IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-CA-00055

BARBARA ANN LYNCH — APPELLANT

VERSUS

CURTIS SUMMERLIN — APPELLEE

BRIEF OF THE APPELLANT

(On Appeal from the Chancery Court of Madison County, Mississippi)

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following 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. James M. Crews, III and the law firm of Herring, Long & Crews, P.C., attorneys for the Appellant.
2. Barbara Ann Lynch, the Appellant.
3. Durwood E. McGuffee, Jr., attorney for the Appellee.
4. Curtis Summerlin, the Appellee.
5. Honorable William J. Lutz, former Madison County Chancery Judge

BARBARA ANN LYNCH, APPELLANT

By: _____

JAMES M. CREWS, III, ATTORNEY FOR THE APPELLANT

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BARBARA ANN LYNCH, APPELLANT

By:_____
JAMES M. CREWS, III, ATTORNEY FOR THE APPELLANT

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STATEMENT OF THE CASE

I. NATURE OF THE CASE. This case began with the appointment of the Appellant, Barbara Ann Lynch, as the Administratrix of the Estate of Grover S. Summerlin, Jr., deceased, who died on January 4, 2004. The decedent was the father of Barbara Ann Lynch, and her brother, Appellant Curtis Summerlin. Letters of Administration were issued to Barbara Ann Lynch on March 10, 2005. (R.E. 1). On June 1, 2005, the Administratrix filed a Summary Petition to Discover Estate Assets pursuant to *Miss. Code Ann.* §91-7-103 (1972) (as amended). In her Summary Petition to Discover Estate Assets, Barbara Ann alleged, *inter alia*, that Curtis Summerlin had concealed and wrongfully withheld certain assets of the estate and that he had failed and refused to identify those assets, despite prior requests to do so. Barbara Ann requested that the Court compel Curtis to answer under oath all facts known to him concerning the assets of the estate and to deliver the estate assets in his possession to Barbara Ann pending the conclusion of the administration of the estate. (R.E. 3). The hearing on the Summary Petition

for Discovery of Estate assets was scheduled on June 24, 2005. However, on June 20, 2005, approximately a year and a half after his father's death, Curtis filed a Petition for Probate of Last Will and Testament and for Issuance of Letters Testamentary, which included a copy of the decedent's Will. (R.E. 6). In addition, Curtis also filed a Response to Summary Petition to Discover Estate Assets, claiming that at the time of his death, Grover S. Summerlin, Jr. owned no real property and that his estate consisted solely of items of personal property. (R.E. 13).

Following the service of the Response to Summary Petition to Discover Estate Assets, Barbara Ann filed her Petition to Set Aside Conveyance of Real Property and for Other Relief on July 21, 2005. (R.E. 16). In her Petition to Set Aside Conveyance of Real Property and for Other Relief, Barbara Ann alleged that on August 29, 2003, the late Grover S. Summerlin, Jr. purportedly conveyed certain real property lying and being situated in Madison County, Mississippi to Appellant Curtis Summerlin, by Quitclaim Deed (referred to throughout this Brief as the "Quitclaim Deed") recorded at Book 541, Page 149 of the land deed records of Madison County, Mississippi. (R.E. 19). The basis for the request to set the Quitclaim Deed (R.E. 19) aside was (1) that at the time of the execution of the Quitclaim Deed, Grover S. Summerlin, Jr. lacked the requisite legal capacity necessary to effect a valid legal conveyance; (2) that there was no consideration paid for the subject conveyance; and (3) that the subject conveyance was the product of undue influence, as the late Grover S. Summerlin, Jr. always intended for his children to receive equal shares of the real property described in the Quitclaim Deed. (R.E. 16).

On July 29, 2005, the Court entered a Decree Admitting Last Will and Testament to Probate and Granting Letters Testamentary. Letters Testamentary were also issued and the newly appointed Executor filed an Inventory on that day. (R.E. 21 - 23).

On August 19, 2005, Curtis Summerlin filed his Answer to Petition to Set Aside Conveyance of Real Property. (R.E. 27). This Answer generally denied the allegations of the Petition.

Following written discovery, as well as the depositions of the parties and other witnesses, Barbara Ann Lynch filed a Motion to Amend Petition to Set Aside Conveyance of Real Property. This Motion requested leave to amend the original Petition to add a claim that certain conveyances within the Quitclaim Deed were void due to inaccurate and vague legal descriptions and that the Court should enter a Declaratory Judgment and / or other findings to that effect, as well as adjudicating that the property affected thereby remained in the Estate of Grover S. Summerlin, Jr. (R.E. 30). On September 28, 2006, the Court entered an Agreed Order Granting Motion to Amend Petition to Set Aside Conveyance of Real Property. (R.E. 35).

