IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2007-CA-00793

Robert Cooper, et al — APPELLANTS

v.

Winnie Gilder, et al — APPELLEES

APPEAL FROM THE CHANCERY COURT
OF WASHINGTON COUNTY, MISSISSIPPI

Cause No. 05-0344

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

consolidated with

Cause No. 05-0345

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

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BRIEF OF APPELLANTS

Robert D. Cooper, Donald B. Dunaway and Connie Burford

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CERTIFICATE OF INTERESTED PERSONS

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

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

John H. Daniels, III
Attorney for Appellants

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2. Whether the Chancellor properly applied the appropriate standard of proof.

3. Whether the factual findings are supported by the record?

4. Whether the Chancellor applied the correct standard and correctly refused to reconsider her findings on the key point of Robin's acquisition of the Cooper Gilder lease prior to his termination in light of the additional evidence submitted on that motion.

5. Whether the Chancellor erred in her application of constructive trust law?

6. Whether the award is properly related to a correct application of the law and the evidence.

STATEMENT OF THE CASE

After both founders of Cooper Gilder, Inc. died in October of 2003 and February of 2004, James Gilder's widow filed two lawsuits against John Cooper's heirs and two Cooper-Gilder employees. In Cause No. 05-0345 ("life insurance case"), Winnie Gilder ("Cookie"), on behalf of herself, her husband's estate and Cooper-Gilder, sued New York Life Insurance and Annuity Corporation ("NYL"), and Robert D. Cooper ("Robin"), Marilyn C. Dunaway, and Mildred Watson, John Cooper's heirs, for the proceeds of two life insurance policies on James Gilder's life based on a 2001 Buy/Sell Agreement ("BSA") between Gilder, John Cooper and Cooper-Gilder. (R. 228-238; RE 86-96)[1] In Cause No. 05-0344 ("business tort case"), Cooper-Gilder, sued Robin, Donald B. Dunaway ("Don") and Connie Burford ("Connie") alleging unfair competition, misappropriation of trade secrets, and unjust enrichment, seeking damages and a constructive trust in 2005 when nearly all its employees left and started a new business serving Cooper Gilder's customer base. (R. 13-19; RE. 79-85)

[1]R. refers to Clerk's Papers.; T. to the transcript; Ex. to trial exhibits; and RE. to Record Excerpts.

After NYL was dismissed, the life insurance case came to trial on May 18, 2006. Shortly after testimony began, the Chancellor, on her own motion, consolidated the cases over strenuous objections of the defendants. (R. 112-113; T. 45-56; RE. 10-11, 18-29) Trial was continued until August of 2006 when both cases were tried together. When the Plaintiffs rested, the Chancellor granted a directed verdict in the life insurance case and denied one in the business tort case. (T. 241-260; RE. 30-49) After trial, judgment was rendered jointly against the business tort defendants for $1,347,040.00 on constructive trust theories despite earlier findings essential to the ruling in the life insurance case and a finding that much of what occurred was the result of bad business judgment by Mrs. Gilder. (R. 111; T. 426-439; RE. 14, 50-63) On April 11, 2007, the Chancellor denied the business tort Defendants' motion for reconsideration. (R. 200; RE. 15) Defendants timely filed a notice of appeal on May 8, 2007. (R. 201-203) On May 10, 2007, the Chancellor denied Plaintiffs' Motion for reconsideration in the life insurance case. (R. 207-208) Plaintiffs filed a cross appeal on May 22 and Defendants file an amended notice of appeal on May 24, 2007. (R. 211-213, 216-219)

STATEMENT OF FACTS

In 1974 John Cooper and James Gilder formed what later became Cooper Gilder, Inc. Each owned 50% or 400 shares. The original business was cleaning barges, reclaiming the chemical residue and reselling it. The business was originally located at 210 Bayou Road and later moved around the corner to 502 Cedar Lane, Greenville. Some parts of its operations had also been conducted on the river front at Island 84 since 1974. (T. 28-31, 421; Exs. P1 & P2)

John Cooper and Gilder were close friends and business associates. They jointly owned several pieces of property, including Island 84, as individuals and not through Cooper-Gilder. Cooper Gilder never owned the land-locked Island 84. It only owned a lease over Entergy's

lands to access Island 84. (T. 30, 112, 182, 219, 396; Ex. P3)

John Cooper and Gilder had life insurance funded buy/sell agreement(s) before 2001. In August 1990, they switched from another insurer to NYL, which issued policy # 62623781 for $550,000 and policy # 45944993 for $75,000 on Gilder's life to John Cooper. (R 327-330; T. 31-32, 184; Exs. P4 & P5) On December 21, 2001, John Cooper and Gilder executed the BSA at issue in the life insurance case which valued John Cooper's and Gilder's halves of Cooper Gilder's stock at $650,000 each, or $1.3 million total. NYL policy # 62623781 and # 45944993 and two policies owned by Gilder on John Cooper's life were listed in Exhibit B. Its purpose was to provide for management continuity and disposition of Cooper-Gilder stock when either John Cooper or Gilder died. By that time, both were in poor health. John Cooper had been diagnosed with cancer earlier that year. (T. 33-34, R. 118, 172; P6 at Exs. A & B; RE. 117-118)[2]

As time progressed, both Gilder's and John Cooper's health deteriorated. Gilder was on oxygen and John Cooper's cancer worsened particularly in the months before his death. (T. 171-172, 394) On July 23, 2003, they executed several deeds to partition their jointly owned lands held separately from Cooper-Gilder, including Island 84. John Cooper got 100% ownership of Island 84 and Gilder got 100% ownership of property close to his house and Cooper-Gilder's offices suitable for his wife's[3] horses. John Cooper immediately conveyed Island 84 to himself and Robin as joint tenants with right of survivorship. Gilder initiated these land transactions which were handled for them by a lawyer about 20 months before the events at issue in the business tort case and 18 months after the 2001 BSA determining ownership of Cooper-Gilder and the policies in Ex. B upon the death of the first to die was adopted. The 2003 deed

[2]There is a typographical error in one of the policy numbers on Ex. B to P6. (T.34-35; RE. 118)

[3]Gilder at age 70 married Cookie then age 34 or 35 in October of 2000. (T.145-146; 155-157)

transactions were not part of the 2001 BSA or its plan.[4] (T. 219:17-28, 395:25-396:7, 398:3-4, 403:16-404:10, 407:5-408:5)

Three months after exchanging deeds ending their joint ownership of any land and John Cooper's conveyance of Island 84 to himself and Robin with right of survivorship, John Cooper died on October 29, 2003 . In November, Gilder filed claims on the policies on John Cooper's life listed in the BSA exhibits. He did not receive the full face because he had used the policies as security for a loan. (T. 36-37, 39; R. 598; Ex. P20)

On December 2, 2003, NYL wrote the insured, Gilder, in care of the deceased owner, John Cooper, informing Gilder the Estate was the new owner of the policies on Gilder's life. The letter included forms for changing ownership from the Estate to an individual successor. NYL addressed the letter to Gilder's Bayou Road house address used by both Gilder and John Cooper for personal mail. It was delivered to Cooper-Gilder's offices. All mail addressed to either John Cooper or Gilder was routinely delivered to the office if it was open or to Gilder's Bayou Road house when the offices were closed. (T. 41-42, 72, 102, 151, 214; Ex. P8) Gilder monitored the mail closely. Connie turned over any bundles received from the post lady to Gilder. (T. 389-390)

On December 17, 2003, Gilder executed several documents implementing the BSA provisions triggered by John Cooper's death. He signed two checks to the Estate filled out by Connie, totaling $594,550.78, the full proceeds of the NYL policies and executed a promissory

[4]When pressed on the effect she thought Gilder expected the land swap to have on ownership of Island 84 and Cooper Gilder after his death, she said she believed, Gilder expected to die first based on age. If he did, the Coopers would have the business and Island 84 which Cooper Gilder had been using and the Gilders would have the lands near the house and office and funds from all the insurance policies after the Coopers used the policy proceeds on John Cooper's life to buy out Gilder's shares and the Gilders got the policy proceeds on John Coopers life. (T. 395-399) But that doesn't make the land part of the BSA plan.

note for $55,449.78 payable to the Estate in five annual installments beginning December 17, 2004 for the balance of the price of Cooper's shares. He secured the note with a stock pledge and security agreement using his Cooper-Gilder stock. Gilder also executed, individually and as Cooper-Gilder's President, an agreement with the Estate through its administrator Robin Cooper which settled the means of calculating the amount Cooper-Gilder owed John Cooper for 2003 profits up to his death date (proration of the corporation's AAA account) and the payment method (by Gilder's note to be executed after calculation by the parties' accountant, James Bennett) to be secured by a pledge of his Cooper-Gilder stock. It specifically refers to the 2001 BSA agreement, John Cooper's death triggering the stock transfer and life insurance provisions, and the parties' intent to settle their obligations under the BSA. It transferred John Cooper's stock to Gilder, making Gilder sole owner of Cooper-Gilder, in exchange for the net life insurance proceeds on John Cooper's life, the $55,449.78 note, the stock pledge and security agreement, and an exchange of irrevocable stock/bond powers. (T. 36-37, 74; R. 75; Exs. P10 & P11)

Both John Cooper and Gilder had a habit of drawing against their profit shares by paying personal expenses from Cooper-Gilder's bank accounts. The AAA account was used annually to attribute and reconcile these draws with their profit shares and to determine profit amounts to pass through to their individual tax returns. The monthly premiums for the policies John Cooper and Gilder owned on each other's lives were customarily paid this way using automatic electronic funds withdrawals. After John Cooper's death, automatic withdrawals continued for the policies on Gilder's life with no changes to be balanced when the accountants determined what Cooper Gilder still owed Cooper's estate via the AAA account. (R. 453-454, 561, 562, 573; T. 44, 78, 96-97)

On December 19, 2003, Robin, as executor, signed forms to change the official successor owner of policies John Cooper owned on Gilder's life from his estate to his heirs, Robin, Marilyn, and Mildred. Connie copied parts of the form to make room for information on Robin, Marilyn and Mildred. She also assisted in filling out and copying the filled out forms. James Gilder, then the sole owner of Cooper-Gilder, was present with Connie and Robin when these documents were filled out and executed and was aware of what was being done. There was no attempt to secretly transfer these policies without his knowledge. (R. 309, 331-338; T. 214-215, 218; Ex. P13)

Although not present when the forms were filled out in Gilder's presence, Cookie testified over objection that Connie filled out the forms NYL sent to Gilder with the December 2, 2003 letter. She erroneously claimed the first form's purpose was to change the beneficiaries to the three Cooper heirs. She said the words "business associate" were squeezed in for each of the three heirs, when Robin was only Gilder's employee, Marilyn's only relationship to Gilder was Gilder's employment of her husband, and Mildred had no relationship to the corporation, was not on the payroll, and had no interest in the business. On cross examination, Cookie admitted Mildred made public relations gifts Cooper-Gilder gave to customers. (T. 84-88, 206-207)

Connie said she used the "business associate" words because these three were heirs to the Estate from whom Gilder had bought John Cooper's shares. As Gilder did not receive sufficient insurance proceeds to pay the heirs the full price of the shares, Gilder's note for the balance was secured by his shares. Connie used "business associate" because of this connection and the heirs' interest in Cooper-Gilder owned by Gilder but pledged to secure a debt to them. (T. 219)

