IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2007-CA-00793

Robert Cooper, et al	APPELLANTS
v.	
Winnie Gilder, et al	APPELLEES

APPEAL FROM THE CHANCERY COURT
OF WASHINGTON COUNTY, MISSISSIPPI

Cause No. 05-0344

Cooper Gilder, Inc. v. Robert D. Cooper, Donald B. Dunaway and Connie Burford

Consolidated with Cause No. 05-0345

Winnie Gilder, Individually and as Administratrix C.T.A. of the Estate of James A. Gilder, Deceased and Cooper Gilder, Inc., a Mississippi Corporation v. New York Life Insurance and Annuity Corporation, Robert D. Cooper, Marilyn C. Dunaway and Mildred C. Watson

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BRIEF OF CROSS APPELLEES
Robert D. Cooper and Marilyn C. Dunaway

and

REPLY BRIEF OF APPELLANTS
Robert D. Cooper, Donald B. Dunaway and Connie Burford

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Robert Cooper, et al **APPELLANTS**

v.

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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 or recusal:

1. Robert D. Cooper, Appellant
2. Donald B. Dunaway, Appellant
3. Connie Burfurd, Appellant
4. Cooper-Gilder, 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 Daniels, Attorney for Appellant
10. James D. Bell, Attorney for Appellee
11. Honorable Marie Wilson, Chancellor, Washington County
12. Craig Geno, Bankruptcy Attorney for the Appellants

John H. Daniels, III, MSB[redacted]
Attorney for Appellants

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STATEMENT OF THE CROSS APPEAL ISSUES

1. Whether John Cooper's heirs were the rightful owners of the policies on James Gilder's life.

STATEMENT OF THE CASE ON THE CROSS APPEAL

Cross Appellees Robert D. Cooper (Robin), and Marilyn C. Dunaway, Defendants in the life insurance case, adopt the business tort Appellants' Statement of the Case.[1]

STATEMENT OF FACTS PERTINENT TO THE CROSS APPEAL

In 1974 John Cooper and James Gilder formed a company which was later renamed Cooper Gilder, Inc. Each owned 50% or 400 shares. T 28-31, 421; Exs. P1 & P2. At some point they entered into one or more predecessor buy/sell agreement(s) to the one at issue in this appeal. In August 1990, they switched their policies funding their buy/sell agreement from their prior insurer to NYL. On August 3, 1990, NYL issued policy # 62623781 for $550,000 on Gilder's life to John Cooper. On January 13, 1997, NYL issued policy # 45944993 for $75,000 in additional coverage on Gilder's life to John Cooper. NYL also issued policies for similar amounts on John Cooper's life to James Gilder. R 327-330; T 31-32, 184; Exs. P4 & P5.

In October 2000, Gilder, age 70, married Winnie (a/k/a Cookie), age 34 or 35. Cookie had worked 15 years at a finance company after high school, but was unemployed when they married.. T 145-146; 155-157 Sometime in 2001, John Cooper was diagnosed with cancer. T. 172. On December 21, 2001, he and Gilder executed the Buy/Sell Agreement (BSA) at issue in this appeal replacing their prior agreements. The 2001 BSA's exhibits valued Cooper-Gilder at $1,625.00 a share for a total of $1.3 million with Gilder and Cooper each owning half. NYL policy # 62623781 and # 45944993 on Gilder's life were listed as owned by Cooper. Two other

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[1]Cross Appellees Cooper and Dunaway disagree with Cross Appellant's Statements of the Case and Facts, and do not admit identity of defendants or issues or appropriateness of consolidating the two cases.

NYL policies on Cooper's life were listed as owned by Gilder. The BSA's stated purpose was to provide for continuity of management and disposition of stock upon the occurrence of certain events, including death of one of the stockholders. T 33-34, R 118; P6 at Ex.s A & B[2]

By July of 2003, Gilder's health had deteriorated and John Cooper's cancer was worse. T 171-172, 394. In transactions which Cross Appellees maintain were separate from the 2001 BSA and irrelevant to the life insurance case, John Cooper and James Gilder executed deeds severing the joint tenancies under which they owned several pieces of land prior to their deaths. John Cooper then immediately placed one of the pieces he received sole title to into a joint tenancy with right of survivorship with his nephew Robin. D9; RE 119.

On October 29, 2003 John Cooper died. Gilder was 73 years old and quite ill. Gilder filed a claim with NYL in November for the proceeds of his policies on Cooper's life. The total received was reduced because of a prior loan secured by the policies. T36-37, 39;R 598; Ex. P20

On December 2, 2003, NYL sent a letter to Gilder's home address used by both Gilder and John Cooper for all their personal mail. It was addressed to the insured in care of the deceased owner of the policies Cooper owned on Gilder's life, and informed the insured that the Estate of John Cooper now owned the policies on his life. Information on NYL's requirements for transferring ownership of the policies on its books from the Estate to the individual successor owner(s) was included along with the proper forms. Like all of Cooper and Gilder's personal mail, it was delivered to the office. When mail arrived at the office, the person receiving the mail routinely took it to James Gilder for his review and distribution. T 41-42, 72, 102, 151, 214; P8

On December 17, 2003, Gilder executed documents implementing the BSA provisions

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[2]There is a typographical error in one of the policy numbers on Ex. B to P6. T34-35.

triggered by John Cooper's death using life insurance proceeds to fund stock purchases. He signed two NYL checks filled out by Connie, for $486,446.68 and $108,104.10, transferring his proceeds from the policies on Cooper's life to Cooper's Estate; a promissory note for $55,449.78 payable to the Estate over five years for the balance of the purchase price of Cooper's shares; and a stock pledge and security agreement using his Cooper-Gilder stock to secure the note. Gilder, acting for himself and for Cooper-Gilder, and Robin, acting as executor of the Estate, also executed an agreement to settle Cooper-Gilder's debt to John Cooper for 2003 profits through October 29, 2003 by proration of the corporation's AAA account to be paid by an additional note to be executed by Gilder and secured by his stock after calculation by James Bennett, accountant for both Gilder and Cooper and Cooper-Gilder. These agreements specifically stated an intent to settle the parties' obligations under the 2001 BSA provisions triggered by Cooper's death, but there is no mention of the policies in the BSA's exhibits on James Gilder's life owned by John Cooper. The agreements transferred Cooper's stock to Gilder in exchange for the life insurance proceeds on John Cooper's life, Gilder's promissory note for $55,449.78, the stock pledge and security agreement, and an exchange of irrevocable stock/bond powers. After these transactions, Gilder owned 100% of Cooper-Gilder's stock subject to a significant security interest held by the life insurance defendants to secure debts owed to them. T 36-37, 74; R 75; Exs. P10 & P11.

There is no mention in these documents or elsewhere in the evidence of Gilder giving notice of intent to exercise a right to acquire the policies on his life to the Cooper Estate, of Gilder tendering payment of the cash surrender value of these policies to either the Estate or Cooper's heirs, or of any written request to the Estate or Cooper's heirs by Gilder to transfer the policies to him. There is no evidence that Gilder even attempted to determine to cash surrender value of the policies. All these actions are specifically required by the BSA to exercise any right

to acquire policies arising under § 7.4 which states:

> 7.4 Right to Purchase Police(is). 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 receives 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*** it not exercised, ***within 30 days after the expiration of the option or termination of this Agreement.***[3] In the event that a Stockholder elects to acquire any life insurance policy, then ***after receipt of the required 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.*

Ex. P6; RE 110-111.

On December 19, 2003, Robin, as executor of John Cooper's Estate which was the successor owner of the policies on Gilder's life under the terms of the policy, sign the forms NYL required to change the official owner on its books from the Estate to the heirs of John Cooper (Robin Cooper, Marilyn C. Dunaway and Mildred Cooper Watson). The original form contained space tax information on only one successor owner. Connie copied this part creating an attachment with space for two more tax statements so information could be provided on Robin, Marilyn, and Mildred. She also made copies of the completed form. James Gilder, then owner of 100% of Cooper-Gilder, was present with Connie and Robin when the forms were filled out and executed. He was not under the misimpression the forms were being filled out to transfer the policies to him. Nothing was done secretly. R309, 331-338, T214-215, 218; Ex. P13

Although not present at either time, Cookie testified over objection that these forms were

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sent to Gilder by NYL with the December 2, 2003 letter and were filled out by Connie. She erroneously claimed the form was to change *the beneficiaries* to the three Cooper heirs and that the words "business associate" were fraudulently squeezed in next to each heir's name when Robin had no relationship to Gilder other than that of employee to employer, Marilyn had no relationship to Gilder other than that her husband was an employee of Cooper-Gilder, and Mildred had no relationship to the corporation, was not on the payroll and had no interest in the business. On cross examination, Cookie admitted Mildred made gifts distributed to Cooper-Gilder customers and associates for public relations purposes. T84-88, 206-207.

However, it is undisputed Gilder had executed one note payable to Robin, Marilyn and Mildred secured by his stock two days earlier, and another such note, also to be secured by his stock, was contemplated to settle the amounts Cooper Gilder owed to John Cooper on his death. See P13 Connie testified she squeezed in the business associate words as a shorthand reference this relationship, connection to and interest in Cooper-Gilder controlled 100% by Gilder. T 219.

Robin testified when the forms came in the mail, Gilder had the letter in his and Connie's presence. Gilder was observing, with Marilyn and Mildred, when the ownership transfer form was filled out and signed openly on a work day in Cooper-Gilder's office. Nothing was hidden from Gilder who was aware of everything that was done. T225, 229-232

Both John Cooper and Gilder had a long standing practice of paying personal expenses from Cooper-Gilder's bank accounts which were then treated as draws against their share of Cooper-Gilder's profits attributed to each annually through the AAA account when Cooper-Gilder's Subchapter S profits and losses were passed through to them to be reported on their individual income tax returns. The monthly life insurance premiums for the policies John Cooper and Gilder owned on each other's lives were historically paid in this manner using

monthly automatic electronic funds withdrawals. After John Cooper's death, no one took any action immediately to change the automatic withdrawals for premiums on policies insuring Gilder's life so they continued as charges to be balanced when the accountant calculated what Cooper Gilder still owed John Cooper's estate. R 453-454, 561, 562, 573; T 44, 78, 96-97.

