IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO.2008-CA-00275-COA

KEN COVINGTON and
MITCH MOSLEY APPELLANTS

V.

CREMONIA GRIFFIN APPELLEE

BRIEF OF APPELLEE, CREMONIA GRIFFIN

On Appeal from the Chancery Court of Kemper County, Mississippi

Submitted by:
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Respectfully submitted,
CREMONIA GRIFFIN.

By: _____
One of Her Attorneys

ORAL ARGUMENTS NOT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons listed have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Defendant and Appellee
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Appellants
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(7) Mitch Mosley

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Chancery Judge
(7) Honorable Max Kilpatrick

Respectfully submitted,

CREMONIA GRIFFIN

By: _____
One of Her Attorneys

TABLE OF CONTENTS

TABLE OF CASES & OTHER AUTHORITIES

Cases

Mississippi Rules of Civil Procedure

Treatises.

I. STATEMENT OF THE ISSUES

A. THE CHANCERY COURT DID NOT ABUSE ITS DISCRETION BY SETTING ASIDE FINAL JUDGMENT.

1. Default Judgments Are Not Favored by Mississippi, and Fairness and Equity Dictated the Default Judgment To Be Set Aside by the Lower Court.

2. Appellants' Complaint Did Not Strictly Comply with the Provisions of *Miss. R. Civ. P. 4* (c)(4)(A) Which Voided the Default Judgment.

3. The Defective Service of Process Upon Ms. Griffin Also Voided the Default Judgment.

B. THE CHANCERY COURT'S REFUSAL TO ENFORCE THE OPTION CONTRACT WAS NOT IN ERROR.

1. A Unilateral Mistake Voided the Option Contract.

2. A Fiduciary Relationship Existed Between the Parties.

3. Griffin was of Unsound Mind and Lacked Capacity to Contract with Appellants .

4. The Enforcement of the Option Contract would be Procedurally Unconscionable.

II. SUMMARY OF THE ARGUMENT

This matter involves a classic example of the exercise of undue influence on an unsuspecting, unsophisticated, elderly person with a history of mental illness by two savvy businessmen with the intention of obtaining her real property. Appellants, Ken Covington ("Covington") and Mitch Mosley ("Mosley"), owned property adjoining the property belonging to Appellee, Cremonia Griffin ("Ms. Griffin"), which had been in her family since the 1930s. The Appellants knew Ms. Griffin as their families were neighbors for quite some time. In February 2006, the Appellants approached Ms. Griffin on several occasions in an attempt to gain her trust and curry her favor with respect to selling them her property. On each occasion she told them it was not for sale.

Feeling that she could trust them as a result of their established confidential relationship, Ms. Griffin called Mosley on February 23, 2006, to drive her in her car from her home in Dekalb, Mississippi to her cousin's house in Meridian, Mississippi. Even though Ms. Griffin mentioned nothing about selling her property during this telephone conversation, Mosley intended to use this opportunity to hatch a plan to trick Ms. Griffin into signing an option contract. He even went so far as to call his wife to meet him and Ms. Griffin at a local bank in Meridian with the option contract so he and Ms. Griffin could sign and notarize it. As part of his devious plan, Mosley suggested to Ms. Griffin that she needed spending money for an upcoming trip she had planned, and offered to take her to a bank so he could give it to her. Once they arrived at the bank, Mosley went inside to secure a notary to notarize the option, unbeknownst to Ms. Griffin. Mosley then called Ms. Griffin into the bank, gave her a check and handed her a document to sign as a receipt for the check. Ms. Griffin then signed what she thought was a receipt for the check. The document turned out to be an option contract for the sale of her land to him and Covington and the check was later determined to

be $1,000.00 earnest money. She did not receive a copy of the contract to review prior to signing it, and Mosley did not explain the contents of the agreement to her. Needless to say, she was not afforded an opportunity to confer with her family or an attorney prior to signing the contract as she did not know that she was signing a contract. For her part, Ms. Griffin thought the check was a gift and has never cashed it. She attempted to return the check to Mosley the same day upon the advice of her family members when she realized what earnest money was, but Mosley refused to accept it. She attempted to return it on the next day and on other occasions as well, but was refused.

The Appellants filed a Complaint to Enforce Option Contract and subsequently entered default judgment against Ms. Griffin because she did not answer as a result of not properly being served with the complaint. The lower court set the default aside because the Appellants failed to comply with ***Miss. R. Civ. P.*** 4(c)(4)(A), which is well established under Mississippi law must be strictly observed. ***McDuff v. McDuff***, 173 So.2d 419 (Miss. 1965). Under ***Mississippi Rule of Civil Procedure*** 60(b)(4), a default judgment may be set aside when it is void. It is well settled under Mississippi law that a default judgment rendered without valid service or jurisdiction is void. ***McCain v. Dauzat***, 791 So.2d 839 (Miss. 2001).

A trial on the merits was conducted and the learned Chancellor below set the Option contract aside because 1) there was a unilateral mistake and misapprehension on the part of Ms. Griffin with respect to signing the contract; 2) there existed a confidential relationship between the parties; 3) Griffin was of unsound mind; and 4) the enforcement of the Option Contract would be unconscionable. The record below fully supports the Chancellor's findings and thus, the lower court's setting aside of the Final Judgment and the setting aside of the Option Contract should be affirmed.

III. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Appellants, Ken Covington ("Covington") and Mitch Mosley ("Mosley") (collectively referred to as "Plaintiffs" or "Appellants") appealed the Opinion of the Honorable Max Kilpatrick ("Chancery Judge Kilpatrick"), dated November 26, 2007 ("Chancery Judge Kilpatrick's Opinion") (R. At 79). In this case, Appellants allege they are entitled to specific performance of an Option Contract ("Contract") for the sale of land owned by Appellee, Cremonia Griffin ("Ms. Griffin" or "Appellant.") located in Kemper County, Mississippi. *(Id.)* On several occasions, Appellants attempted to purchase Ms. Griffin's property which was owned by her family since the 1930s. *(Id.)* On each occasion, Ms. Griffin told Appellants that she was not interested in selling her land. (Id.) On February 23, 2006, Appellants exercised undue influence over Ms. Griffin, an elderly woman who has a history of mental illness and got her to sign and notarize an option contract granting Appellants the right to purchase Ms. Griffin's land. (R. at 84). Ms. Griffin was released from a mental health facility shortly before purportedly signing the agreement in question. (R. At 82). The Chancellor set the Option Contract aside after conducting a full hearing on the merits. (R. At 79-86). Appellants appeal the lower court's findings of fact and application of law.

A. Facts Giving Rise to This Action

In this case, Appellants allege they are entitled to specific performance of an Option Contract for the sale of land owned by Ms. Griffin located in Kemper County, Mississippi. (R. at 79). At some point in February 2006, the Appellants began negotiating the sale of Ms. Griffin's property with Bennie Mayberry ("Mayberry"), a friend of Ms. Griffin's brother, who was staying in the house located on the land in question. (Tr. At 93, lines 27-29;94, lines 1-29).

The Appellants determined that Mayberry did not have authority to sell the land when Ms. Griffin did not attend the closing at the Appellants' attorney's office which they scheduled with Mayberry. (Tr. At 94, lines 12-29). Ken Covington, along with his father, Jerry then met with Ms. Griffin, their long time neighbor, and advised her that Mayberry had been negotiating on her behalf to sell her land. (Tr, At 96, lines 9-21). Ms. Griffin advised the Covingtons that her land was not for sale like she had done on several other occasions, when approached by the Appellants. (R. At 79; Tr. At 96, lines 24-28; 97, lines 21-23; 120, lines 15-29; 121, lines 1-25). On or about February 23, 2006, Ms. Griffin called Mosley to drive her to her relatives' home in Meridian as she was going out of town for a little while. (Tr. At 244, lines 28-29; 245, lines 1-10). Even though Ms. Griffin made no mention of wanting to sell her property to Mosley during that telephone conversation, he went to her apartment with the intention of getting her to sign the agreement. (Tr. At 207, lines 20-29; 208, line 1). During that car ride, she never told Mosley that she wanted to sell her property to him. (Tr. At 245, line26-29; 246, lines 1-7). Mosley suggested to Ms. Griffin that perhaps she needed money for her trip. (Tr. At 245, lines 16-17). He then called his wife and told her to meet him and Ms. Griffin at the Trustmark Bank with the option contract. (Tr. At 245, line 19). Mosley went into the bank first, and then came to get Ms. Griffin to come into the bank. (Tr. At 245, lines 20-21). Once in the bank, a woman who worked at Trustmark handed Ms. Griffin a one page document to sign, which she thought was a receipt for the check Mosley gave her. (Tr. At 247, lines 1-11). Mosley did not give Ms. Griffin an opportunity to review the document, to discuss its terms, or to consult with a lawyer or her family about the document prior to her signing. (Tr. At 247, lines 16-29; 248, lines 1-16). Ms. Griffin did not understand the check was given to her as earnest money, nor did she know what earnest

money was. (Tr. At 248, lines 24-29). Once she got to her cousin's home later that day, she discussed with them the fact that Mosley just gave her a check, for reasons unknown to her. (Tr. At 249, lines 22-29). Her cousins told her to give the check back, and they called Mosley that same day to return the check but he refused to take it. (Tr. At 250, lines 3-4). The next day, Ms. Griffin attempted to return the check to Mosley and Covington in person and they refused to accept it again. (Tr. At 250, lines 9-11). At that meeting, he advised Ms. Griffin that the check was a gift for her, and neglected to tell her that it was earnest money or in any way connected with a contract to purchase her property. (Tr. At 250, lines 11-18). Ms. Griffin has never attempted to cash the check. (Tr. At 250, lines 20-21; 254, lines 27-29). As further evidence that this `whole transaction was made on the fly and in an attempt to quickly get Ms. Griffin to sign the agreement, Covington had not secured financing for his half of the deal at the time the option was signed by Ms. Griffin. (Tr. At 142, lines 1-29; 143, lines 1-16).

Covington spoke to Griffin when she was in California a few weeks after the transaction. (Tr. at 64, line 22). Ms. Griffin advised again that she did not want to sell her property. (Tr. at 64, lines 20-22). While speaking to Ms. Griffin's family members by telephone, Covington did not tell them that Ms. Griffin executed an agreement to sell her property to him and Mosley. (Id. At lines 23-24). During another call to Ms. Griffin while she was in California, Covington advised her brother, Arthur, that he had an option to buy the Griffin land. (Tr. At 65, lines 1-3). However, Covington did not advise that suit was going to be filed to enforce the option contract. (R. At 65, lines 8-9).

On April 6, 2006, Appellants mailed their notice to exercise their option to purchase the property via certified mail, return receipt requested.[1] (R. at 9-10). Ms. Griffin never received a copy of the notice to exercise option and never attended the closing for the sale of her property. (Tr. At 253, line19-22). Plaintiffs subsequently filed suit to enforce their Option.