When the December 2, 2003 letter and forms came by mail, Connie and Gilder handed them to Robin when he walked into the office. Gilder, Mildred and Marilyn were present when

the form transferring ownership of policies on his life from the Estate to John Cooper's heirs was filled out and signed. It was openly filled out and signed on a work day in Cooper-Gilder's office with Gilder aware of everything that was done. Nothing was hidden from him. (T. 225, 229-232)

Upon Gilder's death on February 8, 2004, Cookie inherited 100% of Cooper-Gilder. She had finished high school and some college business classes and worked 15 years at a finance company, but stopped working when she married Gilder. (T. 145-146; 155-157) She admitted she had no experience in Cooper-Gilder's type work. She had not been involved in the business at all during her husband's lifetime. (T. 106, 147, 152) She claimed Gilder suggested she sell Cooper-Gilder to Robin after his death but when she tried to do so Robin wanted her to keep the business for two years to make sure she really wanted to sell it. But, she also said while Gilder was in the hospital, he had her contact a customer, Ted Graves, because Graves knew a lot of people in the industry and could get the ball rolling to help her sell the company quickly. (T. 106-107) In the months following Gilder's death, Graves produced two prospects who sent representatives to Cooper-Gilder in Greenville to investigate the possibility of buying Cooper-Gilder. (T. 378)

Shortly before he died, when Connie and Cookie were with Gilder at the hospital, Cookie told Gilder she didn't know anything about running the business. Gilder told Cookie to listen to Connie.[5] Connie understood from his statement she was to oversee Cooper-Gilder's management after his death and train Cookie when she was willing to come to the office. (T. 361)

[5]Earlier the court sustained an objection to Cookie's testimony Gilder respected Connie and trusted her with everything, would sign any check Connie put in front of him without question, and had told her she could trust and depend upon Connie who would help her through the process of taking on the ownership of Cooper-Gilder and with anything she ever needed. (T. 44-45)

Cookie took little interest in Cooper-Gilder for several months after Gilder's death. Checks had to be signed by two people. Between February and the summer of 2004, Connie and Cookie were the only two people authorized to sign checks.[6] Connie would bring her up to date on sales, bank balances, and other matters when she got Cookie to sign checks. (T. 362-363)

When Gilder died, Cooper-Gilder had ten or eleven employees, mostly relatives of either Gilder or John Cooper who had been there for twenty to thirty years. Connie was both an officer and a director. She continued to do the books after Gilder's death as she had always done. Cookie said she relied on Connie completely in this area. Connie said after John Cooper's death, Robin and Don stepped up to assume part of John's responsibilities. When Gilder died a few months later, many employees were anxious about what would happen with Cooper-Gilder. They felt the corporation needed them, but they also all needed their jobs. All the employees did the best they could to fill in for the founders. Cookie asked Connie and Robin to help her with the business after Gilder's death because of her lack of experience. On February 10, 2004, with Cookie's consent, Connie set up a management team consisting of Robin, Don, and herself. (T. 106, 111-112, 147-150, 213, 328-329, 358, 360-362, 408)

On February 11, 2004, Ex. P18, signed by Robin, Don, and Connie, was sent to Cooper-Gilder's customers. It thanked them for their support and sympathy on the deaths of both John Cooper and James Gilder. It assured customers that despite the deaths of Cooper-Gilder's founders, the tradition of integrity and good service they had established would continue. It gave current office phone, home phone and cell phone numbers for Robin, Don and Connie. Cookie claimed she never saw this letter until after all the employees left, but Don testified she was

[6]After John Cooper's death and before Gilder's death, Gilder (then president) and Connie appointed Cookie vice-president and director and added her to the bank signature cards. (T. 363-364)

aware of it when it went out. Connie explained Cookie had put her in charge at a meeting that day and a decision was made to send out the letter under hers, Don's and Robin's names because those were the names that would be recognized in the industry and would impart the reassurance the letter was focused on. Cookie's name would not have been recognized and they just didn't think of adding it at that time. Cookie was included in the Christmas card sent out at the end of the year memorializing the two founders. (T. 150, 330, 364-365, 369)

Prior to this point, Cookie said Robin was just a yard employee. From this point on, however, she claimed he was a key employee whom she relied upon and trusted, both in supervising the yard and working from the office brokering chemicals reclaimed from the barges. Although Cookie claimed she trusted and relied on Robin as a key employee, she admitted he never became an officer or director, remaining only an employee. (T. 108-109, 112)

Cookie felt because Gilder owned 100% of the Cooper-Gilder shares as of December 17, 2003 and the premiums on the policies on his life continued to be automatically debited from Cooper-Gilder's bank account each month between John Cooper's and Gilder's deaths, Gilder should be deemed the owner of the policy and she should receive the proceeds as his sole heir. In April of 2004, she said she learned she would not receive those proceeds and hired attorney Nate Adams to pursue legal action to obtain these proceeds. But she had no knowledge of what action, if any, he took on her behalf in pursuit of these claims. (T. 77-78, 117, 119, 339-340)

Cookie began working at Cooper-Gilder in July or August of 2004. She claims she was spending six to seven hours every day going over bank statements and learning how to make journal entries with Connie trying to learn the office part of Cooper-Gilder's business. Even after she began going to the office, she would only speak to Cooper Gilder's accountant in greeting when he came to the office to get something. Cookie did not meet with him at all in 2004 to

review 2003 tax returns or discuss the business of Cooper-Gilder or what the management team was doing or even the nature of Cooper-Gilder's business. She said she did not know enough about the business and the books to know what to ask. Despite this lack of knowledge and the fact she did not even work in the office at all for several months after her husband's death, she was allowed to testify, over objection, that following John Cooper's death, the corporation attributed the premiums on the policies on Gilder's life to him on its books between John Cooper's death and his death. (T. 87-91, 120-121, 147-148, 152, 154, 159, 161)

Cookie, answering the Chancellor's question, said the Island 84 access lease was in Cooper-Gilder's name from 1976 until February 4, 2005[7] when Robin put it his name without contacting her. She had no basis for her testimony the lease was actually transferred to Robin other than the January 4, 2005 letter informing Entergy that Robin was now the owner of Island 84. (T. 112-116, 209) Robin explained however he did not acquire the lease, but only opened negotiations with Entergy, in January of 2005. At Connie's suggestion that he ought to be paying for the access lease to Island 84 since he had become its sole owner on John Cooper's death, Robin wrote Entergy informing them of Cooper's death and his own ownership of Island 84, enclosing a check for the same amount as Cooper-Gilder's annual lease payment. Entergy responded asking for proof of his ownership which he sent back. He admitted he did not tell Cookie he sent the letter and was negotiating with Entergy to acquire access to his own property. However, he did have discussions with Entergy about notifying Cooper-Gilder he was going to lease the land and he agreed Entergy should notify Cooper-Gilder. Then negotiations shifted to Robin purchasing the land instead of transferring the lease to eliminate possible environmental issues connected with Cooper-Gilder's past use if the lease were transferred. The Entergy Island

[7]From the context she clearly meant January rather than February. (Ex. P17;T. 112-116)

84 negotiations were in this position when Katrina hit. After Katrina, Robin could not get in contact with anyone with authority to finish the negotiations for him to buy the land blocking land access to his Island 84. He sent one check to Entergy with the first letter to pay for access to his property - Island 84. He assumed he had permission from Entergy to use the land for access to his property as Entergy did not return his check and negotiating to buy the property continued. (T. 235-239, 370; Ex. P17) While Robin may not have informed Cookie or her brother that he had asked to have the lease put in his name, it would appear Entergy notified Cooper-Gilder as they had discussed. Cooper-Gilder's corporate representative, Roncali, said he knew of Robin's communications with Entergy concerning the access lease prior to February 21,2 005. (T. 282-283) Also, since Cookie had appointed Connie to manage Cooper Gilder and Connie was training Cookie and keeping her up to date on major events, the evidence supported a reasonable inference Cooper-Gilder, through its highest level employees, either had suggested the change themselves or at the very least they had knowledge of or had been notified the letter Robin wrote.

Under Connie's, Robin's, and Don's management, Cooper-Gilder had record receipts and profits in 2004. T. 331 Yet Cookie claimed she began to think she might need Cooper-Gilder's employees sign a non competition covenant in January or February 2005. Without discussing her concerns with the corporation's accountant, she asked attorney Nate Adams to draft a covenant which she presented to employees without even reading it. (T. 116-117, 120, 154-155, 201)

On February 21, 2005, it is undisputed the employment of Robin, Don and Connie with Cooper-Gilder ceased along with the employment of every other Cooper-Gilder employee except Cookie, Roncali and her son. Cookie had only about eight months of limited office experience at

Cooper Gilder. She had just hired her brother, Roncali, as operations manager less than a week earlier even though he had no experience with the kind of work Cooper-Gilder did. Her son had only been working at Cooper-Gilder for approximately one year. (T. 161-162)

Cookie had told Connie the previous Friday, but no one else other than her brother, a meeting had been scheduled for Monday. She told noone other than Roncali about the non-competition agreement or the purpose of the meeting. Over the weekend, Roncali had the locks changed on the doors and locked down the yard at Cooper-Gilder's place of business on Cedar Lane. On the morning of February 21st, before the meeting began, Roncali terminated Robin without notice allegedly for insubordination during a conversation prior to the meeting in which he informed Robin that signing non-competition agreements would be addressed in the meeting. Roncali terminated Robin immediately when he said he would not sign one. Roncali claimed he saw Robin talking with the other employees near their trucks after he was terminated and before the meeting. (T. 120-122, 162-165, 167-169, 264, 266-271, 278-280, 306-307, 329, 373)

Cookie said she told the employees "I was bringing in my little brother to help me because I did not understand the business."[8] The covenant along with some other papers Nate Adams told her to get the employees to fill out were in packets on the chairs. The first sentence said the covenant was in consideration of continued employment. After Roncali was introduced, Don stood up with the non-competition agreement and asked "If we are not going to sign this, do we need to be here? Do we need to be in this meeting." Roncali responded "I guess not" and they all walked out. (T. 120-122, 162-165, 167-169, 264, 266-271, 278-280, 306-307, 329)

The employees' version differs slightly from Cookie's and Roncali's version. Most said

[8]Cookie hired her brother on February 15, 2003 as vice president of operations. But the position he held was not disclosed to anyone else until the February 21st meeting a week later. (T. 265)

they were present when Robin refused to sign the non-competition agreement and was fired by Roncali, but they did not meet with Robin before the meeting. After Roncali was introduced, he started going over some new rules. Don raised his hand and asked if none of the employees signed the non-competition agreement was there any need for the meeting to continue. Roncali responded "Basically not. You're fired." The employees then walked out. They took no contact lists or other company property or information when they left. Robin, Don, and Connie never talked about starting a competing business prior to the meeting where Roncali said signing the non-competition agreement was a necessary condition of continued employment. Don explained there was a gathering of employees at Cooper-Gilder's gate before the meeting because the locks on the gate had been changed over the weekend and Don did not have a key to let them in. Robin was not there. After the employees walked out of the meeting, they gathered outside stunned until someone suggested they go over to John Cooper's nearby home. Robin had access to the house and let them in. (T. 299-303, 305, 308-309, 312-313, 316-325, 331-333)

Connie said she was met at the gate that morning by either Wayne Cooper or Wayne Kerr and told to look at non competition agreement on the last page of her clipboard. Entering the office, she found her chair had been removed from her desk and she was summoned to Cookie's office where Roncali told her he was the new vice president and there were going to be a lot of changes. He threatened her with prison saying Cooper-Gilder didn't have the licenses it needed. Cookie then said she was going to relieve Connie of much of her responsibility, but there would be no cut in pay because Gilder had loved Connie and she was going to take care of Connie. She asked Connie "Are you with us?" which Connie decided not to answer until she learned more about what was going on. At that point everyone went into Roncali's office for the meeting. After reading the non competition agreement's first paragraph she decided not to sign it. By the

end of the meeting, she had been fired. She went with the other employees to John Cooper's house. Later she filed for unemployment and signed up at the job bank. (T. 373-380)

