Agreement, he began the process of purchasing the stock of Mr. Cooper from the Cooper estate, but instructed his wife to sell the business to Robin as soon as she could. He also began the process of acquiring the policies on his life.

After the death of Mr. Cooper, James Gilder requested instructions from New York Life on the transfer of ownership of the policies on his life. On December 2, 2003, New York Life responded to Mr. Gilder and provided instructions on how to transfer ownership of the policies from the Estate of John Cooper. (T 191, Plaintiffs' Exhibit 8)

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[3]Plaintiffs' Exhibit 6; which is set forth in detail in the discussion of the cross appeal.

[4]

Trial testimony of C Burford, T-396 L 25 - 399 L17. This was also the position of the Defendants throughout the litigation. See R 603, 651, 652, 666, referencing the deposition testimony of R Cooper and C Burford, that Mr. Gilder swapped his interest in Island 84 to Mr. Cooper for some pasture land "two or three years" before he died, because he thought he was going to die before Mr. Cooper and he wanted Island 84 to be in the hands of the family that would end up with the business. Actually, the "swap" took placed a few months before both men died, while they were both in ill health.

Mr. Gilder was attempting to transfer ownership to himself. He had no reason to request information to transfer ownership to anyone else. The letter is set forth below, with our highlighting added, along with our comments in the margin.

Dear James A. Gilder

COMMENTS

On behalf of New York Life, I extend our sincere sympathy on the death of John H. Cooper, who was the owner of this policy. Since a successor owner was not named, **the interest of the policy is now vested in the Estate of John H. Cooper. Therefore, ownership must be transferred through the estate.**

The Cooper Estate already owned the policies!

Mr. Gilder was told what he must do to transfer ownership of the policy!

If John H. Cooper had a Last Will and Testament, which was submitted to a probate court, **please send to us the following:**

(1) the change of ownership form signed by the estate representative, giving the name, address and social security number of the new owner;
(2) Certified copies of court-issued letters showing the appointment of the estate representative.

Mr. Gilder needed Robin Cooper, the estate representative, to sign the change of ownership form!

If the owner had no will, please contact your local court to determine the necessary requirements to transfer ownership from the Estate of John H. Cooper.

New York Life told Mr. Gilder how to change ownership if there was no estate representative.

When all of the information is received, **we will review the file and advise you if additional requirements are needed to transfer ownership of the**

policy. If you have any questions, please call me at the toll-free number above.

Sincerely,
/s/
Tiffany Y. Crawford
Customer Service Representative

Enc.

The change of ownership form was enclosed.

cc: Mike A. Garrett CLU CHFC A49

The Cooper's are now asserting that James Gilder was attempting, by this contact, to transfer ownership to them! But, he had no reason to request that ownership be transferred from the Cooper Estate to the Cooper heirs. A request from Mr. Gilder would not be necessary to transfer ownership to the Cooper's heirs. New York Life automatically changed its records to reflect an ownership change from John Cooper to his estate. The Chancery Court would transfer ownership to the Cooper heirs at the appropriate time, unless Mr. Gilder exercised his option to acquire the policy. Nothing would have had to be done by James Gilder to transfer ownership to the Cooper heirs. They already had ownership of the policies. The only reason he would have to inquire about transferring ownership would be to exercise his right to acquire the policies following the death of Mr. Cooper.

On December 17, 2003, James Gilder told Winnie that he had to pay the insurance proceeds that he received from the death of Mr. Cooper to the Cooper Estate for the purchase of Mr. Cooper's stock. He told her not to worry because she would receive the remaining $650,000 in insurance proceeds under the Agreement when he

passed away.[5] He also told her that she should sell the business to Robert Cooper as soon as she could, so that she would not be burdened with the business. (T 106-107) On that same day Mr. Gilder paid all of the insurance proceeds that he had received (approximately $595,000) to the Cooper Estate, gave the Estate a promissory note in the approximate amount of $55,000 and acquired Cooper's ½ interest in Cooper Gilder, Inc. He was then the 100% owner of Cooper Gilder, Inc. (T 74-75, Plaintiffs' Exhibit "10, 11")

The surviving Stockholder has 30 days to acquire the policies after the "termination" of the Agreement.[6] The purchase of the Cooper shares of stock terminated the Agreement because the purpose of the Buy-Sell Agreement had been fulfilled. Mr. Gilder had done all that was required of him. His purchase of the Cooper stock on December 17, 2003, was an event that triggered his right to acquire the policies. This was Mr. Gilder's and Mr. Cooper's understanding of the agreement. (T 189-190) Significantly, this was also Robin Cooper's understanding of the agreement (T 228, R 643)

At the time that he was purchasing the stock of Cooper Gilder, Inc., Mr. Gilder had in his possession the form that would change ownership from the Estate of John Cooper to himself. The form was filled out by Connie Burford, and, according to the Defendants, the Cooper estate representative and the heirs of John Cooper were

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T-84; This was a statement of his intent, understanding, plan and motive, and as such is an exception to the hearsay rule. (MRE 803 (3))

6

Plaintiffs' Exhibit 6, para. 7.4; also, see detailed examination of the Buy-Sell Agreement in the discussion of the cross appeal, below.

present with Mr. Gilder when the transfer of ownership form was completed. (T 225-229, 213-218)

On that same day, when Mr. Gilder should have received the transfer of ownership of the insurance policies, the Defendant Mildred Watson signed a transfer of ownership form transferring ownership to herself. On that form, she falsely claimed to be a "business associate" of the insured (Mr. Gilder).[7] New York Life's form required a relationship to the insured. (Plaintiffs' Exhibit 13) On December 19, 2003, Robin Cooper and Marilyn Dunaway also signed the transfer of ownership form, transferring ownership to themselves. They, too, claimed to be business associates of Mr. Gilder. In fact, Robin Cooper was an employee of Cooper Gilder, Inc., but he was not a "business associate" in any ordinary use of the term. Marilyn Dunaway was not an employee of the company and was certainly not a business associate of Mr. Gilder. Her only connection was that her husband was at that time an employee of the company.

On December 19, 2003, Robin Cooper returned the Change of Ownership form to New York Life, changing ownership of the policies to himself, Marilyn Dunaway and Mildred Watson, using the form sent to James Gilder by New York Life. (T 84, Plaintiffs' Exhibit 13)

The Cooper's had an ally in Mr. Gilder's office. Connie Burford was the long time secretary and office manager for John Cooper and James Gilder. She was an officer

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7 T-86-87, Plaintiff's Exhibit 13. Ms. Watson later explained that she was a business associate because she sold the company some coffee cups and other promotional material in 1986. In 2003 she was not a "business associate."

and Director of the company. She had Mr. Gilder's complete confidence. She filled out all of his checks and forms and kept his books. She received, opened and distributed all of the mail that came into the business and even handled Mr. Gilder's personal mail. Mr. Gilder made arrangements with the post office to have his personal mail delivered to the Cooper Gilder office. (T 213, 41-44, 72)

In October of 2003, while John Cooper was dying, Robert Cooper gave Ms. Burford a "gift" of $11,000 from John's funds.(T 103-104) Then, two months later, in December of 2003, Ms. Burford filled out the form transferring ownership of James' policies, not to Mr. Gilder, but to the Cooper heirs. This was done even though James, John and Robin believed that Mr. Gilder had a right to have the policy transferred to himself. Ms. Burford now works for Robert Cooper and Marilyn Dunaway's husband in a competing business, Warfield Point Associates, Inc. (T 105, 214)

Connie Burford and Robin Cooper testified that the transfer of ownership papers were signed by the Cooper heirs in Mr. Gilder's office, in the presence of Mr. Gilder, at about the time that Mr. Guilder was buying the Cooper stock, and that he voiced no objection or complaint to the transfer of ownership from the Coopers to the Coopers instead of to himself. (T 214-219, R 572, R 579, R 669) Burford and Cooper admitted that the transfer of ownership form had been altered, in a cut and past fashion. Ms. Burford admitted that she had copied the form and the top part of the form, where Mr. Gilder's name would have been placed if the policies were being transferred to him, was cut off, and a new cut and paste form was created. At the bottom of the form is a portion that would have to be signed by the "New Owner", the person to whom the policy was being transferred, which could explain the presence of Mr. Gilder at the

execution of the form. (T 215-218, 229)

The Chancellor found it curious that Mr. Gilder would be present for a transfer of ownership from the Coopers to the Coopers, as demonstrated by the following:

Examination by the Court:

Q. Are you saying when this transfer of ownership form was completed Mr. Gilder was present?
A. Yes, mam.
Q. Why? Why was he present?
A. We did it in the office and he was in the office working. We were all there.
Q. But I'm trying to figure out. You didn't need him to be present, as I understand your testimony, to change the ownership, did you?
A. We didn't plan for him to be present. We just did it during a work day. He was there.
Q. How is it that he was there when this - - what? Did you all get together and you said, "Mr. Gilder, we're going to transfer ownership"?
A. Yeah. Yes, mam. Connie prepared it. We came in signed it. The Captain was there. Everything took place during work days there. I mean, Captain was privy to everything.
T229 Line 26- T 231 Line 2

This was not the last curious event concerning the transfer of ownership. Mr. Cooper had other policies on his life through Mr. Garrett, that were not related to the Buy-Sell Agreement. In October of 2003, transfer of ownership forms on those other policies were filled out by Connie and signed by the Coopers. In November of 2003, claim forms were filled out by Connie and signed by the Coopers. On each of these previous occasion, the forms were mailed to Mr. Garrett. This was the normal procedure, according to Mr. Garrett. But, when ownership of the Gilder life insurance policy was transferred, Mr. Garrett was left out of the loop. Robin and Connie sent the form directly to New York Life. (T 218, 220, 222-223, Plaintiffs' Exhibit 26, 192-194) Mr. Garrett was in a position to know if the wrong persons were being designated as beneficiaries. (T 220, R 632-637)

Mr. Garrett was not permitted to testify why he was surprised that the Coopers were designated as beneficiaries. (T 190-191) However the reasons for his surprise are in the record.[8]

After ownership of the insurance was transferred to the Cooper heirs instead of to Mr. Gilder, you might expect that the Cooper heirs would pay for the insurance. Instead, Mr. Gilder paid for the insurance. Mr. Gilder was paying for insurance on his life, not for the benefit of his heirs or his widow, but for the benefit of the Cooper heirs! (T 76-80, Plaintiffs' Exhibit 12) Payment of the policy by Mr. Gilder is precisely what you would expect to see if Mr. Gilder thought that he owned the policies.