Cookie inherited 100% of Cooper-Gilder when Gilder died. Cookie admitted she had no involvement in the business during her husband's lifetime and knew nothing about it. But she felt her husband should be deemed the owner of the policies on his life, and she should receive the proceeds, because he acquired 100% of Cooper-Gilder on December 17, 2003 and the premiums continued to be automatically debited from Cooper-Gilder's bank account during the four months between John Cooper's and Gilder's deaths. T 77-78, 106, 117, 119, 146, 152, 339-340

At the close of the Plaintiffs' cases in chief, the Chancellor directed a verdict on the life insurance case holding the language of the 2001 BSA was unambiguous. Thus, she could not look beyond the BSA's four corners for Gilder's and John Cooper's intent on ownership of the remaining policies after the death of the first of them to die. Under the BSA's plain language, John Cooper and James Gilder each owned half of a business worth $1.3 million dollars. They each insured half the value of the business by purchasing life insurance on the other's life in an amount equal to half the value of the business. Between the businesses and the life insurance policies, the face value of assets covered by the BSA agreement was $2.6 million. It plainly stated that upon the death of the first, the other would have ready access to the cash from the life insurance policies on the life of the first to die to be used to buy the half of the business passing to the first to die's estate. That estate would then have $650,000 in cash or purchase money equivalents and approximately $650,000 in life insurance policies on the remaining stockholder's life. The surviving stockholder would then have his original half of the corporate shares valued

at $650,000 plus the newly acquired other half the shares also valued at $650,000. The scales would balance with each side having approximately the same amount of assets by face value after the death of the both. She ruled the BSA's insurance buyout options would only be triggered if the BSA was terminated while both Gilder and John Cooper were still alive as might occur if they decided to dissolve the business prior to the death of either. T. 249-257.

Several objections were sustained during trial on hearsay and parol evidence grounds to attempts to offer testimony as to Gilder's and John Cooper's intent behind provisions of the 2001 BSA, the purpose of the life insurance policies in connection with the BSA, what they intended to happen to the policies on the surviving shareholder's life after the first died, and the intent behind the continuing automatic payment of the premiums on the remaining policies between John Cooper's death and Gilder's death. Neither Cookie nor the NYL agent[4] who sold the policies were permitted to testify as to what John Cooper and James Gilder told them about their intent in regard to the BSA and the insurance policies because the BSA's provisions spoke for themselves unambiguously on these issues. T 38-40, 72, 76, 77, 185-186, 189.

SUMMARY OF CROSS APPEAL ARGUMENT

The Chancellor correctly excluded parol evidence of intent as the BSA unambiguously expressed John Cooper's and James Gilder's intent concerning the ownership of the remaining life insurance policies on the survivor after the proceeds of the policies on the first to die were used to purchase the other's half of the stock. Even if the Chancellor erred in interpreting the BSA agreement, and James Gilder had an option to purchase the policies on his life, the result is still correct because there is no evidence, and not even a claim, that James Gilder ever gave the

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[4]A proffer shows the NYL agent would have said Cooper and Gilder said something like "it's taken care of" in 1990 when he mentioned a surviving partner option to purchase policies on his own life. T 190

notice or tendered the purchase price required by the BSA in those circumstances where a stockholder had the option to purchase the policies on his life.

ARGUMENT

I. Standard of Review on Cross Appeal

While a chancellor's factual findings will not be disturbed unless they are manifestly wrong, unsupported by credible evidence, or the chancellor applied an erroneous legal standard, issues or conclusions of law are subject to de novo review. *Davidson v. Davidson*, 667 So.2d 616, 620 (Miss. 1995). Contract construction is a legal issue reviewed de novo. *Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, 908 So. 2d 107, ¶ 5 (Miss. 2005) A chancellor's wide discretion on evidentiary rulings will not be reversed unless the discretion is so abused it prejudices the party opposing the ruling. *Smith v. Averill (In re Will of Smith)*, 722 So. 2d 606, ¶ 4 (Miss. 1998).

II. The Constructive Trust Standard and Burden of Proof in Both Cases

Throughout the litigation of these cases, Cookie has attempted to lump all the defendants in both cases together and to hold them, as a group, to her interpretation of the answer of a single defendant in one of the cases to questions worded by her own counsel as "the Defendants' theory of the case." She is making some sort of estoppel argument that all the individual defendants should be held to a single totally consistent theory of defense in both cases, that each individual defendants in each case is bound by her constructions of any statement or testimony of any other defendant, and that each defendant is personally liable for any action of any defendant in either case. Her argument appears to be that she should recover against all the Defendants as a group in both the life insurance and business tort cases, or at least that any position other than her own interpretation of the evidence is unbelievable, unless there is total consistency among all defendants from beginning to end in every explanation in every interrogatory answer and every

answer to every question in every deposition and at trial and in the appellate briefs.

At times, Cookie's arguments even go beyond lumping together defendants, especially when she argues the "Cooper family" first stole the insurance on her husband's life and then stole the business which Cooper-Gilder was doing after being paid twice for John Cooper's share of the business. There is no "Cooper Family" defendant in either case. The same people did not even get paid for John Cooper's share of Cooper Gilder and then start up a competing business. Mildred, Marilyn and Robin got paid for John Cooper's shares in Cooper Gilder. Mildred and Marilyn have no interest in, and do not even work for, Warfield Associates, the business Cookie alleges is now doing the business of Cooper Gilder. Don Dunaway and Chuck (Robert S.) Cooper, two of the three founders of Warfield Associates, did not get paid anything for John Cooper's shares of Cooper Gilder. Chuck is not even a defendant in either case. Connie Burford has been made a defendant in the business tort case even though she did not get paid anything for John Cooper's shares in Cooper Gilder, received no life insurance proceeds, was not a founder or officer of Warfield Associates, and has no ownership interest in Warfield Associates.

The law does not put such a burden of proof on the individual defendants or bind them to each other's testimony or even require total consistency in all the defenses of a single defendant. Cookie has the burden of proof to prove each element of her case by clear and convincing evidence against each individual defendant. *Dear v. Boggan (In re Estates of Gates)*, 876 So. 2d 1059 , ¶¶ 13-14 (Miss. App. 2004); *Mariner Health Care, Inc. v. Estate of Edwards*, 964 So. 2d 1138, ¶¶ 47-49 (Miss. 2007); *Beverly Enters. v. Reed*, 961 So. 2d 40, ¶ 12 (Miss. 2007) (Instructions segregating the claims of duty, breach, causation, and damages against each Defendant were required). The identity of the two consolidated cases and the identity of their separate defendants must be kept separate. *Smith v. H.C. Bailey Cos.*, 477 So. 2d 224, 231

(Miss. 1985). Furthermore, Cookie must prove the individual duties, conduct, breaches of duty, and liabilities of each individual defendant in each case. *Estate of Edwards*, at ¶¶ 47-49; *Reed*, 961 So. 2d 40, ¶ 12. For example, she cannot prove entitlement to a constructive trust over the life insurance proceeds held by Robin, Marilyn and Mildred based on a confidential relationship between James Gilder and Connie Burford and conduct she claims Connie took in regard to life insurance policies when Connie is not even a defendant in the life insurance case and does not hold title to the policies at issue. *Arrington v. Castle*, 909 So. 2d 1135, ¶ 7 (Miss. App. 2005)

To recover in the life insurance case on a constructive trust theory against Robin, Marilyn and Mildred, Cookie must prove each of these defendants had a confidential relationship with James Gilder and each of these individual defendants acquired legal title to these policies on James Gilder's life by abuse of that relationship. *First Nat'l Bank v. Huff*, 441 So. 2d 1317, 1321 (Miss. 1983). To recover on a constructive trust theory in the business tort case against Robin, Don and Connie, Cookie must prove she had a confidential relationship with each of these individuals and that each acquired title to something rightfully belonging to Cookie by abuse of that relationship. *Id.* Although it is possible for a confidential relationship to arise between business partners, a confidential relationships are not created between parties by a contractual relationship and rarely exist in any business relationship. *Nygaard v. Getty Oil Co.*, 918 So. 2d 1237, ¶ 20 (Miss. 2005) In all the case law finding confidential relationships, they are based upon personal relationships between specific individuals. No Mississippi cases find a confidential relationship between two people because they are heirs or successors to two other individuals who shared a confidential relationship. Confidential relationships are by their very nature personal. They are not heritable, assignable, or otherwise migratory.

In addition to proving the existence of the confidential relationship, Cookie must also

prove that the life insurance policies rightfully belonged to James Gilder, that each life insurance defendant to be held liable breached the confidential relationship s/he had with James Gilder, and that the particular breach proven by that defendant was the means by which that individual defendant acquired or held title to the policies which rightfully should have been held by Gilder. The fact that someone ends up with title to property which the decedent thought would go, or intended to go, to someone else is not sufficient to support a constructive trust unless an abuse of a confidential relationship by the person actually receiving title is what caused him to obtain the property. *Stovall v. Stovall*, 218 Miss. 364, 67 So.2d 391 (Miss. 1953) Even a breach of contract is insufficient to support a constructive trust unless the breach is the giving of a contractual promise by one party to the confidential relationship which he never intended to keep and the other party relied on that promise. *Sojourner v. Sojourner*, 153 So. 2d 803, 807 (Miss. 1963)

To recover on constructive trust theories in the business tort case, Cookie must prove she had a confidential relationship with each individual defendant, that each defendant breached that confidence, and that through the breach of confidence each defendant has acquired title to and profited from property while it equitably belonged to Cookie. *Huff*, 441 So. 2d 1317 Unless Cookie has proved she has an exclusive right to what she claims the business tort defendants took and an exclusive right to the business free of competition, then nothing has been taken from her which rightfully belonged to her and can form the res of a constructive trust. Thus, she must either prove she had the right to be free from competition by the business tort defendants and that Robin, Don and Connie now hold business which Cooper Gilder had an exclusive right to or that she or Cooper Gilder had the right to use Island 84 for the business and Robin, Don and Connie have prevented Cookie or Cooper Gilder from exercising the right to use Island 84. Further, she has to prove that Robin, Don and Connie each acquired something which rightfully belongs to

her or Cooper Gilder and that each acquired title to what s/he wrongfully holds as a result of his/her breach of his/her confidential relationship with Cookie. If she does not prove each of these things by clear and convincing evidence, she is not entitled to a constructive trust. *Id.*

III. Neither Cookie Nor Cooper Gilder is Entitled to the Life Insurance At Issue Under Any Supportable Construction of the Written Contracts

Cookie concedes entitlement to the life insurance at issue in the cross appeal is governed by the 2001 BSA. Both the BSA and the associated life insurance policies are written contracts subject to well established rules on construction and interpretation of written contracts. Written contracts bind both the parties and their estates, executors and administrators. *Hodges v. Hodges (In re Estate of Hodges)*, 807 So. 2d 438, ¶ 28 (Miss. 2002) Mississippi courts use a three step process for interpreting contracts and determining whether extrinsic evidence can be considered.

