2012 WL 4208187 (Minn.App.) (Appellate Brief)
Court of Appeals of Minnesota.

In the Matter of the Estates of Lois Jeannette WIGGS, Deceased,
and
Darlene J. NEUMAN, Deceased.

No. A11-1695.
July 2, 2012.

Respondents' Brief and Appendix

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***1 STATEMENT OF ISSUES**

1. Did the District Court **abuse** its discretion in finding Sietsema, as a co-personal representative, breached her fiduciary duties to the beneficiaries of the Wiggs Estate?

The District Court concluded that Sietsema breached her fiduciary duties and that those breaches damaged the Estate in the amount of $156,519.61.

Authority:

Minn. Stat. § 524.3-712 (2011);

In re Estate of Baumgartner, 274 Minn. 337, 144 N.W.2d 574 (1966);

In re Trust Created by Enger, 225 Minn. 229, 239, 30 N.W.2d 694, 701-702 (1948).

Restatement (Second) of Trusts §§ 170-174 (1959, 1992);

Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts (also known as Scott on Trusts), Vol. IIA, §§ 170-174 (4th ed. 1987)

2. Did the District Court **abuse** its discretion in finding Sietsema should not be allowed to keep an admittedly arbitrary, unearned payment of $5,000 paid from the Estates' assets?

The District Court found that Sietsema must repay the $5,000 to the Estates.

Authority:

Minn. Stat. § 524.3-712 (2011);

In re Estate of Baumgartner, 274 Minn. 337, 144 N.W.2d 574 (1966);

In re Trust Created by Enger, 225 Minn. 229, 239, 30 N.W.2d 694, 701-702 (1948);

ServiceMaster v. GAB Business Services, Inc., 544 N.W.2d 302, 306 (Minn. 1996).

***2 STATEMENT OF THE CASE**

Appellant Elizabeth Sietsema ("Appellant" or "Sietsema") appeals from a two day bench trial held on May 12 and 13, 2011, before referee Dean M. Maus of the Hennepin County District Court, Probate/Mental Health Division ("District Court"). The

trial addressed objections to the administration of the Estate of Darlene J. Neuman ("Neuman"), who died on March 1, 2008 and objections to the administration of the Estate of Lois Jeannette Wiggs ("Wiggs"), who died June 22, 2008.[1] Neuman bequeathed her entire estate to her friend, Wiggs. Although Wiggs was nominated as personal representative of Neuman's Estate under Neuman's Will, she countersigned a May 15, 2008 Petition with Kelvin Miller ("Miller") for the appointment of Miller as personal representative. Miller was appointed the personal representative of the Neuman Estate on July 16, 2008.

Wiggs died on June 22, 2008, approximately one month before the District Court approved the petition to appoint Miller as personal representative in the Neuman Estate. Wiggs' Last Will and Testament was executed on February 4, 2008, and a Codicil to that Will, executed on May 15, 2008 (the "Wiggs Codicil"), nominated Miller and Sietsema as co-personal representatives of the Wiggs Estate. Miller and Sietsema were appointed as co-personal representatives of the Wiggs Estate on August 18, 2008.

Under the terms of Wiggs' Will and Codicil her entire estate was divided equally among three charitable beneficiaries: Friend of Animal Adoption, Inc. d/b/a Animal Ark No-Kill Shelter ("Animal Ark"), Feline Rescue and a trust benefiting Wiggs' cats ***3** (designated the "Kitty Trust") and upon their death to the University of Minnesota Foundation ("Foundation"). The Kitty Trust was ultimately determined to be invalid under Minnesota law and the gift to the Kitty Trust was reformed by court order into an outright gift to the Foundation.

Approximately 16 months after Miller was appointed personal representative of the Neuman Estate and Miller and Sietsema were appointed as co-personal representatives of the Wiggs Estate, inventories in both Estates were executed: the Neuman Estate Inventory on October 23, 2009 and the Wiggs Estate Inventory on November 16, 2009. (Appellant's Appendix ("A.App.") 9, 43). On November 10, 2009, a Final Account in the Neuman Estate was filed with a petition for its approval. (A.App. 14-18).

In response to the inventories and petition, Wiggs Estate beneficiary Animal Ark filed objections and supplemental objections to the Neuman Final Account and objections and supplemental objections to the Wiggs Inventory. The objections questioned, among other things, the legitimacy, accuracy, appropriateness and veracity of: asset valuations, representations in the inventories and the Neuman Final Account, missing assets, and billings by and payments to Sietsema, Miller and their employer, Primarius Promotions ("Primarius"). Animal Ark also filed a petition to convert both Estates to supervised administrations and demanded a bond be posted in both Estates. Based on similar concerns, the Foundation filed a petition dated February 2, 2010, seeking to restrain Miller and Sietsema from taking any further actions or making any further payments from the Estates.

***4** After discovery revealed additional previously undisclosed payments to Miller and Sietsema from assets of the Estates, the Foundation amended its petition on February 22, 2010, asking the Court to require the deposit of funds from the Estates with District Court or impose a constructive trust and to expedite discovery. When Miller and/or Sietsema did not post a bond, Animal Ark moved to require that Miller and Sietsema post the equivalent of a bond or, alternatively, to replace them as personal representatives. On February 25, 2010, the District Court issued its order requiring a bond or vacating the appointments of Miller and Sietsema as personal representatives.

On February 26, 2010, the District Court further found that there was a significant likelihood that Miller and Sietsema would take actions that would harm the Estates, and therefore issued an order restraining them from acting in either estate and suspending their powers in both Estates. (2/26/10 Order, p. 9, ¶¶ 9-10). As a result of Miller and Sietsema's maladministration and their failure to post a bond, the District Court also appointed Terrence McCool ("McCool") as special administrator of both Estates, pending further order by the District Court.

On April 20, 2010, the District Court formally removed Miller as personal representative of the Neuman Estate and removed Miller and Sietsema as personal representatives of the Wiggs Estate and appointed McCool as the successor personal representative of both Estates.

Because Miller and Sietsema had not timely filed their Final Account of the Wiggs Estate administration, the Foundation filed a petition on July 23, 2010, to require the production of that Final Account. The District Court ordered Miller and Sietsema to file ***5** the Final Account by September 7, 2010, and because the Estates were interrelated, also ordered that the Wiggs Final Account and the anticipated objections to that Account would be tried with the objections to the Neuman Estate Final Account. (District Court Order dated 9/2/10). Miller and Sietsema, as former personal representatives, filed a Final Account dated September 1, 2010 (A.App.63), to which the Foundation and Animal Ark timely objected, seeking surcharges against Miller and Sietsema.

Trial on these matters was held before the District Court on May 12 and 13, 2011. On July 29, 2011, the District Court issued its Order Adjusting Accounts; Surcharging Personal Representatives; and Order for Judgment (hereinafter "Trial Findings"). The District Court found that "the entire administration of both estates was permeated with fiduciary breaches." (Trial Findings, ¶¶ 22, 28 (A.Add.4, 6)). In particular, the District Court found that Primarius grossly overcharged the Estates and Wiggs and that Miller and Sietsema, who both worked for Primarius, used "less than reasonable care" in paying those bills and failing to oversee the work allegedly performed by Primarius. The District Court further found that Miller and Sietsema double billed for their work, and had conflicts of interest, which placed their personal interests in Primarius over, and to the detriment of, the Estates' and Wiggs' interests. (Id. at ¶¶22-23, 30-31, 54-71 (A.Add.4, 6, 7, 10-13).

In determining damages, the District Court concluded that Primarius' services, including the individual services of Miller and Sietsema through Primarius, were reasonably worth no more than $10,000. (Trial Findings, ¶¶ 67-78 (A.Add.13-14)). The District Court then apportioned the $10,000 between the Estates and the work for Wiggs ***6** individually by multiplying the amount Primarius billed to each Estate and Wiggs by $10,000 and then divided that number by Primarius' total bills ($178,271.14). (Id. at 79-82 (A.Add.15)). As a result, the District Court found that Primarius was overpaid for work performed on Wiggs' personal affairs by $19,373.33 and the Newman Estate by $38,628.20. (Id. at ¶¶ 83-84 (A.Add.15-16)). Even though Sietsema served as an attorney-in-fact of Wiggs and was heavily involved in Primarius' work on the Neuman Estate, the District Court held Miller solely responsible for these damages. (Id.) The District Court also found that the Wiggs Estate overpaid $108,519.61 to Primarius and found both personal representatives Miller and Sietsema individually liable for that damage. (Id. at ¶ 85 (A.Add.16)).

In addition to Primarius' billings, the District Court reviewed the fiduciary fees and gifts Miller and Sietsema paid themselves from the Estates. The District Court found these payments lacked any supporting documentation and were duplicative of the charges for their work through Primarius, which were already billed at rates well above the standards for professional fiduciaries. (Trial Findings, ¶¶ 86, 90-91 (A.Add.16-17)). In addition to their breaches of fiduciary duty in retaining and paying Primarius, the District Court found that Miller **abused** his role as a fiduciary in taking personal loans from the Estates and that Sietsema knew of these actions by Miller and breached her fiduciary duties in failing to stop Miller and inform the District Court or the beneficiaries of these wrongful acts. (Id. at ¶¶ 26-29 (A.Add.6)). Further, the District Court found that the inventories and final accounts of both Estates were inaccurate and misleading, and that neither Miller of Sietsema could explain the accounting discrepancies or even provide ***7** any assurance that the Primarius' billings were properly allocated among the Estates. (Id. at ¶¶ 24-25, 32 (A.Add.5-7)).