B. Procedural History

The Appellants filed their Complaint to Enforce Option Contract and Related Relief on May 11, 2006. (R. At 1). The Application for Entry of Default Judgment and Supporting Affidavit was filed on July 5, 2006. (R. At. 11). There is no indication in the record where Appellants attempted to serve Ms. Griffin with notice of the filing of their Application of Default Judgment and Supporting Affidavit, or the Motion for Default Judgment. (R. 11-15). The Motion for Default Judgment, Affidavit for Default, and entry of Default were filed on July 6, 2006. (R. At. 11-15). The Application for Entry of Default Judgment and Supporting Affidavit were filed on August 22, 2006. (R. At. 16-18). The Motion for Default Judgment and Default Judgment were filed on August 22, 2006. (R. At. 19-20). Appellants did not give Ms. Griffin any notice of the filing of the Application for Entry of Default Judgment and Supporting Affidavit, the Motion for Default Judgment, or the Default. (R. At 16-20). Yet, on September 19, 2006, Appellants sent Ms. Griffin a copy of the Final Judgment via certified mail, return receipt requested to three different addresses in three different states[2]. (R. at 21). After learning of the

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[1]Appellants sent their correspondence to an address in El Cahon, California, and another address in San Bernadino, California.

[2]Appellants sent Ms. Griffin the Final Judgment to addresses in Daleville, Mississippi; St. Louis, Missouri; and San Bernadino, California.

lawsuit instituted against her for the first time in late September 2006, and the subsequent Final Judgment taken against her, Defendant Cremonia Griffin's Motion to Set Aside Default Judgment, Stay of Judgment and Motion to Extend Time for Filing Notice of Appeal was filed on October 18, 2006. (R. At. 26-39). An Order Extending Time for Filing a Notice of Appeal was entered by the Chancellor below on October 23, 2006. (R. At. 40). Appellants' Motion to Enforce Final Judgment was filed on November 1, 2006. (R. At. 41-43). Ms. Griffins' Response in Opposition of Plaintiffs' Motion to Enforce Final Judgment was filed on November 15, 2006. (R. At. 48-58). A Hearing on Cremonia Griffin's Motion to Set Aside Default Judgment, Stay of Judgment and Motion to Extend time for Filing Notice of Appeal was held before the Honorable Max Kilpatrick on November 16, 2006. On November 20, 2006, the Chancellor vacated the Default Judgment because Plaintiffs failed to comply with the strict requirements of process by publication. (R. At 64-66). Ms. Griffin filed her answer and a trial on the merits was held on August 28, 2007 at the Kemper County Courthouse. After hearing testimony from several witnesses, the Chancellor set the option contract aside as to do otherwise would be unconscionable. (R. At 79-85). Final Judgment in favor of Ms. Griffin was entered on January 14, 2008. (R. At 86).

IV. ARGUMENT

A. STANDARD OF REVIEW

1. Standard of Review for Chancellor's Decision to Set Aside Default.

Appellate Courts review motions to set aside default judgments under an abuse of discretion standard. ***Tatum v. Barrentine***, 797 So.2d 223, 227(¶ 15) (Miss.2001). The Mississippi Supreme Court has held on numerous occasions that "[d]efau lt judgments are not favored and relief should only be granted when proper grounds are shown. The determination whether to vacate such a judgment is addressed to the discretion of the trial court. While the trial court has considerable discretion, this discretion is neither 'unfettered' nor is it 'boundless.'" ***Chassaniol v. Bank of Kilmichael***, 626 So.2d 127, 135 (Miss.1993). The trial court applies a three-prong balancing test in reviewing a motion to set aside a default judgment, pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure. ***Stanford v. Parker***, 822 So.2d 886, 888(¶ 6) (Miss.2002). "When faced with a ***Miss. R. Civ. P.*** 60(b) motion, the trial court must consider: '(1) the nature and legitimacy of the defendant's reasons for his default ..., (2) whether the defendant in fact has a colorable defense to the merits of the claim, and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default is set aside." ***Am. Cable Corp. v. Trilogy Communications, Inc.***, 754 So.2d 545, 552 (Miss.Ct.App.2000). The test "boils down almost to a balancing of the equities-in whose favor do they preponderate, the plaintiff or the defendant?'" ***McCain v. Dauzat***, 791 So.2d 839, 842 ¶ 10 (Miss. 2001). Furthermore, "[w]here there is a reasonable doubt as to whether or not a default judgment should be vacated, the doubt should be resolved in favor of opening the judgment and hearing the case on its merits." ***Id.***

2. Standard of Review for Chancellor's Findings of Fact.

It is well settled that appellate courts "always review a chancellor's findings of fact, but ... will not disturb the factual findings of a chancellor when supported by substantial evidence unless [the court] can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard." ***Biglane v. Under the Hill Corp.***, 949 So.2d 9, 13-14 (Miss.2007) (quoting ***Cummings v. Benderman***, 681 So.2d 97, 100 (Miss.1996)). Appellate Courts in Mississippi are reluctant to disturb the factual findings of a chancellor because of "[t]he credibility of the witnesses and the weight of their testimony, as well as the interpretation of evidence where it is capable of more than one reasonable interpretation, are primarily for the chancellor as the trier of facts." ***Rodriguez v. Rodriguez***, --- So.2d ----, 2009 WL 117588, 2 ¶ 6 (Miss. App. 2009) "The chancellor's factual findings are 'insulated from disturbance on appellate review' if they are 'supported by substantial credible evidence.'" ***Id.*** "As the sole trier of fact, the chancellor determines the credibility of the witnesses and what weight to give to the evidence." ***Heidkamper v. Odom***, 880 So.2d 362, 365(¶ 10) (Miss.Ct.App.2004). Moreover, the Appellate Court does not substitute its judgment for that of the lower court, even if it disagrees with the chancellor's findings of fact or might have come to a different conclusion. ***Owen v. Owen***, 798 So.2d 394, 397-98(¶ 10) (Miss.2001).

