IN THE COURT OF APPEALS OF THE
STATE 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 MARITAL 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 APPELLANTS

ORAL ARGUMENT REQUESTED

Charles E. Ross (MSB NO. [redacted]
Bill Lovett (MSB NO[redacted]
WISE CARTER CHILD & CARAWAY
Professional Association
600 Heritage Building
401 East Capitol Street
Post Office Box 651
Jackson, Mississippi 39205
Phone: (601) 968-5500
Facsimile: (601) 968-5593

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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 representations are made so that the justices of the Court of Appeals may evaluate possible qualification or 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 Marital Trust and as Trustee for the James J. "Jimmy" Joel Family Trust, Appellant
4. Charles E. Ross, Esq., Attorney for Appellants
5. Bill Lovett, Esq., Attorney for Appellants
6. James H. Joel and Margaret R. Joel, Appellees
7. Gerald Jacks, Esq., Attorney for Appellees
9. Kathy Clark, Esq., Attorney for Appellees

THIS, the 24th day of August, 2009.

CHARLES E. ROSS (MSB NO. [redacted]
BILL LOVETT (MSB NO. [redacted]
ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATISES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

I. Whether this Court should conduct a *de nova* review of the findings of fact and conclusions of law when the chancellor's thirty-four (34) page opinion was virtually a verbatim copy of the proposed opinion submitted by Plaintiffs' counsel.

II. Whether the clear and convincing standard for imposing a constructive trust was met when the only evidence of the alleged misrepresentation upon which the trust was based was the oral testimony of the proponent (*i.e.*, Plaintiff), and the Plaintiff waited over six (6) years to file suit (after the person who supposedly made the misrepresentation had died, and cannot testify).

III. Whether the chancellor erred in allowing Plaintiffs to amend a sworn Complaint with a second sworn Complaint when; the second Complaint was flatly inconsistent with, and irreconcilable with, the first Complaint; the second Complaint was filed to avoid dismissal after Defendants moved for summary judgment; and all of the "facts" alleged in the first and second Complaints were based on the Plaintiffs' personal knowledge, which they had from the very beginning.

IV. Whether the chancellor erred by not dismissing on statute of limitations grounds Plaintiffs' claim that a life estate deed should be set aside because of alleged misrepresentations as to the meaning of a life estate made prior to the 2001 closing, when the statute of limitations on misrepresentation claims is three (3) years and Plaintiffs did not file suit until over six (6) years later in 2007.

V. Whether the chancellor erred in not dismissing the Plaintiffs' claims based on the doctrine of laches when Plaintiffs did not pursue their claim that they were misled as to the meaning of life estate language in a deed until over six (6) years after

the closing on the deed, and after the death of the person that supposedly misled the Plaintiffs, when Plaintiffs knew at the time of closing that the deed in question contained a life estate, could have consulted their lawyer at the closing or at any time thereafter, and the language of the deed was clear and unambiguous.

VI. Whether the chancellor erred in imposing a constructive trust when the chancellor did not consider or apply the factors mandated by this Court and the Mississippi Supreme Court in determining whether a confidential relationship existed.

VII. Whether the chancellor erred in finding a confidential relationship existed when the proponent of the constructive trust himself testified that he and his wife lived independently, were in good health, managed their own healthcare needs, handled their own finances, made their own financial decisions, had bought and sold several houses, had used lawyers a number of times, were not dependent on their son or anyone else in their daily lives, and generally made all of their own decisions, big or small.

VIII. Whether the chancellor erred by imposing a constructive trust based only on the Plaintiff's own subjective testimony that he "trusted" his son to explain to him the meaning of a life estate.

IX. Whether the chancellor erred by determining that a constructive trust could be imposed on the purported basis of unjust enrichment without first determining if a confidential relationship existed – *i.e.*, by finding that the land deal the Plaintiffs made with their son was a bad deal, and then using the "bad" deal as the basis for finding a confidential relationship.

X. Whether the chancellor erred in finding that a gratuitous agency relationship existed.

XI. Whether, assuming *arguendo* the existence of a gratuitous agency relationship, such a relationship can serve as the basis for finding that a confidential relationship exists when the mandatory factors for finding a confidential relationship have not been considered and the undisputed evidence shows that the mandatory factors cannot be satisfied.

XII. Whether the chancellor erred in finding there was "abuse" of a confidential relationship (assuming *arguendo* such existed) when both parties had legitimate reasons for entering into the agreement at the time, the language of the deed in question was unambiguous, the deed was presented to the Plaintiffs during the closing, the Plaintiffs accepted delivery of a properly recorded copy of the deed thereafter, and the Plaintiffs were represented by counsel during the closing and capable of timely seeking legal advice at any time thereafter.

XIII. Whether the chancellor erred in finding there was "abuse" of a confidential relationship (assuming *arguendo* such existed) when the only abuse alleged was that a lay person (the Plaintiffs' son) told his parents (the Plaintiffs) what he thought were the answers to their questions about the meaning of a life estate, the son's answers were, in fact, true and accurate statements, and there was no evidence the son was acting with any ill intent, in doing so.

XIV. Whether the Chancellor erred in finding that Plaintiffs' son "abused" a confidential relationship (assuming *arguendo* such existed) because he did not contribute "one penny" toward the purchase of the house at issue, when the undisputed evidence showed that he contributed $20,500 in equity, gave up

liquidity and control of that equity for the duration of the life estate, and the Plaintiffs and their son had valid reasons for entering into the deal at the time.

XV. Whether the chancellor erred in finding the value of a house was the amount asserted by Plaintiffs (*i.e.*, the contract price of $94,500), when the Plaintiffs submitted no expert testimony to support their assertion, and when Defendants' expert testified that the value in 2001 was $115,000.

XVI. Whether the chancellor erred in fashioning a remedy that gave the Plaintiffs fee simple title in the subject property (assuming *arguendo* any remedy was proper) when it was undisputed that the Plaintiffs bargained for a life estate in the property, knew that they received a life estate, and Plaintiff admitted that all he wanted was for the remainder interest to be reformed.

XVII. Whether the chancellor erred in denying Defendants' counterclaims for an equitable lien when it was undisputed the Plaintiffs' son put $20,500 in equity and paid for more than $8,000 in improvements to the subject property in exchange for a remainder interest in that property.

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STATEMENT OF THE CASE[1]

INTRODUCTION

The chancellor in this case undid a 2001 real estate transaction on the basis that the Appellees' son misled them about the meaning of a life estate they agreed to purchase in the property at issue prior to the closing on the property. In undoing the transaction, the chancellor erred by imposing a constructive trust on the remainder interest in the property held by the son's estate, without regard to the statute of limitations, which ran years before the Appellees filed suit and thus barred their claims, and without regard to the doctrine of laches, which stood as a further bar to their claims. The chancellor further erred by imposing a constructive trust without considering or applying the mandatory factors for determining the existence of a confidential relationship (a threshold issue in constructive trust cases) under circumstances in which the proponents of the trust (the Appellees) admitted that, at the time of the transaction,

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[1] References to the Record will be cited as "R." References to the trial transcript, which are volumes 8 and 9 of the Record, will be cited as "TT." References to the Record Excerpts will be cited as "RE." References to trial exhibits will be cited as "Ex. at p. __."

the son did not exert a dominant influence over them, and they were not dependent upon him in their daily lives. The chancellor also erred by finding that the testimony of the proponent of the trust, by itself, constituted clear and convincing evidence as to both the existence of a confidential relationship and its abuse, when the evidence overwhelmingly showed there to be no such relationship and no abuse. And, in denying the Appellants' equitable counterclaim, the chancellor erred by ignoring the overwhelming evidence that showed it to be valid. Because of these errors, as discussed in detail below, Appellants hereby seek relief from the chancellor's opinion and order granting Appellees' claims and denying Appellants' counterclaims.

