IN THE SUPREME COURT AND COURT OF APPEALS

OF THE STATE OF MISSISSIPPI

KEN COVINGTON and
MITCH MOSLEY — APPELLANTS

VS. — NO. 2008-CA-00275-COA

CREMONIA GRIFFIN — APPELLEE

BRIEF OF APPELLANTS

APPEAL FROM THE CHANCERY COURT OF KEMPER COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

SUBMITTED BY:

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TABLE OF CONTENTS

STATUTES:

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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 the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Ken Covington, Plaintiff and Appellant

Mitch Mosley, Plaintiff and Appellant

Walter T. Rogers
Martin, Rogers & Mitts, LLP, Attorneys of Record for Appellants

Cremonia Griffin, Appellee and Defendant

John C. Hall, II
Brunini Law Firm, Attorneys of Record for Appellee

Respectfully submitted,

HON. WALTER T. ROGERS
ATTORNEY FOR APPELLANTS

IN THE SUPREME COURT AND COURT OF APPEALS

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STATEMENT OF ISSUES

I.

THE TRIAL JUDGE ABUSED HIS DISCRETION IN SETTING ASIDE THE FINAL JUDGMENT.

II.

THE TRIAL COURT ERRED IN FAILING TO ENFORCE OPTION CONTRACT.

IN THE SUPREME COURT AND COURT OF APPEALS

OF THE STATE OF MISSISSIPPI

KEN COVINGTON and MITCH MOSLEY	**APPELLANTS**
VS.	**NO. 2008-CA-00275-COA**
CREMONIA GRIFFIN	**APPELLEE**

STATEMENT OF CASE

This action was commenced in the Chancery Court of Kemper County, Mississippi, by the filing of a Complaint to Enforce Option Contract and Related Relief by Appellants, Ken Covington and Mitch Mosley, hereinafter referred to as "Ken" and "Mitch", Plaintiffs, against Cremonia Griffin, Appellee, hereinafter referred to as "Cremonia", Defendant.

Cremonia failed to file her Answer to said Complaint, and on Motion for Default Judgment, Final Judgment was entered by the Chancery Court.

On Motion of Cremonia to set aside Final Judgment, the Court entered its Judgment setting aside the Final Judgment.

Cremonia filed her Answer, and the parties proceeded to trial. At the conclusion of trial, the Chancery Judge entered its Opinion and Final Judgment, setting aside the Option Contract.

IN THE SUPREME COURT AND COURT OF APPEALS

OF THE STATE OF MISSISSIPPI

KEN COVINGTON and
MITCH MOSLEY **APPELLANTS**

VS. **NO. 2008-CA-00275-COA**

CREMONIA GRIFFIN **APPELLEE**

STATEMENT OF FACTS

The Appellants herein, Ken Covington and Mitch Mosley, were the Plaintiffs in the lower court and are referred to herein as "Plaintiffs" or "Ken and Mitch."

The Appellee herein, Cremonia Griffin, was the Defendant in the lower court and referred to herein as "Cremonia" or "Defendant."

Cremonia Griffin owned 160 acres, and an undivided interest in an additional 40 acres of land located in Kemper County, Mississippi. (R.90, 97) This property was previously owned by A.D. Griffin and his Wife, Laura Griffin, her parents. (R.89) A.D. Griffin predeceased his wife and Laura Griffin deeded the land to Cremonia. (R.89-90, 259)

Ken Covington and his family owned property adjoining the Griffin property to the East. (R.88) Ken lived most of his life on this farm, where they raise fish. Ken and his father had hunted the Griffin Property, and helped the Griffin family at times when vehicles got stuck or graded roads loggers had rutted up. (R.88-89, 107) Although Ken knew A.D. Griffin and his Wife, Laura Griffin, for some years, he wasn't sure he had ever met Cremonia until their dealings with the land. (R.110-111)

Sometime in the year 2006, Bennie Mayberry called Ken, expressing an interest in selling the Griffin property, saying he was authorized by the Griffin family to do so. (R.91) Bennie Mayberry, Precious Mayberry, and another person named Larry, was staying in the old house located on the Griffin Property. (R.94) Willie Griffin, a brother to Cremonia Griffin, who was in prison, had asked permission from Cremonia for the Mayberrys to stay there, and Cremonia had given them the keys to the house. (R.180, 272) Cremonia was living in an apartment in Meridian. (R.95, 182)

Hearing that the land was for sale, Ken contacted Mitch Mosley. (R.92) Mitch had bought the property to the West of the Griffin property in the mid-90's. (R.92, 194) Mitch had the Chevrolet dealership in DeKalb, Mississippi, and had sold two (2) cars to Cremonia previously. (R.190) The first time Mitch had met Cremonia was in the mid-1990's. (R.194)

Ken and Mitch agreed to attempt to purchase the property. Ken and Mitch rode over the property, and, in doing so, saw two (2) timber companies looking also at the property. They met Bennie Mayberry at the old Griffin house, who offered to sale the property for $1,250.00 per acre. (R.93,180-181)

Ken and Mitch had an Option prepared to pay $1,000.00 per acre for the Griffin property, with $1,000.00 earnest money, and set up a time to have the Option signed. After the parties did not appear, Ken and Mitch began to question the Mayberrys' authority to sell the property. (R.94, 182; RE.11-13)

The first of the next week, Ken traveled to Meridian to talk with Cremonia at her apartment. Ken wasn't sure he had ever met Cremonia before this meeting, and this was the first time he had ever had a conversation with Cremonia. (R.95, 111) Ken told Cremonia the

Mayberrys were trying to sell the property, and tried to determine whether the Mayberrys were representing the family. Ken told her how much he and Mitch would pay for the property, and asked her for the telephone numbers for Cremonia's brothers to contact them. (R.95)

Ken then went to the courthouse, looked at the land records, and believed Cremonia owned the land outright. (R.96) Ken visited Cremonia with his father, Jerry Covington. Ken told Cremonia what he had discovered at the courthouse, that she was the true owner, that she could sell the property, and do what she wanted to with it. Ken told Cremonia he was interested in purchasing the land, and warned her to be careful of signing any papers from the Mayberrys. Ken told Cremonia he did not trust the people staying in the house. (R.96-97) Ken was still not sure that Cremonia knew she owned the property. He wanted to be up front with her and the family, and did not want her to be tricked. (R.116) Ken advised her to counsel with her family, but also felt that Cremonia was sharp, and was already cautious of these people. (R.117)

Ken next had the title checked by a lawyer to confirm his belief that Cremonia did own the property. He then visited Cremonia with Mitch to confirm her ownership, telling her that they would be interested in purchasing the property if she sold it. Ken, again, counseled her to seek advice from other members of her family. Ken and Mitch were still somewhat unsure about what was going on because the Mayberrys living in the house were still acting as if they were going to sell the property. Cremonia told Ken and Mitch that she wasn't interested in selling the property right now, but would call them if she changed her mind. (R.97-98, 182)

