IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-00474

DEBRA JOEL, AS EXECUTRIX OF THE ESTATE OF JIMMY JOEL; LINDSEY MEADOR, AS TRUSTEE FOR THE JAMES J. "JIMMY" JOEL TESTAMENTARY MARTIAL TRUST AND AS TRUSTEE FOR THE JAMES J. "JIMMY" JOEL FAMILY TRUST; MICHELLE A. HUMBLE, FORMERLY KNOWN AS MICHELLE A. SHACKELFORD; AND MICHAEL A. SHACKELFORD — APPELLANTS

V.

JAMES H. JOEL AND MARGARET R. JOEL — APPELLEES

ON APPEAL FROM THE
CHANCERY COURT OF THE SECOND JUDICIAL DISTRICT OF
BOLIVAR COUNTY

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The Undersigned counsel of record certifies that the following listed persons may have an interest in the outcome of this case. These representatives are made so that the justices of the Court of Appeals/Supreme Court may evaluate possible qualifications of recusal.

1. The Honorable William Willard, Chancery Court Judge of Bolivar County, Mississippi
2. Debra Joel, as Executrix of the Estate of Jimmy Joel, Appellant
3. Lindsey Meador, as Trustee for the James J. "Jimmy" Joel Testamentary Martial Trust and as Trustee for the James J. "Jimmy" Joel Family Trust, Appellant
4. Charles E. Ross, Esquire, Attorney for Appellants
5. Bill Lovett, Esquire, Attorney for Appellants
6. James H. Joel and Margaret Joel, Appellees
7. Gerald H. Jacks, Esquire, Attorney for Appellees
8. Kathy Clark, Esquire, Attorney for Appellees

This the 12th day of November, 2009.

Gerald H. Jacks, Miss. Bar No. [redacted]
Attorney for Appellees

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Statement Regarding Oral Argument

Appellees respectfully requests that the Court deny Appellants' request for oral argument on the basis that the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Furthermore, oral argument is not necessary because the issues before the Court in this case have been authoritatively decided.

Statement of Issues

1. What is the standard of review of a chancellor's decision to impose a constructive trust?

2. Whether the chancellor erred in allowing the Joels to amend their complaint?

3. Whether the Joels' claim for a constructive trust is barred by the statute of limitations?

4. Whether the Joels' claims are barred by laches?

5. Whether the trial court erred in imposing a constructive trust on the Avery Street property?

6. Whether the chancellor's decision is supported by clear and convincing evidence?

7. Whether the chancellor erred in vesting fee simple title in the Joels?

8. Whether the chancellor erred in denying the counterclaim filed by Jimmy Joel's estate?

Statement of the Case

Introduction

This case is about the parents of three children, who worked their entire lives to acquire their only asset of any value, a home they owned debt free and in their names alone. It is a case about two

parents who loved their children and who had left everything in their wills to their three children in equal shares at the death of the last of the two parents to die.

It is a case about a son who encouraged his septuagenarian parents to sell their only asset of any value, their debt free home, and who encouraged his parents to buy a new home. It is a case about a son who advised his parents to have the sellers of the new home to deed the property to his parents in a life estate. It is about a son who was an expert in real estate matters and whose parents were unskilled in real estate matters. It is about two parents who explained to their son that they did not know anything about a life estate and who asked their son to make sure that they had a title which would allow them to sell the home and which would allow them to have the new home pass to their three children in equal shares as provided for in their respective wills at the death of the last of them to die. It is about a son who misrepresented to his parents about the legal effects of a life estate, telling his parents that a life estate "won't change a thing" and telling his parents that he would take care of the arrangements associated with the closing on the home. It is about a son who handled all of the legal and financial arrangements associated with his parents' purchase of the new home, working through the son's personal attorney and banker. It is about a son who took from his parents when he instructed his personal attorney to prepare the deed which would grant his parents a life estate in their new home **to be measured by the life of the first of his parents to die** with the remainder interest to the son, depriving the survivor of his parents of a place to live at the death of the first of his parents to die.

It is about a son who used his relationship with his personal attorney to get the attorney to prepare the deed as the son had instructed him to prepare it and about an attorney who prepared the deed in the manner the son instructed him because he trusted the son had an agreement with his

parents - when the son had no such agreement with his parents. It is about a closing where all parties involved admitted that the deed was one of the most unusual they had ever seen and which no one explained anything to the parents about the title they were acquiring.

It is a case about two parents who paid almost $100,000 for their new home without assistance from anyone, not even the son who took advantage of their trust. It is about two parents who learned several years after the closing that their son had essentially taken their home from them by making sure that title went to him at the death of the first of his parents, while the other was left homeless. It is about two parents who still had faith that a mistake had been made and who asked the son about the problem with their deed. It is about a son who told his parents that he would correct the problem with their deed, never intending to do so, only intending to pacify them and who died suddenly thereafter. It is a case where two parents, in their eighties, who were left with no choice but to sue their son's estate. It is a case where the chancellor found that the son engaged in the epitome of self-dealing, taking advantage of his parents' trust and reliance, and ordering that the parents were entitled to a constructive trust.

Trial

Based on the testimony and the evidence received in the trial of this matter, the chancellor made the following findings of fact and conclusions of law all of which are supported by substantial, credible evidence in the record:

Background Facts

By way of background, in 2001, Mr. and Mrs. Joel's son, Jimmy Joel, and his wife, Debra,

were both in the real estate business.[1] (TT 17, 92, 93, 115, 238,)[2]. Specifically, Debra was a licensed realtor and appraiser. (TT 17, 93, 233). Jimmy was a real estate developer and described by his attorney, Lindsey Meador, as a sophisticated real estate person. (TT 17, 92, 115-116, 233). Jimmy's personal banker, Jerry Bullock, described Jimmy as one of the best and largest real estate investors in Cleveland, Mississippi. (TT 92).

Mr. and Mrs. Joel, on the other hand, were in their 70's in 2001, and their only real estate experience was the buying and selling of the homes which they resided in during the course of their 60 years of marriage. (TT 7, 10-12, 43, 50). With the exception of the Avery Street home which is the subject of this suit, Mr. and Mrs. Joel made all of the arrangements associated with the purchase of the homes during the course of their marriage, and they owned every home they had ever purchased in their names alone. (TT 10-12, 40, 88-89).

Jimmy's knowledge regarding real estate in general, as well as the various ways in which real estate could be titled, was far superior to that of Mr. and Mrs. Joel. (TT 11-12, 14, 42, 89, 115-116).

Mr. and Mrs. Joel had three children, Mike, Ann, and Jimmy. (TT 6). Jimmy was the oldest. (TT 43). Mr. and Mrs. Joel's only asset of any significance which they had to leave as an inheritance to their three children was their home. (TT 321).

Mr. and Mrs. Joel only had a twelfth grade education. (TT 6, 8, 43). Jimmy, on the other hand, had a high school degree and some college. (TT 44).

At the time of the trial, Mr. Joel was 80 years old. (TT 7). Mrs. Joel passed away in

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[1]Hereafter, Plaintiffs/Appellees will be referred to as Mr. and Mrs. Joel or the Joels. Plaintiffs'/Appellees' son, Jimmy Joel, will be referred to as Jimmy.

[2]Hereafter, Trial Exhibits will be referenced as TE; Trial Transcript will be referenced as TT; and Clerk's Papers will be referenced as CP.

December of 2008. (TT 7). By agreement of the parties prior to trial, it was agreed that Mrs. Joel's estate would be opened and substituted as a party as though it had been done prior to trial. (TT 2-4). After Mrs. Joel's estate was opened, the chancellor entered an order substituting Mrs. Joel's estate as a party. (CP 891).

Facts Leading Up to Mr. and Mrs. Joel's Purchase of Avery Street Home

In 1999, Jimmy built the home located at 808 Avery Street which is the subject of this appeal and sold it to Michael and Michelle Shackelford for $93,500. (TE 4, TT 239).

In 2001, Mr. and Mrs. Joel were living in a home they owned on North Bayou Road in Cleveland, Mississippi. (TT 11, 40). Mr. and Mrs. Joel's home on North Bayou Road was paid for and was worth approximately $87,000. (TT 36, 40). The title to Mr. and Mrs. Joel's home on North Bayou Road was a fee simple title in Mr. and Mrs. Joel's names alone. (TT 40).

In 2001, Mr. and Mrs. Joel's son, Jimmy, executed a contract to buy back the 808 Avery Street home for $94,500 from Michael and Michelle Shackelford. (TE 4). Thereafter, Jimmy told Mr. and Mrs. Joel that the Shackelford's home located at 808 Avery Street, Cleveland, Mississippi was for sale. (TT 12-14). Jimmy encouraged his parents to purchase the Shackelford home and sell their paid for home on North Bayou. (TT 12-13, 65-66). After Mr. Joel expressed concern that he could not afford to purchase the Avery Street home before selling the Bayou Street home, Jimmy told Mr. Joel that Mr. and Mrs. Joel should get a bridge loan from Merchants and Farmers Bank, whose then vice president, Jerry Bullock, was Jimmy's personal banker. (TT 12-13, 16-17, 92-93). Jimmy told Mr. and Mrs. Joel to borrow against both their North Bayou house and the Avery Street house to pay for the Shackelford's home on Avery Street. (TT 16-17) (RE 2).

Jimmy Suggests That Parents Place Property In Life Estate and Misleads Them About What A Life Estate Is

After Mr. and Mrs. Joel decided to buy the Avery Street house, Jimmy told his parents that they should have the Shackelford's Avery Street property placed in a life estate to protect it in case Mr. or Mrs. Joel ever got sick. (TT 13-14, 41, 83-84) (RE 2). Mr. and Mrs. Joel told Jimmy that they just wanted their wills to be in effect, meaning that they wanted the house to pass according to the way they had it in their wills. (TT 14-16, 22, 41-42, 83-84, 86-88, 90-91) (RE 2). Mr. and Mrs. Joel had prepared their wills in 1998, and under their wills, all of their property was devised and bequeathed to the survivor of Mr. or Mrs. Joel and at the death of the last of them, their property was devised and bequeathed to their three children equally. (TE 6 and 7).

Jimmy told Mr. and Mrs. Joel that a life estate would not change anything. (TT 14, 22) (RE 2). Mr. and Mrs. Joel understood this to mean that if Mr. and Mrs. Joel still owned the house when the last of Mr. or Mrs. Joel died, the house would pass to their children in equal shares under their wills. (TT 14-16, 22, 41-42, 83-84, 86-88, 90-91) (RE 2).

Mr. and Mrs. Joel also told Jimmy that they wanted to be able to sell the Avery Street home if the need ever arose, and Jimmy told them that a life estate would not have any effect on that and that Mr. and Mrs. Joel would be able to sell the home if it was placed in a life estate. (TT 14-16, 22, 41-42, 83-84, 86-88, 90-91) (RE 2).

Relying on Jimmy's representations to them, the trust they placed in him, and Jimmy's sophistication with regard to real estate matters, Mr. and Mrs. Joel told Jimmy that it would be fine to place the property in a life estate. (TT 14, 22, 29, 42, 83-84, 89-90) (RE 2).

Based on the above proof, the chancellor correctly found that Mr. and Mrs. Joel understood,

based on Jimmy's representations to them, that by placing the property in a life estate, Mr. and Mrs. Joel would not have any restrictions on their ability to sell the property or on their ability to pass the house under their wills. (CP 955) (RE 1). The chancellor further correctly found that it is clear from the testimony that Mr. and Mrs. Joel had no understanding of a life estate and that Jimmy did. (CP 955) (RE 1). The chancellor further noted that Lindsey Meador, Jimmy's personal attorney, testified that Jimmy understood the difference between a life estate and a fee simple title and that Jimmy understood where title passed when a life estate terminated. (TT 116) (RE 2). The chancellor further correctly found that Mr. and Mrs. Joel did not understand that the life estate they ultimately received would (1) terminate at the death of the first of Mr. or Mrs. Joel to die, with fee simple title to be vested in Jimmy; (2) prevent Mr. and Mrs. Joel from selling a fee simple interest in the house; and (3) prevent the home from passing to the survivor of Mr. or Mrs. Joel or to their children equally at the death of the last of Mr. or Mrs. Joel as was provided under the terms of their wills. (CP 955) (TT 87-88) (RE 1, 2). In sum, the chancellor found that the way that Jimmy explained a life estate to the Joels was that a life estate would entitle the Joels to the same privileges that a fee simple title would; however, it would protect the home if Mr. or Mrs. Joel ever needed to go into a nursing home. (CP 955) (TT 14-16, 22, 41, 83-84, 87-88, 91) (RE 1, 2).

The chancellor also found that Mr. and Mrs. Joel's reliance on Jimmy's representations to them was reasonable because Jimmy was experienced in real estate matters, having a knowledge of the law with regard to real estate matters that was superior to that of the Mr. and Mrs. Joel which induced Mr. and Mrs. Joel to act and rely on his representations. (CP 955-56, TT 11-12, 17, 29, 42, 90, 92, 115-16) (RE 1, 2, 3). In addition, the chancellor also noted that Jimmy professed to have a knowledge of the law superior to that possessed by Mr. and Mrs. Joel, inducing Mr. and Mrs. Joel

to rely on his representations, and they did so. (CP 955-56, TT 11-12, 14-16, 22, 41-42, 83-84, 86-88, 90) (RE 1, 2).

Jimmy Tells Attorney How to Prepare Deed

Jimmy suggested to Mr. and Mrs. Joel that they use attorney Lindsey Meador to close on the Avery Street house. (TT 20) (RE2). Mr. Meador had a long term attorney-client relationship with Jimmy. (TT 20, 115, 138) (RE 2, 3).

Prior to the closing, Jimmy went to Lindsey Meador's office alone and told Lindsey Meador how to prepare the deed. (TT 21, 123-24)[3] (RE 1, 3). Mr. Meador testified that Jimmy told him that his parents were buying a house on Avery Street and that his parents were borrowing money from Merchants and Farmers Bank to purchase the house. (TT 117-119) (RE 3). Mr. Meador testified that Jimmy told him to draft a deed conveying to Mr. and Mrs. Joel a life estate in the Avery Street house to terminate upon the death of the first of Mr. or Mrs. Joel to die with the remainder interest going to Jimmy. (TT 119) (RE 3). Jimmy explained to Mr. Meador that he had two reasons for having the deed drawn this way. (TT 118-119) (RE 3). First, Jimmy explained that he wanted the deed drawn this way to protect the house from Medicaid[4]. (TT 118-119) (RE 3).

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[3]Jimmy's estate incorrectly asserts that Mr. Joel went with Jimmy prior to closing to discuss the details of the transaction with Mr. Meador. (Appellant Brief at 8). Mr. Joel testified that prior to closing, he did not have any conversations with Lindsey Meador nor anyone in his office. (TT 20) (RE 2). Mr. Joel testified that at the closing, his only contact with Lindsey Meador was when Lindsey walked through the conference room and briefly told him good morning. (TT 23) (RE 2). Lindsey Meador testified that he recalls seeing Mr. Joel and Jimmy in his office immediately prior to closing; however, he had no recollection of what was discussed. (TT 129) (RE 3).

[4]While the chancellor found that Lindsey Meador testified that Jimmy explained he wanted to protect the house from Medicaid, Lindsey Meador actually testified Jimmy wanted to protect the house from Medicare. (TT 118-119).

Second, Jimmy indicated that he (not Mr. or Mrs. Joel) was worried about overreaching by a brother or sister if one of his parents died. *Id.*

Mr. and Mrs. Joel were not present during Jimmy's meeting with Mr. Meador and had no knowledge of Jimmy's instructions to Mr. Meador. (TT 21, 25, 123-124) (RE 2 and 3).

Based on Jimmy's instructions to him, Lindsey Meador prepared the deed to the Avery Street property conveying a life estate to Mr. and Mrs. Joel to be measured by the life of the first of Mr. or Mrs. Joel to die with the remainder to Jimmy. (TT 118-119) (RE 3). Lindsey Meador relied on Jimmy's representations that this was how Mr. and Mrs. Joel wished for the deed to be prepared because Mr. Meador trusted Jimmy when in actuality Mr. and Mrs. Joel never intended for the deed to be drawn the way that Mr. Meador drew it. (TT 25, 124) (RE 2 and 3). Importantly, Mr. Meador has admitted that the way that the deed was drawn was in error if the way that it showed the title was to be held was not what Mr. and Mrs. Joel agreed to. (TT 139) (RE 3). The chancellor also found that Mr. and Mrs. Joel were Lindsey Meador's clients with respect to the Avery Street transaction. (CP 957, TT 124) (RE 1, 3).

Although Defendants readily admitted that the way that Jimmy asked Mr. Meador to draw the deed was very unusual because the life estate was to terminate at the death of the first of Mr. or Mrs. Joel to die, there is no proof that Mr. Meador or anyone from his office ever had any conversations with either Mr. or Mrs. Joel regarding how the deed was to be drawn. (TT 20-21, 23-24, 120-121, 123-124, 146, 148, 271) (RE 2-4). In fact, the only credible proof on this issue is that offered by Mr. Joel. According to Mr. Joel, neither Lindsey Meador nor anyone from his office met with either Mr. or Mrs. Joel prior to drawing the deed nor did anyone from Lindsey Meador's office have any conversations with either of them regarding how the deed was to be drawn. (TT 20-21, 23-

24) (RE 2). The chancellor found Mr. Joel's testimony on this point to be credible and persuasive. (CP 957) (RE 1).

Jimmy Makes Financing Arrangements

Jimmy made arrangements with Jerry Bullock, who at the time was the Senior Vice President of Merchants and Farmers Bank, to finance the purchase of the Avery Street house by Mr. and Mrs. Joel. (TT 16-17, 18-19, 90, 93-94). Mr. Bullock testified at trial that Jimmy was one of his largest customers and that Jimmy was a sophisticated real estate investor. (TT 92-93).

Mr. Joel testified that Jimmy went with him to meet with Jerry Bullock and that Jimmy did all of the talking at the bank. (TT 18). Mr. Bullock testified that Jimmy represented to him that Mr. and Mrs. Joel would put up both the Avery Street house and North Bayou house as collateral and that Mr. and Mrs. Joel would own the Avery Street house. (TT 93-94, 102). Importantly, Mr. Bullock testified that Jimmy never told him that Jimmy was going to have the remainder interest and that the Joels would only have a life estate to be measured by the life of the first of Mr. or Mrs. Joel to die. (TT 94, 102, 113-114). Mr. Bullock's testimony that Jimmy told him that the house would be owned by Mr. and Mrs. Joel without any restrictions is consistent with what Jimmy told his parents. (TT 94, 113-114). The chancellor found Mr. Bullock's testimony on this point to be particularly enlightening, credible, and persuasive. (CP 958) (RE 1).

Based on Jimmy's representations to him, Jerry Bullock arranged for the financing for Mr. and Mrs. Joel to purchase the Shackelford's Avery Street house. (TE 1). In addition, based on Jimmy's representations to Mr. Bullock that Mr. and Mrs. Joel would be owning the property, Mr. and Mrs. Joel only - and not Jimmy - were required to sign the loan documents and the deed of trust related to the purchase of the Avery Street property. (TT 101-102, 114). Jerry Bullock testified that

if he had known that Mr. and Mrs. Joel were not acquiring a fee simple title to the Avery Street property, he would have never financed the purchase of the Avery Street property by Mr. and Mrs. Joel from the Shackelfords. (TT 102).

Loan Application

As a part of the loan process, in August of 2001, Mr. and Mrs. Joel signed a Conventional Real Estate Loan Application from Merchants and Farmers Bank. (TE 1 at pages 25-26) (RE 5). One of the questions asked on the loan application was how title was to be vested. *Id.* Specifically, the loan application asked the following: "Exact names in which title is vested" and the response given was "SAME AS BORROWERS", meaning title would be vested in Mr. and Mrs. Joel's names alone. (TE 1 at page 25, and TT 96) (RE 5). Mr. and Mrs. Joel were the only borrowers listed on the loan application. *Id.* The chancellor found this to be a particularly important fact as it is evidence that Mr. and Mrs. Joel thought that the home would become their property without any restrictions which is consistent with how Jimmy explained to Mr. and Mrs. Joel their title to the Avery Street home would be. (CP 958) (RE 1).

Closing On Avery Street House

The closing on Mr. and Mrs. Joel's purchase of the Avery Street house took place on August 21, 2001. (TE 1). Mr. and Mrs. Joel and Jimmy were all present at the closing. (TT 22) (RE 2). Attorney Lindsey Meador did not handle the closing. (TT 23, 120, 131) (RE 2, 3). Instead, his paralegal, Margie Prescott, handled the closing. (TT 23, 120) (RE 2, 3). Neither Lindsey Meador nor Margie Prescott recalled having any conversations with either Mr. or Mrs. Joel regarding the title

they were to receive on the Avery Street house. (TT 119, 123, 148)[5] (RE 3,4). Mr. Joel testified that neither Lindsey Meador nor Margie Prescott, the paralegal who handled the closing, explained to Mr. or Mrs. Joel anything about the title they would be receiving. (TT 24) (RE 2). Because Mr. Joel is the only one who can recall what was and was not discussed, the chancellor found that Mr. Joel's testimony is the only credible proof on this issue. (CP 959) (RE 1). The chancellor also found that Mr. and Mrs. Joel did not understand at the closing that the title they would be receiving to the Avery Street property would have any restrictions. (CP 959) (RE1).

Mr. and Mrs. Joel executed loan documents, including a deed of trust in favor of Merchants and Farmers Bank as well as a promissory note obligating them to pay $98,119.00, plus interest, secured by the Avery Street Home. (TE 1 at pages 2-3, 28-35) (RE 5). Mr. and Mrs. Joel were the only ones to execute any of the aforementioned documents and were the only ones obligated to pay the indebtedness contained therein. *Id.* One of the documents executed by Mr. and Mrs. Joel was an Agreement to Provide Insurance and on this agreement, Mr. and Mrs. Joel only are listed as the "Owner" of the Avery Street property. (TE 1 at page 52) (RE 5). The chancellor also found it particularly noteworthy that although Jimmy had been conveyed the remainder interest in the Avery Street property, Jimmy did not sign the deed of trust, indicating further that even the bank that was making the loan was not advised by Jimmy of his remainder interest. (CP at 959) (RE 1).