Cookie and Roncali admitted in 30 years of Cooper-Gilder's operation, there was no hint anyone had considered using a non-competition agreement. With the exception of Cookie, Roncali and her son, most of the Cooper-Gilder employees had been with the company for more than 20 years and were nearing social security retirement age. Following the meeting and their termination for refusing to sign a five year non competition agreement covering the entire south eastern United States, they all filed for unemployment compensation which they received after a hearing in which the commission determined they had been terminated. (Ex. D1; T. 120-122, 162-165, 167-169, 264, 266-271, 278-280, 306-307, 329)

On the morning of February 21, 2005, Cookie said she looked for the customer contact lists, but could not find them all. She found the one in Don's office but not the one for Robin's desk. Roncali admitted Cooper-Gilder had absolutely no evidence Robin, Don or Connie had taken any lists. He also admitted Cooper-Gilder had no exclusive contracts with any of its customers. Although they claimed the lists were trade secrets, Cookie admitted the departing employees personally knew most of the customers and suppliers. The business tort defendants also submitted the Inland River Guide to demonstrate the names of customers and suppliers on Cooper-Gilder's lists were easily obtainable from regularly published industry directories. There had been numerous copies of the list and no real security procedures of any kind to keep the information secret. (T. 122-123, 149, 177, 275, 334-336; Exs. D2 & D3)

Before Gilder's death, Charlie Chemical and D& R Tank Cleaning Services, both owned by Robin, operated from the same location as Cooper-Gilder. The fax line was, and had always been, registered to Charlie Chemical. However, it had also been used by Cooper-Gilder on its

invoices and letterhead and to receive quotes and orders. When Robin took those businesses with him within a few weeks along with the fa had paid along with Charlie Chemical's other expenses for years. (T. 129-131)

Within a month of being fired, Robin, Don and Chuck Cooper formed Warfield Point Associates. Connie works in the office but is neither an officer, director nor a stockholder.

Cookie claims Warfield stole Cooper-Gilder's business. To prove this claim, she offered her own unsupported testimony without explanation that Warfield is in the same business as Cooper-Gilder. She said Cooper Gilder's income and profits plummeted in 2005 and 2006, while Warfield had gross sales of $785,592.00 in nine months in 2005 and $628,621.89 in the first half of 2006. Cooper Gilder deposited $92,938.60 in gross receipts in 2006. Of that $46,100 was insurance and tax refunds. Refunds, loan pay backs and other expenses of $55,683.47 reduced net income to $37,255.13. She claimed Cooper Gilder closed[9] in part because of old EPA and Coast Guard liabilities of $90,500 for old spills she was unaware of until she got a Coast Guard letter addressed to Don at Cooper-Gilder in December of 2005. (T. 109-110, 132-136, 138-140)

Warfield's business, however, is far from the same business Cooper Gilder did. It took several months of preparation before they could begin operating at all. While it now uses the fax line to confirm orders, orders are generally received by phone. Connie testified after expenses, Warfield's 2005 profit was around $100,000.00. At trial, it was too early to try to project 2006 profits. While there is some overlap between Cooper-Gilder and Warfield Point's business, there are major differences. Warfield does some barge stripping using Robin's Island 84 land as a

[9]She later admitted Cooper-Gilder is not closed. It has ceased operations, but kept up licenses and permits, in the tow boat/barge cleaning industry and formed new subsidiaries to operate in other business areas using the equipment and assets Cooper-Gilder previously used in the tow boat industry. (T. 198-199)

mooring spot, but it is far less than Cooper Gilder did because of lack of equipment and other issues are seriously limiting their ability to build this side of the business.[10] Warfield is also unable to get chemicals from many of Cooper Gilder's most lucrative land based customers such as shipyards, which became even more valuable as chemical prices rose. K-Solv, a Houston, has picked up many of these former Cooper Gilder customers. With access to fewer chemicals from barge reclamation and shipyards, Defendants have expanded Warfield's chemical brokering business far beyond what Cooper-Gilder had. (T. 327, 345, 349-351, 371, 380-384, 399, 413-414)

Roncali testified Cooper-Gilder had absolutely no evidence Robin, Don, or Connie had done anything at all toward starting a new business to compete with Cooper-Gilder before February 21, 2005. He admitted before February 21, 2005, any of Cooper-Gilder's employees were free to quit if they wished and go to work anywhere they might want. (T. 273-274)

During the year following Gilder's death, Cookie admitted under the management of Robin, Don, and Connie, Cooper-Gilder had gross receipts of $2.5 million dollars. She drew a salary of $125,000 that year and benefitted from all Cooper-Gilder profits as she owned 100% of it during this profitable period. She acknowledged these people worked hard to generate these profits for her and her company. She also admitted they worked just as hard for Cooper-Gilder in 2005 up until the meeting at which she presented them with the non-competition agreement. In fact, they were hard at work in adverse weather conditions the night before she presented them with a covenant not to compete as a condition of continued employment. Cooper-Gilder

[10]Although both Cooper-Gilder and Warfield have used Island 84 as a convenient mooring spot, barge stripping can be done anywhere on the bank that can accommodate the equipment, including several commercial sites. Thus, lack of access to Island 84 should have had little impact on Cooper-Gilder's value or viability. Cooper Gilder, however, increased Island 84's value. A sale of Cooper-Gilder would have given Robin an opportunity to sell Island 84 for a higher price than without it. (T. 415-416, 421)

went on to bring in gross receipts of $776,000 for 2005 despite losing all the experienced employees in mid-February and the start up of Warfield in March. She admitted the tow boat industry is one where close personal relationships are very important to business success and that she, her brother, and her son did not have that type of relationship with people in the industry. In the time she worked at Cooper-Gilder after Gilder's death, she admitted she had only talked to three customers herself. The employees she presented with the non-competition agreement, however, did have strong personal relationships with many people in the industry. Furthermore, she acknowledged they did not have the training or experience to get jobs in any other industry. All they knew was what they had done at Cooper-Gilder. (T. 172-173, 177, 204)

Prior to his termination on February 21, 2005, Robin allowed Cooper-Gilder to use his Island 84 property without charge. (T. 371) Cookie admitted after Robin was terminated by Cooper-Gilder, she did not expect him to allow Cooper-Gilder to continue to use Island 84. (T. 182) Moreover, even after he was terminated, she admitted he voluntarily and without pay assisted Cooper-Gilder and its remaining and new employees in identifying chemicals and with other things that were a part of continuing its business. (T. 202)

At the close of the Plaintiffs' cases in chief, the Chancellor directed a verdict on the life insurance case and denied one on the business tort case. She held the language of the BSA was not ambiguous and thus the court could not look outside the BSA's four corners to determine Gilder's and John Cooper's intent as to ownership of the remaining policies if one of them died first. Under the plain language of the 2001 BSA, John Cooper and James Gilder each owned half of a business worth $1.3 million dollars. They each insured half the value of the business by purchasing life insurance policies on the other's life in an amount equal to half the value of the business. Thus, between the businesses and the life insurance policies, there were $2.6 million

in assets covered by the BSA agreement. The plain terms of the agreement were upon the death of the first of them, the other would have ready access to the cash from the life insurance policies on the other's life to be used to buy the half of the business passing to the estate of the first to die. That estate would then have $650,000 in cash or purchase money equivalents and life insurance policies for approximately $650,000 on the remaining stockholder's life. The surviving stockholder would then have his original half of the corporate shares valued by the BSA at $650,000 plus the newly acquired other half the shares also valued at $650,000. The scales would be balanced with each side having approximately the same amount of assets after the death of the first. The court ruled the insurance buyout options in the BSA would only be triggered if the BSA was terminated while both Gilder and John Cooper were still alive as might occur if they decided to dissolve the business prior to the death of either. (T. 249-257)

At the end of the trial, the Chancellor took the business tort case under advisement, issuing her opinion four months later. She found after John Cooper's and Gilder's deaths, under the 2001 BSA, Cookie obtained the business worth $1.3 million dollars and the Cooper heirs got approximately $1.3 million from the life insurance proceeds. Cookie had no experience in running the business and put Connie in charge based on her husband's advice before his death. She relied heavily on Connie, Robin and Don for assistance in running the business. They were aware of her need to rely on them for the business to succeed because she lacked experience. She continued:

> Apparently, James Gilder and John Cooper had made a deal in which John Cooper received ownership of the property on which the business was conducted and James Gilder received One Point Three Million Dollars. As I understand it, what happens is ships pull up to the property from the Mississippi River and for a price their barges are cleaned and the waste collected. However, the only road which allows access to the property by land is owned by Entergy who for years leased its use to Cooper Gilder or the Cooper Gilder business. Without her

> knowledge, but apparently with the knowledge of the defendants, the lease regarding ingress and egress to the property on which the business had been conducted very successfully for approximately 30 years was bought by Robert Cooper.
>
> Upon discovering that Cooper Gilder no longer had a lease with ingress and egress to the property, Winnie Cooper [sic] made some changes in the business. She changed the locks. She brought in her brother who had no real experience in this particular type of business and placed him over all the other employees including Connie, Robert, and Dunaway, and she asked the employees, all of whom are either Coopers or close friends of the Cooper family, to sign a non-compete agreement which had an unreasonable time requirement of five years.

(T. 432-433; RE. 56-57)

She then found Robin Cooper was fired for refusing to sign the non-competition agreement prior to the meeting which caused another employee to ask in the meeting upon presentation of the agreement if there was any need to be there if they were not going to sign. When Cookie said "I guess not," they all walked out.

> Two or three days after walking out, the defendants started another chemical waste business using the same land that Cooper Gilder had been using for about 30 years. It took a few months to get all the paperwork completed. They do not yet have all the equipment needed to conduct precisely the same business as Cooper Gilder, but, clearly it is their intention to do so in the near future. They have contacted longstanding customers of Cooper Gilder, acquiring customers that usually gave their business to Cooper Gilder. At the time of trial, their company had grossed $700,000.00 during the year 2006.
>
> Cooper Gilder, in the meantime, has gone from a company that had profits of over One Million Dollars a year to a company that has profits of less than $40,000.00 a year and is now out of business.

(T. 434; RE. 58)

The Chancellor rejected the misappropriation of trade secrets claim finding the customer lists were not trade secrets as the customer's names could be obtained from trade directories. They had learned the methods of operation as a result of 20 years of experience and there was no evidence the methods used were not generally known and readily ascertainable by proper means

by other persons. She found while Cookie's decision to bring in her brother and try to get the employees to sign a non-competition agreement was understandable, given her lack of experience and total dependence on the defendants, it "was just a bad business decision." She continued:

> In fact, none of Winnie Gilder's arguments would have merit except for one point. She trusted the defendants. Even they admit they were in a fiduciary or confidential relationship with her. They argue that her bringing in inexperienced persons over them and demanding that they sign an unreasonable non-compete agreement dissolved any confidential relationship between them.
>
> The problem with this argument is that it overlooks one key fact, the purchasing of the Entergy lease without telling Winnie Gilder during a time when the defendants clearly had a fiduciary responsibility to tell her. This coupled with what appears to be secrecy and a change of routine concerning the handling of the Gilder insurance policy, as well as the walk-out of each and every employee, even an employee who, although absent from the meeting, asked Winnie Gilder no questions, clearly and convincingly shows an abuse of that confidence on the part of the defendants.