A couple of days later, Cremonia called Mitch at the Chevrolet dealership to come to Meridian to her apartment. (R.183, 245) Cremonia had first tried to contact Ken, but he was out of town on business. (R.139, 245) Feeling uncomfortable about going to Cremonia's apartment alone, Mitch called his wife to ride with him. (R.151) He put the prepared Option over his sunvisor. (R.183) (RE.11-13) When Cremonia answered the door, she gave him a list of the brothers' names, telephone numbers, and addresses, and had her bags packed. Cremonia asked Mitch to carry her to her cousin's house, Arthur Darden, and store her car until she called for it because she was going out of town. (R.184-185, 261)

Mitch drove Cremonia in her vehicle and his wife left in his vehicle. (R.184)

While in Cremonia's vehicle, Cremonia told Mitch that she was ready to sell, and that $1,000.00 per acre was a fair price. Mitch then called his wife to bring the Option and meet them at Trustmark National Bank in Broadmoor Mart, Meridian, Mississippi, so the Option could be signed before a notary public. (R.245) Mitch's wife brought the Option to Trustmark Bank, and they went into the bank to sign the Option before a notary public. The Option was available for Cremonia to read over and look at it. It was three (3) pages stapled together. (R.153, 185-186) (RE.11-13)

Cremonia signed the Option before Robin Shelton, a notary public. (R.160) Mitch explained to Cremonia that the Option was for $1,000.00 per acre, and he paid her $1,000.00 earnest money with a check with the words "earnest money" on it. (R.188) All blanks in the Option were completed at the time of the signing at Trustmark Bank, and no changes were made to the Option. Cremonia was not confused about the Option, and had an opportunity to read it. (R.185-186, 187)

Robin Shelton, the notary public, was the financial service representative employed at Trustmark Bank, and notarized the signature of Cremonia Griffin and Mitch Mosley. (R.160) The document was completed at the time Cremonia and Mitch signed, and she saw them sign the Option. Nothing out of the ordinary with the notarization of their signatures occurred. (R.160-161,165) Mitch did not notice any disability that prevented Cremonia from understanding what she was signing. (R.190)

After the Option was signed, Mitch took Cremonia to her cousin's house, Arthur Darden, unloaded her bags and things, and took her car to the Chevrolet dealership to store it. (R.188-189)(R.249) Mitch then recorded the Option at the courthouse. (R.186) (RE.11-13)

The next morning Cremonia called Mitch and asked if she could have her car back. Mitch called Ken, and Ken followed Mitch to the Darden's house to return the car. (R.189) It was at this time that Cremonia said she wanted to give Mitch back the earnest money check. He told her that the Option was recorded, and did not feel comfortable about taking the check back. Cremonia told him that she was going to sell the property, but not right now. (R.189) The earnest money check has never been returned to Mitch. (R.188)

After the Option was signed, Cremonia went to her brother's house in California, Arthur Griffin, with an address of 4982 Vail Lane, San Bernardino, California, and, also, stayed at her sister's house, Mary Brown, 1430 Lexington Avenue, El Cahon, California. (R.100, 138, 253, 276)

Ken called and spoke with Cremonia on two (2) occasions when she was in California. (R.100) Cremonia gave Ken permission to call her brothers and sister. Ken called and

talked to the three (3) brothers he had telephone numbers for, and her sister. Ken told them he and Mitch had purchased an Option on the property, and intended to exercise the Option. Ken wanted them to know what was going on, and that he was trying to do the right thing. During these conversations, Cremonia never told Ken she did not want to sell the land. (R.101) Ken asked Cremonia when she was coming back to conclude the sale, since she had entered into the Contract and was responsible to fulfill it. (R.101, 145, 146)

After the Option had been signed, Ken asked two (2) different people to look at the property to determine its value. Ricky Goforth, a Forest Consultant with Goforth Forest Management, with thirty-one (31) years of experience as a registered forester and real estate broker, viewed the property with Ken. (R.124,168)

The property was farmed in the years past and it had grown up in grass and scrub timber. The timber had been cut through over the years with more hardwood being left than pine, and which was of a rough grade. (R.168) Goforth put a value of $700.00 per acre on the land, with a value of $200.00 to $400.00 per acre for timber. (R.171,172) If the land was purchased, then the new owner would have to remove everything on the land and start over, with an additional cost of approximately $300.00 per acre. (R.172)

Cremonia Griffin was sixty-seven (67) years of age, having been born December 1st, 1939. She knew how to read and write. (R.263) She had gone to the 12th grade. (R.236) After school, she had worked in electronics and with children. In her early years, she had moved to California, and had lived there for 16 to 17 years. (R.236, 237) She had traveled back and forth from California more than six (6) times. (R.269) A long time ago, she had undergone mental health treatment, and had spent 2 to 3 weeks in a facility. (R.239) In 2005, she had gone to Weems, experiencing mental problems of confusion. (R.240) In 2006, she

had gone to Alliance in Meridian. She was placed on medication. (R.239, 241) When her mother had gotten sick, she had returned from California to help her mother. (R.273)

Cremonia's explanation of what transpired at Trustmark Bank was that Mitch had asked her to sign a check for the money that he was giving her (earnest money). She believed she only signed one (1) paper, and that she and Mitch never talked about what was in the document. (R.245, 247)

Cremonia testified she was renting her apartment in Meridian; (R.255) that she had rented property before; that she has read over the leases; and that with the leasing of her apartment, she had to put up a security deposit; and that she understood the terms of the leases. (R.256)

Cremonia stated that she had a checking account and she would write checks on her checking account, and she understood what she was doing when she did that. (R.256-257) Cremonia stated she knew she had deeded the property to Robert (her brother). She understood the title to the land was in Robert's name. (R.261) She had asked Mitch to drive her to the Darden house because she was not supposed to be driving. (R.262) She admitted it was her signature on the Option Agreement, and she signed her name. (R.263) She admitted she did not read the document, and she could have read the document if she had wanted to. She, also, stated there was nothing preventing her from reading the document. (R.266)

Cremonia had traveled back and forth to California more than six (6) times by bus, car or by air. She had ridden in a car with someone else in traveling to California, and she has taken the airplane and bus by herself. She could do it by herself, but her family helped her. At times the air flight would require her to change planes between California and Jackson, and

she had flown from California to St. Louis one time. (R.269-271) She had asked the people staying in the house to leave (the Mayberrys), and had taken care of that by herself. (R.273) When her mother was sick, she took care of her, and handled her affairs. Generally, she would get someone to help her to go to different places with her mother. (R.273)She stated she was capable of handling her own business at times. Cremonia stated that sometimes she was depressed and gets confused. (R.274)

Cremonia stated she had never received a check for $1,000.00 (earnest money) as a gift. (R.275)

Cremonia had been out of Alliance a week or two before she called Mitch to come to her house. (R.285) Cremonia knew she owned 160 acres of land. Cremonia said the land was not for sale until all of her family agreed to the sell, and that is why she gave the addresses to Ken and Mitch. (R.289) She was at Alliance because she was disturbed. (R.240)

At times, Cremonia had sold timber off the property because of worms, and the timber had died. She had asked Michael Clark to cut the timber within the last 6 to 8 months. (R.292-293)

