IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2008-CA-00275-COA

KEN COVINGTON and
MITCH MOSLEY — APPELLANTS

VS.

CREMONIA GRIFFIN — APPELLEE

APPELLANTS' REPLY BRIEF

APPEAL FROM
THE CHANCERY COURT OF KEMPER COUNTY, MISSISSIPPI

SUBMITTED BY:

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The Chancellor set aside the default judgment and, as addressed in Appellants' Brief, Page 15-18, for the reasons as set forth in the Judgment dated November 20th, 2006. (RE.24-26). The Chancellor set aside the default judgment on the belief that the complaint and summons should have been mailed simultaneously with the issuance of the summons by publication, and for no other reason. Cremonia, the Appellee, has failed to show how she was prejudiced because of the delay between the issuance of the summons by publication and the clerk's mailing of the summons and complaint.

It was for this reason the lower court set aside the default judgment, and is the issue that is before this Court for a decision.

APPELLANTS' REPLY
TO
APPELLEE'S ARGUMENT 1V(C)

As set forth in Appellants' Brief, a unilateral mistake in execution of the option herein by itself is not sufficient to permit someone to avoid the consequences of their actions. Otherwise, one could simply state they signed a document by mistake and avoid its consequences. Every commercial transaction in this nation would be in jeopardy if this was the case.

A unilateral mistake must be accompanied by some fraud, deception or other bad faith activity that prevented the other party from discovering the mistake. Brown v. Chapman, 809 So.2d 772, Page 274.

In this action, the lower court found that there was no fraud, the option contract was valid, and the consideration was adequate. There is no testimony of any deception or misrepresentation by Ken or Mitch, or any promises made by them concerning the option contract. Cremonia had the ability to read and write, and had full opportunity to read the option contract prior to her execution of it before the notary public at Trustmark Bank. In all cases setting aside the execution of a contract based on a unilateral mistake, fraud, deception or bad faith was involved. Such is not the case here, nor was it proven in the lower court. The changing of one's mind, after executing a valid legal document, in itself is not grounds to cancel the contract.

Cremonia, further, asserts that the Chancellor found there was a confidential relationship that existed between the parties in this action. That is simply not the case. An assumption of undue influence only arises after a finding of a confidential relationship. Only then would the burden shift to the Appellants, Ken and Mitch.

As set forth in In Re Estate of Holmes, 961 So.2d 674, Page 680 (MS 2007), the following factors must be considered in determining whether a confidential relationship exists:

> (1) whether one person has to be taken care of by others, (2) whether one person maintains a close relationship with another, (3) whether one person is provided transportation and has their medical care provided for by another, (4) whether one person maintains joint accounts with another, (5) whether one is physically or mentally weak, (6) whether one is of advanced age or poor health, and (7) whether there exists a power of attorney between the one and another.

As seen by the record, the relationship of the parties in this action was not such as to give rise to a confidential relationship between Cremonia and Ken and Mitch.

Further, as to Cremonia's mental condition, there was absolutely no proof at trial as to what her condition was, and what affect it would have on her. There was no testimony as to the medication Cremonia was taking, if any, and no testimony from any expert as to her condition at the time of the execution of the option. In fact, Mitch, and Robin Shelton, the Trustmark National Bank's notary public, both testified there was nothing out of the ordinary when Cremonia executed the option. ® 160-161, 165). Cremonia freely and voluntarily executed the option agreement, understanding full well what she was doing. After family members became involved, she unilaterally changed her mind. As the court found, no fraud was involved, there was no misrepresentation, the option was legally valid and the consideration was adequate. The option contract is a valid, legal agreement, and should be enforced by this Court.

CONCLUSION

The Chancellor abused his discretion in setting aside the default judgment.

Further, the judgment of the lower court should be reversed as said judgment is not supported by the evidence in the record.

Respectfully Submitted,

KEN COVINGTON and
MITCH MOSLEY, APPELLANTS

BY: _____
WALTER T. ROGERS, THEIR ATTORNEY

CERTIFICATE OF SERVICE

I, Walter T. Rogers, do hereby certify that I have this date served a copy of the above and foregoing, **Reply Brief of Appellants** on the following by placing a copy of same in the U. S. Mail, postage prepaid, addressed to their regular business mailing address:

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Hon. J. Max Kilpatrick
Chancery Judge
Post Office Box 520
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THIS, the 26th day of February, 2009.

_____
HON. WALTER T. ROGERS