(T. 435-436; RE. 59-60)

Relying on *Allred v. Fairchild,* 785 So.2d 1064 (Miss. 2001) and constructive trust and unjust enrichment theories, the Chancellor found by obtaining the Entergy lease through an abuse of Cookie's confidence, the defendants were "successfully able to essentially commandeer all of Cooper Gilder's business." She then rendered judgment against Connie, Don and Robin jointly for $1,347,040.00 in actual damages as representative of "an average year's gross profit ... [from] 2000 to 2005, or ... approximately the value of the business as contemplated by John Cooper and James Gilder's Buy/Sell Agreement." (T. 436-439; RE. 60-63)

During the trial, numerous objections were repeatedly sustained . Objections to Cookie's testimony that Gilder respected Connie, trusted her with everything, and told Cookie if she ever needed anything she should go to Connie who would help her were sustained. (T. 44-45) Several objections were sustained on hearsay and parol evidence grounds to attempts to offer

testimony as to Gilder's and John Cooper's intent behind provisions of the 2001 BSA, the purpose of the life insurance policies in connection with the BSA, what they intended to happen to the policies on the surviving shareholder's life after the first died, and the intent behind automatic payment of the premiums on the remaining policies between John Cooper's death and Gilder's death. Neither Cookie nor the NYL agent[11] who sold John Cooper and James Gilder the policies were permitted to testify as to what they had been told of John Cooper's and James Gilder's intent in regard to the BSA and the insurance policies. The BSA's provisions were found unambiguous and spoke for themselves on these issues. (T. 38-40, 72, 76, 77, 185-186, 189)

The Chancellor sustained objections to Cookie's attempts to testify as to the value of Cooper-Gilder. She also sustained objections to Cookie's attempts to show the value of Cooper-Gilder by testifying as to what Robin had said in his interrogatories each family was to get under the December 21, 2001 BSA. (T. 143-144) Objections were also sustained to Cookie's attempts to testify to what Roncali told her occurred in conversations between himself and Robin when Cookie was not present because she was not present or party to those conversations. (T. 120-121)

SUMMARY OF ARGUMENT

The Chancellor correctly excluded parol evidence of intent as the BSA unambiguously expressed John Cooper's and James Gilder's intent on ownership of Cooper-Gilder's stock and the remaining policies on the survivor's life after proceeds of the policies on the first to die were used to purchase the other's half of the stock. But she lost track of the ruling that John Cooper's

[11]A proffer showed the NYL agent would have said when he sold the policies in 1990, he raised the subject of a surviving partner option to buy the policy on his own life when the other died. The response he got from John Cooper and James Gilder was something to the effect that "it's taken care of." (T. 190)

heirs owned the policies on Gilder's life and its implications, failed to preserve the separate identity of the cases, and confused the evidence when she erroneously found James Gilder and John Cooper made a deal in which John Cooper received ownership of the property where the business was conducted and James Gilder received $1.3 million. Those errors were compounded by erroneously finding Robin had actually acquired the access lease while still an employee of Cooper Gilder. All these errors led to misapplication of constructive trust law in conflict with unfair competition and employment law, eviscerating the business tort defendants' right to earn a living when all they did was refuse to accept the bad business judgment of an inexperienced woman who decided to bite the hand feeding her record profits while she was ill equipped to handle the consequences of her own folly. Even if constructive trusts were applicable, the award was unrelated to permissible constructive trust remedies.

ARGUMENT

I. Standard of Review

A chancellor's factual findings will not be disturbed unless they are manifestly wrong, unsupported by credible evidence, or the chancellor applied an erroneous legal standard. Issues or conclusions of law, however, including the applicability of constructive trusts, are reviewed under the de novo standard. *Davidson v. Davidson*, 667 So.2d 616, 620 (Miss. 1995)

II. The Chancellor Erred in Consolidating Substantially Different Cases and in Using Evidence from One Case in Deciding the Other

The court has liberal, but not unlimited, discretion to consolidate "actions involving a common question of law or fact ... ." M.R.C.P. 42(a). " [T]he court must recognize that ... [t]o avoid prejudice, consolidation should be invoked only where the issues of law or fact justifying consolidation predominate over individual issues ... ." M.R.C.P. 42(a) cmt. Although *Hegwood*

v. Williamson, 949 So. 2d 728 (Miss. 2007) and *Capital City Ins. Co. v. G.B. "Boots" Smith Corp.*, 889 So. 2d 505 (Miss. 2004) are cases, they demonstrate consolidating cases which lead to the trier of fact considering evidence in one case that should be excluded or is irrelevant to the other is an abuse of discretion. *Capital City*'s discussion of the separation of damage and liability issues from the existence of insurance coverage under Capital City's contract shows the issues in the present cases are also completely separate and concern distinct litigable events.

> [T]he circuit court should have severed the claims. The third party tort claim against Williamson and the first party breach of contract and bad faith claims involve distinct litigable events. The claims against Williamson and State Farm arise out of separate allegations of wrongdoing occurring at separate times. While it is true that the genesis of both claims arose out of the accident, the two claims involve different factual issues and different legal issues. The car accident raises fact issues of how the accident occurred and legal issues of simple negligence (duty, breach of duty, proximate causation, and damages). The breach of contract and bad faith claims raise fact issues of what occurred between the two insurance adjusters and how they made their decisions and legal issues of interpretation of insurance policies and bad faith under which an award of punitive damages may or may not be appropriate.

949 So.2d at 732 ¶ 8. The Chancellor's bench ruling recognized the importance of keeping "in mind that consolidated actions never lose their identity as separate actions" and "[c]onsolidation in no way dispenses with the need for separate pleadings ... ." (T. 46-47; RE. 19-20); see also *Smith v. H.C. Bailey Cos.*, 477 So. 2d 224, 231 (Miss. 1985). But these concepts got lost in this case.

The Chancellor failed to recognize there were few common issues of law or fact and whatever commonality existed did not predominate over the individual issues. She lost sight of the separate identity of actions and pleadings, mixing and confusing the pleadings, identity, issues, evidence and findings in the two cases. Thus matters relevant only to the life insurance action and the 2001 BSA were allowed to bleed over into the business tort case where they were

irrelevant, prejudicing Defendants, particularly Connie and Don who were not life insurance Defendants.

The same attorney filed the life insurance case and the business tort case in Washington County Chancery Court on March 11, 2005. (R. 13-19; 228-238; RE. 79-96) The death of both Cooper-Gilder's founders within a few months was tangentially related to both cases. The cases had almost completely different parties. Cooper-Gilder was a life insurance plaintiff and the only business tort plaintiff. Each case had three defendants, with only Robin common to both. John Cooper's sisters Marilyn and Mildred were not business tort defendants. Don and Connie, Cooper-Gilder employees, were not life insurance defendants. Gilder's estate and Cookie, in her individual capacity, were not parties to the business tort case. Cooper-Gilder was not a real party in interest in the life insurance case as Cookie's receipt of the proceeds would not have benefitted it. (R. 13-19, 228-238; RE. 79-96); *Sneed v. Ford Motor Co.*, 735 So. 2d 306, ¶ 21 (Miss 1999)

Issues in the life insurance case focused on the founders' December 2001 BSA and who was entitled to the life insurance proceeds on Gilder's life under it. Its plaintiffs claimed equitable ownership of the policies on Gilder's life because he owned 100% of Cooper Gilder for the four months between John Cooper's and his own death during which the premiums were paid with Cooper Gilder funds. It alleged John Cooper's heirs were unjustly enriched by receiving policy proceeds on Gilder's life after Gilder used the proceeds of the policies on John Cooper's life to pay them for John Cooper's half of the Cooper Gilder stock under the BSA. Nothing in the pleadings referred to anything after Gilder's death other than the claim for and payment of policy proceeds on Gilder's life and Cookie's discovery that ownership of the policies had not been transferred to Gilder when he purchased the stock from John Cooper's

Estate. The focus was primarily on events surrounding the formation of the BSA in 2001 and matters occurring between John Cooper's death on October 29, 2003 and Gilder's death on February 8, 2004. It was primarily a contract case with an equitable ownership claim based on failure to specifically perform the 2001 BSA as interpreted by Cookie and the Estate. The pleadings did not mention unfair competition, breach of fiduciary duty, abuse of confidential relationship, interference with corporate opportunities, stealing trade secrets or customer lists, enticing away employees and customers, conspiracies to compete with Cooper-Gilder, mass employee walkouts or constructive trusts. In short, the life insurance pleadings had nothing to do with Cooper-Gilder's operation after Gilder's death. (R. 228-238; RE. 86-96)

The business tort issues focus on Robin's, Connie's and Don's status as key employees of Cooper-Gilder following Gilder's death and their actions in starting and operating a competing business after their employment ceased on February 21, 2005. It alleges Connie owed fiduciary duties to Cooper-Gilder as an officer, that Robin owed similar duties as a key employee, and that they breached those duties by interfering with Cooper-Gilder business opportunities, conspiring to establish a competing enterprise, enticing away company employees, and misappropriating trade secrets and a fax number. Aside from a brief mention that John Cooper and Gilder formed Cooper Gilder in 1974 and both are now deceased, the pleadings do not mention anything prior to February 21, 2005. These are distinct litigable events from the 2001 BSA, life insurance policies, any agreements between John Cooper and James Gilder, any lease, Island 84 or any agreement concerning Island 84, or even agreements concerning land swaps between John Cooper and Gilder which are not mentioned in the business tort pleadings. The pleadings are a straight post employment unfair competition case with a request for constructive trust tacked on. (R. 13-19; RE. 79-85)

Based on the pleadings, there should have been little or no overlap in the issues or facts in these two cases. Witnesses would have overlapped, but they should have been testifying about separate time frames and events in the two cases. But once consolidated, all sorts of evidence about the BSA, the long business relationship between John Cooper and James Gilder, who they intended should own Cooper-Gilder, and who should receive what insurance proceeds, who should own what land after they were dead, were allowed to bleed over into the business tort case where they were irrelevant to the issues and theories pled. Had the cases remained separate, such evidence would have been excluded in the business tort case.

Based on the objections sustained and her findings four months after trial, it also appears the Chancellor was unable to keep straight in her mind what evidence she excluded from which case and why. *Supra* at pages 18 through 21. Several major points the Chancellor relied on in finding the sole merit to Cooper-Gilder's business tort claims and on which she relied to impose a constructive trust would not have been present had she not erroneously consolidated the cases to the prejudice of the Defendants, particularly those not party to the life insurance case. Keeping the cases separate would probably have also avoided the factual errors discussed later in this brief as they too appear to arise from the Chancellor losing sight of the separate identity of the cases. Thus, this is precisely the kind of case where consolidation is an abuse of discretion.

III. The Chancellor Failed to Hold the Plaintiffs to the Proper Burden of Proof

The sole basis of the relief granted was constructive trust count. The burden of proof rests on one seeking to impose a constructive trust to prove the trust by clear and convincing evidence including the elements of a confidential relationship and the grantee's acquisition of property through abuse of that confidence. The burden of proof never shifts to the grantee under constructive trust law. *McNeil v. Hester*, 753 So. 2d 1057, 1069-1070 (Miss. 2000)

The Chancellor's choice of language in her bench ruling clearly show she did not hold the Plaintiffs to the appropriate high standard of proof and that her findings, even if supported by the evidence, are insufficient to satisfy the applicable burden of proof. *Stovall v. Stovall*, 218 Miss. 364, 67 So. 2d 391 (1953) Words like "apparently ... had made a deal" and "what appears to be secrecy" connote a lack of the high degree of certainty required in *Stovall* and other cases.