Ken and Mitch decided to exercise the Option and, in accordance with their decision, a letter was sent to Cremonia Griffin on April 6th, 2006. (RE.14-15) The closing for the purchase of the property was set for 1:00 o'clock P.M. on May 1st, 2006. Cremonia did not attend the closing that was set, and the *Complaint to Enforce Option Contract and Related Relief* was filed on May 9th, 2006 in the Chancery Court of Kemper County, Mississippi. (RE.7-15)

The Complaint listed Cremonia's address of 4982 Vail Lane, San Bernardino, California 92407-2984, and 1430 Lexington Avenue, El Cahon, California 92019, and process was obtained by publication. (RE.7-10) However, the Chancery Clerk failed to send by first class mail, postage prepaid, to her address a copy of the Summons and Complaint when the action was initially filed. (RE.3-6)

Cremonia filed no answer or other responsive pleadings, and on July 6th, 2006, Ken and Mitch filed their Application for Entry of Default with supporting Affidavit, Motion for Default Judgment, and Clerk's Default. (RE.3-6)

However, because the Chancery Clerk had failed to mail a copy of the Summons and Complaint to Cremonia, no Judgment was presented to the court. On July 17th, 2006, the Chancery Clerk sent by certified mail the Summons and Complaint to both addresses listed in the Complaint to Enforce. (RE.3-6) On August 26th, 2006, Ken and Mitch, again, filed their Application for Entry of Default with supporting Affidavit, Motion for a Default Judgment, and Clerk's Default, and the Chancery Court entered its Final Judgment on September 19th, 2006. (RE.3-6)

On October 18th, 2006, Cremonia filed her Motion to Set Aside Default Judgment, and Ken and Mitch filed their Motion to Enforce Judgment on November 1st, 2006. (RE.3-6)

On November 16th, 2006, the Court heard Cremonia's Motion to Set Aside Default Judgment, and, also, Motion to Enforce Judgment filed by Ken and Mitch. On November 20th, 2006, the Court entered its Judgment setting aside the Judgment, stating its reasoning as follows:

> "Although Rule 4C does not set forth a specific time in which the mailing of the Complaint and the Summons is required, this Court feels that the Complaint and Summons should be mailed simultaneously with the issuance of the

> Summons by Publication. Clearly, to have a copy of the Summons and Complaint mailed to the Defendant approximately sixty days after the date of the first publication and the Entry of Default Judgment does not comply with the provisions of Rule 4C." (RE.26)

At the hearing of the Motion to Set Aside the Judgment, Cremonia testified she left Mississippi, and had lived in California with her brother, Arthur Griffin, in San Bernardino, with her niece in Linwood, California, and with her sister, Mary Brown, in El Cahon, California. (R.23, 29-30) She stated she never received a summons or a complaint or anything from Mitch, Ken or their attorney. (R.24) Cremonia stated that her brother, Robert, who lives in St. Louis, called her in August of 2006 to come down to Mississippi because Ken and Mitch were suing her. She came two weeks in August when her mother passed away. Cremonia flew to St. Louis and drove down to Kemper County with her brother, Robert, in September, 2006. (R.24, 26) It was her understanding she and her brother were coming to Mississippi to appear in court. (R.26)

Cremonia stayed in Meridian for two weeks with her purpose was to find out about the court action. Robert told her that he would take care of the court action, and had Cremonia sign a deed to the property to him, prepared by a lawyer in Meridian. (R.27, 32-39) The deed was then recorded in the Chancery Clerk's Office in Kemper County, on September 19th, 2006 at 10:37 o'clock A.M. (RE.22-23) The Final Judgment dated September 19th, 2006, and based on her default, was filed on September 19th, 2006 at 10:29 o'clock A.M. (RE.21)

This action was tried before the Chancery Court of Kemper County on August 28th, 2007.

On November 26th, 2007, the Court issued its Opinion (RE.30-36), and Final Judgment was entered on January 10th, 2008 (RE.37), setting aside the Option Contract.

SUMMARY OF THE ARGUMENT

The lower court abused its discretion in arbitrarily setting aside the Judgment dated September 19th, 2006, granting unto Appellants, Ken and Mitch, a Default Judgment based on a failure of the Chancery Clerk in mailing a copy of the Summons and Complaint to Cremonia until fifty (50) days has passed from the date of the first publication of the Summons by Publication. The Mississippi Rules of Civil Procedure, Rule 4C, does not set forth a stated time within which the Clerk is to mail a copy of the Summons and Complaint to the Defendant, based on a Summons by Publication, and to rule that said mailing of Summons and Complaint to the Defendant must be mailed simultaneously with the issuance of the Summons by Publication is an abuse of the Chancellor's discretion.

No prejudice was shown to have occurred to the Defendant as the results of the Chancery Clerk mailing a copy of the Summons and Complaint to the Defendant fifty (50) days after the first date of publication of the Summons. In fact, Cremonia, the Defendant, was well aware of the pending litigation, and attempted to avoid its consequences by deeding the property in question to her brother, Robert. The deed to Robert was filed in the Chancery Clerk's Office on September 19, 2006, at 10:37 o'clock A.M., and which was the same day and time the Chancellor was considering the Motion for Default, and signing the Final Judgment based thereon.

Further, the trial court erred in setting aside the Option Contract, and considering procedural unconscionability as a ground therefor, when said defense was not pled as an affirmative defense by Cremonia, the Defendant.

Although the lower court found the consideration for the purchase of the land was adequate, the Option Contract was valid, and no fraud was shown, it set the Option Contract aside. The Court found there existed a fiduciary relationship between the parties, that Cremonia was of unsound mind, and the enforcement of the Option Contract would be unconscionable.

The record in the lower court does not support a find of a fiduciary relationship between the parties or that Cremonia was of such unsound mind she could not enter into a legally binding agreement. Further, Cremonia is receiving the fair market value for the sale of the land, and to enforce the Option Contract would not be unconscionable in these circumstances.

The lower court's judgment should be reversed and rendered in favor of Ken and Mitch.

ARGUMENT

I.

THE TRIAL JUDGE ABUSED HIS DISCRETION IN SETTING ASIDE THE FINAL JUDGMENT.

Ken and Mitch filed their *Complaint to Enforce Option Contract* on May 9th, 2006. The Complaint contained the Defendant's last known address of 4982 Vail Lane, San Bernadino, California 92407-2984, and 1430 Lexington Avenue, El Cahon, California 92019. (RE.7-10)

Process by publication for Cremonia was published in the Kemper County Messenger on May 18th, 2006, May 25th, 2006, and June 1st, 2006. (RE.3-6)

The Chancery Clerk failed to send, by first class, postage prepaid, a copy of the Summons and Complaint to the addresses listed in the Complaint as required by MRCP(4), until July 7th, 2006. At this time, the Chancery Clerk mailed a copy of the Summons and Complaint to Cremonia addressed to the last known address as stated in the Complaint. (RE.3-6, 7-10)

No answer or other responsive pleadings were filed by Cremonia.