B. THE CHANCERY COURT DID NOT ABUSE ITS DISCRETION BY SETTING ASIDE FINAL JUDGMENT

In the instant case, Final Judgment was entered by default against Griffin. (R. At 25). The lower court conducted a hearing on Appellee's Motion to Set Aside Default Judgment, on November 16, 2006. (R. At 64). The Chancellor below properly set aside Final Judgment

because the Appellants failed to comply with the procedures set forth by the Mississippi Rules of Civil Procedure, which voided the default judgment. (Id.)

1. Default Judgments Are Not Favored by Mississippi, and Fairness and Equity Dictated the Default Judgment To Be Set Aside by the Lower Court.

To begin, it is well settled that default judgments are "never favored" under Mississippi law. ***Chassaniol v. Bank of Kilmichael***, 626 So. 2d 127, 135 (Miss. 1993). Instead, courts "universally favor" a trial on the merits. ***Id.*** at 135. Relief from a default judgment may be granted upon a sufficient showing of fraud, mistake, or other justifiable reason. ***Rich v. Nevels***, 578 So.2d 609 (Miss. 1991); ***see also Miss. R. Civ. P.*** 60(b). In deciding the propriety of granting relief from a default judgment, the Court must consider: (a) the nature and legitimacy of the defendants reasons for default; (b) whether the defendant has a colorable defense on the merits of a claim; and (c) whether the plaintiff will suffer prejudice if the judgment is set aside. ***See Capital One Services, Inc. v. C.J. Rawls***, 904 So.2d 1010, 1015 (Miss. 2004); ***see also McCain v. Dauzat***, 791 So.2d 839, 843 (Miss. 2001). If there is any reasonable doubt as to whether a default judgment should be set aside, the doubt falls in favor of allowing the case to go forward for a decision on the merits. ***Capital One Services, Inc.*** , 904 So.2d at 1015 ***citing McCain***, 791 So. 2d at 843. In this case, fairness and equity dictated that the default judgment be set aside by the lower court. ***See McCain v. Dauzat***, 791 So.2d 839 (the factors that a court must consider in determining whether to set aside a default judgment "bo ils down almost to a balancing of the equities").

2. Appellants' Complaint Did Not Strictly Comply with the Provisions of *Miss. R. Civ. P. 4* (c)(4)(A) Which Voided the Default Judgment

The lower court, balancing the equities as stated in ***McCain***, set aside the default judgment since Ms. Griffin never received notice of this action until several weeks after the Appellants commenced default proceedings because Appellants failed to strictly comply with the provisions of ***Miss. R. Civ. P.*** (c)(4)(A). It is well established under Mississippi law that the requirements governing service by publication must be strictly observed. ***McDuff v. McDuff***, 252 Miss. 459, 463, 173 So.2d 419 (Miss. 1965). Failure to strictly observe the requirements results in the court's lack of jurisdiction over the person.[3] ***Griffith, Mississippi Chancery Practice***, 2000 ed., § 236 et seq. Under ***Miss. R. Civ. P.*** 4(c)(4), it is essential that the sworn complaint, sworn petition, or filed affidavit include a statement that the defendant is a nonresident of the state, or that she is not to be found therein on diligent inquiry. ***Miss. R. Civ. P.*** 4(c)(4)(A)[4]; ***see also May's Food Products, Inc. v. Gloster Lumber Co.,*** 102 So. 735 (Miss. 1925)(a judgment by default is void when the plaintiffs fail to include a statement that the defendants are nonresidents of the State of Mississippi or not to be found therein on diligent inquiry [5]). In their sworn complaint, the Appellants in this case alleged that Ms. Griffin was a resident of the State of Mississippi, but failed to include a provision, to the effect, that she "**could not be found** therein on diligent inquiry." ***emphasis added*** (R. at 1, ¶ B). Appellants then elected to serve Ms. Griffin

[3] Under ***Mississippi Rule of Civil Procedure*** 60(b)(4), a default judgment may be set aside when it is void. It is well established under Mississippi law that a default judgment rendered without valid service or jurisdiction is void. ***McCain v. Dauzat***, 791 So.2d 839 (Miss. 2001).

[4] ***Miss. R. Civ. P.*** 4(c)(4)(A) sets forth the alternative requirements regarding the averment of the Defendant's address. The Rule provides, in pertinent part, that: (a) "the post office address of such defendant be stated in the complaint..." ,or (b) "if it be stated in such sworn complaint ... that the post office address of the defendant is not known to the plaintiff ...after diligent inquiry...", or (c) if the affidavit be made by another for the plaintiff or petitioner, that such post office address is unknown to the affiant after diligent inquiry and he believe it is unknown to the plaintiff or petitioner after diligent inquiry by the plaintiff..."

[5] The court, in ***Gloster Lumber Co.***, based its decision upon Section 3920, Code of 1906, which is substantially similar to ***Miss. R. Civ. P.*** 4.

by publication, and on May 11, 2006, filed a Summons by Publication. (The summons does not appear in the record below). The Mississippi Supreme Court has stressed the importance of properly complying with ***Miss. R. Civ. P.*** 4(c)(4)(A):

> Publication for a non-resident, or absent defendant, is not a mere formal or perfunctory matter; but the purpose is to give the defendant actual as well as constructive notice of the suit and an opportunity to make defense thereto, if it be reasonably possible to do so. Due process of the law requires notice and an opportunity to be heard, and this applies to residents and non-residents alike when sued in the courts of this state. ... If he cannot be found in this state, and any fact in regard to his whereabouts and/or post office and street address be unknown to the complainant, then he or she must make an honest and diligent effort, or inquiry, to ascertain the same, so that when publication is made the clerk may send him a copy of the notice. Good faith to the court ... requires this to be done before any affidavit for publication is made. And if, at any stage of the proceedings, it should appear that such duty was not performed, and that the affidavit was not made in good faith after diligent inquiry under the facts of the particular case, the process should be quashed by the court, of its own motion, as a fraud on its jurisdiction; for courts sit to protect the rights of defendants as well as to enforce those of complainants.