This is a precedent-setting case, the importance of which goes well beyond the property at stake herein. Simply put, unless the chancellor is reversed and the original Deed put back into place, every land transaction between family members, friends, partners, and others in like situations will be subject to attack by one party based on nothing more than his own testimony that "he trusted the other party, and the other party misled him" – even after the accused party has died. If not reversed, the chancellor's ruling will create an issue of fact as to the three-year statute of limitations for claims of misrepresentation or fraud in every case involving the sale of real property, will eviscerate the clear and convincing standard for proving constructive trusts, and will open the door in every such case for the admission of parol evidence to explain clear and unambiguous language in land deeds. The certainty of contracts and deeds will be severely undermined, and people like the Defendants herein will be subjected to an unpredictable and wholly subjective judicial process in which their property can be taken from them based on little more than the opposite party's after-the-fact word.

Fortunately, this is not the law in Mississippi. When Mississippi's law of constructive trusts is properly applied, it is clear the chancellor erred, and his ruling in the Joels' favor should be reversed and remanded.

THE JOELS IN AUGUST, 2001

The Plaintiff's own testimony establishes that, in August of 2001, Plaintiffs-Appellees James Joel ("Mr. Joel") and his wife Margaret ("Mrs. Joel") (collectively "the Joels") were in good health[2], and did not depend on anyone for their day to day needs.[3] (TT 58; RE 37) Mr. Joel worked as a driver for local car dealerships, delivering cars to Tennessee, Alabama, Arkansas, Texas, Louisiana, Missouri and Georgia. (TT 46-47; RE 25-26) Mr. Joel used road maps when delivering an automobile to a town or dealership that was new to him. (TT 47; RE 26) Mr. Joel's job required him to go out of town once or twice a week. (TT 48-49; RE 27-28) During these times, Mrs. Joel stayed by herself, and cared for herself. (TT 48-49; RE 27-28) The Joels owned two (2) automobiles at that time, a pickup for Mr. Joel and a car that Mrs. Joel used to drive herself to the beauty shop, or wherever else she needed to go. (TT 48-49 & 52; RE 27, 28 & 31)

In August of 2001, the Joels managed their own financial affairs. They had a retirement account, bank accounts, and life insurance, all of which they administered and/or otherwise handled by themselves. (TT 50-53 & 235; RE 29-32) The Joels paid their bills themselves, and made all of their own financial decisions, including if and when to buy or cancel insurance policies, to take out a loan, to buy a new car, or to purchase a new house. (TT 52-55; RE 31-34) They were familiar with land transactions, having bought

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[2] Mr. Joel's physical and mental health were excellent in 2001. (TT 56; RE 35) Mrs. Joel was hospitalized once in 1997 for depression, but was of sound mind and in good physical health in 2001. (TT 48 & 57-58; RE 27 & 36-37)

[3] Mrs. Joel passed away prior to trial. As set forth in detail herein, Mr. Joel continues to live independently, drive, and make decisions for himself.

and sold several houses over the years. (TT 10-11) They had borrowed money from banks for home and house purchases on numerous occasions. (TT 49-50; RE 28-29)

The Joels also had experience with lawyers and managing their own legal affairs. In 1998, they had retained legal counsel to draft their wills (TT 320) and they had consulted with attorney Lindsey Meador regarding a potential legal claim prior to August of 2001. (TT 55-56, 116-17 & 125; RE 34-35) The Joels had also been represented by counsel in numerous house closings prior to August of 2001, and were familiar with the process. (TT 10-11) In every instance, the Joels provided their attorneys with all of the information they needed to handle each of these legal matters. (TT 56; RE 35)

In August of 2001, the Joels took care of all their own healthcare needs, driving themselves to the doctor when necessary, and taking care of any paperwork required by insurance or Medicare for payment of their bills. (TT 57 & 55, respectively; RE 36 & 34)

In short, the uncontradicted evidence showed that, in August of 2001, the Joels made all of their own decisions, both big and small, and that they were not dependent on their son Jimmy Joel ("Jimmy"), or anyone else, for assistance in their every day lives. Quoting Mr. Joel's own testimony, in which he summed up his detailed testimony as to this critical point, as set forth above:

> Q: You would agree that back in 2001, it's fair to say that you and Mrs. Joel were not dependent upon your son, Jimmy Joel, for your every day living.
>
> A: That's right.
>
> Q: That would extend to making decisions about finances, is that correct?
>
> A: Right.
>
> Q: That would extend to making decisions about what type of purchases you made, correct?

A: Right.

(TT 58; RE 37)

Every other witness at trial who testified as to the Joels' competence and independence, confirmed Mr. Joel's assessment, quoted above. (See, e.g., TT 112 (testimony of Jerry Bullock, the Joels' banker, that he considered the Joels to be competent to handle their own financial affairs, and to be independent "as far as making judgments"), 137 (testimony of Lindsey Meador, the Joels' attorney, that he perceived the Joels to be acting independently during the August, 2001 closing on the Avery Street property involved herein); 158 (testimony of Margie Prescott, Mr. Meador's legal assistant, that the Joels did not appear to be dependent upon, defer to, or be under the influence of, Jimmy during the aforementioned closing); and 234 (testimony of Debra Joel, the Joels' daughter-in-law and Jimmy Joel's widow, that Joels were not dependent on Jimmy in making decisions, and that the Joels made their own decisions)).

THE TRANSACTION

On August 21, 2001, the Joels closed on a house located at 808 Avery Street in Cleveland, Mississippi ("Avery Street Property" or "Property"). The house was originally built by Jimmy, who sold it to Michael and Michelle Shackelford (collectively, the "Shackelfords") for $93,500 in 1999 with the understanding that he would buy the house back for $1,000 over the original sale price if the Shackelfords should ever want to sell. (TT 236, 239-40; Ex. 4 at 70 (hereinafter RE 1)) When the Shackelfords contacted Jimmy in August of 2001 to accept his buy-back offer, Jimmy and Debbie tried to convince the Shacklefords to sell the house on the open market since the value was approximately

$20,000 more than Jimmy's 1999 buy-back offer of $94,500. (TT 240 & 242) The Shacklefords did not want to do this, however, preferring a quick sale to Jimmy. (TT 242) Shortly before the August 21, 2001 closing ("Closing"), the Shackelfords entered into a contract with Jimmy for the purchase of the Avery Street Property for $94,500, $1,000 more than they had paid Jimmy in 1999. (TT 239-40; Ex. 1 at 62 (hereinafter RE 2))