The premiums were paid by draft from the Cooper Gilder, Inc., account. After Mr. Gilder acquired 100% of the stock in Cooper Gilder, Inc., on December 17, 2003, several premium payments were drafted from the company account during the year 2004. The corporation was a "Sub-chapter S" corporation, meaning that the profits and losses were attributed directly to the owner and were made a part of the owner's tax return. The money in the Cooper Gilder, Inc., account was Mr. Gilder's. (T 80-83)

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He was surprised that the Cooper's were listed as the owners because, "they were not a party to the buy-sell agreement. And the insurance was taken out to fund the buy-sell agreement. And I just thought it was kind of interesting that it would be changed from the Estate to the individuals named." It was his expectation that Mr. Gilder, the survivor, would get the policy, because that was the way it worked in every other buy-sell agreement he had funded. His understanding of the intent of Mr. Cooper and Mr. Gilder after talking with them about the buy-sell agreement was that the survivor would get the policy on his own life.

When asked directly if the Cooper heirs were supposed to receive the insurance proceeds on Mr. Gilder's life, Mr. Garrett responded, "No, not to my knowledge. That was not the way –it was not the purpose of the insurance to begin with." Mr. Garrett expected that Mr. Gilder, his estate or his heirs would receive the proceeds of the life insurance policy on his life. R 608-609, 632-637

The Defendants have attempted to explain this by saying that personal expenses of the owners, such as life insurance, were accounted for in an account called AAA, and were settled from time to time. However, the record shows that the AAA account of Mr. Cooper was closed and settled as of the date of his death, October 29, 2003. No insurance payments made after his death were attributed to his AAA account. Instead, the payments were attributed to Mr. Gilder. (T 75-82, 88-98, Plaintiffs' Exhibit 11) Even as late as February 28, 2005, an attorney for the Cooper heirs, who are Defendants in the insurance case, admitted that Mr. Gilder's life insurance funds had never been attributed to Mr. Cooper's AAA account. (Plaintiffs' Exhibit 14 and 15, T 88-98)

On February 8, 2004, less than four months after his partner passed away, James Gilder died, believing he was leaving his widow $650,000 in life insurance. Instead, the three Cooper heirs received $652,281.86 of Mr. Gilder's insurance proceeds. In addition to the insurance payment, the final payment included a refund to the Coopers of unearned insurance premiums paid by Mr. Guilder and by Winnie Gilder![9]

The Coopers had already received the purchase price for the sale of Mr. Cooper's stock. Now, they had successfully been paid for the business a second time! But, they weren't through. There was still a business to steal.

Throughout the litigation, the Defendants attempted to explain the double payment for their stock as part of an "agreement" between James Gilder and John

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Plaintiff's Exhibit 20, page 2, Life Insurance Statement, lines 23 and 24, and page 3 lines 23 and 24. Part of the refund was for payments made by draft after the death of Mr. Gilder. Winnie was his only heir and inherited 100% interest in the account from which payments were made. Thus the payments came from her account and refund of premiums should have been paid to her.

Cooper, that one family would get $1.3 million dollars and the other family would get the business. (R 305, 316, T 395-400) The Defendants also tried to explain that a difficult to understand "land swap" occurred between Mr. Cooper and Mr. Guilder in 2003 as part of an effort to transfer the business to the Cooper family in the expectation that the Guilder family would receive $1.3 million in insurance proceeds upon the death of the partners. Although that has been one of the Defendant's positions throughout the litigation, they sought to disavow their own theory of the case in their brief.

On July 23, 2003, a "land swap" apparently occurred. This was while both men were in very poor health, and both were months away from dying. Mr. Guilder had chronic pneumonia for many years and was frail in the last months of his life. He began to rely more and more on others to conduct his business, particularly Connie Burford, whom he trusted. As for Mr. Cooper, in the weeks and days just before his death there were times that he did not even know he was in the world. (T 394-395) James Guilder died less than four months later, in February of 2004. According to the deeds, Mr. Guilder deeded to Mr. Cooper his interest in Island 84 and Mr. Cooper deeded to Mr. Guilder his interest in 12 acres of pasture. On the same day, Mr. Cooper deeded Island 84 to himself and Robin Cooper, and Mr. Guilder deeded the pasture to himself and his wife. (Defendants' Exhibit 6) Upon the death of John Cooper, Robin Cooper became the owner of the river front property. The Defendants claimed that the swap occurred "years ago," instead of just months before the death of Mr. Cooper and Mr. Gilder. Winnie was unaware of this land swap, and was surprised to learn that Robin Cooper

had somehow ended up with ownership of the critical river front property.[10]

Robin Cooper explained that the swap occurred because it was assumed that James Guilder would die first and Island 84 should be in the hands of the family that would be buying the business. (R 651-652) Connie Burford testified that she spoke with both Mr. Guilder and Mr. Cooper about the land swap. (T 403 L15-21) When she was asked to explain why Mr. Guilder, who she had described as a shrewd business man, would swap the heart of the business for a few acres of pasture, she explained that Island 84 was to go to the family that was going to buy the business (the Cooper's) and the Guilder family was to get $1.3 million. (T 398 L 5-13) The difficulty in getting Ms. Burford to testify about this transaction is, itself, informative:

> A. James and John owned a lot of property together and Cookie wanted -- Mr. Gilder wanted to give Cookie certain parcels of that land for her to have her horses on. There was property close to the house and then property on Redmond Road, a little farther from the house. And in the land swap, John got the river land and Mr. Gilder got sole ownership of that other property.
> Q. So, this river land, how many acres is that along the river?
> A. I think it's about 20 acres.
> Q. Whatever it is, it's number 20 or 30 to maybe 40 acres right there on the river, is that right?
> A. I'm not sure exactly how much it is.
> Q. Okay. And this was land used by the business to do it's business?
> A. Yes, sir.
> Q. Okay. And that was swapped for some pasture. Where?
> A. Right behind the office and it was some property down on Redmond Road.
> Q. And how many acres was that?
> A. I'm not sure.
> Q. Five acres? Ten acres?
> A. I have no idea.
> **Q. All right. Are you suggesting that this true businessman swapped**

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T181-183, See also, R 652, where Robin Cooper, denied that the transfer was within a year of the death of Mr. Cooper and Mr. Gilder, and testified that the swap occurred "two or three years" before, but he was not certain of the date.

the heart of the business for five or ten acres of pasture?
A. I'm suggesting that Mr. Gilder thought he was going to die first and he was leaving the river land to the person that would wind up with the company.
Q. Okay. Because, whoever was going to have the company, would need to have that river land?
A. It was important to the company.
BY THE COURT: I don't think you answered his question.
Q. Whoever was going to end up with the company was going to get that river land, is that right?
A. Not - -
BY MR. DANIELS: Objection, if Your Honor, please. That was not what the witness testified to.
BY THE COURT: He's cross-examining her. She can say what she's saying.
BY MR. DANIELS: Yes, mam.
BY THE COURT: She can clarify herself. You know...objection overruled.
BY MR. DANIELS: All right.

Mr. Bell continues:
Q. Now, I thought you just said that Mr. Gilder thought he was going to die first and he wanted the property to end up in the hands of the family that was going to end up with the business. Is that what you just said?
A. I think that's what James thought all along, that he was taking care of Cookie by giving her that property.
Q. Okay. And so, one family was going to get the business and the land to go with it, and another family was going to get one point three million dollars, is that the idea?
A. State it again, please.
Q. One family was going to get the land and the business and the other family was going to get one point three million dollars. That's what you understood his intent to be?
A. Well, the land and the business didn't come together. The land at the river had been separated from - -
Q. Well, I mean, I thought that's what you said. Did you tell me that he (Mr. Gilder) intended for the land to go to the family that was going to get the business? Is that what you told me?
A. Yes.
Q. Ok. And didn't you tell me in your deposition that one family would get 1.3 million dollars and the other family would get the business? Isn't that what you told me?
A. Correct.
Q. Ok. And so John and then later Robin got the land as part of a transaction in which the Cooper family would end up with the business, is that right?