As a result, the District Court ordered Miller to reimburse the $30,000 in fiduciary fees he paid himself from the Neuman Estate, but did not assess Sietsema any liability for the payment of those fiduciary fees. (Trial Findings, ¶ 92 (A.Add.17)). With regard to the $5,000 fiduciary fee/gift paid to Sietsema from the Neuman Estate, the District Court found both Miller and Sietsema should bear liability for refunding that money to the Estates. As Miller and Sietsema were both personal representatives of the Wiggs Estate, the District Court held them both individually liable for repayment of the $43,000 in additional fiduciary fees paid to Miller and Sietsema. (Id.)

Miller has not appealed the District Court's July 29, 2011, Order and its accompanying judgment and, as such, it is now final as to him. Sietsema has appealed the District Court's findings of liability against her. [2]

After the Estates began collection efforts on the judgments, Sietsema stayed the collection efforts against her by posting a $180,000 supersedeas bond with the District Court on December 2, 2011.

***8 STATEMENT OF FACTS**

A. Decedents Neuman and Wiggs

Neuman and Wiggs lived together for many years as companions at their jointly-owned home located at 4929 Ridge Road, Edina, Minnesota. (Trial Transcript ("Tr.") at 58)). Each executed a will naming the other as their sole beneficiary and nominated the other as the personal representative of their estate. (Tr. at 79).

B. The Beneficiaries of the Wiggs Estate

The three beneficiaries of the Wiggs Estate are all charitable organizations. Wiggs was particularly devoted to animal causes and had a longstanding relationship with beneficiaries Animal Ark and Feline Rescue. (Tr. at 184-185). The Foundation is the third beneficiary and is directed to use its share of the Wiggs' monies for the University of Minnesota Women's Golf Program as Wiggs was an avid golfer. (District Court Order dated 4/20/10, p. 5).

C. Wiggs' and Miller's meeting after Neuman's death

Neuman was the first of the two friends to die on March 1, 2008, leaving a probate estate worth $115,274.77, consisting of public company stock, cash, bank accounts, two cars and tangible personal property. (A.App.9-10). On April 7, 2008, Wiggs met Miller at a restaurant. (Tr. at 60, 62-63). At that meeting, Wiggs signed a one paragraph document prepared by Miller authorizing Primarius, "specifically [Miller] or [Sietsema]... to act on my behalf in all matters related to my being named beneficiary of the Estate of Darlene J. Neuman." (Trial Exhibit ("Ex.") 1; Ex. 39, Admission No. 2; Tr. at 62-63). The document does not identify what rates would be charged, and Wiggs was not ***9** represented by legal counsel at that meeting or at any time in connection with the implementation of this arrangement. (Tr. at 67). Sietsema testified she was not present at the meeting with Wiggs, but when she spoke to Wiggs sometime thereafter, Wiggs was still in a "vulnerable state" and "very distraught and in grief over the death of her friend." (Tr. at 212).

Later in April 2008 and again in May 2008, Wiggs signed two different Minnesota statutory short form powers of attorney naming Miller and Sietsema as Wiggs' attorneys-in-fact. (A.App.1-4). The powers of attorney were prepared by Miller's lawyer, Ronald Kopeska. (Tr. at 64).[3] As powers of attorney, Miller and Sietsema retained Primarius to provide services to Wiggs. (Tr. at 65). At no time was Wiggs presented with any documentation setting forth the scope of Primarius' work or costs for services that Primarius would provide to Wiggs. (Tr. at 63, 66).

D. Wiggs' death on June 22, 2008

Wiggs lived only about two months after giving Miller and Sietsema power of attorney to act on her behalf. (Tr. at 261). During that time, Miller, Sietsema and other Primarius employees provided Wiggs some basic personal care services typical for an **elderly** person, such as running errands, driving Wiggs to appointments, paying bills, and assisting Wiggs in moving to an assisted care facility. (Tr. at 25-26, 256-257). Wiggs never saw a Primarius' bill. (Tr. at 255). Also during this time, Wiggs and Miller jointly petitioned to appoint Miller as personal representative of Neuman's Estate and Wiggs ***10** executed her Codicil to her Will, nominating Miller and Sietsema to serve as personal representatives. (A.App.5).

The Wiggs Estate, valued at $543,405.88, included the remaining assets of the Neuman Estate, the Wiggs/Neuman home and Wiggs' two bank accounts, cash and personal property. (Trial Findings, ¶47 (A.Add.9)). After Wiggs' death, the District Court appointed Miller as personal representative of the Neuman Estate and Miller and Sietsema as personal representatives of the Wiggs Estate. (A.App.7-8).

E. Miller's and Sietsema's Relationship with Primarius

Primarius was an event planning and promotions company. It had no experience acting as a conservator, attorney-in-fact or personal representative and had never been in the business of providing such services or personal care services to individuals or estates. (Tr. 68-70). Primarius was owned entirely by Miller. (Tr. at 66). In addition to being Primarius' owner, Miller was an employee of Primarius, receiving a $150,000 salary. (Tr. at 66). Sietsema was the office manager of Primarius and was paid $54 per hour by Primarius. (Tr. at 251). She had worked for Primarius for over 20 years and her recent yearly compensation from Primarius was approximately $90,000. (Tr. at 101, 251).

Miller and Sietsema never considered any other company besides Primarius to perform **elder** care services or administer the Estates. (Tr. at 265). Although Primarius billed $178,217.14 to Wiggs and the Estates in 2008 and 2009, there was never a written engagement with Primarius. In recent years, Primarius had not been profitable and ultimately went out of business. (Tr. at 60, 164). Wiggs and the Estates became a significant portion of Primarius' business. (Tr. at 164, 251-253).

***11** While Miller and Sietsema retained Primarius to provide administrative services to the Estates and **elderly** care services to Wiggs, at no time did either Miller or Sietsema inform the District Court or the Wiggs Estate beneficiaries that they retained Primarius to perform these services or of their respective personal interests in Primarius. (Tr. at 85-86).

F. The Commingling of the Estates

The District Court found that the personal representatives administered the Estates together as one estate. (Trial Finding at ¶ 42 (A.Add.8)). No bank account was ever opened for the Neuman Estate, the assets were comingled and the vast majority of expenses were paid from the Wiggs estate, regardless of whether the charges pertained to Wiggs' personal care, the Neuman Estate or the Wiggs Estate. (*Id.;* Tr. at 28, 82-83, 104-105, 142-143). Miller testified that he could not determine from Primarius' bills whether work was correctly allocated to Wiggs individually, the Neuman Estate or the Wiggs Estate as claimed in the Final Accounts of the respective Estates. (Tr. at 83-85).

G. Work and Fees of Primarius for the Estates

1. Work Billed Through Primarius Was Not Complex and Did Not Require Specialized Skills

All services performed for the Estates and Wiggs, including those of Miller and Sietsema as personal representatives, were billed through Primarius. (Tr. at 65, 256-257, 260). The District Court found that none of the services Primarius performed for Wiggs or the Estates were complex. (Trial Findings, ¶¶ 44, 49 (A.Add.8-9)). The services performed for Wiggs were basic services family members normally provide, such as ***12** running errands, driving Wiggs to appointments, paying bills, and assisting Wiggs in moving to an assisted care facility. (Tr. at 25-26, 256-257, 266-267). Similarly, the administration of the Estates involved only standard, relatively simple tasks that family members typically perform, such as hosting funerals, communicating with family and friends, paying final bills, selling stock, selling a home, and filing standard probate documents such as an inventory and accounting with appropriate legal assistance. (Tr. 25-26, 256-257).

2. Primarius' Rates For Services Rendered Were Excessively High

The rates Primarius charged the Estates and Wiggs ranged from $125 per hour to $60 per hour. (Tr. at 72; R.A.1-53). [4] The vast majority of time billed was at $125 per hour (Miller's standard rate) and $85 per hour rate (Sietsema's standard rate). Primarius' receptionist billed at $60 per hour. (Tr. at 72, 74-75).

In charging these rates, Miller and Sietsema never investigated what the prevailing market rates were for the services Primarius provided to the Estates and Wiggs, nor did they ever seek competitive bids from other vendors for these services. (Tr. at 265). Sietsema knew the market rate for these types of services was $20 per hour based on her experience retaining such services for her mother. (Tr. at 266-267). Professional fiduciary McCool, who often retains vendors to provide the types of services Primarius provided, testified that the market rate for companies providing such services is $18 to $25 per hour. (Tr. at 351-53, 355). Furthermore, while experienced vendors use employees trained in **elder** care, financial management and estate administrative services, ***13** Primarius' staff performing these services had no such training or expertise. (Tr. at 69, 95-96). Nevertheless, Miller and Sietsema, in their fiduciary capacities, paid Primarius at four to six times the market rate of experienced service providers. (Tr. at 72).

McCool, who has over 20 years of experience in the financial services industry and as a professional guardian, conservator, attorney-in-fact and personal representative, charges only $55 per hour. (Tr. at 343-344, 348, 397). McCool further testified that the standard fees charged by professional fiduciaries in the Twin Cities generally are in the range of $50 to $75 per hour. (Tr. at 397). McCool testified that individuals who have no or little experience serving as conservator, guardian, attorney-in-fact or personal representative should charge a significantly lower hourly rate to account for their lack of experience and the fact that it might take such persons longer to complete tasks than an experienced fiduciary. (Tr. at 397-398). Miller conceded Primarius billed additional hours as part of its “learning curve.” (Tr. at 95-96). McCool concluded that the rates charged by Primarius were “very excessive,” a fact the District Court confirmed based on its experience in probate matters. (Trial Findings, ¶¶ 62-67 (A.Add.12-13); Tr. at 367). Given Primarius' high rates and lack of experience, McCool would not have hired Primarius. (Tr. at 361).