After closing costs and attorney's fees and payment in the amount of $94,500 for the contract

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[5]Jimmy's estate incorrectly asserts that Margie Prescott testified that she confirmed with the Joels at the closing that they understood they were purchasing a life estate and that the remainder interest would pass to Jimmy. (Appellants' Brief at page 9). Margie Prescott actually testified that she had no independent recollection of discussing with Mr. or Mrs. Joel the fact that the deed only gave them a life estate interest. (TT 148). Margie Prescott further testified that she could not remember if she followed her custom and practice of explaining the life estate and the remainder interest to the Joels at closing. (TT 156-57).

price of the house, Mr. and Mrs. Joel received a check in the amount of $3,382.01, which was the balance of the loan proceeds, and they used this money to make improvements on the Avery Street home. (TE 1 at pages 4, and TT 19-20) (RE 1, 5).

Several days after the closing, Mr. and Mrs. Joel received the original recorded Warranty Deed to the Avery Street property from Mr. Meador's office. (TT 26). The Warranty Deed granted Mr. and Mrs. Joel a life estate in the property measured by the life of the first of Mr. or Mrs. Joel to die with the remainder interest to Jimmy. (TE 9) (RE 6). Mr. and Mrs. Joel placed the Warranty Deed in a safe place without reading it because they trusted that Jimmy had done what he told them he would do with regard to their title to the Avery Street property. (TT 26, 72-73). Based on this proof, the chancellor found there was no reason for Mr. and Mrs. Joel to review the Warranty Deed. (CP 960) (RE 1).

The chancellor noted that the purchase of the Avery Street property by Mr. and Mrs. Joel was the first time that Jimmy had ever been involved in a house Mr. and Mrs. Joel were purchasing, and it was the first time that Jimmy handled all of the arrangements associated with the purchase of a house purchased by Mr. and Mrs. Joel. (CP 960) (RE 1). The chancellor also noted that it was also the first time that the Mr. and Mrs. Joel ever acquired a title which was less than fee simple absolute. (CP 960) (RE 1). These findings are supported by substantial credible evidence in the record. (TT 10-12, 40, 88-89).

Jimmy and His Wife Debra Sell Mr. and Mrs. Joel's North Bayou Home

After Mr. and Mrs. Joel purchased the home located at 808 Avery Street, Jimmy's wife, Debra Joel, made arrangements for Mr. and Mrs. Joel to sell their home located on North Bayou. (TT 256, 276; TE 21). In October of 2001, Jimmy negotiated the sale of the North Bayou home, and

Debra Joel prepared the contract associated with Mr. and Mrs. Joel's sale of their North Bayou house. (TT 256-257, 276; TE 21). At trial, Debra tried to minimize her involvement with the sale of the North Bayou house; however, on cross-examination, it became apparent to the court that she was greatly involved with the sale of the North Bayou home. (TT 256, 274-275). Debra admitted that she participated in numerous conversations with the Joels and Jimmy regarding the sale of the North Bayou home, met with the Joels and the buyers to get them to sign documents, "helped [the Joels] put together what they had negotiated", and attended the closing. *Id.*

By using proceeds from the sale of their North Bayou home, Mr. and Mrs. Joel reduced their $98,119.00 loan associated with the purchase of the Avery Street home and refinanced the balance of $22,879.00. (TE 1 at pages 6-8; TT 36, 100). Importantly, in January of 2002, Mr. and Mrs. Joel signed another loan application associated with the refinance of the balance owing on the Avery Street home and on this loan application, Mr. and Mrs. Joel indicated that title was vested in Mr. and Mrs. Joel's names alone. (TE 1 at pages 9-10) (RE 5). The chancellor found this to be consistent with Jimmy's representations to Mr. and Mrs. Joel that Mr. and Mrs. Joel's title to the Avery Street home would be one without any restrictions. (CP 961) (RE 1).

Improvements to Avery Street Home

The chancellor found that after Mr. and Mrs. Joel purchased the Avery Street home, Jimmy made some improvements to the home. (CP 961) (RE 1). The chancellor further found that the improvements Jimmy made to the Avery Street home were intended to be gifts as evidenced by the fact that at times, when Mr. Joel tried to pay Jimmy for the improvements, Jimmy refused his offer. (CP 961, TT 37-40, 81-82). Furthermore, the chancellor noted that there is proof in this case that Mr. and Mrs. Joel had helped Jimmy financially in the past, and the chancellor found that it is only

natural for Mr. and Mrs. Joel to assume that Jimmy would want to assist them in their retirement. (CP 961; TT 35, 278). In fact, Mr. Joel testified that he tried to pay for some of the improvements and Jimmy refused his offers and implied he was paying for the improvements to help them. (CP 961, TT 37-40, 81-82). Finally, the chancellor noted that there is no testimony or other proof that Jimmy ever told either Mr. or Mrs. Joel that he was paying for the repairs because he would own the house as soon as either Mr. or Mrs. Joel died. (CP 961) (RE 1).

Mr. and Mrs. Joel Without Assistance from Anyone Pay Off Loans They Took Out To Purchase Avery Street Home

Mr. and Mrs. Joel, without assistance from anyone, made the payments on the loan from Merchants and Farmers Bank that was secured by their Avery Street and North Bayou homes, and eventually, Mr. and Mrs. Joel paid off the loan. (TT 36, 276). The chancellor found it noteworthy that Jimmy did not pay one penny toward the purchase of Mr. and Mrs. Joel's Avery Street home. (CP 961) (RE 1).

Mr. and Mrs. Joel Learn That Jimmy Had Misled Them About the Title to Avery Street Home and Jimmy Leads Plaintiffs To Believe He Was Going to Correct the Title

In 2005 or 2006, Mr. and Mrs. Joel asked their son Mike to look at their "legal papers", including their wills and the deed to the Avery Street property. (TT 26-27)[6]. The wills provided that

[6]Jimmy's estate incorrectly asserts that Mr. Joel met with Lindsey Meador in the fall of 2006 after learning of the error in the deed and could have raised any issue regarding the deed. (Appellants' Brief at page 12 fn 10). There is no proof in the record that Mr. Joel met with Lindsey Meador in the fall of 2006. The only proof is that Mr. Joel met with Lindsey Meador regarding the potential medical malpractice claim sometime after 2001 and before the fall of 2007. (TT 136). Thus, Appellants are incorrect in asserting that Mr. Joel knew of the problem with his deed when he met with Lindsey Meador. Furthermore, even if this meeting took place after Mr. Joel was aware of the problem with his deed, the proof is that Jimmy had informed Mr. Joel that he was going to correct the problem with the deed, and there would have been no reason for Mr. Joel to discuss the problem with Mr. Meador. (TT 28-29).

their property would pass to the survivor of Mr. or Mrs. Joel, and in the event that neither Mr. or Mrs. Joel survived, their property was to be divided equally between their three children. (TT 14-15) (RE 2). After reviewing the deed to the Avery Street property, Mike told Mr. and Mrs. Joel that it looked like they did not own the house and that they only had the right to live in the house until one of them dies (TT 27). The chancellor found that this was the first time that Mr. and Mrs. Joel had actual knowledge that (1) they did not have an unrestricted title; and (2) that the house was set up to go to Jimmy at the death of the first of Mr. or Mrs. Joel to die. (CP 962) (RE 1). The chancellor further noted that, the fact that Mr. and Mrs. Joel showed their son, Mike, the deed wherein the remainder interest went to Jimmy to the exclusion of Mike and Ann, further supports the court's conclusion that this was the first time that Mr. and Mrs. Joel learned of Jimmy's remainder interest as it would not make sense for Mr. and Mrs. Joel to point out to Mike that he had been excluded from inheriting Mr. and Mrs. Joel's only asset of any significance. (CP 962) (RE 1). Shortly after it came to Mr. Joel's attention, Mr. Joel asked Jimmy several times to correct the deed like Jimmy had represented to Mr. Joel the deed would be originally. (TT 28-29) (RE 2). Mr. Joel told Jimmy that he never wanted the house to go to Jimmy to the exclusion of Mike and Ann. (TT 28-29) (RE 2). Several times, Jimmy told Mr. Joel that he would take care of correcting the deed, leading Mr. Joel to believe that Jimmy was going to correct the deed and Mr. and Mrs. Joel justifiably relied on Jimmy's representations. (TT 28-29) (RE 2). Debra Joel testified that Jimmy told his parents that he was going to fix the deed; however, he told them this only to pacify them, never intending to correct the deed. (TT 268-269).

Before Correcting The Problem With Mr. and Mrs. Joel's Title Jimmy Dies

Unfortunately, Jimmy Joel died unexpectedly of a heart attack on June 9, 2007 without

correcting the problem with Mr. and Mrs. Joel's title to their home. (TT 29-30, 259).

Jimmy Joel's Will has been admitted for probate. In his Will, Jimmy Joel left his property to The James J. "Jimmy" Joel Testamentary Marital Trust and The James J. "Jimmy" Joel Family Trust. (CP 287). Attorney Lindsey Meador (the same attorney who drafted the deed to the Avery Street property) is the Trustee of both aforementioned trusts. (TT 115). Jimmy Joel's widow, Debra, is the executrix of his estate. (CP 283-84).

Mr. Joel asked Debra Joel, Executrix of the Estate of Jimmy Joel, to execute the necessary documents to correct the problem with their title, and after not being totally responsive to Mr. Joel's requests, she ultimately refused the request. (TT 31-32).

Mr. and Mrs. Joel File Suit Seeking Equitable Relief

As a result, on December 6, 2007, approximately six years and three months after Mr. and Mrs. Joel purchased their home and received the warranty deed which only conveyed to them a life estate to be measured by the life of the first of them to die with the remainder to their son, Jimmy, Mr. and Mrs. Joel filed this suit seeking equitable relief. (CP 6-12). On April 24, 2008, Mr. and Mrs. Joel filed their First Amended Complaint asking the Court for the following forms of relief, pled in the alternative: (1) constructive trust; (2) resulting trust; (3) equitable lien; (4) reformation of deed based on unjust enrichment; (5) reformation to correct scrivener's error; and (6) any other equitable relief the court deems just. (CP 259-280)

Debra's Position

Debra testified that she never participated in any of Jimmy's conversations with Mr. and Mrs. Joel. (TT 270-71). Thus, her testimony was based solely on what Jimmy told her. *Id.* According to Debra, Jimmy told her that he offered to rent the Shackelford home to Mr. and Mrs. Joel for

$1,000 a month or sell them a life estate. (TT 244, 246). Debra testified that Jimmy told her that Mr. and Mrs. Joel agreed to purchase a life estate in the Avery Street home instead of renting the home. (TT 246-47, 270-72).

Mr. Joel testified that there were never any discussions with Jimmy regarding renting the Avery Street home and that at all times, based on Jimmy's representations, Mr. and Mrs. Joel thought they were purchasing a home and getting a title which would not have any restrictions on Mr. and Mrs. Joel's ability to sell the home or devise it in their wills. (TT 14-16, 41-42, 83-84, 86-88) (RE 2). The Court found that Mr. Joel's testimony is more credible than that of Debra's. (CP 964) (RE 1).

It is Debra's position that the Shackelfords' Avery Street home was worth $110,000 - $115,000, and Jimmy had "equity" in the Avery Street home because it was worth more than the $94,500 contract price. (TT 246). To support her theory that Jimmy had "equity" in the Avery Street home, Debra offered the testimony of John Fiser, a property appraiser. (TT 170-211). Mr. Fiser testified that he did a "drive-by" appraisal (without inspecting the interior or going on the premises) of the Avery Street home in November of 2007 in order to determine what the house was worth in August of 2001 when Mr. and Mrs. Joel purchased it. (TE 17; TT 170-173). According to Mr. Fiser, the Avery Street house was worth $115,000 in August of 2001; however, on cross-examination, Mr. Fiser admitted that the best indicator of value is what a willing seller will sell to a willing buyer. (TT 178, 186) (RE 7). Mr. Fiser testified that he never took into account the $94,500 contract sales price because he assumed that the sale of the Avery Street home to Mr. and Mrs. Joel was a familial transaction. (TT 185, 189, 195-96) (RE 7). Mr. Fiser explained that he assumed that Jimmy sold the Avery Street house to his parents. (TT 185, 189, 195-96) (RE 7).

The chancellor found it noteworthy that, contrary to Mr. Fiser's assumption, the contract at issue in this case was not between Jimmy and his parents. (CP 964-65; TE 1 at page 62) (RE 1, 5). But rather, it was between the Shackelfords and Jimmy, and the Shackelfords agreed to sell the Avery Street home to Jimmy (and ultimately to the Joels) for $94,500. (TE 1 at page 62) (RE 1, 5). Thus, the chancellor found that the contract sales price of $94,500 is the best indicator of the value of the home. (CP 964-65) (RE 1). The chancellor's opinion that the home was worth $94,500 is further supported by Mr. Fiser's testimony on cross-examination. Specifically, Mr. Fiser admitted that Mr. and Mrs. Joel paid $76.62 per square foot for the Avery Street house and that the comparables he used had a price per square foot which was in line with the $94,500 that Mr. and Mrs. Joel actually paid for the Avery Street house. (TT 190-93; TE 17 at pages 160-73) (RE 7). It is also noteworthy that the banker, Jerry Bullock, did an "in house" evaluation of the property when he made the loan to Mr. and Mrs. Joel to buy the Avery Street house and that he placed a value of $94,500 on the house. (TT 96-98; TE 1 at page 48). This is consistent with Mr. Fiser's testimony on cross-examination that the sales price is the best indicator of value and with the price per square foot of the comparables used by Mr. Fiser. (TE 17 at pages 160-73; TT 178, 186, 190-93) (RE 7).

Debra Joel testified that Jimmy came up with the language giving his parents a life estate for the life of the first of his parents to die because Jimmy was concerned about overreaching by his sister, Ann, against Mrs. Joel in the event that Mr. Joel died first. (TT 246-47). The chancellor questioned that if this testimony were accepted, that Jimmy was concerned about overreaching by Ann, then why would he have the deed drawn in such a manner as to exclude his brother Mike from the remainder interest. (CP 965) (RE 1).

Debra testified that it was Jimmy's intent, in setting up the life estate in the manner that he

did, to make sure Mr. Joel would have a place to live. (TT 272). However, the chancellor found this testimony was not consistent with the wording of the deed because the only way Mr. Joel would have a life estate was if Mr. Joel died first. (CP 965-66) (RE 1). The chancellor found it noteworthy that the manner in which Jimmy had the life estate prepared did not protect Mr. Joel's interest in the house in the event that Mrs. Joel died first. *Id.* In fact, that is what has happened. Mrs. Joel passed away in December of 2008, and now, Mr. Joel, who is now 80 years old, no longer has a home because the remainder interest is now vested in Jimmy's estate and beneficiaries. (TT 2, 7, 118, TE 9). This is so even though there was never any concern about Ann's potential overreaching with respect to Mr. Joel and even though Debra testified that it was Jimmy's intent for Mr. Joel to have a place to live. (TT 247, 272). The chancellor noted that Mr. Joel is left without a place to live and no ownership interest in the Avery Street property since the death of his wife. (CP 966) (RE 1).

The chancellor noted that there is no testimony in this case from anyone that Mr. and Mrs. Joel agreed to purchase a life estate to be measured by the life of the first of Mr. or Mrs. Joel to die. (CP 966) (TT 21, 25-26, 87-88, 247). Both Lindsey Meador and Debra testified that Jimmy, not the Joels, came up with this plan. (TT 118-119, 247) (RE 3). Mr. Joel has testified that he and Mrs. Joel never agreed to the deed being drawn this way, and the chancellor found Mr. Joel's testimony on this point to be credible. (CP 966, TT 21, 25-26, 87-88) (RE 1, 2).

The chancellor noted that Mr. and Mrs. Joel paid $94,500 for a house they ultimately only had the right to live in until the first of Mr. or Mrs. Joel died. (CP 966, TE 1 at pages 4 and 5 and TE 9) (RE 5, 6). The chancellor noted that Debra's own expert, John Fiser, testified that a life estate for 2 people in their 70's was worth significantly less than the sales price that Mr. and Mrs. Joel paid for the Avery Street home. (CP 966, TT 199) (RE 1, 7).

As it tragically turned out, Mr. and Mrs. Joel only had the right to live in the house for a little over seven years. Mr. and Mrs. Joel purchased the house in August of 2001 and Mrs. Joel died in December of 2008. (TT 7, TE 1 and 9). Because the remainder interest passed at the death of the first of Mr. or Mrs. Joel to die, it is now vested in Jimmy's estate and beneficiaries. (TE 9, CP 260 (¶3), 267 (¶32), 297 (¶3), 300 (¶32)).

The chancellor found that Mr. and Mrs. Joel knew that the property would be placed in a life estate as Jimmy explained that term to them; however, the chancellor stated that he was persuaded that Mr. and Mrs. Joel did not understand the legal significance of a life estate and their misunderstanding of a life estate was based solely upon the explanation of a life estate as was told to them by Jimmy. (CP 967) (RE 1). The chancellor found that (1) Mr. and Mrs. Joel never agreed to receive a title that they could not sell or devise; (2) there was never any agreement for Jimmy to receive the remainder interest; and (3) there was never any agreement for the remainder interest to Jimmy to pass to him at the death of the first of Mr. or Mrs. Joel to die. (CP 967) (RE 1). The chancellor's findings are supported by the trial transcript. (TT 11-12, 14-16, 21-22, 25, 29, 41-42, 75, 83-84, 86-88, 90-91) (RE 2).

For the reasons set forth above, the chancellor rejected the theory put forth by Jimmy's estate and found for Mr. and Mrs. Joel. (CP 967) (RE 1). The chancellor found from the uncontradicted testimony of Mr. Joel that, while he told Jimmy that it would be fine to place the property in a life estate, the only way to accomplish what Mr. and Mrs. Joel intended (to have a title Mr. and Mrs. Joel could sell / devise) was for Mr. and Mrs. Joel to have fee simple title. (CP 967) (RE 1). The chancellor noted that the court's holding is particularly supported by the fact that Jimmy told Lindsey Meador how Jimmy (not Mr. and Mrs. Joel) wanted the title to be vested, including for the life estate

to terminate at the death of the first of Mr. and Mrs. Joel to die. (CP 967, TT 118-119) (RE 1, 3). Based on the facts set forth herein, the chancellor found that the only way for Mr. and Mrs. Joel's instructions to Jimmy to be carried out (i.e., that Mr. and Mrs. Joel have a title they can sell/devise) and their intentions from the beginning is for the court to find that fee simple title should be vested in Mr. and Mrs. Joel. (CP 967) (TT 14-16, 21-22, 29, 41-42, 91) (RE 1, 2). The chancellor reached these conclusions relying on the theory that a constructive trust was warranted based on the following principles: unjust enrichment, equity and good conscience, *Allgood v. Allgood*, abuse of confidential relationship, and abuse of fiduciary relationship. (CP 967-982) (RE 1).

The chancellor rejected Jimmy's estate's counterclaim for lost profits based on Jimmy's estate's theory that Jimmy had "equity" in the Avery Street home at the time it was purchased by Mr. and Mrs. Joel. (CP 982-83) (RE 1). The chancellor found that Mr. and Mrs. Joel purchased the home for fair market value and that Jimmy did not have any equity in the house. *Id.* The chancellor further found that Mr. and Mrs. Joel paid the purchase price without assistance from Jimmy. *Id.* The chancellor found that there was never any agreement for Mr. and Mrs. Joel to purchase only a life estate in the Avery Street property as that term is traditionally defined. *Id.* In addition, the chancellor found that Jimmy did not sell a life estate to Mr. and Mrs. Joel, but rather, Mr. and Mrs. Joel bought the property from the Shackelfords and through Jimmy's questionable conduct, Mr. and Mrs. Joel only received a life estate despite Jimmy's representations that Mr. and Mrs. Joel would receive a title without any restrictions. *Id.* The chancellor also rejected Jimmy's estate's counterclaim requesting equitable relief and/or damages arising out of the improvements Jimmy made to the Avery Street property. *Id.* In reaching this conclusion, the chancellor noted that the improvements that Jimmy made to the Avery Street property were made with no provision by Jimmy

that he expected re-payment or because he would own the home as soon as one of them died. *Id.*

Defendants have perfected this appeal. (CP 992-993).

Errors In Appellants' Statement of the Case

As a preliminary matter, the Court should be aware that the following allegations in Appellants' Statement of the Case simply are not supported by the record:

1. Jimmy's and the Joels' Prior Use of Jerry Bullock and Lindsey Meador

Appellants Allege: Jimmy "on occasion" used Mr. Meador and Mr. Bullock in real estate transactions. (Appellant's Brief at 8). Jimmy's estate also alleges that the Joels used Mr. Bullock and Mr. Meador on prior, unrelated transactions.

Proof: Mr. Joel had talked to Lindsey Meador on one occasion prior to 2001 regarding a legal matter, and Jimmy went with Mr. Joel to this meeting. (TT 117, 125). Mr. Meador described Mr. Joel as an occasional client. (TT 138) (RE 3).

Jimmy, on the other hand, had a long time attorney client relationship with Lindsey Meador. (TT 115, 138) (RE 3). Mr. Meador described Jimmy as an ongoing client and testified that he did a lot of legal work for Jimmy. (TT 138) (RE 3). In fact, Mr. Meador testified that he is the attorney representing Jimmy Joel's estate in the probate proceeding and is the trustee of the two trusts created under Jimmy Joel's will. (TT 115) (RE 3).

With regard to Jerry Bullock, Mr. Joel and Mr. Bullock both testified that Mr. Bullock had made small consumer loans to Mr. Joel in the past. (TT 54, 112-13). Jimmy, on the other hand, was described by Mr. Bullock as one of Mr. Bullock's larger volume customers. (TT 92-93).

2. Mr. Joel and Jimmy Met with Mr. Meador Prior to Closing to Discuss the Transaction

Appellants Allege: Jimmy's estate alleges that Mr. Joel and Jimmy went together to meet with Mr. Meador prior to the closing to discuss the transaction. (Appellant's Brief at 8).

Proof: Mr. Joel testified that prior to closing, he did not have any conversations with Lindsey Meador nor anyone in his office at all about the purchase of the house. (TT 20) (RE 2). Mr. Joel testified that his only contact with Lindsey Meador was when Mr. Meador walked through the conference room and briefly told him good morning on the day of closing. (TT 23) (RE 2).

Mr. Meador testified that Jimmy brought him the initial information and told Mr. Meador how Jimmy wanted the deed prepared. (TT 117-119, 123-24) (RE 3).[7] Mr. Meador testified that Mr. Joel was not present at this meeting. (TT 123-24) (RE 3). Mr. Meador further testified that he had a meeting with Jimmy and Mr. Joel prior to closing; however, he testified that he didn't have "any independent recollection of what was discussed in that meeting." (TT 119) (RE 3). Mr. Meador testified that he recalls seeing Mr. Joel and Jimmy in his office immediately prior to closing; however, he had no recollection of what was discussed. (TT 129) (RE 3).