Curtis Summerlin filed an Answer to Amended Petition to Set Aside Conveyance of Real Property and Counterclaim for Reformation of Deed on October 23, 2006. The Counterclaim requested that the Court reform the Quitclaim Deed to reflect a conveyance of the ***Northwest*** Quarter of Section 4, Township 9 North, Range 5 East, Madison County, Mississippi, which the decedent actually owned, rather than the ***Northeast*** Quarter of Section 4, Township 9 North, Range 5 East, Madison County, Mississippi described in the Quitclaim Deed. The basis for the Counterclaim was an allegation that the incorrect description was the product of a mistake, or "scrivener's error," and that the decedent actually intended to convey all of his land to Curtis Summerlin. (R.E. 39). On October 24, 2006, Barbara Ann Lynch filed her Answer to Counterclaim for Reformation of Deed, which set forth a general denial of the allegations in the Counterclaim. (R.E. 44).

The trial of this action was held on October 26, 2006. Following the conclusion of Barbara Ann Lynch's case in chief, counsel for Curtis Summerlin immediately called his first

witness. Before that witness entered the courtroom, the Trial Judge informed him that "I expected you to make a motion." (T. 155). Mr. Summerlin's counsel then presented an *ore tenus* "motion for a directed verdict", which the Court characterized as a motion to dismiss. (T. 155-56). The parties then presented their respective arguments for and against the motion to dismiss. (T. 156-59).

Following arguments of counsel, the Court immediately issued a bench opinion dismissing Barbara Ann Lynch's Amended Petition to Set Aside Conveyance of Real Property and for Other Relief and granting Curtis Summerlin's Counterclaim for Reformation of Deed. (R.E. 56; T. 159-66). On December 26, 2006, the Court entered an Order memorializing the terms of the bench opinion. (R.E. 46).

II. STATEMENT OF FACTS. The decedent, Grover S. Summerlin, Jr., was a resident citizen of Madison County, Mississippi, who died on January 4, 2004. At the time of his death, Mr. Summerlin was nearly 91 years old. (T. 42). He had two children, who are the Appellant, Barbara Ann Lynch and the Appellee, Curtis Summerlin. Mr. Summerlin was married to Alton Summerlin at the time of his death. (T. 9-10).

Grover S. Summerlin, Jr. was the owner of a 320-acre tract located in Sections 4 and 5, Township 9 North, Range 5 East, Madison County, Mississippi, which will be referred to throughout this Brief as the "subject property." The events in this action revolve around the procurement, execution, delivery and effect of the Quitclaim Deed executed by Grover S. Summerlin, Jr. on August 29, 2003. By this Quitclaim Deed, the decedent purportedly conveyed the entire subject property to his son, Curtis Summerlin. On the same day, the decedent executed a Last Will and Testament that bequeathed most of his personal property and the remainder of his real property in equal shares to his wife, Alton Summerlin, his daughter, Barbara Ann Lynch

and his son, Curtis Summerlin. (R.E. 9). It is noteworthy that the Will had basically the same effect as if Mr. Summerlin had died intestate.[1]

The procurement of the Quitclaim Deed began in or about June or July of 2003. (T. 33). According to Curtis Summerlin, one day, his father suddenly stated that he wanted to see a lawyer. The senior Summerlin was not acquainted with any attorneys. Curtis suggested that they retain attorney Steve Ratcliff, who was practicing law in Jackson, Mississippi. (T. 18). Mr. Ratcliff had represented Curtis in at least three prior real estate transactions. (T. 18-20). However, Ratcliff had never met or represented Grover S. Summerlin, Jr. before the series of events at issue in this action. (T. 55).

Curtis called Mr. Ratcliff for an appointment, which was scheduled that same day. Curtis then drove his father to Ratcliff's office. (T. 21-23). This purpose of this meeting was to discuss the preparation of the Quitclaim Deed, as well as the Will. According to both Curtis Summerlin and Steve Ratcliff, Curtis was present during at least part of this initial consultation. (T. 23; 56-57). According to Curtis, it was during this meeting that Grover Summerlin announced an intention to convey all of his land to Curtis Summerlin. (T. 23). This plan was a surprise even to Curtis Summerlin, who admitted that throughout his life, he had assumed that he and sister Barbara Ann would be left equal shares of the land when their father died. (T. 28).