On August 26th, 2006, Ken and Mitch filed their *Application for Entry of Default* with *Supporting Affidavit, Motion for Default Judgment* and *Clerk's Default*. (RE.17-18,19,20) On September 19th, 2006, the Chancellor entered the *Final Judgment*. (RE.21)

On October 18th, 2006, Cremonia filed her *Motion to Set Aside the Final Judgment*, and which was heard by the Court on November 16th, 2006. (RE.24-26)

The Chancellor set aside the *Final Judgment*, dated September 19th, 2006, finding the Summons and Complaint should have been mailed simultaneously with the issuance of the Summons by Publication, and the delay from May 18th, 2006, being the date of the first publication, until July 7th, 2006, being the date of the mailing of the Summons and Complaint, did not comply with MRCP Rule 4(C).

The Chancellor stated as follows in his *Opinion*, to-wit:

> "Although Rule 4C does not set forth a specific time in which the mailing of the Complaint and the Summons is required, this Court feels that the Complaint and Summons should be mailed simultaneously with the issuance of the Summons by Publication. Clearly, to have a copy of the Summons and Complaint mailed to the Defendant approximately sixty days after the date of the first publication and the Entry of Default Judgment does not comply with the provisions of Rule 4C." (RE.24-26, page 26)

Actually, the delay the Chancellor speaks of was fifty (50) days.

The standard of review in matters such as this is whether or not the Chancellor abused his discretion.

> When this Court reviews a denial of a motion to set aside a default judgment, it applies an abuse-of-discretion standard. ***McCain v. Dauzat***, 791 So.2d 839, 842 (Miss. 2001). Under the abuse-of-discretion standard, this Court first determines whether the trial court "applied the correct legal standard." ***Burkett v. Burkett***, 537 So.2d 443, 446 (Miss. 1989). The Court then "consider[s] whether the decision was one of those several reasonable ones which could have been made." ***Id.*** Accordingly "the trial court's exercise of its **discretion** may be disturbed only where it has been abused." ***Guar. Nat'l Ins. Co. v. Pittman***, 501 So.2d 377, 388 (Miss. 1987). (Cited in Greater Canton Ford Mercury Ins. v. Pearl Lee Lane, 2008-MS-107.540 10-16-08).

Rule 4 of Mississippi Rules of Civil Procedure does not set forth a time-period in which the Chancery Clerk must mail a copy of the Summons and Complaint to the Defendant based on process by publication.

The question is whether the delay in the Chancery Clerk's mailing a copy of the Summons and Complaint to the Defendant prejudiced the Defendant in any way.

At the hearing on the *Motion to Set Aside the Final Judgment*, Cremonia testified that in the first part of September her brother, Robert, who lives in St. Louis, told her about the Court proceedings in Kemper County. Cremonia then flew to St. Louis, and she and Robert drove to Meridian, Mississippi. (R.24,26) They were there for two (2) weeks. (R.25,34) The purpose of their trip was to find out about the Court action. (R.34) Her brother, Robert, told her that he would take care of it. (R.35) While in Meridian, they visited a lawyer's office where they had a deed prepared deeding the property to her brother, Robert. (R.35-37) Cremonia signed the deed to the land to Robert, and they recorded it in the Chancery Clerk's office in DeKalb, Mississippi. (R.38)

The deed from Cremonia to Robert was dated September 19th, 2006, and recorded in the Chancery Clerk's Office on September 19th, 2006 at 10:37 o'clock A.M. (RE.22-23)

The *Final Judgment* the Chancellor signed, based on Cremonia's default, was dated September 19th, 2006, and was filed the same day at 10:29 o'clock A.M., in the Chancery Clerk's Office. (RE.21)

Cremonia was well aware of the Court action against her in Kemper County, Mississippi. She was in a lawyer's office the same day where she could have sought advise. She was in DeKalb, Mississippi, in the Chancery Clerk's Office, recording the deed to her brother, Robert, the same day the *Motion for Default* was being heard before the Chancellor, and the *Judgment* based thereon was signed and entered with the Clerk. (RE.21,22-23)

The purpose of process is to inform the Defendant of a pending court action, and grant to them an opportunity to seek legal advise, and to file their response to the action. Cremonia had ample opportunity to accomplish this, but sought to respond otherwise to the pending action by deeding the property to her brother.

The delay in the Chancery Clerk mailing a copy of the Summons and Complaint to Cremonia did not prejudice her in this matter. It accomplished its purpose, in that Cremonia was made aware of the pending court action, and sought to escape the consequences of the Summons and Complaint by deeding the property to her brother, Robert.

Cremonia had sufficient notice of Ken and Mitch's pending Complaint to Enforce the Option Contract she had signed. Instead of responding to the Complaint, she decided to deed the property to her brother.

The failure of the Chancery Clerk to mail a copy of the Summons and Complaint to Cremonia until 50 days after the appearance of the first publication did not prejudice Cremonia or put her to a disadvantage. In fact, it granted Cremonia additional time to seek legal advise.

The Chancellor abused his discretion in this regard and judgment should be rendered in favor of Ken and Mitch.

II.

THE TRIAL COURT ERRED IN FAILING TO ENFORCE OPTION CONTRACT.

The findings of a chancellor should not be disturbed or set aside on appeal unless the decision of the trial court is manifestly wrong and not supported by substantial, creditable evidence unless an erroneous legal standard was applied. *Carrow v. Carrow*, 741 So.2d, 200 (Miss. 1999).

The Appellants herein, Ken and Mitch, submit that the Chancellor was manifestly wrong in finding a fiduciary relationship existed between Ken and Mitch, and Cremonia, and that the enforcement of the Option Contract would be unconscionable.

In response to Ken and Mitch's Complaint to Enforce Option Contract, Cremonia filed her answer, and which contained the following affirmative defenses pertinent to the chancellor's ruling, to-wit:

FIFTH DEFENSE

> The Plaintiffs' intentionally and fraudulently deceived the Defendant into signing what purports to be an Option Contract.

SIXTH DEFENSE

> The Option Contract is void due to the Plaintiffs undue influence on the Defendant....

SEVENTH DEFENSE

> There was no meeting of the minds regarding the Option Contract. (RE.27-29)

The Chancellor's opinion found the Option Contract signed by the parties was valid. (RE.32) The Option Contract contained a description of the property, consideration for the

purchase of the property, and the date by which the Option Contract was to be exercised. The Option Contract was not invalid due to vagueness or failure to include essential terms. (RE.32) The Contract was straightforward by legal standards, and the purchase price of $1,000.00 per acre was not so low as to shock the conscience of the court. Also, the Chancellor found there was no fraud and that the Defendant's evidence did not meet the clear and convincing standard. (RE.33)

The Chancellor did find a fiduciary relationship existed between the parties, that it was procedurally unconscionable to enforce the Option Contract against Cremonia and set the Option Contract aside. (RE.33, 34-35)

Ken and Mitch do point out to this Court that Cremonia did not include in her answer and defenses a claim of unconscionability as required by Mississippi Rules of Civil Procedure (8)(c), as an affirmative defense. (RE.27-29) As this defense was not plead by Cremonia, it should not have been relied upon by the court in setting the Option Contract aside. To do so would put Ken and Mitch in the unfavorable position of not knowing or being able to put into evidence sufficient facts to rebut the Court's conclusions.