3. Jimmy Explained to Mr. Meador the Reasons Why Jimmy and The Joels Wanted A Life Estate

Appellants Allege: Jimmy's estate alleges that Jimmy explained to Mr. Meador the reasons why Jimmy and the Joels wanted the life estate set up. (Appellants' Brief at 9).

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[7]Interestingly, when Jimmy had Mr. Meador draw the deed, Jimmy told him he wanted the property to be placed in a life estate to protect the property from Medicare and from overreaching by a sibling. (TT 117-119) (RE 3). It is now Jimmy's position that the life estate arrangement came about as the result of a business transaction he had with his parents i.e., Jimmy forfeited the "equity" he allegedly had in the house in exchange for receipt of the remainder interest. Notably, Jimmy never informed Mr. Meador that the property was to be placed in a life estate because of this alleged business arrangement, making the theory advanced by Jimmy's estate even less credible.

Proof: Mr. Meador testified that Jimmy told him that Jimmy (not Jimmy and the Joels) wanted the life estate set up to protect his parents' estate from Medicare and because Jimmy (not Jimmy and the Joels) had some concern of overreaching by a sibling if one of his parents died. (TT 119) (RE 3).

4. **Margie Prescott Confirmed that The Joels Understood They Were Purchasing A Life Estate and that the Property Would Pass to The Remainderman**

Appellants Allege: Jimmy's Estate alleges that Margie Prescott, Mr. Meador's legal assistant, testified that at closing she followed her long term custom and practice of confirming that the Joels understood that they were purchasing a life estate and that at death, the property would pass to the remainderman. (Appellants' Brief at 9).

Proof: Margie Prescott actually testified that she had no independent recollection of discussing with Mr. or Mrs. Joel the fact that the deed only gave them a life estate interest. (TT 148) (RE 4). Margie Prescott further testified that she could not remember if she followed her custom and practice of explaining the life estate and the remainder interest to the Joels at closing. (TT 156-57). (RE 4) Mr. Joel was the only person who could remember what was and was not discussed at closing, and Mr. Joel testified that Margie Prescott did not explain anything to Mr. or Mrs. Joel at closing. (TT 24) (RE 2). Mr. Joel testified that he did not have any independent recollection of Margie presenting the deed to him at closing. (TT 24, 72) (RE 2). With regard to going over the deed with the Joels, Margie Prescott testified that she would have asked Mr. and Mrs. Joel if she spelled their name correctly on the deed; however, she did not recall whether she went over the life estate and remainderman interest with them. (TT 148, 156-57) (RE 4).

5. **Mr. Joel Had An Opportunity to Address His Deed Issue With Mr. Meador in 2006 and Failed to Do So**

Appellants Assert: Jimmy's estate asserts that Mr. Joel met with Mr. Meador during the fall of 2006 on an unrelated legal matter and failed to raise the issue of the problem with his deed. (Appellants' Brief at 12 fn 10).

Proof: There is no proof in the record that Mr. Joel met with Lindsey Meador in the fall of 2006. Mr. Meador testified that Mr. Joel met with him regarding the potential medical malpractice claim sometime after 2001 and before the fall of 2007. (TT 136). Furthermore, even if this meeting took place after Mr. Joel was aware of the problem with his deed, the proof is that Jimmy had informed Mr. Joel that he was going to correct the problem with the deed, and there would have been no reason for Mr. Joel to discuss the problem with Mr. Meador. (TT 28-29).

Appellants Incorrectly Represent that the Following Proof Was Uncontradicted

In addition, Appellants' assert that the following allegations contained in Appellants' Statement of the Case are uncontradicted by proof in the record. As set forth below, these allegations were contradicted by the proof at trial.

1. **Equity In Avery Street Home**

Appellants allege: By entering into a contract with the Shackelfords to buy back the Avery Street property for $94,500, Jimmy immediately had equity in the amount of $20,500 in the house because the appraised value of the house was $115,000. (Appellants' Brief at 6). Jimmy's estate further represents that this testimony was uncontroverted. *Id.*

Contradicted Facts: John Fiser, the expert appraiser for Jimmy's estate, admitted on cross-examination that the best indication of market value is what a willing seller will sell the property to

a willing buyer. (TT 185-186) (RE 7). Despite this admission, Mr. Fiser acknowledged that he did not take into account the sales price because he assumed this was a familial transaction (father to son) and that there was some concession in the sales price. (TT 195-96) (RE 7). In this case, it was undisputed that this was not a sale by Jimmy to Mr. and Mrs. Joel but rather a sale by the Shackelfords who were willing to sell the home for $94,500. (TE 1 and TE 9). Because Mr. Fiser admitted that his assumption that this was a familial transaction could have effected his appraisal and because Mr. Fiser testified that the best indicator of market value is what price a willing seller will sell the property to a willing buyer, the chancellor was entitled to reject Mr. Fiser's testimony that the appraised value of the Avery Street home was $115,000 and find that the sales price of $94,500 was the best indicator of the value of the home. (TT 195) (RE 7). The chancellor was also entitled to rely on the testimony of Jerry Bullock, a banker with 30 years experience, who placed a value of $94,500 on the Avery Street home based on the sales price, which is consistent with Mr. Fiser's testimony on cross-examination that the sales price is the best indicator of value. (TT 96-98; TE 1 at page 48; TE 17 at pages 160-73; TT 178, 186, 190-93).

Additionally, Mr. Fiser also admitted on cross-examination that the $94,500 sales price was closer to the price per square foot of the comparables Mr. Fiser used in his appraisal rather than the price per square foot of the appraised value that Mr. Fiser ultimately gave the home. (TT 189-93). Furthermore, it is undisputed that Jimmy did not pay one penny toward the purchase price of the Avery Street property. (TT 36, 276). This was further proof from which the chancellor correctly found that Jimmy did not have any equity in the Avery Street home when Mr. and Mrs. Joel purchased it from the Shackelfords.

2. Mr. and Mrs. Joel Agreed To Purchase A Life Estate With a Remainder to Jimmy

Appellants Allege: Jimmy offered to allow the Joels to purchase a life estate in the house for $94,500 with the remainder interest in the house going to Jimmy. (Appellants' Brief at 6). Mr. and Mrs. Joel looked at the Avery Street property and agreed to purchase a life estate in the property. (Appellants' Brief at 7). Jimmy's estate alleges that it is undisputed that Mr. and Mrs. Joel knew they were purchasing a life estate interest in the Avery Street property prior to closing. (Appellant's Brief at 8).

Contradicted Facts: Mr. Joel testified that Jimmy never discussed with Mr. or Mrs. Joel setting up the title in the manner that it was ultimately set up. (TT 21, 25) (RE 2). It was Mr. Joel's testimony that after he and Mrs. Joel told Jimmy that they (Mr. and Mrs. Joel) wanted to purchase the Avery Street house, Jimmy told them that they needed to put the property in a life estate to protect it in case the Joels got sick. (TT 14-16, 22) (RE 2). Mr. Joel told Jimmy that it would be fine to place the property in a life estate so long as the property would pass under Mr. and Mrs. Joels' wills and so long as Mr. and Mrs. Joel could sell the property if the need ever arose. (TT 14-16, 22, 41-42, 91) (RE 2). Jimmy represented to the Joels that a life estate would not have any effect on the Joels' ability to sell the home or their ability to devise the home in their wills. (TT 14-16, 22, 41-42, 91) (RE 2). Jimmy told Mr. Joel that a life estate would not change a thing. (TT 14) (RE 2). On cross-examination, Mr. Joel was asked repeatedly to admit that he knew that the deal was going to be structured as a life estate, and each time, Mr. Joel testified without wavering that he was under the impression based on Jimmy's representations that it was going to be a life estate as Jimmy explained that term to him, meaning the property would pass under the Joels' wills and that Mr. and Mrs. Joel could sell the home. (TT 75, 83-84, 86) (RE 2). Mr. Joel further testified that Jimmy never told him that the life estate would be measured by the life of the first of Mr. or Mrs. Joel to die.

(TT 87-88) (RE 2). Mr. Joel also testified that Jimmy never told him that Jimmy would get the remainder interest. (TT 87-88) (RE 2). Based on this testimony, the chancellor was correct in finding that Mr. and Mrs. Joel did not understand the legal significance of a life estate, that the Joels misunderstanding was caused by Jimmy, and the only way to accomplish what Mr. and Mrs. Joel intended was to vest them with fee simple title. (CP 966-67) (RE 1).

3. First To Die Provision

Appellants Allege: Mr. and Mrs. Joel agreed to a life estate to be measured by the life of the first of Mr. or Mrs. Joel to die. (Appellants' Brief at Page 7).

Contradicted Facts: Mr. Joel testified that Jimmy never discussed a life estate to be measured by the life of the first of Mr. or Mrs. Joel to die and that Jimmy never told him about the deed being set up so that at the death of the first of Mr. or Mrs. Joel, Jimmy would have full title to the property. (TT 21-22, 25, 88) (RE 2). Mr. Joel also testified that he and Mrs. Joel never agreed to the first to die provision. (TT 24-25) (RE 2).

Debra testified that Jimmy told Mr. Joel the following regarding setting up the property in a life estate: "we could do **if you happen to die first**, the property would come to me. . . ." (TT 247).

Lindsey Meador testified that Jimmy (not Mr. and Mrs. Joel) wanted the first to die provision because Jimmy was concerned about overreaching by a sibling. (TT 118-19).

It respectfully submitted that it was up to the chancellor to decide who to believe, and it was within the chancellor's discretion to elect to believe Mr. Joel's testimony that he and Mrs. Joel did not agree to the first to die provision that was contained in the deed. Alternatively, even if the Court finds that the chancellor should have rejected Mr. Joel's testimony and accepted Debra's testimony

with regard to the first to die provision, according to Debra's testimony the "first to die" provision was not supposed to apply if Mrs. Joel died first. (TT 247). That is what has happened in this case. Mrs. Joel died in December of 2008. (TT 7). Thus, Mr. Joel should not be left homeless as even Debra Joel testified at trial that Jimmy told his daddy "if you happen to die first, the property would come to me." (TT 247).

4. Concerns Regarding Overreaching By Ann

Appellants allege: Jimmy's estate contends that placing the property in a life estate with a first to die provision alleviated the shared concerns of Jimmy and the Joels about Ann Joel taking advantage of Mrs. Joel should she survive Mr. Joel. (Appellants' Brief at 8). Jimmy's estate further alleges that every single request that Mr. Joel made to Debra and her sons to change the deed after Jimmy's death involved Mike or Jimmy's sons as the remaindermen to the exclusion of Ann and Jimmy's estate implies that this supports their theory that Mr. Joel was concerned about overreaching by Ann. (Appellants' Brief at page 8 footnote 5, page 13 footnote 11).

Contradicted Facts: Mr. Joel testified that he never had to help Ann with gambling debts, never had to pay off her loans, Ann did not have a drug problem, and that Mrs. Joel did not feel a special burden for Ann. (TT 60-61). Lindsey Meador testified that Jimmy told him that Jimmy (not Mr. Joel) was concerned about overreaching by one of Jimmy's siblings. (TT 119). Debra Joel's own testimony demonstrates that Mr. Joel was not concerned about Ann taking advantage of Mrs. Joel. Specifically, Debra testified "Jimmy, I know, was concerned about overreaching by Ann", that Jimmy "told Mr. Joel that Ann was not going to live in that house", and that Mr. Joel told Jimmy that Mr. Joel wanted to make sure that Ann could live in the Avery Street house and take care of Mrs. Joel in the event that Mrs. Joel became incapacitated. (TT 247).

Mr. Joel further testified that he never had a conversation with Jimmy's children asking them to sign over the remaining interest to Mike. (TT 318). Mr. Joel testified that he told Jimmy's children that he would like to get the deed changed from the way it was back to the way their wills would be in effect, that he'd like for Mike to be the executor, and for Mike, Ann, and Jimmy's boys to get an equal third. (TT 318-319). In fact, Jimmy's son, John Joel testified that Mr. Joel asked him to make sure that Mike and Ann got a third of the house. (TT 300). John further admitted on cross-examination that Mr. Joel asked him that if Mr. Joel got something drawn up so that Jimmy's boys would share with Mike and Ann would John get his brothers to sign it. (TT 303). On redirect, John clarified that Mr. Joel told him that the document he would have drawn up would make sure that Mike and Ann got their share. (TT 306). Jimmy's son, James Joseph Joel, Jr. testified that Mr. Joel told him that "when they passed away, they wanted the house to be divided up where Mike could have a third, Aunt Ann would have a third, and us boys would have a third." (TT 311, 314-15).

5. Improvements Were Not Gifts

Appellants Allege: Appellants allege that the improvements Jimmy made to the Avery Street property were not gifts. (Appellants' Brief at 11).

Contradicted Facts: Mr. Joel testified that he tried to pay for the vinyl siding, and Jimmy would not accept payment. (TT 37). When Jimmy's workers showed up to the Joels' house to do bathroom renovations, Mr. Joel called Jimmy and Jimmy told him, "daddy, just let them alone. Let them do what I sent them over there to do." (TT 38). Mr. Joel also testified that he and his son, Mike, tried to help pay for the bathroom renovation, and Jimmy would not accept payment. (TT 38, 82). Mr. Joel testified that he tried to pay for repairs to the vent pipe and the hot water heater; however, the repairman sent by Jimmy would not accept payment. (TT 82).

In sum, the chancellor had to decide whose proof to believe and the chancellor believed the proof presented on behalf of Mr. Joel and the estate of Mrs. Joel. Because the chancellor's decision is supported by substantial credible evidence in the record, it is respectfully submitted that this Court should affirm.

6. Original Complaint vs Amended Complaint

Appellants Allege: Jimmy's estate alleges that the facts pled in the amended complaint flat-out contradict those pled in the original complaint. (Appellants' Brief at 15). Jimmy's estate also alleges that it was improper for the Joels to set out Jimmy's misrepresentations in the amended complaint when they were not set forth in the original complaint. (Appellants' Brief at 16).

Contradicted Facts: In the original complaint the Joels allege that they thought they would be receiving essentially a fee simple title. In the Amended Complaint the Joels explained the reason that they thought they were getting essentially a fee simple title, i.e., this was how Jimmy explained the life estate to them. Thus, the amended complaint does not contradict the original complaint. Rather, it explains the reasons for the Joels' belief. It was not error to amend the complaint to set out Jimmy's misrepresentations because Jimmy's estate had filed a motion asserting that the Joels had failed to state a claim for a constructive trust because the original complaint did not set forth any wrongdoing on Jimmy's part - the exact nature of which was not discovered until after Lindsey Meador's deposition.

Summary of the Argument

The chancellor did not err in allowing the Joels to amend their complaint. The amendment took place early in the litigation, and Jimmy's estate has failed to allege any prejudice that it suffered by the amendment. Moreover, the chancellor correctly rejected Jimmy's estate's argument that the

amendment should have been barred based on judicial estoppel. A review of the original and amended complaints reveals the Joels' story did not change. In addition, Jimmy's estate has not directed the Court to any benefit that the Joels received through their original complaint, a requisite element for a claim of judicial estoppel.

The Joels' claim for a constructive trust is not barred by the statute of limitations. The statute of limitations for a constructive trust is ten years. The Joels acquired the Avery Street property in 2001 and filed suit in 2007, well within the ten year statute of limitations. In addition, Jimmy's estate has waived any defense the Joels' claim for a constructive trust was barred by the statute of limitations by failing to pursue this defense and by representing to the chancellor at trial that the Joels' claim for constructive trust was not barred by the statute of limitations.

The Joels' claims were not barred by laches. A suit filed within the statute of limitations is not barred by laches. Moreover, the Joels' delay in bringing suit was caused by Jimmy's representations to the Joels that he would take care of changing the deed.

The chancellor did not err in applying the legal requirements for a constructive trust. A confidential relationship is not required. There are many Mississippi cases where the Mississippi appellate courts have found that a constructive trust should be imposed without finding that the parties were in a confidential relationship or where the courts have examined theories other than the abuse of a confidential relationship.

The chancellor correctly found that the Joels were entitled to a constructive trust based on the theories of abuse of a confidential relationship, unjust enrichment, principles of equity and good conscience, breach of fiduciary relationship, and the principles of the *Allgood* case. Specifically, Jimmy was active in bringing about his parents' purchase of the Avery Street house and the selling

of their debt free North Bayou home. When his parents told him they could not afford to purchase the Avery Street home without selling their North Bayou home, Jimmy arranged for his personal banker to finance the purchase of the Avery Street home and he and his wife assisted his parents in selling of their North Bayou home. Jimmy was a skilled real estate investor, whereas his parents were not skilled in real estate matters. Jimmy advised his parents to put the Avery Street property in the life estate, and when his parents explained to him they did not know anything about a life estate and looked to him for guidance, Jimmy misrepresented to his parents the legal effects of a life estate. Thereafter, Jimmy represented to his parents he would arrange for his personal attorney to close the loan and see to it that his parents would obtain a title which would allow them to sell their home and devise the home under their wills because they wanted to make sure that at their death, the home went to their three children equally. Instead, Jimmy engaged in self dealing and instructed his personal attorney to prepare a deed deeding his parents a life estate measured by the life of the first of his parents to die with the remainder interest to Jimmy. Because of their trust in Jimmy and their reliance upon him, the Joels did not ask any questions at closing nor did they consult with an attorney. Because of the attorney's relationship with Jimmy, the attorney who drew the deed did not consult independently with the Joels. No one explained to the Joels at closing that they were acquiring a title they could not devise/sell, that their title was only as good as the life of the first of them to die, that at the death of the first of Mr. or Mrs. Joel - the survivor would be homeless, or that the remainder interest was going to Jimmy. Jimmy's parents paid the entire purchase price of the Avery Street home, and Jimmy acquired his interest via questionable means for not one penny.

The chancellor did not err in vesting fee simple title in the Joels. The supreme court has held that courts are bound by no unyielding formula in imposing constructive trusts. Moreover, in

most cases were a constructive trust is imposed, the result is to restore the status quo. The only way to give the Joels a title they can devise and sell (which is what Jimmy represented to them they would receive) is for Mr. and Mrs. Joel to have fee simple title.

The chancellor did not err in denying Jimmy's estate's counterclaim for lost profits / lost rent because Jimmy did not have any equity in the Avery Street house and did not pay one penny toward the purchase price. Moreover, the chancellor did not err in denying Jimmy's estate's counterclaim for an equitable lien based on the improvements to the Avery Street property based on the evidence that Jimmy intended for the improvements to be gifts.

Argument

Issue 1

Standard of Review to Be Applied to Chancellor's Findings of Fact and Conclusions of Law

A. Standard of Review of Decision to Impose Constructive Trust

Jimmy's estate asserts that the chancellor's decision to impose a constructive trust is subject to *de novo* review. (Appellants' Brief at 22). It is respectfully submitted that this is not an accurate statement. Rather, a two-part examination arises when an appellate court is called upon to review a chancellor's decision to impose a constructive trust.

First, the Court must review the chancellor's findings of fact. The supreme court has noted that an appellate court's "review of a chancellor's findings of fact, **including those regarding a constructive trust**, is limited in that [it] cannot set aside a chancellor's findings of fact so long as they are supported by substantial credible evidence." *McNeil v. Hester,* 753 So. 2d 1057, 1064 (¶26) (Miss. 2000) (emphasis supplied); *City of Picayune v. Southern Regional Corp.,* 916 So. 2d 510,

518-19 (¶22-23) (Miss. 2005); *In re Estate of Abernathy,* 778 So. 2d 123, 126-27 (¶13) (Miss. 2001); *Davidson v. Davidson,* 667 So. 2d 616, 620 (Miss. 1995); *Allgood v. Allgood,* 473 So. 2d 416, 421 (Miss. 1985). "Where there is substantial evidence to support the chancellor's findings, [an appellate court] is without the authority to disturb the chancellor's conclusions, although [the appellate court] might have found otherwise." *City of Picayune v. Southern Regional Corp.,* 916 So. 2d 510, 518-19 (¶22) (Miss. 2005). In the case of *Allgood v. Allgood,* 473 So. 2d 416, 421 (Miss. 1985), a constructive trust case, the supreme court noted that it sits "as an appellate court, not as trier of facts *ab initio*."

Second, after reviewing a chancellor's findings of fact, the appellate court must also review the chancellor's conclusions of law. An appellate court's review of a chancellor's conclusions of law regarding the applicability of a constructive trust is *de novo*. *McNeil v. Hester,* 753 So. 2d 1057, 1064 (¶26) (Miss. 2000) (emphasis supplied); *City of Picayune v. Southern Regional Corp.,* 916 So. 2d 510, 518-19 (¶22-23) (Miss. 2005); *In re Estate of Abernathy,* 778 So. 2d 123, 126-27 (¶13) (Miss. 2001); *Davidson v. Davidson,* 667 So. 2d 616, 620 (Miss. 1995).

In sum, as set forth above, the chancellor's findings of fact are subject to deferential review. Whereas, the conclusions of law are subject to a *de novo* review.

B. Findings of Facts Not Subject to *De Novo* Review

i. Chancellor did not adopt verbatim the Joels findings of fact

Jimmy's estate incorrectly asserts that the chancellor adopted virtually verbatim Mr. and Mrs. Joel's proposed findings of fact and conclusions of law and urges the Court to conduct a *de novo* review of the record as a whole. (Appellants' Brief at 23).

It is respectfully submitted that a comparison of the proposed findings of fact submitted by

the Joels with the findings of fact adopted by the chancellor reveals that the chancellor made numerous changes. (CP 892-926 and 951-984). Specifically, the chancellor made the following changes:

On page 8 of the Joels' proposed findings, paragraph beginning "Based on", the chancellor reworded the second and third sentences. (CP 899 compare CP 958).

On page 9 of the Joels' proposed findings, paragraph beginning "The Plaintiffs executed", the chancellor deleted the word importantly, reworded the second sentence, and added an observation by the Court to the end of the last sentence. (CP 900 compare CP 959).

On page 10 of the Joels' proposed findings, paragraph beginning "Several days", the chancellor added a phrase to the end of the first sentence and added a sentence to the end of the paragraph to make an observation by the Court. (CP 901 compare 960).

On page 10 of the Joels' proposed findings, paragraph beginning "The Court finds", the chancellor deleted the phrase "it to be particularly enlightening", added the phrase "by the Plaintiffs", and added the phrase "a house purchased by them." (CP 901 compare CP 960).