Barbara Ann Lynch was not present, nor had she been notified of this meeting. Curtis admitted that he never mentioned the circumstances surrounding the Quitclaim Deed or the Will to his sister until after the death of Grover S. Summerlin, Jr. (T. 51)

Following the first meeting at Ratcliff's office, Curtis Summerlin visited either the Madison County Courthouse or Tax Assessor's office, where he obtained the legal description that would be utilized in the preparation of the Quitclaim Deed. (T. 25; 38). Curtis wrote the

[1] The validity of Last Will and Testament is not at issue in this appeal.

land description down on a piece of paper and delivered it to Mr. Ratcliff, who subsequently drafted the Quitclaim Deed and the Will. (T. 52).

On August 29, 2003, Curtis Summerlin again drove Grover S. Summerlin, Jr. to Ratcliff's office. The senior Summerlin executed the Quitclaim Deed and the Will at that time. (T. 26-27).

There is no doubt that Curtis was present in the attorney's office on August 29, 2003, although there was conflicting testimony as to his exact location within the premises. Steve Ratcliff testified that he knew "he [Curtis Summerlin] was there and I know he heard conversations between myself and Mr. [Grover] Summerlin. I would have to assume yes, he knew what was going on." Ratcliff could not remember with certainty whether or not Curtis was actually in the conference room during the execution of the documents, although he admitted that it was "possible." (T. 63). Curtis testified that he was in a hallway just outside the room, but that the door was open and he could see at least part of what was taking place. (T. 26). As before, Barbara Ann Lynch was not present, nor had she been notified of these transactions until after the death of her father. In the words of Curtis Summerlin, the entire series of circumstances was subject to "*confidentiality*." (T. 51).

Following the execution of the Quitclaim Deed, Curtis Summerlin delivered it to the Madison County Chancery Clerk's office, where it was recorded at Book 541, Page 149 of the Madison County land records. (T. 75). Ratcliff's fee for legal services was $300.00, which Curtis Summerlin paid. According to Curtis, his father later insisted on reimbursing him, but Curtis resisted his doing so. (T. 27-28).

Curtis Summerlin admitted that his father and Barbara Ann shared a good relationship throughout his father's life. However, Curtis never once mentioned the series of events that led to an almost complete disinheritance of his only sister until after his father had died, when he

determine if those findings are supported by substantial evidence, whether the Chancellor abused his discretion, was manifestly wrong or clearly erroneous, or whether he applied an erroneous legal standard. *In re Estate of Crutcher*, 911 So. 2d 961, 965 (Miss. App. 2004) (other citations omitted)

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT A CONFIDENTIAL RELATIONSHIP DID NOT EXIST BETWEEN THE DECEDENT AND THE APPELLEE, CURTIS SUMMERLIN.

II. WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND THAT A PRESUMPTION OF UNDUE INFLUENCE EXISTED WITH REGARD TO THE PROCUREMENT OF THE QUITCLAIM DEED.

III. WHETHER THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S MOTION FOR DIRECTED VERDICT AT THE CONCLUSION OF THE APPELLANT'S CASE IN CHIEF.

On August 29, 2003, Grover S. Summerlin, Jr. executed the Quitclaim Deed purportedly conveying 320 acres of land in Madison County, Mississippi to his son, Curtis Summerlin. This Quitclaim Deed was subsequently recorded at Book 541, Page 149 of the land deed records of Madison County, Mississippi. (R.E. 19). One of the pivotal issues in this action is whether the Quitclaim Deed was the product of undue influence, and was, therefore, voidable by the Trial Court.

In order to set a deed aside on the ground of undue influence, the evidence must show that the will and free agency of the grantor were destroyed and that the deed actually reflects the will of the person exerting the influence. *Greenlee v. Mitchell*, 607 So. 2d 97, 105 (Miss. 1992). Said another way, whenever there is relationship between two people in which one person is in a position to exercise a dominant influence upon the former, arising either from weakness of mind or body or through trust, the law does not hesitate to characterize such a relationship as fiduciary

in character. *Holmes v. O'Bryant*, 741 So. 2d 366, 371 (Miss. App. 1999) (citations omitted). Before the Court can scrutinize a facially valid deed, a confidential relationship must be shown. *Id.* The confidential relationship does not have to be a legal one, but may be moral, domestic or personal. *Mullins v. Ratcliff*, 515 So. 2d 1183, 1191-92 (Miss. 1987). In determining the validity of a deed from parent to child, the existence of undue influence depends on the facts and circumstances of the case. *Olmstead v. Olmstead*, 103 So. 2d 399 (Miss. 1958).