3. The Hours Billed by Primarius Were Excessive and Unsupported

Despite the lack of complex issues, Primarius billed the Estates and Wiggs for 1,550 hours of work, which Miller admitted was excessive and caused by Primarius' employees' inexperience in administering estates. (Trial Finding, ¶ 67 (A.Add.13); R.A.1-53; Tr. at 147-150). In addition, the bills submitted by Primarius provide ***14** inadequate detail to even confirm how many hours were spent on each alleged task. (R.A.1-53). Primarius' bills show hourly work was reported in weekly bulk time, with little or no description. (Id; Tr. at 283-285). Primarius also billed time for services performed by other vendors, making Primarius' bills duplicative. (Trial Findings, ¶ 70 (A.Add.13); Exs. 28, 29).

Professional fiduciary McCool testified he would have objected to the hours billed by Primarius and the bills' lack of description of the work performed. (Tr. at 361-62). Standards in the Minnesota community of fiduciaries require billing entries sufficient for a court to understand the nature of the work performed. (Tr. at 349, 355). Neither Miller nor Sietsema questioned any Primarius billing entries or hours. (Tr. at 180, 267-69).

H. The Estates' Inventories and Accounts Were Inaccurate, Incomplete and Required Significant Effort to Reconcile

The Estates Inventories and Final Accounts were replete with inaccuracies. (Trial Findings, ¶¶24, 32 (A.Add.5, 7)). The District Court expressly noted six groups of inconsistencies in the accountings and inventories, (Id. at ¶ 24 (A.Add.5)), including:

(a) The Estates' collective Final Accounts identify payment of $53,558.50 to attorney Kopeska, but records show he only received $30,318. (Exs. 10, 17,22);

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(b) A $5,000 payment to Sietsema was mischaracterized as a "repay for advanc (sic) to Neuman Est by paying Wiggs Bill to Liz Sietsema," even though both Miller and Sietsema knew it was a gratuitous payment to Sietsema. (R.A.64; Tr. at 82, 261);

(c) The Wiggs Estate Inventory does not contain or reference an annuity payment that Wiggs received as Neuman's beneficiary of $20,985.41. ***15** (compare Exs. 18, 21). Further, the Inventory does not reconcile with bank account statements at the time of death. (R.A.75);

(d) The Wiggs Final Account shows different beginning assets and values than the Wiggs Inventory and does not reconcile those differences. (Exs. 21, 22). The Wiggs Final Account identifies different assets than the Inventory, a second Wells Fargo account and a $10,000 life insurance policy. (Id.);

(e) The Neuman Final Account does not account for the remaining household and other tangible personal property on hand for distribution. (A.App.14); and

(f) Multiple discrepancies between the Wiggs Final Account and Neuman Final Account and no reconciliation of these discrepancies. (Exs. 10, 22).

The District Court agreed with professional fiduciary McCool that fiduciaries must file accurate accountings and the District Court found that the Estate ought not to pay for inaccurate or incomplete inventories and accountings. (Trial Findings, ¶¶ 24-25 (A.Add.5-6); Tr. at 401).

I. The District Court's Findings That Sietsema Breached Her Fiduciary Duties

Because the issues before the Court pertain to Sietsema, this brief focuses on her actions and inactions as a fiduciary. Both Miller and Sietsema acknowledged at trial that Sietsema owed fiduciary duties to Wiggs as an attorney-in-fact and as a personal representative to administer the Wiggs Estate in the best interest of its beneficiaries. (Tr. at 108, 259, 269). Included in those duties was the duty not to pay unreasonable bills. (Tr. at 269). Professional fiduciary McCool testified that he would not hire, as a fiduciary or co-fiduciary, a firm in which he has a personal interest, as such a practice ***16** would present a conflict of interest. (Tr. at 356-57). In complying with his fiduciary duty to act in the best interests of the estate's beneficiaries, McCool avoids even the appearance of a conflict of interest. (Tr. at 394-395).

Despite acknowledging her fiduciary duties at trial, Sietsema never objected to any bills of Primarius, including the number of hours and reasonableness of the rates, even though she knew them to be well above rates for professional service providers. (Tr. 267-69). Sietsema had full access to Primarius' timesheets, bills and "every piece of paper that came in or out of [Primarius'] office." (Tr. 36, 109, 174, 180, 268). She simply signed the checks to pay Primarius' bills, admitting she never even reviewed them. (Tr. 108-109, 267, 270). [5]

Similarly, Sietsema acknowledges signing the Wiggs Estate's Inventory and Final Accounting and did not dispute the discrepancies in these documents or that there are no assurances that the expenditures are properly allocated among the Estates. (Tr. at 83, 104- ***17** 105, 225). Sietsema personally performed approximately 80% of the Estates' banking and reconciled the Estates' bank statements. (Tr. at 272; R.A. 180-200).

While the District Court found Sietsema had clear conflicts of interest, Sietsema testified that she had no opinion on whether she or Miller had conflicts of interest in hiring Primarius to perform work for the Estates or Wiggs. (Trial Findings, ¶¶ 22(b), 23(b) (A.Add.4); Tr. at 272). Despite her refusal to give an opinion, she acknowledged she had the ability to object, but did not do so as she believed it would put her job in jeopardy. (Tr. at 302, 304). Sietsema also did not dispute that the more hours she could bill at Primarius, the more money she would be paid. (Tr. at 305). Sietsema was paid by Primarius at a rate of $54

per hour and generally received about $90,000 a year from Primarius, meaning that the work for the Estates and Wiggs was a significant portion of her income in 2008 and 2009. (Tr. at 101, 251).

Further, Sietsema was aware that Miller and Primarius withdrew over $108,000 in assets from the Estates to fund their own needs and that such actions were improper. (Tr. 277- 278). Sietsema in fact recorded Miller's improper withdrawals in the Estates' bank records. (Tr. at 131-132, 135, 277-278; see examples R.A.194-200). Sietsema complained to Miller about his withdrawals, but took no steps to stop them or inform the District Court and the beneficiaries of these inappropriate acts. [6] (Tr. at 277- 278). As a result, the District Court was never informed of these acts until the beneficiaries learned of them through their own investigations. (Tr. at 278). Sietsema put her own financial ***18** interests ahead of the beneficiaries of the Wiggs Estate. Professional fiduciary McCool testified that a co-fiduciary should have objected to Miller's self-dealing and notified the District Court of such actions. (Tr. at 357-361).

Finally, Sietsema concealed the administration of the Estates from the Court and charitable beneficiaries for nearly 16 months. Charitable beneficiary Animal Ark attempted to obtain information on the Wiggs Estate three times during the year after Wiggs died and either received no response or was told by Sietsema that the accounting was not finished. (Tr. at 185-186). Inventories of assets are typically produced to beneficiaries within a few months after the Estate is opened. (Tr. at 189). Finally, when the beneficiaries heard from Sietsema, she demanded paperwork establishing the charities' non-profit status, which they provided. (Tr. at 188-189). Sietsema took time to review the charities status, but not Primarius' bills or conduct.

J. Miller and Sietsema Pay Themselves Additional and Unearned Fiduciary Fees

Despite their poor administration of the Estates, Miller and Sietsema paid themselves additional fiduciary fees, even though their time acting as fiduciaries was already billed to the Estates through Primarius at the unreasonably high rates of $125 per hour for Miller and $85 per hour for Sietsema. Both Miller and Sietsema acknowledged that the additional fiduciary fees were for no additional work performed, and they could produce no records supporting how these fees were calculated. (Tr. at 30, 274-75).

The Neuman Estate is credited with paying Miller $30,000 in personal representative fees and Sietsema $5,000 in personal representative fees, even though she ***19** was not a fiduciary of the Neuman Estate. (Tr. at 82, 89, 260-61, 274; R.A.64). At trial, Sietsema asserted the $5,000 was not the "repay for advanc to Neuman Est by paying Wiggs Bill to Liz Sietsema" [7] as set forth in the Neuman Accounting, but a gift to her by Miller from an unidentified funds of the Estates. (R.A.64; Tr. at 260-61, 274). The $5,000 check to Sietsema was never identified at trial. Sietsema accepted the $5,000 without objection even though she was a fiduciary of the Wiggs Estate and the sole beneficiary of the Wiggs Estate was the Neuman Estate. (Tr. at 261). Sietsema also did not object to Miller's receiving $26,500 and her receipt of $16,500 in fiduciary fees from the Wiggs Estate. (A.App.64; Trial Findings, ¶ 49 (A.Add.9-10)).

Sietsema knew of the payments to Miller and did not question them or seek any information to justify them. (Tr. 274). Miller claimed that he talked about the fiduciary fees with Sietsema as they "talked about everything" and that both of them thought the fees were appropriate and they "simply divided them up." (Tr. 29-30, 111-112). Sietsema never objected to any fiduciary fee payments or offered to return the fees she received. (Tr. at 113, 237-238).

Professional fiduciary McCool testified that Miller's and Sietsema's fees billed through Primarius were excessive, and the fiduciary fees and gifts they paid themselves were excessive, undocumented and completely inappropriate. (Tr. at 368-370).

***20** In total, the personal representatives charged $289,040.31 in fees to partially administer two interrelated, non-contested estates that contained common and uncomplicated assets having a total value of approximately $521,000. (Trial Finding, ¶ 51 (A.Add.10). Not included in the $289,040.31 figure are the attorney fees of Kopeska, accounting fees and fees of other third-

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parties retained to prepare and sell the Wiggs/Neuman home. Sietsema does not contest that each charitable beneficiary has received to date:

● substantially less than Primarius received from the Estates;

● less than Miller received from the Estates in fiduciary fees;

● only $14,000 more than Sietsema received in fiduciary fees.