On page 10 of the Joels' proposed findings, paragraph beginning "After Plaintiffs", last sentence, the chancellor added the phrase "to the Court" and changed the word "heavily" to "greatly." (CP 901 compare CP 960).

On page 10-11 of the Joels' proposed findings, paragraph beginning "Using proceeds": the chancellor added the word "by", changed "paid down" to "reduced", deleted word "importantly", and reworded a phrase. (CP 901-902 compare CP 960-61).

On page 11 of the Joels' proposed findings, first paragraph beginning "The Court finds", the chancellor made the following changes: line 1 (deleted "The court finds"), line 4 (deleted phrase

"furthermore, there is proof in this case"), line 7 (deleted "In fact"), line 8 (added phrase "as his parents"), and line 8 (deleted "Finally").

On page 11 of the Joels' proposed findings, second paragraph beginning "The Court finds", the chancellor reworded the first and second sentences. (CP 902 to CP 961).

Page 12 of the Joels' proposed findings, paragraph beginning "In 2005", the chancellor reworded the fourth sentence and completely reworded the last sentence. (Compare CP 903 to CP 962).

Page 12 of the Joels' proposed findings, paragraph beginning "Thereafter", the chancellor changed thereafter to shortly, added phrase "after it came to Mr. Joel's attention", changed fix to correct, added word originally, changed fixing to correcting, and deleted "In fact". (CP 903 compare CP 962).

Page 13 of the Joels' proposed findings, paragraph beginning "Mr. Joel", the chancellor reworded this paragraph. (CP 904 compare CP 963).

Page 14 of the Joels' proposed findings, paragraph beginning "It is", the chancellor changed a word in the third and fourth sentences. (CP 905 compare CP 964).

Page 15 of the Joels' proposed findings, first paragraph beginning "Debra testified", the chancellor completely reworded the last sentence. (CP 906 compare CP 965).

Page 15 of the Joels' proposed findings, second paragraph beginning "Debra testified", the chancellor reworded most of this paragraph. (CP 906 compare CP 965).

Page 16 of the Joels' proposed findings, the chancellor made changes to almost every sentence on this page. (CP 907 compare CP 966).

Page 17 of the Joels' proposed findings, paragraph beginning "For the reasons", the

chancellor added the phrase "and their intentions from the beginning" to the last sentence of this paragraph. (CP 908 compare CP 967).

It is respectfully submitted that by making changes to the Joels' proposed findings of fact, the chancellor exercised independence, demonstrating that he sifted through the evidence and smelled the smoke of the battle. Accordingly, the chancellor's findings of fact may not be disturbed on appeal absent a finding that they are manifestly wrong, clearly erroneous, or not supported by substantial credible evidence. *City of Picayune v. Southern Regional Corp.*, 916 So. 2d 510, 518-19 (¶22) (Miss. 2005); *In re Estate of Abernathy,* 778 So. 2d 123, 126-27 (Miss. 2001).

The four cases cited by Jimmy for the proposition of heightened review are distinguishable. Unlike the chancellor in this case, the chancellor in three of the four cases cited by Jimmy's estate adopted the litigant's proposed findings verbatim. *Brooks v. Brooks,* 652 So. 2d 1113, 1118 (Miss. 1995); *Omnibank of Mantee v. United Southern Bank,* 607 So. 2d 76, 82-83 (Miss. 1992); *Rice Researchers v. Hiter,* 512 Sol 2d 1259, 1265 (Miss. 1987). In the fourth cased relied upon by Jimmy's estate, the chancellor only changed one phrase and added one paragraph to the litigant's proposed findings of fact. *Smith v. Orman,* 822 So. 2d 975, 978 (¶8) (Miss. App. 2002). Accordingly, because the chancellor in this case made numerous modifications to the proposed findings of fact submitted by the Joels, it is respectfully submitted that the findings of fact are not subject to heightened review.

ii. Even if chancellor adopted Joels findings of fact verbatim, the standard of review is one of heightened scrutiny, not *de novo*

Moreover, even if the Court finds that the chancellor adopted the Joels' findings of fact verbatim, the standard of review is one of heightened scrutiny with deference still being given to the

chancellor's decision (though not as much as in the ordinary case), not *de novo* review as urged by Jimmy's estate. *Estate of Grubbs v. Woods,* 753 So. 2d 1043, 1046-47 (¶9) (Miss. 2000); *Estate of Grubbs v. Woods,* 753 So. 2d 1043, 1046-47 (¶9) (Miss. 2000); *Stark v. Anderson,* 748 So. 2d 838, 841 (¶6) (Miss. Ct. App. 1999). The supreme court has rejected the idea that de novo review is required and has observed that the chancellor still had the better view of the battle. *Rice Researchers, Inc. v. Hiter,* 512 So. 2d 1259, 1265 (Miss. 1987). Thus, "where the trial court adopts verbatim finds of fact and conclusions of law prepared by a party to the litigation, [an appellate court] analyzes such findings with greater care.. . . . [It] will uphold the lower court's findings . . . if supported by substantial credible evidence." *Estate of Hart v. James,* 758 So. 2d 436, 438 (¶7) (Miss. App. 1999); *Thomas v. Scarborough,* 977 So. 2d 393, 396 (¶9-10) (Miss. App. 2007); *Stark v. Anderson,* 748 So. 2d 838, 841 (¶6) (Miss. App. 1999).

Contrary to the representations by Jimmy's estate, none of the cases cited in its brief hold that *de novo* review is appropriate solely because a chancellor adopted verbatim a litigant's proposed findings of fact. *Brooks v. Brooks,* 652 So. 2d 1113, 1118 (Miss. 1995) (holding "[w]here the chancellor adopts, verbatim, findings of fact and conclusions of law prepared by a party to the litigation, this Court analyzes such findings with greater care, . . .and the evidence is subjected to heightened scrutiny."); *Omnibank of Mantee v. United Southern Bank,* 607 So. 2d 76, 83 (Miss. 1992), (holding that where the chancery court literally signs off on a litigant's proposed findings of fact, not changing one word, the supreme court conducts a lessened deferential review, reviewing "the challenged findings of fact and the appellate record as a whole with a more critical eye", not a *de novo* review as suggested by Jimmy's estate); *Rice Researchers, Inc. v. Hiter,* 512 So. 2d 1259, 1265-66 (Miss. 1987), (holding that the court "cannot and will not review the case de novo" even

where the chancellor adopted verbatim a litigant's proposed findings); *Smith v. Orman,* 822 So. 2d 975, 977-78 (¶7) (holding that where a chancellor adopts proposed findings verbatim the "Court analyzes such findings with greater care, and the evidence is subjected to heightened scrutiny").

Jimmy's estate also asserts that *de novo* review is appropriate based on the chancellor's rulings on two objections by the Joels' counsel as well as an observation by the court which Jimmy's estate claims calls into question the chancellor's impartiality / objectivity. (Appellants' Brief at 23 fn 19).[8] This assignment of error is without merit because Jimmy's estate has not cited a single case

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[8]First, Jimmy's estate incorrectly asserts that on page 248 of the transcript, the chancellor refused to allow Debra Joel to testify to matters he found to be hearsay "even though the Joels had not raised a hearsay objection." Jimmy's estate fails to mention that one page earlier in the transcript, an objection had been made to the same testimony Debra attempted to offer on page 248, and the court had sustained the objection on hearsay grounds. Specifically, on page 247 of the transcript, Debra Joel began to testify as to what Miliford Smith had told her when he came to see her, the attorney for the Joels objected, and the judge sustained the objection on hearsay grounds. On page 248, Debra Joel again sought to testify as to what Miliford told her when he came to see her, and the chancellor reminded her that he had sustained Mr. Jacks' objection and that she could not testify as to what someone told her. A review of the sustained objection on page 247 in comparison with the testimony on page 248, reveals that Jimmy's estate is incorrect in asserting that the Joels had not raised a hearsay objection to Debra's testimony regarding what Miliford Smith had told her. Second, on page 273 of the transcript, Debra Joel began rambling in response to a question by the Joels' counsel, Mr. Jacks. Mr. Jacks objected to her rambling as being nonresponsive. The chancellor sustained the objection and observed that in addition to being nonresponsive to the question asked, her testimony was also hearsay. (TT 273). Jimmy's estate complains that the observation by the court that the testimony was hearsay when this ground was not asserted by Mr. Jacks calls into question the judge's objectivity. It is respectfully submitted that this is much ado about nothing. Mr. Jacks objected on one ground, the court found the objection sustainable on that ground as well as another ground not raised by Mr. Jacks. Jimmy's estate makes no complaint that the sustaining of the objection based on the ground raised by Mr. Jacks was inappropriate. Thus, it strains reason for Jimmy's estate to assert that the sustaining of the objection was due to partiality by the chancellor. Finally, Jimmy's estate asserts that the chancellor's objectivity is in doubt because he noted at the trial that Debra Joel's testimony as to the value of the Avery Street home was self-serving. (TT 241-42). This observation was made in response to an objection by counsel for the Joels that Debra had not been designated by an expert. In overruling the objection the chancellor stated "[t]he Court gives what probative weight and value it does to a party testifying to numbers that are obviously self-serving numbers. . . but I'm the one that will put the weight and credibility to that comment, but I

which stands for the proposition that de novo review is required based on a chancellor's ruling on objections, and instead, has cited a case where the supreme court held that a judge should grant **a motion to recuse** himself/ herself if the judge's impartiality is in question. *Mississippi United Methodist Conf. v. Brown,* 929 So. 2d 907 (Miss. 2006). In this case, Jimmy's estate has **never** requested that the chancellor recuse himself. The right to recusal may be waived, and if a party knows of a ground for recusal and fails to move for a recusal, the party will be considered to have impliedly consented to have the judge go forward with the case. *Ryals v. State,* 914 So. 2d 285 286 (¶5) (Miss. App. 2005). Our appellate court's have also held that "if a party wishes to have a chancellor recused, the motion [should] be made **prior to the chancellor issuing an opinion**." *Wilbanks v. Gray,* 795 So. 2d 541, 547 (¶24) (Miss. App. 2001) (emphasis supplied). A party cannot "take his chances with a judge about whom he knows of grounds for recusal and then, after he loses, file his motion." *Id.* In this case, almost 6 weeks elapsed from the date of the trial when Jimmy's estate asserts that the chancellor allegedly made the rulings which "raised substantial questions as to the chancellor's objectivity" to the date of the chancellor issuing his findings of fact and conclusions of law; however, at no point in this case has Jimmy's estate ever filed a motion for the chancellor to recuse himself. The supreme court has held that failing to file a motion to recuse will result in waiver of that issue on appeal. *Tubwell v. Grant,* 760 So. 2d 687, 689 (Miss. 2000). Accordingly, it is respectfully submitted that Jimmy's estate is procedurally barred from raising this issue on appeal based on the failure to file a motion to recuse as well as the failure to cite authority

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think she can testify to it." (TT 242). Because the chancellor was the finder of fact, it was a matter within the chancellor's discretion to determine whether someone's testimony is self-serving in deciding what weight to give to their testimony. Thus, this comment by the chancellor was not out of line.

which holds that de novo review is required.

In sum, because the chancellor did not adopt verbatim Mr. and Mrs. Joel's proposed findings of fact, the Court should conduct a deferential review and uphold those findings because they are supported by substantial credible evidence. *McNeil v. Hester,* 753 So. 2d 1057, 1064 (¶26) (Miss. 2000) (emphasis supplied). Alternatively, even if the Court finds that the chancellor adopted the Joels' proposed findings of fact verbatim, de novo review is not appropriate. *Rice Researchers, Inc. v. Hiter,* 512 So. 2d 1259, 1265-66 (Miss. 1987). Rather, the Court must review those findings of fact with a heightened level of scrutiny, giving deference to the chancellor and should uphold the findings because they are supported by substantial credible evidence. *Id.*

Issue 2

Chancellor Did Not Err In Allowing Joels to Amend Their Complaint

Jimmy's estate asserts that the chancellor erred in allowing Mr. and Mrs. Joel to amend their complaint. (Appellants' Brief at 24-26).

A. Standard of Review

It is well-settled that motions to amend are within are within the sound discretion of the trial court, and absent an abuse of discretion, the trial court will not be reversed. *Estes v. Starnes,* 732 So. 2d 251 (¶4) (Miss. 1999). "In practice, an amendment should be denied only if the amendment would cause actual prejudice to the opposite party." M.R.C.P. 15 cmt; *Coleman v. Smith,* 841 So. 2d 192, 194-94 (Miss. App. 2003). Jimmy's estate has failed to allege any prejudice that it suffered as a result of the chancellor allowing the Joels to amend the complaint, and instead alleges that the Joels should have been judicially estopped from amending their complaint. (Appellants' Brief at 24-26). It is respectfully submitted that failure to allege prejudice is fatal to Jimmy's estate's claim that

the chancellor erred in granting the Joels leave to amend their complaint. *Moeller v. American Guarantee and Liability Ins. Co.*, 812 So. 2d 953 (¶30) (Miss. 2002). Moreover, the amendment took place in the very early stages of the litigation and could not possibly have resulted in prejudice to the defendants.

B. Judicial Estoppel

Jimmy's estate alleges that the Joels made statements in their amended complaint which were inconsistent with statements contained in their original complaint and that the chancellor erred in failing to find that the Joels were judicially estopped from amending their complaint. (Appellants' Brief at 24-26). Specifically, Jimmy's estate asserts that the following allegations contained in the original complaint were contradicted by the Joels in the proposed amended complaint: (1) the Joels thought they were getting fee simple title; (2) no one discussed with the Joels that the title they would be receiving was anything less than fee simple title; and (3) the Joels only thought that a mistake had been made.

"Judicial estoppel precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation." *Richardson v. Cornes,* 903 So. 2d 51, 56 (¶17) (Miss. 2005).

It is respectfully submitted that a review of the original complaint along with the amended complaint, in its entirety, reveals that the Joels' story did not change. Rather, the only thing that changed is that in the amended complaint, the Joels provided a more detailed explanation of why they thought they had been vested with essentially a fee simple title when their home was conveyed to them, why the deed was drawn in the manner that it was drawn (which the Joels did not learn until Lindsey Meador's deposition), how the Joels learned that they did not have fee simple title, why the

Joels are entitled to a constructive and/or resulting trust, and the nature of the mistake that the Joels were asking the chancellor to correct as one of their alternative forms of relief.

Specifically, in the original complaint, the Joels alleged that they thought they were receiving fee simple title. (CP 8-9 at ¶9, 14, and 15). The Joels did not explain why they thought they were receiving fee simple title. In the amended complaint, the Joels explain that Jimmy explained to them that a life estate would essentially provide them with what would be a fee simple title. (CP 262-63 at ¶16-19).

Likewise, the Joels' allegation that no one discussed with them that they would receive anything less than fee simple title has not changed from that in the original complaint. (CP: 8 at ¶14). In the proposed amended complaint, Joels explain that Jimmy essentially explained that a life estate would give them an unrestricted title to their home. (CP 262-63: Amended Complaint ¶16-20).

In the original complaint, the Joels alleged that the deed should be reformed to correct a mistake. (CP10 at ¶22). In the amended complaint, the Joels explain that the mistake that they were seeking to correct is the scrivener's error in drawing the deed. (CP 264 at ¶22 and 40).

In the original complaint, the Joels alleged that they are entitled to a constructive/resulting trust without setting forth the reasons in detail[9]. (CP 10 at ¶23-24). In the proposed amended complaint, the Joels describe in great detail why Jimmy's actions entitle them to a constructive/resulting trust. (CP at ¶260-266).

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[9]Jimmy's estate incorrectly implies that the only theory set forth in the Joels' original complaint was a mistake theory. (Appellants' Brief at 24). On the contrary, the original complaint also advanced the constructive trust theory; however, it did not set forth Jimmy's wrongdoing. (CP 10 at ¶5).

In sum, a comparison of both the original complaint with the proposed amended complaint, reveals that, in both, the Joels allege that they thought they were receiving what was in effect a fee simple title. In both, the Joels allege that they subsequently learned that they did not have unrestricted title to their home. In both, one of the alternative forms of relief sought by the Joels is to correct a mistake. In both, the Joels asked the court to impose a constructive / resulting trust as another alternative form of relief. For this reason, Jimmy's estate is incorrect in asserting that the Joels' story has changed and that the chancellor erred in granting the motion to amend.

C. Even If Court Finds that Joels Changed their Position, They Would Not Have Been Judicial Estopped From Amending Their Complaint Because Judicial Estoppel Only Applies Where A Party Benefitted from the Change In Position

The Mississippi Supreme Court has held that when the party making the prior statement which is inconsistent with his position in the present action has not benefitted from the assertion, the doctrine of judicial estoppel should not be applied. *Dockins v. Allred,* 849 So. 2d 151, 155 (¶8) (Miss. 2003). In this case, it is respectfully submitted that even if the Court finds that the Joels' position in the amended complaint was inconsistent with their position in the original complaint, there is no proof that the Joels received a "benefit" from their original position. In fact, Jimmy's estate has not directed the Court to any benefit received by the Joels from the allegations contained in their original complaint. (Appellants' Brief at 24-26). For this additional reason, Jimmy's estate has failed to state a claim of judicial estoppel. *Dockins,* 849 So. 2d at 155 (¶8).

D. Leave to Amend Is Proper Even After Summary Judgment Motion Filed

Jimmy's estate argues that the Joels' request to amend their complaint after Jimmy's estate filed its motion for summary judgment "smacked of gamesmanship." (Appellants' Brief at 26). It is important for the Court to be cognizant of the posture of the case at time the chancellor allowed

the amended complaint to be filed. By way of background, the Joels' filed their original complaint on December 7, 2007. (CP 1). Jimmy's estate filed its answer on or about January 3, 2008. (CP 13). Prior to any depositions being taken, Jimmy's estate filed a motion for summary judgment on February 11, 2008, approximately five weeks after it had filed its answer. (CP 27, 79-80). On March 13, 2008, the Court orally ruled that the Joels should be permitted to conduct discovery prior to responding to the summary judgment motion and granted the Joels an extension of time to respond to the summary judgment motion. (CP 101-103). The first depositions were conducted on March 25, 2008. (CP 102, 231). After conducting the depositions of Lindsey Meador and Margie Prescott, the Joels filed their motion requesting leave to file an amended complaint on April 3, 2008. (CP 102-104).

It is noteworthy that Jimmy's estate has failed to cite a single case wherein the supreme court has held that it is error to grant a motion to amend a complaint after a motion for summary judgment is filed but before the motion for summary judgment has been granted. In fact, our appellate courts have found it to be reversible error when the trial court did not grant leave to amend after a motion for summary judgment was filed. *Pratt v. City of Greenville,* 804 So. 2d, 972, 978 (¶18) (Miss. 2001); *Frank v. Dore,* 635 So. 2d 1369, 1375 (Miss. 1994); *Coleman v. Smith,* 841 So. 2d 192, 94-95 (¶5) (Miss. App. 2003).

Furthermore, it should be noted that Jimmy's estate alleged in the summary judgment motion that the Joels' original complaint failed to state a cause of action for a constructive trust and/or unjust enrichment because there had been no allegation of fraud or wrongdoing on Jimmy's part. (CP 36-37 at ¶20-22). A motion for summary judgment is converted to a Rule 12 motion to dismiss if it is ultimately decided by the trial court solely based on the allegations contained in the pleadings.

Kountouris v. Varvaris, 476 So. 2d 599, 602 (fn. 3) (Miss. 1985). The Mississippi Rules of Civil Procedure provide that if a complaint is dismissed based on a deficiency in the pleadings, leave to amend shall be granted. M.R.C.P. 12(b). Thus, even if the chancellor had dismissed the original complaint because the Joels failed to plead a cause of action for constructive trust / unjust enrichment, as Jimmy's estate alleged in the summary judgment motion, the Joels would have been entitled to amend their complaint. As a result, it was not error for the chancellor to allow the Joels to file an amended complaint wherein they specifically set forth Jimmy's wrongdoing in response to a motion for summary judgment.

E. New Information Learned In Depositions Warranted Filing of Amended Complaint

Jimmy's estate incorrectly asserts that nothing new was learned by the Joels after the filing of the original complaint which would entitle them to file an amended complaint. (Appellants' Brief at 26). Jimmy's estate cites no authority which holds that an amended complaint can only be filed upon the discovery of new information. Moreover, this argument completely ignores the fact that in the proposed amended complaint, the Joels added the newly discovered evidence that they learned from taking Lindsey Meador's deposition. (CP 218, 231-244). As discovered for the first time during Lindsey Meador's deposition, the Joels learned that Jimmy told Mr. Meador that the deed should convey a life estate to Mr. and Mrs. Joel to be measured by the life of the first Mr. or Mrs. Joel to die with a remainder interest going to Jimmy. *Id.* Jimmy explained to Mr. Meador that he wanted the deed to be drawn this way, in part, because he was concerned about his siblings' overreaching to gain an interest in the house should one of his parents die. *Id.* Prior to Mr. Meador's deposition, Mr. and Mrs. Joel were unaware of Jimmy's instructions to Mr. Meador regarding the manner in which the deed was ultimately drawn. Up until Jimmy's death, Jimmy had led the Joels

to believe that the way the deed was drawn was in error and that he was going to correct the problem with it. (TT 28-29). This newly discovered evidence supported Mr. and Mrs. Joels' constructive / resulting trust theory, entitling them to amend their complaint.

Issue 3:

The Joels' Claim for A Constructive Trust Is Subject to Ten Year Statute of Limitations

Jimmy's estate argues that because the Joels' claims for imposing a constructive trust are based on statements by Jimmy, the chancellor should have found that the Joels' claim for a constructive trust was barred under the general three year statute of limitations applicable to fraud claims. (Appellants' Brief at 26-29). The chancellor decided this case based on constructive trust principles. Thus, the issue is whether the chancellor should have found that the Joels' claim for a constructive trust is barred by the statute of limitations.

A. Waiver

Jimmy's estate has waived any right to assert that the Joels' claim for a constructive trust is barred by the statute of limitations by failing to pursue this defense and by representing to the chancellor at trial that the Joels' constructive trust claim was not barred by the statute of limitations.