As explained below, the appraised value of the Avery Street Property at that time (August of 2001) was $115,000. (TT 178) Because of Jimmy's buy-back agreement with the Shackelfords, which allowed Jimmy and Debbie to buy the house at a price well below its appraised value, Jimmy and Debbie would have immediately realized $20,500 in equity in the house if they had closed on the deal by themselves. However, Jimmy knew that his parents, the Joels, wanted to move to a smaller home in a safer neighborhood and had been hunting for such a house, but had not been able to find anything they liked or could afford.[4] (TT 61-64) For these reasons, and for the additional reasons set forth in detail below, 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. (TT 245-47) Such an arrangement allowed Jimmy to preserve his $20,500 in equity in the house (and its anticipated appreciation), while at the same time allowing the Joels to live out their lives in a house that met their needs at a price they could afford. (TT 246-47)

Jimmy's Estate established through uncontroverted expert testimony at trial that the appraised value of the house in August of 2001 was $115,000, and that its appraised value in 2007 was $135,000. (TT 178; Ex. 17 at 160 & Ex. 18 & 174, respectively). Jimmy's Estate also put on expert testimony (again uncontroverted) showing that, if he had not

[4] Jimmy did not own or otherwise hold an interest in any of the properties the Joels looked at prior to the Avery Street Property. (TT 64)

allowed his parents to purchase a life estate in the Property, he could have put the Property up for sale for between $115,000 and $120,000 (TT 240), or, more likely, would have rented the house for approximately $1,000 per month, the going rental rate for such properties at the time. (TT 244) Jimmy's profit from such a sale, including what he would have made from reinvesting that profit, would have totaled $45,178 as of trial; if Jimmy had returned the Property to his rental inventory, he would have earned more than $56,333, to date. (TT 223 & 226, respectively) The Joels did not put on any expert testimony as to either these appraised values or Jimmy's lost profits.

Because of their equity, Jimmy and Debbie never considered selling the Avery Street Property to the Joels in fee simple for $94,500, or allowing them to step into the contract Jimmy negotiated with the Shackelfords as the buyers of fee simple title. (TT 245-46, 253) The only options discussed by Jimmy and Debbie were renting the Property to the Joels, or allowing them to purchase a life estate in the Property. (TT 244-46)

The Joels looked at the Avery Street property, liked it, and agreed to purchase a life estate in the Property. (TT 65-66 & 83) Both Jimmy and the Joels thought the life estate agreement was a good idea. (TT 83, 272-73) Also, the Joels had previously told Debbie that they could not afford to purchase another house priced at $105,000, much less the $115,000-$120,000 at which the Avery Street Property would have been listed had the Shackelfords put it up for sale. (TT 61) They could, however, afford to pay $94,500 for a life estate in the Property. Purchasing a life estate with a first to die provision also alleviated the shared concerns of Jimmy and the Joels about losing the house to Medicaid if they had to move into a nursing home, and about Ann Joel ("Ann"), Jimmy's sister, taking advantage of the Joels (or, more specifically, Mrs. Joel,

should she survive Mr. Joel), if the house were in the Joels' names alone[5] (TT 14, 66, 83, 247 284, 299, 309-10 & 317)

It is undisputed that the Joels knew that they were purchasing a life estate in the Property prior to the Closing, a fact the chancellor himself noted in his opinion. (RE 16, 18 & 41-42; TT 14, 16, 22, 74, 84; R 954-55) According to Mr. Joel, he and Jimmy discussed the life estate arrangement on several occasions. (*See id.*)

Jerry Bullock's bank financed the Joels' purchase, and Lindsey Meador's law firm handled the Closing. (TT 16, 20 & 90) Jimmy and the Joels had both used Mr. Bullock and Mr. Meador in prior, unrelated transactions. (TT 17, 70-71 & 112) Jimmy used them on occasion for real estate transactions relating to Jimmy's business. (TT 92) The Joels had previously (and independently of Jimmy) worked with Jerry Bullock, borrowed money from Mr. Bullock's bank, and consulted with Lindsey Meador regarding a legal matter. (TT 54 & 56; RE 33 & 35) Jimmy did not refer his parents to, and was not involved in any of the Joels' prior associations with, Mr. Bullock or Mr. Meador.

Mr. Joel and Jimmy went together to meet with both Mr. Bullock and Mr. Meador prior to the Closing to discuss the details of the transaction. (TT 18, 90 & 129) Jimmy also met with Mr. Meador on one occasion by himself, during which they discussed how the

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[5] Ann had a troubled past. Over the years, Ann had been married and divorced at least five (5) times, and she and her kids had relied on the Joels financially and lived with them extensively, over the years. (TT 58-60) Jimmy was concerned that, if the house were put in the Joels' name, alone, Ann would take advantage of them financially, and expose them to health risks and a lifestyle the Joels should not have to tolerate, *viz.*, bringing men home for overnight visits. (TT 247) And, Jimmy's concerns were not unfounded. During one of the periods in which Ann lived with her parents, Jimmy and Debbie discovered that Ann was undergoing treatment for genital herpes, a sexually transmitted disease. (TT 248)

Mr. Joel attempted to downplay his concerns regarding Ann (see e.g., TT 60), but every single request he made to Debbie and her sons to change the Deed involved either Mike or Jimmy's sons as the remainder men, to the exclusion of Ann. (TT 260, 283-84, 299-300, 310-312 & 315) (See also TT273 (testimony by Debbie that the purpose for not naming Ann as a remainderman in the Deed was to prevent her potential abuse of the Joels, and not to prevent her from getting her share of the Property after the Joels died)) In this case, Mr. Joels' actions speak louder than words.

life estate and remainder interests were to be listed on the Deed, how and with whom the Joels planned to finance their purchase of the life estate, and the reasons why the Joels and Jimmy wanted the life estate to be set up. (TT 117-19) Given the fact that the Avery Street Property was Jimmy's, *i.e.* one that he developed, built, sold, and contracted to buy back at a price substantially lower than its fair market value, it makes sense that Jimmy would discuss the form of the Deed with Mr. Meador. Jimmy's interest in protecting his equity and remainder interest, and in ensuring that the estates were set up in strict accordance with his agreement with the Joels. Jimmy's interests in the Property were just as substantive and meaningful as the Joels' interest in the Property.

The Joels, the Shackelfords and Jimmy attended the August 21, 2001 Closing.[6] (TT 142-43, 148, 151 & 164) Mr. Meador was in the law office during the entire Closing, met with Mr. Joel and Jimmy briefly in his office prior to the start of the Closing, and was available throughout the Closing should any question or concern arise with regard to any aspect of the Closing. (TT 23, 130, 133 & 157) Margie Prescott, Mr. Meador's legal assistant of more than twenty (20) years, conducted the mechanics of the Closing. According to Mrs. Prescott, she followed her long-time custom and practice of presenting the Deed to the buyer, confirming the spelling of each name shown on the face of the Deed, and confirming that the buyer understood that he was purchasing a life estate and that, upon his death, the property would pass to the person listed on the Deed as the remainderman.[7] (TT 156-57; R 480-81) Mr. Joel did not dispute that Ms.

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[6] Mr. Joel testified that Debbie also attended the Closing. (TT 22) However, every other witness with direct knowledge regarding the Closing, testified Debbie was not there. (TT 143 & 151) Mr. Joel was mistaken.

[7] Mr. Meador confirmed that it was also his routine practice to conduct life estate closings in the way Ms. Prescott described, and that he had trained her to conduct life estate closings in this way. (TT 131) Mr. Meador further testified that he was confident in Ms. Prescott's ability to conduct (continued...)