Even considering the great deference that must be given to a Chancellor's factual determinations by the Appellate Court, it is respectfully submitted that the Trial Court erred in its determination that a confidential relationship did not exist between the decedent, Grover S. Summerlin, Jr. and his son, Curtis Summerlin.

At trial, as the contestant of the Quitclaim Deed, Barbara Ann Lynch was first to present her case in chief. After presenting her evidence and testimony, Mrs. Lynch's counsel announced that she rested her case. At that point, counsel for Curtis Summerlin immediately called his first witness.

However, before that witness was brought into the courtroom, the Trial Court stated, "Mr. McGuffee, [Curtis Summerlin's attorney] I expected you to make a motion." In response to the Court's suggestion, counsel responded:

> *Okay, your Honor. Your Honor, at this time, we'd ask for a directed verdict on the grounds that the Petitioner has not made out the prima facie case that a confidential relationship existed between Grover Summerlin and Curtis Summerlin.*

The Trial Court responded:

> *So what you're asking the Court is that I dismiss their petition?*
>
> (T. 155)

Following the respective arguments of counsel, the Trial Court immediately ruled from the bench that no confidential relationship existed between Grover S. Summerlin, Jr. and Curtis

Summerlin, and that the Petition to Set Aside Conveyance of Real Property and for Other Relief would be dismissed. (T. 164-65; R.E. 56)

This Court has held that a confidential relationship arises when a dominant, over-mastering influence controls over a dependent person or trust, justifiably reposed. In evaluating the existence of the confidential relationship, this Court has developed a list of elements that should be considered. *See, e.g., Murray v. Laird,* 446 So. 2d 575, 578 (Miss. 1984); *In re Estate of Dabney,* 740 So. 2d 915, 921 (Miss. 1999); *Wright v. Roberts,* 797 So. 2d 992, 998 (Miss. 2001); *In re Conservatorship of Moran*, 821 So. 2d 903, 906-907 (Miss. App. 2002).

These elements and their existence in this action are as follows:

1. *Whether one person has to be taken care of by others.* At trial, there was extensive testimony showing that Grover S. Summerlin, Jr. was very dependent on others to take care of his needs, particularly during the last four or five years of his long life. His wife, Alton, took care of the day-to-day finances. His daughter, Barbara Ann, assisted him at times, particularly after Alton's 2002 stroke. (T. 87). He relied on his wife (T. 130), his daughter (T. 85-86) and his son (T. 13) to drive him to medical appointments. Curtis Summerlin took an increasingly active role in maintaining his father's land, especially during the last few years of his life. (T. 14-15) Very significantly, Grover Summerlin relied on Curtis to select an attorney and to drive him to the attorney's office for the meetings that resulted in the Quitclaim Deed at issue. (T. 17-28).

A caregiver possesses a special opportunity to privately influence the recipient of the care without the "interference" of others. This relationship is undoubtedly the reason why caregiving is one of the elements that the Court must consider when determining the existence of undue influence.

In the present case, the Court noted that several people took care of Grover Summerlin:

> *Whether one person has to be taken care of by others. Yes everybody has admitted that Grover Summerlin needed help*

> *physically. But most of that, the testimony also was very clear that most of that help was provided by Alton, his wife, and then by Barbara, and then by some nurse called Rabbit for a couple of weeks, I think while Alton was in the hospital.* ***No evidence was presented that Curtis did any more than drive him to the hospital for eye surgery or something like that.*** (T. 160). (boldface emphasis added).

There is no question that his wife, Alton, and his daughter, Barbara Ann, provided care to him. Nothing less should be expected.

However, the Court either overlooked or misinterpreted the extent of Curtis Summerlin's participation in Grover Summerlin's care. By his own admission, Curtis drove his father to the doctor some twenty-five to thirty times during his last years. (T. 13). He assisted his formerly very independent father in the hands-on workings of the subject property. (T. 15). Most significantly, Curtis selected his father's attorney, who happened to be Curtis' attorney, as well. Curtis made the appointment to see the attorney, explained the purpose of the visit, was present during the initial consultation, procured the information used in the preparation of the Quitclaim Deed, was present during the execution of the conveyance, paid the attorney at closing and had the document recorded at the courthouse. (T. 17-28).

Reviewing the evidence fairly, it must be concluded that given his participation in his father's affairs, Curtis was in an especially opportune position to unduly influence his father, since he saw fit during the last years to assist in the maintenance of the farm on many occasions. And as Alton Summerlin put it, "I think that the older his daddy got, the more he [Curtis] saw him [Grover] and did for him." (T. 131).