In their amended complaint, the Joels' asked the court for the following relief: (1) to impose a constructive trust; (2) to impose a resulting trust; (3) to impose an equitable lien; (4) to have the deed reformed based on the theory of unjust enrichment; or (5) to order that the deed be reformed to correct a scrivener's error. (CP 268). In responding to the amended complaint, Jimmy's estate raised the defense of all applicable statutes of limitations. (CP 301 at ¶44). However, in its summary judgment motion, Jimmy's estate solely argued that the Joels' claim to reform the deed based on a scrivener's error was barred by the statute of limitations. (CP 496 at ¶17). Jimmy's

estate specifically stated in its summary judgment motion that it was not asserting that the Joels' claim for a constructive trust was barred by the statute of limitation, and reserved the right to raise this defense in future filings or at the trial. (CP 501 at fn 7). Jimmy's estate did not pursue a motion to dismiss the Joels' claim for a constructive trust based on the expiration of the statute of limitations in future filings with the court nor did it raise this defense at trial. It is well-settled that a defendant who raises an affirmative defense in his answer, but fails to actively pursue that defense while actively participating in the litigation, waives that defense. *Grimes v. Warrington,* 982 So. 2d 365, 370 (¶27)(Miss. 2008).

In addition, at the trial of the case, during his motion for a judgment as a matter of law, counsel for Jimmy's estate represented to the chancellor, "I think it's clear that all claims **except for constructive trusts** are barred by the statute of limitations." (TT 165). It is well-settled that issues not raised first at the trial level are procedurally barred. *McIntosh v. McIntosh,* 977 So. 2d 1257 (¶46) (Miss. App. 2008). By failing to pursue a statute of limitations defense to the Joels' constructive trust claim and by representing to the court the constructive trust claim was not barred, Jimmy's estate is procedurally barred from raising this issue on appeal.

B. Statute of Limitations for a Constructive Trust is 10 Years

It is respectfully submitted that even if the Court finds that Jimmy's estate did not waive its statute of limitations defense to the Joels' claim for a constructive trust, this assignment of error is without merit because the Joels' complaint for a constructive trust was timely filed.

The statute of limitations to impose a constructive trust is ten years. Miss. Code Ann. §15-1-39; *Allred v. Fairchild,* 785 So. 2d 1064, 1070 (¶16) (Miss. 2001). Where the cause of action and remedy are purely equitable, the ten year statute of limitations and not the general statute of

limitations applies to a claim for a constructive trust. *Alvarez v. Coleman,* 642 So. 2d 361, 374 (Miss. 1994); *Winters v. AmSouth Bank,* 964 So. 2d 595, 599 ¶12-17 (Miss. Ct. App. 2007). The supreme court has held that where a person acquires property for his own benefit when he has been charged with acquiring it for someone else's benefit, the ten year statute of limitations applicable to constructive trust applies rather than the general statute of limitations. *Patton v. Pinkston,* 86 Miss. 651, 38 So. 500, 502 (1905).

In the case of *Patton v. Pinkston,* 86 Miss. 651, 38 So. 500, 502 (1905), the defendant received money from the testator during the testator's lifetime to invest for the testator's benefit. Instead, the defendant invested in lands for his own benefit without the testator's knowledge. The supreme court held that the defendant held the lands in constructive trust, and suit to enforce the trust was subject to a ten year statute of limitations and not the general statute of limitations. *Id.*

In *Alvarez*, Alvarez filed an action for breach of contract and a constructive trust. *Id.* at 364. (Alvarez asserted claims for a constructive trust arising out of an abuse of confidential relationship and unjust enrichment. *Id.* at 368-69.) The chancellor found that Alvarez's claims were barred by the general statute of limitations (which at the time was six years). *Id.* at 366. Alvarez appealed arguing that the ten year statute of limitations applied to his claim for a constructive trust. *Id.* at 373. The defendant argued that the ten year statute of limitations is applicable only to purely equitable causes of action and because Alvarez sought relief also on a breach of contract theory, an action at law, the general statute of limitations and not the ten year statute of limitations applies. *Id.* The supreme court rejected this argument, holding that the plaintiff was entitled to plead claims in the alternative, and the ten year statute of limitations, not the general statute of limitations, applied to the plaintiff's claims for equitable relief on the theory of a constructive trust. *Id.*

In the case of *Wholely v. Cal-Maine Foods, Inc.* 530 So. 2d 136, 137 (Miss. 1988), Wholely and Rogers were limited partners in a limited partnership in which Cal-Maine Foods was a general managing partner. Wholely and Rogers were informed through a regular status report that the partnership was experiencing net loss and there was little hope of their obtaining any refund on their investment. *Id.* The limited partnership was dissolved in 1978. *Id.* In February of 1979, Wholey and Rogers became aware there would be no return on their investment. *Id.* at 139. In April of 1986, Wholely and Rogers filed suit against Cal-Maine Foods alleging that Cal-Maine Foods, through misappropriations from the partnership and through self-dealing, made hidden profits for itself and concealed those profits from Wholely and Rodgers which led to the limited partnership's demise. *Id.* Wholely and Rogers accused Cal-Maine of fraud and breach of fiduciary duties. *Id.* The chancellor granted Cal-Maine Food's motion for summary judgment finding that Wholely and Rogers claims were based upon fraud and subject to the general statute of limitations. *Id.* The chancellor found that Wholely and Rogers were aware of Cal-Maine's actions at least by February of 1979 and their suits filed in April of 1986 were barred by the general statute of limitations. *Id.*

Wholely and Rogers appealed asserting that their claims were subject to the ten year statute of limitations for a constructive trust. *Id.* The supreme court held that the key inquiry was whether Wholely and Roger's actions were cognizable at law or whether they were purely equitable. *Id.* at 139. The supreme court found that Wholely and Rogers had alleged that Cal-Maine had breached its fiduciary duties and that this was one of the situations in which a constructive trust could be applied. *Id.* Thus, the supreme court found that the ten year statute of limitations and not the general statute of limitations applied.

In this case, the Joels sought purely equitable relief through the imposition of a constructive

trust which is subject to the ten year statute of limitations. (CP 268). No money damages were sought, just the reformation of the deed and/or the reconveyance of the property. *Id.* This was purely an equitable claim. Like the defendant in the *Patton* case, who was supposed to invest in property for the testator's benefit, Jimmy was charged with making sure that his parents received a title his parents could convey and sell. Like the defendant in *Patton,* Jimmy, without the Joels' knowledge, acquired the remainder interest to Jimmy's benefit and to the detriment of the Joels. Like *Alvarez*, the Joels pled claims for a constructive trust arising out of a breach of confidential relationship and unjust enrichment. (CP 259-268). Like *Wholely,* the Joels pled claims for a constructive trust arising out of a breach of fiduciary relationship. *Id.* The chancellor decided the case based purely on principles of equity. Thus, the ten year statute of limitations applies. The Avery Street property was deeded to the Joels in August of 2001, and the Joels filed this suit in December of 2007, well within the ten year statute of limitations. (CP 6, TE 9).

The cases cited by Jimmy's estate for the proposition of applying a three year statute of limitations are distinguishable because none of those cases involved a claim for a constructive trust. *O'Neel Steel, Inc. v. Millette*, 797 So. 2d 869, 870-71 (¶9) (2001) (suit did not include a claim for a constructive trust and issue was whether ten year statute of limitations for suit to recover land under 15-1-7 or three year statute of limitations for fraud under 15-1-49 applied); *Sullivan v. Tullos,* 2008 WL 4782450 *1 (¶5) and (¶14) (Miss. App. Nov. 4, 2008) (suit was based solely on fraud and did not assert a claim for a constructive trust); *McWilliams v. McWilliams,* 970 So. 2d 200 (¶6) (Miss. App. 2007) (suit did not include a claim for a constructive trust and issue was whether ten year statute of limitations for suit to recover land under 15-1-7 or three year statute of limitations for fraud under 15-1-49 applied).

C. Deed did not constitute constructive notice

In the alternative, it is respectfully submitted that even if the Court finds that Jimmy's estate did not waive the statute of limitations defense and the three year statute of limitations for fraud claims applies, the filing / mailing of the deed did not constitute constructive notice which set into motion the three year statute of limitations. The Mississippi Supreme Court has held that

> [w]here the fact misrepresented or the matters which are concealed are peculiarly within the representor's knowledge and the representee is ignorant thereof, it is generally held that, although the real fact appear on the public records, the representee is under no obligation to examine the records, and his failure to do so does not defeat his right of action. This is especially true where the very representations relied on induced the hearer to refrain from an examination of the records. . . .In such cases the doctrine of constructive notice is inapplicable.

Guastella v. Wardell, 198 So. 2d 227, 230 (Miss. 1967); *See also Green Realty Management Corp. v. Mississippi Transportation Comm'n,* 4 So. 3d 347, 350 (¶6-7 and 15) (Miss. 2009). In this case, Jimmy led Mr. and Mrs. Joel to believe that their deed would allow Mr. and Mrs. Joel to sell and devise the Avery Street home inducing the Joels to refrain from examining the deed / public records. (TT 67-68, 72-73). Mr. Joel testified that he did not read the deed after receiving it in the mail because Jimmy told him "everything was like I told him I wanted it." (TT 26). Based on this proof, the chancellor found there was no reason for Mr. and Mrs. Joel to review the Warranty Deed. (CP 960). Accordingly, the deed did not constitute constructive notice and the statute of limitations did not start running until 2005 or 2006 when Mr. and Mrs. Joel discovered that Jimmy had caused them to receive a title they could not sell or devise in their wills. Their suit filed in December of 2007 was timely.

Issue 4:

The Joels' Claims Are Not Barred By Laches

As its fourth assignment of error, Jimmy's estate asserts that the Joels' claims are barred by laches. (Appellants' Brief at 29-32). Jimmy's estate asserts that Mr. and Mrs. Joel's delay in bringing suit has resulted in harm to it because Jimmy is dead, and he is the only one privy to the conversations in which the life estate agreement was reached. *Id.*

It should be noted that Jimmy's death was unexpected and could not have been predicted by Mr. and Mrs. Joel. (TT 30, 259). Both Debra Joel and Mr. Joel testified that Jimmy died unexpectedly of a heart attack. (TT 30, 259). The Mississippi Supreme Court has held that a delay in bringing suit until after the death of a party, in and of itself, is insufficient to establish laches. *Sojourner v. Sojourner,* 247 Miss. 342, 352, 153 So. 2d 803, 807 (1963); *Continental Oil Co. v. Walker,* 238 Miss. 21, 35, 117 So. 2d 333, 338 (1960).

Moreover, Jimmy had assured his parents, prior to his death, that he was correcting the problem with their deed; therefore, the Joels' delay in bringing suit was understandable. (TT 27-29). Mr. Joel testified that he had three or four conversations with Jimmy about changing the deed, and every time, Jimmy told him, "daddy, I will get it taken care of. I'm busy right now, but I'll take care of it." (TT 28-29). The last conversation took place approximately ten days before Jimmy's death in June of 2007, and during this conversation, Jimmy told Mr. Joel, that he was busy building a house; however, he would take care of it and told Mr. Joel not to worry about it. (TT 29, 259). On cross-examination of Debra Joel, it was revealed that Debra Joel stated in her affidavit in support of her summary judgment motion that after the Joels asked "Jimmy to give up our interest in the property[,] Jimmy told them he would 'think about what could be done,' **but did so only to pacify them**." (CP 534 at ¶5) (emphasis supplied) (TT 269). Mr. Joel also testified that after Jimmy's death, Debra informed him that the Avery Street property was in probate and that they would have

to wait until it came out of probate to do anything about the problem with the Joels' title. (TT 31-32). Debra never told the Joels during this initial meeting she had no intention of conveying the property back to them. *Id.* Thus, it is respectfully submitted that Jimmy and Debra, by leading Mr. and Mrs. Joel to believe that Jimmy would correct the problem with their title when in fact he never intended to do anything, are the ones that should be estopped from asserting the bar of laches.

Mr. and Mrs. Joel's claims are not barred by laches for the additional reason that no claim is barred by laches if it is brought within the statute of limitations. *Bailey v. Estate of Kemp,* 955 So. 2d 777, 783 (Miss. 2007); *Hans v. Hans,*482 So. 2d 1117, 1120-21 (Miss. 1986); *Continental Oil Co. v. Walker,* 238 Miss. 21, 34, 117 So. 2d 333, 337-38 (1960). As noted in the argument above, Mr. and Mrs. Joels' request to have a constructive trust imposed is not barred by the statute of limitations.

Issue 5

Chancellor Did Not Err In Applying the Legal Requirements For A Constructive Trust

Jimmy's estate asserts that a constructive trust cannot be imposed absent a finding of an abuse of a confidential relationship and that the chancellor erred in finding that Jimmy and the Joels were in a confidential relationship. In paragraph A, the Joels will set forth the reasons that the chancellor was not required to find the abuse of a confidential relationship before imposing a constructive trust, entitling the chancellor to consider alternative theories such as unjust enrichment, breach of fiduciary relationship, equity and good conscience, and the principles of *Allgood v. Allgood.* In paragraph B, the Joels will demonstrate why the chancellor did not err in finding that Jimmy was in a confidential relationship with the Joels which he abused, entitling the chancellor to

rely on this alternative theory in imposing a constructive trust.

A. Confidential Relationship Is Not Required

Jimmy's estate incorrectly asserts that a constructive trust can only be imposed if the parties were in a confidential relationship which was abused.

In the case of *Saulsberry v. Saulsberry,* 223 Miss. 684, 78 So. 2d 758 (1955) (emphasis supplied), the Mississippi Supreme Court held

> [a] constructive trust is one that arises by operation of law against one who, by fraud, actual, or constructive, by duress **OR** abuse of confidence, by commission of wrong, **OR** by any form of unconscionable conduct, artifice, concealment, or questionable means, **OR** who in any way against equity and good conscience, either has obtained **OR** holds the legal right to property which he ought not, in equity and good conscience, to hold and enjoy.

Although the abuse of a confidential relationship can lead to the imposition of constructive trust, the definition of a constructive trust set forth above demonstrates that a confidential relationship is not required. As noted by the court in *Saulsberry*, the court can impose a constructive trust against someone who through fraud OR the abuse of a confidential relationship OR through any form of unconscionable conduct, artifice, concealment or questionable means OR who obtained title to property he ought not, in equity and good conscience hold and enjoy. *Id.* In the case of *Russell v. Douglas,* 243 Miss. 497, 505-06, 138 So. 2d 730, 734 (1962) (emphasis supplied), the supreme court cautioned against narrowly tailoring the situations in which a constructive trust can be imposed, stating:

> A constructive trust is a fiction of equity. It is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. The equity must shape the relief, and **courts are bound by no unyielding formula**.

Contrary to the representations by Jimmy's estate, there are many cases where Mississippi's appellate courts either have found that a constructive trust should be imposed without any finding that the parties were in a confidential relationship or where the courts have examined theories other than an abuse of a confidential relationship in deciding whether a constructive trust is an appropriate remedy.

In the case of *Arrington v. Castle,* 909 So. 2d 1135, 1137-38 (¶6-7) (Miss. Ct. App. 2005), the court of appeals considered whether a constructive trust should be imposed solely on the principles of wrongdoing and unjust enrichment and never mentioned that a confidential relationship was a required element.

In the case of *In Re Estate of Law,* 869 So. 2d 1027 (¶3, 11-14) (Miss. 2004), the Mississippi Supreme Court affirmed a chancellor's decision to impose a constructive trust based on fraud alone without any discussion of a confidential relationship.

In the case of *McCord v. Spradling,* 830 So. 2d 1188 (Miss. 2002), the supreme court upheld the imposition of a constructive trust based solely on the theory of unjust enrichment.

In the cases of *Tatum v. Barrentine,* 797 So. 2d 223, 230-31 (¶30-32) (Miss. 2001) and *Saulsberry v. Saulsberry,* 232 Miss. 820, 833-35, 100 So. 2d 593, 598-99 (1958), the supreme court examined whether a constructive trust could be imposed based on three separate principles: fraud, abuse of confidential relationship, and unjust enrichment. It is respectfully submitted that if the only way a constructive trust could have been imposed was based on a confidential relationship (which the court found did not exist in those cases) and an abuse thereof, the court would not have analyzed the case on the alternative principles of fraud and unjust enrichment and would have simply stopped its analysis based on its finding that there was no confidential relationship.

In the case of *Dew v. Langford,* 666 So. 2d 739, 743 (Miss. 1995), the supreme court noted that a constructive trust can arise where a wrong has been committed coupled with unjust enrichment without ever mentioning that a confidential relationship is required.

In the case of *Planters Bank and Trust Co. v. Sklar,* 555 So. 2d 1024, 1034-35 (Miss. 1990) the supreme court held that a constructive trust can be imposed based solely on the dictates of equity and good conscience without ever mentioning that a confidential relationship is required.

In the case of *Allgood v. Allgood*, 473 So. 2d 416 (Miss. 1985) the supreme court upheld the imposition of a trust, although there was no finding that there was a confidential relationship.

In the case of *Pitchford v. Howard,* 208 Miss. 567, 583-84, 45 So. 2d 142, 147-48 (1950), the supreme court found that a constructive trust could be imposed based solely on fraud without finding that the parties were in a confidential relationship.

The cases cited by Jimmy's estate for the proposition that a confidential relationship is required in order for a court to impose a constructive trust can be easily distinguished. In *McNeil v. Hester,* 753 So. 2d 1057, 1064 (¶23) (Miss. 2000) the sole basis of McNeil's cause of action for a constructive trust was an abuse of confidential relationship. It was for this reason that the supreme court stated that the chancellor was required to find an abuse of a confidential relationship in order to impose a constructive trust. *Id.* at 1064 (¶23 and 27). The supreme court did not state that a constructive trust can never be imposed absent an abuse of a confidential relationship. Rather, in reaching its conclusion that the chancellor did not err in denying McNeil's request for imposition of a constructive trust, the supreme court specifically noted that McNeil failed to offer evidence of **fraud**, **duress**, **abuse of confidence**, OR **any type of unconscionable conduct**, **concealment**, OR **questionable means** on the part of Linda and Terry. *Id.* at 1070 (¶46). By this holding, it is

respectfully submitted that the supreme court acknowledged that other avenues (such as fraud, unconscionable conduct, or questionable means) are available for the imposition of a constructive trust beyond the abuse of a confidential relationship.

In *Van Cleave v. Fairchild,* 950 So. 2d 1047, 1055 (¶30) (Miss. Ct. App. 2007),the sole basis asserted for the imposition of a constructive trust was an abuse of a confidential relationship. It was for this reason that a confidential relationship was required in that case to impose a constructive trust. In fact, the Court of Appeals acknowledged in *Vancleave* that a constructive trust can arise through fraud OR duress OR abuse of confidence OR commission of wrong OR by any form of unconscionable conduct. *Id.* at 1055 (¶29).

In the case of *In re Estate of Hood,* 955 So. 2d 943, 949 (Miss. Ct. App. 2007) the Court of Appeals did not hold that the only way a court could impose a constructive trust is through finding the abuse of a confidential relationship. Rather, the court cited case law that a constructive trust can arise out of an abuse of a confidential relationship. *Id.* at 949 (¶21). The court also cited case law which provides that a constructive trust can arise out of fraud, duress, or unconscionable conduct. *Id.*

Jimmy's estate incorrectly asserts that the court of appeals held in the case of *Thornhill v. Thornhill,* 905 So. 2d 747, 753 (¶18-21) (Miss. Ct. App. 2004) that a confidential relationship is required in order to impose a constructive trust. In *Thornhill,* the court of appeals noted that the supreme court has upheld the imposition of a constructive trust based solely on unjust enrichment without ever even discussing or identifying the confidence that was abused. On this basis, the court of appeals remanded the case for a determination of whether there was unjust enrichment which would warrant the imposition of a constructive trust. *Id.*

Jimmy's estate incorrectly asserts that the supreme court held in the case of *Summer v. Summer,* 224 Miss. 273, 80 So. 2d 35 (1955) that a confidential relationship is a threshold issue, without which a constructive trust cannot be imposed. Contrary to the assertions by Jimmy's estate, the supreme court in *Summer* actually examined other methods available for the imposition of a constructive trust, including, fraud, abuse of confidence, commission of a wrong, and/or unconscionable conduct. *Id.* at 277.

In *Planters Bank and Trust Co. v. Sklar,* 555 So. 2d 1024, 1034-35 (Miss. 1990) the supreme court imposed a constructive trust based solely on the dictates of equity, without ever mentioning or discussing that a confidential relationship was required.

In *Campbell v. Campbell,* 249 Miss. 670, 163 So. 2d 649 (1964), the supreme court did not hold that the proponent of a constructive trust must show the existence of a trust relationship and an abuse thereof. Rather, the court simply stated that the chancellor did not err in that case in finding that the evidence was insufficient to show a confidential relationship. *Id.* at 684.

In this case, the chancellor found that a constructive trust should be imposed based on the theories of unjust enrichment, equity and good conscience, abuse of a confidential relationship, abuse of a fiduciary relationship, and the holding in the case of *Allgood v. Allgood.* Because a chancellor is not limited to imposing a constructive trust based solely on the abuse of a confidential relationship, it was not error for the chancellor to impose a constructive trust based on the alternative theories.

The case of *Allgood v. Allgood,* 473 So. 2d 416 (Miss. 1985) is one of the cases where the supreme court found that a constructive trust was warranted even though there was no finding that the parties were in a confidential relationship. Although the chancellor relied on *Allgood* in concluding that the Joels were entitled to a constructive trust; Jimmy's estate has made no attempt

to distinguish *Allgood* in its brief nor has it assigned as error the chancellor's decision to impose a constructive trust based on the principles stated in *Allgood.*

In *Allgood,* a mother mentioned to her son that a piece of property that was for sale in Jasper County. The son asked his mother to make arrangements for him to purchase the piece of property because he lived out of state. *Id.* at 418. The mother, who was a legal secretary, negotiated a loan for the purchase of the property in the amount of $3,500 which was to be repaid in 36 monthly installments. *Id.* at 419. The mother had the seller deed the property to her, instead of to her son. *Id.* In addition, the mother signed the deed of trust and the promissory note associated with the bank loan which was used to finance the purchase of the property. *Id.* Thereafter, the mother sent the son the deed and the installment note. *Id.* When the son questioned why the property had been conveyed to her instead of him, his mother explained that it would make it easier for her to look after the property since he lived out of state. *Id.* Thereafter, the son paid 33 of the 36 installments. *Id.* The mother paid 3 of the installments during a period of time when the son was unemployed. *Id.* The son filed suit to assert his interest in the land under various trust theories. *Id.* at 420.