> Legal purpose or intent should first be sought in an objective reading of the words employed in the contract to the exclusion of parol or extrinsic evidence. First, the "four corners" test is applied, wherein the reviewing court looks to the language that the parties used in expressing their agreement. ... we will read the contract as a whole, so as to give effect to all of its clauses. Our concern is not nearly so much with what the parties may have intended, but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy. Thus, the courts are not at liberty to infer intent contrary to that emanating from the text at issue. On the other hand, if the contract is unclear or ambiguous, the court should attempt to harmonize the provisions in accord with the parties' apparent intent. Only if the contract is unclear or ambiguous can a court go beyond the text to determine the parties' true intent. The mere fact that the parties disagree about the meaning of a contract does not make the contract ambiguous as a matter of law."
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> Secondly, if the court is unable to translate a clear understanding of the parties' intent, the court should apply the discretionary "canons" of contract construction. Where the language of an otherwise enforceable contract is subject to more than one fair reading, the reading applied will be the one most favorable to the non-drafting party. Finally, if the contract continues to evade clarity as to the parties' intent, the court should consider extrinsic or parol evidence. It is only when the review of a contract reaches this point that prior negotiation, agreements and conversations might be considered in determining the parties' intentions in the construction of the contract.

Facilities, Inc., 908 So. 2d 107, ¶ 7 (internal citations omitted)

Section 7.4, and several other provisions, of the 2001 BSA are very clear in the parts relevant to disposition of the insurance on the surviving partner's life after the first partner dies.

> 7.4 Right to ***Purchase*** Police(is). 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 receives 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 it not exercised, within 30 days* after the expiration of the option or termination of this Agreement. In the event that a Stockholder elects to acquire any life insurance policy, then ***after receipt*** of the *required 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.*

Even a stockholder with an option right must satisfy several conditions to acquire ownership of policies on his life: 1) either the stockholder exercising the option must cease to be a stockholder or the BSA must terminate, 2) this stockholder must give the policy Owner notice to transfer the policy to himself, 3) the Owner must receive the notice, 4) the electing stockholder must pay the Owner the cash surrender value plus the unearned premium as of the date the Owner receives notice to transfer the policy to the stockholder, 5) the Owner has no obligation to execute any transfer documents until *after* s/he has received payment of the cash surrender and unearned premiums, 6) all these requirements must be satisfied to exercise the option and 7) exercise of the option must occur within 30 days of the event terminating the BSA. P6 at § 7.4

Contrary to Cookie's argument, John Cooper's death and Gilder's subsequent purchase of his stock was not a "terminating event." "Terminating events" are defined by § 16 of the BSA.

> 16. Terminating Events. This Agreement shall terminate upon the occurrence of any of the following events:

(a) The written agreement of all of the Parties;
(b) The dissolution, bankruptcy or insolvency of the Corporation; or
(c) The death or adjudication as incompetent or insane of all Stockholders within a period of 90 days.

This language clearly states a stockholder's death is a terminating event only if all stockholders die or are adjudicated insane or incompetent within a 90 day period. Neither James Gilder nor John Cooper was ever adjudicated insane or incompetent. Gilder died 102 days after Cooper. R. 233, T. 39 Therefore, Cooper's death was not a terminating event. Since Gilder remained a stockholder until his death and John Cooper's death was not a terminating event, Gilder did not satisfy the first clearly stated condition for having an option to purchase the policies under § 7.4.

Even if Cooper's death were a terminating event, Gilder did not comply with the other conditions for purchasing the policies on his life. There is no evidence he gave, or even tried to give, notice to Cooper's Estate, that the Estate received notice he intended to exercise the option, that Gilder paid the Estate the cash surrender value plus the unearned premium as of the date of notice of intent to purchase or that he tendered any payment or even tried to determine the cash surrender value of the policies. These conditions were not satisfied within 30 days of Cooper's death or even within 30 days of Gilder's December 17, 2003 purchase of Cooper's stock. Until these conditions were all satisfied, the life insurance defendants, as Owners, had no duty to execute any documents transferring any policies to Gilder. Section 7.4 explicitly requires receipt of payment of the cash surrender value before any such duty arises. P6 at § 7.4

Since none of these conditions were satisfied, the Chancellor correctly granted judgment dismissing the life insurance case claims at the close of the plaintiffs' case. Even if Cookie's position that John Cooper's death followed by James Gilder's purchase of Cooper's shares was a terminating event were correct, she produced no evidence any of the other conditions in § 7.4

were ever satisfied. To succeed on the life insurance claim, she had to prove a great deal more than that James Gilder requested ownership transfer forms from NYL, that forms to transfer policy ownership on NYL's books from Cooper's Estate to his heirs were executed and processed without Gilder's knowledge, and that the automatic payment of premiums from Cooper Gilder's bank account continued for four months between Gilder's and Cooper's deaths.[5]

There is no ambiguity in the first sentence of § 7.4 granting a stockholder the option to purchase policies on his life in certain very limited situations. When that sentence is read in conjunction with the remainder of § 7.4 and the definition of terminating events in § 16, the language is very plain that it applies only where the insured ceases to be a stockholder during his own lifetime or where one of the terminating events defined by § 16 occurs. Death of one stockholder is not defined to be a terminating event under § 16.

Cookie's arguments that purchasing the first stockholder's stock after his death eliminates any justifiable reasons his estate or heirs have for insuring the remaining stockholder's life lack merit. Section 6.3 specifies any part of the purchase price not covered by life insurance proceeds is to paid by a five year promissory note secured by the purchaser's shares. The 2001 BSA states stock is to be revalued every year and does not obligate shareholders to purchase sufficient additional insurance on the other to cover either the initial or the updated full purchase price of the stock. As stockholders age and developed illness and acquiring additional insurance becomes more costly, it would be increasingly less likely that each would maintain sufficient life insurance to cover the full price of the other's stock and more likely Cooper Gilder stock would have to be

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[5]Section 7.1 cover premium payments by the insured when the Owner does not pay on time. Such payments create only a right to reimbursement and not any right to an ownership interest in the policy. Thus, at most, the four month continuation of automatic premium payments from Cooper Gilder's accounts entitles Cooper Gilder, or Cookie, to reimbursement of those premium. See P6 at § 7.1

used to secure a buyout. In such situations, future note payments would depend on the future profitability of Cooper Gilder which would be source of funds used to pay the note. There was evidence that Cooper Gilder's business was highly dependent upon personal relationships in the industry and of considerable unease among employees about job security and what would happen to the business after the death of both of the key founders. Thus, the note's payees would have an insurable interest in, and reason to maintain insurance on, the remaining stockholder's life.

There are other reasons why the first stockholder's heirs might have an interest in the surviving stockholder's life. Cooper Gilder employed members of both the Cooper and Gilder families. When the surviving stockholder bought the first stockholder's shares from his heirs, there would be less job security for those heirs employed by Cooper-Gilder. The long standing friendship between the two founders was such that their job security was likely to continue as long as the other original partner was still running the business. But once the surviving partner died, there was no such close connection between John Cooper's heirs and James Gilder's heirs to protect the income stream from their Cooper Gilder jobs. Thus, the heirs who were employees or married to Cooper Gilder employees had another interest in the surviving partner's life.

The primary reasons Cookie's insurable interest argument is irrelevant, however, is that Mississippi law does not require heirs of a deceased owner to have an independent insurable interest in the insured's life for the policy to remain valid[6] and the Estate and heirs of the first partner to die were entitled to some benefit for the premiums the deceased paid which had built up the value of the policies on the surviving partner's life prior to the first partner's death.

There is yet another explanation for why the 2001 BSA was written to give a shareholder

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[6] *First-Columbus Nat'l Bank v. D. S. Pate Lumber Co.*, 163 Miss. 691, 703, 141 So. 767 (Miss. 1932). See also, *Mississippi Farm Bureau Mut. Ins. Co. v. Todd,* 492 So. 2d 919, 931 (Miss. 1986) (insurable interest must exist when the contract is entered into)

the right to purchase the policies on his life only if he ceased to be a stockholder during his lifetime or if one of the terminating events listed in § 16 occurred. If a stockholder ceased to be a stockholder during his lifetime, it would most likely occur because his employment relationship with Cooper Gilder ended due to disability or some other reason triggering a required buyout of his stock such as an attempt to sell his stock. See P6 at Articles III and IV. Thus, the funds used to pay him for his stock would be available to purchase the policies on his life. If the 2001 BSA terminated because of corporate insolvency as specified in § 16, it would be likely that policies of more than one stockholder would be outstanding and that each stockholder could use the funds received from sale of the policies he owned on the other to pay for his purchase of the policies on his own life. In effect, the partners would trade policies and the one with greater cash value would pay the other boot in the amount of the difference in cash value. If the BSA were terminated by written agreement, some settlement of assets would likely occur providing funds for each to acquire the policies on a stockholder's own life by purchase or exchange.

However, where one partner died more than 90 days before the other, it would be most likely that even with the insurance to fund a substantial part of the survivor's required purchase of the deceased's stock that the survivor would not have the cash to purchase the remaining policies on his own life. While there are provisions for using a promissory note to make up the full purchase price for the required stock purchase, there are no provisions for financing the purchase of the insurance policies on the survivor's life. See P6 at Articles VI and VII. Given that James Gilder had borrowed against the policies he held on John Cooper's life and had to use promissory notes secured by his own Cooper Gilder stock to complete the purchase of Cooper's shares and to cover the amounts Cooper Gilder owed to John Cooper on his death, it would appear unlikely he would have been able to come up with the cash to pay for the cash value on

whole life policies with a face value of approximately $650,000 acquired when the insured was 60 years old on which 13 years of premiums had already been paid.