A. There was never any question that the land could be used for the business, regardless of who it belonged to.
By the Court: That's not what he just asked you. I need you to answer the question first. I know this is emotional, but it will be better if you would answer his question. ...

Q. ...So John and Robin ended up with island 84 as part of Planned transfer of the business to the Coopers?
By Mr. Daniels: Your Honor, may I note an objection for the record? That is not in the buy/sell agreement.
By the Court: Overruled.
A. I believe that's what Mr. Gilder believed.
Q. And then Mr. Gilder would be expecting that insurance proceeds, the 1.3 million dollars, would end up going to his family, is that right?
A. Yes
Q. And then the business would end up going to the Cooper family?
A. That was based on his supposition that since he was older.
Q. Is it fair to say that Warfield Point Associates is in the same business as Cooper Gilder was.
A. Basically
Q. Ok. And isn't it fair to say that Warfield Point Associates is operating at the same island, in the same place where Cooper Gilder always operated? That's true, isn't it?
A. Yes, sir.
Q. And it's doing business with a lot of the same customers and servicing the same barges that Cooper Gilder used to service?
A. Yes sir.
Q. And today it's doing about a million and half dollars worth of business if it stays the same through this year?
A. That's based on your projection.
Yes Mam.
Q. But the business stayed the same?
A. Yes
Q. And you indicated that it seems to be staying the same?
A. Yes
Q. Ok. Well, what actually happened was the Coopers ended up getting both the 1.3 million dollars in insurance and they've ended up with the business, isn't that true?
A. No, sir.
Q. Well, they ended up with 1.3 million dollars, didn't they?
A. Yes
Q. And Warfield Point Associates is doing the business that Cooper Gilder use to do?
A. Some of the business.

T 395-400, emphasis added.

Until February of 2005, the company continued to use the river front property it had used since 1976. Access to the property was gained by a long term lease that Cooper Gilder had with MP&L since 1976. The company paid $750 per year for the lease. (Plaintiffs' Exhibit 3) The easement was vital to the business, and was, as counsel for the Defendants pointed out, the way that Cooper Gilder made its money. (T 182 L 21-25)

Just before his death, James Guilder called Connie and Winnie to his death bed. Winnie had told her husband that she knew nothing about the business. James told Winnie to trust Connie and to listen to her. He told her to depend upon Connie and she would help Winnie through this. (T 106, 112, 361) Everyone agreed that Winnie had a lot of confidence in Connie, as did Mr. Guilder. (T 342) In February of 2004, after Mr. Guilder's death, Winnie put Connie in charge of the business. Connie formed a management team with Don Dunaway and Robin Cooper. Robin was put in charge of the "yard", Connie in charge of the office, and Don in charge of marketing product. Connie, Robin and Don became key employees, upon whom Winnie relied "100%". (T 359, 361-362, 105-106, 108-112)

After Mr. Guilder's death, Connie, Don and Robin sent a letter to all of the customers and suppliers of Cooper Guilder, assuring them that the business was continuing under their direction. No mention was made of the company's new owner, Winnie Guilder. (T 363-365)

As Mr. Guilder was dying, he suggested that Winnie should try to sell the business, and that she should offer it to Robin first. She did, but Robin declined and suggested that she wait a couple of years before she sold the property. Winnie talked

with a potential buyer who visited the facility. Because she did not know the business, she confided in Robin, and asked Robin to show the prospective buyer around the facility. He did, but the prospect left and did not return.(T 106-107)

Another prospective buyer, Superior, visited the facility and dealt with Connie and Robin. Ms. Burford stated that she spoke with both prospects and discussed a selling price. The price she used was the price set by Mr. Cooper and Mr. Gilder, $1,300,000. (T 378-379) Robin and Connie did not tell Winnie about Superior. The first time that Winnie heard about this prospective buyer of her business was during the last day of the trial. (T 401, 414-417, 425) By then, she was already out of business.

When asked about the prospective buyers, Robin admitted that he had not told Winnie about Superior, and bragged that he was in the "catbird seat" when dealing with prospective buyers. He said that Cooper Gilder was worth a lot more with Island 84 than without it, and that he could have either sold Island 84 and "Got a lot of money for it," or negotiated with a buyer for a good paying job for himself. (T 414 L 26- 415 L 25, 416 L 9 - 24, 417 L 5-9) Winnie did not know that Robin was self dealing.

This was not the only time that the Defendants failed to give critical information to Winnie. On January 4, 2005, while he was a key employee with Cooper Gilder, Inc., Robin Cooper, at the suggestion of Connie Burford, notified Entergy (MP&L) that he was now the "owner" of the lease that had been held by Cooper Gilder, Inc., since 1976. He paid Entergy $750 to have the lease transferred to his name. (Plaintiff's Exhibit "17"; T 235-239;R 646-650; R 180-181) He never told his employer, Winnie Gilder, that he had acquired or had attempted to acquire the key lease giving access to the river property out from under the corporation. (T 115-116; R 650) Connie Burford,

an officer and director of the company, in whom Winnie had complete trust, never told Winnie that Robin had acquired or had attempted to acquire the company's lease.[11]

After this case was tried, Cooper Gilder, Inc., received notice from Entergy that the lease on the subject property was about to expire and that a payment was due. This Court had not yet entered its ruling, but the trial was complete. In September of 2006, Winnie Gilder, on behalf of Cooper Gilder, Inc., made the lease payment in order to protect whatever rights she had to the easement pending the Court's decision. (R 182)

Between January 4, 2005 and February 21, 2005, Winnie and her brother, Bill Roncali, became suspicious that Robin and others were preparing to go into competition with Cooper Gilder, Inc. (T 281-283, 116-117) Winnie sought legal advise, and her lawyer prepared a covenant not to compete.

On February 21, 2005, Winnie and her brother called a meeting with all of the Cooper Gilder employees. Just prior to the meeting, there was a confrontation between Robin and Bill over the proposed covenant not to compete. In that confrontation, Bill fired Robin. Robin then meet with all of the employees, except one who was out in a truck. (T 121-122) A few minutes later, the employees entered the meeting room where Bill and Winnie were waiting. Accounts of the meeting differ. Everyone agrees that the employees did not sign the covenant not to compete, and that there was no attempt by any of the employees to discuss the terms of the covenant or to suggest changes to the terms of the covenant. According to Winnie, the employees quit as a group, got up and walked out. (T 120-122, 165-166, 324) The only employees that remained were

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The issue of the lease transfer, along with specific quotations proving that the Defendants claimed throughout the litigation to have the lease, until after the verdict, is dealt with in greater detail under Appellants' Issue 4, below.

Winnie's son, who had worked with the company for less than a year, and her brother, who had worked with the company only a few days. (T121, 169-170)

Bill spoke with the driver who was not present for the meeting, and, initially, he was going to stay with the company. But, when he returned to the office later that day, he quit also, after talking with other former employees. (T 271-272)

The former employees of Cooper Gilder immediately went to the nearby house of John Cooper and meet with Robin. (T 332-333, 342) Almost all of the former employees joined Robin, Don and Connie in a competing business. They immediately began doing business, apparently through Charlie Chemical, a business owned by Robin, and started the process of forming a new business entity. The new business, Warfield Point Associates, Inc., was incorporated on March 4, 2005. (Plaintiff's Exhibit 21) Robin, Don, and Robin's Cousin, Robert C. Cooper, are the owners of Warfield Point.

Prior to the departure of the Coopers, customer and supplier contact lists were prepared, and placed at work stations for Robin, Don, and Connie. Winnie also had a list. (T 122-124, 174-175, Plaintiffs' Exhibit 19) The list was used daily, and was far more useful than a mere directory, such as a phone book or the Inland Water Guide. (T 341) When the employees left, only Don's list was found in the office. The same day they left Cooper Gilder (or, according to Don Dunaway, within three or four days), Robin Cooper and Don Dunaway began calling the former customers and suppliers of Cooper Gilder, seeking business. (T 275 L21-30, 343)

Cooper Gilder had placed storage tanks with some of its customers, where customers of Cooper Gilder would store waste chemicals. Cooper Gilder would

periodically pick up the chemicals and re-sell them. Within days of leaving Cooper Guilder, Robin picked up and sold chemicals that had been set aside for Cooper Guilder in one of its storage tanks. (T283-284, 343-344)

Orders for chemicals and requests to pick up chemicals typically were faxed to Cooper Guilder over a telephone line used by Cooper Guilder and paid for by Cooper Guilder for years. The number was printed on Cooper Gilder letter head, invoices and promotional items, such as coffee cups. At the time, Winnie did not realize that the telephone line was listed in the name "Charlie Chemicals", a small company owned by Robin and operated out of the Cooper Gilder office. Virtually all of the expenses of Charlie Chemical were paid by Cooper Gilder. The income went to Robin. When Robin and the other employees left, they transferred service on the fax line to their new business. (T 129-131) As orders intended for Cooper Gilder came in over the fax, all that Robin, Don and Connie had to do was simply filled the orders through their new company.

The Defendants immediately began using the river front property that had formerly been used by Cooper Gilder and used the property leased from Entergy that had previously been used by Cooper Gilder. They began servicing the same customers formerly serviced by Cooper Gilder,[12] using the same fax number previously used by Cooper Gilder to receive orders. (T 129-130) Cooper Gilder was prohibited from using its river front, and its Entergy lease property and consequently lost virtually all of its customers and went out of business. (T 182, 138)

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T 399 L18 - 400 L 8; Plaintiffs' Exhibit 22, list of customers common to Cooper Gilder and Warfield Point.