Notwithstanding the above, Ken and Mitch address the issues of procedural unconscionability as set forth in the lower court's opinion. In doing so, Ken and Mitch cite MS Credit Center, Inc. v. Horton, 926 So.2d 167 (Miss. 2006). In this case, *Horton* had made three (3) loans from *MS Credit*, two (2) of which had carried credit life and disability insurance. *Horton* sued *MS Credit* and insurance defendants alleging that they did not adequately disclose the terms of the credit insurance. With one (1) of the loans, *Horton* had signed an arbitration agreement. During the progression of the proceedings, *MS Credit* filed its motion

to compel arbitration. In defense to the motion to compel arbitration, *Horton* asserted *MS Credit* had waived its rights to compel arbitration. Further, that *Horton* claimed she did not knowingly and voluntarily agree to arbitration, and, therefore, the arbitration agreement was procedurally unconscionable.

The lower court denied the motion to compel arbitration, finding the arbitration was unconscionable and unenforceable.

On appeal, this court found the record did not support the lower court's finding of unconscionability, but that *MS Credit* had waived its right to compel arbitration.

It is the discussion of procedural unconscionability that is important to the issues raised in this action.

In *Horton*, supra., the issue of unconscionability, as it pertains to legal agreements, was set out, to-wit:

> This 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." *Taylor*, 826 So.2d at 715 (*quoting 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 lack of opportunity to study the contract and inquire about the contract terms." *Taylor*, 826 So.2d at 714 (*citing Pridgen*, 88 F.Supp.2d at 655). ...
>
> Factors considered by this Court (fn5) in finding arbitration provisions procedurally unconscionable are: 1) lack of knowledge; 2) lack of voluntariness; 3) inconspicuous print; 4) complex legalistic language; 5) disparity in sophistication or bargaining power; 6) lack of opportunity to study the contract and inquire about the contract terms. *Id.* We now proceed to examine each of these factors as applied to the record before us. ...

Horton alleges that, because of the arbitration agreement was not explained to her and not brought to her attention, she neither understood arbitration nor knew of its presence in her documentation. Under Mississippi law, however, parties to a contract have an inherent duty to read the terms of a contract prior to signing; that is, a party may neither neglect to become familiar with the terms and conditions and then later complain of lack of knowledge, nor avoid a written contract merely because he or she failed to read it or have someone else read and explain it. *Titan Indem. Co. v. City of Brandon, Miss.*, 27 F.Supp.2d 693, 697 (S.D.Miss.1997). *Horton* may not escape the agreement by simply stating she did not read the agreement or understand its terms.

Horton also alleges that because the arbitration agreement was not explained to her, she did not have proper knowledge of the legal effect of the agreement. However, this Court has never held that one party to an arm's-length contract has an inherent duty to explain its terms to the other. Duties to disclose or to act affirmatively, such as explaining the terms of a contract, do not arise in arm's length transactions or under an ordinary standard of care. Rather they arise only in fiduciary or confidential relationships. *Van Zandt v. Van Zandt*, 227 Miss. 528, 86 So.2d 466 (1956). Consequently, Defendants in this case had no affirmative duty to disclose, explain, or affirmatively act on behalf of *Horton*, and she cannot attribute her lack of knowledge to Defendant's failure to explain.
...
Horton, supra., Pages 177-178.

Horton's claim that there was a lack of sophistication or bargaining power is not supported by any evidence, sworn testimony, or affidavits. Rather, she merely states that she was "certainly less sophisticated in business matters." Even if this contention is correct, it is certainly not enough, standing alone. This Court could hardly employ a rule which required the parties to every contract to be of exactly equal sophistication. One party or the other will always be more or less sophisticated in business matters than the other. Here, however, there is no evidence in the record that *Horton* attempted to negotiate the terms of the arbitration agreement or have it removed. Nor does the record reflect *Horton's* alleged lack of sophistication in financial matters. Nothing in the record indicates *Horton* could not have obtained a loan with another financial institution, had she so desired. Thus, *Horton* has failed to demonstrate lack of sophistication sufficient to render the arbitration agreement unenforceable. ...

The record provides no specific facts supporting *Horton's* alleged lack of opportunity to study and inquire about the contract terms. There is no indication she was rushed or hurried into completing the loan transaction by a set time; nor can we find she was prevented from studying and inquiring as to the terms. Accordingly, this Court does not find any lack of opportunity to study and inquire about the contract terms. *Horton*, supra., Page 179.

As in *Horton*, supra, Cremonia had the opportunity and duty to read the Option Contract before she signed it. (R.187, 263) Cremonia testified that she could read and write and had the opportunity to read the Option Contract at Trustmark National Bank, when the parties went before Robin Shelton, the financial service representative of the bank, to sign the Option Contract, and have their signatures notarized. (R.160,165,263) The entire Contract was present and completed at that time, and available to her. (R.186) Ms. Shelton noticed nothing out of the ordinary with the notarization of the signatures. (R.165)

There was no duty of Mitch, who was present with her at this time, to explain the terms of the Option Contract to Cremonia. However, Mitch did explain to Cremonia that it was an Option Contract to purchase the property for $1,000.00 per acre, with earnest money of $1,000.00 being paid. The check for the earnest money even had the words "earnest money" written on it. (R.188) There was nothing preventing Cremonia from simply not signing the Option Contract. She was strong enough to remove the Mayberrys from the house, and had sufficient capacity to understand the effect of her signature. (R.273) There was no testimony the Option Contract was anything other than what it purported to be. There was no mis-representation relied on by Cremonia.

As stated before, Cremonia could read and write. (R.263) She had purchased vehicles before (R.266), had taken care of her mother's affairs (R.273), had leased apartments and understood their terms. (R.255-256) She had maintained a checking account. (R.257) She had traveled back and forth from California at least six (6) times (R.269), and had attended school to the 12th grade. (R.236) Cremonia had the sophistication to read and understand the effect of signing an Option Contract for the sale of her land, just

as she understood the effect of her signing a deed to this property to her brother, Robert, transferring the property to him, after Ken and Mitch had filed their Complaint to Enforce the Option Contract. (R.261)

Cremonia explanation of why she signed the Option Contract is still somewhat unclear. She stated that she thought she was signing for the $1,000.00 earnest money check Mitch was giving to her, even though she testified no one had ever given her $1,000.00 before. (R.275,290)

This is not the situation that arose in *Rothenberry v. Hooker*, 864 So.2d, 266 (MS 2003), where the court found a unilateral mistake allowed a party to an agreement to rescind the agreement due to a mistake of $230,000.00.

In *Rothenberry*, supra., the parties were remaindermen in real property and each owned a one-half interest and a trust which consisted, among other substantial assets, a 3,262 acre farm. The farm was secured by a deed of trust with a balance of $459,000.00.

The trust terminated and efforts were underway to divide the assets of the trust between Rothenberry and Hooker. If the parties could not have agreed to the division of the land, then a partition suit would have partited the property with each party receiving one-half of the land subject to one-half of the $459,000.00 debt.