IV. Factual and Evidentiary Problems With Cookie's Arguments

In arguing her claim to the NYL policies on her husband's life, Cookie draws several inferences unsupported by the admissible evidence in the record to reach her conclusion that James Gilder and John Cooper intended the surviving partner to acquire the policies on his own life after the other partner died. Then, she draws additional unsupported inferences to claim James Gilder had begun the process of acquiring ownership of the policies on his life. She then draws yet additional unsupported inferences of fraud from the mere continuation from December 17, 2003 to February 10, 2004 of the automatic premiums deductions and the failure of the life insurance defendants to transfer the policies to her husband when she believes they should have done so. She draws inferences of fraudulent intent even though there is no evidence Gilder ever made a specific request to the life insurance defendants to transfer the policies to him or that he tendered the notices and payments required for such a transfer under § 7.4 and even though the automatic payment system was set up for the policies on both partner's lives and John Cooper's Estate had only been open for a short time. Finally, based on all these earlier inferences, she draws the further unsupported inference that James Gilder became the equitable owner of these policies and that equitable ownership passed to her on his death. There are a number of problems with these arguments which together clearly demonstrate the error of her position.

The most important weakness in Cookie's use on stacked inferences is that her theory of recovery in both the life insurance and business tort cases is based on the equitable theories of constructive trust and unjust enrichment allegedly derived from fraud. Unjust enrichment and constructive trust are very closely linked with constructive trust being the equitable remedy used

to prevent unjust enrichment in situations where "the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another." *Estate of Johnson v. Adkins*, 513 So. 2d 922, 926 (Miss. 1987) To recover on these theories, she must establish the elements of her case by clear and convincing evidence. *Dear v. Boggan (In re Estates of Gates)*, 876 So. 2d 1059 , ¶¶ 13-14 (Miss. App. 2004)

> Clear and convincing evidence is that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case. Clear and convincing evidence is such a high standard that even the overwhelming weight of the evidence does not rise to the same level.

Sumler v. East Ford, Inc., 915 So. 2d 1081, ¶ 20 (Miss. App. 2005)

Stacking inferences upon other inferences, while not absolutely prohibited, is frowned upon and is a very weak means of attempting to prove a case. When the basing of an ultimate inference on other inferences produces only a strong possibility of the ultimate inference, such proof is insufficient to support a judgment under the more probable than not standard, much less a clear and convincing standard of proof. *Goodyear Tire & Rubber Co. v. Brashier*, 298 So. 2d 685, 688 (Miss. 1974) *Goodyear* and the cases it is based on have repeatedly admonished that inferences built upon inferences should be permitted only when the ultimate inferences "are safe and dependable probabilities, measured by legal standards" and that a Court should go "no further than required in the interest of justice by the reasonable necessities of the case." *Id*

> [W]here a party, who has the burden of proof, has the power to produce evidence of a more explicit, direct, and satisfactory character than that which he does introduce and relies on, he must introduce that more explicit, direct, and satisfactory proof, or else suffer the presumption that, if the more satisfactory evidence had been given, it would have been detrimental to him and would have laid open deficiencies in, and objections to, his case, which the more obscure and uncertain evidence did not disclose.

Id at 689.

Cookie relies upon NYL agent Mike Garrett's excluded testimony that when John Cooper and James Gilder purchased the policies in 1990, he explained to them under the typical buy sell agreement funded by life insurance the survivor has the right to acquire the policies on his life and they responded with something like "[i]t's taken care of" as demonstrating that Gilder and John Cooper advised Garret of their belief and intent that under the 2001 BSA, the survivor be entitled to the policies on his life. Gilder brief at pp. 2-3. The first problem with this argument is the testimony was excluded when the Chancellor sustained Defendant's hearsay, relevancy and parol evidence rule objections. See Gilder brief at pp. 2-3; T. 184-191. The second problem is its relevance requires an inference that "it's taken care of" means Gilder and Cooper were saying their agreement followed the typical agreement. It is equally likely they were telling Garrett his advice was not needed as they had already considered the issue and made their own decision on it outside the insurance contracts. Next, it requires a further inference without any proof that the insurance provisions of the agreement in force in 1990 were identical to those in the 2001 BSA as anything Gilder and John Cooper told Garrett in 1990 about a buy-sell agreement could not possibly have been in reference to the 2001 BSA executed eleven years later.[7] No prior buy-sell agreements were introduced and no testimony was presented about the content of any earlier buy-sell agreement from which any inferences about the similarities or differences to the 2001 BSA could be drawn or which would provide a relevancy connection between what might have been said eleven years earlier and the meaning of the agreement at the time of trial.

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[7]John Cooper and James Gilder had prior buy-sell agreements, but only the 2001 BSA is in the record. There is no evidence of similar insurance provisions in the 2001 BSA and its predecessor. A most evidence shows the 2001 BSA replaced a prior agreement when it was drafted. T. 33-34

Next, Cookie's claims Gilder began the process of acquiring the policies on his life under section 7.4 of the 2001 BSA suffer from a similar lack of competent evidentiary support. She relies on her own inadmissible hearsay testimony that in regard to the agreements signed on December 17, 2003 to purchase John Cooper's stock under the 2001 BSA, her husband told her

> His recollection of that was that, since the Cooper heirs had been bought out of the company and he was a hundred per cent owner of the company, that I would be the beneficiary of his own life insurance.

She erroneously claims this testimony is admissible because it is a statement of intent under M.R.E. 803(3)/F.R.E. 803(3). T. at 83-84. The clear import of this testimony is that James Gilder was telling his wife two years after execution of the 2001 BSA his recollection of what he intended or what he did in executing the 2001 agreement. M.R.E. 803(3) states that the hearsay rule does not exclude a

> statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Thus, the rule expressly excludes a statement of memory or belief as to the execution of a contract or agreement, allowing past recollections only in relation to wills. Furthermore, the issue in the life insurance case was what the terms of the 2001 BSA were. Gilder's intentions in regard to the December 17, 2003 agreement could not change the terms of the earlier agreement and were not relevant to the insurance issue as the December 17, 2003 agreements made no mention of the policies on his life. They provide no evidence that he had begun the process of acquiring the policies either. To the contrary, by mentioning the intent to settle the parties obligations under the 2001 BSA and not mentioning the policies on Gilder's life, they seem to indicate that he had not taken any action to acquire the policies. P. 11

Next, Cookie draws an inference from the inadmissible statement her husband made to her about his recollection of the agreement and from the following testimony by Robin that her husband's purchase of John Cooper's stock had to be a triggering event which gave him a right to transfer to himself the policies on his life owned by John Cooper because that is what he and Robin both understood the 2001 BSA to mean.

> Q. ... You knew that Mr. Gilder had a right to transfer the policy to himself, didn't you?
> A. No.
> Q. Well didn't you tell me that you knew he did?
> A. After the deposition, I read a little closer and to my – and I'm not a lawyer – but it don't say it. Seven four says that if both parties are alive there can be some transfers. It don't say anything else.
> Q.. Well, the agreement just says what it says, right? Whatever it says.
> A. Whatever it says.
> Q. Okay. But it was your understanding them and it was your understanding that Mr. Gilder could transfer the policy to himself. That was your understanding, wasn't it? ...
> A. I had roughly read the policy and I thought that's what it said.
> Q. Okay. So when Mr. Gilder got this form, you believed he had a right to transfer the policies to himself?
> A. No. ...
> Q. In fact, you thought that he had 30 days to acquire the policy, didn't you?
> A. At that point in time, I did, or when we had the deposition I did. That's the first time I had actually read in detail the thing.
> BY THE COURT: The what?
> A. The Buy/Sell

T. 227: 16 to 228:18. However, Robin's testimony clearly states that if he ever had such an understanding, it was before he read the actual language of the BSA. Once he read the actual language of the BSA, he no longer had that understanding. Thus, this evidence does not support the inference Cookie draws from it to any level of probability even if the parol evidence rule did not apply to prohibit use of such testimony to vary the meaning of the actual language from the BSA. Furthermore, a principal purpose of the statute of frauds and putting agreements into writing is "to avoid dependence on the imperfect memory of the contracting parties, after the

passage of time, as to what they actually agreed to some time in the past." *Sharpsburg Farms, Inc. v. Williams*, 363 So. 2d 1350, 1354 (Miss. 1978) The inferences Cookie draws are not only tenuous, but run straight into legal standards which exclude such evidence precisely because they do not produce safe and dependable probabilities of what actually happened.

Cookie claims James Gilder requested instructions from NYL on how to transfer ownership of the policies on his life to himself, but the only evidence she has ever relied upon to support this argument is a form letter written by NYL on December 2, 2003 containing information on what would be necessary to transfer ownership of the policies and the transfer forms accompanying the letter. Cookie's argument requires an inference that the letter is a response to her husband's request for information on how to transfer ownership of the policies to himself, but there is no evidence in the record of any such request by phone, fax or letter.[8] The letter does not refer to a previous request or indicate that there was a prior communication from James Gilder. It reads like a form letter sent as a routine matter to an insured on the death of a policy owner run through a mail merge program to add policy specific information. It is addressed to Mr. James A. Gilder as the insured but mailed to him in care of John Cooper at the same Bayou Road address where all of John Cooper's business and personal mail was received. See P7 & P8 If this letter really were a response to a request from Mr. Gilder on how to transfer the policies to his own name, Cookie should have been able to produce more direct evidence of the request in the form of a copy of a written request or phone notes documenting a phone request from NYL's files on the policies. She also should have been able to produce some direct proof of at least an attempt by Gilder to notify the Cooper heirs of his intent to exercise his

[8]Contrary to the statement on p. 6 of the Gilder brief, Defendants are not asserting that James Gilder was attempting to transfer ownership to them. They dispute the claim that the December 2, 2003 letter supports an inference that anyone requested the forms sent with it.

rights under § 7.4 of the BSA and of his efforts to determine the cash value of the policies and tender of payment of cash value to John Cooper's heirs as provided for in § 7.4 of the 2001 BSA.