Prescott presented the Deed to him at the Closing, or that he could have read the Deed, but didn't. (TT 71-72) Neither the Joels nor Jimmy expressed any concerns during the course of the Closing with regard to the form of the Deed, or any other matter relating to the transaction. (TT 148)

On August 23, 2001, Mr. Meador mailed a copy of the properly recorded Deed to the Joels with the instruction "to keep this Deed in your safe deposit box or with your other important papers for safekeeping." (TT 135; Ex. 8 at 93 (hereinafter RE 3)) The Joels accepted delivery of the Deed, and put it and other papers from the Closing in a bank box under their bed. (TT 26) According to Mr. Joel, they did not read the Deed before storing it under their bed, but could have (and later did). (RE 9 & 20; TT 71-73 & 85)

The life estate language in the Deed was clear and unambiguous, reading in pertinent part:

> FOR A VALID, VALUABLE CONSIDERATION . . . **we**, MICHELLE A SHACKELFORD and husband MICHAEL L. SHACKELFORD . . . do **hereby convey, warrant, and deliver a life estate interest unto JAMES H. JOEL and wife, MARGARET R. JOEL, with the remainder interest to JIMMY J. JOEL**, said life estate to be measured by the life of the first to die of either life tenant, at which time the remainder shall vest in Jimmy J. Joel. . . .

(TT 128-29; Ex. 9 at 96-97 (hereinafter RE 4-5)) (emphasis added)

After the Closing, nothing was said about the Deed for more than four (4) years. (TT 85; TT 26 (testifying more specifically that this occurred at the end of 2005 or the beginning of 2006)) During this time, Jimmy, in his capacity as the remainderman for the Property, arranged for and paid for improvements to the house totaling over $8,000.[8] (TT

(...continued)
a life estate closing in a manner consistent with Mr. Meador's routine practice, and that he could not conceive of a situation in which Margie would act otherwise. (TT 132 & 134).

[8] This total did not include the cost of the vinyl siding and its installation, both of which Jimmy (continued...)

144, 209-10, 253-55; Ex. 12 at 112 (receipts for some of the repairs and improvements, but not including money spent by Jimmy for labor in connection with the concrete patio installed at the house, or the cost of vinyl siding installed by Jimmy on the house)) These improvements included painting the interior of the house, installing vinyl siding on the house, electrical work at the house, a remodeling of the bathroom, and labor costs for spreading the concrete when the patio was installed. (*See id.*) These improvements were not gifts from Jimmy to the Joels[9], but were instead done by Jimmy for the sole purpose of protecting his equity and future interest in the house. (TT 256) Mr. Joel knew that Jimmy was making these improvements to the Avery Street Property and that Jimmy was paying for them. (TT 81-82) Neither Mike nor Ann ever invested any money or equity in the house. (TT 281)

THE JOELS DECIDE THEY WANT TO CHANGE THE DEAL

In late 2005, well over four (4) years after the Closing (and long after the three-year statute of limitations had run on any claim they may have had relating to the Closing or the Property), the Joels asked their son Mike Joel ("Mike") to look at the papers in their lock box to "see if everything looks all right." (TT 26) Mike, with only his twelfth (12th) grade education and with no specialized knowledge, experience or training in real estate matters, immediately understood based on the plain language of the Deed that the life estate was set up in a way that the remainder would vest in

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[8](...continued)
paid for but for which no receipt could be found. (TT 254-55)

[9] One improvement to the Property arranged by and paid for by Jimmy was, however, a gift to Mrs. Joel for her birthday, with an accompanying note. (TT 256; Ex. 2 at p. 266 (with hand-written note that sated, "Momma, from Jimmy Deb & the boys")) This was the only improvement to the house that Jimmy did as a gift to his parents. (*Id.*) The cost for this gift/improvement was $321. (Ex. 2 at p. 66)

Jimmy, rather than all of the Joels' children, and that it would vest when the first of the Joels died. (TT 27-28)

At this point, and for the first time since the closing in 2001, the Joels sought legal advice regarding the Joels' life estate, consulting with an attorney retained by Mike in order to confirm Mike's reading/understanding of the Deed.[10] (TT 27; R 463) Thereafter, Mr. Joel talked to Jimmy about the life estate and how it was set up in the Deed. (TT 27-28) Quoting Mr. Joel:

> I told him it wasn't written up like we wanted it, like we talked about. And I said, I want to get it straightened out. I want it back like it was supposed to be[, meaning the remainder was supposed to go] to the 3 children equally.

(TT 28) Mr. Joel testified he had four (4) or five (5) such conversations with Jimmy. (TT 29)

Jimmy did not take any action to change the remainderman language in the Deed prior to his death in June of 2007. According to Debbie, Jimmy did not want to change the remainderman clause in the Deed because of the concerns he and Mr. Joel shared about Medicaid and Jimmy's sister Ann when they made the life estate agreement in August of 2001, and Jimmy's and Debbie's concern regarding the money they had invested in the Property since the Closing (e.g., their equity, its appreciation, and the numerous improvements to the Property for which they paid). (TT 247-49 & 273)

Jimmy died on June 9, 2007. (TT 259) Jimmy willed his remainder interest in the Avery Street Property to the Family Trust, the beneficiaries of which were his sons. (R 815 & 823-28)

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[10] The Joels did not consult with Mr. Meador at this time. Mr. Joel did, however, consult with Mr. Meador several months later (in the Fall of 2006) regarding a potential medical malpractice claim. (TT 136) Then, approximately one (1) year later, after Jimmy's death, Mr. Joel and Mike went to see Mr. Meadow for the first time to discuss the Deed. (TT 122 and 136) Mr. Joel did not raise any issue regarding the Deed with Mr. Meador during the Fall 2006 consult, even though Mike had read the Deed for the Joels months prior to this visit.

Shortly after Jimmy's funeral, Mr. Joel approached Debbie to ask that she help him "get the house thing straightened out." (TT 31) According to Debbie, Mr. Joel wanted to keep the Avery Street Property in a life estate, but wanted her to change the Deed so that Mike would hold the remainder interest in the Property. (TT 260) Debbie explained that Jimmy did not leave his remainder interest in the Avery Street Property to her, and that the Joels would have to talk to her sons about changing the Deed. (TT 260)

Thereafter, Mr. Joel spoke to Jimmy's sons Jeff and Jay, telling them the same thing, *viz.* that the Joels wanted to leave the Property in a life estate, but that "things were different now" that Jimmy was gone, and they (Jimmy's boys) needed to sign over their remainder interest in the property to Mike. (TT 283-84 & 310-12) According to Jay, Mr. Joel said that Mrs. Joel did not want Debbie to be "in charge of the house" (TT 310 & 312). They wanted Mike to "be in charge," instead, so that after they died, Mike could make sure the Property was split "a third to Ann, a third to Mike and a third to [Jimmy's sons]." (TT 315, 318-19)

In a separate conversation with Jimmy's son John, Mr. Joel again confirmed that he wanted the Property to remain in a life estate, and again requested that the remainder be signed over to Mike because "things were different now." (TT 299) This time, however, Mr. Joel also offered to leave the Deed exactly as it was, without any change as to who held the remainder, provided John and his brothers signed a letter agreeing that they would "make sure Ann and Mike got their share" of the Property after the Joels died.[11] (TT 300)

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[11] These requests by Mr. Joel that the remainderman be changed to Mike, or left the way it was with written assurances that Jimmy's sons would split the Property three ways upon the Joels' deaths as Mike was expected to do, underscores the fact that Mr. Joel shared Jimmy's concerns regarding (continued...)