The Trial Judge concluded Mr. Summerlin "loved it" when Curtis got involved in working the land. One interpretation of these actions is that a son was just helping his elderly and infirm father with the hard work that a farm requires. But given all of the factors involved in this case, Curtis' participation could just as easily be viewed as an effort to ingratiate his father

with the intent of ultimately persuading him to convey all of the land to Curtis. The question remains whether Grover Summerlin "loved it" so much that he knowingly and freely executed a conveyance that disinherited a daughter with whom he shared a wonderful relationship throughout his lifetime.

It is respectfully submitted that the Chancellor committed manifest error in his finding that "[n]o evidence was presented that Curtis did any more than drive him to the hospital for eye surgery or something like that." A great deal of evidence and testimony clearly and convincingly established that Curtis did much more than just take his father to a medical appointment on an isolated occasion. Curtis' extensive involvement in his father's affairs during those last years should have given the Court great concern as to who was in control.

2. *Whether one person maintains a close relationship with another.* Curtis Summerlin maintained a normal father-son relationship with Grover Summerlin. (T. 31). Such a statement would imply an ongoing relationship of love, trust and contact. However, for years after his father's second marriage to Alton in 1976, Curtis maintained no relationship whatsoever with Grover. The close relationship was renewed only during the last years of Grover Summerlin's life. (T. 93-94; 131). The motive for the timely "revival" of the father-son relationship is suspect, given the nature and effect of the Quitclaim Deed.

There was no dispute that Barbara Ann Lynch and her dad also enjoyed a loving father-daughter relationship. (T. 28; 89). The only negative testimony regarding their relationship was that a small argument occurred over some World War Two memorabilia. (T.103; 107). However, given the fact that apologies were made and accepted on the same day, it is in great question as to whether such an event would lead a father to wholly disinherit his daughter.

The Trial Court ruled that Grover's closest relationship was with his wife, Alton and then with Barbara Ann Lynch. The Court also noted that Curtis' relationship with his father only

occurred during the last few years. From these observations, it would seem highly improbable and completely unfair that Mr. Summerlin intended to wholly disinherit his only daughter. Yet the Court concluded that "*this doesn't have anything to do with fair.*" (T. 160).

Barbara Ann Lynch respectfully disagrees with the Trial Court's conclusions with respect to this element. The "fairness" of the outcome of these events is greatly indicative of the presence of undue influence as the motivating factor behind the Quitclaim Deed. Indeed, this unfair result also raises serious and substantial questions as to who was actually in control, Curtis or Grover.

3. *Whether one person is provided transportation and has their medical care provided by another.* As stated *supra,* Curtis Summerlin drove his father to the doctor on numerous occasions. The fact that others provided such assistance only underscores the dependent nature of the decedent at the end of his life, as well as his susceptibility to the influence of those with improper motives.

4. *Whether one person maintains joint accounts with another.* There were no joint accounts between Curtis Summerlin and Grover Summerlin.

5. *Whether one is physically or mentally weak.* Mr. Summerlin did not suffer from a mental disorder nor had he undergone psychiatric care. On the other hand, the combination of his physical ailments and great age contributed to his vulnerability to less-than-upright dealings. The family witnesses each acknowledged that he suffered from substantial hearing loss. (T. 12; 84; 111). With the exception of Curtis Summerlin, those witnesses testified that Grover Summerlin's hearing disability caused considerable difficulty in communicating with others and forced him to rely on his family members. (T. 84; 111; 122; 134-35). Despite the very clear and convincing testimony that Mr. Summerlin's hearing problem was a serious impairment, the

Trial Court simply remarked, "*His hearing was bad. We've had plenty of testimony on that.*" (T. 161).

Even conceding that Grover Summerlin did not suffer from mental weakness, it cannot be reasonably disputed that advanced age, difficulty in communication with others and failing health all combined to make him vulnerable to the influences of one who detected his weaknesses and preyed on them.