IV. Several Findings Are Contrary to the Facts and Evidence

A. The Finding That Pursuant to the 2001 BSA, Cookie Obtained Ownership of Cooper-Gilder, a Business Worth $1.3 Million Dollars and the Heirs of John Cooper Obtained Possession of $1.3 Million in Life Insurance Proceeds

Noone but John Cooper or James Gilder could acquire ownership of Cooper Gilder under the BSA as they were the only stockholders it listed. The life insurance proceeds did not total $1.3 million as Gilder had taken a $55,000 loan against the policies. Gilder undisputedly owned 100% of Cooper Gilder by December 17, 2003, almost two months prior to his death. Moreover, the BSA terminated by its own terms prior to Cookie inheriting Cooper Gilder from her husband. (T. 36-37, 39; R. 598; Exs. P6 & P20; RE. 97-118) Thus, the finding Cookie obtained ownership of Cooper Gilder pursuant to the BSA is incorrect and contrary to the evidence.

Likewise the finding that John Cooper's heirs obtained $1.3 million in life insurance proceeds for the stock or business is contrary to the evidence. Cooper's heirs were paid approximately $650,000 in a combination of insurance proceeds and Gilder's five year note, secured by his Cooper Gilder stock, for John Cooper's half of the Cooper-Gilder stock. They received the proceeds of the policies on Gilder's life in exchange for the premiums paid and charged to John Cooper's share of Cooper-Gilder profits in the years since 1990. (R. 453-454, 561, 562, 573; T. 44, 78, 96-97; Ex. P6, P10 & P11; RE 97-118)

B. The Finding of a Deal Between James Gilder and John Cooper that James Gilder

Conveyed Ownership of Island 84 to John Cooper for One Point Three Million Dollars

There is absolutely no evidence of any deal between James Gilder and John Cooper in which Gilder received 1.3 million dollars[12] much less one in which John Cooper paid 1.3 million dollars for sole ownership of Island 84. The only evidence concerning land ownership was that John Cooper and Gilder initially owned Island 84 and other properties jointly as individuals, and their shared property ownership was separate from their ownership of Cooper-Gilder. In July 2003, they executed deeds eliminating their joint ownership, leaving James Gilder with sole ownership of land suitable for his wife's horses near the Cooper-Gilder business address on Cedar Lane plus other property on Redmond Road and John Cooper with sole ownership of Island 84 in Arkansas which he then deeded to himself and his brother Robin as joint tenants with right of survivorship. On John's death, Robin became sole owner of Island 84 with no strings attached by right of that deed. These land swaps partitioning their jointly owned land were initiated by Gilder and handled for them by a lawyer or lawyers. The land transactions were not a part of the transaction in which the BSA was agreed upon. They occurred at least a year and a half after execution of the 2001 BSA which sets out their agreement and determines ownership of Cooper-Gilder and the life insurance policies upon the death of the first to die but makes no mention of any land. Despite John Cooper's diagnosed cancer, there is no evidence John Cooper and James Gilder put contingencies in their July 2003 conveyances to alter the result of the conveyances if John Cooper should die before James Gilder. These conveyances occurred about 20 months before the events at issue in the business tort case and are irrelevant to the issues in that case. Their only relevance to the business tort case is that after acquiring sole

[12]The only reference to any source of funds totaling $1.3 million anywhere in the record refers to the total of all the life insurance policies held on both James Gilder and John Cooper. None of that money was available prior to the death of at least one of them. Island 84 changed hands in July of 2003 months before either of their deaths. Thus, Gilder could not have received $1.3 million for Island 84.

ownership of Island 84, in July of 2003, John Cooper conveyed it to himself and Robin with right of survivorship which is how Robin legally, morally, and ethically acquired both title and beneficial ownership of Island 84 and the right to control use of Island 84. (T. 219, 370, 395-396, 403-404, 406-408; Ex. D5; RE. 119-123)

Gilder might have initially expected, based on age probabilities, he would die before John Cooper , and the Cooper family would acquire full ownership of Cooper Gilder under the BSA. He might have expected if age probabilities held and his younger partner survived him, the probable result of his separate actions in regard to the 2001 BSA controlling ownership of Cooper Gilder and 20 months later in regard to the ownership of Island 84 and the land near the office and on Redmond Road would be that the Cooper family would eventually own both Cooper Gilder and Island 84. But that does not establish by the preponderance of the evidence, much less clear and convincing evidence, any agreement or a deal between James Gilder and John Cooper for Gilder to receive $1.3 million in exchange for Cooper receiving full ownership of the land on which Cooper Gilder's business was conducted as found by the Chancellor.

There was no testimony at all as to John Cooper's intent or agreement in regard to these land transactions and any relationship to future ownership of Cooper Gilder or any sum of money. The only testimony at all on the possibility of a connection between the agreement on future ownership of Cooper Gilder and Island 84 was that ownership of Island 84 was and always had been completely separate from ownership of and agreements concerning future ownership of Cooper Gilder. (T. 398: 3-4) There was no testimony James Gilder thought he had an agreement tying ownership of Island 84 to ownership of Cooper Gilder. The most the testimony supported was that one witness believed John Gilder believed he would die first – not even testimony based on personal knowledge of his actual expressed intent in regard to the land

transactions much less evidence of the existence of an actual agreement or deal connecting ownership of Island 84 to any money or to ownership of the business of Cooper Gilder. See note 4 at page 4, supra. It would have been no more than a mere expectancy as Gilder knew he could not control life and death. Given John's terminal cancer, it would have been unrealistic of him just three months before John's death to expect John Cooper to outlive him.

The supposed "deal" that the Cooper family was to get Island 84 while the Gilder family was to get $1.3 million dollars, regardless of who died first, would have been directly contrary to the BSA in the event John Cooper died first as well as to the terms of the Island 84 deed and the terms of the life insurance policies regarding ownership, designation of successor owners, and designation of beneficiaries. (Exs. P4, P5, P6, & D5; RE. 97-123) Regardless of Gilder's subjective beliefs as to who would likely die first, Gilder, John Cooper and their successors were all bound by the terms of the contracts and deeds Gilder and John Cooper entered into even if they did not achieve the result Gilder anticipated because John Cooper died first. *McNeil* at 1067 To go behind those written agreements and deeds, and overturn them on testimony of someone not a party to those written agreements as to what she subjectively believes one of the deceased parties subjectively believed would be the likely outcome of the occurrence of an uncertain event which was specifically addressed in one of the contracts, i.e. which would die first, turns the law of contracts, the rules of contract and deed construction, the parole evidence rule, and the requirement of clear and convincing evidence for the imposition of a constructive trust all on their heads. *Saulsberry v. Saulsberry*, 232 Miss. 820, 835-836, 100 So. 2d 593 (1958); *McNeil*, supra; *Stovall*, supra.

C. The Finding of Apparent Secrecy and Changed Routine Concerning the Handling of the Gilder Insurance Policy

There was no evidence of a change in routine concerning the handling of the Gilder insurance policy much less of any secrecy concerning the policy. Prior to John Cooper's death, the monthly premiums for the policies on John Cooper's and James Gilder's life were paid by automatic bank draft on Cooper Gilder's account. When John Cooper died, it did not change. The premiums continued to be paid by automatic bank draft from Cooper-Gilder's account on the remaining policies on James Gilder's life. (T. 78) There had never been any changes in ownership of the policies prior to John Cooper's death, so there was no routine to be followed concerning the formality of moving the policies owned by John Cooper through the estate to the heirs. Even if there had been, these changes were done openly in Cooper-Gilder's offices with James Gilder, Connie Burford and the Cooper heirs present. There was no evidence to the contrary[13]. (R. 309, 331-338;T. 84-88, 206-207, 214-215, 218, 219, 225, 229-232; Ex. P13)

D. The Finding Robin Bought the Island 84 Access Lease While Under a Duty to Disclose

The evidence shows Robin wrote a January 4, 2005 letter to Entergy informing them on John Cooper's death, he became owner of Island 84 to which the existing lease between Cooper Gilder and Entergy provided access and enclosing a check for the lease payment from October 2004 to October 2005. (Ex. P17) The evidence does not establish Robin ever "purchased" the lease or that Cooper Gilder actually lost the access lease, much less that Robin "purchas[ed] ... the Entergy lease without telling Winnie Gilder during a time when the defendants clearly had a fiduciary responsibility to tell her." The burden was always on Plaintiffs to establish by clear

[13]Objections to Cookie's testimony James Gilder could not have been aware of what was occurring in his presence when she was not present at the meeting based on statements he allegedly made later to her concerning his intention that she receive the proceeds of these policies were sustained. (T. 37-40)

and convincing evidence the defendants held "legal title" to what Plaintiffs claimed in fairness and equity ought to have belonged to Cooper Gilder. That burden could not be shifted to Robin as the supposed "grantee" of the new lease. *McNeil*, 753 So. 2d at 1069-1070

Plaintiffs introduced no evidence Robin ever acquired title to the Entergy Island 84 access lease which Cooper Gilder held. No lease in Robin's name was introduced because there is none. No other evidence was introduced showing Entergy actually transferred the lease to Robin, that Robin actually acquired title to the access lease by any other means, or even that Cooper Gilder ever lost legal title to its lease. There is no evidence at all that either Connie or Don ever even requested legal title to an access lease across Entergy land much less that they acquired it.

Robin writing of a letter informing Entergy he owned the property the lease provided access to and enclosing a check in the amount of the prior lease payments is no more than an offer to lease access to landlocked property he owned. There is no evidence it ever ripened into an actual transfer or even a bilateral contract to transfer the lease. It does not even constitute an agreement with Entergy to lease, much less an actual transfer of the lease as it contains no evidence Entergy accepted the offer. For Robin to acquire the lease, Entergy would have had to accept the offer and transfer the lease. The only evidence admitted at trial concerning Entergy's response to the January 4, 2005 letter was Robin's testimony Entergy did not accept his offer.

> Q. In January of 2005, you acquired a lease on the easement to Island 84, is that right?
> A Not exactly, I negotiated for the lease.
> Q Well, isn't that when you told me in your deposition that you acquired the lease?
> A. Well, I acquired permission to use the land. ...
> Q. And you paid for that?
> A. I did pay for it. ...
> BY THE COURT

Q. You said you were negotiating to acquire the lease?
A. I sent them a letter requesting that the access be put in my name since all the property -- and they sent back needing proof of ownership which I delivered to them. Then I started negotiating to buy the property and we were in that position when --
To buy the leased proeprty?
Yes. And Katrina hit and, since Katrina hit, I can't get a hold of anybody, you know, so we can finish it up.
Q So you say you've now acquired permission to use the --
A. Right
Q. --property? Are you paying for it?
A. Pardon me?
Q. Are you paying for the use of it?
A. I've sent them one check. That's all I've sent them. They've not requested anymore. They've not done anything.
Q. Have they accepted the check you sent them?
A. They've not sent it back.
Q. And when was this?
A. When I first applied for the lease.
Q. Which was when? Well let me ask you this. Would that be around the time of the letter that you sent telling them you owned the property?
A. Say that again please?
Q. Would that be around the same time as the letter that you sent to them --
A. Yes, mam.
Q. -- telling them that you owned the property?
A. I sent a check with the letter. ...
Q. The check that you're talking about that you sent them, is that the same check that you sent with that letter?
A. Yes, it is.
Q. Did that check come back to you?
A. No mam.
Q. Is that lease done yearly?
A. It was yearly prior to this, but, shortly after that, we went into negotiations to purchase the property. I had trouble with the environmental portion. They had to send someone in to make sure that, as far as the lease goes, that we weren't environmentally violating the land. So, I met with that lady and we did a walk-thru. And then it was transferred to a different person some kind of way and he says, "Well, we have to tell Cooper-Gilder that you're leasing this land". I said "Okay." And then I said "What about buying the land?" He said "We do that quite often ..." he said "... and a lot of times it eliminates problems." I said, "Well, let's go ahead and set up a purchase price for the land and let me just buy the land. That way we can tie it to my 22 acres."
Q. Has any money been paid on the lease since that check was sent in January of 2005?
A. Yes mam – what was the question?