In response to this new offer, John told Mr. Joel that he would take the offer to his brothers for consideration if Mr. Joel would get them a copy of the Joels' wills and the document the Joels wanted them to sign regarding the administration of the remainder interest after their deaths. (TT 300) Mr. Joel did not provide John or his brothers with any of the requested documents.[12] (TT 300) The Joels, instead, retained counsel and filed suit.

THE LAWSUIT

The Joels commenced the instant action on or about December 6, 2007.[13] (RE 6) In their Complaint, which they signed under oath ("Original Sworn Complaint"), the Joels based their claims on an alleged unilateral mistake on their part with regard to their interest in the Avery Street Property, as described in the Deed. (RE 7-10) Specifically, the Joels alleged that they assumed that the Deed had conveyed fee simple title to them, and were "shocked" to discover "several months" prior to the filing of their Original Sworn Complaint that they held a life estate interest in the Property, with the remainder going to Jimmy. (RE 9) The Joels' alleged mistake was, by their own admission, based on their failure to read the Deed during either the August 2001 Closing

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[11](...continued)
Ann. Mr. Joel did not include her in any scenario he proposed for changing the remainderman clause of the Deed, even though the simplest way to accomplish his alleged intent as to the remaindermen (to have the house split three ways when after the Joels died) would have been to have the Deed changed to include all three of the Joels' children as remaindermen.

[12] As set forth in detail below, Mr. Joel testified at trial that he made this offer to John, and he did so without disputing, refuting, or in anyway qualifying the details of the offer as testified to by John. (TT 320)

[13] The Joels sued Debbie in her official capacity as the Executrix of Jimmy's estate, and Lindsey Meador in his official capacity as the Trustee of the James J. "Jimmy" Joel Family Trust ("Family Trust"). Jimmy left his remainder interest in the house in question to the Family Trust. Since the beneficiaries of the Family Trust were Jimmy's and Debbie's four (4) sons, the Joels essentially sued their grandsons to take away property they inherited from their father.

or when they accepted delivery of the recorded Deed shortly thereafter. (RE 9) In the Original Sworn Complaint, the Joels made no mention of any false representations by Jimmy.

The Defendants ("Jimmy's Estate" or "Estate") answered the Joels' Original Sworn Complaint, asserted a counterclaim for the equity Jimmy contributed to the purchase of the house, its appreciation, and the money spent on improvements to the Property and, and then moved to dismiss and/or for summary judgment. (R 13 & 27, respectively) In lieu of a response to the Motion for Summary Judgment, the Joels sought and were granted leave to conduct summary judgment-related discovery, including the depositions of Debra Joel, Lindsey Meador, and Margie Prescott. (R 69 & 74; R 101)

Upon completion of the requested depositions, the Joels filed a motion for leave to amend their Original Sworn Complaint in a blatant attempt to avoid summary judgment. (R 102) To do so, however, required that the Joels plead a number of material facts that flat-out contradicted those alleged in their Original Sworn Complaint.[14] (*See infra*, n. 14 "Chart A") The most significant changes the Joels made

[14] The following chart details the material differences in the Original Sworn Complaint (RE 6) and the Joels' Amended Sworn Complaint. (R 259 (hereinafter (RE 13))

CHART A

ORIGINAL SWORN COMPLAINT	AMENDED SWORN COMPLAINT
Neither prior to nor during the closing did anyone discuss with the Joels the possibility that they would receive anything less than fee simple absolute title from the Shackelford Defendants. (RE 8 at ¶ 14)	Several weeks before the closing of the Joels' purchase of the Avery Street house Jimmy told the Joels they should have the property placed in a life estate. The Joels and Jimmy discussed the life estate several times. (RE 16-17 at ¶ 16 & RE 23 at ¶ 23)
The Joels were to receive a warranty deed vesting them with fee simple title. (RE 8 at ¶ 9)	The Joels told Jimmy to place their interest in the property in a life estate. (RE 17 at ¶ 19)

(continued...)

to their story in the amended Complaint (which they also signed under oath) (hereinafter "Amended Sworn Complaint"), were: (1) in the Amended Sworn Complaint, the Joels admitted that they knew about the life estate before the Closing, rather than only learning about the life estate shortly before filing suit in December of 2007 as they alleged in their Original Sworn Complaint; and (2) in the Amended Complaint, the Joels alleged that Jimmy made fraudulent misrepresentations to them prior to the Closing regarding the meaning of a life estate – conduct on which they based all of their claims for relief – whereas the Joels did not allege in their Original Sworn Complaint that Jimmy did or said anything wrong in connection with the Deed

[14](...continued)

The Joels assumed the warranty deed had conveyed fee simple title to them, and they placed the warranty deed in a safe place without reading it. (RE 9 at ¶ 15)	The Joels placed the warranty deed in a safe place without reading it based on their belief that a life estate allowed them to do everything they could do with a fee simple interest. (RE 17 & 17 at ¶¶ 19 & 27)
Several months ago, the Joels discovered that they did not have fee simple title to their home, but rather only a life estate. (RE 9 at ¶ 17)	At some time during late 2006 or early 2007, the Joels decided to review their legal papers and obtain legal advice regarding their interest in the property, at which time they became aware of the legal significance of their decision to take the life estate. (RE 20 at ¶ 29)
The Joels were convinced the warranty deed vesting them with a life estate interest was simply a mistake. (RE 9 at ¶ 18)	The Joels first discussed taking a life estate interest in the property with Jimmy "several weeks before the closing." However, at the time the Joels agreed to take the property as a life estate, they did not understand the legal significance of their decision. (RE 16-17 at ¶¶ 16 & 19)
The Joels assert that they are entitled to have the deed reformed to correct the mistake in the title, as it was supposed to convey fee simple title to them. (RE 10 at ¶ 22)	The Joels assert that they are entitled to have the deed reformed because Jimmy was guilty of an abuse of a confidential relationship, substantial overreaching, wrongdoing, unconscionable conduct, and/or fraud. (RE 21 at ¶ 34)

and life estate, asserting instead only a unilateral mistake on their part. (*See supra*, n. 14 "Chart A")

The alleged "misconduct" on which the Joels based their claims in the Amended Sworn Complaint consiste d of misrepresentations allegedly made by Jimmy prior to Closing. (TT 83-84) Quoting Mr. Joel's testimony:

> A: [Jimmy] told us what we needed to do was to put it in a life estate. . . . I said as long as our wills are in effect . . . and I can sell if I need to, then I will agree[15]
>
> Q: What was [Jimmy's] response to your telling him that?
>
> A. He said, oh, this won't have nothing to do with your wills. It won't change a thing.