The attorney for Hooker by letter wrote the attorney for Rothenberry stating that Hooker would sell her one-half interest in the land less "the balance of the debt," instead of one-half of the debt. Rothenberry accepted this offer and when Hooker refused to conclude the deal, Rothenberry filed a complaint for specific performance.

The chancellor found that there had been a unilateral mistake and set the agreement between the parties aside.

This court, in finding that the chancellor's findings of a unilateral mistake was not manifestly wrong, stated as follows, to-wit:

> We hold that the chancellor's finding of unilateral mistake was not manifestly wrong. 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 Comm'n v. Becknell*, 329 So.2d 57, 60-61 (Miss. 1976) (quoting *State Highway Comm'n vs. State Constr. Co.*, 203 Or.414, 280 P.2d 370,380 (1955) (italics in original & boldface added)).
>
> The chancellor reviewed the dealings between the parties and found that neither party had an obligation to pay any more than one-half of the debt. As the chancellor noted, "[i]f the parties could not agree upon a tenant to lease the property in order to keep the property active and producing income, in which both parties would be entitled to share equally in the profits, then why would [*Hooker*] agree to sell her interest less the debt to be deducted from the asking price." It is simply counterintuitive to think that *Hooker* would knowingly and consciously sell her one-half interest in the farmland less the amount of the *entire* det when she was only obligated to pay one-half of it. A mistake to the tune of $230,000 bestows an "unconscionable advantage" upon Rothenberry. Rothenberry, supra., Page 271.

In the present case, no unfair advantage was being taken. Cremonia received more than adequate consideration for the property, as testified to by the forester, Ricky Goforth, who valued the land at $700 per acre and the timber between $200 and $400 per acre. After

purchasing the property, Ken and Mitch would still have to expend an additional $300.00 per acre to put the land to its best use of growing timber. (R.171-172)

Cremonia did not make a unilateral mistake in signing the Option Contract which would result in a great financial injustice. Cremonia simply changed her mind after having received negative feedback from her family members.

In Brown v. Chapman, 809 So.2d, 772 (MS 2002), *Brown* sought to reform a deed to her grandson *Chapman* to reduce the number of acres conveyed, claiming she did not intend to convey all of the seventeen acre tract of land.

Brown did not read the deed before she signed it, but relied on the good faith of her grandson to have prepared the deed according to her wishes. *Chapman* claimed it was the parties intentions to convey the land described in the deed, and the problem arose after the conveyance when family members began to complain.

In affirming the chancellor's decision not to reform the deed to reduce the number of acres in the deed and reform it, this court addressed the issue of a mistake in a legally binding instrument as follows:

> Not every allegation of mistake by a part to a legally-binding instrument, even if proven to have occurred, entitles the party to relief. The law permits reformation of instruments to reflect the true intention of the parties when (a) the erroneous part of the contract is shown to have occurred by a mutual mistake, i.e., the party seeking relief is able to establish to the court's satisfaction that both parties intended something other than what is reflected in the instrument in question, or (b) the error has arisen by the unilateral mistake of one party and that mistake is accompanied by evidence of some sort of fraud, deception, or other bad faith activity, by the other party that prevented or hindered the mistaken party in the timely discovery of the mistake. *McCoy v. McCoy*, 611 So.2d 957, 961 (Miss. 1992). ... Brown, supra., Page 774.

On appeal, Brown relies extensively on case law dealing with confidential relationships of various sorts that give rise to a presumption of undue influence on the part of the recipient of a conveyance. *See, e.g., Mullins v. Ratcliff*, 515 So.2d 1183, 1191-1192 (Miss. 1987); *Anderson v. Burt*, 507 So.2d 32, 36 (Miss. 1987). Her contention appears to be that, due to her advanced age and the close family relationship existing between her and Chapman, he was able to exert undue influence over her to execute the deed for substantially more property than she actually desired to convey. This theory of recovery is not, in our view, the same as a claim based on mistake, whether mutual or unilateral. A claim of undue influence involves evidence that the independent will or judgment of one party has been effectively overmastered by the other and that overmastering influence is then used to persuade the party to undertake some action the party otherwise would not have done.

Even were the case to be analyzed under a claim that the deed was obtained against Brown's better judgment through the improper exertion of undue influence by Chapman, there is not much evidence in the record that would tend to show that Brown was so dependent upon Chapman that he could reasonably be seen as able to exercise undue influence over her decision-making processes. The only evidence in that regard was that Brown was advanced in years and that Chapman, from time to time, helped her out in rather mundane ways. There was no evidence that he was active in the management of her property or her finances or that she relied upon him for advice in such matters on a regular basis. To the contrary, the only evidence in that regard was that Brown, despite her advanced years, maintained an independent lifestyle and was fully capable of making her own independent judgments on various things.

As to some other form of bad faith or underhanded dealing on Chapman's part to disguise from Brown the true import of the deed she was to sign, we can discover no compelling evidence suggesting that to be the case. It is undisputed that the deed was presented to Brown in the presence of a completely disinterested and neutral person—that being the clerical assistant who prepared the deed—and that, in that person's presence, Brown was encouraged to review the instrument to determine that it was according to her intentions. The deed itself, as we have already demonstrated, quite plainly reflected on conveyance of substantially more than one acre. During the course of the trial, counsel for Chapman sought to have Brown read the paragraph from the deed reciting the number of acres in the conveyance and, insofar as the record shows, Brown was able to read the instrument without hesitation or difficulty. The law does not permit a person to escape the consequences of entering into a written agreement upon proof that the person, having an opportunity to review the terms of the instrument, elected not to do so. *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.*, 584 So.2d 1254, 1257 (Miss. 1991). *Brown*, supra., Pages 775-776.

The chancellor, further, found there was no meeting of the minds between the parties, due to the fact Cremonia was an elderly person, of unsound mind, and, further, there exist a fiduciary relationship between the parties. (RE.35)

At the time of the trial, Cremonia was sixty-seven (67) years of age (R.236); she had gone to the twelfth (12^{th}) grade (R.236); she had lived and worked in California for approximately sixteen (16) years. (R.236,237) While in California, a long time ago, she had undergone mental health treatment, and spent two to three weeks in a facility. (R.239) What type of mental health treatment she underwent, her treatment, diagnosis and its effect was never developed in the lower court. In 2005, Cremonia had gone to Weems experiencing mental health problems. (R.240) Again, what type of facility Weems is was never developed at trial, nor was it developed the particular mental problem she had, if any, except that of "confusion." In 2006, Cremonia had gone to Alliance. (R.239,241) Again, it was never developed what type of facility Alliance was, nor was it developed her problem, diagnosis, and how it affected her.