The impact of the actions by Robin, Don and Connie was rapid and dramatic. Gross income of Cooper Gilder from 2000 through 2004 ranged from $1.4 million to $2.5 million, averaging just under $1.6 million. Gross profit during that time averaged over $1.3 million. (Plaintiffs' Exhibit 23) In 2004, the gross income was $2.5 million, with a net profit of $495,000. After Robin, Don and Connie began competing through Charlie Chemical and Warfield Point, sales of Cooper Gilder dropped immediately and drastically. In 2005, gross income was $777,000, with a loss of $140,000. Most of the income was from sales made before the competition began, but paid after the Cooper's left. In 2006, Cooper Gilder had income of only $37,000. (Plaintiffs' Exhibit 25, 23, 24) The company had closed its doors by the time this case went to trial. Winnie has incorporated two new businesses, trying to use the licenses and remaining facilities of Cooper Gilder, but neither entity has conducted any business or had any income. (T 207) A business that was worth $1,300,000 was now less than worthless. After the Coopers left, Winnie received notice that the federal government was making an $82,000 super-fund claim against the company for an alleged chemical spill that occurred while the Coopers were employees of Cooper Gilder. (T 139-140)

In the meantime, business at Warfield point grew rapidly. Warfield grossed $785,592 during calendar year 2005, and grossed $628,621, through May 31, 2006. According to Ms. Burford, business had leveled off by the time she testified in August of 2006 and was on track to gross about $1.5 million in the year 2006. This was approximately the amount that Cooper Gilder averaged in a year. (T 391-393, Plaintiffs' Exhibit 22) Warfield Point was in the same business as Cooper Gilder, in the same river front location as Cooper Gilder, using the same Entergy easement, using the same

fax number, servicing the same customers that Cooper Gilder had serviced, and, by 2006, was having an average Cooper Gilder year in gross sales.

SUMMARY OF THE ARGUMENT

Upon the death of John Cooper, James Gilder had a right to acquire ownership of the policies on his life. He obtained the necessary form from New York Life. But, his confidant, Connie Burford intercepted and altered the form. Instead of transferring the policies from the Coopers to Mr. Gilder, the form was used to transfer the policies from the Coopers to the Coopers. Thinking that they owned the policies, the Gilder's payed the policy premiums after ownership was secretly transferred to the Coopers. The Cooper heirs received over $650,000 in insurance funds and premium refunds that should have been paid to Winnie Gilder.

As he was dying, Mr. Gilder told Winnie to sell the business to Robin. She tried, but he refused, telling her to wait two years. In fact, Robin had no intention of paying money for the business. After the death of Mr. Gilder, Robin Cooper, Connie Burford and Don Dunaway used their positions of trust to gain control of the business of Cooper Gilder. Within two years, Winnie was out of business, and Robin, along with Don Dunaway, and Connie Burford, were operating virtually the same business, using the same river front easement that Cooper Gilder had used for 30 years, using the same employees to service the same customers Cooper Gilder had serviced, and using the same fax number as Cooper Gilder. By 2006, they were having an average Cooper Gilder year in gross sales. The value of the business wrongfully taken from Winnie Gilder was $1.3 million.

ARGUMENT

Several key assertions by the Defendants actually provide proof that the Plaintiffs are entitled to judgment and that the Defendants acted in bad faith.

1. The Defendants have taken the position that the Buy-Sell Agreement provided that "one family would have 100% of Cooper Gilder and the other family was to have $1.3 million dollars." ® 305, 316, T 395-400, T 250) However, the Buy-Sell Agreement clearly states that each partner owned 400 shares of stock, and that the Stockholders themselves valued the shares of stock at $1,625 each. (Exhibit "A" to Plaintiffs' Exhibit 6, page 21) This means that the value of John Cooper's interest in the corporation was $650,000, not $1.3 million dollars. James Gilder already owned half the company. The Buy-Sell Agreement did not require him to pay for the half he already owned. When James Gilder paid the Cooper Estate $650,000 (in cash and note) he received all of John Cooper's stock. He then owned all of the company. Therefore, the whole premise of the defense is wrong!

The Defendants' backed themselves into a corner. To overcome the first lawsuit, concerning the insurance proceeds, they took the position that Mr. Gilder agreed to pay 1.3 million dollars for $650,000 worth of stock. He would do this, they said, because one family would get the business and the other family would get 1.3 million dollars. They explained that as a part of the transfer of the business, in anticipation of the Coopers receiving the business upon the death of Mr. Guilder, there was a land swap in which the Cooper family received the river front property, and the Gilders received a few acres of pasture.

But now, in the second case, the Defendants' would like to disavow their position

in the first case and claim that there was no agreement or understanding that one family would get the business and the river property and the other 1.3 million dollars. This agreement was essential to their defense to the insurance suit but has become anathema to them in the business suit. In any event, the Court correctly recited the Defendants' position that one family was to receive 1.3 million dollars and the other family was to receive the business, and that the land on island 84 was to go with the business.

2. Next, the Defendants claim that Mr. Gilder assisted them in transferring ownership of the policies on his life to them, and that he was present when ownership was transferred to them. While this allegation may have sounded good to the Defendants when made, upon examination, it is absolutely fatal to the Defendants' case and proves unequivocally that the Plaintiffs' are entitled to judgment against them. This allegation also proves that the Defendants' committed fraud!

To believe this allegation, one would have to believe that Mr. Gilder, who they claim was a shrewd business man, willingly paid $1.3 million for an interest that he and his partner had valued at only $650,000. We would have to believe that he thought that he not only had to buy Mr. Cooper's stock, but that he had to pay the Cooper's for the stock he already owned!

We would have to believe that he contacted New York Life to obtain instructions on how to transfer ownership of the policies from the Cooper heirs, to the Cooper heirs! If he believed that the policies properly belonged to the Cooper heirs, then he would have been meddling in their business by request information on how to transfer ownership of the policy. On top of this, this shrewd business man would have been

using his time to perform a useless act! He did not need to transfer the policies to the Coopers because they already owned the policies. The only logical reason to request a change would be if he were seeking a change in ownership to someone other than the Cooper heirs; i.e., himself!

We would also have to believe that Mr. Gilder, who had a right to the policy, chose to allow the policy to pass to the Cooper heirs instead of to his own heirs. Even though he knew his wife had no experience in the business, he was choosing to allow the Cooper heirs to have the gift of his own life insurance policy.

We also have to believe that Mr. Gilder chose to pay for policies that were for the benefit of the Coopers!

Consider the Defendants' favorite defense. "We signed the transfer of ownership in the presence of James Gilder." The Court is not required to believe the unbelievable or to give credence to the incredible. They claim that he participated in the signing over of his life insurance policies to them. They claim that he took great care to make provisions for persons who had no insurable interest in his life to the detriment of his own wife, while he was elderly and in ill health. And, they claim that he voluntarily paid the premiums on policies that he knew were owned by others! This claim is so incredible that it can only be a lie. But, all of the Defendants have participated in this lie! They all have placed themselves in the presence of James Gilder while the cut and paste "transfer of ownership" was being signed. Since Mr. Gilder would not have participated in a transfer of the policy to the Defendants, he must have been led to believe by those who were present that he was receiving the policy along with the stock. The only remaining logical conclusion is that the Defendants

cooperated with one another to steal the policy from Mr. Gilder. They have put themselves at the scene of the crime, and they have admitted that they participated.

3. We know that Mr. Gilder believed that he could transfer the policy to himself. He told his widow and Mr. Garrett that he believed that he could transfer the policy to himself. He was not the only one who believed this. Robert Cooper testified that he had the same understanding. (T 228)

> Q. Have you ever read the buy\sell agreement?
> A. Yes.
> Q. Did you understand from the buy\sell agreement that upon termination of the buy\sell agreement that the insured would have the right to own his own policy?
> A. Yes, I did.
> Q. Okay.
> A. For thirty days, I think.

® 643, Robert Cooper Depo. P 8 L 6 - 13)

Logic dictates and the evidence overwhelmingly points to the fact that James Gilder was attempting to exercise his right to own his policies and believed that he had done so. The Defendants either led him to believe that they were transferring ownership to him, or they substituted a separate transfer of ownership form and transferred ownership to themselves instead of James. This explains why James continued to pay for the policies after the transfer to the Cooper heirs. He believed the policies were his!

ISSUE ON CROSS APPEAL

Under the Buy-Sell Agreement, Does the Surviving Partner Have the Right to Purchase the Insurance Policies on His Own Life?

The Chancellor found that the actions and behavior of the Defendants surrounding the transfer of the Gilder policies was suspicious and secretive. However,

under her reading of the policy, Mr. Gilder did not have a right to acquire the policies on his own life. She therefore directed verdict in favor of the Defendants in the insurance case. (T 257)

The Buy-Sell Agreement is not clearly written and is subject to misinterpretation. However, when analyzed, the only conclusion consistent with the plain language of the instrument is that the surviving partner has a right to acquire the policies on his on life.