Caldwell v. Caldwell, 533 So.2d 413, 417 (Miss. 1988.)

Here, the Appellants failed to strictly comply with ***Miss. R. Civ. P.*** 4(c)(4)(A) and consequently the lower court properly set the default judgment aside. (R. At 64-66).

The Appellants could have ensured that Ms. Griffin received a copy of process by serving her, by certified mail restricted delivery, in accordance with ***Miss. R. Civ. P.*** 4(c)(5). Rule 4(c)(5) of the Mississippi Rules of Civil Procedure provides, in pertinent part, that:

> [i]n addition to service by any other method provided by this rule, a summons may be served on a person outside this state by sending a copy of the summons and complaint to the person to be served by certified mail, return receipt requested. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked "restricted delivery."

In accordance with ***Miss. R. Civ. P.*** 4(c)(5), the Appellants could have chosen to serve Ms. Griffin by this method in addition to any other method under Rule 4, like publication. In fact, the

Appellants had already chosen this means of communication, except for restricted delivery, when they purportedly accepted their option under the contract, and when they sent Ms. Griffin a copy of the Final Judgment. (R. At 9-10; 21-24). However, the Appellants chose to serve Ms. Griffin by publication and subsequently entered for default without ever attempting to notify Ms. Griffin, personally, until after the final judgment by default had been entered. Moreover, when the Appellants sent Ms. Griffin the notice of Final Judgment they sent such notice to an additional address, 1519 Valle, St. Louis, MO 63133, which was not included in the original Complaint.

These facts, together with those described above, illustrate the Appellant's attempts to circumvent well established rules of civil procedure in an effort to improperly take a default against Ms. Griffin, and further supports the setting aside of default judgment.

3. The Defective Service of Process Upon Ms. Griffin Also Voided the Default Judgment.

Moreover, Appellants' failure to secure proper service of process upon Ms. Griffin negated personal jurisdiction over her which voided the default judgment. In determining the appropriateness of granting default judgment, the Courts require an initial showing of jurisdiction:

> A salient requirement of issuing a judgment by default is that the court must have jurisdiction over the party against whom the default judgment is to be taken. As the comment to the Rule 55 states: "Before a default [judgment] can be entered, the court must have jurisdiction over the party against whom the judgment is sought, which also means that he must have been effectively served with process. ***Arnold v. Miller***, 26 Miss. 152 (1853)." ***M.R.C.P.*** Rule 55 cmt. Succinctly stated, a court must have jurisdiction obtained by proper service of process in order to enter a default judgment against a party. ***McCain v. Dauzat***, 791 So.2d 839, 842(¶ 7) (Miss.2001) (citing Arnold, 26 Miss. at 155). "Otherwise, the default judgment is void." Id. If a default judgment is void, then the trial court has no discretion and must set the judgment aside. ***Sartain v. White***, 588 So.2d 204, 211 (Miss.1991).

Flagstar Bank, FSB v. Danos, --- So.2d ----, (¶ 20) 2008 WL 5064953 (Miss.App. 2008)

As discussed above, Ms. Griffin was not properly served with process, consequently the lower

court could not confer personal jurisdiction over her, thus the default judgment was void and had to be set aside as a matter of law. (*See Dauzat, Sartain, and Flagstar*).

C. THE CHANCERY COURT' S REFUSAL TO ENFORCE THE OPTION CONTRACT WAS NOT IN ERROR.

The lower Court refused to enforce the option contract against Ms. Griffin because he found that 1) a unilateral mistake and misapprehension on the part of Ms. Griffin existed regarding the formation of the contract; 2) a fiduciary relationship existed between the parties, 3) Ms. Griffin was of unsound mind, and 4) to enforce the option would be procedurally unconscionable.

1. A Unilateral Mistake Voided the Option Contract.

The Chancellor below found that Ms. Griffin made a mistake or misapprehension about what she was doing by signing the contract, in essence there was a failure of the parties' meeting of the minds. In Mississippi, equity will prevent an intolerable injustice such as where a party has gained an unconscionable advantage by mistake and the mistaken party is not grossly negligent:

> But where the mistake is of so fundamental a character, that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension; and there was no gross negligence on the part of the plaintiff, either in falling into the error, or in not sooner claiming redress; and no intervening rights have accrued; and the parties may still be placed in statu quo; equity will interfere, in its discretion, in order to prevent intolerable injustice. This is the clearly defined and well established rule upon the subject, in courts of equity, both in England and America.

Miss. State Building Common v. Bucknell , 329 So.2d 57, 60-61 (Miss.1976) (quoting ***State Highway Com-man v. State Constr. Co.***, 203 Or. 414, 280 P.2d 370, 380 (1955) (italics in original & boldface added)).

In this case, the facts were clear that on several prior occasions, Ms. Griffin was adamant about not wanting to sell her property. (Tr. At 243, lines 6-19; 288, lines 25-29). She never gave anyone permission to inspect the property, to conduct a survey, or to appraise her timber. (Tr.

At 243, Lines 20-29). There was nothing to indicate that Ms. Griffin took any preliminary steps to sell her property which her family owned since the 1930s. Surely some thought or action would have been taken by her if she truly intended to convey this property to the Appellants.