(TT 14)

> Q: [T]his lawsuit boils down to . . . what you contend [Jimmy] said, [doesn't] it?
>
> A. Exactly. [Jimmy] said it twice, not just once. Before we started talking about [a life estate], I told him as long as our wills are in effect, that's fine. Then I made him be sure about it when we went to close![16]

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[15] The Joels alleged, and the chancellor found, that Jimmy made two statements that constituted misrepresentations, the other being that the Joels could sell their life estate if the need should arise. (*See, e.g.*,R 954-55) However, Mr. Joel, Debbie Joel, and Jimmy's sons Jay, Jeff and John all testified that the Joels wanted the life estate to remain in effect after Jimmy's death. (TT 260, 283-84, 299, & 310-12) Mr. Joel went so far as to testify that "all [he'd] ever wanted" was what he had told Jimmy's sons, *viz.*, for the house to go to Mike, Ann, and Jimmy's children in equal shares upon their deaths. (TT 319) Given this uncontradicted testimony by both Mr. Joel and Jimmy's wife and sons, the Joels waived any claim they may have had with regard to their inability to sell the Avery Street Property due to it being a life estate. To the extent that the chancellor ruled that fee simple title should be vested in the Joels based upon this alleged misrepresentation by Jimmy, the chancellor erred.

[16] With regard to the second occasion on which Jimmy and Mr. Joel allegedly discussed the life estate, Mr. Joel testified as follows:

> A. Mr. Joel, did you ever have any conversation before the closing with Jimmy about setting up the deed in this manner?
> Q. The only thing I said to him about it was, when we was fixing to walk into the office to do the closing, I said, now Jimmy, son, I want you to be sure our wills are still in effect and that

(continued...)

(TT 84).

The only testimony as to what Jimmy allegedly said regarding the life estate and its legal effect on the Joels' wills, was from Mr. Joel, quoted above. (TT 259 & 271) The only other person who knew what was said regarding these matters was Jimmy, who died six months prior to the Joels' filing their lawsuit and thus could not tell his side of the story. (TT 259 & 270)

The case proceeded to trial on January 27, 2009.[17] At the close of evidence, the chancellor ordered the parties to submit proposed findings of fact and conclusions of law. On March 2, 2009, the Joels e-mailed the chancellor their thirty-four (34) page proposed findings of fact and conclusion of law. (R 892-926). Jimmy's Estate submitted similarly detailed proposed findings of fact and conclusions of law. (R 927-50)

Just nine (9) days later, on March 11, 2009, the chancellor, without a hearing, issued the court's findings of facts and conclusions of law in which he adopted virtually verbatim each and every factual finding and legal conclusion proposed by the Joels – all 34 pages of them. (*Compare* R 892 & 951 (hereinafter RE 38)) The chancellor made no changes to either the form or substance of the Joels' submission, adopting even the headings and sub-headings used by the Joels in their proposed findings of fact and conclusions of law. (*Compare* R 892 & RE 38) The only changes made by the chancellor to the Joels' proposed findings of fact and conclusions of law were stylistic – literally, a word or phrase here and there. (*Compare* R 892 & RE 38) In short, the Joels'

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[16](...continued)

> we can sell if we need to later on. [Jimmy] said, daddy, the life estate won't change anything about that. I said, as long as you are sure.

(TT 22)

[17] Jimmy's Esatate moved for summary judgment on the Amended Sworn Complaint prior to trial. The chancellor denied the motion from the bench at the conclusion of oral arguments thereon.

attorneys wrote the chancellor's opinion, which ordered Jimmy's Estate to immediately transfer fee simple title to the Joels under a constructive trust theory, and denying the counterclaims asserted by Jimmy's Estate. It is from the chancellor's Order granting the Joels' requests for relief and denying the relief sought by Jimmy's Estate that Jimmy's Estate appeals to this Court. (RE 70-71)

SUMMARY OF THE ARGUMENT

In August of 2001, when the Joels[18] closed on the Avery Street Property, they knew that they were purchasing a life estate. Nevertheless, the Joels sued Jimmy's widow Debbie claiming that the Deed should be changed to give them fee simple title in the house because Jimmy allegedly misled them prior to the closing with regard to the meaning, or legal effect, of a life estate. And, the Joels waited until more than six (6) years after they closed on the house and accepted delivery of a filed copy of the Deed – after Jimmy had, in fact, died.

Of course, any claim for reformation of the Deed based on an alleged misrepresentation was, by this time, barred by the applicable three-year statute of limitations. So, too, was, any claim for reformation barred by the doctrine of laches, given the Joels' admitted knowledge of the life estate prior to the Closing. The Joels could have stopped the Closing with a word if they had merely read the Deed, or consulted with their attorney regarding the form of the Deed and/or the meaning of the life estate they were to receive pursuant to the Deed. The Joels could also have timely consulted with their attorney at any time after they accepted delivery of the Deed, but instead waited six (6) years to do so, and then only after Jimmy had died and was no longer available to tell his side of the story.

[18] Margaret Joel died in December of 2008. By agreement of the parties, the estate of Margaret Joel was substituted as a party hereto on February 26, 2009. (R 891)

The Joels further claimed that a constructive trust should be imposed as to the house based on Jimmy's alleged abuse of their trust in his alleged representations made prior to the Closing. However, the only evidence presented by the Joels in support of a confidential relationship came from Mr. Joel, the proponent of the constructive trust. Mr. Joel admitted that he and his wife lived independently, arranged their own financial and legal affairs, and were not dependent on Jimmy or anyone else in their daily lives and decisions. Mr. Joel further testified that he and Mrs. Joel "trusted" their son when he allegedly explained to them the meaning of a life estate.

The chancellor's decision to grant the Joels' request for a constructive trust on this basis should be reversed and remanded. The Joels totally failed to present clear and convincing evidence of a constructive trust. To find a constructive trust, a chancellor must first find that a confidential relatio nship exists, using the mandatory factors enumerated by the Mississippi Supreme Court ("Confidential Relationship Factors" or "Factors"), the purpose of which are to determine dependence and/or dominance. The chancellor must then find that there was an abuse of the confidential relationship, if such existed.

The Joels, by Mr. Joel's own testimony, admitted that none of the Factors were satisfied, and that he and his wife were not dependent on Jimmy in their daily lives or in making decisions.

The chancellor did not apply the Factors, as mandated by the supreme court and this Court, in determining the confidential relationship issue (which, by itself, is reversible error), but instead found a confidential relationship existed because the Joels' alleged trust in their son to correctly answer their questions regarding the meaning of a life estate, and/or because their son was their gratuitous agent. Moreover, in creating

a constructive trust on these bases, the chancellor ignored undisputed evidence and essentially worked backwards to find a confidential relationship from what the chancellor considered to be an unfair land transaction. This was improper as a matter of discretion on the chancellor's part, and as a matter of constructive trust law.

Further, the Joels presented no evidence of abuse (assuming only *arguendo* the existence of a confidential relationship). The chancellor erroneously found "abuse" based on the Joels' argument that Jimmy did not contribute "one penny" to the purchase of the house, even though the undisputed evidence showed that he, in fact, contributed $20,500 in equity toward its purchase. The chancellor further found abuse based on Mr. Joels' testimony regarding misrepresentations allegedly made by Jimmy, even though the representations were true and accurate responses to the Joels' questions. The chancellor also ignored the undisputed testimony that both the Joels and Jimmy had valid reasons for wanting to structure the transaction as they did at the time. The chancellor herein did not apply the mandatory factors for determining the existence of a confidential relationship and, in fact, ignored the admissions by Mr. Joel that none of the factors were satisfied. The Joels' claims were, at most, garden variety misrepresentation claims that were barred by the three-year statute of limitations and the equitable doctrine of laches.