After a hearing, the chancellor found that a resulting trust arose by implication of law out of the conveyance to the mother. *Id.* at 420. It was noted that, the mother had record title to the property with respect to which she was out of pocket not one penny, while the son, on the other hand, paid the entire purchase price of the property and had nothing. *Id.* The chancellor thereafter entered a decree declaring son to be the true lawful and legal owner of the land in question and directed the mother to convey the premises to the son free and clear. *Id.*

The mother perfected her appeal to the supreme court asserting that the facts were not sufficient to show a trust relationship between her and her son. *Id.*

The supreme court began its analysis by noting that, although the chancellor imposed a resulting trust, the facts import a constructive trust. *Id.* at 421. The supreme court then noted that a constructive trust is a means recognized by the law to force someone who unfairly holds a property interest to convey it to the person to whom it justly belongs. *Id.* "It prevents unjust enrichments." *Id.* The supreme court concluded that based upon the facts, the chancellor correctly held that the mother unfairly holds title and ought to be required to convey it to her son. *Id.* The supreme court concluded that "it requires little imagination to perceive that upon the facts . . .[the mother] unfairly holds title and ought in equity be required to convey it to [her son]." *Id.* at 421.

The facts of the case of *Allgood v. Allgood,* 473 So. 2d 416 (Miss. 1985) are almost directly on point with the facts of this case. Like the mother in the *Allgood* case who was the one who brought the subject property to her son's attention, Jimmy in this case encouraged Mr. and Mrs. Joel to buy the Avery Street property. (TT 12-13, 65-66). Like the mother in the *Allgood* case who made all of the arrangements with the bank, Jimmy made all of the arrangements for the financing of the Avery Street house. (TT 16-19, 71, 90, 93-94). More egregious than the mother in the *Allgood* case, Jimmy led the banker who financed the purchase to believe that the home would be owned solely by Mr. and Mrs. Joel. (TT 93-94, 102, 113-14). Like the son in the *Allgood* case, Mr. and Mrs. Joel in this case never agreed for any interest to be conveyed to Jimmy. (TT 21, 25, 87-88) (RE 2). However, Jimmy, in this case, like the mother in the *Allgood* case, arranged for the owner of the property to convey an interest to him. (TT 118-24, TE 9) (RE 2, 6). Like the mother in the *Allgood* case who led her son to believe that even though her name was on the deed, the property was his, Jimmy led his parents to believe that by placing the property in a life estate, it would belong to Mr. and Mrs. Joel to do with as they wished, including selling or devising it. (TT 14-16, 22, 41-42, 91)

(RE 2). Similar to the mother in the *Allgood* case, Jimmy in this case received an interest in the subject property for which he paid not one penny. (TT 36, 276). Similar the son in the *Allgood* case, Mr. and Mrs. Joel made all of the payments on the Avery Street property. *Id.* Just as the supreme court found in the *Allgood* case that based on these facts there was sufficient proof for the imposition of a constructive trust, the chancellor correctly found in this case that these facts constitute clear and convincing proof that warrant the imposition of a constructive trust. (TT 972-74).

B. The Chancellor Correctly Found A Confidential Relationship Between Jimmy and The Joels Which Was Abused

It is respectfully submitted that based on the case law cited above, a confidential relationship is not a prerequisite to the imposition of a constructive trust, and the chancellor correctly considered alternative theories. However, even if the Court finds that a confidential relationship (and an abuse thereof) is required to establish a constructive trust, the chancellor in this case found that Jimmy was in a confidential relationship with his parents which he abused. The chancellor did not err in this finding. For this additional reason, the chancellor's decision should be affirmed.

i. Definition of Confidential Relationship Necessary To Impose A Constructive Trust

The supreme court has held that

> [w]hile a confidential or fiduciary relationship does not in itself give rise to a constructive trust, an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against the another generally suffices to ground equitable relief in the form of the declaration of a constructive trust, and the **courts are careful not to limit the rule or the scope of its application by a narrow definition of fiduciary or confidential relationships protected by it.** An abuse of confidence within the rule may be an abuse of either a technical fiduciary relationship or, of an informal relationship where one person trusts in and relies upon another whether the relation is a moral, social, domestic, or merely a personal one. The origin of the confidence imposed is immaterial. A confidential relationship within the rule need involve neither a promise for the benefit of another nor an express fiduciary relationship.

Saulsberry, 223 Miss. 684, 78 So. 2d 758 (1955) (emphasis supplied). In the case of *Allred v. Fairchild,* 785 So. 2d 1064, 1068 (¶9) (Miss. 2001), the Mississippi Supreme Court noted that "[i]n harmony with the equitable purpose of constructive trusts, we are careful not to apply too narrow a definition of confidential relationship." See Accord *Sunflower Farms v. McLean,* 223 Miss. 72, 101 So. 2d 355 (1958).

a. Chancellor Not Required to Apply Checklist Proposed By Jimmy's Estate Before Finding Confidential Relationship

Contrary to the spirit of constructive trust law, Jimmy's estate asserts that the chancellor should have applied a narrow checklist of six factors before finding that the Joels were in a confidential relationship with Jimmy which Jimmy abused justifying the imposition of a constructive trust. (Appellants' Brief at 35-36, 41, 44-45). Jimmy's estate has not cited a single constructive trust case wherein the supreme court or the court of appeals has applied the six factors which Jimmy's estate claims is required in order for a chancellor to find a confidential relationship in a constructive trust case. Instead, the cases that Jimmy's estate cites for this proposition do not involve constructive trusts but rather involve setting aside intervivos transfers of property or setting aside a will based on undue influence arising out of a confidential relationship. *In re Estate of Holmes,* 961 So. 2d 674 (Miss. 2007); *Wright v. Roberts,* 797 So. 2d 992, 998 (Miss. 2001); *In re Estate of Dabney,* 740 So. 2d 915, 919 (Miss. 1999); *In re Estate of Grantham,* 609 So. 2d 1220, 1224 (Miss. 1992); *Costello v. Hall,* 506 So. 2d 293 (Miss. 1987); *Hendricks v. James,* 421 So. 2d 1031 (Miss. 1982); *Campbell v. Campbell,* 249 Miss. 670, 163 So. 2d 649 (1964); *In re Estate of Hall,* 2009 WL 1668494 (Miss. Ct. App. June 16, 2009); *In re Caspelich,* 2009 WL 514199 (Miss. Ct. App. April 14, 2009); *Stevens v. Estate of Smith,* 2009 WL 514199 (Miss. Ct. App. Feb. 17, 2009); *In re*

Conservatorship of Simpson, 3 So. 3d 804 (Miss. Ct. App. Feb. 17, 2009); *In re Estate of Summerlin,* 989 So. 2d 466 (Miss. App. 2008); *Spencer v. Hudspeth,* 950 So. 2d 238 (Miss. Ct. App. 2007). These are two entirely different scenarios. In the *VanCleave v. Fairchild* case, the court of appeals noted that the checklist of factors which Jimmy's estate proposes are required to establish a confidential relationship necessary **to set aside an intervivos transfer of property based on undue influence**. *Vancleave,* 950 So. 2d 1052 (¶17). Whereas, in describing a confidential relationship necessary to establish **a constructive trust** the court makes no mention of the checklist of factors which Jimmy's estate suggests is required. *Id.* at (¶29-30); *In re Estate of Hood,* 955 So. 2d 943, 946 (¶11) and 949 (¶21).

Because the supreme court has instructed that a narrow definition should not be applied to a confidential relationship necessary to impose a constructive trust and because the supreme court has never considered the checklist of factors proposed by Jimmy's estate in a constructive trust case, the chancellor did not err in failing to consider the checklist proposed by Jimmy's estate in this case. *Allred v. Fairchild,* 785 So. 2d 1064, 1068 (¶9) (Miss. 2001). The chancellor properly considered the factors considered by the supreme court in the *Russell* and *Anderson* constructive trust cases in finding a confidential relationship, and his decision should be affirmed.

Jimmy's estate further argues that a confidential relationship which supports a constructive trust can only arise where the defendant exercised a dominant / overmastering influence. (Appellants' Brief at 44). It is respectfully submitted that the overwhelming weight of constructive trust cases finding that the parties were in a confidential relationship make no mention that one of the parties exercised a dominant / overmastering influence, an indication that a dominant / overmastering influence is not required: *Allred v. Fairchild,* 785 So. 2d 1064 (Miss. 2001); *In re*

Estate of Horrigan, 757 So. 2d 165 (Miss. 1999); *Anderson v. Kimbrough,* 741 So. 2d 1041 (Miss. Ct. App. 1999); *Davidson v. Davidson,* 667 So. 2d 616 (Miss. 1995); *Alvarez v. Coleman,* 642 So. 2d 361 (Miss. 1994); *Russell v. Douglas,* 243 Miss. 497, 138 So. 2d 730 (1962); *and Pitchford v. Howard,* 208 Miss. 567, 45 So. 2d 142 (1950). In the alternative, even if the court finds that a dominant / overmastering influence is required. There is proof in this case that Jimmy dominated and overmastered the Joels in respect to the purchase of the Avery Street property as described in the paragraph below.

b. Chancellor Correctly Found A Confidential Relationship Which Was Abused

In this case, the chancellor correctly found that with regard to the purchase of the Avery Street property, Jimmy was in a confidential relationship, i.e., a moral, personal relationship, with his parents which he abused. Specifically, Jimmy was active in bringing about Mr. and Mrs. Joel's purchase of the Avery Street property in which he received the remainder interest. (TT 12-13) (RE 2). Jimmy's parents trusted and relied on him to handle all of the arrangements associated with the financing and the drawing up of the deed on the Avery Street property. (TT 18-19, 20-21, 29, 68, 90, 117-119). Jimmy encouraged his parents to place the property in a life estate. (TT 14-16) (RE 2). When Mr. and Mrs. Joel expressed concern that a life estate might prevent them from devising or selling the property, Jimmy misled his parents about the legal effects of a life estate. (TT 14-16, 22, 42, 91) (RE 2). Based on Jimmy's misrepresentations, Mr. and Mrs. Joel agreed to place the property in a life estate. (TT 14-16, 22, 87-88) (RE 2). Mr. Joel considered Jimmy to be skilled in real estate matters whereas Mr. Joel was not. (TT 42) (RE 2). Thereafter, Jimmy instructed Lindsey Meador to draw a deed conveying a life estate to Mr. and Mrs. Joel for the life of the first of Mr. or Mrs. Joel to die with the remainder to Jimmy, all the while knowing that Mr. and Mrs. Joel were

relying on him to make sure that Mr. and Mrs. Joel received a title Mr. and Mrs. Joel could devise or sell. (TT 29, 90, 117-119) (RE 2, 3). Because of their trust in Jimmy and their reliance upon him, Mr. and Mrs. Joel did not ask any questions at closing nor did they consult with another attorney. (TT 67-69, 71) (RE 2). Mr. and Mrs. Joel relied on Jimmy to make sure they would be able to sell / devise the Avery Street house. (TT 90) (RE 2). Jimmy failed to carry out his promise to his parents that they would receive a title that his parents could devise and/or sell, and instead, took advantage of his parents reliance and the trust they placed in him. This constitutes clear and convincing proof of Jimmy was in a confidential relationship with his parents which he abused.

In the case of *Anderson v. Kimbrough,* 741 So. 2d 1041, 1045 (¶16-17) (Miss. Ct. App. 1999), the Mississippi Court of Appeals found that a confidential relationship existed between the grantor and a grantee where the grantor and grantee had a close relationship and but for the grantor's confidence in the grantee, the conveyance from the grantor to the grantee would not have occurred. In reaching this conclusion, the court noted that a confidential relationship may be moral, domestic or personal one. *Id.* Based on this finding, the Court of Appeals held that the grantor held the property in trust for the grantee. *Id.*

In this case, the chancellor correctly found that Jimmy had a close relationship with his parents. (TT 29, 128). The relationship was both moral and personal. Jimmy visited regularly with the Joels, he advised the Joels regarding the purchase of the Avery Street house and handled the arrangements associated with the purchase, as well as negotiating the sale of their home on North Bayou. (TT 12-18, 20, 29, 68, 90, 93-94, 251, 276,). In the testimony of Mr. Joel, he put all of his trust in Jimmy when it came to the Avery Street transaction. (TT 29) (RE 2). But for Mr. and Mrs. Joel's confidence and trust in Jimmy, Mr. and Mrs. Joel would have never received a title to their

home which gave them only a life estate measured by the first to die, with Jimmy receiving the remainder interest to the exclusion of Mr. and Mrs. Joel's other two children.

Jimmy's estate incorrectly asserts that the *Anderson* court's analysis of the confidential relationship was dicta and should not have been relied on by the chancellor. (Appellants' Brief at 44). In *Anderson*, the appellate court spent three paragraphs discussing the confidential relationship and constructive trust issues, demonstrating that the confidential relationship / constructive trust discussion was not dicta. *Id.* at 1045-46 (¶15-17). After deciding those issues, the court stated "[w]e set the constructive trust issues aside" and went on to analyze the case under the alternative concept of a deed executed in lieu of a mortgage. *Id.* 1046 at (¶18). It is respectfully submitted that the court was simply making a transition to the next point in the case and was not indicating that the confidential relationship discussion was dicta. This is supported by the fact that at the end of the case, the court of appeals instructed the chancellor to consider the constructive trust theory on remand in the event the chancellor ultimately rejected the deed in lieu of mortgage theory. *Id.* at 1049 (¶31). Accordingly, the confidential relationship/constructive trust discussion was not dicta.

The chancellor's opinion that Jimmy was in a confidential relationship with his parents which he abused is also supported by the holding in the case of *Russell v. Douglas*, 243 Miss. 497, 138 So. 2d 730 (1962) wherein the supreme court found that a confidential relationship was abused and imposed a constructive trust in a case with facts directly on point with the facts in this case.

In *Russell v. Douglas*, Leroy and his wife brought suit in equity against his aunt, Gladys, for a decree declaring that certain land acquired by Gladys was held by her in trust for Leroy and his wife. *Id.* at 500. The facts leading up to the filing of the suit were as follows: Leroy had defaulted on a loan by Deeb construction which was secured by the property on which the Leroy lived. *Id.*

Thereafter, Deeb instituted eviction proceedings against Leroy in order to get possession of the property. *Id.* Leroy went to Attorney Cohn to work out a settlement with Deeb to get the property back. *Id.* at 502. Prior to this meeting with Attorney Cohn, Leroy had a conversation with his Aunt Gladys in which he was led to believe that she would loan him the money to get his property back. *Id.* After meeting with Leroy, Attorney Cohn wrote Deeb and told Deeb that Leroy would get the money to redeem his home from his relatives. *Id.* After extensive negotiations between Deeb and Attorney Cohn, Deeb agreed to execute a quitclaim deed to Leroy if he would pay $1,465.87, the amount owing to Deeb, plus expenses. *Id.*

Attorney Cohn thereafter contacted Gladys and her husband, and they told Attorney Cohn to have Deeb execute the deed in Gladys's name and to secure a quitclaim deed from Leroy to Gladys. *Id.* Thereafter, Gladys and her husband came to Mississippi and had Attorney Cohn prepare the quitclaim deed quitclaiming the property to Gladys for Leroy's signature. *Id.* Attorney Cohn had not had any further contact with Leroy. *Id.* When the quitclaim deed was prepared, Gladys's husband called Leroy and told him to go by Attorney Cohn's office and sign it. *Id.* Leroy went to Attorney Cohn's office and executed the quitclaim deed. *Id.* Leroy knew that he was executing a quitclaim deed to Gladys but no one explained the transaction to him. *Id.* At the time Leroy executed the quitclaim deed, Gladys and her husband were present and nothing was said about Leroy moving from the property. *Id.* After the quitclaim deed was executed by Leroy, Attorney Cohn made arrangements with Deeb for its execution of the quitclaim deed in favor of Gladys. *Id.*

After the quitclaim deed from Deeb arrived, Gladys's husband paid the $1,465.87, placed the deed of record, paid some back taxes, paid Attorney Cohn, and insured the house. *Id.* at 503. Gladys thereafter wrote Leroy and told him to vacate the premises. *Id.*

The proof demonstrated that Leroy only finished the 11th grade and had no experience in real estate transactions. *Id.* Gladys's husband, who assisted her in the transaction, was a college graduate. *Id.* The proof further revealed that the property was worth 3 times what Gladys paid for it. *Id.* The proof further demonstrated that although the deed of trust had been foreclosed on by Deeb, Leroy had not lost his property and at the time that the quitclaim deed was executed, Leroy had the right to redeem the property for $1,465.87. *Id.* The proof further revealed that Leroy received nothing for executing the quitclaim deed.

Leroy filed suit to have a constructive trust imposed. *Id.* at 500. The chancellor dismissed the suit because there was no specific agreement between Gladys and Leroy regarding the repayment of the loan and the kind of security that was to be taken. *Id.* at 504. Leroy appealed to the supreme court.

The supreme court held that there was a confidential relationship between Leroy and Gladys which Gladys had abused. *Id.* The supreme court based this finding on the following facts: Leroy felt close to his Aunt Gladys. *Id.* Gladys and Leroy had a joint lock box. *Id.* Gladys and Leroy had the same attorney and the attorney considered the relationship between Leroy and his aunt close enough that he did not find it necessary to inquire into what agreement they had in connection with the redemption of the property from Deeb. *Id.* at 505. When Gladys's husband asked that the deeds be made to Gladys instead of to Leroy, the attorney regarded the relationship as such that he did not think he needed to inquire as to what arrangements they had between them or that it was necessary to explain the effect of the transaction to Leroy. *Id.* The supreme court further found that Leroy never understood or had any reason to understand that he was losing his property. *Id.* On this basis, the supreme court found there to be a confidential relationship between Leroy and his aunt and that

Leroy relied on this relationship in allowing title to be placed in his aunt's name. *Id.*

In reaching this conclusion, the supreme court noted that "[c]ourts construe the term 'confidential relationship' liberally in favor of the confider and against the confidant for the purposes of raising a constructive trust." *Id.* at 505. The supreme court found that Leroy and Gladys had a confidential relationship, held that Gladys should be prohibited from becoming unjustly enriched at Leroy's expense, and ordered that a constructive trust be imposed. *Id.*

Similar to Leroy in the *Russell* case who felt very close to his aunt, Mr. and Mrs. Joel in this case had a close relationship with Jimmy as evidenced by the fact that they agreed to allow him to handle all of the arrangements associated with the purchase of the Avery Street property. (16-17, 18, 20-21, 29, 71, 90, 93-94, 234). Mr. Joel, Lindsey Meador, and Debra Joel testified that Jimmy and the Joels had a close relationship. (TT 29, 35-36, 128, 234). Mr. Joel and Jerry Bullock testified that Jimmy handled the discussions with Jerry Bullock at the bank in arranging for the financing of the purchase of the Avery Street home. (TT 18, 71, 93-94). Mr. Joel and Lindsey Meador testified that Jimmy told Mr. Meador how to draw the deed and handled the arrangements associated with the closing of the loan. (TT 20-21, 117-119) (RE 2, 3). Mr. and Mrs. Joel put all of their trust in Jimmy. *Id.*

Similar to Leroy, who was unsophisticated in real estate matters, so were the Mr. and Mrs. Joel in this case in comparison to Jimmy. (TT 11-12, 14-16, 89, 92, 115-116) (RE 2, 3).

Similar to Gladys who acquired her interest in the property for an amount three times less than what the property was worth, Jimmy, in this case, acquired his interest in the property for not one penny. (TT 36, TE 1 at pages 4 and 5) (RE 5).

Similar to Gladys in the *Russell* case who made all of the arrangements for the preparation

of the deed at issue, so did Jimmy in this case. (TT 20, 117-119) (RE 2, 3).

Just as Leroy had reason to believe that his aunt was acting for his benefit when she made the arrangements with attorney Cohen in the *Russell* case, Mr. and Mrs. Joel in this case had reason to believe that Jimmy was acting for their benefit in making the arrangements with Lindsey Meador for the preparation of the deed. (TT 14-16, 29) (RE 2).

Similar to the attorney in the *Russell* case who prepared the deed based solely on what Gladys told him because he considered the relationship between Leroy and Gladys close enough that he did not find it necessary to inquire with Leroy about the arrangements he had with his aunt nor did he think it necessary to explain the transaction to him, the attorney who prepared the deed to the Avery Street home in this case considered Jimmy's relationship with his parents close enough that he just assumed that the Joels were in accord with Jimmy's instructions and made no further inquiry. (TT 119, 123-24) (RE 3).

Similar to Attorney Cohen who did not explain the transaction to Leroy, no one from Lindsey Meador's office explained to the Joels anything about the title they were receiving to the Avery Street property. Specifically, Mr. Joel testified that nothing was explained to him or Mrs. Joel at closing. (TT 23-25) (RE 2). Margie Prescott and Lindsey Meador testified that they had no independent recollection of explaining anything to the Joels about how title was going to be vested. (TT 119, 123, 129, 157, 161) (RE 3, 4).

Just as nothing was said to Leroy when he signed the quitclaim deed about losing his interest in the property, nothing was said to Mr. and Mrs. Joel when they closed on the purchase of the Avery Street home about Jimmy getting the remainder interest or about Mr. and Mrs. Joel losing all interest in the property at the death of the first of Mr. or Mrs. Joel to die. (TT 21, 24-25) (RE 2).

Similar to Leroy who knew that he was executing a quitclaim deed but did not understand the significance of it, Mr. and Mrs. Joel, in this case, knew that the term life estate was being used; however, they did not understand the legal significance of the term. (TT 11-12, 14-16, 22, 75, 83-84, 87-88).

Similar to Leroy who never agreed for his aunt to receive the interest that she did in his home, Mr. and Mrs. Joel in this case never agreed to receive a title that restricted Mr. and Mrs. Joel's ability to sell or devise the property, and which vested in Jimmy at the death of the first of Mr. or Mrs. Joel. (TT 14, 21-22, 25, 42, 87-88).

Just as the supreme court found in the *Russell* case that Gladys was in a confidential relationship with Leroy which she abused, the chancellor in this case correctly found that there is clear and convincing evidence that Jimmy was in a confidential relationship with his parents which he abused and appropriately found the Joels were entitled to a constructive trust.

Jimmy's estate attempts to distinguish the *Russell* case by asserting that there was no terminal illness which required the Joels to depend on Jimmy. (Appellants' Brief at 46). There was no proof that the nephew in the *Russell* case had a terminal illness which required him to depend on the aunt, and yet, the supreme court found that he was in a confidential relationship with his aunt. Thus, this argument is without merit.