On the contrary, Ms. Griffin did not know why Mosley gave her the check, and was told it was a gift. (Tr. At 25 , lines 9-29; 275, lines 18-29). She further did not know that she signed an option contract to sell her property to the appellants. (Tr. At 247. Lines 16-29; 248, lines 1-6; 290, lines 6-22). Moreover, when shown the option contract at trial and given an opportunity to read it, Ms. Griffin was under the impression that the entire contract price was for $1,000.00, nor could she determine how much of her land was being sold by looking at the contract[6]. (Tr. At 280, lines 13-26).

The application of rule that mistake, to constitute equitable relief, must not be merely result of inattention, personal negligence, or misconduct on part of party applying for relief is not always mandated, but must be judged from particular facts or circumstances before court. ***Mississippi State Bldg. Commission v. Bucknell Const., Inc.***, 329 So.2d 57, at 60. In***Bucknell Const., Inc.***, the Mississippi Supreme Court granted equitable relief and set aside a construction bid made in error by a construction company, where the bid was promptly called to attention of State Building Commission before contract was let and at a time when the status quo could have been restored without substantial injury to parties. The Chancellor's opinion below also cited ***Rotenberry v. Hooker***, 864 So.2d 266 (Miss. 2003) which held:

But where the mistake is of so fundamental a character, that the minds of the

[6]The face of the option reads "for the purchase price of {handwritten} $1,000.00 per acre for each acre Cremonia Griffin owns." However, the contract does not specify how many acres Ms. Griffin owns, how many acres are being sold, or how much the total contract price is.

> parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension; and there was no gross negligence on the part of the plaintiff, either in falling into the error, or in not sooner claiming redress; and no intervening rights have accrued; and the parties may still be placed in statu quo; equity will interfere, in its discretion, in order to prevent intolerable injustice.

In ***Rottenberry***, the Supreme Court upheld a chancellor' s denial of specific performance of a contract where a there was a mistake in offering to sell a one-half interest in a trust for a designated price "less amount due" on trust debt, insofar as she was obligated for only half rather than entire amount of debt in the first place. The Court found that the party was entitled to equitable relief from the enforcement of contract because there was no showing that there was no negligence in rendering the offer, no intervening rights had accrued to parties, and neither party had changed position they held prior to the offer. ***Rotenberry v. Hooker***, 864 So.2d 266, 271 ¶ 19. In the present case, the Chancellor found that Ms. Griffin misapprehended what she was doing by signing the contract, did not cash the earnest money check, and attempted to return it on the same day. Like the facts in ***Rottenberry*** and ***Bucknell Const., Inc.***, equity required the setting aside of the option here because there was a unilateral mistake which did not allow a meeting of the minds that was not the result of gross negligence, which would result in an unconscionable advantage to the Appellants. The Appellants had an opportunity to take the check back that same day and suffered no adverse consequence or damages as a result of doing so. (Tr. At 146, lines 20-25). They had no specific intention on what to do with the land, and Covington never even secured financing for his portion of the contract price prior to the signing of the agreement by Ms. Griffin. (Tr. At 146, lines 17-19; 142, lines 1-29; 143, lines 1-16). The Chancellor's application of these facts to the well established tenets of equity and unilateral mistake in this

Mississippi should be affirmed.

2. A Fiduciary Relationship Existed Between the Parties.

Another reason given by the Chancellor below for setting the option contract aside was because the parties shared a confidential, fiduciary relationship. "It is well-established in Mississippi and elsewhere that where a confidential relationship is shown to exist between parties to the deed, and where the grantee, who is the beneficiary, is the dominant spirit in the transaction, the law raises a presumption of undue influence, or, as is sometimes said, a deed is prima facie voidable in such cases. Under such circumstances the burden or duty of repelling or rebutting such a presumption is cast upon the grantee." ***Leggett v. Graham***, 218 So.2d 892, 895 (Miss. 1969).

Mississippi Appellate Courts have stated the following regarding fiduciary relationships:

> Although every contractual agreement does not give rise to a fiduciary relationship, in Mississippi such a relationship may exist under the following circumstances: (1) the activities of the parties go beyond their operating on their own behalf, and the activities [are] for the benefit of both; (2) where the parties have a common interest and profit from the activities of the other; (3) where the parties repose trust in one another; and (4) where one party has dominion or control over the other.

Holland v. Peoples Bank & Trust Co., --- So.2d ----, ¶ 17 2008 WL 5173857 (Miss. 2008).

The Chancellor in this case found that a fiduciary relationship existed between the parties. Ms. Griffin knew the Appellants for several years prior to this transaction and placed trust in both of them. Covington testified that he lived on the land adjoining Ms. Griffin's since he was in third grade and knew Ms. Griffin and her parents. (Tr. At 89, lines 1-18). According to Covington, Ms. Griffin lived next door to him for twenty years. (R. At 110, lines 12-28). Moreover, Covington actually grew up hunting on the land in question. (Tr. 89, lines 11-21). To further illustrate the nature of their relationship, Covington and his father felt comfortable

enough with Ms. Griffin to meet her in her apartment to discuss the sale of her land. (Tr. At 96, lines 9- 21). Any other time the appearance of two men meeting with an elderly woman alone in her apartment to discuss business would raise suspicion, this instance is no different. The Covingtons' conversation with Ms. Griffin on this particular occasion was under the guise of protecting her from the Mayberrys and informing her that she was the true owner of the land, that she could remove the Mayberrys from the house, and that she should be careful of signing any papers given to her from the Mayberrys. (Tr. At 96, lines 9- 21). Little did she know that it was the Covingtons who she should have been leery of. Mosley on the other hand had known Ms. Griffin since the mid 1990s. (Tr. 194, lines 16-19). Furthermore, Mosley had previously sold two vehicles to Ms. Griffin in the past, both times she was accompanied by either her father or another relative. (Tr. At 195, lines 1-71). Covington and Mosley approached Ms. Griffin together on another occasion at her apartment, this time, to "counsel" her to seek other members of her family to determine what she wanted to do. (Tr. At 97, lines 13-20). Yet, this same advice to confer with other family members or even an attorney was not given to Ms. Griffin on the momentous occasion of her actually signing the agreement. (Tr. At 248, lines 7-16). Clearly, the Appellants were seizing upon the opportunity to create a fear in Ms. Griffin of the Mayberrys in an effort to gain her favor and to bolster her faith and trust in them. As a result of their coordinated efforts to gain Ms. Griffin's trust and confidence, on February 23, 2006, Ms. Griffin felt comfortable enough to call Mosley to drive her to her cousin's house in Merdian. There was ample proof in the record that Ms. Griffin had family in the area and also a case worker whom she relied upon to handle her affairs for her. Yet, she chose Mosley, and reposed trust in him to safely deliver her to her destination, and to also keep her vehicle for her overnight. The fact that