6. *Whether one is of advanced age or of poor health.* As stated *supra*, Grover Summerlin was of advanced age and his health was poor, particularly during the last year of his life. The Chancellor noted that he suffered from Parkinson's disease and a heart condition, both of which were "debilitating". (T. 161)

7. *Whether there exists a power of attorney between the one and another.* On this point, the Chancellor held that there was no power of attorney. (T. 161). However, on August 27, 2003, Grover S. Summerlin, Jr. executed a United States Department of Agriculture Power of Attorney form naming "Curtis Summerlin" as his attorney-in-fact. In his pretrial deposition, Curtis had explained that the Power of Attorney was intended to designate his son, Curt (Curtis Summerlin, Jr.) as attorney-in-fact for Grover S. Summerlin, Jr. to deal with the federal government CRP program. At trial, Curtis confirmed this arrangement. (T. 15). However, there was no evidence other than Curtis' own self-serving testimony that Curt was intended to be attorney-in-fact, not Curtis himself. The omission of the suffix "Jr." from the Power of Attorney is suspicious, and the Court should have insisted on additional verification of Grover Summerlin's intent in designating his attorney-in-fact, rather than relying solely on Curtis's explanation.

The existence of a confidential relationship is determined by the facts at hand. As the Trial Judge noted in this case:

> *[Q]uite frankly, this is—this is almost abnormal in this kind of case. I have stated that this part of a will contest, which is normally what it is or a deed contest, is the easiest hill to climb, establishing a confidential relationship."* (T. 164)

While the Chancellor is presumed to be in the best position to assess the evidence, there are occasions when a retrospective review reveals manifest error in the Court's determinations. Five of the seven elements that this Court has prescribed as the standard for determining the existence of a confidential relationship have been clearly established. Curtis Summerlin was heavily involved in the procurement of the Quitclaim Deed. "Suspicious circumstances, along with the confidential relationship, give rise to a presumption of undue influence." *In re Estate of Saucier*, 908 So. 2d 883, 886 (Miss. App. 2005).

At trial, Curtis verified the existence of a confidential relationship between his father and himself:

> *"Q. [Y]ou never discussed the circumstances surrounding the deed or the will with your sister, Barbara Ann, or your stepmother, Alton, right?*
>
> *A. I did not, no.*
>
> *Q. You maintained absolute secrecy with respect to these documents until after your Dad died, didn't you?*
>
> *A.* ***Confidentiality, yes."***
>
> (T. 51).

It is respectfully submitted that the Trial Court erred in summarily dismissing this action merely on the basis that no confidential relationship existed. The Court should have allowed the case to proceed.

IV. WHETHER THE COURT ERRED IN REFUSING TO ENTER A DECLARATORY JUDGMENT AND/OR OTHER APPROPRIATE FINDINGS THAT THE QUITCLAIM DEED IS VOID DUE TO THE EXTENT THAT IT PURPORTED TO CONVEY ANY INTEREST IN THE NORTHWEST QUARTER

OF SECTION 4, TOWNSHIP 9 NORTH, RANGE 5 EAST, MADISON COUNTY, MISSISSIPPI.

On September 28, 2006, the Court entered an Agreed Order Granting Motion to Amend Petition to Set Aside Conveyance of Real Property. (R.E. 35). This Agreed Order amended the original Petition to Set Aside Conveyance of Real Property and for Other Relief to add the following:

1. The Petition to Set Aside Conveyance of Real Property be and it hereby is amended to add the following claims:

> *"10. The legal description of the real property purportedly conveyed by the Quitclaim Deed was the W ½ of NE ¼ and NW ¼ of SE ¼ and NE ¼ of Section 4, and Lot 9 E.B.L. of Section 5, all being in Township 9 North, Range 5 East, less and except all oil, gas and minerals in, on and under said land. Said minerals and mineral interests having been reserved or sold heretofore by former owners.*
>
> *11. By Warranty Deed dated March 20, 1957 and recorded at Book 67, Page 404, of the land records of Madison County, Mississippi, the decedent was conveyed certain real property lying and being situated in Madison County, Mississippi described as 'the W ½ of NE ¼ and NW ¼ of SE ¼ and NW ¼ of Section 4, and Lot 9 E.B.L. of Section 5, all being in Township 9 North, Range 5 East, less and except all oil, gas and minerals in, on and under said land. Said minerals and mineral interests having been reserved or sold heretofore by former owners.' A true and correct copy of this Warranty Deed is attached hereto and marked Exhibit "B".*
>
> *12. At no time during his life did the decedent own any real property described as the NE ¼ of Section 4, Township 9 North, Range 5 East. Due to this fact, that portion of the Quitclaim Deed purporting to convey said described property was void because the decedent had no interest therein to convey. Moreover, the Quitclaim Deed did not convey any interest in the NW ¼ of Section 4, Township 9 North, Range 5 East, due to a description that was void for vagueness with regard to said NW ¼.*
>
> *13. Accordingly, the Court should issue a declaratory judgment and / or other appropriate findings that the Quitclaim Deed is void to the extent that it purports to convey any interest in the NW ¼ of Section 4, Township 9 North, Range 5 East.*