In an attempt to distinguish *Russell,* Jimmy's estate incorrectly represents that Margie Prescott explained the terms of the deed to the Joels at closing. (Appellants' Brief at 47). Contrary to Jimmy's estate's representations, Margie Prescott testified that she had no independent recollection of what took place at closing or whether she explained the life estate to the Joels. (TT 156-57, 161) (RE 4).

C. Proof Required to Establish Constructive Trust

Jimmy's estate incorrectly asserts that it is a well-established rule that the oral testimony of a proponent of a constructive trust is not sufficient to prove the existence of a confidential relationship or its abuse. (Appellants' Brief at 40). Not a single case cited by Jimmy's estate stands for this proposition. Instead, the supreme court authority cited by Jimmy's estate provides that the proof and facts necessary to establish a constructive trust must be clear and convincing and oral testimony should be received with caution. *Sojourner v. Sojourner,* 247 Miss. 342, 153 So. 2d 803, 809 (1963). *Harris v. Armstrong,* 232 Miss. 192, 200, 98 So. 2d 463, 467 (1957). A constructive trust "may be established by parole testimony notwithstanding the statute of frauds." *In re Estate of Horrigan,* 757 So. 2d 164, 170 (¶25) (Miss. 1999).

Jimmy's estate misrepresents that the case of *In re Estate of Pope*, 5 So. 3d at 427 (¶14) (Miss. App. 2008) was a constructive trust case as well as the holding in that case. In paragraph 14 of the *Pope* case, the Mississippi Court of Appeals in discussing whether a **will should be set aside based on undue influence**, stated that once a confidential relationship has been established and the presumption of undue influence arises, "the testimony of the proponents or interested parties is not sufficient **to rebut the presumption of undue influence**." *Id.*

The *Arrington v. Castle*, 909 So. 2d 1135 (Miss. App. 2005) case cited by Jimmy's estate has absolutely no mention of a confidential relationship. The issue in that case was whether there was sufficient proof to establish a constructive trust based on a wrong, plus unjust enrichment. *Id.* at 1139 (¶6). The plaintiff was an experienced attorney who initiated a transaction whereby the attorney deeded property to a 22 year old. *Id.* at (¶6-8). The attorney sued the 22 year old seeking to impose a constructive trust. In refusing to impose a constructive trust, the court of appeals noted

that there was no proof of wrongdoing by the 22 year old and that the attorney was the one who had initiated the transaction. *Id.* On this basis, the court of appeals held that the attorney's assertions did not rise to the level of clear and convincing evidence. *Id.* at (¶8). The court did not hold that a proponent's assertions can never establish a confidential relationship and an abuse thereof.

In any event, the chancellor relied on more than Mr. Joel's testimony in finding that a constructive trust was warranted: (1) Lindsey Meador and Jerry Bullock both testified that Jimmy was a sophisticated real estate investor. (TT 92, 115); (2) Debra Joel testified that Jimmy initiated Mr. and Mrs. Joel's purchase of the Avery Street home and initiated the discussion regarding placing it in a life estate. (TT 244-247); (3) Jerry Bullock testified that Jimmy came to see him to inquire about a loan to Mr. and Mrs. Joel to purchase the Avery Street home. Jimmy told Jerry Bullock that the Joels wanted to put up both the Avery Street and North Bayou homes as collateral to give Mr. and Mrs. Joel time to sell the North Bayou Street home. (TT 93-94); (4) Jerry Bullock also testified that it was represented to him that title to the Avery Street home was to be solely in Mr. and Mrs. Joel's names. (TT 93-94); (5) Jimmy alone handled the preparation of the deed. Lindsey Meador testified that Jimmy came to him alone and told him how Jimmy (not Mr. and Mrs. Joel) wanted the deed prepared - life estate for life of first of Mr. or Mrs. Joel to die with remainder to Jimmy. (117-119; 123-24) (RE 3);(6) The Conventional Real Estate Loan Application and Agreement to Provide Insurance signed by the Joels on the day of closing of the purchase of the Avery Street home indicated that title was to be in the Mr. and Mrs. Joel's names alone. (TE 1 at pages 25-26, 52) (RE 5); (7) Mr. and Mrs. Joel were the only one to execute the loan closing documents and were the only ones obligated to repay the indebtedness, indicating that even the bank that was making the loan was not advised by Jimmy of his remainder interest. (TE 1); (8) Lindsey Meador testified that if Jimmy

were to have the remainder interest, he should have been required to sign the deed of trust; however, a review of the loan closing documents reveals that Jimmy did not sign anything. (TT 121 and TE 1); (9) Jimmy did not contribute one penny to the purchase price of the Avery Street home. (TE 1 at pages 4 and 5) (RE 5); (10) John Fiser testified that a life estate, measured by the life of the first of Mr. or Mrs. Joel to die, was worth significantly less than what Mr. and Mrs. Joel paid for the Avery Street house. (TT 198-99) (RE 7); (11) Debra Joel admitted on cross-examination that she and Jimmy were heavily involved in Mr. and Mrs. Joel's sale of their home on North Bayou. (TT 274-76); (12) When Mr. and Mrs. Joel refinanced their Avery Street home after applying the proceeds from the sale of their North Bayou home in January of 2002, Mr. and Mrs. Joel indicated that title to the Avery Street home was in their names alone on the Conventional Real Estate Loan Application. (TE 1 at pages 9-10) (RE 5); (13) Debra Joel testified that after Mr. Joel learned that he only had a life estate, Mr. Joel asked Jimmy to correct the problem with the deed, and Jimmy told him, he would think about what could be done, but did so only to pacify him. (TT 269, CP 534 at ¶5). Jimmy did not tell Mr. Joel - this is what you agreed to and I am not changing the deed - which speaks volumes.

Jimmy's estate incorrectly asserts that the chancellor found that a confidential relationship existed between Jimmy and the Joels based on the fact that Jimmy was the Joels' son. (Appellant's Brief at 41). A review of the chancellor's opinion reveals that the chancellor reached this conclusion, not based on the father/son relationship, but rather based on the fact that Jimmy was active in bringing about the Joels' purchase of the Avery Street home, the Joels were unsophisticated in real estate matters as compared to Jimmy, Jimmy handled the arrangements associated with the financing and drafting the deed, Jimmy initiated the placement of the property in a life estate and

misrepresented to his parents the legal effects of a life estate, Jimmy knew that his parents were relying on him to make sure that his parents received a title his parents could devise or sell, Jimmy took advantage of his parents' trust in acquiring the remainder interest, and Jimmy was unjustly enriched. (CP 975-81). The court then correctly applied the holdings of the *Anderson v. Kimbrough*, 741 So. 2d 1041, 1045 (Miss. Ct. App. 1999) and *Russell v. Douglas,* 243 Miss. 497, 138 So. 2d 730 (1962) and found that Jimmy was in a confidential relationship with his parents which he abused.

D. Chancellor Was Entitled to Impose Constructive Trust Based On Unjust Enrichment and Equity and Good Conscience

i. Confidential Relationship Not Required

Jimmy's estate asserts that the chancellor was not entitled to impose a constructive trust based solely on the theories of unjust enrichment and equity and good conscience without first finding that a confidential relationship existed. (Appellants' Brief at 48). It is respectfully submitted that this assignment is without merit for two reasons.

First, the chancellor found that Jimmy and the Joels were in a confidential relationship which Jimmy abused. (CP 974-981).

Second, even if the chancellor erred in finding that the Joels were in a confidential relationship with Jimmy, the chancellor was still entitled to impose a constructive trust based on the theories of unjust enrichment / equity and good conscience. *McCord v. Spradling,* 830 So. 2d 1188 (Miss. 2002) (upholding the imposition of a constructive trust based solely on the theory of unjust enrichment); *Allgood v. Allgood*, 473 So. 2d 416 (Miss. 1985) (upholding the imposition of a trust, although there was no finding that there was a confidential relationship); *Dew v. Langford,* 666 So. 2d 739, 743 (Miss. 1995), (noting that a constructive trust can arise where a wrong has been

committed coupled with unjust enrichment without ever mentioning that a confidential relationship is required); *Planters Bank and Trust Co. v. Sklar,* 555 So. 2d 1024, 1034-35 (Miss. 1990) (holding that a constructive trust can be imposed based solely on the dictates of equity and good conscience without ever mentioning that a confidential relationship is required); *Arrington v. Castle,* 909 So. 2d 1135, 1137-38 (¶6) (Miss. App. 2005) (holding that a constructive trust can be imposed to prevent unjust enrichment); *Thornhill v. Thornhill,* 905 So. 2d 747, 753 (¶18-21) (Miss. Ct. App. 2004) (noting that the supreme court has upheld the imposition of a constructive trust based on unjust enrichment without ever even discussing or identifying the confidence that was abused and remanding the case for a determination of whether a constructive trust should be imposed to prevent unjust enrichment).

The *Spencer v. Hudspeth, In re Estate of Hall, In re Caspelich, Stevens v. Estate of Smith, In re Conservatorship of Simpson,* and *In re Summerlin* cases cited on pages 49-50 of Appellants' brief are not constructive trust cases and are not relevant.

ii. Court Properly Found Constructive Trust To Prevent Unjust Enrichment

The Mississippi Supreme Court has held

> [t]he doctrine of unjust enrichment. . . applies to situations where there is no legal contract but where the person sought to be charged is in possession of . . .property which in good conscience and justice he should not retain but should deliver to another. . . .

Hans v. Hans, 482 So. 2d 1117, 1122 (Miss. 1986). The question that must be answered is whether or not the person, in good conscience and justice, should be allowed to retain the property, and if he is allowed to retain the property, would the person be unjustly enriched. *Id.* "The best way to determine the question is to view the obvious and see whether a resulting or constructive trust may

be implied under the facts of th[e] case." *Id.* A constructive trust is a means recognized by the law wherein one who unfairly holds a property interest may be compelled to convey that interest to another to whom it justly belongs. *Id.* It prevents unjust enrichment. *Id.*

The chancellor correctly found in this case that Jimmy's estate would be unjustly enriched if he were allowed to retain the remainder interest in the Joels' Avery Street home based on the following facts:

(1) At Jimmy's suggestion, the Joels agreed to sell their home on North Bayou Road which was completely paid for and which the Joels owned in fee simple absolute and purchase the home on Avery Street; (TT 12-17, 36, 40, 65-66);

(2) The Joels purchased the home on Avery Street for which they paid in excess of $94,000, plus improvements of $3,382.01, without any assistance from Jimmy. (TT 36, 276, TE 1 at pages 4-5);

(3) At Jimmy's suggestion, the Joels agreed to place the Avery Street property in a life estate so long as it would not restrict the Joels' rights to devise the property equally to their three children at the death of the last of the Joels or sell the property before their death; (TT 13-16, 22, 41-42, 83-84, 86-88, 90-91) (RE 2);

(4) Jimmy incorrectly informed the Joels that a life estate would not prevent the Joels from devising the property or selling the property as set forth above; *Id.*

(5) The Joels were justified in relying on Jimmy's representations because he was experienced in real estate matters and had a greater knowledge of real estate law than did the Joels which induced the Joels to rely and act on his misrepresentations. (TT 11-14, 42, 89, 115-116). The Joels also placed their trust in their son, Jimmy, and relied on him to carry out their wishes. (TT 29);

(6) At the time that the Joels agreed to place the property in a life estate, their wills provided that their property went to the survivor of the Joels and if neither of the Joels survived, the property was to be divided among their three children equally. (TT 14-15) (RE 2);

(7) The Joels' home was the only asset of any value that they had to leave to their children. (TT 321);

(8) Jimmy handled all of the arrangements associated with the preparation of the deed, and instructed his personal attorney, Lindsey Meador, how to prepare the deed. (TT 20, 117-19) (RE 2, 3);

(9) Based on Jimmy's instructions, Lindsey Meador drew the deed which only granted the Joels a life estate for the life of the first of the Joels to die, with the remainder interest going to Jimmy. *Id.*;

(10) Jimmy took Mr. Joel to his banker Jerry Bullock to arrange for a loan to Mr. and Mrs. Joel to purchase and make improvements to the Avery Street house. (TT18-19, 93-94). Jimmy told Mr. Bullock what Mr. and Mrs. Joel needed and also told him that the Joels would own the home in Mr. and Mrs. Joel's names. *Id.*;

(11) The Joels never agreed to receive a life estate as that term is legally defined, nor did they agree to forfeit all interest in the property at the death of the first of the Joels to die, nor did the Joels agree for Jimmy to receive the remainder interest. (TT 14-16, 22, 41, 83-84, 87-88, 90-91) (RE 2). In fact, the Joels only agreed to receive a title which they could devise and/or sell. *Id.*;

(12) The purchase of the Avery Street property was the first time that Jimmy had ever been involved in a home purchase by the Joels, was the first time that Jimmy handled all of the arrangements associated with the financing and preparation of the deed, and was the first time that

the Joels acquired anything other than fee simple title. (10-12, 40, 88-89);

(13) Jimmy did not pay one penny toward the purchase price of the Avery Street property. (TT 19, 36, TE 1 at pages 4-5);

(14) The Joels have paid nearly $100,000.00 for the Avery Street property without assistance from anyone. *Id.*;

(15) The bulk of the payment for the Mr. and Mrs. Joel's Avery Street home came from the sale of their home on North Bayou, the sale of which was negotiated by Jimmy. (TT 36, 100, 274-76, TE 21);

(16) The amount the Joels paid for the Avery Street property greatly exceeded the value of the life estate. (TT 199-99); and

(17) Jimmy obtained his remainder interest via unconscionable conduct and questionable means.

In sum, the chancellor correctly concluded that because Jimmy led Mr. and Mrs. Joel to believe that they would have the equivalent of a fee simple title (one they could devise as well as sell) and because Jimmy did not pay anything toward the purchase price of the Avery Street property, Jimmy would be unjustly enriched if the property were to remain in a life estate with the remainder interest going to Jimmy.

Jimmy's estate argues that Jimmy was not unjustly enriched because the Joels received a life estate at a price that was substantially less than the fair market value. (Appellant's Brief at 50). This argument is without merit because even John Fiser, the expert appraiser for Jimmy's estate, testified that a life estate for two people in their seventies was worth significantly less than the $94,500 that the Joels paid for the Avery Street property. (TT 198-99) (TE 7).

iii. Principles of Equity and Good Conscience

Alternatively, the chancellor correctly found that the way that Jimmy obtained his title to the Avery Street property was in violation of the principles of equity and good conscience. A constructive trust is an appropriate remedy where a party obtains property which under the dictates of equity and good conscience should be possessed by another party. *Planters Bank & Trust Co. v. Sklar,* 555 So. 2d 1024, 1034-35 (Miss. 1990); *Saulsberry v. Saulsberry,* 223 Miss. 684, 78 So. 2d 758 (1955). It is raised by equity to satisfy the demands of justice. *Planters Bank & Trust Co. v. Sklar,* 555 So. 2d 1024, 1034-35 (Miss. 1990). The forms and varieties of constructive trusts are practically without limit. *Id.* For the same reasons stated above, the chancellor correctly found that Jimmy obtained his interest in the Avery Street property was in violation of the principles of equity and good conscience.

E. The Chancellor Correctly Imposed Constructive Trust Based on Gratuitous Agency

Jimmy's estate incorrectly asserts that the Joels did not plead a claim based on gratuitous agency and that it was error for the chancellor to consider this theory in finding that a constructive trust was warranted. (Appellants' Brief at 51).

In the amended complaint, the Joels asserted that Jimmy was in a fiduciary relationship with them which he abused. (CP 268 at ¶35). The Joels also alleged that Jimmy handled the arrangements with the bank and the drawing of the deed and that they had informed Jimmy that they wanted to receive a title they could devise and sell. (CP 261-264, 267-68). Instead, of arranging for Lindsey Meador to draw a deed which would give the Joels a title they could devise or sell, Jimmy instructed Lindsey Meador to place the property in a life estate to be measured by the life of the first of Mr. or Mrs. Joel to die with the remainder interest to Jimmy. *Id.* At trial, Mr. Joel testified that

he relied on and trusted Jimmy to handle the financial arrangements and the drawing of the deed and that the title he ultimately received was contrary to what he and Mrs. Joel had agreed. (TT 14-18, 20, 22, 25-26, 29-30). Thus, the chancellor appropriately considered the case under the theory that Jimmy was the Joels' gratuitous agent and owed them a fiduciary duty. Miss. R.Civ. Pro. 8.

Jimmy became Mr. and Mrs. Joel's agent and owed Mr. and Mrs. Joel a fiduciary duty to make sure that Mr. and Mrs. Joel's wishes were carried out when he undertook to make arrangements for the Joels' purchase of the Avery Street property and the preparation of the deed. The Mississippi Court of Appeals has held that

> [a] gratuitous [agency] relationship arises when an individual makes a promise or engages in other conduct which: (1) he should realize will cause another to reasonably rely upon the performance of definite acts of service by him as the other's agent, and (2) which causes the other to refrain from having such acts done by other available means.

Lee Hawkins Realty, Inc. v. Moss, 724 So. 2d 1116, 1119 (¶16) (Miss. App. 1998). The relationship between a principal and agent is a fiduciary one, demanding conditions of trust and confidence. *Robley v. Blue Cross / Blue Shield of Mississippi,* 935 So. 2d 990, 995 (Miss. 2006). A gratuitous agent occupies the same fiduciary relation to his principal as an agent for hire and is required to exercise the utmost good faith in dealing with his principal, owing his principal a duty to act solely for the benefit of his principal. RESTATEMENT (SECOND) OF AGENCY § 378 cmt d and 387 cmt c; 3 AM. JUR. 2D *Agency* §205; *Knecht v. Citizens & Northern Bank,* 528 A.2d 203, 205 (Penn. 1987); *Giordano v. Stubbs,* 184 S.E. 2d 165, 170 (Ga. 1971); *Home Undertakers, Inc. v. Bristow Building & Loan, Ass'n.,* 42 P.2d 259 (Ok. 1935); *SNML Corp. v. Bank of North Carolina,* 254 S.E. 2d 274, 280 (N.C. App. 1980); *Rodes v. Shannon,* 35 Cal. Rptr. 339, 343 (Ca. App. 1963). Where a gratuitous agent obtains property for himself instead of for his principal, he holds the property in

constructive trust. RESTATEMENT (SECOND) OF AGENCY §387 cmt c and illustrations.

In this case, the chancellor correctly found that Jimmy led Mr. and Mrs. Joel to believe that they would receive a title that Mr. and Mrs. Joel could devise or sell, and that Mr. and Mrs. Joel trusted Jimmy. (TT 14, 22, 29-30, 41, 67-68). Mr. Joel testified that Jimmy told him that "I will get Lindsey to close it for us." (TT 20) (RE 2). Lindsey Meador testified that Jimmy met with him alone and told him to place the property in a life estate with the remainder interest going to Jimmy at the death of the first of Mr. or Mrs. Joel to die. (117-119, 123-24) (RE 3). Mr. Joel testified that he relied on Jimmy to get the Avery house transferred to Mr. and Mrs. Joel as Mr. Joel understood it would be (a home they could devise and sell) based on Jimmy's representations to him. (TT 29-30). When asked what trust he put in Jimmy as it related to the transaction about acquiring the house, Mr. Joel testified, "All the trust. He was my son. I never doubted him about anything before." (TT 29) (RE 2). Mr. Joel testified he relied on Jimmy to take charge and make sure everything was done correctly. (TT 90-91) (RE 2). Mr. Joel testified that neither he nor Mrs. Joel met with Lindsey Meador prior to closing. (TT 20) (RE 2). Mr. Joel also testified that he did not ask any questions at closing, consult with another lawyer, or read the deed after he received it in the mail because he trusted Jimmy to handle everything. (TT 68-69, 73) (RE 2). Mr. Joel testified that in 2001 he didn't know what a life estate was and when Jimmy approached him about placing the property in a life estate, he told Jimmy, "I don't know anything about life estate." (TT 11-12, 14). Mr. Joel further testified that he considered Jimmy to be skilled in real estate matters, with a knowledge of the law superior to his. (42, 89). Jerry Bullock testified that Jimmy was one of the larger real estate investors in town, focusing solely on real estate investment type work. (TT 92). Lindsey Meador testified that Jimmy was an astute businessman with an emphasis in real estate and

that Jimmy knew the difference between fee simple and life estate as well as where title passed when a life estate terminates. (TT 115-116) (RE 3). Accordingly, Mr. and Mr. Joel were justified in relying on Jimmy. Thereafter, Jimmy assumed responsibility for having the deed prepared, causing Mr. and Mrs. Joel to believe that he was arranging to have a deed drawn to the Avery Street property which could be devised or sold by Mr. and Mrs. Joel. (TT 29, 90-91, 117-119, 123-24) (RE 2, 3). Because of Jimmy's actions and Mr. and Mrs. Joel's trust in Jimmy, Mr. and Mrs. Joel made no independent arrangements associated with the preparation of a deed nor did they ask any questions about the deed they ultimately received to the Avery Street property. (TT 29, 68-69, 73) (RE 2). Thus, Jimmy became a gratuitous agent of Mr. and Mrs. Joel, owing Mr. and Mrs. Joel a fiduciary duty.

The court correctly found that Jimmy took advantage of the trust Mr. and Mrs. Joel imposed in him when he caused Lindsey Meador to prepare a deed to the Avery Street property which granted Mr. and Mrs. Joel a title that Mr. and Mrs. Joel could not devise or sell and which granted Jimmy the remainder interest at the death of the first of Mr. or Mrs. Joel to die. Jimmy's actions were the epitome of self-dealing. The court correctly found that this proof constitutes clear and convincing proof of an abuse of a fiduciary relationship, entitling Mr. and Mrs. Joel to have a constructive trust imposed on the Avery Street property. RESTATEMENT (SECOND) OF AGENCY §387 cmt c.

In an attempt to assert that Jimmy was not the Joels' gratuitous agent, Jimmy's estate incorrectly asserts that Mr. Joel testified that he did not know that Jimmy made the arrangements with Lindsey Meador for the preparation of the deed. (Appellants' Brief at 52). Jimmy's estate has taken Mr. Joel's testimony out of context and has ignored Mr. Joel's testimony that Jimmy told him "I will get Lindsey to close it for us." (TT 20) (RE 2). Instead, Jimmy's estate cites a portion of Mr.

Joel's testimony where he was explaining how he learned the reason Lindsey Meador drew the deed in the manner that it was ultimately drawn. Mr. Joel testified that after Mike explained to him the problem with his deed, he met with Lindsey Meador, and learned from Lindsey Meador that Jimmy told Mr. Meador that Mr. Joel wanted the deed set up this way. (TT 20-21) (RE 2). He did not testify that he did not know that Jimmy had met with Lindsey Meador to discuss the deed until five years after the closing.