Q. Has there been any money --
A. No, no.
Q -- paid for the lease of that property since that check was sent in January, 2005?
A. They've not requested anymore money. We are still in negotiations or were in negotiation on the purchase.

(T. 235:27 to 239:4)

Plaintiffs offered no proof contradicting Robin's testimony Entergy did not accept the January 4, 2005 offer to lease . The only evidence they offered on the lease was the 1976 one year lease and an attempt by Cookie to testify Robin transferred the lease based on the mere fact he informed Entergy he owned Island 84 and offered to pay for access to his property in the letter. While the court did admit the letter itself based on Robin's deposition admission that he wrote and sent the letter, it did not overrule the objection to Cookie's testimony that the effect of the letter was to "get the lease from Cooper Gilder into Robin D. Cooper." The Chancellor limited what she was permitting Cookie to testify to and Plaintiffs' counsel moved on. The exchange shows the sole basis for her intended testimony the transfer actually occurred was the letter informing Entergy of Island 84's new owner. She had no personal knowledge or evidence of actual transfer and even admitted she did not know who owned Island 84. (T. 113-116, 181)

Plaintiffs offered no evidence of any attempt to contact Entergy to confirm the status of the lease after learning of the January 4, 2005 letter before Robin was fired, or even after that and prior to the end of trial. There was clearly testimony that Cooper Gilder used the access with no interruption between the time the January 4, 2005 letter was written and February 21, 2005 when Cookie and her brother terminated the Defendants' employment. There was even evidence Cooper Gilder used the access to service a tanker tying up at Island 84 at night in bad weather with no interference after Defendants knew Cookie's brother had changed the locks. (T. 204)

Plaintiffs evidence did not show a preponderance of, much less clear and convincing, evidence, that Defendants, or Robin, acquired title to the lease while employed by Cooper Gilder.

IV. The Chancellor Compounded Her Error in Finding Robin Purchased the Access Lease While Employed By Cooper Gilder When She Denied the Motion For Reconsideration

Following the Chancellor's bench ruling, Defendants filed a motion under M.R.C.P. 59 asking the Chancellor to reconsider her decision. Rule 59's states in an action tried without a jury, a rehearing may be granted for any reasons previously granted in courts of equity. It also specifically mentions submitting additional evidence by affidavits with no requirement the evidence be newly discovered.[14] This court has repeatedly held a chancery court can reopen a case for additional proof even after a final hearing if "some material point is either left unproved or the explanation of it is insufficient." *S.C.R. v. F.W.K.*, 748 So. 2d 693, 701 (Miss. 1999).

Following those principles, in addition to pointing out to the Chancellor how the evidence before her failed to support the findings discussed here, the Defendants submitted additional evidence to assist the Chancellor in seeing that her rulings were not only unsupported by the required level of proof in the record but also that the Chancellor's misperception of the evidence on what she herself identified as key points had led to a clearly unjust and incorrect result. In support of Robin's testimony that he never acquired title to Cooper Gilder's access lease, Robin submitted with his affidavit, the letter Entergy sent in reply[15] to his January 4, 2005

[14]M.R.C.P. 60 which does refer to "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)" is not applicable because the motion here was timely filed under M.R.C.P. 59(b).

[15]Plaintiffs counsel stipulated that Plaintiffs had no objection to admission of the January 11, 2005 letter or the July 2003 deeds showing all parts of the land swap which resulted in John Cooper acquiring full ownership of Island 84 before deeding it to himself and Robin with right of survivorship. (T. 448: 14-19; 449:23)

letter declining to transfer the lease on the basis of Robin's letter. He also stated in his affidavit that evidence was available through Mr. Miller, Lead Real Estate Analyst at Entergy that Entergy never accepted his offer to lease the property, that the lease always remained in Cooper Gilder's name and that Cooper Gilder, not Robin, had in fact paid the lease through the end of the 2006 lease period. Defendants requested permission based on those affidavits to reopen the record, take Mr. Miller's deposition and present his evidence on lease ownership to the court. (T. 440-446)

Plaintiffs argued it was improper to submit additional evidence on ownership of the lease after trial because it was not newly discovered evidence and Robin had chosen to remain silent while Connie testified that he had acquired the lease. Plaintiffs' counsel also argued that Robin's statement in his affidavit that he had recently learned Cooper Gilder had paid the Entergy lease through 2006 was somehow an effort to deceive the court into believing he didn't acquire the lease when he took the position during discovery and at trial that he did own the lease. According to their argument, Robin couldn't have newly discovered evidence on the lease ownership issue because he had a January 11, 2005 letter all along showing Entergy's response to his letter. (T. 448-450; R. 177-182) But Plaintiffs counsel also informed the court that Cooper Gilder paid the lease ***after trial*** and prior to the court's bench ruling ***after receiving notice from Entergy that its lease was about to expire***. (T. 448-450) He never explained how something that did not occur until after trial could possibly not be newly discovered evidence. This argument also conveniently ignores Robin's testimony quoted in the previous section of this brief clearly stating that while he was negotiating to lease the access or buy the property, the negotiations were never concluded and he never acquired title. That can hardly be interpreted as remaining silent or taking the position at trial that he had purchased the Entergy lease in January

of 2005.

As Robin's counsel pointed out, Cooper Gilder's counsel did not inform the court that after trial, his client had received notice from Entergy that its lease was about to expire and had paid that lease. (T. 451) To the contrary, he claimed in his response brief that Robin and Connie were now lying in claiming Cooper Gilder's receipt of the notice and payment of the lease after trial was additional evidence he never acquired the lease because they admitted at trial or in depositions that he did acquire ownership of the lease. This argument relied upon trial testimony by Connie that she didn't see why Cooper Gilder should pay for the lease when Robin owned the land and her deposition testimony which states "After John died and Robin owned the property, then he paid the lease amount and ***asked*** that they put the lease in his name." (R. 129-130) Neither is a statement that the lease was actually transferred to Robin. It also relies upon Robin's deposition testimony completely ignoring Robin's trial testimony quoted above explaining what actually occurred in his dealings with Entergy, even though Plaintiffs counsel chose not to cross examine Robin on this testimony using the deposition testimony he now claims is inconsistent despite a specific invitation by the court to him to cross examine Robin on his negotiation testimony directly after Robin's testimony. (T. 239)

There is a big difference between proving someone asked for legal title and proving that he actually acquired legal title. Whether Robin actually acquired legal title to the Entergy lease and if so when were not some insignificant matter tangential to the court's ruling. Actual holding of legal title to the property over which a constructive trust is sought, not just a request for it, is a required element for imposing a constructive trust. *First Nat'l Bank v. Huff*, 441 So. 2d 1317, 1321 (Miss. 1983) There is a big difference between proving someone asked for legal title and proving that he actually acquired legal title. While the business tort complaint never

mentioned the lease and Cookie admitted that even if Cooper Gilder had a lease she could not have expected Robin to allow Cooper Gilder to use Island 84 after he was fired, the Chancellor pointed specifically to Robin's "purchasing" the lease at a time when he was still employed by Cooper Gilder as the "one key fact" breathing life into any of Plaintiffs' claims. (T. 435-436)

While the Chancellor has wide discretion in deciding whether to reopen the record for the admission of additional evidence, her ruling states the motion was denied because the "additional proof Defendants' seek to admit into the record is not newly discovered and by due diligence, proof of its existence could have been discovered in time for trial." This ruling applies the standard of M.R.C.P. 60 and not that of M.R.C.P. 59. Moreover, her stated reason could not possibly have been valid in regard to the evidence that Cooper Gilder had received notice from Entergy its lease was about to expire and in response paid the lease through October of 2006 when those events were admitted by Plaintiffs' counsel to have occurred after trial ended. When the trial testimony is viewed in light of that evidence, it is even clearer that the burden of proof was impermissibly shifted to the Defendants and Plaintiffs never met their burden of proving by clear and convincing evidence that Robin held title to a lease which in good conscious he should not have retained because in equity the beneficial interest in the lease belonged to Cooper Gilder.

IV. The Chancellor Erred in Misapplying Constructive Trust Law to Accomplish a Result Contrary to the Law of Employment at Will, Covenants Not to Compete, Breach of Fiduciary Duty, and the Inability of Repetition of Favors or Gratuitous Accommodations to Form a Basis for a Claim of Right

A. Repetition of Favors or Gratuitous Accommodations Cannot Form a Basis for a Legal or Equitable Claim of Right

The Chancellor's whole constructive trust concept is based on the theory that Cooper-Gilder had some sort of an equitable right to continue to use Island 84 after Robin became its sole owner, i.e. that Robin held legal title to that which in fairness and equity ought to have

belonged to Cooper Gilder. But nothing in the law supports any such right. Although Cooper Gilder owned an Entergy lease providing access to Island 84, the lease was worthless without a right to use Island 84. Robin had no obligation to continue to allow Cooper Gilder to use Island 84 after he became its sole owner by reason of the joint tenancy with right of survivorship deed with John Cooper and John Cooper's death. Cookie even admitted once Robin's employment was terminated, she could not expect Cooper Gilder to be allowed to use Island 84, at least not gratuitously. Yet without that right, the lease Cooper Gilder continued to hold was worthless.

A "repetition of favors for accommodation cannot constitute a foundation for a valid claim to their enjoyment as a right." *Vicksburg & M. R. Co. v. Dixon*, 61 Miss. 119, 122 (1883); *Yazoo & M. V. R. Co. v. Crawford*, 107 Miss. 355, 364, 65 So. 462 (1914). In *Dixon*, the railroad company maintained and repaired a stock gap for 30 years at the plaintiff's field. No matter how long it maintained the gap, that practice could never impose any obligation on the railroad to continue to maintain the stock gap even if the plaintiff relied on that past practice and the railroad's failure to maintain the gap allowed cattle to enter his field and destroy his crop. In *Crawford*, the court held a railroad had the unilateral right without notice to abolish a course of dealing allowing any shipper with log loading equipment to load logs at any point along its lines. The railroad unilaterally changed its policy requiring shippers to bring logs to stations for loading by the railroad's designated agent. This effectively put some private log loaders along the line out of business. But they had no right to prevent the railroad's change of a practice they had found profitable because the railroad had no obligation to continue the accommodation of allowing loading at any point along the line by those who could provide their own equipment.

Thus, no matter how long John Cooper and his predecessors had granted Cooper Gilder the favor or accommodation of using Island 84, which Cooper Gilder did not own or lease, such

allowance of gratuitous use could not provide a basis for a right by Cooper Gilder or Cookie to continue that use when Robin became the sole owner of Island 84. Nor could Robin's allowance of such gratuitous use for the year following John Cooper's death provide a basis for either a legal or equitable right in January of 2005 or after Robin was fired. Thus, Cooper Gilder had no legal or equitable right to continue to use Island 84 regardless of whether Robin provided them with advance notice of his own actions in regard to obtaining access to Island 84.