Cookie's reasoning on this theory also requires the further inference that despite years of treating John Cooper like a brother and John Cooper's family like his own family, James Gilder would not have assisted Cooper's heirs in dealing with the paperwork connected with his death. Cookie then makes yet another attenuated and unsupported assumption that there could not be a non-fraudulent purpose for the life insurance defendants to fill out the forms to transfer the policies on the insurance company's books from the Estate's names to their individual names and there was no need for the Cooper heirs to fill out NYL's forms for such a transfer as that transfer of ownership occurred automatically on John Cooper's death and the orders of the Chancery Court in the probate proceedings would transfer ownership of the policies from the Estate to the heirs at the appropriate time if James Gilder did not exercise his option.

Transfers of life insurance policies and bank accounts pursuant to terms of the policy or deposit contract frequently occur outside of probate. Such transfers are governed by contract and insurance law and insurance company procedures. The December 2, 2003 letter takes into account both the existence of a will or the lack of a will and clearly contemplates the completion of forms like the one that occurred here to move a policy from the Estate to the heirs on the insurer's books. There is nothing sinister in the use of such forms to transfer ownership of the policies on the life insurance company's books from the deceased owner to his Estate or heirs.

Next Cookie draws inferences of fraud from the use of the phrase "business associate" to describe the heirs' relationship with her husband and the copying of the part of the form for certifying backup withholding status of the new owner in order to provide space for making the certification for each of John Cooper's three heirs. The form clearly states that this certification

is required by both the IRS and New York Life. In this section there is only room for one person to provide a taxpayer identification number, select his or her withholding status, and sign the statement under penalty of perjury. With three different individuals, making copies of the certification for each and attaching the extra two certificates is the logical means of complying with this requirement. The space provided on the form for providing the name of the new owner and the relationship to the insured is only one and a half lines long which does not provide sufficient space to explain in detail Robin, Mildred, and Marilyn's status as heirs to the insured's deceased business partner who had just sold the deceased's shares to the insured, the holding of a security interest in the insured's shares to secure part of the purchase price, and stood in the deceased's shoes in regard to the moneys owed by the business to the deceased. In addition, Robin was also an employee of the insured's business and the owner of land used by the business for part of its operations. Given the former partnership between James Gilder and John Cooper and the fact that the heirs rights were derived from John Cooper's status as Gilder's business partner, the term "business associate" was a reasonable shorthand choice.[9] (R. 528-529)

The next fallacious inference Cookie relies on to prove fraud is that the conduct by the life insurance defendants in regard to the transfer of ownership of the policies on Gilder's life is her claim that transfer of ownership of policy on her husband's life was handled differently than other transfer of ownership forms filled out by Connie Burford and signed by the Coopers on other policies held with NYL by John Cooper. See Gilder Brief at p. 10. Cookie argues that the normal procedure followed for the other policies was to send transfer of ownership forms to Mr.

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[9]The term business associate has no uniform meaning, being rather vague in its connotations. It ordinarily signifies joining in a loose relationship with others sharing a common purpose, including relationships like partner, fellow worker, colleague, friend, companion, or ally. *Garrett v. Langley Federal Credit Union*, 121 F. Supp. 2d 887, 899-900 (E.D. Va. 2000). The term is certainly broad enough to include creditors and holders of security interests as well as purchasers and sellers.

Garrett, the NYL agent from whom the policies were purchased, who would then send them on to NYL. The evidence, however, does not support her claim that there were any other transfer of ownership forms on any other tanks.

John Cooper owned more NYL policies on his own life. The forms Connie Burford had previously filled out which were signed by the Cooper heirs and sent to Mike Garrett were not change of beneficiary its transfer of ownership forms. These other documents refer only to a personal policy which John Cooper owned on his own life. Shortly before his death, John Cooper changed the beneficiaries on the policy he owned on his own life to Robin, Marilyn, Mildred and his sister in law. After his death, Robin, Marilyn, Mildred and their sister in law signed claim forms to collect the proceeds of these personal policies. Those forms were accompanied by a page describing settlement alternatives which contained the following language specifically encouraging claimants to seek the assistance of an agent in making their claims:

> Your agent will be glad to help you with any of these options and with additional ways to use your proceeds to address your income, education, business, retirement or estate needs.

T. 218: 16-29; P 26

It is clear from the context of the letters that there were some issues on these forms with which some assistance was needed and that Mike Garrett provided that assistance. It seems likely from the context of the letters that Mr. Garrett provided both the change of beneficiary forms and the claim forms to the Coopers. Conversely, the forms for transfer of ownership of the policy on James Gilder's life came directly from NYL and were sent back to NYL where they were apparently processed with no problems or any need for assistance from, or intervention by, the selling agent. The sending of change of beneficiary forms and claim forms on a personal policy

through an agent when his assistance is needed to complete the forms to the insurer's satisfaction does not in any way support an inference that it is fraudulent to send a completely different change of ownership form on a business related policy on another person's life directly back to the address from which it came when no additional assistance was needed to complete the form.

The final piece of evidence from which Cookie draws an inference of fraud is the continued payment of premiums on the policies on James Gilder's life by automatic draft from Cooper-Gilder's accounts as they had been paid in the past after John Cooper's death. Her arguments sound as if there was an conscious change in payments in which Mr. Gilder began paying the premiums on his life. However, what the evidence actually shows is inertia or a lack of change in regard to premium payments. The premiums were set up to be automatically paid from Cooper Gilder's bank account. They continued to be paid from Cooper Gilder's bank account. There was a recognition in the December 17, 2003 agreements between Mr. Gilder and the Cooper Estate that a settlement of accounts had not yet occurred and was expected to take place sometime in the future. Unfortunately, Mr. Gilder died less than two months later and the accounting to settle out what was owed by whom to whom did not occur until February of 2005. The fact that automatic payments continued for four months after John Cooper's death does not support an inference of fraud. It simply reflects inertia during a period of extreme stress for those close to John Cooper and James Gilder who were trying to keep the business going after losing both founders. R 453-454, 561, 562, 573; T 44, 78, 96-97 The inference of fraud or ownership of the policy by James Gilder which Cookie attempts to draw from the lack of change in payment is particularly undercut by the provisions of the BSA concerning the right of reimbursement when one shareholder pays the premiums on a policy on his own life which was acquired by another shareholder. P5 at § 7.1 Furthermore, the lack of any evidence Gilder gave notice of his

intent to purchase the policy on his life, took any effort to determine the cash value of the policy, or tendered payment of the cash value of the policy to the Estate within 30 days of John Cooper's death or even within 30 days of purchasing John Cooper's stock on December 17, 2003 supports a much stronger inference that he either knew he had no option to purchase the policy or chose not to do so than the inference Cookie draws from the continuation of automatic payment of the premium from Cooper Gilder's account after he acquired 100% ownership of Cooper Gilder.

All Cookie's arguments boil down to drawing inferences of fraud from a stack of shaky inferences drawn from events with perfectly innocent explanations, particularly in light of the relationship between the Cooper and Gilder families and their long term friends and employees also treated like family. Fraud is never to be presumed or inferred, but must be proven by clear and convincing evidence." *Boling v. A-1 Detective & Patrol Serv., Inc.*, 659 So. 2d 586, 590 (Miss. 1995) (citing Nichols v. Tri-State Brick and Tile, Co., 608 So. 2d 324, 330 (Miss. 1992)).

Moreover, many of the inferences Cookie relies upon are themselves dependent upon her belief that her husband believed the 2001 BSA's provisions in regard to the life insurance varied from what the language of that agreement actually says. Like a house of cards, her entire web of inferences of deceit and fraud falls apart unless both parties to the BSA, all of John Cooper's heirs, and Connie Burford, a long term employee of both James Gilder and John Cooper, all believed James Gilder was entitled to ownership of the policy on his life without giving notice of intent to purchase the policy or tendering payment of its actual cash value to the Cooper Estate or heirs as clearly required by § 7.4 of the BSA. Without any direct evidence that James Gilder did any of the things required by § 7.4 or even that he requested information from NYL on how to have ownership of the BSA policies on his life transferred to him, the evidence just does not support her claims of fraud and abuse of confidential relationship, even if she could get around

the plain meaning of the language of the BSA and the parol evidence rule. *Goodyear Tire & Rubber Co. v. Brashier*, 298 So. 2d 685, 688 (Miss. 1974)

V. Reply Argument on Business Tort Appeal

A. Cookie's Arguments Based on Defendants' Alleged Changes in Position Are Meritless

Cookie arguments on inconsistent positions appear to be an estoppel argument. Of the types of estoppel, none of which apply, her arguments most closely resemble judicial estoppel.

> Judicial estoppel is designed to protect the judicial system and applies where "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." ... [There are] three requirements for judicial estoppel: "(1) the party is judicially estopped only if its position is clearly inconsistent with the previous one; (2) the court must have accepted the previous position; and (3) the non-disclosure must not have been inadvertent."

Kirk v. Pope, 973 So. 2d 981, ¶¶ 31-32 (Miss. 2007) " However . . . where the first position asserted was taken as a result of mistake, judicial estoppel should not be invoked." *Gonzales v. Gray (In re Estate of Blanton)*, 824 So. 2d 558, ¶ 17 (Miss. 2002)

These requirements are not satisfied here. Cookie's arguments that Defendants have taken allegedly inconsistent positions misconstrue both their testimony and their arguments both below and on appeal. Defendants' positions are not intentional self-contradictions. There are no later positions clearly inconsistent with earlier positions accepted by the court. At most what Cookie claims to be later inconsistent positions are corrections of Cookie's misinterpretation of earlier statements or corrections of earlier statements as a result of discovering a mistake.

B. Cookie's Double Payment Argument is Meritless

Cookie claims the Defendants[10] were paid twice for John Cooper's stock in Cooper

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[10]This is an example of her repeated improper lumping of Defendants from both cases together. Don Dunaway and Connie Burford received no payment for Cooper Gilder stock. Cookie argues after being paid twice for John Cooper's share of the business, the "Defendants" or "the Coopers" went on to steal

Gilder because her husband paid them the $595,000 in insurance proceeds from the policy he held on John Cooper's life plus a $55,000 note on December 17, 2003 and they also received $652,000 in insurance proceeds from the policies on James Gilder's life listed in the BSA as owned by John Cooper. However, there was no double payment for the stock. The $650,000 James Gilder paid to Robin, Marilyn, and Mildred for the stock, which was comprised of $595,000 in insurance proceeds Gilder received from the policy he held on John Cooper's life and a $55,000 note, is the only payment they received for John Cooper's stock. The $652,000 they received after James Gilder's death was not payment for John Cooper's stock.