Further, the chancellor erred in ordering Jimmy's Estate to turn over fee simple title in the Property to the Joels, when the evidence showed that, from the very beginning, the Joels only intended to purchase a life estate in the Property.

Even if it is assumed that the chancellor was correct in setting aside the Deed, which Jimmy's Estate denies, the chancellor nevertheless erred in denying the counterclaim asserted by Jimmy's Estate. It was undisputed that Jimmy contributed

more than $20,000 in equity toward the purchase of the property and that Jimmy paid for more than $8,000 in improvements to the house, all in exchange for his remainder interest. Yet, the chancellor ignored this undisputed evidence, and found instead that Jimmy did not contribute "one penny" toward the purchase of the house. In this, the chancellor obviously erred.

Given the chancellor's failure to make independent factual findings, his failure to consider critical evidence presented at trial, and his failure to properly interpret and/or follow Mississippi law, this Court should reverse the chancellor's rulings for the Joels, and remand this case.

ARGUMENT

I. The Chancellor's Failure to Make Independent Findings of Fact or Conclusions of Law Requires This Court to Conduct a *De Novo* Review of The Evidence and Record

A chancellor's decision to impose a constructive trust is a matter of law and subject to *de novo* review. *Van Cleave v. Fairchild,* 950 So. 2d 1047, 1051 (Miss. Ct. App. 2007). So, too, are the findings and conclusions of fact on which the chancellor based his decision to impose a constructive trust subject to *de novo* review when the chancellor adopts verbatim (or makes only minor alterations to) proposed findings and conclusions of fact presented by the prevailing party. *See Brooks v. Brooks,* 652 So. 2d 1113, 1118 (Miss. 1995) (finding that the findings of fact and conclusions of law adopted by the chancellor should not to be given deference, and that the record should therefore be reviewed *de novo*) (citations omitted); *Omnibank of Mantee v. United Southern Bank,* 607 So. 2d 76, 83 & 86 (Miss. 1992) (finding appellate court must "engage in a much more careful analysis of adopt[ed] findings than in cases where the findings

and conclusions have been authorized by the trial judge himself" and, upon *de novo* review, any findings of fact and conclusions of law that are not supported by substantial evidence must be reversed); *Rice Researchers, Inc. v. Hiter,* 512 So. 2d 1259, 1265 (Miss. 1987) (finding that a chancellor abuses his discretion by failing to make his own factual findings and conclusions of law, and "the appellate court must view the [adopted] findings of fact and the appellate record as a whole with a more critical eye to ensure that the trial court has adequately performed its judicial function"). *See also, Smith v. Orman,* 822 So. 2d 975, 978 (Miss. Ct. App. 2002) (finding that "minor alterations [to a party's proposed findings and conclusions of fact] do not affect the rule requiring a heightened level of scrutiny").

As previously stated (*see supra* at pp. 15-16 (comparing R 892 & RE 38), the chancellor herein adopted virtually verbatim the Joels' proposed findings of fact and conclusions of law, thereby "trigger[ing]" the "heightened scrutiny" standard, which requires this Court to conduct a *de novo* review of both the evidence on which the factual findings were based, and the record as a whole.[19] *Dept. of Human Serv.*, 997 So. 2d at 989-90; *Rice Researchers,* 512 So. 2d at 1266. If, upon *de novo* review, the Court finds that the findings of facts and conclusions of law adopted by the chancellor

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[19] The chancellor's conduct and comments at trial also corroborate that this Court must review the evidence and record *de novo*. For instance, the chancellor struck from the record and/or refused to let Debbie testify to matters he found to be hearsay, even though the Joels had not raised a hearsay objection. (TT 248 & 273) At one point, the chancellor allowed testimony by Debbie to which the Joels objected on hearsay grounds, but only after stating from the bench that her testimony (before she had even begun to testify) was "obviously self-serving." (TT 242) Such conduct and comments by the chancellor were improper and raise substantial questions as to the chancellor's objectivity as the trier of fact herein. *Cf., Mississippi United Methodist Conf. v. Brown,* 929 So. 2d 907 (Miss. 2006) (holding that a judge's statements indicating that he has already decided where fault lies or language showing that the judge has assumed the position of advocate for the plaintiff, show that the judge "[cannot] sit as an impartial administrator of justice"). The chancellor made no such comment about the testimony of Mr. Joel, who was seeking to obtain a constructive trust by his own testimony as to what Jimmy told him more than six (6) years earlier (when Jimmy was no longer able to tell his side of the story).

were not supported by substantial credible evidence, those findings and conclusions must be reversed. *See Van Cleave*, 950 So. 2d at 1051.

II. The Chancellor Erred in Allowing the Joels to Amend Their Original Sworn Complaint to Take Divergent Sworn Positions as to Material Facts That Were Based on Their Own Personal Knowledge of the Events From Which Their Claims Arose

A chancellor's decision to allow amendment of a complaint will be reviewed and reversed if the chancellor abused his discretion. *Fletcher v. Lyles*, 999 So.2d 1271, 1277 (Miss. 2009). As set forth in detail below, the chancellor's decision in this case should be reversed based on the doctrine of judicial estoppel.

The Joels alleged in their Original Sworn Complaint that they only became aware of the life estate language in the Deed a few months before filing suit in December of 2007. (RE 9 at ¶ 17) According to the Joels, they were never told at any time prior to the Closing that they would receive anything other than fee simple title in the Avery Street Property. (RE 8 at ¶ 14) The Joels asserted that the of life estate language in the Deed was simply a mistake that needed to be fixed. (RE 9 at ¶ 18) Then, faced with dismissal on summary judgment, the Joels requested leave to amend their Complaint to change their story – to allege that, while they admittedly discussed purchasing a life estate in the Property with Jimmy several times prior to the Closing, and, in fact, agreed to purchase a life estate rather than fee simple title, Jimmy misrepresented the legal significance of the life estate and thus abused their trust in him as their son. (RE 16-17 at ¶ 17, and RE 19 at ¶ 23) The chancellor granted the Joels' request to amend over the objections of Jimmy's Estate, thereby committing reversible error by allowing the Joels to take a divergent and irreconcilable sworn position as to

facts of which they had actual knowledge at the time they filed their Original Sworn Complaint.

Judicial estoppel "is directed against those who would attempt to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings." *Johnson Serv. Co. v. TransAmerica Insurance Co.*, 485 F. 2d 164, 175 (5th Cir. 1973). "[It] is designed to prevent parties from making a mockery of justice by inconsistent pleadings." *Id.* Under Mississippi law, the doctrine "prohibits a party in a judicial proceeding from denying or contradicting sworn statements made therein." *Banes v. Thompson*, 352 So. 2d 812, 815 (Miss. 1977). *See also Franklin v. Thompson*, 722 So. 2d 688, 695 (Miss. 1998) (citing *Banes v. Thompson*, as quoted above, with approval); 31 C.J.S. Estoppel § 121(so stating the rule). Thus, "a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation." *In re Estate of Richardson*, 903 So. 2d 51, 56 (Miss. 2005) (further finding that doctrine precludes a party from asserting a position, then retreating from that position later in the litigation, should it become more convenient or profitable to do so).

Neither reliance nor injury need to be shown in order for the doctrine of judicial estoppel to apply. *Johnson Serv. Co.*, 485 F. 2d at 175. A party is estopped merely by the fact that he previously pled facts under oath that are contrary to those sought to be made. 31 C.J.S. Estoppel § 121. In other words, the truth and the integrity of the judiciary are important and must be protected.