> *14. The Court should further adjudge that the **NW ¼** of Section 4, Township 9 North, Range 5 East remains vested in the decedent's estate and that it should be devised according to the terms of his Last Will and Testament, which is presently being administered in this action."*

2. The prayer in the Petition to Set Aside Conveyance of Real Property be and it hereby is amended to request the following relief:

> *"The Petitioner also requests that the Court enter a declaratory judgment and / or other appropriate findings that the Quitclaim Deed is void to the extent that it purports to convey any interest in the **NW ¼** of Section 4, Township 9 North, Range 5 East. The Court should further adjudge that the **NW ¼** of Section 4, Township 9 North, Range 5 East remains vested in the decedent's estate and that it should be devised according to the terms of his Last Will and Testament, which is presently being administered in this action."*
>
> (boldface emphasis added for clarity)

In summary, a portion of Grover S. Summerlin, Jr.'s land was in the **NW ¼** of Section 4, Township 9 North, Range 5 East, Madison County, Mississippi. The Quitclaim Deed at issue in this action described the **NE ¼** of Section 4, Township 9 North, Range 5 East, Madison County, Mississippi. The Amended Petition sought to set aside any purported conveyance of an interest in the NW ¼ of Section 4, Township 9 North, Range 5 East, Madison County, Mississippi on the basis that the incorrect description rendered the Quitclaim Deed void with respect to the lands in that area.

Curtis Summerlin testified that he visited the Madison County "tax office and got the tax receipts for a legal description." He went on to state that he "looked at it and copied it down." on a piece of paper. (T. 38; 52). From this testimony, it is abundantly clear that the mistake in the Quitclaim Deed originated with Curtis Summerlin.

Mr. Ratcliff testified that he "believed" that the source of the legal description used in the Quitclaim Deed was an "old deed." However, given his admittedly less-than-perfect memory

and his use of the equivocal verb, "believed", it is obvious that Ratcliff was uncertain of the origin of the description. (T. 62). Ratcliff later admitted that if Curtis Summerlin had provided such an erroneous handwritten description, it would have been possible to have transposed it. (T. 77).

In all fairness, it can be conceded that an attorney with a busy solo practice could hardly be expected to remember all of the details of a transaction that seemed fairly routine at the time. On the other hand, one would expect Curtis Summerlin, the recipient of such a large gift, to have clear recall of the details. Thus, the logical conclusion is that the erroneous Quitclaim Deed was the product of a unilateral mistake on the part of Curtis Summerlin. Steve Ratcliff simply transposed the mistake. (T. 77).

In his Counterclaim for Reformation of Deed, Curtis Summerlin alleged that the land description was a scrivener's error and that the Court should reform the Quitclaim Deed to refer to the "NW ¼ of Section 4, Township 9 North, Range 5 East", rather than the "NE ¼ of Section 4, Township 9 North, Range 5 East". (R.E. 39). The Trial Court agreed, stating that

> *[T]here is nothing that that indicates to me and there is no evidence at all that indicates to me that this—the error in the deed from the warranty deed to the quitclaim deed was anything more than a scrivener's error. There is nothing that I've been presented that would indicate that it was his intent not to include his whole farm in that thing.* (T. 165)

In order for a party to be entitled to reformation of a deed, the general rule is that there must be either a mutual mistake on the part of both parties or a mistake on the part of one party with fraud or inequitable conduct on the part of the other party. The burden of proof is upon the party trying to establish mutual mistake and ***the proof must establish mistake beyond a reasonable doubt.*** (*emphasis added*). *Wise v. Scott*, 495 So. 2d 16, 19 (Miss. 1986) (citing *Perrien v. Mapp*, 374 So. 2d 794, 796 (Miss. 1979) (*other citations omitted*). The proof has

shown that the mistake at issue was Curtis'. No one has alleged that there was any wrongful conduct on the part of G.S. Summerlin.

The most plausible interpretation of the evidence is that Curtis Summerlin made an error in copying the legal description and Steve Ratcliff utilized that description in preparing the Quitclaim Deed. The only evidence of any error on the part of anyone connected with the procurement of the Quitclaim Deed was that of Curtis Summerlin. Curtis was the one that went to the Madison County Tax Assessor's office and obtained the legal description at the request of Steve Ratcliff. He admitted that he "strictly furnished" the description. (T. 30). Curtis Summerlin admitted that Grover Summerlin did not accompany him when he obtained the legal description, *nor did the senior Summerlin review the description to be sure that it accurately described the land that he intended to convey.* (T. 25-26).