Under the Buy-Sell Agreement, the death of a partner triggered both the right and the obligation to buy the stock of the first to die. Once the surviving Stockholder purchases stock under the agreement the "Owner" of the remaining insurance policy (generally an estate) will no longer have a justifiable reason to own a policy on the life of the remaining Stockholder. Therefore, the Agreement provides to the survivor the right to acquire the existing policy on his life. James Gilder attempted to exercise his option to acquire the policy, but his effort was intercepted by the Defendants. (T 191; Plaintiff's Exhibit 8)

Several pertinent portions of the Agreement, (with marginal comments added) are as follows:

ARTICLE V
DEATH OF A STOCKHOLDER

COMMENTS
(Not in original agreement)

5.1 **Purchase by Remaining Shareholders.** Upon the death of a Stockholder (the "**Deceased Stockholder**"), except as otherwise provide in Paragraph 5.2, the Deceased Stockholder's personal representative(s) shall sell to the Remaining Shareholders, and the Remaining Shareholders shall purchase, all of the Stock owned by the Deceased Stockholder at a price equal to the Purchase Price of Stock multiplied by the number of shares of Stock owned by the

The surviving Shareholder is required to purchase the stock of the deceased Shareholder.

Deceased Stockholder at the date of his death, upon the terms and conditions as set forth in Article VI.

5.3 **Closing of Purchase.** The closing of the purchase of a Deceased Shareholders Stock shall take place on a date designed by the majority vote of the Board of Directors of the Corporation within175 days after the date of the appointment of the Deceased Stockholder's personal representative(s). The Corporation shall give notice of the date of closing to the Deceased Stockholder's personal representative(s) at least ten (10) days prior to the date of closing.

The sale of stock is to take place within 6 months of the appointment of a representative of the estate.

ARTICLE VI
TERMS AND CONDITIONS OF PURCHASE

6.1**Time of Closing.** If a purchase of any shares of Stock is required under this Agreement, such purchase shall take place on the date of closing, as such date is determined in accordance with the applicable provisions of this Agreement, at which time the applicable seller(s) shall sell and the applicable purchaser(s) shall purchase all of the shares of Stock that are subject to such closing at the Purchase Price prescribed by the applicable provisions of this Agreement.

6.3**Payment of Purchase Price.** Payment of the Purchase Price applicable to each purchaser shall be paid (1) by payment in good U.S. funds on the date of the closing in an amount equal to the greater of (a) ten percent of such Purchase Price, or (b) the net line insurance proceeds received by each purchaser in the event of the death of a Stockholder, and (2) by a promissory note for the unpaid balance executed from purchaser, as maker, said promissory note to be secured by the purchased Stock as collateral for the payment of the note. Each promissory note shall be due and payable in not more than five (5) consecutive equal annual installments of principle and interest, the first of which shall be due and payable one year from the date of closing, and the remaining installments shall be due and payable in equal sums on the next immediately

Payment of the Purchase price is to include a down payment of all of the insurance proceeds received by the purchaser as a result of the death of his partner, plus a promissory note for any unpaid balance.

succeeding anniversaries of such closing. The number os installments shall be determined by the purchase in his or its sole discretion. Each promissory note shall also contain a provision for the acceleration of payment in the event of the bankruptcy, insolvency, or on the making of an assignment for the benefit of creditors, of the maker, or, in the event of a default in payment of principal and interest that is not cured within ten days of the notice of such default from the holder of the promissory note. Each promissory note shall bear interest on the unpaid principal balance at an annual rate equal to the lowest amount allowed by the Internal Revenue Code in order to avoid the imputation of interest. The maker of the promissory note shall have the right to prepay the unpaid balance, together with any accrued interest, at any time or times without penalty or premium. At closing, the appropriate seller(s) shall deliver to the appropriate purchaser(s) all certificates representing the share of Stock being purchased and sold, free and clear of all legal liens and encumbrances, properly endorsed for transfer, with signatures guaranteed in such manner as counsel for the Corporation reasonable may require.

ARTICLE VII
INSURANCE

7.1 **Life Insurance Policies.** Should the Corporation and/or Stockholder and/or a trust (an "**Owner**") purchase life insurance which insures the life of another Stockholder (the "**Insured**"), then such policy(ies) shall be listed on **Exhibit "B"** hereto, and the Owner shall pay all premiums on the life insurance policy on the life of the Insured, and he shall deposit proof of payment with the Insured within 15 days after the due date of each premium. If an Owner should fail to pay any premium within 15 days after the due date, the Insured may pay such premium, in which the Insured shall immediately be entitled to reimbursement from the Owner within ten (10) days. This Agreement shall extend to and include all policies which the Stockholders so designate by supplementing **Exhibit "B"**, attached hereto. All policies shall be kept at the principal business office of the Corporation. Each Owner and Insured agrees to perform all requirements of the life insurance company which are necessary conditions precedent to

The insurance policies involved in the agreement are listed on Exhibit "B" and are to be paid for by the Owner. The Insured has a right to pay for the policy and be reimbursed if the Owner fails to pay.

the issuance of any life insurance policy.

7.2**Cancellation of Policies**. If the Owner elects to cancel any such policy, prior to such cancellation, the Owner shall notify the Insured in writing, and (to the extent permitted by such policy) the Insured shall have the right to pay any unpaid premium and to purchase such policy from the Owner at its cash surrender value, and, upon such purchase, the Owner shall lose any of his rights to such policy.

The Insured has the right to purchase the policy on his life if the Owner elects to cancel a policy.

7.3 **Use of Life Insurance Proceeds.** If the Owner becomes obligated under this Agreement to purchase the Stock of any Stockholder, and the Owner receives the proceeds from any insurance policy on the life of the Stockholder, then the Owner shall be required to use such net insurance proceeds to satisfy his obligations to pay the applicable Purchase Price, including the prepayment on the Owner's Promissory Note up to the full amount of any such note.

If The Owner of a policy receives any proceeds from any insurance policy on the life of the other Stockholder, he must use those proceeds to pay the Purchase Price.

7.4 **Right to Purchase Policy(ies).** If any Stockholder shall cease to be a Stockholder during his lifetime or if this Agreement terminates before the death of a Stockholder, then such Stockholder shall have the right to purchase any life insurance policy which insures his life and is owned by the Owner. For each life insurance policy to be purchased, the Stockholder shall pay the Owner an amount equal to the cash surrender value of the life insurance policy plus the unearned premium on the date the Owner received the notice from the Stockholder to transfer ownership of the life insurance policy. A Stockholder's right to purchase a life insurance policy shall lapse if not exercised within 30 days after the expiration of the option of termination of this Agreement. In the event that a Stockholder elects to acquire any life insurance policy, then after receipt of the required

If a Stockholder ceases to be a Stockholder during his lifetime, then he can acquire the policies on his life.

If the Agreement terminates while a Stockholder is still living ("before the death of a Stockholder"), then that surviving Stockholder has a right to acquire the policies on his life.

A right to acquire policies must be "exercised" within 30 days of Termination of the Agreement.

payments, the Owner shall execute and deliver to the Stockholder all documents which are required to transfer ownership of the life insurance policy or policies.

The Buy-Sell Agreement terminated before the death of "a" Stockholder (as opposed to "any" Stockholder). Mr. Gilder was a Stockholder when the agreement terminated. The Agreement terminated before Mr. Gilder's death. Therefore, "such Stockholder" (Mr. Gilder, the surviving Stockholder) had a right to acquire the insurance policies which insured his life.

The right to acquire policies applies only to a living Stockholder. A dead Stockholder would not need to acquire life insurance. The language reads; "if this Agreement terminates before the death of **a** Stockholder, then **such** Stockholder shall have the right to purchase any life insurance policy which insures his life and is owned by the **Owner**." There were only two stockholders. The singular terms "a" and "such" applies to a single, living stockholder, which presumes the death of the other stockholder. While the Stockholder who has the right to acquire the policies on his life must be living, he would not have a right to acquire the policy unless the other Stockholder had passed away, except under limited conditions enumerated in the Agreement.

If both Stockholders were to die in a common accident or at the same time, then neither would need the right to acquire the policies insuring his own life. Hence, the Agreement requires that at least one Stockholder be living.

James Gilder had a right under the Buy-Sell Agreement to transfer the policies on his life to himself. By trick, the policy was transferred instead from the Cooper heirs to the Cooper heirs. Then Mr. Gilder's funds were wrongly used to pay the premiums

on the insurance policies on his life for the benefit of the Cooper heirs. Under Mississippi law, Mr. Gilder's heir is entitled to the proceeds of the life insurance policies. In *Lackey v. Lackey*, 691 So.2d 990 (Miss. 1997), a trustee wrongly used trust funds to obtain life insurance upon his own life, and named his heirs as beneficiary. Upon the death of the trustee, the beneficiary of the trust, not the heirs of the trustee, was determined to be entitled to the life insurance proceeds. The Court held:

> One who, acting in a fiduciary capacity, secretly and wrongfully, and therefore, fraudulently, uses fiduciary funds to purchase real estate or personal property, including policies of life insurance, for his own benefit and puts it in his own name, takes the title and interest in it as a trustee *ex malefico* for the owner of the misappropriated funds he thus uses, the *cestui que* trust. The equitable ownership and title of the misappropriated funds and the fruits thereof remain in the *cestui que* trust as long as they can be traced, and the trustee holds nothing but the naked title for the exclusive benefit of the cestui que trust.
>
> In equity, not only the property which the trustee acquires with the misappropriated funds, but all its fruits, in every form, its increase, its income, other property acquired by the trustee by the exchange or use of it in any way, become, at the option of the *cestui que* trust, his property... *Lackey* at p. 994

Connie Burford, as an employee, officer and director of Cooper Gilder, Inc. and as a person in whom both James Gilder and Winnie Gilder placed extraordinary trust, was a fiduciary to the company and to James and Winnie. She owed a duty to them to prevent the misuse of company funds by the payment of insurance proceeds for the benefit of the Cooper heirs instead of for James and his heirs. She had a duty to tell James Gilder, and later, Winnie Gilder, that Cooper Gilder, Inc., funds were being misused to purchase life insurance for the Cooper heirs. Officers and Directors of a corporation owe their employer a duty to exercise the utmost good faith and loyalty and are held to a higher standard than the morals that normally operate in the marketplace.