The $652,000 was paid to Robin, Mildred and Marilyn as a contractual obligation of NYL in exchange for monthly premiums of $5,232.01 paid from August 3, 1990 through October 3, 2003 which were attributed and taxed to John Cooper. Over those 13 years, more than $820,000 in premiums for this policy were attributed to John Cooper's share of Cooper Gilder's profits.[11] R at 372, 453-454, 561, 562, 573; T 44, 78, 96-97. The Chancellor correctly recognized this fallacy in Cookie's arguments during argument on the motion for directed verdict and tried to explain to Cookie's counsel that each man owned both half the business and an insurance policy, and that in order for the both the business and the insurance assets to be split evenly, one person could not end up with both 100% of the business and ownership of the remaining policy after the death of the first. T. 255-256 It has been the efforts to explain to Cookie's attorney the

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the same business by competing with Cooper Gilder through Warfield Associates. Marilyn Dunaway and Mildred Watson are not involved in Warfield Associates. Connie is merely an employee, not an officer, stockholder, organizer, or investor, of Warfield Associates. Neither the nebulous "Cooper family" nor most of the organizers, officers and employees of Warfield Associates are defendants in either case.

[11]Four months of premiums totaling slightly less than $21,000 were paid after John Cooper's death. Even assuming they were not attributed to funds owed to John Cooper's estate, these four payments total less than 2.5% of the total premiums paid to NYL for the policy which generated the $652,000 payout.

simple fact that the2001 BSA is complete in and of itself, that its clear language is the only relevant evidence of the intent of the parties in regard to that agreement, and that the insurance policies have value in and of themselves independent from the business which cannot be left out of consideration in understanding why Mr. Gilder would agree to the bargain as set forth in the plain language of the 2001 BSA which led to questions about one family getting the business and the other getting $1.3 million dollars. See e.g., T. 255-256

As the court's directed verdict ruling correctly recognized, but apparently forgotten, in the business tort ruling, because there is a clear written agreement, the court cannot look beyond the four corners of the 2001 BSA for the intent behind that deal. T. 257 James Gilder's subjective expectations as to what would likely occur as a result of the agreement based on a supposition that he would likely die first as he was the elder of the two partners is completely irrelevant to what the parties actually agreed to in the 2001 BSA in the event that John Cooper passed away first. Robin and Marilyn's understanding of what the two men agreed to in December of 2001 is even less relevant. What matters is what they actually agreed to as evidenced by the objective intent of the words they used in the agreements. *Facilities, Inc.*, 908 So. 2d 107, ¶ 7. There is no ambiguity within the four corners of the 2001 BSA. Thus, any statements made by any of the Defendants on their understanding of the purpose or intent behind the 2001 BSA, none of whom were even parties to that agreement, are not relevant to determining James Gilder and John Cooper's intent when they executed that agreement even if one or more of the Defendants has made inconsistent statements in regard to his or her understanding of the 2001 BSA. *Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, 908 So. 2d 107, ¶ 7 (Miss. 2005)

C. Defendants Have Not Disavowed Their Position Below on the $1.3 Million Deal

Cookie claims Appellants' brief on the business tort litigation seeks to disavow the

Defendants' theory of the case below in regard to the intent of the parties to the agreement between John Cooper and James Gilder. She relies on the following parts of the record which she incorrectly claims represents Defendants' position below and is disavowed by the business tort Appellants' position in their brief to this court:

1) In response to her interrogatory No. 3 in the life insurance case which asked the life insurance defendants to "[p]lease describe your understanding of the [2001 BSA] agreement, Robin responded "My understanding is that one family was to have 100% of Cooper-Gilder and the other family was to have 1.3 million dollars." R. 305.

2) In response to the same interrogatory, Marilyn Dunaway responded:

> I generally understood that a Buy-Sell Agreement existed between John H. Cooper and James A. Gilder. My brother, John H. Cooper, told me that James A. Gilder had insurance policies on John and John owned polices on James. When one partner died, the other one was to use the insurance money to buy out the company. The heirs would get the insurance money and the surviving partner would own the company. R. 316[12]

3) On cross examination of Connie Burford, the following exchange occurred in regard to the change of ownership of Island 84 in July of 2003, a year and a half after John Cooper and James Gilder entered into the 2001 BSA:

> Q. That brings [us] to how it is that this land got transferred, that it had been in Mr. James Gilder and John Cooper's hands all this time, how is it that it ended up in, first, John Cooper's hand and then Robin Cooper's hand in July of 2003? How did that come about?
> 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?

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[12]Marilyn's answer to this question is of no relevance whatsoever to whether there is any inconsistency between positions at trial and Appellants' brief in the business tort case. She is not a Defendant or an Appellant or even a party to the business tort case.

A. I think it's about 20 acres.
Q. Whatever it is, its number 20 to 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 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 the 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 clarify herself. You know. Objection overruled. ...
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 an 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 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. Okay. And didn't you tell me in your deposition that one family would get one point three million dollars and the other family would get the business? Isn't that what you told me?
A. Correct.
Q. Okay. 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 that land could be used by the business, regardless of who it belonged to.
....
Q. So John and Robin ended up with Island 84 as part of the plan to transfer the business to the Coopers?
BY MR. DANIELS: Your Honor, may I note an objection for the record. This is not in the Buy/Sell Agreement.
BY THE COURT: Overruled. Overruled.
A. I believe that that's what Mr. Gilder believed.
Q. Okay. And then Mr. Gilder would be expecting that insurance proceeds, the one point three million dollars, would be 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 since he was older.

T. 395:25 to 399:17

It is and always has been the position of both the life insurance Defendants and the business tort Defendants that John Cooper and James Gilder were close friends who not only formed and operated a business together but also jointly held property separately from the business and that their dealings constituted several independent transactions and not a single agreement. While they may have engaged in multiple transactions and agreements with each other, only the 2001 BSA is at issue in the life insurance case. No agreement between John Cooper and James Gilder is directly at issue in the business tort case and only the 2001 BSA and the completely independent July 2003 deed severing their joint ownership of Island 84 which they held separately from Cooper Gilder is even relevant to the business tort case. It is and always has been their position that the 2001 BSA was executed in 2001 and as stated in that written agreement, everything that was a part of that contract or agreement was set out in the

written agreement which both signed and which is the only relevant evidence of the intent of both in regard to the disposition of ownership of Cooper Gilder and the proceeds of the life insurance policies listed in the exhibit to that agreement.

Defendants maintained during the trial below and continue to maintain that under the 2001 BSA after the first partner died and his shares were bought out, the surviving partner would own 100% of Cooper Gilder. The heirs of the first partner to die would receive $650,000 from insurance proceeds or a combination of insurance proceeds and promissory notes for that partner's shares in Cooper Gilder from the surviving partner and would also inherit the policies on the surviving partner's life with a face value of approximately $650,000. When the surviving partner died, the heirs of the first partner to die would receive the proceeds of the second insurance policy. If both partners died within a relatively short time period, as actually occurred, the effect of the 2001 BSA agreement would be that the heirs of the surviving partner would own 100% of the business and the heirs of the first partner to die would have received the proceeds of the policies on both partner's lives with the value of what both sets of heirs wound up with being approximately $1.3 million. Thus, in a loose sense, a lay person could describe the effect of the 2001 BSA where both partners died within a short time period as one family getting the business and the other family getting $1.3 million dollars.

What the business tort Defendants argued in their Appellants' brief is that disposition of the shares in Cooper Gilder and the proceeds of the life insurance policies listed in the exhibit to the 2001 BSA was the totality of the subject matter of the 2001 BSA and that deal had nothing to do with either the ownership of or the transfer of ownership of Island 84 in July of 2003. There is no inconsistency in any of the Defendants' positions for several reasons. Most significantly, a deal under which both partners are to insure the life of the other for half the total value of the

business with the survivors using the proceeds of his policy to buy out the other partner's share of the business from his heirs with the heirs also inheriting his policy on the survivor's life is not the same as a deal to exchange the proceeds of policies on both partners life for full ownership of the business ***and*** full ownership of a piece of property the two partners owned jointly but separately from the business. Thus, when the business tort Defendants argued in their brief that there was no evidence of any deal in which John Cooper received ownership of the property on which the business was conducted and James Gilder received $1.3 Million Dollars, that argument is in no way inconsistent with their position in the trial court that James Gilder and John Cooper entered into an agreement under which the survivor would use the proceeds of the policy on the other's life to purchase the deceased partner's shares from his heirs with the end result that the surviving partner would own his own shares and the deceased partner's shares (1005 of the business) while the deceased partner's heirs would have the deceased partner's policy on the survivors life and the proceeds of the survivor's policy on the deceased partner's life (which would result in the receipt of a total of $1.3 million upon the death of the surviving partner).

Furthermore, the defendant's theory of the case does not depend at all upon what Robin, Marilyn or Connie might have understood to be the effect of or intent behind the 2001 BSA or what Connie subjectively believed that Gilder subjectively believed would happen based on a supposition that he would die first because he was older. The theory of their case is, and always has been, that the only intent that matters in the eyes of the law in both of these cases is that which is expressed in the words John Cooper and James Gilder used in there written 2001 BSA. Only the parties intent at that time as expressed in the clear language of the 2001 agreement is relevant. *Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, 908 So. 2d 107, ¶ 7 (Miss. 2005)

Moreover, even if other evidence surrounding the execution of the 2001 BSA could be

used by the court in interpreting that agreement, nothing which occurred a year and a half after the 2001 BSA was executed would be relevant to their intent when they entered into the 2001 agreement. The 2001 BSA was complete in December 2001. It makes no mention of any land at all. It certainly does not contain any language indicating that it is a part of a larger agreement to dispose of all of each partners assets in the event of that partner's death including transfers of land to occur at a later date. Furthermore, the deeds to Island 84 in the record do not mention the 2001 BSA or a transfer of Cooper Gilder stock. The deeds do not even mention Cooper Gilder at all or even a right held by anyone other than the owner to use Island 84 for any purpose. As time travel is not possible, what James Gilder subjectively expected or believed in 2003 was likely to occur in regard to the order of his and John Cooper's deaths ,and based on that belief, who would ultimately inherit what after both their deaths cannot possibly demonstrate that John Cooper agreed to anything in 2001. It certainly does not demonstrate that John Cooper agreed that the Gilder family would receive the proceeds of both the policy on his life and the policy on James Gilder's life in exchange for his heirs receiving 100% ownership of both Cooper Gilder and Island 84 or that John Cooper had agreed that consideration for James Gilder's 2003 transfer of Gilder's interest in Island 84 to himself was his agreement that the Gilders would receive the proceeds of both the policies on his life and on Gilders life and the Coopers would receive 100% ownership under the 2001 BSA. What James Gilder subjectively expected in 2003 cannot demonstrate that the unconditional transfer of James Gilder's interest in Island 84 to John Cooper followed by John Cooper's transfer to himself and Robin jointly was any part of the 2001 agreement. It cannot demonstrate that the 2003 transfer was merely the implementation of an unmentioned part of their 2001 agreement by transferring title to Island 84 to a member of the family who they had agreed would end up with ownership of Cooper Gilder's stock.