(Tr. at 291).

ARGUMENT

This District Court's decision should be affirmed under the most basic precepts of fiduciary law: that fiduciaries must act in the best interest of their charges and if the fiduciaries fail to do so, they will be held accountable. Appellant does not materially contest the District Court's findings of fact as they are grounded in the trial record and well within the broad discretion given to District Court in addressing fiduciaries' conduct and fee claims.

Sietsema's brief wholly omits any discussion of the basic fiduciary duties she owed the beneficiaries of the Wiggs' Estate, and tries to claim that she can only be held liable as a co-fiduciary for the misdeeds of Miller. Sietsema intentionally ignores that she is liable for her own actions and inactions that were found to damage the Wiggs ***21** Estate. The District Court did not overlook this basic precept of fiduciary law and neither should this Court. Sietsema can be held liable for both her own breaches of fiduciary duty and for Miller's breaches of fiduciary duty.

Sietsema asserts that the District Court erred as a matter of law by not accepting her argument that her status as an employee of her co-fiduciary's company, and her need to keep that job, extinguished any fiduciary duty she had to Wiggs or the beneficiaries of the Wiggs Estate. A plain review of the law and the record shows that Sietsema's argument is wrong.

First, her status as an employee of Primarius does not shield her from executing her basic fiduciary obligations of loyalty, to act in the best interest of the estate, to use reasonable care and skill of a person of ordinary prudence in administering the estate and to not delegate her basic fiduciary duties. Second, the record clearly demonstrates that Sietsema knew the estate was being mismanaged for the benefit of her employer, her co-fiduciary and herself. Sietsema, through her actions and inactions, willingly and actively participated in the maladministration and caused the Wiggs Estate damage. Moreover, her direct knowledge of, and unwillingness to stop, her co-fiduciary's undisputed breaches of fiduciary duty subjects her to liability as a co-fiduciary.

Sietsema pleads that her case is "unique" from the decades of cases holding fiduciaries to their duties, but there is nothing new about a fiduciary self-dealing or failing to protect the interests of an estate's beneficiaries to enhance the fiduciary's own financial interests. There is over a century of Minnesota case law reminding fiduciaries that an appointment to act for an estate, trust or other charge requires higher conduct and ***22** putting aside one's self-interest. The District Court did not err in holding Sietsema responsible for the damages caused to the Wiggs Estate by her actions and lack of actions as a fiduciary of that estate.

Similarly, Sietsema argues that her employment status entitles her, as a matter of law, to keep $5,000 she knows was unearned and wrongfully paid to her as a purported fee or gift from the Neuman Estate. Such a position of "entitled" unjust enrichment based on her employment status is extraordinary, even if she were not a fiduciary. Sietsema was not a devisee of the Neuman Estate. Her fiduciary charge, the Wiggs Estate, was the Neuman Estate's sole beneficiary. Sietsema received the $5,000 while a fiduciary of the Wiggs Estate, and, as a fiduciary of the Wiggs Estate, chose to keep and not disclose this wrongful payment. Sietsema's failure to return and report the $5,000 was a clear breach of fiduciary duty to the Wiggs Estate and the District Court did not err as a matter of law or equity in ordering it refunded.

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I. STANDARD OF REVIEW

When a party fails to raise an issue before the trial court in a motion for amended findings or new trial, review on appeal is limited to whether the evidence supports the district court's findings of fact and whether those findings support the trial court's conclusions of law. *Gruenhagen v. Larson,* 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976).

In a case tried without a jury, the district court's findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01 (2010). To be ***23** clearly erroneous, the district court's findings must be manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole. *Gjovik v. Strope,* 401 N.W.2d 664, 667 (Minn. 1987). When reviewing a district court's findings, this Court views those findings in the light most favorable to the judgment of the district court. *Rogers v. Moore,* 603 N.W.2d 650, 656 (Minn. 1999).

In cases where the district court's conclusions include determinations of mixed questions of law and fact, the Court of Appeals reviews them under an **abuse** of discretion standard. *Ly v. Nystrom,* 602 N.W.2d 644, 646 (Minn. Ct. App. 1999) (partially rev'd on other grounds). More specifically, district court decisions on whether an estate should pay claimed administration fees "rest largely in the discretion of the [district] court." *In re Estate of Baumgartner,* 274 Minn. 337, 346, 144 N.W.2d 574, 580 (1966).

II. THE DISTRICT COURT'S FINDINGS ARE WELL SUPPORTED IN THE RECORD AND NOT CLEARLY ERRONEOUS

As Sietsema made no motion to amend the District Court's findings of fact under Minnesota Rule of Civil Procedure 52.02, review by this Court is limited to determining whether the District Court's findings are supported by the record and whether the trial court's legal conclusions are contrary to the law. *Gruenhagen v. Larson,* 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976).

Sietsema, however, does not even argue that the District Court's findings lack support in the record. Instead, Sietsema argues that this Court should make new factual findings and weigh and characterize the testimony in Sietsema's favor. Such a position is directly contrary to the role of this Court and its standard of review. This Court does not ***24** retry the case, but simply determines, in the light most favorable to the District Court's findings, whether those findings are supported in the record and not outside the District Court's wide discretion. *Rogers,* 603 N.W.2d at 656; *In re Estate of Baumgartner,* 274 Minn. at 346, 144 N.W.2d at 580; *Gjovik,* 401 N.W.2d at 667.
A plain review of the District Court's findings shows they are well supported in the record and consistent with established authority. It is also a long standing precept of both trust and estate law that fiduciary fees are not allowed "as a matter of right" and that "it is the duty of courts to protect [estates] from dissipation by exorbitant allowances to their officers." *In re Estate of Simmons,* 214 Minn. 388, 8 N.W.2d 222, 10 (Minn. 1943); *In re Estate of Baumgartner,* 274 Minn. at 346, 144 N.W.2d at 580 (1966). Minnesota has long held that the determination whether to pay an estate's administration fees "rests largely in the discretion of the court; and... the reasonable value of such services is a question of fact." *In re Estate of Baumgartner,* 274 Minn. at 346, 144 N.W.2d at 580. District court decisions to deny such fees have been affirmed as within a fact finder's discretion. *See In re Estate of Balafas,* 302 Minn. 512, 516, 225 N.W.2d 539, 541 (1975)(no **abuse** of discretion in denying special administrator's compensation); *In re Anderson,* 654 N.W.2d 682, 688-689 (Minn. Ct. App. 2002)(no **abuse** of discretion in denying beneficiaries' fees); *In re Matter of Doyle,* 778 N.W.2d 342, 351 (Minn. Ct. App. 2010)(no **abuse** of discretion in disallowing fees and accounts if they are inaccurate and disorganized).

***25** Here, the District Court's findings that Sietsema breached her fiduciary duty to Wiggs and the Wiggs Estate are well supported, as are the District Court's findings that Sietsema should not be allowed to benefit from her or Miller's malfeasance.

A. Sietsema's Appeal Does Not Contest the District Court's Findings That the Estates Were Damaged by Maladministration in the Amount of $243,021.14

The District Court's findings that the Estates were damaged by maladministration are well supported and not contested in Sietsema's brief. Specifically, Sietsema does not dispute the District Court's findings regarding the work performed by Primarius, including that:

● The Neuman and Wiggs Estates were related and essentially administered together and commingled by the fiduciaries. (Trial Finding at ¶ 42);

● The work needed to administer the Estates and act as attorney in fact for Wiggs was not complex and did not require significant time or expertise. (Trial Findings,¶¶ 45, 49, 56, 65);

● The billing rates the fiduciaries charged for their and other Primarius' employees time (primarily $125 per hour and $85 per hour) were unreasonable for the work performed to administer the Estates and that a rate of $25 per hour was appropriate. (Trial Findings, ¶¶ 22a, 55, 62-63, 67-68);

● The 1,550 hours billed to the Estates for work administering the Estates and caring for Wiggs was "highly unreasonable," duplicative of services provided by other vendors and that a reasonable number of hours to perform these services was 400 hours. (Trial Findings, ¶¶ 71, 73-76);

● Primarius' bills lacked sufficiently detailed descriptions of the work allegedly performed, and were not capable of meaningful review by the District Court in assessing what services were performed, hours needed to perform the service and the fees associated with that service. (Trial Findings, ¶¶ 71-72);

***26** ● Primarius was wrongfully paid $166,521.14 out of the Estates. (Trial Findings, ¶¶ 78-82);

(A.Add.4-15).

Moreover, Sietsema's brief does not dispute the District Court's findings regarding the additional fees paid to Miller and Sietsema, including that:

● The $76,500 in direct payments to Sietsema and Miller from the Estates were for no additional work and therefore Sietsema and Miller were paid twice for their work; once through Primarius and again by the Estates. (Trial Findings, ¶¶ 89-91);

● Miller and Sietsema produced no documentation supporting how the $76,500 in payments were calculated or determined. (Trial Findings, ¶¶ 89-91);

● Sietsema and Miller both had conflicts of interest in retaining Primarius to perform work on behalf of Wiggs and the Wiggs Estate. (Trial Findings, ¶¶ 22(b), 30, 51, 60, 86, 89);

● Sietsema and Miller engaged in self-dealing as fiduciaries. (Trial Findings, ¶¶ 23(b), 30, 51, 57, 60, 86); and

● Sietsema and Miller did not exercise reasonable care in overseeing the work allegedly performed by Primarius or in paying Primarius' unreasonable bills. (Trial Findings, ¶¶ 23, 30-31, 49, 53, 55-58);

(A.Add.4-17).