Ellzey v. Fyr-Pruf, Inc., 376 So.2d 1328 (Miss. 1979)

Robert Cooper, had the same fiduciary duty as a result of his employment with Cooper Gilder, Inc., and his special role as a key employee and advisor to Winnie Gilder following the death of James. More significantly, he had a duty to properly convey James' life insurance policies to James, as James obviously intended, rather than to himself and his sisters. As a result, his actions made him a trustee *ex maleficio*, a trustee as a result of his wrongdoing. An equitable trust results from his wrongdoing. Winnie Gilder is the *cestui que* beneficiary, the one who has a right to the beneficial interest of the equitable trust. The fruit of the wrongly used funds (the insurance proceeds) are held by the Defendants in an equitable trust for the benefit of Winnie Gilder.

In conveyances of property, in the execution of wills and in deeds, where one in a fiduciary capacity receives the conveyance of property,(such as the insurance proceeds in this case, the lease and Island 84 in the business case) there is a presumption of invalidity, and the burden of proof is on the fiduciary to show by clear and convincing evidence that there was no fraud or undue influence. *Mullins v. Ratcliff*, 515 So.2d 1183 (Miss. 1987). This is especially true, where, as here, the fiduciary is involved in preparing the conveyance. *In Re Estate of McQueen*, 918 So.2d 864 (Miss App. 2005), *In Re Estate of Dabney*, 740 So.2d 915 (Miss. 1999). In the *Estate of Dabney*, suspicious circumstances were enough to raise an inference of undue influence and the resulting presumption of invalidity. *Dabney* at 921. To determine whether an actor had fraudulent intent, the court must analyze the circumstances surrounding the event. *A&L Inc. v. Grantham,* 747 So.2d 832, 843 (Miss . 1999) The

Defendants used their undue influence of trust with James Gilder to effectuate a transfer of the policies from themselves to themselves rather than from themselves to Mr. Gilder. He obviously believed that they were transferring the policies to him. They were able to use their position of trust to effectuate the fraudulent transfer. Because of the presumption of invalidity, the burden is on them to show by clear and convincing evidence that they did not use fraud or undue influence when transferring the policies.

Indeed, Robert Cooper, Marilyn Dunaway and Mildred Watson each had a fiduciary duty to Mr. Gilder as the apparent 'owners' of the insurance policies. Mr. Gilder was the equitable owner of the policy, but the policies were temporarily in the name of the Cooper heirs. A fiduciary duty arises to "*all persons who occupy a position out of which the duty of good faith ought in equity and good conscience to arise.* 'It is the nature of the relation which is to be regarded, and not the designation of the one filling the relation.' *Parker v. Lewis Grocery Co.,* 153 So. 2d 261, 276 (Miss. 1963) Robert Cooper and other 'owners' of the insurance policy had a duty to advise Mr. Gilder of the facts (that they would transfer the policy to themselves instead of Mr. Gilder) It is the duty of a person in whom confidence is reposed by virtue of the situation of trust arising out of a confidential or fiduciary relationship to make a full disclosure of any and all material facts within his knowledge relating to a contemplated transaction with the other party to such a relationship, and any concealment or failure to disclose such facts is a fraud. *Memphis Hardwood Flooring v. Daniel*, 771 So.2d 924, 930 (Miss. 2000).

In *Bolden v. Gatewood*, 164 So. 2d 721 (Miss. 1964) a partner's executrix sued to recover from the surviving partner the proceeds of life insurance policies. Although,

in that case, the surviving partner swore that no agreement existed, the chancellor admitted through the parole evidence rule, the testimony of the life insurance agent to help determine the intent of the parties. *Bolden* at 730 The chancellor found "under the law, in good conscience and under the principles of equity" their agreement should be enforced. *Bolden* at 730 Here, it is the widow of the survivor seeking to enforce the agreement that the survivor could acquire the policy on his own life. As in Bolden, the Court is entitled to consider the testimony of the insurance agent in determining the intent of the parties to the Agreement.

The original Agreement between John Cooper and James Gilder should be enforced, and "under law, in good conscience and under the principles of equity" Winnie Gilder should receive the insurance proceeds.

DISCUSSION OF ISSUES RAISED BY APPELLANTS

1. Were the Two Cases Erroneously Consolidated?

The Chancellor found as follows:

> Having heard all the evidence, it appears to the court that the court was correct in consolidating these cases because the facts are intertwined and, thus, consolidation is necessary in order to determine the accurate and legal obligation to the parties.

(T430 L16-21)

After consolidation, the Chancellor adroitly handled the evidence and protected the separate identities of the cases and the parties. The Chancellor prevented an unnecessary and expensive second trial involving many of the same witnesses, exhibits and evidence. The consolidation was within the discretion of the court and did not prejudice any party.

The parties in the insurance / unjust enrichment claim were the Plaintiffs, Winnie

Gilder and Cooper Gilder, Inc, and the Defendants, Robert (Robin) Cooper, Marilyn Dunaway and Mildred Watson. In the business tort / unjust enrichment case the parties were the Plaintiff, Cooper Gilder, Inc., and the defendants Robert (Robin) Cooper, Connie Burford and Donald Dunaway (the husband of Marilyn Dunaway). After the cases were consolidated and tried together, the court granted directed verdict on the insurance suit, and dismissed the insurance Defendants. Marilyn Dunaway and Mildred Watson were not parties in the business suit and were dismissed. Robin Cooper was a Defendant in both cases and properly remained as a Defendant in the business suit. The Chancellor obviously did not confuse the parties or the claims.

Winnie Gilder, Robin Cooper and Connie Burford were the key witnesses in both suits. The Buy-Sell Agreement, and testimony surrounding the Buy-Sell Agreement, was critical in both cases. Evidence in the insurance case involved the events leading up to the execution of the last known Buy-Sell Agreement in 2001. The testimony included descriptions of the formation of the business of Cooper Gilder, Inc., the nature of the business, where it did business, the use of Island 84 by the business, the ownership of Island 84, the easement, and the value of the business as agreed upon by the owners. All of this testimony would have to be repeated in the business suit.

The insurance suit involved the use of insurance proceeds to purchase stock of Cooper Gilder, Inc., and the allegation that half of those proceeds were misappropriated or stolen by the Cooper family. The business suit involved the allegation that the business was stolen by the Cooper family, after the Cooper family had been paid twice for the business with the insurance proceeds which were the subject of the first suit. The value of the business was relevant in both suits.

The defendants in the insurance suit claimed that it was appropriate for them to receive 1.3 million dollars in insurance proceeds, because there was an agreement that one family would receive 1.3 million dollars and the other family would receive the business. When it was pointed out that the value of the Cooper's half of the business was only $650,000, the Cooper defendants were quick to point out that the whole picture included a land swap involving Island 84. Island 84 was to go to the family that was to get the business and the other family was to get $1.3 million dollars. The Defendants explained that Mr. Gilder gave Mr. Cooper his part of Island 84 because he believed that the Coopers would be buying the business and that his family would receive $1.3 million dollars. The use of this defense in the first suit was not helpful to the Defendants' cause in the second suit, but this is not a reason to deny consolidation. Their inconsistent statements from the insurance case would still be admissible in a separate trial on the business case.

Common themes of secret dealings by the Coopers and their allies are in both suits. Common themes of confidential relationships and the breach of fiduciary duties permeate both suits. Connie Burford is the key figure in both suits. Her unique position of trust with Mr. Gilder and Mrs. Gilder is central to both cases.

The Chancellor found that the two cases were intertwined, but properly separated the cases when making her ruling. Consolidation was appropriate and was handled without error.

2. Did the Chancellor Apply the Proper Standard of Proof and Properly Apply Constructive Trust Law?

The Chancellor saw the demeanor of the witnesses, experienced their hesitation to answer questions, heard the reluctance to give direct answers to certain questions

and was in the best position to judge the credibility of the witnesses as they testified.