Jimmy's estate also incorrectly asserts that the chancellor was not entitled to impose a constructive trust based on a breach of a fiduciary relationship. The Mississippi Supreme Court has held that when one party acquires property in breach of the fiduciary relationship, he holds the property in constructive trust. *Allred v. Fairchild,* 785 So. 2d 1064, 1068 (¶9-11) (Miss. 2001); *In re Estate of Horrigan,* 757 So. 2d 165, 171 (¶28) (Miss. 1999); *Lackey v. Lackey,* 691 So. 2d 990, 996 (Miss. 1997); *Risk v. Risher,* 197 Miss. 155, 19 So. 2d 484, 487 (1944). Because Jimmy breached a fiduciary duty owed to his parents by self-dealing, the chancellor appropriately applied a constructive trust.

Issue 6.

Chancellor's Decision Was Supported by Clear and Convincing Evidence

Jimmy's estate asserts that the chancellor's decision to impose a constructive trust is not supported by clear and convincing evidence. The chancellor correctly found that there was clear and convincing proof that Jimmy wrongfully acquired his interest in the Joels' property. This proof is set out in Issue 5 above, and the Joels adopt by reference the proof set forth therein.

A. Jimmy's Representations Regarding Legal Effects of Life Estate Were False

Jimmy's estate also argues that Jimmy's representations to his parents about the legal effects

of a life estate were not false and that the chancellor erred in relying on these representations in concluding that the Joels are entitled to a constructive trust. (Appellants' Brief at 58-60).

Mr. Joel testified that, when Jimmy first initiated the conversation with the Joels about placing the property in a life estate,

> he told us what we needed to do was to put it in a life estate and said to protect it, you know, in case we got sick or something. I said as long as our wills are in effect, because of the 3 children, and that I can sell it if I need to, then I will agree. I said I don't know anything about life estate.

(TT 14) (RE 2). Jimmy told Mr. Joel, "oh, this won't have nothing to do with your wills. **It won't change a thing.**" (TT 14) (RE 2). Mr. Joel also testified that he had a second conversation with Jimmy as they walked into closing. (TT 22) (RE 2). Mr. Joel testified,

> I said, now Jimmy, son, I want you to be sure our wills are still in effect and that we can sell it if we need to later on. **He said, daddy, the life estate won't change anything about that**. I said, as long as you are sure.

Id.

Mr. Joel was asked to explain what he means by in effect, and Mr. Joel testified, "I mean when both of us was gone, it would go to all 3 children equally." (TT15-16) (RE 2). Mr. Joel understood, based on his conversations with Jimmy, that the house would be Mr. Joel's if Mrs. Joel died first and that the house would go to his 3 children equally after the last of Mr. and Mrs. Joel to die. (TT 42) (RE 2).

Later in the trial, Mr. Joel was asked specifically what conversations he had with Jimmy about the ability of Mr. an Mrs. Joel "to **sell the house** on Avery Street if somewhere down the road in the future [Mr. Joel] needed to do that." (TT 41) (RE 2). Mr. Joel testified, "[h]e said the life estate won't have any effect on that. We might want to go to an assisted living place. Might want

to sell it. **He said, you can sell it. The life estate won't matter**." (TT41) (RE 2). On redirect, Mr. Joel was again asked what Jimmy told him regarding the ability of Mr. and Mrs. Joel **to sell the Avery Street home**. (TT 91) (RE 2). Mr. Joel testified, "He told us we could sell it. There would be no problem. That wouldn't keep us from selling it." *Id.*

Mr. Joel testified that Jimmy never told Mr. Joel that the life estate was only as good as the life of the first of Mr. or Mrs. Joel to die, and that Jimmy never discussed with Mr. or Mrs. Joel setting up the title in the manner it was ultimately set up. (TT 22, 25-26) (RE 2).

Jimmy's estate argues that Jimmy did not mislead his parents because his parents could sell the life estate and their wills would still be valid and subject to probate. (Appellants' Brief at 58-59).

It is respectfully submitted that a review of Mr. Joel's testimony reveals that Jimmy told him that Mr. and Mrs. Joel could sell the Avery Street home, not the life estate interest as Jimmy's estate suggests. (TT 41, 91) (RE 2). Contrary to Jimmy's representations to his parents, a life tenant is not entitled to sell a fee simple interest in the property. 28 AM. JUR. 2d *Estates* §62 and §87. Thus, there is substantial credible evidence to support the chancellor's conclusion that Jimmy misled Mr. and Mrs. Joel when he caused them to believe that they would receive a title which would permit them to sell the Avery Street home, entitling the Joels to a constructive trust. (CP 971) (RE 2).

Jimmy's estate also suggests that Jimmy's representation to his parents that the life estate would not affect their wills and that it would not change a thing was not false. (TT 14, 22) (RE 2). It is respectfully submitted that contrary to Jimmy's representations, the life estate would affect their wills and it would change the way their property passed because the property placed in the life estate would not pass through their wills. Instead, property placed in a life estate passes to the remainderman upon the death of the life tenant. 51 AM. JUR. 2d *Life Tenants and Remaindermen*

§32 and §67. Mr. Joel clearly told Jimmy that it would only be okay to place the property in a life estate if he could sell the house and "as long as our wills are in effect, because of the 3 children." The only way that these statements could be interpreted was that Mr. Joel was asking Jimmy if the life estate would affect the property passing through the Joels' wills which left everything to their three children at the death of the last of Mr. or Mrs. Joel to die. To hold otherwise, would make Mr. Joel's inquiries to Jimmy meaningless. Why else would Mr. Joel have asked Jimmy if their wills would still be in effect "because of the 3 children" in connection with the property being in a life estate (especially since their home was the Joels' only asset of any significance), other than that Mr. Joel wanted to make sure the property would pass through his will. Jimmy's representations to Mr. Joel were that the life estate would not affect the property passing through the Joels' wills and that a life estate "won't change a thing" were simply not true. Thus, the chancellor's finding that Jimmy led the Joels to believe that they would have a title they could devise was also supported by substantial, credible evidence.

Jimmy's statements were misleading, entitling the Joels to a constructive trust. "One party to a business transaction is under a duty to exercise reasonable care to disclose . . . matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading." *Green Realty Management Corp. v. Mississippi Transportation Comm'n,* 4 So. 3d 347 (¶7) (Miss. 2009).

Jimmy's estate falsely alleges that Mr. Joel's testimony concerning where he understood the property was to go at the death of the last of Mr. or Mrs. Joel to die was conflicting. (Appellants' Brief at 59). It is respectfully submitted that this is a complete distortion of the record and that in each instance where Mr. Joel testified regarding this point, he testified that he understood from

Jimmy's representations that it would go to his three children equally. (TT 14, 15-16, 42, 83, 87-88).

B. Joels Were Entitled to Rely on Jimmy's Representations

Jimmy's estate also alleges that the Joels were not entitled to rely on Jimmy's representations regarding the legal effect of a life estate, alleging that the Joels were shown the deed at closing and that the life estate language was read to and explained to the Joels. (Appellants' Brief at 60-61). Jimmy's estate cites cases wherein the Mississippi appellate courts have held that a party is bound by a document which **he or she signs**. *Holland v. Peoples Bank and Trust Co.*, 3 So. 3d 94, 100 (Miss. 2008), *Ballard v. Commercial Bank of DeKalb,* 991 So. 2d 1201, 1207 (Miss. 2008), and *Brown v. Chapman,* 809 So. 2d 772, 776 (Miss. App. 2002). These cases are not applicable for three reasons.

First, in each of the cases cited by Jimmy's estate, the party was trying to avoid a legal document which the party signed. In this case, the Joels did not sign the deed to the Avery Street house. (TE 9) (RE 6). It was signed by the Shackelfords.

Second, none of the cases cited by Jimmy's estate are constructive trust cases. Whereas, in the case of *Russell v. Douglas,* 243 Miss. at 502 (described in paragraph 5(B)(i)(b) above), the supreme court held that a constructive trust could still be imposed even though the complainant knew he was signing a quitclaim deed, and he did not have his closing attorney explain the transaction to him where his aunt obtained her title through inequitable conduct. In this case, Mr. Joel testified that although he knew the term life estate was being used, he understood, based on Jimmy's representations, that he could sell and devise the Avery Street house. (TT 14-16, 75, 83, 87-88) (RE 2). Mr. Joel testified that neither he nor Mrs. Joel signed the deed, no one explained to them the kind of title that they were getting at closing, and he could not remember whether Margie

Prescott showed the deed to him. (TT 24) (RE 2). Margie Prescott testified that she had absolutely no recollection of whether she went over the life estate language or the remainder interest with the Joels at closing and that she could only remember showing them the deed, saying "this is the property you are buying and this is how your names are spelled." (TT 151, 156-57) (RE 4). Contrary to the representations by Jimmy's estate, there is absolutely no testimony from either Margie Prescott, Mr. Joel, or Lindsey Meador that the life estate language was read to and explained to the Joels at closing. (Appellants' Brief at 61). Lindsey Meador testified that he was not present, Margie testified that she had no recollection of going over this, and Mr. Joel testified that this was not discussed with them. (TT 24, 120, 131, 156-57).

Third, unlike this case, none of the cases cited by Jimmy's estate concerned misrepresentations regarding the true import of the legal document at issue, a factor that the court of appeals found to be worthy of note in *Brown,* 809 So. 2d at 775 (¶15). Thus, in this case, even if the Joels had been shown the life estate language in the deed (which there is no such proof in this case), there would have been no reason for them to question it as Jimmy had represented to them that by placing the Avery Street house in a life estate, the Joels could devise and/or sell it, which is exactly what they wanted to be able to do.

The Mississippi Supreme Court has held that a misrepresentation of law is actionable where the maker of the misrepresentation has or professes to have knowledge of the law superior to that of the person to whom the representation is made, inducing the person to rely thereon. *Pennsylvania Mutual Life Ins. Co. v. Nunnery,* 176 Miss. 197, 210 167 So. 416, 418 (1936).

In this case, it is undisputed that Jimmy's knowledge of the law regarding the legal effect of a life estate was superior to the Joels / and that Jimmy professed to have a superior knowledge

regarding life estates than the Joels. Mr. Joel testified that, when Jimmy initiated the conversation about placing the property in a life estate, Mr. Joel did not know what a life estate was, and he told Jimmy "I don't know anything about life estate." (TT 12, 14) (RE 2). Mr. Joel testified that he considered Jimmy to be skilled in real estate matters, while he was not. (TT 42) (RE 2). Jimmy did not tell Mr. Joel he did not know the answers to his questions in response to the inquiries from his father about whether he could devise or sell the Avery Street property if he agreed to place it in a life estate. (TT 14, 22) (RE 2). Instead, Jimmy answered Mr. Joel's questions thereby professing to have a knowledge of the law superior to the Joels. *Id.* Jimmy's attorney, Lindsey Meador, testified that Jimmy was an astute businessman with an emphasis on real estate, Jimmy knew the difference between fee simple title and a life estate, and Jimmy knew where the remainder interest passed at the death of the life tenant. (TT 116) (RE 3). It is clear that this testimony constituted clear and convincing proof from which the chancellor correctly found that Jimmy's knowledge regarding the legal effect of a life estate was superior to the Joels which induced the Joels to reasonably rely on his representations.

C. Chancellor Correctly Found that Jimmy Did Not Pay A Penny For the House

Jimmy's estate also alleges that the chancellor erred in finding that Jimmy did not pay anything toward the purchase price of the Avery Street property. Jimmy's estate asserts that the chancellor was required to accept its argument that Jimmy had "equity" in the house based on his contract to purchase the home from the Shackelfords for $94,500 and his appraiser's testimony that it was allegedly worth $20,500 more than the $94,500 price that his parents ultimately ended up paying for the house. (Appellants' Brief at 61-63, 66-68). Jimmy's estate asserts that if it had not been for Jimmy's alleged equity, the Shackelfords would have placed the house on the open market

and would have listed the house for $115,000-$120,000 which is more than the Joels could have afforded to pay for the house. (Appellants' Brief at 62). Thus, Jimmy's estate argues that it was Jimmy's alleged "equity" that allowed his parents to purchase the Avery Street home.

It is respectfully submitted that this argument is without merit for two reasons. First, Jimmy never exercised any option to purchase the house for $94,500. While he signed a contract, he never closed on the house and never paid one penny to the Shackelfords for the house. (TE 1). Jimmy's contract to purchase was certainly not something he would put on a financial statement. The Shackelfords ultimately sold the house to Jimmy's parents (who did not have an option to purchase like Jimmy allegedly did[10]) for $94,500, the same price they offered to sell the house to Jimmy. This is an indication that the Shackelfords would have sold the house to anyone who would pay the $94,500 which is what the Shackelfords obviously thought the house to be worth.

Second, the chancellor was entitled to reject the testimony of Mr. Fiser on direct examination that the house was actually worth $115,000 because Mr. Fiser admitted on cross-examination that the contract sales price of $94,500 is the best indicator of market value of the home. (TT 178, 185-90). While making this admission, Mr. Fiser testified that he did not consider the contract sales price in his analysis because he considered this to be a familial transaction (based on the names Joel and Joel) and that this affected his appraisal. (TT 189-90, 195-96). Mr. Fiser erred in this assumption because the contract at issue was between Jimmy and the Shackelfords (a nonfamilial transaction),

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[10]The only proof offered at trial of Jimmy's alleged "buy-back" arrangement with the Shackelfords was Debra Joel's testimony. (TT 239-40). Interestingly, no such "buy back" arrangement was in Jimmy's 1999 contract with the Shackelfords. (TE 4). Nor was any written proof regarding this alleged arrangement offered at trial. It should be noted that Jimmy's estate incorrectly represents in its brief that the buy back arrangement was included in Jimmy's original contract with the Shackelfords. (Appellants' Brief at 67).

wherein the Shackelfords agreed to sell the house to Jimmy (and ultimately to the Joels) for $94,500. Thus the chancellor did not err in finding that the contract sales price of $94,500 was the best indicator of the home's value in reaching his conclusion that Jimmy did not have any equity in the Avery Street home. In addition, Mr. Fiser also admitted on cross-examination that Mr. and Mrs. Joel paid $76.62 per square foot for the Avery Street house and that the comparables he used had a price per square foot which was in line with the $94,500 that Mr. and Mrs. Joel actually paid for the house. (TT 190-93; TE 17 at pages 160-73). The chancellor was entitled to rely on this testimony to reject Mr. Fiser's appraised value of $115,000 and to find that the home was worth no more than the $94,500 that the Joels paid for it. *Hollingsworth v. Bovaird Supply Co.*, 465 So. 2d 311, 314 (Miss. 1985) (holding that the basis of an expert's conclusions are open to cross-examination and the finder of fact is entitled to reject or accept the expert's testimony just like the finder of fact could reject or accept the testimony of any other witness).

In addition, Jerry Bullock testified that in his in-house evaluation of the Avery Street home, he gave it a value of $94,291.00, based on the contract sales price. (TT 96-97, 105). The chancellor was entitled to rely on Mr. Bullock's in-house evaluation based on the contract sales price as it was consistent with the testimony of Jimmy's estate's expert's, John Fiser's testimony that the best indicator of market value is what a willing buyer will sell to a willing seller. (TT 186).

Because Jimmy did not pay a penny toward the purchase price, because the expert presented by Jimmy's estate admitted on cross-examination that the contract sales price of $94,500 was the best indicator of value of the home, and because the $94,500 sales price was in line with the price per square foot of the comparables Mr. Fiser used, the chancellor correctly found that Jimmy did not have any equity in the home based on his unexercised "buy back arrangement."

Issue 7.

The Court Did Not Err In Vesting Fee Simple Title in the Joels

Jimmy's estate asserts that the chancellor erred in vesting fee simple title in Mr. and Mrs. Joel. At most, Jimmy's estate asserts that, the chancellor should have left the life estate in place but changed the remainderman language therein. (Appellants' Brief at 63-65).

It is respectfully submitted that the chancellor did not err in vesting fee simple title in Mr. and Mrs. Joel. Mr. Joel testified that after Jimmy approached him about placing the Avery Street house in a life estate, Mr. Joel told Jimmy that he and Mrs. Joel would agree to place the property in a life estate if Mr. and Mrs. Joel could sell the Avery Street house and if their wills would be in effect, passing the property to their three children equally at the death of the last of Mr. or Mrs. Joel to die. (TT 14-16, 22, 29, 41, 42, 83-84) (RE 2). Jimmy led the Joels to believe that a life estate would not affect the Joels' ability to devise or sell the Avery Street house. *Id.* Jimmy told his daddy that a life estate "won't change a thing." (TT 14). Thereafter, Jimmy told Mr. Joel that he would arrange for Lindsey Meador to close on the transaction. (TT 20). Jimmy, instead of instructing Lindsey Meador to draw a deed which would allow the Joels to sell the Avery Street house and pass the property under their wills, instructed Lindsey Meador to place the Avery Street house in a life estate for the life of the first of Mr. or Mrs. Joel to die with the remainder interest to Jimmy. (TT 14-16, 22, 29, 41, 42, 83-84).

"When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him to trustee. The equity must shape the relief, and the **courts are bound by no unyielding formula**." *Russell v. Douglas,* 243 Miss. 497, 505-06, 138 So. 2d 730, 733 (1962) (emphasis supplied). "In most cases where a

constructive trust is enforced against one in favor of another, the result is to restore the status quo. . . ." W. Fratcher, V *Scott on Trusts* §462.2, at 317-18 (1989). The only way to give the Joels a title that they can devise and sell (which is what Jimmy represented to them they would receive) is for Mr. and Mrs. Joel to have fee simple title. Thus, the chancellor correctly vested fee simple title in the Joels.

Issue 8.

The Chancellor Did Not Err In Denying Jimmy's Estate's Counterclaim

Jimmy's estate asserts that the chancellor erred in denying its counterclaim. (Appellants' Brief 65-70). First, Jimmy's estate asserts that it should have been awarded an equitable lien in the property based on the equity Jimmy had in the Avery Street house. The chancellor correctly found that Jimmy did not have any equity in the Avery Street home as discussed in Issue 6(C) above. Thus, the chancellor did not err in finding that Jimmy's estate was not entitled to lost profits / lost rent. In addition, Danny Barfield, the expert presented by Jimmy's estate to support its claim for lost profits / lost rental income, admitted on cross-examination that his opinion was based on the assumption that Jimmy put $94,500 into the purchase price and that if this assumption was wrong, his opinion would not be applicable. (TT 227-228). It is undisputed that Jimmy did not put one penny into the purchase price. (TT 36, 276, TE 1 at pages 4-5). For this additional reason, the chancellor was correct in denying the counterclaim for lost profits / lost rental income.

Second, Jimmy's estate asserts that it should have been awarded an equitable lien based on the improvements that Jimmy paid to have done to the Avery Street property. (Appellants' Brief at 69). Jimmy's estate incorrectly asserts that the only proof offered on this issue was the testimony on Debra Joel who testified that Jimmy did not intend for the improvements to be gifts. *Id.* Contrary

to the representations by Jimmy's estate, Mr. Joel testified that at times, when he or his son, Mike, tried to pay Jimmy for the improvements, Jimmy refused their offers. (TT 37-40, 81-82). Furthermore, there was no testimony presented that Jimmy ever told either Mr. or Mrs. Joel that he was paying for the improvements because he would own the house as soon as either Mr. or Mrs. Joel died. Thus, the chancellor correctly found that the improvements to the Avery Street property were gifts, made with no provision by Jimmy that he expected re-payment or because he would own the house as soon as Mr. or Mrs. Joel died. *City of Picayune v. Southern Regional Corp.*, 916 So. 2d 510, 518-19 (¶22) (Miss. 2005).

Conclusion

In the end, the questions that the Court must ask itself, when reviewing this case are:

Why would the Joels, who were in their 70's in 2001, have agreed to give up their only asset of any value, their paid for home on North Bayou, which they owned in fee simple absolute, in exchange for the Avery Street home, in which they only obtained a life estate until the death of the **first of the Joels to die**?

Why would the Joels have agreed to pay nearly $100,000 for the Avery Street home, which the Joels could not sell or mortgage in the event they needed to move into an assisted living facility, when they were concerned about this at the time they purchased the Avery Street home?

Why would the Joels have agreed to pay nearly $100,000 for the Avery Street home for a life estate measured by the first of them to die, a price even Jimmy's expert, John Fiser, admitted was way too much for the interest the Joels got in the Avery Street property?

Why would the Joels have agreed for Jimmy to get the remainder interest in the Avery Street home, while the survivor of the Joels is still alive and is wandering around homeless?

Why would the Joels have agreed for this remainder interest to go to Jimmy to the exclusion of the Joels' other children, Mike and Ann when their home was their only asset of any value they had to leave to their children?

Why would the Joels have asked their son Mike to review the Avery Street house deed wherein Jimmy got the remainder interest to the exclusion of Mike and Ann if the Joels knew that was how the deed read?

It is respectfully submitted that, in reviewing the proof in this case, the chancellor correctly found that the Joels' son, Jimmy, who instigated the entire transaction and handled all of the arrangements associated with the purchase of the Avery Street home, took advantage of his parents, engaged in self-dealing, and acquired his interest in the Avery Street house through deceit and questionable means, entitling the Joels to a constructive trust.

For these and all the reasons set forth herein, the Joels respectfully request that this Court affirm the chancellor's decision.

THIS, the 12th day of November, 2009.

Respectfully Submitted,

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CERTIFICATE OF FILING

I, Amy Chicorelli, secretary for Gerald H. Jacks, do hereby certify that I have filed the foregoing Appellees' Brief, 3 copies of said Appellees' Brief, along with a 3½ inch disc with the proper label containing said Brief by depositing on this day said documents/disc in the U.S. Mail (first class and postage prepaid) addressed to the clerk of the Mississippi Supreme Court.

THIS the 12th day of November, 2009.

Amy Chicorelli

CERTIFICATE OF SERVICE

I, Gerald H. Jacks, Attorney for Plaintiffs/Appellees, do hereby certify that I have this day mailed via U.S. Mail first class, postage prepaid, a true and correct copy of the foregoing Appellee Brief along with a 3½ inch disc with the proper label containing said Brief via U.S. Mail with postage prepaid to the following:

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The Honorable William Willard
P.O. Box 22
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Chancery Court Judge for the
Second Judicial District of
Bolivar County, Mississippi

THIS the 12th day of November, 2009.

Gerald H. Jacks