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Sietsema further takes no issue with the District Court's overall conclusion that the maladministration of the Estates caused them to be over-charged $243,021.14 in Primarius fees and additional personal representative fees. (Trial Findings ¶¶ 82-89 (A.Add.15-16). Sietsema also does not dispute the District Court's conclusions that Miller should be liable for all of this damage.

***27** What Sietsema disputes is the District Court's findings that she can be held liable for her breaches of fiduciary duty, maladministration and self-dealing or that she can be forced to give up monies she wrongfully received from the Estates. Contrary to Sietsema's brief, the District Court found her individually liable for her own breaches of duty, not Miller's undisputed malfeasance. She was not held liable for Primarius' overcharges of the Neuman Estate in the amount of $38,628.20 or its overcharges for Wiggs' personal care in the amount of $19,373. Similarly, Sietsema was held not liable for the repayment of Miller's additional and unearned fiduciary fees charged to the Neuman Estate of $30,000. (A.Add.18, ¶ 1). Moreover, the District Court did not even require Sietsema to disgorge the monies she received from Primarius as a salary for performing services for the Estates. Given the obvious impropriety by Sietsema, the District Court arguably used its wide discretion to relieve her of additional personal liability it could have assessed against her.

What is before this Court is whether the District Court **abused** its discretion in applying its well supported (and largely undisputed) factual findings to assess Sietsema with liability for the undisputed maladministration of the Wiggs Estate and to prevent her from keeping unearned and unjustified bonuses and fees she wrongly accepted from both Estates. The District Court's well-reasoned analysis here should be affirmed.

B. The District Court Did Not Clearly Err in Finding Sietsema Breached Her Fiduciary Duties

Sietsema's brief focuses on co-fiduciary liability based on Miller's misdeeds, hoping to avoid addressing the District Court's findings that she independently ***28** committed misdeeds and breached her fiduciary duties. Her actions and inactions directly subject her to liability.

A breach of fiduciary duty by a personal representative subjects that personal representative to liability for damages to the estate:

> If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of fiduciary duty to the same extent as a trustee of an express trust.

Minn. Stat. § 524.3-712 (2011).

A fiduciary's duty to the beneficiaries of its charge include:

- the duty to use reasonable care and skill of a person of ordinary prudence in administering the estate;
- the duty to furnish information to beneficiaries and render accurate accounts;
- the duty of loyalty to act in the best interest of the estate; and
- the duty to not delegate her fiduciary obligations.

Minn. Stat. § 524.3-703 (2011); RESTATEMENT (SECOND) OF TRUSTS §§ 170-174 (1959, 1992);[8] Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* (also known as Scott on Trusts), Vol. IIA, §170-174 (4th ed. 1987); George G. Bogert, *Trust and Trustees,* §§ 541, 543 & 544 (2nd ed. 1993).

The District Court's findings that Sietsema was a fiduciary and breached all of the above fiduciary duties is well supported.

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***29 1. Sietsema's duty to exercise reasonable care is an objective standard, measured against the actions of a prudent person**

In assessing whether Sietsema exercised reasonable skill and care in administering the Wiggs Estate, a court measures Sietsema's actions against an objective or "external standard of a [person] of ordinary prudence in dealing with [her] own property." Restatement (Second) of Trusts, § 174, cmt. a (1959). This baseline standard can be enhanced if the person acting as fiduciary has greater skills than the ordinary prudent person, but the standard cannot be lowered below the judgment of a reasonably prudent person, absent express direction to do so in the governing instrument. SCOTT ON TRUSTS, § 174.

The District Court's finding that Sietsema did not exercise the reasonable skill or care of an ordinary prudent person as a fiduciary of the Wiggs Estate is well supported. Primarius had no experience providing care to an **elderly** ward or administering an estate. Sietsema did not compare rates in the marketplace of companies that specialize in providing these services, even though Sietsema was well aware that such firms charge $20 per hour as opposed to Primarius' general rates of $60-$125. (Tr. at 266-267). Sietsema made no objection to paying up to six times as much as the market rate to have a company with no experience provide estate administration and **elderly** care services. Primarius' work was highly inefficient, billing over three times the reasonable number of hours one would expect for such services and billing for duplicative work that other third party service providers performed. Sietsema had access to "every piece of paper that came in or out of [Primarius]," including its bills, many of which did not provide any ***30** meaningful detail to allow a reviewer to understand what services were performed and the amount of time each task required. Despite this, she did not oppose paying Primarius' bills, signing the checks to pay them in her fiduciary capacity. (Tr. 267, 270; R.A.86, 105, 110, 122, 129-130, 144, 150, 165).

Also during the administration of the Wiggs Estate, Sietsema knew her co-fiduciary Miller took money from the Estate for his own personal use and did not report it to either the District Court or the Estate's beneficiaries. (Tr. at 227, 278). In fact, she intentionally concealed this information from the beneficiaries. (Tr. at 185-186). Similarly, Sietsema accepted unearned fiduciary fees and gifts from both Estates and did not exercise her fiduciary role to stop even larger inappropriate payments to Miller. (Tr. at 274; R.A.83, 131, 175). The District Court did not clearly err in finding that Sietsema failed to exercise reasonably prudent care in administering the Wiggs Estate and therefore breached her fiduciary duty.

2. Sietsema's duties to provide accurate accountings and not conceal critical information from the Court and beneficiaries

The duties of a fiduciary to render accounts and provide accurate information to the beneficiaries are long established obligations of fiduciaries. RESTATEMENT (Second) of Trusts, §§ 172-173 (1959); Scott on Trusts, §172-173; Minn. Stat. §524.3-706 (2011). When a fiduciary fails to accurately provide information and an accounting, all doubts about such an accounting are resolved against the fiduciary, as "[t]he [fiduciary] alone is in a position to know all the facts concerning the administration of the [estate], and obviously [s]he cannot be permitted to gain any possible advantage from [her] failure ***31** to keep proper records." SCOTT ON TRUSTS, § 172 at 452-453. The cost of correcting inaccurate accounts is borne by the negligent fiduciaries, and no compensation should be awarded for such inaccurate accounts. Id. at 454.

> Here, the District Court correctly found the Wiggs Inventory and Final Account were inaccurate, inconsistent with the related Neuman accounting, and forced the Wiggs Estate to expend monies to correct these mistakes. The District Court cited numerous examples of inaccuracies from the record. (Trial Findings ¶ 24 (A.Add.5)). The District Court's findings that Sietsema breached her duty to provide accurate accounts and information are well supported in the record and consistent with black letter law.

3. Sietsema's duty of loyalty and to act in the best interest of the Wiggs Estate

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The duty of loyalty and to act in the best interest of the trust is the "most fundamental duty" owed by a fiduciary. SCOTT ON TRUSTS, §170 at 311. "A [fiduciary's] primary duty is not to allow his interest as an individual even the opportunity of conflict with his interest as [fiduciary]. A [fiduciary] can breach the duty of loyalty by acting for personal gain." In re Matter of the Revocable Trust of Margolis, 731 N.W.2d 539, 546 (Minn. Ct. App. 2007) (quoting Smith v. Tolversen, 190 Minn. 410, 413, 252 N.W. 423, 425 (1934) and citing In re Estate of Lee, 214 Minn. 448, 9 N.W.2d 245 (1943)). In 1949, the Minnesota Supreme Court stated that the rule against self-dealing "is so firmly established and universally accepted that it seems useless to again restate the rule here." In re Trust Created by Anneke, 229 Minn. 60, 64, 38 N.W.2d 177, 179 (1949). Minnesota has also long held that fiduciaries have an obligation to fully and ***32** frankly disclose to beneficiaries any conflicts of interest and self-dealing without reservation, and the failure to do so constitutes fraud. In re Trust Created by Enger, 225 Minn. 229, 239, 30 N.W.2d 694, 701-702 (1948). In Enger, the Supreme Court refused to allow the approval of accounts to act as claim preclusion to concealed self-dealing by a trustee. In rendering this decision the Supreme Court held:

> But where there is a solemn duty to speak, independently of coercion, and in judicial controversy as well, whether asked to speak or not, and there is a failure to speak, resulting in the enrichment of the wrongdoer and the impoverishment of the one to whom that duty is owing, there is a fraud of the most serious nature and, in a sense, both intrinsic and extrinsic.

Id. at 702 (quoting Laun v. Kipp, 155 Wis. 347, 373 145 N.W. 183, 192 (Wis. 1914).

The District Court's findings that Sietsema breached her duty of loyalty by self-dealing and failing to disclose and address conflicts of interest are well supported. Sietsema had a clear conflict of interest in retaining Primarius as she worked for Primarius and a significant portion of her job at Primarius was dependent on Primarius doing work for the Estates and Wiggs. The conflicts of interest and self-dealing were only exacerbated by Primarius' unduly high billing rates and hours allegedly billed. Sietsema also knew her co-fiduciary Miller owned and was President of Primarius. Despite these obvious conflicts of interest, she did not disclose them to the District Court or the beneficiaries of the Wiggs Estate so that they could be addressed before damage to the Estates was done. Sietsema paid the Primarius' bills without question and acquiesced to her and Miller's unearned and duplicative fiduciary fees. Moreover, Sietsema was aware of Miller taking Estate monies for his own purposes. Putting her own job and income above her duty to the beneficiaries and her duty as an officer of the court, ***33** Sietsema did not stop these actions or disclose them to the beneficiaries and the District Court as her duty required. (Trial Findings, ¶¶ 22(b), 23(b) (A.Add.4)).