The Chancellor found that Winnie had "total dependence" on the Defendants, and that "She trusted the Defendants. Even they admit that they were in a fiduciary or confidential relationship with her." The Court then found as follows:

> The problem with this argument is that it overlooks **one key fact, the purchasing of the Entergy lease without telling Winnie Gilder during a time when the defendants clearly had a fiduciary responsible to tell her.** This, coupled with what appears to be secrecy and a change of routine concerning the handling of the Gilder insurance policy, as well as the walk-out of each and every employee, even an employee who, although absent from the meeting, asked Winnie Gilder no questions, **clearly and convincingly shows an abuse of that confidence on the part of the defendants.**
>
> **The court, therefore, finds that there has been a breach of the fiduciary or confidential relationship on the part of the defendants.**[13]

The Court specifically mentioned the secretive behavior of the Defendants, which included the cutting and pasting of the transfer of ownership form, changing routine and leaving the insurance agent out of the loop, secretly transferring the lease to Robin, dealing with prospective buyers without telling the owner, using Gilder funds to pay for the insurance policies, etc. The factors establishing a confidential and fiduciary relationship include the fact that the Defendants were officers, managers or key employees of Cooper Gilder, and confidants of Winnie, the death bed assignment of duties to Connie and the assignment to Robin of the duty to show the facilities to a prospective buyer.

Officers and Directors of a corporation, such as Connie, owe their employer a duty to exercise the utmost good faith and loyalty and are held to a higher standard

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[13] T 435 L24- 436 L22

than the morals that normally operate in the marketplace. *Ellzey v. Fyr-Pruf, Inc.*, 376 So.2d 1328 (Miss. 1979). The secrecy surrounding the behavior of the Defendants, coupled with the acquisition of the lease to the easement, or, as Robin now says, the acquisition of permission to use the lease, without telling Winnie, violated their fiduciary relationship to her. The failure to tell her about a prospective buyer, while maneuvering to take advantage of the "catbird's seat" violated the confidential and fiduciary relationship they had with Winnie. Robin Cooper was paid insurance funds that should have gone to Winnie, while he was employed by her. Robin received a share of the refund of the insurance premium paid by the Gilders, and neither he nor Connie told Winnie.

The Defendant in *Adcock v. Merchants & MFR'S Bank of Ellisville,* 207 Miss. 448, 42 So.2d 427 (1949), claimed that parol testimony about intent should not be permitted because it might contradict the terms of a special warranty deed. But, the Court there, as here, ruled that all of the evidence, taken together, was ample to establish a constructive trust, noting that:

> Trusts are often deduced from circumstances. Old Ladies' Home Ass'n v. Grubb's Estate, 191 Miss. 250, 199 So. 287, 2 So.2d 593. The intention of the parties may be inferred from the facts, the conduct of the parties and the surrounding circumstances.
>
> "Courts construe the term 'confidential relationship' liberally in favor of the confider and against the confidant for the purposes of raising a constructive trust." Adcock v. Merchants & Manufacturers Bank, 207 Miss. 448, 42 So.2d 427. " 'It is * * * unjust enrichment under cover of the relation of confidence, which puts the court in motion.' See also Farano v. Stephanelli, 7 A.D.2d 420, 183 N.Y.S.2d 707." *Russell v Douglas,* 243 Miss. 497, 138 So.2d 730 (Miss. 1962)

Because of the breach of their fiduciary duties to the Plaintiff, Winnie requested that a constructive trust be imposed upon the Defendants for the value of her business

that they usurped or for the income they earned as a result of the theft of her business. The Chancellor found that a constructive trust was appropriate. In *Allred v. Fairchild*, 785 So.2d 1064 (Miss. Sup. Ct. 2001), the Court described a constructive trust as follows:

> A constructive trust is one that arises by operation of law against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, to hold and enjoy. Sojourner v. Sojourner, 247 Miss. 342, 153 So.2d 803, 807 (1963) (citing 54 Am.Jur., Trusts, § 218).
> ...
>
> [6] [7] ¶ 9. In addition, the evidence indicates that Allred and Fairchild shared a special relationship based upon trust and mutual respect. "While a confidential or fiduciary relationship does not in itself give rise to a constructive trust, an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another suffices...." Sojourner, 153 So.2d at 807. In harmony with the equitable purpose of constructive trusts, we are careful not to apply too narrow a definition of confidential relationship. "An abuse of confidence within the rule may be an abuse of either a technical fiduciary relationship or of an informal relationship where one person trusts in and relies upon another, whether the relation is a moral, social, domestic, or merely personal one." Id. at 808.

The special relationship of Connie, Robin and Don makes it unconscionable for them to secretly double deal and self deal at Winnie's expense. Winnie sought relief because the Defendants were unjustly enriched when the Cooper family was paid twice for the business, and then, because of a series of machinations, ended up with control of the business. They obtained title to the land, the lease, the fax number and the asset of primary importance to a business, the customers.

> 5] [6] ¶ 24. A constructive trust is a fiction of equity created for the purpose of preventing unjust enrichment by one who holds legal title to property which, under principles of justice and fairness, rightfully belongs

> to another. Allgood v. Allgood, 473 So.2d 416 (Miss.1985); Russell v. Douglas, 243 Miss. 497, 138 So.2d 730 (1962).
>
> [7] ¶ 25. Clear and convincing proof is necessary to establish a constructive trust. Planters Bank at 1034 (citing Allgood v. Allgood, supra; Shumpert v. Tanner, 332 So.2d 411, 412 (Miss.1976)). This Court has stated that "[i]t is the [confidential] relationship plus the abuse of confidence imposed that authorizes a court of equity to construct a trust for the benefit of the party whose confidence has been abused." Davidson v. Davidson, 667 So.2d 616, 620 (Miss.1995) (quoting Summer v. Summer, 224 Miss. 273, 80 So.2d 35, 37 (1955)). Fraud need not be shown. Russell, 243 Miss. at 505-06, 138 So.2d at 734.

McNeil v. Hester, 753 So.2d 1057(Miss. 2000)

The Court found by clear and convincing evidence that a confidential relationship existed, that it was breached by the Defendants, and that the Plaintiff was damaged by that breach.

3. Were the Chancellor's Findings of Fact Supported by the Evidence?

The Court correctly summarized in its findings of fact exactly what ultimately happened. James Gilder obtained 100% of Cooper Gilder upon the death of John Cooper, and Winnie Gilder inherited Cooper Gilder when her husband died. The Coopers obtained $1.3 million in insurance proceeds. Through various machinations and breaches of fiduciary duties, the Defendants unfairly obtained the business formerly operated by Cooper Gilder.

The defense used throughout the insurance case was that one family would get the insurance money and the other family would get the company. The Chancellor correctly used the testimony of Robin Cooper and Connie Burford and the interrogatory answer of Robin Cooper when she found that there was a deal between John Cooper and James Gilder that provided that one family would get the business and the other family would get $1.3 million and that Island 84 was to go with the family that would get

the business. But, the Defendants don't like the consequences of convincing the Chancellor of the existence of the "deal" that they used to defeat the insurance case.

The Defendants also complain that the Chancellor found their behavior to be secretive. Acquisition of the lease, payment of insurance premiums with Gilder funds, leaving the insurance agent out of the loop, change of routine, entertaining a prospective purchaser without telling Winnie, and self dealing from the "cat bird seat" with prospective purchasers without telling Winnie are some examples of the secretive behavior of the Defendants.

The findings of the Chancellor are amply supported by the evidence.

4. A. Did the Chancellor Correctly Find That Robin Breached a Confidential and Fiduciary Duty to Winnie When he Secretly Acquired the Easement?

B. Did the Chancellor Correctly Deny the Motion to Reconsider or Reopen, Where the Proffered Information Concerning the Easement Was Not "Newly Discovered Evidence?"

From the beginning of the litigation until after the Chancellor issued a ruling against Robin Cooper, Don Dunaway and Connie Burford, it was the consistent position of these Defendants that Robin Cooper acquired the lease from Entergy in January of 2005. This position changed for the first time after the Chancellor issued her judgment. After the Judgment was issued, the Defendants filed a motion to, among other things, admit "new evidence", claiming that Robin Cooper never had the Entergy lease. However, in the affidavit attached to the motion, Robin Cooper says that he learned on January 11, 2005, that he could not lease the property! If that is true, then this would not be "newly discovered evidence", because the trial concluded in August of 2006. Instead, Robin's latest statement is a newly revealed lie.

The Court correctly ruled that the evidence established that Robin Cooper acquired the subject lease.

At trial, Robin testified about the lease as follows:

Q. In January of 2005, you acquired a lease on the easement to Island 84, is that right?
A. Not exactly. I negotiated the lease.
Q. Well, isn't that what you told me in your deposition, that you acquired the lease?
A. Well, I acquired permission to use the land.
Q. From Entergy?
A. Yeah.
Q. And you paid for that?
A. I did pay for it.
Q. And, when you did that, you were employed at Cooper Gilder?
A. Yes, sir.
Q. Okay. And you did not tell your employer about that?
A. No.

...

Examination by the Court:

Q. You said you were negotiating to acquire the lease?
A. **I sent them a letter requesting that the access be put in my name since all the property...and they sent back needing proof of ownership which I delivered to them. Then I started negotiating to buy the property and we were in that position when - -**
Q. To buy the leased property?
A. Yes. And Katrina hit and, since Katrina hit, I can't get a hold of anybody, you know, so we can finish it up.
Q. So you say you've now acquired permission to use the - -
A. Right.
Q. - - property? Are you paying for it?
A. Pardon me?
Q. Are you paying for the use of it?
A. I've sent them one check. That's all I've sent them. They've not requested anymore. They've not done anything.
Q. Have they accepted the check that you sent them?
A. They've not sent it back.
Q. And when was this?
A. When I first applied for the lease.
Q. Which was when? Well, let me ask you this. Would that be around the time of the letter that you sent telling them you owned the property?
A. Say that again, please?
Q. Would that be around the same time as the letter that you sent to them

- -
A. Yes, mam.
Q. - - telling them you owned the property?
A. I sent a check with the letter.