B. Law on Employment at Will, Covenants Not to Compete, Corporate Opportunity, and Breach of Fiduciary/Confidential Relationship by an Employee

Following the death of both John Cooper in October of 2003 and James Gilder in February of 2004, Cookie became the sole owner and principal of Cooper Gilder with the complete authority to make all decisions related to the company and had a responsibility to act accordingly. Robin, Don and Connie were at-will employees of Cooper Gilder, Inc. subject to termination for any or no reason at Cookie's direction. They were not shareholders. Robin and Don were not even officers or directors.

ACI Chems., Inc. v. Metaplex, Inc., 615 So. 2d 1192, 1198 (Miss. 1993) sets out the applicable law concerning employment at will, covenants not to compete, corporate opportunity, and breach of fiduciary duty or confidential relationship by an employee. Patterson worked with Settles at AmChem. Patterson eventually left AmChem and formed ACI. A few years later, Settles left AmChem to join Patterson at ACI. Seven years later, Patterson sent Settles a non-competition agreement. When Settles refused to sign it, Patterson fired him, took back his company car and all company documents in his possession. Within a month, Settles formed his own competing company and hired other ACI workers who refused to sign the non-competition agreement. Settles also engaged in some consulting and accepted fees for future consulting prior

to termination of his employment.

The Court held those ACI employees who refused to sign the non-competition agreement were free to start their own business serving ACI's customers as long as they did not take and use any true trade secrets. ACI Chems, relying on Restat. 2d, Agency § 393 comment e, also holds

> [e]ven before the termination of the agency, he (the agent) was entitled to make arrangements to compete, except that he could not properly use confidential information peculiar to his employer's business and acquired therein. He was not entitled to solicit customers for such rival business before the end of his employment, nor could he properly do other similar acts in direct competition with the employer's business.

The *ACI* Court also rejected the breach of fiduciary duty/abuse of confidential relationship argument pointing out that in order to recover on this theory, the employer had to be able to show a drop in sales or loss of customers prior to the employee's termination. It was not enough to show the employee had incorporated the new competing business before he was terminated and was producing and selling products within three months of termination. Nor did the acceptance of consulting work or fees for future consulting work prior to actual termination result in a breach of fiduciary duty or abuse of a confidential relationship.

Cooper-Gilder's corporate representative testified both that he knew of Robin's letter to Entergy by February 21, 2005 and that Cooper-Gilder had absolutely no evidence that prior their termination on February 21, 2005, Robin, Don, or Connie had done anything at all toward starting a new business that would compete with Cooper-Gilder. (T. 273-274) Clearly he did not consider the letter to be a step toward starting a new business to compete with Cooper-Gilder.

While Cookie and her brother might have been upset about the letter Robin wrote to

Entergy, there is no evidence Robin, Connie, or Don did anything to conceal it from them. Since Cookie had put Connie in charge and it was Connie who suggested to Robin he should pay the lease instead of Cooper-Gilder, there was no reason for Robin to think Cooper-Gilder was unaware of or disapproved of him writing the letter or paying the lease. There is no evidence Connie was not acting Cooper-Gilder's best interest. She simply did not think Cooper-Gilder should pay for the lease when Robin owned the land. It never occurred to her Robin's letter or payment of the lease would have any effect on Cooper-Gilder's use of the land or the access route to it over Entergy's land. (T. 370-371)

In short, neither Plaintiffs nor Defendants believed there was any connection between the letter about the lease and the Defendants starting a new company in competition with Cooper Gilder after they were fired. There was a connection between Defendants being fired for refusing to sign the non-competition agreement demand and starting a new competing company so they would still have jobs. But that was entirely ethical and legal. *ACI*

ACI rejected an argument similar to what the Chancellor here relied on to establish breach of a fiduciary duty/confidential relationship pointing out employees have a right to prepare to compete with their current employer even prior to termination. *ACI* does not require employees to notify employers of such preparation work. The right to prepare without giving notice is implicit in *ACI's* holding the employee has the right to prepare while still working for the former employer. If the employee were required to disclose his preparation to compete, most employers would immediately fire the employee. Thus, even if Robin intended his actions in writing Entergy concerning the lease for access to his Island 84 property to be an act of preparation in setting up a competing business prior to his departure (which is not supported by the evidence), it would not have been a breach of fiduciary duty because under *ACI*, he was

entitled to take such action. Given Robin's right to take such action, the knowledge of the other Defendants, even if proven[16], of Robin's actions could not give rise to liability. In the present case, as in *ACI*, there is no evidence of a drop in the former employer's (Cooper Gilder's) sales, income or customers until after the termination of Robin's, Connie's and Dunaway's employment relationship. Thus, the Court's reasoning for the monetary award against based on a breach of fiduciary duty or confidential relationship is in conflict with *ACI*.

C. Constructive Trust Law Including the Failure to Prove Abuse of A Confidential Relationship By Clear and Convincing Evidence

While the constructive trust law discussed and cited by the Chancellor is not incorrect viewed in isolation from the facts or as general statements of constructive trust law, it does not support a finding of an abuse of a confidential relationship or warrant imposition of a constructive trust remedy awarding $1.3 million dollars to Cooper Gilder jointly against Don, Connie and Robin. The law allows the imposition of a constructive trust to prevent unjust enrichment when one unfairly derives benefit from holding legal title to property acquired under such circumstances he ought not in good conscious to retain the beneficial interest which in equity belongs to another. These elements must be proved by clear and convincing evidence. *In re Administration of the Estate of Abernathy*, 778 So. 2d 123 (Miss. 2001) This burden of proof never shifts to the grantees – Robin, Connie and Don. If the evidence on any element is not clear and convincing, constructive trust law will not support the award against Defendants. See *McNeil*, supra.

The first requirement for imposing a constructive trust which is unsupported by the evidence is the holding of legal title by Connie, Don and Robin. A constructive trust cannot be

[16]While the evidence establishes Connie's knowledge of Robin's correspondence with Entergy concerning the access lease, there is no evidence of Dunaway's knowledge of Robin contacting Entergy.

imposed upon a defendant who does not hold legal title when suit is filed. *Huff*, 441 So. 2d at 1321 For this element, the Chancellor assumed Robin had acquired legal title to the lease. But, as has been discussed above, the evidence of actual acquisition of the lease falls woefully short of clear and convincing. It does not even rise to a preponderance of the evidence, much less satisfy the heightened clear and convincing standard required for imposition of a constructive trust.

Plaintiffs proof Robin ought not in good conscious to hold legal title to access rights to Island 84 also falls far short of clear and convincing. The evidence shows Robin lawfully acquired ownership of Island 84 by right of survivorship when John Cooper died more than three months before Gilder died. (Ex. D5; RE. 119-123) Immediately upon acquiring sole and full ownership of Island 84, Robin acquired a legal and equitable right to negotiate for access to his land locked property and even to take legal action to have the government assist him in acquiring a private right of way to his land upon payment of compensation should his negotiations fail. Miss. Code Ann. § 65-7-201 (2007); *Hooks v. George County*, 748 So. 2d 678, 680-681 (Miss 1999) His right to use and control his own property "is a sacred right not to be lightly invaded or disturbed." *Id.*

When he acquired ownership of Island 84 and his right to negotiate for access, he had no business relationship at all with Cookie and no confidential or fiduciary relationship with Cooper Gilder. He was just a yard employee of Cooper-Gilder then owned by James Gilder. Cookie was not an owner, officer, director or employee of Cooper-Gilder at that time. Moreover, there is no evidence Cooper-Gilder was anything more than a gratuitous permissive user of Island 84 with no valid claim of a right against its owner to continue such use. John Cooper's and James Gilder's repeated gratuitous favor or accommodation to the separate legal entity Cooper Gilder

of allowing Cooper Gilder to use Island 84 without compensation or any ownership right to Island 84 could not provide a foundation for Cooper Gilder to have a valid claim of right to continue using Island 84 even while both were alive and were co-owners of both Cooper Gilder and Island 84. Their action certainly could not create rights in their successors to ownership of Cooper Gilder or bind their successors in ownership of Island 84 to continue such gratuitous favors. *Dixon*, 61 Miss. At 122; *Crawford*, 107 Miss. at 364 Thus, once John Cooper died, neither James Gilder, Cooper-Gilder, nor Cookie Gilder had any legal or equitable right to use Island 84. Given their lack of a right to continue using Island 84 and Robin's very clear legal and equitable right to negotiate for access to the land-locked property he then owned, the evidence cannot establish Robin ought not in good conscious to hold legal title to access rights to Island 84.

Next, a constructive trust requires proof of either a fiduciary or confidential relationship and a breach of fiduciary duty or an abuse of a confidential relationship. While the definition of a confidential relationship is a broad one, the Chancellor's reliance on *Allred v. Fairchild,* 785 So. 2d 1064 (Miss. 2001) does not support the finding of a confidential relationship here or its abuse. Unlike the *Allred* parties, Cookie had not built up a personal relationship of trust with Robin, Connie and Don over a period of 20 years of doing business as partners on a handshake. Cookie had only been involved in Cooper Gilder's business and been Defendants employer for about a year. Unlike the *Allred* parties, she didn't do business with them on an equal footing. They were not partners or even joint venturers. They were her at-will employees. Unlike *Allred,* Cookie had no oral agreement with Robin, Don and Connie specifically in regard to the Entergy access lease or even the use of Island 84 which Robin, Don and Connie were able to breach as a result of trust built over 20 years of mutual respect and doing business.

Instead, the evidence was that Cookie expressed her unease with her inexperience to her husband in the hospital and he told her she should trust Connie because Connie knew more than she did about the business. Connie, Don and Robin admitted Cookie followed that advice in the first few months following her husband's death. And as long as she was following that advice, they were making record profits for her. None of the cases relied upon by the Chancellor or any other case Defendants can find has found abuse of a confidential relationship sufficient to support a constructive trust in an employment situation like the present one.

The relationship here is like the relationship between step siblings from prior marriages of both parties to a second marriage both of whom are now dead. The fact that their second marriage might have created a confidential relationship between A and B does not create a confidential relationship between A's child by an earlier marriage and B's child by an earlier marriage even if B did tell his child by a former marriage before he died that she should trust A's child because he has greater knowledge than she has. There is no case law finding that a confidential relationship exists in such circumstances. Even the much closer relationship of parent and child has often been held insufficient to support a confidential relationship. This case is more like the relationship between a parent and child which courts often find insufficient to support a constructive trust. See *Saulsberry,* 232 Miss. at 834; *McNeil*, at ¶ 28.

There is no legal basis for finding a confidential relationship between successors based on how their predecessors did business or on the trust between their predecessors. Nor is there any law finding that a failure of one of the successors to do what one of the predecessors wanted done after his death constitutes an abuse of a confidential relationship or supports the imposition of a constructive trust in the absence of the successor's promise to his predecessor that he would carry out those wishes *and* the detrimental reliance of the predecessor on such a promise.