4. Sietsema's duty not to delegate her fiduciary duties

One of the "fundamental" precepts of fiduciary law prohibits fiduciaries from delegating their fiduciary duties, absent express authority to do so in the instrument. SCOTT ON TRUSTS, § 171 at 437. "A [fiduciary] cannot properly commit the entire administration of the [estate] to an agent or [co-fiduciary] unless [s]he is permitted to do so by the terms of the [will]." RESTATEMENT (SECOND) OF TRUSTS § 171, cmt. c (1992). While a fiduciary can delegate specific tasks, the fiduciary cannot delegate her fiduciary duties to administer the estate in the best interest of the beneficiaries. Id. at cmt. d; SCOTT on Trusts, §171.1 at 439. If the fiduciary delegates the administration of an estate, the fiduciary is personally liable for such damages caused by that delegation. Id. at 441. A fiduciary who is not willing to undertake the fiduciary obligations owed to the beneficiaries must immediately seek permission from the court to resign. Id.

Here, the District Court properly held Sietsema to her fiduciary duties.

5. Sietsema's few objections to the District Court's factual findings are unsupported and ignore the underlying facts relied on by the District Court

In her brief, Sietsema tries to break down the individual damage findings of liability against her in an effort to try to avoid having all of her actions and inactions considered together. However, breaking these actions out does not diminish the soundness of the District Court's findings or reasoning.

***34 a. The District Court Did Not Err In Holding That Sietsema Breached Her Fiduciary Duty in Allowing The Wiggs Estate to Overpay Primarius $08,519.61**

Sietsema does not directly address most of the District Court's findings supporting its decision, but she disputes the District Court's findings that she had a financial incentive for Primarius to perform work for the Wiggs Estate. (Appellant's Brief at p. 24). This assertion is directly contradicted on the same page of her own brief, in which she argues she could not stop this misconduct "given her employment by Miller." (Id.) The District Court's conclusion that she had a financial interest in Primarius performing, billing and collecting on its work for the Wiggs Estate to insure her ongoing employment at Primarius is well-supported.

Sietsema further argues, without any authority, that it was "untenable" as a matter of law for the District Court to find that she should have contacted the District Court to address the conflicts of interest, self-dealing and mismanagement. (Appellant's Brief at 25). The District Court is the finder of what is reasonably prudent conduct and its conclusion was also supported by McCool's testimony and the Restatement (Second) Trusts § 184, comment c (1992). It is well established that a co-fiduciary can appeal to the Court for instructions regarding the administration of an estate or to redress wrongs done to the estate. What Sietsema found untenable was that she needed to put the interests of the Wiggs Estate's beneficiaries ahead of her own in order to act as a fiduciary.

Finally, Sietsema apparently argues it was error to consider professional fiduciary Terrence McCool's testimony because McCool has never acted as a co-fiduciary with his ***35** employer. (Appellant's Brief at 25).[9] At most, the fact that McCool never put himself into the obvious conflict of interest situation in which Sietsema put herself goes to the weight of McCool's testimony; it is not a basis for excluding McCool's testimony.[10] The fact McCool has not put himself in a conflict of interest situation in his 25 years of acting as a court-appointed fiduciary should only lend credibility to his testimony. (Tr. 343, 350-51, 356-57). Sietsema's argument fails to recognize that she is held to the objective standard of a reasonably prudent person and that fiduciaries are obligated to resolve conflicts of interest to avoid damaging the estates they have agreed to serve. Restatement (Second) of Trusts, § 174, cmt. a (1959).

b. The District Court Did Not Err In Holding That Sietsema Breached Her Fiduciary Duty in Allowing The Wiggs Estate to Pay Her and Miller's Additional Fiduciary Fees ($43,000)

Sietsema does not present any citation to the record showing that the District Court's findings are unsupported, but again argues she cannot be held responsible for her actions and inactions because of her conflict of interest as an employee of Primarius. (Sietsema's Brief at 19-20). In making this argument, Sietsema does not dispute that she knew the additional fiduciary fees paid to her and Miller were unearned and duplicative of compensation the Wiggs Estate paid to Primarius for work performed by her and Miller at rates exceeding what professional fiduciaries charge in Minnesota. She agrees that there are no documents supporting the calculation of these additional fiduciary ***36** payments.[11] Further, she does not dispute that she knew Miller made personal loans to himself from the Estates, which she did not report to either the beneficiaries or the Court. While Sietsema claims she had no authority to object to the bonus fiduciary fees she and Miller received, she takes the position that the Court as a matter of law cannot force her to return her ill-gotten gain. Such is the brazen indifference Sietsema shows for Wiggs' testamentary intent and the interests of Wiggs Estate's beneficiaries. The District Court's determination is well within its discretion and should be affirmed.

C. The District Court Did Not Clearly Err in Finding Sietsema Must Refund the $5,000 She was Paid as a Purported "Gift" from the Neuman Estate

The District Court is well within its discretion to determine Sietsema must compensate the Estates for the additional $5,000 she received as a fee or gift from the Neuman Estate. Sietsema does not dispute the District Court's findings that she did no work for the $5,000 and that it was a gratuitous payment to her. (Trial Finding ¶¶ 24(b), 45 (A.Add.5, 8-9); Appellant's Brief at 17). She received the payment while she was a fiduciary of the Wiggs Estate, which was the sole beneficiary of the Neuman Estate. As a fiduciary of the Wiggs Estate, she chose to keep this inappropriate payment. The District Court also correctly notes that these interrelated Estates were commingled and ***37** administered together. (Trial Finding at ¶ 42 (A.Add.8). [12] Even the submitted Neuman Accounting shows a relationship between the two Estates regarding the $5,000: "repay for advanc (sic) to Neuman Est by paying Wiggs Bill to Liz Sietsema" (R.A.64). [13]

While admitting she did not earn the $5,000 payment, Sietsema still perversely claims she is entitled to keep it. First, she argues it was a gift. Sietsema, however, was not a beneficiary of the Neuman Estate or the Wiggs Estate. There is no good faith basis to uphold a gift that is contrary to the express directions of testator Neuman, let alone to someone who was purportedly working at the direction of the personal representative of the Estate and who was already fully paid for that work. Even worse, $5,000 should have been paid to the Wiggs Estate, of which Sietsema was indisputably a fiduciary. ***38** Fiduciaries are not beneficiaries of the estates they serve and taking gifts from them without express testamentary authority can only be considered self-dealing.

Sietsema's fallback argument is that if the $5,000 was inappropriate, the District Court cannot compel her to return it, but can only order Miller to repay it. (Appellant's Brief at 17-18). The only authority Sietsema can muster to support her right to keep estate monies she did not earn is the last sentence of Minn. Stat. §524.3-712, which provides that the rights of purchasers and others dealing with the personal representative shall be determined as provided in Minn. Stat. § 524.3-713-714. Minn. Stat. § 524.3-713 expressly states transactions involving the personal representative's agent, or any transaction in which there is a substantial conflict of interest is voidable unless the will authorizes it or the transaction is approved by the court after notice to the interested parties. Similarly, Minn. Stat. § 524.3-714 protects good-faith purchasers of estate assets and those who in good-faith deal with the personal representative. Here, no good faith purchaser stands before the Court; only an insider and fiduciary of a related estate, with obvious conflicts of interest, seeking to keep an unauthorized gift from the Estates that was concealed from both the District Court and the beneficiaries. The District Court did not err in holding Sietsema should not profit from an inappropriate gift or fee from the Estates

While Sietsema claims to have no idea why Miller gave her $5,000, Miller's testimony is that they "talked about everything" and that both of them thought the fees were appropriate and they "simply divided them up." (Tr. 29-30, 111-112). Putting aside Sietsema's efforts to shoehorn herself into the role of good-faith purchaser, as a matter of ***39** equity, Sietsema has no right to this money. "To establish an unjust enrichment claim, the clamant must show that the defendant has knowingly received or obtained something of value for which the defendant 'in equity and good conscience' should pay." ServiceMaster v. GAB Business Services, Inc., 544 N.W.2d 302, 306 (Minn. 1996). The District Court's finding that Sietsema wrongly received $5,000 and is liable for its repayment to the Estates is strongly grounded in the record, the law, and in equity.

III. SIETSEMA'S POSITION THAT SHE HAD NO FIDUCIARY DUTIES BECAUSE OF HER EMPLOYMENT AT PRIMARIUS HAS NO BASIS AT LAW

Ignoring the trial admissions that she had fiduciary duties (Tr. at 108, 259, 269), Sietsema's brief does not even acknowledge she had such duties to either Wiggs, as an attorney-in-fact, or the Wiggs Estate, as a personal representative. Instead, Sietsema implicitly argues that she has no fiduciary duties to the Wiggs Estate because she had a higher duty of subservience to her employer to act in its interests, including those interests that were detrimental to the Wiggs Estate. (Appellant's Brief at 24-25). Such a claim of immunity from liability turns the law of fiduciary duty on its head.

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Minnesota law holds that "if two or more persons are appointed co-representatives and unless the will or the court provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate." Minn. Stat. § 524.3-717 (2011). Therefore, Sietsema, as a co-personal representative, had an equal obligation to administer the Wiggs Estate and to comply with her fiduciary duties to the beneficiaries of the Wiggs Estate. *See also In re Russ,* No. BKY 4-87-2332, ***40** 1996 Bankr. LEXIS 119 at *6-*7 (Bankr. Minn. Feb. 7, 1996) [14] ("If joint or co-personal representatives are appointed, it is the general rule that each stands upon equal ground and the concurrence of both is required with respect to all acts connected to the administration and distribution of the probate estate.").

