

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
NO. 2007-CA-00823

BILLY MACK SULLIVAN, TERESA SULLIVAN  
RANKIN, BILLY H. SULLIVAN, ALICE M LOWTHER,  
JAMES H. LOWTHER, JR., JULIAN BARRY LOWTHER,  
PAUL EDWARD LOWTHER, AND SHERRI LYNN LACY

APPELLANTS

VS.

EUGENE C. TULLOS AND JOHN RAYMOND  
TULLOS, individually and d/b/a  
TULLOS & TULLOS; CRYMES G. PITTMAN;  
BILLY MEANS; and JOHN DOES 1-10

APPELLEES

In Re: Appeal from Order Granting Summary Judgment  
of the Circuit Court, Honorable Bobby B. Delaughter, Circuit Judge,  
In *Billy Mack Sullivan, et al vs. Eugene C. Tullos, et al*,  
Cause No. 251-06-496 CIV; Circuit Court of Hinds County, Mississippi,  
First Judicial District

**REPLY BRIEF FOR THE APPELLANTS**

**ORAL ARGUMENT REQUESTED**

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## INTRODUCTORY STATEMENT

Appellants will not seek to correct all of the factual representations made by Appellees even though some are wrong or are clearly wrong. Appellants would like to point out that the Defendant, Pittman Germany Roberts & Welsh, LLP, was dismissed by Appellants, however, it is unknown whether counsel for that particular Defendant ever entered the order of dismissal with the clerk's office.

The second factual representation made by the Appellees which needs to be brought to this Court's attention is contained on page 5 of the Appellee, Pittman's Brief. It is alleged that ". . . the Plaintiffs knew and in fact swore under oath there was no bidding on the property." (Appellee Pittman's Brief, p. 5). The Petition for Approval of Final Accounting attached to Appellee's Motion to Supplement the Record on Appeal contains no such language, and conversely, rebuts the trial court and Appellees' statements that Appellants were represented by separate counsel. The only attorney's signature contained on the Petition is that of Tullos.

Since the start of this case, Appellants have always maintained that the Appellee, Tullos, undertook a duty to sale the land involved herein on their behalf. This duty created a fiduciary relationship between Tullos and the Appellants. In response to Appellants' arguments concerning this relationship and the duties that arise therefrom, the Appellees embark on a remarkable litigation strategy - - they simply ignore them. Appellees' weaknesses, however, are their overconfidence and oversimplification of the issues. This overconfidence blinds them to the facts of this case and the case law that is applicable to those facts. Rather than address the issues raised by Appellants, Appellees pretend there are no issues involved other than a simplistic and incorrect interpretation of the statute of limitations. In Appellees view, this is a simple case

which is unworthy of any scrutiny by this Court. As shown below, Appellees' weak arguments, as well as the trial court's ruling, are wrong, and that is the only thing simple about this case.

## **ARGUMENT**

### **I. The Existence of a Fiduciary Duty is a Question of Fact for the Jury.**

The Mississippi Supreme Court has held that “[f]iduciary relationship’ is a very broad term embracing both technical fiduciary relations and those informal relations which exist whenever one person trusts in or relies upon another.” *Lowery v. Guaranty Bank & Trust Co.*, 592 So.2d 79, 83 (Miss. 1991). Furthermore, “[a] fiduciary relationship may arise in a legal, moral, domestic or personal context, where there appears on one side an overmastering influence or, on the other, weakness, dependence, or trust, justifiably reposed.” *Id.*, citing *Miner v. Bertasi*, 530 So.2d 168, 170 (Miss. 1988). Additionally, “[w]henver there is a relationship between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character. *Id.* citing *Hopewell Enterprises, Inc. v. Trustmark National Bank*, 680 So.2d 812, 816 (Miss.1996); *see also Collums v. Union Planters Bank, N.A.*, 832 So.2d 572, 578 (Miss.Ct.App. 2002).