Cremonia was taking medication. However, what type of medication, for what problem, and its effect was not developed in the lower court. (R.241)

However, it was shown Cremonia was capable of traveling back and forth to California and had done so more than six (6) times by bus, car or air. (R.269) She had rented apartments in Meridian, had signed and understood leases (R.255,256), had a checking account that she wrote checks on (R.257), managed her affairs, and knew that by signing a deed to the property to Robert, her brother, he had title to it. (R.261)

When her mother was sick, she was able to take care of her, and only needed help from others in getting around with her mother. (R.273) When she discovered the actions of the Mayberrys, who were living on the house on the Griffin property, she was capable of removing them. (R.273)

Cremonia had, also, sold timber off of the land when the timber had died, and had contacted Michael Clark to cut the timber on the land within the last six to eight months. (R.292-293)

The lower court had found that the consideration to be paid by Ken and Mitch for the property was not inadequate. (RE.33) Further, there was no testimony of any misrepresentation by Ken or Mitch, or promises by them that were not kept in dealing with Cremonia and her property. Cremonia was, certainly, capable of managing her own affairs and did so. She was not suffering from any condition that prevented her from understanding the consequences of her action.

This issue of setting aside a deed on the grounds of undue influence and incompetency was addressed in *Brown v. Ainsworth*, 943 So.2d 757 (Miss.2006).

This case involved an attempt to set aside a deed by a conservator of a ward who had died to a friend. Samuel, the Ward, was placed under a conservatorship in the 1970's for severe mental and physical problems. The conservatorship was lifted in 1995. The conveyance by Samuel, the ward, to Ainsworth, his friend, was in 1998. Samuel was again placed under a conservatorship in 1999, and he died before the trial. In addressing whether a confidential relationship existed between Samuel and Ainsworth, this Court stated, to-wit:

> The court in this case specifically addressed the confidential relationship factors. The court specifically found that Ainsworth did not provide care for Samuel. The court found that Ainsworth sometimes drove Samuel

> around, but that Samuel also "drove his own vehicle." The court did not specifically address the issue of joint accounts or power of attorney, but we note that no evidence at trial indicates that Ainsworth and Samuel had joint accounts or that Ainsworth had power of attorney. The court did find that Ainsworth and Samuel had a close, personal relationship and that Samuel confided in Ainsworth as a friend. The court also noted that Samuel had both mental and physical problems that were often severe, even requiring hospitalization around the time of the execution of the deed.
>
> We find that the court did not err in finding that the Browns failed to prove that there was a confidential relationship between Samuel and Ainsworth. Ainsworth did not provide medical care or other significant care for Samuel, he did not share joint accounts with him, and he did not enjoy power of attorney. While Samuel had mental and physical problems, the evidence presented did not indicate that those problems prevented him from making his own decisions or running his own life to the point where it would be easy for another person to exert control over his decisions. Furthermore, while Samuel and Ainsworth enjoyed a close friendship, none of the evidence presented about that relationship indicated that Ainsworth controlled Samuel in any way. Therefore, the court did not err in finding there was no confidential relationship. ... *Brown*, supra., Page 761.

Finding there was no confidential relationship, the burden of proof remained with the conservator to show undue influence was exerted over Samuel in the execution of the deed to Ainsworth.

> "In order to set aside a deed on grounds of undue influence, evidence must show that the will and free agency of the grantor were destroyed and the deed actually reflects the will of the person exerting the influence". *Greenlee v. Mitchell*, 607, So.2d 97 (Miss. 1992). The lower court's decision was upheld. *Brown*, supra., Pages 762.

Samuel's mental condition was at issue in *Brown*, supra, and was, certainly more severe and detailed than the case at hand. A chronology of Samuel's conditions and actions were set out in *Brown*, supra, and were as follows:

> 06/20/1961: Samuel's father executes a will leaving Samuel all of his property, without reservations or restrictions.

Samuel's mother is given a life estate to all of Samuel's father's property. (fn3)

1961: Although there are apparently no records of it, Kay Brown testified that Samuel was admitted to Whitfield for the first time in 1961.

07/02/1965: Samuel is admitted to Whitfield and is diagnosed as having schizophrenic reactions/schizoaffective type.

1971: Samuel's father passes away.

04/03/1975: Samuel is again diagnosed as a schizophrenic/ schizoaffective type and is prescribed some form of medication that is given him by injection.

05/14/1975: Samuel is again admitted to Whitfield, and his doctor notes four prior visits to Whitfield.

07/25/1977: John Brown, Samuel's brother is appointed as conservator over Samuel.

05/05/1978: John Brown resigns as conservator and Melvin Brown, another brother, is appointed as his successor. Melvin is appointed despite the fact that he can neither read nor write

06/12/1978: Samuel is admitted again to the mental hospital at Whitfield. His chart apparently notes that this was his sixth admission to Whitfield.

1980: Samuel's mother, with whom he was living at the time, passes away.

05/12/1980: Another admission to Whitfield, with a note that Samuel had been admitted many times previously due to his schizophrenia.

08/24/1987: Samuel is released after a roughly two-month stay at Whitfield, diagnosis is schizophrenia.

09/03/1993: Samuel has an annual exam that notes that his blood pressure is elevated.

11/11/1994: Samuel signs a deed selling his timber on his land. He gets $70,000 in return.

11/15/1994: Samuel allegedly uses his proceeds from the sale of his timber to purchase land for his nephew, David Brown (Melvin's son). Samuel purchases the land for David because he believes that David will put a chicken farm on the land and Samuel wants to help David.

05/19/1995: Dr. Sherry Meadows finds that Samuel is "capable of managing his personal business matters. He was totally lucid in our conversation and fully cognizant of all details of our conversation."

08/15/1995: David Brown sells the property that Samuel gave him.

11/06/1995: Samuel is restored to reason and the conservatorship is dissolved. The dissolution of the conservatorship is backdated to 11/10/1994. The timber company notes in its filings that Melvin Brown has never filed an accounting as conservator of Samuel.

04/03/1998: Samuel executes the deed transferring his property to Ainsworth.

05/19/1998: Samuel is admitted to the hospital for extremely high blood pressure and is diagnosed with diabetes.

09/1999/10/27/1999: Samuel goes to Seattle to visit a brother who is dying. The next day family friends inform the family that Samuel is "acting crazy." Samuel is ultimately admitted to Whitfield on 10/27/1999, under the care of Dr. Paul Jackson. He is discharges several months later. Dr. Jackson testified that he believed that some of Samuel's 1999 problems had a "recent" onset. On cross-examination, Dr. Jackson clarified that recent would probably mean less than a year.

12/17/1999: Kay Brown is appointed as Samuel's conservator. Samuel is still in Whitfield at the time of the appointment.

03/17/2000: Samuel is released from Dr. Jackson's care at Whitfield into the care of his family.

06/08/2000: Melvin deeds a piece of property to Samuel. At trial, Melvin claimed that he deeded the property to Samuel because the property was given to Melvin as payment for trees that were cut off of Samuel's property.

07/23/2002: Samuel passes away. *Brown*, supra., Pages 762-764.