The next requirement is abuse of a confidential relationship. Failing to follow a decedent's expressed intent as to disposition of property after death where the decedent did not leave a binding writing accomplishing his intent or take action to accomplish it before his death is not an abuse of confidence. Expressions of intent made by a decedent before death, and even a defendant's admission that it was understood between him and the decedent the plaintiff was to have the property over which a constructive trust is sought, however, are insufficient to meet the plaintiff's burden. Such evidence fails to establish the required element that the decedent asked the defendant to see to it his intention was carried out and relied on his express agreement or at least acquiescence to carry out his intention by refraining from conveying or transferring the property to the plaintiff during his life or in otherwise providing in a binding legal writing for the plaintiff to receive it on his death. It is manifest error for a chancellor to impose a constructive trust on evidence the decedent expressly told the defendant he wanted the plaintiff to have the property and that there was an understanding between the decedent and the defendant that the decedent wanted the plaintiff to have the property after his death. Even such evidence is insufficient to meet the burden of proof for constructive trust unless there is also evidence that the defendant agreed to carry out the decedent's wishes and the decedent relied on the decedent's promise to carry out his wishes in forgoing action he could have taken to legally insure his wishes were carried out after his death. *Stovall*

The Chancellor made no finding of even an understanding between the business tort defendants and Cooper Gilder or Cookie Gilder, that James intended ownership or even the right to use Island 84 to pass to Cookie along with ownership of Cooper Gilder.[17] She couldn't make

[17]If she made any finding on Gilder's intent regarding the passage of ownership after his death, it was that he intended both Cooper Gilder and Island 84 to pass to the Coopers.

such findings as there was no reference to anyone's intent or belief other than James Gilder's[18]. She made no finding that Robin, Connie and Don promised James or Cookie Gilder, expressly or by acquiescence, that they would carry out an intention after his death contrary to the plain language of the BSA and the Island 84 deed which together clearly specified on the death of John Cooper prior to the death of James Gilder, the ownership of Cooper Gilder and of Island 84 would pass into different hand even before Gilder's death. Gilder could not have foregone steps to secure for Cookie or Cooper Gilder an ownership or use right in Island 84 in reliance on such a promise since Gilder gave up the right to control ownership and use of Island 84 eight months before his death by deeding it to John Cooper without reservation in a transaction to which neither Robin, Connie, nor Don was a party. (Exs P6 and D5; RE. 97-123). Her findings do not even rise to the level found insufficient in *Stovell* much less findings to the level found necessary by *Stovall.*

The evidence shows these defendants did their best to make Cooper-Gilder profitable for Cookie until Cookie herself jeopardized the viability of Cooper-Gilder by rejecting her husband's advice, bringing in her brother who knew nothing of the business and trying to force her brother's ideas of how Cooper-Gilder should be run and the non-competition agreement on them. (T. 172-173, 177, 204) Cookie admitted these defendants worked hard to earn her a profit in 2004 and also in 2005 right up to the moment they were presented with the non-competition agreement even to the point of working through bad weather in the wee hours of the night and morning before the meeting when they already knew the locks had been changed at Cooper Gilder. (T. 172-173, 177, 204) Cookie also admitted even after Connie and Robin's

[18]Even the reference to his belief was mere supposition based on subjective belief as to what his subjective belief was as to who would die first. (T. 395-399)

employment was terminated, they still provided some gratuitous assistance to Cooper-Gilder. (T. 202)

Such evidence does not support the existence of any *abuse* of a confidential relationship even if such a relationship existed. In *Allred*, the court pointed out the abuse occurred because the confidential relationship allowed Allred to fraudulently conceal the profits he was reaping from Fairchild with whom he had orally agreed to share the profits when he never intended to perform that agreement. There is no evidence of any agreement, even oral, between Robin and Cooper-Gilder entitling Cooper-Gilder to use Island 84 or that Robin would not seek to acquire a legal right of access for the benefit of his property. There isn't even any evidence of a promise made to Plaintiffs by any of the Defendants. Nor is there any evidence that when he sought to have the lease put in his name he had any intention of denying Cooper-Gilder use of the access or of his property. There is certainly no evidence he earned any profits from his letter concerning the lease. And there is certainly no evidence of the kind of fraud found in *Allred.*[19]

Next, the law of constructive trusts requires proof of unjust enrichment or benefit unjustly derived by the Defendant from the property he wrongfully acquired or holds title to. Cooper-Gilder's corporate representative testified he knew about Robin's letter to Entergy before February 21, 2005. He also testified Cooper Gilder had no evidence any of the defendants did anything prior to February 21, 2005 toward setting up a competing business. (T.

[19]The Chancellor relied on *Adcock v. Merchants & Mfgrs. Bank*, 207 Miss. 448, 42 So. 2d 427 (1949) for the proposition neither fraud not intent to abuse need be proved to support a constructive trust. *Adcock* holds a constructive trust can be imposed without evidence of intent or fraud, where title is acquired under an agreement to hold in trust which is then breached. That principle has no application here because there is no evidence Don, Robin or Connie ever agreed to acquire or hold title to anything, much less Island 84 or the access lease to Island 84, in trust for Cooper Gilder or for purposes of reconveyance to Cooper Gilder. Without such an agreement, there could be no breach of the agreement sufficient to constitute abuse of the relationship without fraud or intent to profit from holding title wrongfully acquired.

273-274, 282-283) That means Cooper-Gilder did not view Robin's letter as any evidence any of the Defendants intended to go into business in competition with Cooper Gilder.

The Chancellor's analysis is not based on benefit to the Defendants, but rather on the loss of business suffered by Cooper Gilder. Constructive trust law does not provide a remedy measured by actual damages or loss as was assessed by the Court. Even where applicable, the remedy it provides is recovery of the profits reaped by the defendant who breached his duty to the plaintiff. *Hill v. Southeastern Floor Covering Co.*, 596 So. 2d 874, 878 (Miss 1992)[20] Moreover, the plaintiff must show by a preponderance of the evidence it was capable of doing the work by which the defendant-employee wrongfully reaped a profit. *Id.*

Applying that remedy, a constructive trust could generate a recovery of no greater than $700,000 as that was the total gross sales the Chancellor found the Defendants had generated after setting up their competing business, Warfield Point Associates. The limit should be even lower because gross profits takes into account only cost of goods sold and not other expenses. True profit must take into account all expenses of generating the receipts. (T. 381, 391, 402-403)

The Court found since starting their competing company, the Defendants had business of $700,000.00 in the year 2006, while Cooper Gilder's business declined from over $1 million dollars a year to less than $40,000 a year and is now out of business. The $700,000.00 figure is a

[20] *Hill* found the employee owed and breached a fiduciary duty to his employer because he was a general manager of the corporation with full authority to do what he decided was best for the business which made him an officer. The evidence here establishes only Connie had such authority. Connie, Robin and Cookie all testified shortly after Gilder's death when Cookie was not coming into the office regularly, Cookie appointed Connie to be in charge of Cooper-Gilder. T. 150, 365, 408 While Don and Robin might have been key employees, there is no evidence they had general manager level or were ever officers or directors of Cooper-Gilder. Nor is there any evidence Don, Robin or Connie had such broad authority once Cookie began regularly working in the Cooper-Gilder officers. Thus, *Hill* does not demonstrate the existence of a fiduciary or confidential relationship between Don or Robin and Cooper-Gilder or Cookie.

gross sales figure which does not take into account cost of goods sold, returns or expenses. It does not show profit. (T. 391, 402-403) In 2005, Warfield's gross sales of just over $600,000 generated net profits of about $100,000.00 (T. 381) Moreover, little of that profit is connected to the use of Island 84, but is instead the result of Defendants using their personal contacts to expand the brokering business of Warfield far beyond what Cooper-Gilder ever did because they unable to obtain the business of many of Cooper-Gilder's most lucrative land based clients who were not serviced at Island 84.[21] (T. 413-414) The $40,000.00 figure for Cooper Gilder in 2006 is a net profit figure after expenses. (T. 131-132) The Chancellor compared apples to oranges and did not look at profit or enrichment derived by the Defendants from the use of the Island 84 access.

V. The Evidence Does Not Support A Proximate Causal Relationship Between the Damages Assessed and the Abuse of Confidence Found

Saulsberry holds that even where the defendants made an oral promise and breached it, such a breach is not sufficient to support a constructive trust, regardless of how reprehensible or immoral the conduct might be, unless the conduct influenced or produced a result which would not otherwise have occurred and the causal connection between the conduct and the result was such that the conduce amounts to a fraud. 232 Miss. at 835-836. No promise was made here, but if it had been there is no showing of a causal connection between Robin acquiring an access lease to Island 84 and the damages awarded.

Even if Don, Connie and Robin had acquired the Island 84 access lease, which he did not, such an acquisition could not have caused $1.3 million in harm to Cooper Gilder or $1.3 million in profit to Don, Connie, and Robin. Cooper Gilder had no right to use Island 84 and Robin had

[21]The testimony was that many of the lucrative shipyard clients (who do not require access to Island 84) have now placed their business with K-Solv from Texas. (T. 413-414)

every right to control and/or prohibit its use by Cooper Gilder with our without the access lease.

Furthermore, Cookie admitted what really caused Cooper-Gilder's losses, and it was not loss of the access lease. She admitted that this industry is a highly personal one where success depends heavily on personal contacts and relationships. She admitted she and he brother did not have those contacts or relationships and the defendants did. Once Defendants were fired as a result of her imprudence, Cooper Gilder was going down. If she had had the ability to make a success of the business without Defendants' personal contacts, she could have used any number of locations along the river other than Island 84.

More importantly, Defendants reaped no benefits from blocking Cooper Gilder's use of the access over Entergy's land. To the extent they profited through Warfield in connection with Island 84, it came from Robin's right to control the use of land he owned and had fairly acquired. Any loss to Cooper Gilder related to Island 84 would have happened regardless of Defendants' actions on the lease because Robin owned Island 84 and Cooper Gilder had no right to use it.

CONCLUSION

The outcome in this case should be controlled by *Dixon, Crawford, Huff*, and *Stovall. Stovall,* in particular, is far more applicable than the cases relied upon by the Chancellor.

John Cooper and James Gilder executed written agreements and deeds expressing their intentions regarding ownership of Cooper-Gilder, certain life insurance policies, and certain parcels of land after their deaths. They adopted provisions determining ownership of all these assets upon their death in either the BSA or the deeds. They and their successors are bound by their contracts and deeds. Under the terms of those documents, who acquired ownership of what depended upon who died first. While it is entirely possible they expected a different order of deaths than what actually occurred, they had no control over who would die first and knew that.

While actual results may have come out differently than what they anticipated, that is not grounds for setting aside the plain language of their contracts and deeds. *McNeil,* 753 So. 2d at 1067

Imposing a constructive trust was not justified because Plaintiffs did not present clear and convincing evidence of all the elements of a constructive trust. There was no promise by Defendants to carry out what Plaintiffs claim James Gilder's intentions were. Gilder did not forgo any opportunity, in reliance on any promise of Defendants, to act before his death in binding legal action that could have caused ownership of Island 84, the access lease and Cooper-Gilder to pass together to the same person or family after the death of both founders. The level of evidence which *Stovall* requires to impose a constructive trust is clearly not present in this case.

The Chancellor's award of $1.3 million jointly against the Defendants is contrary to the law and the evidence. Plaintiffs failed to carry their burden of proof in either case. Thus, the business tort case judgment should be reversed and judgment should be rendered for Defendants.

Respectfully submitted,

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Attorney for Appellant

CERTIFICATE OF SERVICE

I, John H. Daniels, III, attorney for Appellants, Robert D. Cooper, Donald B. Dunaway and Connie Burford, hereby certify that I have this day caused to be delivered by United States Mail, postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellants, Robert D. Cooper, Donald B. Dunaway and Connie Burford, to:

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CERTIFIED, this the 18th day of January, 2008.

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