she placed this kind of trust in Mosley, rather than her case worker or even her own family members lends support to the Chancellor's determination that a confidential relationship existed between the parties which invalidates the option contract. Moreover, both Covington and Mosley both testified about visiting Ms. Griffin under the pretext of looking out for her best interests and protecting her from other individuals who sought to take advantage of her.

"Whenever there is a relation 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." ***Wright v. Roberts***, 797 So.2d 992, 998 ¶ 17 (Miss. 2001). In ***Wright***, the Court found a fiduciary relationship existed between an older, physically and mentally weak individual, and another she had known for several years who provided her with financial advice, and transportation assistance. ***Id.*** At 998 ¶ 19. In this case, the facts were that Ms. Griffin was an elderly woman who was recently released from a mental health facility shortly before signing this agreement. She knew both Appellants for several years and spent time being "counseled" by both in her apartment, without the benefit of her own family members, friends, or attorneys. She also felt comfortable asking Mosley for a ride to her relative's home, rather than asking another friend, relative, or her case worker to do so. Looking at the totality of the circumstances, the Chancellor did not abused his discretion, was not manifestly not wrong, nor did he apply an erroneous legal standard in finding that a confidential relationship existed between the parties which gave rise to the presumption that the deed was executed as a result of undue influence.

"Once the burden shifts, if the grantee is to overcome the presumption which has arisen,

he must show by clear and convincing proof that the deed was not the result of undue influence or fraud." Griffith, Mississippi Chancery Practice s 589 (2d ed. 1950). As discussed in ***Houser v. Houser***, 251 Miss. 209, 168 So.2d 801 (1964), the presumption of fraud or undue influence may be repelled by showing the facts and circumstances surrounding the case, the consideration involved, the relationship of the parties, mental condition of the grantor at the time of the conveyance, and the degree of independence exhibited by the grantor. ***Leggett v. Graham***, 218 So.2d 892, 895 (Miss. 1969). The Appellants failed to rebut the presumption that the deed was a result of undue influence, because it clearly was. Consequently, the lower court should be affirmed.

3. Griffin was of Unsound Mind and Lacked Capacity to Contract with Appellants.

The Chancellor below found that the option contract should be set aside because Ms. Griffin was mentally incompetent to formulate a contract. The uncontested testimony at trial was that Ms. Griffin had a history of mental illness and required assistance from others to handle her affairs. In Mississippi, three ways exist to establish the mental incapacity of a person to execute a deed. These are:

> (1) establishing that the grantor suffered from a total lack of capacity to execute the deed (i.e., that the grantor did not understand the legal consequences of his or her actions); (2) establishing that the grantor suffered from a general "weakness of intellect" coupled with either (a) inadequate consideration given for the transfer or (b) a confidential relationship between the grantor and grantee; or (3) establishing that the grantor suffered from permanent insanity up to and after the date of execution. ***McMahan v. Webb***, 990 So.2d 825, 827 ¶ 9 (Miss.App. 2008).

While Ms. Griffin may not have been insane, there was ample proof in the record that Ms. Griffin suffered from a weak mind throughout her life, and especially at the time of this

transaction. At the time of trial, Ms. Griffin was receiving SSI benefits as a result of her mental illness. (Tr. At 278, lines 16-29; 2791-15; 282, lines 28-29, 283, lines 1-21). She also suffered from confusion and received mental treatment when she lived in California in the past which required her confinement in a facility. (Tr. At 240, lines 5-8; 239, lines 9-22). She also received mental treatment at Alliance and Weems in Mississippi in 2006, at the time she entered into this agreement. (Tr. At 239, lines 6-29; 240, lines 1-8; 285, lines 1-29; 287, lines 23-29; 288, line 1; 290, lines 23-29; 291, lines 1-6). Ms. Griffin was also medicated for her mental illness in 2006, at the time she purportedly entered into this agreement. (Tr. At 241, lines 6-18; 286, lines 1-11). Ms. Griffin required the assistance of others to handle her affairs. (Tr. At 286, lines 9-29; 287, lines 1-2). Her mother initially helped her until her death in 2006. (R. At. 242, lines 14-21); Her case worker from the mental health facilities also assisted her with her affairs. (R. At 240, lines 19-20).

The Mississippi Supreme Court has held that the determination of unsound mind is a question of fact. ***Woolbert v. Lee Lumber Co.,*** 151 Miss. 56, 117 So. 354 (Miss. 1928). The Mississippi Supreme Court has previously deferred to the Chancellor's finding that the mental incompetence of a party invalidated a land lease where that party had a history of mental illness. ***Wigley v. Wigley***, 58 So.2d 59 (Miss. 1952). ***Wigley*** involved a suit by the executor and devisees of an estate to cancel a 10 year lease covering the decedent's land and personal property, where the lease had been executed at time the decedent was 83 years of age, after he suffered a cerebral hemorrhage. ***Id.*** The Supreme Court affirmed the Chancellor's finding that the decedent had been mentally incompetent to execute valid contract at time of execution of alleged lease. ***Id.*** In this case, the Chancellor, sitting as the trier of fact, with the benefit of judging the credibility of

the witnesses firsthand, specifically found that Ms. Griffin was of unsound mind and was unable to enter into this agreement. Consequently, the lower court should be affirmed.