> The same level of competency is required to execute a deed as is required to execute a will. Whitworth v. Kines, 604 So.2d 225, 228 (Miss. 1992). Even if an individual has suffered from a severe mental defect, "[t]emporary or intermittent insanity or mental incapacity does not raise a presumption that such disability continued to the date of execution." *Id.* (quoting Young v. Martin, 239 Miss. 861, 871, 125 So.2d 734, 738 (1961)). A grantor who has executed a facially valid deed, such as the one presently at issue, is presumed to be competent, and the party challenging the validity of a deed bears the burden of showing, by clear and convincing evidence, that the grantor lacked the capacity to execute the deed. *Id.;* Mullins v. Ratcliff, 515 So.2d 1183, 1190 (Miss.1987); Richardson v. Langley, 426 So.2d 780, 784 (Miss.1983). The *Whitworth* court specifically noted that "mental incapacity or insanity, 'is not always permanent, and a person may have lucid moments or intervals when that person possesses necessary capacity to convey property.'" *Whitworth*, 604 So.2d at 229 (quoting Smith v. Smith, 574 So.2d 644, 653 (Miss.1990)). However, where an individual has been shown to be permanently insane, significant evidence is required to show that the individual was lucid and competent at the time of the execution of the deed. Williams v. Wilson, 335 So.2d 110, 113 (Miss.1976). Brown, supra., Page 764.

Although Cremonia testified at times, she had been "confused" or "disturbed", there was complete lack of evidence she lacked the capacity to execute the Option Contract. In fact, everyone surrounding her at the time of the execution of the Option Contract, stated Cremonia was not confused by the option, that no disability was present, and she understood what she was signing. (R.165,190)

Further, the evidence developed in the lower court did not support the chancellor's finding that a fiduciary existed between Cremonia and Ken and Mitch.

The evidence presented was that Ken and his family owned property to the West of A.D. Griffin and Laura Griffin. (R.88) Ken and his family had hunted the Griffin property and, at times, helped the Griffin family when vehicles got stuck, or roads needed grading. (R.88-89, 107) Although, he knew A.D. Griffin and Laura Griffin and the family, he wasn't sure he had ever met Cremonia until his visit with her at the apartment to discuss with her the Mayberrys' actions. (R.110-111)

Mitch, who owned the Chevrolet dealership in DeKalb, Mississippi, had purchased property to the East of the Griffin property in the mid 90's. (R.92, 194) He had sold two (2) cars to Cremonia previously, and had met her in the mid 90's. (R.190)

This was simply all the evidence that was presented of a fiduciary relationship between the parties. There was absolutely no evidence of a confidential relationship such as would arise between parties of joint accounts or powers of attorney. There is no evidence that Cremonia confided in Ken or Mitch, or that Ken and Mitch provided medical care, helped Cremonia with her affairs, or enjoyed a close personal friendship with her. The chancellor found there was no fraud in the parties' dealings (RE.33), and no where in the evidence did there exist any promise or misrepresentation to Cremonia.

In *Memphis Hardware Flooring Co. v. Daniel*, 7717, So.2d 924 (MS 2000), this Court addressed the issue of fraud in a fiduciary relationship. In *Memphis Hardware*, supra, an 85 year old retired school teacher owned approximately 800 acres of land. Easley, a person that had previously purchased, sold and had helped Daniel with her timber, approached Daniel about cutting additional timber. Daniel, based on Easley's representations, unbeknowingly, signed a deed to more land than she had agreed with Easley to sell. Furthermore, Easley was buying the timber from Daniel for $150,000.00, and, immediately, selling it to others for $410,000.00, without Daniel's knowledge.

The court found Easley had developed a fiduciary relationship with Daniel, that he breached their relationship, and Memphis, the purchaser of the timber from Easley, was also guilty of fraud, and which arose from Easley's failure of not making a full disclosure of all material facts of the transaction to Daniel.

In the present case, the chancellor found the purchase price for the Griffin was not such that would shock the conscience of the court. Ricky Goforth, a forester, testified that the land value was $700.00 per acre, with a timber value of being $200.00 to $400.00 per acre. (R.171, 172) He, also, stated any new owner of the property would have to remove everything on the property and start over at a cost of approximately $300.00 per acre to put the land in timber production. (R.172)

There was no evidence of any misrepresentation of Ken and Mitch of any fact. The dealings between the parties were at arms' length.

Cremonia had a duty to read the Option Contract. There was no duty on Ken or Mitch to explain to her its terms. The parties were dealing with the other at arms' length. The Option Contract was even signed before a disinterested party, the bank representative, of Trustmark National Bank. (R.160) The Option Contract was available to Cremonia to read (R.185), and she could have sought the advice of the bank's representative. Furthermore, it was explained by Mitch to Cremonia at the time of the Option Contract's execution that she was signing a Option Contract for the sale of the property for $1,000.00 per acre, and receiving an earnest money check of $1,000.00. (R.186) The check even contained the words of "earnest money." (R.187-188)

Cremonia had the capacity to understand the consequences of her executing the Option Contract. She had taken care of her own affairs (R.274), had taken care of her mother's affairs when she was sick (R.273), she was able to travel back and forth from California more than six (6) times (R.269), had signed apartment leases, understood their terms (R.256), and had maintained a checking account. (R.257) She had sold timber on the place (R.292-293), was strong enough to move the Mayberrys out of the family home (R.273),

and she dealt with her affairs as any other person would have. She understood the consequences of signing and executing a deed to her brother, Robert. (R.261)

Ken and Mitch are not receiving some unfair advantage over Cremonia in the parties' agreement as the results of Cremonia's claim of unilateral mistake. Cremonia was receiving adequate consideration, and a fair price for the property, as testified to by Ricky Goforth, the forester, who valued the land at $700.00 per acre, and the timber at $200.00 to $400.00 per acre. (R.171,172)

At the time of the execution of the Option Contract, Cremonia was not suffering from some mental deficient that prevented her from understanding her actions. Although she had received mental treatment years before, there was no testimony of her diagnosis, how it affected her, what medication she was taking, and what particular problem she was taking medication for. As far as the record discloses, Cremonia may have been suffering from insomnia.

Cremonia willingly signed and agreed to the Option Contract, and only after her cousin and family became involved did she change her mind.

And, lastly, there is simply no proof that there existed a fiduciary relationship between Cremonia and Ken or Mitch. Simply knowing someone does not give rise to such a relationship. There was no proof, none at all, that Cremonia relied on Ken or Mitch in any of her dealings. There was no testimony that they had previously advised Cremonia concerning her affairs, or that Cremonia relied on Ken or Mitch for her care or well being or in any other way.

The lower court's finding that the Option Contract should be set aside is not supported by the evidence and should be reversed.

CONCLUSION

Ken Covington and Mitch Mosley, Appellants, respectfully submit the Chancellor erred in setting the Final Judgment based on Appellee's default aside, and Judgment should be entered for Appellants.

Further, Ken Covington and Mitch Mosley, Appellants, respectfully submit the Chancellor erred in setting the Option Contract aside, and Judgment should be rendered in favor of Appellants.

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, **Brief of Appellants** and **Appellants' Record Excerpts** on the following by placing a copy of same in the U. S. Mail, postage prepaid, addressed to their regular business mailing address:

John C. Hall, II, Esquire
Brunini Law Firm, , Attorney for Defendant/Appellee
Post Office Drawer 119
Jackson, MS 39205

Hon. J. Max Kilpatrick
Chancery Judge
Post Office Box 520
Philadelphia, MS 39350

THIS, the 16th day of November, 2008.

HON. WALTER T. ROGERS