Agreements and deals are not made of the subjective expectations of one party concerning which of several uncontrollable contingencies is most likely to occur. Proof of an agreement requires proof of a meeting of the minds of all parties to the alleged agreement. That proof, however, cannot be parol or oral evidence, when the matter involved is one falling within the Statute of Frauds like the an agreement concerning land. Neither Connie's testimony nor any other evidence makes any mention of John Cooper's intent, agreement, or even his expectations in regard to the land transfers in July of 2003. He was dying of terminal cancer in July 2003 when the land transfer occurred, making it unlikely that he expected that he would be buying out James Gilder's shares under the 2001 BSA and leaving the business to his heirs. Furthermore, he immediately transferred title to Island 84 to himself and Robin as joint tenants with right of survivorship but he did nothing to change the fact that whatever he owned of Cooper Gilder on his death would pass to Marilyn, Mildred and Robin. The clear implication of that difference was that it was not his intention for ownership of Island 84 and Cooper Gilder to be in identical hands regardless of the order of deaths between the two partners. The argument that James Gilder's intentions should affect the interpretation of these written documents, particularly when the language is plan, does not comport with the law which requires that the intent be derived from the four corners of the written memorandum of the agreement.

Neither Robin's nor Marilyn's description of the BSA mentions land. Connie's testimony, consistent with the unambiguous language of both the 2001 BSA and Island 84 deeds, specifically states the river land was not a part of or owned by Cooper Gilder, and the land did not go with Cooper Gilder. At most, Connie was describing her own subjective belief as to James Gilder's subjective beliefs concerning his thoughts on distribution of certain property of his estate after his death completely unsupported by any evidence he had expressed these

intentions in writing in the form of either a will, a written agreement with John Cooper, or even any other form of a unilateral writing. She did not even testify that he specifically told her it was his intention for the ownership of Island 84 and Cooper Gilder to come to rest in the same person or family after his death. T. 395-399. The law will not implement such nebulous and unproven expectations for distribution of property in connection with the owner's death. The same rule that court cannot look beyond the four corners of the written document in its search for expression of intent applies to both wills and contracts. See *Facilities, Inc.*, 908 So. 2d 107, ¶ 7 (internal citations omitted); *In re Will & Estate of Lawson v. Brantley*, 792 So. 2d 977, ¶ 19 (Miss. 2001). The rule is actually even stricter in regards to expression of intent regarding distribution of property in connection with death than it is in regard to contracts. *Brantley* holds the court has " authority to give effect to a testator's intent only where that intent has received some form of expression in the will." 792 So. 2d 977 at ¶ 19.

There is no evidence that James Gilder ever made any promises or even express representations to anyone that he intended the transfer of his interest in Island 84 to John Cooper to result in ownership of Island 84 and Cooper Gilder being in identical hands after his death. Even if he had made such promises or representations, the law would not enforce them in the absence of a valid will, a valid contract, or at least his receipt of separate consideration for such a transfer. *Stovall,* 67 So.2d 391. The law does not enforce mere expressions of intent as to disposition of property on death. *Id.*

D. The Independent Land Transactions

The 2001 BSA, containing an integration clause, was executed in December of 2001. James Gilder did not deed his interest in Island 84 to John Cooper until 18 months after they signed the 2001 BSA stating it was their entire agreement on the subjects covered. See P6 & @

Where an agreement stating it is the entire agreement between the parties forms a complete executed bilateral contract 18 months before another transaction between the same parties, the later transaction cannot be a part of the same deal and the same consideration as the earlier agreement. It requires a new agreement and new consideration. *Producers Gin Ass'n (AAL) v. Beck*, 215 Miss. 263, 60 So. 2d 642, 643-644 (1952)

Furthermore, both the BSA and the deed transferring James Gilder's share of Island 84 to John Cooper are written agreements which must be construed according to the words within their four corners. *Facilities, Inc.*, 908 So. 2d 107, ¶ 7 The 2001 BSA does not mention any land or Island 84. The July 2003 deeds to Island 84 do not mention the 2001 BSA. They do not mention Cooper Gilder at all. These documents do not indicate Island 84 is to go to whoever gets the business. The Island 84 deeds are independent of any other transactions and are an unconditional present conveyances to individuals with no strings or conditions attached. They do not mention Cooper Gilder at all. The deed creating the joint tenancy with right of survivorship between John and Robin Cooper an outright unconditional transfer from John Cooper to Robin Cooper. It is not conditioned on who gets Cooper Gilder after the first of the two partners dies.

Since the evidence shows the two transactions are each complete written transactions executed 18 months apart with neither making any reference to the other, it is clear the evidence does not support the finding that apparently James Gilder and John Cooper made a deal to exchange $1.3 million dollars for the river land used in the business. The only evidence of the consideration for the transfer of James Gilder's interest in Island 84 to John Gilder is that John Cooper assigned his interest in two other pieces of property to James Gilder on the same day.

D. Cookie's Attorney's $1.3 Million Business/Insurance Deal/Unfair Competition Theory

The only references to the 2001 BSA, the approximate $1.3 million dollars in insurance

proceeds, and the title and right to ownership and use of Island 84 possibly being part of the same deal is the wording of the questions of Cookie's attorney on Connie's cross examination. Connie tried to explain Cooper Gilder never owned Island 84which was always separate from the business but Cookie's attorney cut her off. He kept insisting Connie had previously told him James Gilder thought he was transferring Island 84 to the family who would get the business. But Connie stuck to her testimony that the only connection between the two transactions 18 months apart was James Gilder's supposition of who was likely to get the business under the BSA based on his belief he would die first because he was older. Such beliefs do not even show an ineffective intention of disposition of a deceased's property after his death. See *Stovall.* It certainly provides no evidence of John Cooper's beliefs or of any agreement between John Cooper and James Gilder concerning Island 84 and the Cooper-Gilder business. There is simply no evidence of any contractual agreement between James Gilder and John Cooper or anyone else giving the Cooper-Gilder business the right to use Island 84 especially after Island 84 and Cooper Gilder passed to different people under the plain language of the 2001 BSA and Island 84 deeds.

The written agreements between John Cooper and James Gilder never contained any restrictions on competition by either partner or any of the employees of Cooper Gilder. The evidence was that in all the years of Cooper Gilder's operation, no mention was ever made of any non competition agreements. The 2001 BSA states it includes the entire agreement between John Cooper and James Gilder on disposition of Cooper Gilder shares and the life insurance proceeds. There is no language imposing any competition limitations on the heirs of the first to die after selling their shares to the surviving partner. There is no language in the BSA or anywhere else where John Cooper's heirs ever agreed to any restrictions on their employment rights as part of being compensated for John Cooper's shares. It might seem unfair to Cookie

Gilder and her attorney for someone to sell his shares in one business and then go right out and start a competing business, but the law allows such free competition in the absence covenants not to compete in sales agreements. *Wilson v. Gamble*, 180 Miss. 499, 177 So. 363, 363 (1938)

There were no such covenants in any Defendant's employment agreement. They were fired for refusing to sign one. There were no such covenants in the 2001 BSA or the agreements in which James Gilder bought John Cooper's shares of Cooper Gilder. Moreover, neither Don Dunaway nor Connie Burford ever owned or sold any Cooper Gilder stock, so there was no such restraint on business in any contract they signed or agreed to. Since there was no prior agreement not to compete with Cooper Gilder, no such agreements were included in any contract under which Robin acquired and then sold an interest in Cooper Gilder or in Robin's employment agreement, and Island 84 belonged to Robin outright after the death of his brother, there can be no valid provision requiring him to allow Cooper Gilder to use Island 84. Without such covenants in either the 2001 BSA or the Island 84 deeds, Robin could not be enjoined from starting a new business and using Island 84 in the new business. Since Don Dunaway and Connie Burford were not parties to any deed and contracts and took no trade secrets, they cannot be held liable for unfair competition. This is especially true for Connie who never owned any of Cooper Gilder and is only employed by Warfield.

Vi. Cookie Did Not Satisfy the Burden of Proof for a Constructive Trust in Either Case

In *Stovall*, the decedent died owning a life insurance policy on his own life payable to the executors and administrators of his estate. He was survived by his widow and his children, both of whom claimed they were entitled to the proceeds of the policy. The widow claimed she was entitled to the proceeds either because her husband had made her a gift of the policy during his lifetime, or by virtue of a parol constructive trust created for her benefit by agreements and

understanding entered into between her husband and her children to the effect that she was to receive the proceeds of the policy on his death. The evidence the widow relied upon to support@ her right to the proceeds of the policy was testimony by attorneys for the estate that shortly after the death of the deceased, the deceased's son told him that in addition to policies naming himself and his sister as beneficiaries, his father owned the policy at issue and the son had an understanding with his father that his father wanted the proceeds of that policy to go to the widow and the son was to see to it that the widow got the proceeds of that policy. Later the son hesitated about writing a letter to the widow stating the children's intent to abide by what their father had told them in regard to his intentions for the proceeds of that policy as he presumed his father had changed his mind because the father never wrote a will expressing his intention for his widow to receive the proceeds of the policy. The daughter testified that her father only told his children that it was his *wish* for his widow to get the proceeds. Other witnesses testified that the deceased had told them he had three life insurance policies – one for his son, one for his daughter, and one for his wife. On this evidence, the court held that the widow was not entitled to a constructive trust over the proceeds of the life insurance policy. The deceased's expectation that she would receive the proceeds was not sufficient to create a constructive trust in her favor in the absence of a promise by the heirs to carry out the deceased's wishes supported by consideration which had to consist at least of the deceased relying on the promise by foregoing the opportunity to take more binding action to carry out his wishes. *Id*

The *Stovall* court then explained why no constructive trust arose against the children and in favor of the widow in terms which make it clear both what Cookie had to prove in order to succeed on her constructive trust theory in either case and why her evidence and arguments based on the inferences she draws about her husband's intentions fail to come anywhere close to

satisfying her burden in either the life insurance or the business tort case.