4. The Enforcement of the Option Contract would be Procedurally Unconscionable.

The lower court properly found that enforcement of the option contract would be procedurally unconscionable. The Mississippi Supreme Court has defined unconscionability as "an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." ***Entergy Miss., Inc. v. Burdette Gin Co.***, 726 So.2d 1202 (Miss.1998). Procedural unconscionability can be proven by showing "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms." ***MS Credit Center, Inc. v. Horton***, 926 So.2d 167, 177 (Miss. 2006.). Contrary to the facts in ***Horton***, the circumstances in this case clearly support the lower court's finding of procedural unconscionability based on three things, lack of voluntariness, disparity in the sophistication of the parties, and lack of opportunity to study the contract.

a. Lack of voluntariness

Ms. Griffin never negotiated the terms of this agreement, nor did she have an opportunity to read, study, or consider it before signing it. The proof at trial was that the terms of the contract were never negotiated by Ms. Griffin, instead, it was negotiated between the Appellants and Mr. Mayberry, an individual who had no authority to sell the property or to negotiate on Ms. Griffin's behalf. (Tr. At 122, lines 5-8, 24-28). Moreover, the contract terms were filled out as

a result of the Appellants' negotiation with Mayberry. (R. At 123). Covington made this overture to Ms. Griffin to purchase her land without the benefit of obtaining a survey or appraisal of the property nor did he inspect the home which was located on the property. (Tr. At 122, lines 19-27). Likewise, there was no evidence at trial that Ms. Griffin ever authorized or obtained a survey, appraisal, or home inspection. Furthermore, as discussed above, Ms. Griffin misapprehended what she was signing at the bank had no idea that what she was signing was an option contract.

The Chancellor determined that there was an indication of a lack of voluntariness on Ms. Griffin's part to execute the contract, based on his specific findings that: 1) one of the Appellants took Ms. Griffin to the bank immediately after she purportedly changed her mind to sell them her property; 2) she had no opportunity to consult with her family or an attorney to make sure she was getting a fair deal; and 3) once she understood the definition of "earnest money" she attempted to return the check the same day and again over the next days. (R. At 84, lines 6-12). The Chancellor's findings that Ms. Griffin did not voluntarily enter into this agreement were supported by the evidence at trial.

b. Disparity in sophistication or bargaining power of the parties

At the time of this transaction with Ms. Griffin, Mosley was the owner of a car dealership and had been in the business for 19 years. (Tr. At 192, lines 14-20). While in the car sales business, he was experienced with sales contracts and personally bought and sold property on at least ten occasions (Tr. At 193, lines 25-29; 92, lines 21-23). Likewise, Covington went to two years of Junior College and was experienced with entering into contracts as part of his business concerns. (Tr. 107, lines 17-28). Covington also has purchased property in the past and has used

an attorney to advise him on those transactions. (Tr. At 108, lines 5-29; 109, lines 1-4). Compare their sophistication with that of Ms. Griffin, who had never sold property before, worked in factory jobs, and relied on family members and mental health case workers to assist her in activities such as purchasing airline tickets and signing rental agreements.

c. Lack of opportunity to study the contract and inquire about the contract terms.

Ms. Griffin clearly lacked an opportunity to review the contract as she had a window of between five to ten minutes to review the contract before she signed it and it was not made available for her review other than to execute the bottom portion. According to the notary who notarized the option contract, Ms. Griffin and Mosley were in front of her for no more than five to ten minutes. (Tr. at 163, lines 19-22). That was hardly enough time to review and accurately consider a three page agreement printed on legal sized paper. Furthermore, Mosley did not explain anything in the documents to Ms. Griffin. (Tr. at 163, lines 14-18). Mosley himself also testified that he did not explain the terms of the contract to Ms. Griffin, nor did he give her a copy of the contract to review before she signed it. (Tr. At 209, lines 21-24). Moreover, Mosley further testified that Ms. Griffin never had a copy of the contract or even read it throughout the negotiation process starting with the negotiations with the Mayberrys and ending up with her execution of the contract. (Tr. at 217, lines 17-22).

Clearly the Chancellor was correct in his finding that there existed a disparity in sophistication between the parties coupled with Ms. Griffin's lack of voluntariness and opportunity to review the agreement prior to signing. The above facts, taken together led the Chancellor to correctly find that the enforcement of the option contract would have been unconscionable.

CONCLUSION

The Chancellor below properly set aside default judgment because the Plaintiffs below failed to follow the strict procedural requirements of service by publication, which voided the default judgment. The Chancellor also correctly set the option contract aside after finding that there was no meeting of the minds due to a unilateral mistake on the part of Ms. Griffin and that Appellants exercised undue influence over her. Moreover, there was ample proof in the record that Ms. Griffin was of unsound mind when she executed the agreement and that the enforcement of the agreement would have been procedurally unconscionable. As a result, the lower court should be affirmed.

Respectfully submitted this the 19th day of February 2009.

Defendant,
CREMONIA GRIFFIN

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CERTIFICATE OF SERVICE

I, John C. Hall, II, do hereby certify that I have caused the foregoing to be served by electronic transmission and/or by placing a true and correct copy of the same in the United States Mail, First Class postage prepaid and properly addressed to the following:

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This the 19th day of February, 2009

John C. Hall II