...

The Court continues:

Q. This letter was written January, 2005.
A. Your Honor, I'm sure that if that's what it says, that's what it - -
Q. So, you had begun negotiations for the lease around this time?
A. I assume. May I see that? I mean, it's hard to answer when...all this is so far behind me.

...

A. Yes, mam.
Q. The check that you're talking about that you sent them, is that the same check that you sent with that letter?
A. Yes, it is.
Q. Did that check come back to you?
A. No, mam.
Q. Is that lease done yearly?
A. It was done yearly prior to this, but shortly after that, we went in negotiation to purchase the property. I had trouble with the environmental portion. The had to send someone in to make sure that, as far as the lease goes, that we weren't environmentally violating the land. So, I met with that lady and we did a walk-thru. And then it was transferred to a different person some kind of way and he says, "Well, we have to tell Cooper Gilder that you're leasing the land." I said, "Okay." And then I said, "What about buying the land?" He said, "We do that quite often..." he said "...and a lot of times it eliminates problems." I said, "Well, let's go ahead and set up a purchase price for the land and let me just buy the land. That way we can tie it to my 22 acres."
Q. Has there been any money paid on the lease since that check was sent in January of 2005?
A. Yes, mam - - what was the question?
Q. Has there been any money - -
A. No, no.
Q. - - paid for the lease of that property since that check was sent in January, 2005?
A. They've not requested anymore money. We are still in negotiation or were in negotiation on the purchase.

T 235 L 26 - 239 L 4, emphasis added.

His deposition was taken July 19, 2005, which of course is after January 11, 2005. When he was asked about the MP & L lease. He gave a long explanation of why

he decided to transfer the lease to his name. Then the following exchange took place:

"Q. **When was it that you transferred the property-that lease to you?**
A. **I don't know.**
Q. **Ok, would this be a copy of the letter–**
A. **Yeah**
Q. **–Where you transferred the lease to your name and paid an annual fee?**
A. **Yeah**
Q. And that was January 4, 2005?
A. If that's what's on the letter, I'm sure it was."

...

Q. What did you tell Cookie about this lease?
A. I don't recall having told her anything. I didn't feel like Cooper Gilder had an insurable interest in that strip anymore since I owned the land. Connie was working at Cooper Gilder at the time, and she said, you should probably go ahead pay this lease, because Cooper Gilder don't have any land there anymore. So, I said, that sounds like a good idea to me."

R 646-650, emphasis added.

During the trial, the Court inspected the easement. Mr. Cooper unlocked the gate at the easement, and showed the Court and all parties where the easement began and where the easement ended. (T 448, L27 - 449 L1) When the Chancellor recessed the trial in May of 2006, she advised that parties that she considered the issue of who has the easement to be a key issue in the case. (T 449 L 1 - 5) When the Response to the Defendant's Motion for Summary Judgment was filed in April of 2006, the secretive seizing of the lease by Robin Cooper was a prominent part of the Plaintiff's pleadings. ® 611-612)

Connie Burford, testified that when it was time to pay the lease she thought that Robin should pay the lease. She did not foresee any problem and presumed that Cooper Gilder could keep using the property as it always had. (T 370 - 371; R 180-181)

On January 11, 2007, after the Judgment was entered, Robin Cooper sought to file an affidavit which stated, in part, the following:

> "...on January 11, 2005, I received a letter from Entergy in response to my letter on January 4, 2005. I'm attaching a copy of that letter. I was told I could not lease Entergy's property unless I complied with the direction of Entergy as set forth in their letter of January 11, 2005.
>
> Entergy did not grant me the lease to the property next to island 84. I do not have the lease to this property as owned by Entergy, I have never signed a lease with Entergy and I am not now nor have I ever been the lessee of that property."[14]

As can be seen from the quotes above, Robin had many opportunities to specifically deny that he had acquired a lease from Entergy. Instead, he testified, variously, that he transferred the lease to his name, that he had paid Entergy to transfer the lease to his name, that he acquired permission to use the easement, that he had paid to acquire permission from Entergy to use the property, and that he had started negotiations to buy the property, but that Hurricane Katrina had interrupted his efforts to buy the property. If we assume, as the Defendants' wish, that Robin Cooper never had the lease, then that information was known or available to the Defendants' before this suit was filed. In other words, this is not newly discovered evidence. This is a newly revealed lie. The problem for Robin is, we don't know which lie to rely upon.

The Defendants also sought to put in evidence that in September, 2006, after the trial, Cooper Gilder received notice that the annual lease payment was due, and that Winnie, in an effort to preserve any interest she may have in the lease, made the lease

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Defendant's Exhibit 7 for Identification, paragraph 3. Contrary to the assertion by the Appellants in their brief, the Plaintiffs did not stipulate to the admission of the Entergy letter. The Plaintiffs specifically objected to the post trial affidavits of Mr. Cooper and to the letter from Entergy as hearsay and on the grounds that the information alleged was not "newly discovered." (T 450 L1-8).

payment on behalf of Cooper Gilder. This does not help the Defendants. It does not change the fact that they secretly acquired permission to use the lease held by Cooper Gilder while employed by Cooper Gilder.

In any event, if we consider the evidence in its best light for Robin, he paid Entergy for permission to use the easement without telling his employer. This does not help Robin. To succeed in a motion for new trial based upon alleged new evidence, the movant must show that the new evidence was discovered after the trial and could not have been discovered by due diligence before the trial. The movant must also show that the new evidence would make a difference in the outcome.[15] The Defendants fail on both counts. The January 11, 2005, letter, if true, was known by Robin long before trial. Paying for permission to use the easement is the functional equivalent of a lease. Either way, he was abusing his position of confidence by secretly gaining use of the easement.

5. Did the Chancellor Err in Application of Constructive Trust Law?

This assignment is addressed under Issue 2, above.

6. Were Damages Properly Assessed?

The Defendants complain that the damages suffered by the Plaintiffs were not causally related to the breach of confidential and fiduciary duties found by the Chancellor. Acquisition of the lease is a central fact, but not the only fact upon which the verdict rests.

Cooper Gilder held the lease on the easement to Island 84 for 30 years. As

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Crawford v. State, 867 So.2d 196 (Miss Sup. Ct. 2003); *Burcham v Estate of Burcham*, 303 So.2d 476 (Miss. 1974)

pointed out by counsel for the Defendants, it was through the easement that Cooper Gilder made its money. Without the easement, neither Robin nor Warfield Point could use Island 84. As long as Cooper Gilder had the easement, Robin needed to deal with Cooper Gilder. When Robin secretly acquired permission from Entergy to use the easement, independent of Cooper Gilder, he eliminated the last leverage Cooper Gilder might have to maintain its vital flow of business. With the lease (or with permission to use the land), he could and did capture all of Cooper Gilder's business.

The "land swap" evidence adduced by the Defendants does not help their cause. They say that John Cooper and James Gilder intended for Island 84 to go to the family that would acquire the business and the other family was to get the insurance money. Using the Defendants' theory of the case, if the Cooper family got the insurance money and the Gilder family initially acquired the business, then Robin Cooper should have held Island 84 in trust for Cooper Gilder and should have returned it when he received his share of the insurance proceeds. This, of course, was never Robin's intent. Instead, Robin and his allies were intent on getting the insurance money and the business. It is obvious from the machinations that had gone on for some time that Robin was using his position of trust to put himself in a position to take the business for nothing when he thought the time was right.

As for the amount of damages, concluding that a judgment of $1.3 million is appropriate is virtually inescapable. Mr. Cooper and Mr. Gilder valued their business at $1.3 million. The Chancellor found that Mr. Cooper and Mr. Gilder had a deal that one family would get the business and the land and the other family would get $1.3 million. The Cooper family ultimately received $1.3 million for their interest in the business.

When prospective buyers looked at the business, Connie told them that the price was $1.3 million. The average gross profit of the business during the years 2000 through 2005 was $1.3 million. The breach of fiduciary duties by Robin, Connie and Don deprived Winnie of a business valued at $1.3 million. The verdict of $1.3 million was reasonable, appropriate and supported by the evidence.

CONCLUSION

Robin Cooper, Don Dunaway and Connie Burford stole a business worth $1.3 million by abusing confidential relationships. The verdict should be affirmed.

Robin Cooper, Marilyn Dunaway and Mildred Watson, with the help of Connie Burford, stole insurance proceeds from James Gilder's widow. Verdict should be awarded against them in the amount of $652,281.86.

Respectfully submitted,
WINNIE GILDER, INDIVIDUALLY, and as ADMINISTRATRIX OF THE ESTATE OF JAMES A. GILDER, AND COOPER GILDER, INC.

BY: _____
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CERTIFICATE OF SERVICE

I, James D. Bell, certify that I have caused to be mailed a true and correct copy of the foregoing instrument to:

John H. Daniels, Esquire
Post Office Drawer 560
Greenville, Mississippi 38702-0560

Honorable Marie Washington
Washington County Chancery Court
Post Office Box 1762
Greenville, Mississippi 38702-1762

SO CERTIFIED, this, the 10 day of April, 2008.

JAMES D. BELL