Appellees never explain or address any of the questions surrounding the sale of the land due to the fact they cannot do so with any legitimate answer. The evidence presented clearly shows that Tullos was using Pittman as a strawman to get around Rule 1.8 of the Rules of Professional Conduct due to the fact Tullos was handling the land sale for Appellants. Tullos knew there was a fiduciary obligation and as a result, used a strawman to circumvent that duty

and obligation.

In addition, the trial court and Appellees have asserted that some of the Appellants were represented by separate counsel. That question is answered in the negative as shown by the Petition to Close the Estate which was supplemented to the record by Appellees. The only attorney listed is Tullos.

The question before this Court is simple and straightforward: based upon the evidence presented, does a genuine issue of material fact exist as to whether the relationship between Tullos and Appellants was fiduciary in nature. If so, summary judgment was improper. See *Lowery v. Guaranty Bank & Trust Co.*, 592 So.2d 79, 85 (Miss.1991).

## **II. A Breach of Fiduciary Duty Tolls the Statute of Limitations.**

If a fiduciary duty existed between Tullos and Appellants, then Tullos owed a duty of loyalty to the Appellants. The duty of loyalty “. . . involves situations in which the attorney obtains an unfair personal advantage, such as acquiring property from a client. . . .” *Tyson v. Moore*, 613 So.2d 817, 823 (Miss. 1992). In addition, “[t]he breach of fiduciary obligations, . . . [is] characterized as ‘constructive’ fraud. . . .” *Id.* Due to the fact Tullos failed to disclose the relevant information to the Appellants, the statute of limitations was tolled and did not begin to run until April 11, 2002, the date the deed to Tullos was recorded.

## **III. It Does Not Matter How Much Appellants Were Paid for the Land.**

Appellees contend that one of the only issues in the present case is whether the Plaintiffs received a fair price for the property. (Appellee’s Brief, p. 16). Appellees then state that Plaintiffs received \$210.00 per acre over the appraised value of \$500.00 per acre. (Appellee’s Brief, p. 17). The first question raised by this assertion is why is Pittman paying \$210.00 over

the appraised value if the land is worth only \$500.00? Was it due to the fact the land was worth more than \$500.00 per acre or just because of Tullos and Pittman are of good Christian character and it was “just the right thing to do?”


Appellants assert that it doesn't matter how much was paid for the land. “Breach of the duty of loyalty is a species of malpractice . . . . The breach is characterized as ‘constructive fraud’ because proof of intent is irrelevant; thus the elements of actual fraud, duress, or coercion do not enter into the analysis . . . . Because a breach of loyalty injures both the client’s interest *and the legal profession’s integrity*, the gravity of the harm cannot be cured by good faith.” *Tyson v. Moore*, 613 So.2d 817, 823 (Miss. 1992) (emphasis added).

The Mississippi Supreme Court has called the type of transaction between Appellants, Tullos and Pittman as rebuttably “presumptively fraudulent.” *Id.* “To overcome the presumption, the attorney must prove three things: (1) the transaction’s fairness, (2) the client’s voluntary entry into the transaction, and (3) the client’s full, independent understanding of the nature of the transactions and his or her rights.” *Id. at 823-824.* Tullos nor Pittman are able to overcome this presumption due to their scheme to hide the fraudulent transaction from the Appellants, as well as Tullos failing to fully disclose the transaction to the Appellants.

### **CONCLUSION**

For all of the reasons stated in Appellants’ Brief and Reply Brief, summary judgment was improper and this Court should vacate the Order of the trial court granting of summary judgment and remand this cause back to the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Respectfully submitted,

  
W. TERRELL STUBBS  
ATTORNEY FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I, W. Terrell Stubbs, attorney for the Appellants, do hereby certify that I have this date filed the original and three (3) copies of the above and foregoing **REPLY BRIEF FOR THE APPELLANTS** with the Clerk of the Supreme Court; and have mailed, by U. S. Mail, postage prepaid, and true and correct copy of same to the following:

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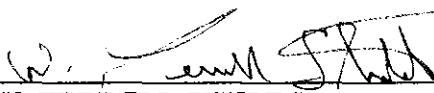
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This the 4<sup>th</sup> day of February, 2008.



  
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