> Thus it is seen that in order for the appellee to maintain her claim of a constructive trust, the burden of proof was upon her to show by clear and convincing evidence the existence of the essential elements thereof. She was required, therefore, to show by this high degree of proof that her husband intended for her to have the insurance, that his children either expressly or by silent acquiescence promised him to carry out such intention, and that he relied upon them to do so, and acting upon such reliance he refrained from changing the beneficiary to his wife or assigning the policy to her, or bequeathing the proceeds to her by will or otherwise providing by writing for her to receive the proceeds of the insurance. We think that the evidence falls short of meeting the high degree of proof which was required in order to establish these essentials of the trust. It is no doubt true that at the time the deceased discussed the matter of this insurance with his children it was his wish and intention that the insurance should go to his wife. There is absolutely no proof, however, that he called upon either his son or his daughter to see to it that this intention was carried out, or that he relied upon either to carry out such intention and refrained from assigning the policy to his wife or willing it to her or otherwise providing by writing for her to receive it. The deceased did not assign the policy to his son or daughter with the request that either collect it and give the proceeds to his wife.

Id at 376-377.

Cookie's case is even weaker than the widow's case in *Stovall.* Cookie's husband did not own the policy. Even if she had proved he had a right to purchase the policy, which she did not prove, there is absolutely no proof in this case that either Robin, Marilyn or Mildred ever promised anyone that they would convey the policies on James Gilder's life to James Gilder or that they would see to it that Cookie got the proceeds of the policies. There is certainly no proof that he gave them the notice of intent to purchase the policies or tendered the purchase price to them as required by § 7.4 if he had the right to purchase the policies. There is no proof James Gilder ever asked Robin, Marilyn or Mildred to convey the policies to him and that they agreed to do so or that he did not take steps he could have taken to secure ownership of the policies before his death because he was relying on the acquiescence of either Robin, Marilyn or Mildred to such a request. As in *Stovall*, the imposition of a constructive trust is inappropriate because

purchase the policies on his life and that he intended her to have the proceeds, she would still be in the same situation as the widow in *Stovall* who was unable to recover because she could not prove all the elements of a constructive trust over life insurance proceeds against each defendant.

Similarly, there is no proof either James Gilder or John Cooper asked Robin Cooper or Connie Burford or Don Dunaway to make sure that Cooper Gilder and Island 84 would go to the same people or that Island 84 would always be available to Cooper Gilder to be used in the business. There is no evidence that any of the three made such a promise or that James Gilder or John Cooper relied on such a promise by foregoing action during their lives that would ensure that ownership of Island 84 and Cooper Gilder would stay the same. To the contrary, John Cooper and James Gilder took action before their death through the 2001 BSA and the July 2003 deeds which by their very clear terms would insure that different parties owned Island 84 and Cooper Gilder if John Cooper, who was then suffering from terminal cancer, died before James Gilder. There was no action that Cookie could have taken before or after the death of John Cooper or James Gilder that would have ensured that Cooper Gilder could continue using Island 84 after their deaths. She had no such rights. She even admitted in her testimony that once he became owner of Island 84 she could not expect Robin to continue to allow Cooper Gilder to use it especially after he was fired from his position at Cooper Gilder for refusing to sign an unreasonable non competition agreement. Thus, she could not have relied upon any promise or acquiesence of Robin by foregoing action to secure Cooper Gilder's right to use Island 84. With such proof, there is nothing to support her constructive trust claim in the business tort case.

Most important of all, Cookie never proved that a confidential relationships existed between: 1) herself and Robin, 2) herself and Don, 3) James Gilder and Robin, or 4) James Gilder and Don. She never proved that James Gilder asked Robin or Don to promise to do

anything for Cookie or the business after his death or that they gave the promise asked for. She never proved that Robin, Mildred or Marilyn had a confidential relationship with James Gilder requiring them to assign the policies on his life to him after John Cooper's death. Moreover, she never proved a proximate cause link between any breach of duty or confidential relationship and the acquisition of property by any defendant.

CONCLUSION

Before either John Cooper or James Gilder died, these two partners executed the valid written 2001 BSA. Over a year later, while both were still alive, they severed their joint tenancies in several pieces of real estate by exchanging deeds, in one of which Gilder deeded his interest in Island 84 to John Cooper. That same day, John Cooper executed a deed transferring Island 84 from himself as sole owner to himself and Robin Cooper as joint owners with right of survivorship. These documents were binding on John Cooper and James Gilder and also on their heirs. The July 2003 deed terms determined ownership of Island 84 both before and after the deaths of John Cooper and James Gilder. The 2001 BSA's terms determined who would be obligated to purchase Cooper Gilder shares with the proceeds of which life insurance policies, who would be obligated to sell Cooper Gilder shares for a fixed price, and who would own the remaining policies on the surviving partner. While they chose to transfer Island 84by the deeds to specific individuals without any contingencies or conditions, in the 2001 BSA their decision as to who would ultimately own the business and life insurance polices was made contingent upon who died first – a factor they knew they could not control. Because John Cooper died first, their decisions caused Island 84 and Cooper Gilder to pass into different hands. This result was caused by their choices, and does not create a constructive trust.

In both cases, Cookie's theory is that her husband intended for her to receive the proceeds

of the life insurance listed in the 2001 BSA exhibits on his life and for Island 84 to go with the business. She wants the BSA sections under which her husband acquired John Cooper's shares to be enforced as written so her husband would acquire 100% of Cooper Gilder for her to inherit on his death. She also wants a constructive trust imposed on Island 84 and the life insurance proceeds on her husband's life to enforce her view of her husband's subjective intent even though this alleged intent is not expressed in any contract or will or even express oral statements to anyone other than herself on the life insurance or anyone at all on Island 84. There is no allegation or evidence that any life insurance defendants promised James Gilder that s/he would carry out his alleged intention for Cookie to receive the proceeds of the policies on his life or that James Gilder decided to forego taking any action before his death to secure those proceeds for Cookie in reliance on such a promise. While Cookie claims her husband had a right to acquire, and started the process of acquiring, the policies on his life by asking NYL how to transfer ownership allegedly causing NYL to send the transfer forms to him, there is absolutely no evidence that James Gilder took any action to satisfy the notice and tender of the purchase price conditions imposed by the BSA when such a right existed. There is no evidence Gilder relied on any promise by any defendant in not tendering notice and the purchase price required by § 7.4 of the BSA. Without a valid written contract, a valid deed, a valid will or such promises by the Defendants and reliance by James Gilder prior to this death, the law would not enforce his wishes or his intentions after his death even if those intentions had been proved by clear and convincing evidence. Clear and convincing proof of both the intentions and each Defendant's promise and James Gilder's reliance on that promise in foregoing the taking of enforceable action to carry out his own intentions are necessary prerequisites to imposing a constructive trust on either the life insurance proceeds or the title to and use of Island 84. See *Stovall,* 67 So.2d 391.

The parol evidence rule and rules of construction for written contracts and wills were designed to prevent precisely the kind of claims Cookie asserts in these two cases. The high standards of proof required to recover on theories of constructive trust serve similar purposes. Particularly where the parties to the agreements and/or deeds are dead, the best evidence of their intent is the written documents they signed. The courts cannot reform agreements they made because an heir or successor of one party thinks they subjectively intended the agreements to lead to a different outcome or because the successors to the parties disagree as to the meaning of the written agreements. *McCoy v. McCoy*, 611 So. 2d 957, 961 (Miss. 1992)

The long history of friendship, trust, and shared business between John Cooper and James Gilder, both now dead, does not transfer to their heirs, friends and employees. As Cookie herself pointed out, when John Cooper died Robin Cooper was an employee of James Gilder, but there was no confidential relationship between James Gilder and Robin. There was also no confidential relationship between James Gilder and the other life insurance defendants who were John Cooper heirs and James Gilder's creditors holding security interests in his stocks.

John Cooper and James Gilder knew they did not hold the power to predict life, death, disability or the future. They made contingency plans and expressed their intentions in regard to ownership of Cooper Gilder, certain life insurance policies on each other's lives, and ownership of land they held jointly in binding legal documents including contracts and deeds. The law looks only to the four corners of such documents for the intentions which are binding on both the parties and their heirs. It does not second guess the parties' intentions after both are dead to achieve the results they might have expected to be the most likely outcome of their actions.

The law also does not give a corporation the right to use land it never held title or a lease to simply because it was allowed to use the land with permission for years. When such land is

owned by an employee of a business, the landowner owes the business no fiduciary no duty to allow the business to continue free use of his land, to refrain from using it himself, to refrain from improving its value by negotiating to buy access to his own land, or even to refrain from competing with the business, especially after being fired for refusing to sign a non competition agreement . Even an officer would owe no duty to allow the business to use land it did not own or have a valid lease on free of charge. Robin did not form a confidential relationship with Cookie or acquire a duty to allow Cooper Gilder to use his land free of charge when James Gilder asked Connie to assist Cookie with the business after his death, Cookie appointed Connie to run the business for her and Connie subsequently asked Robin and Don to assist her in managing Cooper Gilder. The occurrence of these events did not impose a duty on any of the Defendants not to form a business which competed for part of Cooper Gilder's customers and developed other parts of Cooper Gilder's business far beyond the scope of Cooper Gilder's operations, especially after being fired for refusing to sign an unreasonable non competition agreement. Most importantly of all, nothing Defendants did prevented Cookie from leasing or acquiring other land along the river in the area to continue Cooper Gilder's business. They did not profit unfairly from any property rightfully belonging to another or which they should not in good conscious be allowed to continue to hold.

For all these reasons, Cookie's arguments on appeal and cross appeal lack merit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John H. Daniels, III, attorney for Appellants/Cross Appellees, hereby certify that I have this day caused to be delivered by United States Mail, postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellants/Cross Appellees, to:

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