Every witness in the trial (other than Steve Ratcliff) testified that throughout the course of Grover Summerlin's life, they assumed that he would leave his land equally to Barbara Ann Lynch and Curtis Summerlin. (T. 28; 92; 112; 119). His wife, Alton, whom the Trial Court noted held the closest relationship with Grover Summerlin (T. 160) testified that she had no reason to believe that her husband would have any reason not to allow Barbara Ann Lynch to share in the land. (T. 138-139). Alton went on to say that she was surprised that Curtis got all of the land and that Barbara Ann got none. Finally, she testified that her husband "wanted Curtis to have 160 acres where the house was. That's when he got a quitclaim deed." (T. 139). From this testimony, there is a substantial question as to the amount of land that Grover intended to convey – 160 acres or 320 acres? Yet, contrary to the expectations of all of the family members, Curtis received the entire farm and Barbara Ann received nothing.

The evidence conclusively established that the erroneous Quitclaim Deed was the result of a unilateral mistake on the part of Curtis Summerlin. Almost every witness (including Curtis)

testified that they assumed that Grover Summerlin intended that his two children would share the land equally after his death.

It is respectfully submitted that the Chancellor erred as a matter of law when he determined that the defective Quitclaim Deed was nothing more than a scrivener's error. Instead, in order to grant Curtis Summerlin's Counterclaim for Reformation, the Court was required to find beyond a reasonable doubt that a mutual mistake had occurred in the preparation of the Quitclaim Deed. Curtis Summerlin did not meet this burden of proof.

The record is replete with reasonable doubt that a mutual mistake was made. Accordingly, this Court should adjudicate that the Quitclaim Deed is void to the extent that it purports to convey any interest in the **NW ¼** of Section 4, Township 9 North, Range 5 East. The Court should further adjudge that the **NW ¼** of Section 4, Township 9 North, Range 5 East remains vested in the decedent's estate and that it should be devised according to the terms of his Last Will and Testament of Grover S. Summerlin, Jr., which is presently being administered in the Madison County Chancery Court.

CONCLUSION

The Trial Court is presumed to have the best opportunity to hear the evidence and to assess the credibility of the witnesses. In the great majority of cases, the outcome of the trial reflects the evidence presented to the Court. However, in this action, the Appellant respectfully asserts that the Trial Court was in manifest error in determining that a confidential relationship did not exist between the decedent, Grover S. Summerlin, Jr., and his son, Appellee Curtis Summerlin. The Court then erred as a matter of law in granting Curtis Summerlin's Motion for a Directed Verdict and dismissing the Amended Petition to Set Aside Conveyance of Real Property and for Other Relief.

The Trial Court also erred as a matter of law by granting the relief requested in the Counterclaim for Reformation of Deed. Curtis Summerlin was required to prove beyond a reasonable doubt that the Quitclaim Deed was the product of a mutual mistake. The evidence demonstrated substantial and serious questions as to his father's actual intent. For these reasons, Appellant Barbara Ann Lynch respectfully submits that the Trial Court erred in reforming the Quitclaim Deed to convey the NW ¼ of Section 4, Township 9 North, Range 5 East, Madison County, Mississippi to Curtis Summerlin.

Accordingly, Barbara Ann Lynch respectfully requests that this Court reverse and render the decision of the Madison County Chancery Court and re-vest the real property at issue in this action in the Estate of Grover S. Summerlin, Jr., deceased, to be administered and distributed according to the provisions of his Last Will and Testament. The Appellant also requests such other and further relief, both general and specific, as the Court deems proper in the premises.

RESPECTFULLY SUBMITTED, this 3RD day of _____, 2007.

JAMES M. CREWS, III, ATTORNEY FOR APPELLANT, BARBARA ANN LYNCH

CERTIFICATE OF SERVICE

I, James M. Crews, III, attorney for the Appellant, Barbara Ann Lynch, do hereby certify that I have this day filed this Brief of the Appellant with the Clerk of this Court to be received on behalf of the Supreme Court of Mississippi and have served a copy of this Brief by first-class U.S. Mail, postage prepaid, upon the following:

Honorable William J. Lutz
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SO CERTIFIED, this 3RD day of _____, 2007.

JAMES M. CREWS, III, ATTORNEY FOR APPELLANT, BARBARA ANN LYNCH