Minnesota has never accepted Sietsema's blanket assertion that she was a "subordinate" personal representative and therefore not held to the standards of a fiduciary. (Appellant's Brief at 25). Sietsema's appointment as a fiduciary was not limited in any way by Wiggs' Will or by the District Court. Similarly, Sietsema never disclosed to the District Court or beneficiaries that she intended to subordinate the best interests of the Wiggs Estate to her and her employer's interest. (A.App.8). Sietsema was a full co-fiduciary and was properly held to account by the District Court as such.

Sietsema's argument is directly contrary to black letter fiduciary law. She essentially argues her status as an employee of Primarius effectively absolved her from any responsibility she had for acting as a fiduciary. Such a position is directly contrary to the "fundamental" precept that a personal representative cannot delegate her fiduciary duty. Scott On Trusts, § 171 at 437. Similarly, Sietsema's argument flies in the face of her "most fundamental duty" of loyalty to the beneficiaries of the Wiggs Estate to administer the Estate in their interests, which clearly includes: not engaging in self-dealing for herself and her employer; avoiding and disclosing conflicts of interest; and acting in the best interests of the Estate. Scott on Trusts, §170 at 311; In re Matter of ***41** the Revocable Trust of Margolis, 731 N.W.2d at 546. Finally, Sietsema argues that she cannot be held to the long-accepted objective standard of a reasonably prudent person, but instead must be held to her own subjective standard that does not question her conflicts of interest, self-dealing, and willingness to allow the Estates to be administered for the interests of her employer and herself. Sietsema's argument requires the Court to disregard existing fiduciary law.

Sietsema's rationale for this radical step outside the law is that she had a higher duty to her own pocketbook and maintaining her employment than she had to the beneficiaries of the Wiggs Estate. To support this argument she cites a case holding that that employers and employees may have unequal bargaining power in negotiating restrictive covenants in employment agreements. (Appellant's Brief at 21). The present case does not involve the negotiation of an employment agreement where both parties act in their own interests, but rather the discharge of a fiduciary duty to act in the best interests of the beneficiaries of the Wiggs Estate. Sietsema can cite no case supporting her position that she is immune from liability as a personal representative because she thought her employer expected her to put its interests over and above her fiduciary duties as an attorney-in-fact or personal representative. Such a position has been so roundly rejected that as of the 1940s the Supreme Court felt it did not need to restate why self-dealing and conflicts of interest subject fiduciaries to liability. In re Trust Created by Anneke, 38 N.W.2d at 180. The law of fiduciary duty makes it clear that a fiduciary's role is not to put her hand out and take money from the Estate; rather it is a fiduciary's duty to put her foot down and stop any impropriety. Sietsema did not perform her ***42** fiduciary duty and overturning the District Court decision here would make a mockery of the concept of a fiduciary.

Sietsema mistakenly relies on S. Sur. Co. v. Tessum, 178 Minn. 495, 228 N.W. 326 (1929) in support of her argument that she cannot be held liable as a fiduciary as a matter of law. Tessum involved sureties of two brothers who were co-trustees of a trust fund. One brother embezzled from the fund. The other brother lived far away, had no contact with the embezzler, no knowledge of the embezzler's actions, was not involved the management of the trust and did not review or sign the accountings put forward by the embezzler. Id. at 328. Further, it was undisputed that the out-of-town brother did not "benefit of anything not rightly his." Id. The surety of the embezzler brought an action for contribution and subrogation against the "out of town brother" and his surety. Id. at 327. The Tessum court expressly noted that it is "a very different question" in comparing a beneficiary's rights against a fiduciary as opposed to the rights of contribution or subrogation between fiduciaries:

> As to the ward, [the out of town brother] and [embezzler] were joint tortfeasors. But as between themselves [out of town brother] was not a participant in the wrong.

Id. at 329.

***43** The issue in *Tessum* therefore was not whether the innocent co-fiduciary was liable to the estate, the issue was whether the embezzling fiduciary could seek contribution against the innocent fiduciary. If anything, *Tessum* supports the Estates' position here. [15]

Even if Tessum was applicable to this case, Sietsema was not "out of town" like the brother in Tessum. She was active in the management of the Estates. She approved and paid Primarius' bills, even though she knew Primarius was not qualified or willing to provide services to the Estates at appropriate rates and hours. (R.A.86, 105, 110, 122, 129-130, 144, 150, 165). Despite watching Primarius and Miller engorge themselves on the Estates' assets, she did nothing to stop the dissipation of the Estates, but in fact contributed to it. Sietsema reconciled the Estates' bank records confirming the self-dealing and signed the Wiggs Estate checks as its personal representative, which paid for this maladministration. (R.A.179-200). She further allowed the Estates to pay unwarranted additional fiduciary fees to herself and Miller. As the record revealed, Miller and Sietsema discussed everything. (Tr. at 29). Unlike the out-of-town brother in Tessum, Sietsema was an active participant in the maladministration, with direct conflicts of interest, and chose to breach her fiduciary duties to the beneficiaries by putting her own interests above the Wiggs Estate's.

***44** Similarly, Sietsema's foreign case law is miscited and inapplicable to the present case. In *In re Estate of Chrisman,* 746 S.W.2d 131, 135 (Mo. Ct. App. 1988), the trial court made findings that both co-fiduciaries had breached their fiduciary duties and were liable for the damages caused by their breaches of their fiduciary duties. What was at issue in Chrisman was whether one fiduciary would be liable for the actions of the other fiduciary beyond her own independent breaches of fiduciary duty: "In the instant case, [co-fiduciary] does not complain about her liability, only the extent of it." *Id.* The Chrisman court then turned to the question of whether the co-fiduciary would be liable for the other co-fiduciary's liability, applying all five scenarios for such joint liability set forth in Section 224 of the Restatement (Second) of Trusts discussed more fully below. [16] *Id.* at 135. Contrary to Sietsema's argument to this Court, the *Estate of Chrisman* co-fiduciaries were each held to have independently breached their fiduciary duties and then also held liable for each other's breaches of fiduciary duty.

Sietsema's other foreign authority, *In re Estate of Witherill,* 828 N.Y.S.2d 722 (N.Y. App. Div. 2007), also does not support her position. *In Witherill,* an attorney who had represented the decedent as a lawyer and investment adviser had himself and his administrative assistant appointed as co-personal representatives of decedent's estate. Reviewing the administration of the estate, the district court ordered a refund of all of the lawyer's personal representative fees and surcharged the lawyer for damages to the estate. The district court chose not to surcharge the administrative assistant, finding no proof that the administrative assistant was aware of or participated in the lawyer's ***45** malfeasance. *Id.* at 726. The estate beneficiary then appealed to have the personal assistant held jointly and severally liable for the surcharges. The appellate court affirmed that the district court did not **abuse** its discretion in not holding the administrative assistant jointly liable for the surcharge imposed upon the lawyer. *Id.*

Unlike the district court in Witherill, the District Court here weighed the evidence and found Sietsema breached her fiduciary duties to the Wiggs Estate. The District Court further found Sietsema was aware of Miller's malfeasance, did not stop it and contributed to it. Based on those findings the District Court held Sietsema liable for the damages caused by that malfeasance to the Wiggs Estate and refused to allow her to keep any bonus or fiduciary fees on top of her Primarius' salary. Like the appellate court in Witherill, this Court should affirm the District Court's findings because they were not an **abuse** of discretion. Moreover, the Witherill court points out that the decision of the New York trial court was an anomaly, but it was still within the trial court's discretion. Id. at 726, citing Zimmerman v. Pokart, 662 N.Y.S.2d 5, 7 (N.Y. App. Div. 1st Dep't 1997); see also In re Rothko, 379 N.Y.S.2d 973 (N.Y. Sur. Ct. 1975) (holding that even though the defendant was a "secondary" executor of an estate, it still had a duty to stop the executors who had more expertise from self-dealing). The District Court's decision here is no anomaly, but a basic application of black letter fiduciary law and should be affirmed.

***46 IV. SIETSEMA IS ALSO LIABLE FOR MILLER'S BREACHES OF FIDUCIARY DUTY AS A CO-FIDUCIARY.**

In addition to her direct breaches of fiduciary duty, Sietsema is also liable as co-fiduciary of Miller. In general, parties are jointly and severally liable in Minnesota where two or more persons act in "a common scheme or plan that results in injury." Minn. Stat. § 604.02 (2011). More specific to fiduciary law, a co-fiduciary is liable for another co-fiduciary's actions or inactions as set forth in the Section 224 of the Restatement (Second) of Trusts which provides:

(1) Except as stated in Subsection (2), a trustee is not liable to the beneficiary for a breach of trust committed by a co-trustee.

(2) A trustee is liable to the beneficiary, if he

(a) participates in a breach of trust committed by the co-trustee; or

(b) improperly delegates the administration of the trust to the co-trustee; or

(c) approves or acquiesces in or conceals a breach of trust committed by the co-trustee; or

(d) by failure to exercise reasonable care in the administration of the trust, has enabled the co-trustee to commit a breach; or

(e) neglects to take proper steps to compel the co-trustee to redress a breach of the trust.

(1959). See also SCOTT ON TRUSTS, § 224 at 404-405. If Sietsema is found to be liable as a co-fiduciary of Miller, Sietsema is jointly and severally liable for Miller's actions. Restatement (Second) of Trusts § 258, cmt. a (1959); Scott on Trusts § 224.6 at 413-414.

***47** Here, the record reflects Sietsema is liable as a co-fiduciary under all five provisions of §224(2) of the Restatement. Participation in the breach of a co-fiduciary includes acting on the direction, suggestion or judgment of another fiduciary. SCOTT ON TRUSTS, § 224.1. Sietsema admits she did just that, satisfying §224(2)(a). As to improper delegation of her fiduciary duty (§224(2)(b), Sietsema's whole defense is that she delegated her fiduciary role to her co-fiduciary, subjecting herself to both independent liability and liability as a co-fiduciary. SCOTT ON TRUSTS, § 224.2. Further, the District Court properly concluded from the record that Sietsema acquiesced in the overpayments, gratuitous payments, misappropriation of assets, conflicts of interest and self-dealing and concealed all of it from the Court and the beneficiaries, satisfying §224(2((c) and (e). Finally, the District Court found Sietsema exercised a lack of reasonable care in carrying out her duties, satisfying § 224(2)(d). The District Court's findings of Sietsema's liability are supported by the law of joint and several liability for co-fiduciaries.

In arguing she cannot be held liable for co-fiduciary Miller's breaches of fiduciary duty, Sietsema only discusses Section 224(1) of the Restatement of Trusts, leaving out Section 224(2), which contains all of the grounds for holding a co-fiduciary liable. Sietsema cites the Missouri decision of *In re Estate of Chrisman* for the proposition that co-fiduciaries must act together for joint liability, neglecting to mention that *Chrisman* cites and discusses all five grounds for holding a co-fiduciary liable for the acts of other co-fiduciaries. *In re Estate of Chrisman,* 746 S.W.2d at 135. Moreover, the co-fiduciary in *Chrisman* did not dispute her individual liability for breach of fiduciary duty and the ***48** damages caused by that liability. The remaining cases cited by Sietsema all involve co-fiduciaries with no knowledge or involvement of their co-fiduciaries' misconduct. *See Tessum,* at 499; *In re Estate of Witherill,* 828 N.Y.S.2d at 726. The District Court's findings confirm Sietsema was in the middle of the scheme that undisputedly damaged both Estates. No case cited by Sietsema holds that a district court **abused** its discretion in holding a party like Sietsema accountable to the estate she promised to serve by putting its beneficiaries' interests above her own.

The most apt Minnesota case is *White v. Martin,* 266 F.Supp.2d 1029 (D. Minn. 2003), in which the United States Federal District Court first assessed the co-fiduciary administrative assistant's liability for breach of trust and then her liability as a co-

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fiduciary, finding liability where the administrative assistant had direct involvement or knowledge of the inappropriate acts of her co-fiduciary.

There is no authority under which the District Court's well-reasoned and detailed findings of liability should be overturned.

V. SIETSEMA'S PUBLIC POLICY ARGUMENT IS SIMPLY INCREDIBLE

Finally, Sietsema boldly tells this Court that affirming liability against her "will be a chilling effect on whether anyone would willingly serve as a co-personal representative." (Appellant's Brief at 23). The Court should gravely consider the policy implications of a reversal here. A reversal here would abrogate hundreds of years of fiduciary law: It would tell personal representatives that it is acceptable to put their own concealed self-interests above the interests of the estate's beneficiaries.

***49** Here, a woman sought to leave her and her friend's life-savings to three charities. They did not leave their life-savings to Miller and Sietsema or to fund Miller's promotions company. By affirming, the Court can use this shocking example to remind citizens of this State that a personal representative is a fiduciary and an officer of the court, tasked with a high level of trust to act in the best interests of the beneficiaries named by the decedent, and not in the fiduciary's own personal interests. If an affirmance deters people who cannot discharge that trust from becoming fiduciaries, the public policy of this State will be enhanced.

*50 CONCLUSION

Based on the aforementioned, the District Courts well documented and reasoned July 29, 2011, findings, surcharge and order for judgment should be affirmed as an appropriate exercise of the District Court's discretion. The District Court's decision is well supported by the evidentiary record and black letter fiduciary law. Sietsema's position encourages a radical departure from the basic obligations of a fiduciary that this Court has no sound basis to follow. Sietsema failed in her charge as a fiduciary, and the charitable beneficiaries of the Wiggs Estate should be able to recoup the losses caused by her misconduct.

Appendix not available.

Footnotes

1 The Neuman Estate and Wiggs Estate are collectively referred to as the "Estates".

2 On August 5, 2011, the District Court heard petitions pertaining to the payment of the attorney Miller and Sietsema hired for Wiggs and her Estate, Ronald Kopeska. Kopeska's additional fee claim of $27,312.50 was denied and Kopeska was ordered to reimburse the Wiggs Estates $16,260.17 for fees wrongfully paid by Miller and Kopeska out of the Estates.

3 Miller used his fiduciary status as attorney-in-fact to retain his attorney, Kopeska, to draft Wiggs' Codicil, the invalid Kitty Trust and to represent the Neuman Estate. (Tr. at 89; Ex. 5).

4 R.A. refers to Respondents' Appendix.

5 Additionally, Miller and Sietsema retained attorney Kopeska to represent Wiggs and the Wiggs Estate, even though Kopeska had very little experience in probate and trust matters and was suspended from practicing law for violation of ethical rules at least once prior to his engagement, and again after he was engaged to represent Wiggs and the Estates. (Ex. 6). The "Kitty Trust" that Kopeska prepared was invalid under Minnesota law, causing unnecessary expenses to correct this error. (Tr. at 118). Further at Kopeska's rate of $250 per hour his bills indicate he spent over 120 hours preparing two applications for formal probate, the defective Neuman and Wiggs Inventories and Neuman Final Account and attended three hearings. Miller and Sietsema did not investigate Kopeska's experience and did not question his bills before Sietsema paid them. (Tr. 118-119, 275-276). McCool testified that he would have seriously questioned Kopeska's bills. (Tr. at 363). In a subsequent hearing, the District Court reduced Kopeska's fees and ordered a refund. (District Court Order dated 9/22/11).

6 The District Court found Sietsema and Miller could not demonstrate that an appropriate amount of interest was paid, but it accepted the $1,000 payment as sufficient. (Trial Finding, ¶ 29 (A.Add.6).

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7 Sietsema's Appendix failed to include all of the pages of Trial Exhibit 10 (Neuman Estate Accounting). In particular Sietsema's Appendix did not include the schedule identified in that accounting as Ex. 12, which references the $5,000 payment. (R.A.64). Moreover, Sietsema did not include the remaining pages that confirm Ex. 12 to the accounting was not prepared or approved by the accountant who prepared the rest of the accounting. (R.A.65). Respondents have provided a complete copy of Trial Exhibit 10 as a part of their appendix. (R.A.54-70).

8 Minnesota has generally adopted the Restatement (Second) of Trusts. *See ex. Kohler v. Fletcher,* 442 N.W.2d 169, 171-172 (Minn. Ct. App. 1989).

9 Sietsema also miscites her own testimony as McCool's testimony. (Appellant's Brief at 25 citing Tr. 245).

10 Sietsema did not object to McCool's testimony at trial and as such cannot object to it here. *Thiele v. Stich,* 425 N.W.2d 580, 582 (Minn. 1988).

11 Under Minn. Stat. §524.3-719 (2011), the court is to consider three non-exclusive factors in allowing personal representative compensation: time and labor required, complexity and novelty of problems involved, and the extent of responsibilities assumed and results obtained. The District Court found that the lack of documentation made it impossible to assess the claimed fees. Further, the administration of the Wiggs Estate was not complex and the administration was poor, resulting in the payment of excessive and unnecessary fees and self-dealing. (Trial Findings, ¶¶ 22-28, 89-92 (A.Add.4-6, 16-17).

12 The only District Court factual finding Sietsema claims is not supported by the record is not even a factual finding in the District Court's Order. (Appellant's Brief at 17 n. 17). The District Court overruled an evidentiary objection by Sietsema's counsel, seeking to stop Miller from testifying as to whether Sietsema objected to the payment of $30,000 in additional fiduciary fees to Miller. (Tr. at 113-115). Those specific fees are not at issue in this appeal as Sietsema was found not liable to repay them to the Estates. (Trial Finding, ¶ 92 (A.Add.17)). In making its evidentiary ruling, the District Court correctly noted that the Wiggs Estate is the sole beneficiary of the Neuman Estate, and Sietsema was a fiduciary of the Wiggs Estate. (Tr. at 115). The District Court's observation in making its evidentiary ruling is well supported and not properly before the Court in this appeal. *Sauter v. Wasemiller,* 389 N.W.2d 200, 201 (Minn. 1986)(evidentiary rulings must be preserved through a motion for new trial).

13 Sietsema does not dispute the accounting of the $5,000 payment is inaccurate or evidence of an intent to mislead the Court, but argues it does not make Sietsema a fiduciary of the Neuman Estate. (Appellant's Brief at 17-18). The District Court, however, did not find the accounting made Sietsema a fiduciary of the Neuman Estate. Sietsema ignores the District Court's uncontested finding that the Estates were comingled and administered together as one estate and Sietsema was significantly involved in the comingled administration of the Estates.

14 A copy of *In re Russ,* No. BKY 4-87-2332, 1996 Bankr. LEXIS 119 (Bankr. Minn. Feb. 7, 1996) is attached to Respondent's Appendix as R.A.176).

15 Sietsema also cites the unpublished decision of Bouchard v. Tapper, Nos. C4-87-1191 and C6-87-1192, 1988 Minn. App. LEXIS 82 (Minn. Ct. App. Feb. 16, 1988), which is only Minnesota decision that ever cited Tessum. The Bouchard decision actually supports the Estates' position, holding a co-fiduciary is liable for neglecting its fiduciary duties, including its passive activities that are "far short of active participation in the conversion of trust funds by a coguardian." *Id.* at *6. The Bouchard court found that there was evidence of negligence on behalf of the co-trustee, but dismissed the case because the trial court found no damages. *Id.* at *7. Here, the District Court's findings of damages are unchallenged.

16 *See infra* at Argument IV.

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