The doctrine of judicial estoppel was directly applicable to the Joels' request to amend their Original Sworn Complaint to allege "new" facts that were irreconcilably inconsistent with material facts previously alleged by the Joels under oath.[20] *See, e.g.,*

[20] This is not a case in which an attorney signed the complaints based upon what the attorney (continued...)

supra at n. 14 (Chart A). The Joels' request smacked of gamesmanship, given: the fact that they sought to amend their Original Sworn Complaint to change their story only after Jimmy's Estate filed its motion for summary judgment, seeking dismissal of the Joels' claims as a matter of law; and the fact that the contrary "facts" the Joels sought to allege in support of their new story and the Amended Sworn Complaint were based entirely on information in their possession, and about which they had direct knowledge, when they filed their Original Sworn Complaint.

Under these circumstances, the Joels' motion for leave to amend their Original Sworn Complaint should have been denied based on judicial estoppel. The chancellor therefore erred as a matter of law by allowing the Joels to amend their Original Sworn Complaint. Accordingly, the chancellor's findings of fact and conclusions of law based upon the Amended Sworn Complaint should therefore be reversed and rendered.

III. This Is Really A Case of Misrepresentation or Fraud, Barred By The Statute of Limitations

In their Amended Sworn Complaint and at trial, the Joels admitted that they knew they were purchasing a life estate in the Avery Street Property prior to the Closing. (TT 83 (testimony by Mr. Joel that he "knew" that he was purchasing a life estate when he went into the Closing)) The Joels' claims against Jimmy's Estate, as alleged in their Amended Sworn Complaint, and the chancellor's decision to impose a constructive trust as to Jimmy's remainder interest in the Avery Street Property, are built entirely upon alleged representations by Jimmy made prior to the 2001 Closing regarding the legal effect of a life estate; namely, that a life estate would not affect the Joels' wills. (*See* TT 83-84 (testimony by Mr. Joel that it was his understanding that a life estate would not

[20](...continued)
believed to be the facts of the case. The Joels signed both complaints, thereby endorsing under oath the truth and accuracy of the allegations set forth therein.

affect the Joels' wills, and that the house would still go to their three children in equal shares) The Joels contended, and the chancellor found, that they were misled by Jimmy's statements regarding the legal effect of a life estate, and that they were entitled to relief based upon their reliance on Jimmy's alleged misrepresentations.

Quoting the chancellor's finding in this regard,

> The Plaintiffs knew that the property would be placed in a life estate as Jimmy explained that term to them; however, the Court is persuaded that the Plaintiffs 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 told to them by Jimmy.

(R 966-67; RE 53-54) The chancellor did not find that Jimmy committed fraud, or even that Jimmy negligently misrepresented the effect of a life estate when answering the Joels' questions. The chancellor merely found that "Jimmy incorrectly informed the Plaintiffs that a life estate would not prevent [them] from devising the property. . . ." (R 969; RE 56)

Assuming only *arguendo* that Jimmy made the statements attributed to him, the statements were not actionable. Under Mississippi law, a claim to set aside a deed based upon an alleged misrepresentation or fraud must be asserted within three (3) years of the date on which the deed was recorded, otherwise it is barred by the statute of limitations. *See, e.g., Sullivan v. Tullos*, – So. 2d –, 2008 WL 4782450 *4 (Miss. App. Nov. 4, 2008) (finding the three-year statute of limitations found at section 15-1-49 of the Mississippi Code applicable to a claim to recover property allegedly procured through fraud); *McWilliams v. McWilliams*, 970 So. 2d 200, 202-04 (Miss. Ct. App. 2007) (holding that the three-year statute of limitations "applies to an action to set aside a deed on the basis of fraud" and cannot be tolled by a claim of fraudulent concealment if the

deed was recorded as a matter of public record) (citations omitted); *O'Neal Steel, Inc. v. Millette*, 797 So. 2d 869, 874 (Miss. 2001) (applying three (3) year limitations period and holding that a suit brought by one not in possession of land to obtain a decree setting aside a deed thereof as having been procured by fraud is one for relief on the ground of fraud, rather than action for the recovery of real property).

This Court recently addressed the statute of limitations for setting aside deeds in *McWilliams v. McWilliams*, cited above. In that case, which is directly on point, Frank McWilliams sued his brother John McWilliams, seeking to set aside a deed John allegedly procured by fraud. *See McWilliams*, 970 So. 2d at 201-02. According to Frank, his brother misled him as to the purpose for the deed transfer. *See id.* At issue was whether the applicable statute of limitations was the general three-year statute, or the ten-year statute for the recovery of land. *See id.* (citing Miss. Code §§ 15-1-49 & -7, respectively). This Court found that, because Frank's claim was predicated on fraud, the three-year statute was applicable, and that the statute began running on the date the deed was filed with the Sunflower County Chancery Clerk. *See id.* at 203. This Court further found that, because the deed was recorded in the chancery clerk's office, there could be no claim for tolling based on fraudulent concealment. *See id.* at 203-04.

The same is true in this case. It is undisputed that all of the statements allegedly made by Jimmy were made prior to the August 21, 2001 Closing. (TT 22 & 84) It is also undisputed that the Deed was filed with the Bolivar County Chancery Clerk on or about August 23, 2001 (TT 137; RE 3), and that the Joels received a copy of the Deed and put it under their bed for safekeeping, without reading it. (TT 26 & 135; RE 3, 9 & 20) The Joels had ample opportunity, and a legal duty, to confirm that their understanding of a

life estate's effect on their wills was set out correctly in the Deed, and ample time to bring their claims against Jimmy within the three-year limitations period. They did not. Because the Joels waited more than six (6) years to file suit on their claim to set aside the Deed, their claim was barred by the three-year statute of limitations, and should have been summarily dismissed.

IV. The Joels Were Not Entitled to Equitable Relief, Based on Their Own Conduct and the Doctrine of Laches

The Joels' claims were also barred by the doctrine of laches, a doctrine based on the maxims of equity "he who seeks equity must do equity," and "the laws serve the vigilant and not those who sleep over their rights." *See Comes v. Tapley*, 57 So. 567, 573 (Miss. 1911)

Laches is

> a rule [that applies] where it would be practically unjust to give a remedy, . . . because [one p arty] has by his . . . conduct and neglect . . . put the other party in a situation in which it would not be reasonable to place him if the remedy were to be afterwards asserted.

GRIFFITH, MISSISSIPPI CHANCERY PRACTICE, 2d ed., § 33. The doctrine of laches is

> founded upon the possible "injustice that might result from the enforcement of long-neglected rights," [and] the difficulty, if not the impossibility, of ascertaining the truth in such matters. . . .

5 MS Prac. Encyclopedia MS Law § 44:1 (quoting *Comes v. Tapley*, 57 So. at 573). This is one of those cases in which injustice would result if the Joels were allowed to enforce long-neglected rights (assuming only *arguendo* that the Joels had any rights to be enforced during the statutory period following the 2001 Closing). The Joels' failure to timely act upon any legal rights they may have had in connection with the Closing -- their failure to file suit until after Jimmy died – made it difficult, if not impossible, for

Jimmy's Estate to defend against their claims and/or for this Court to ascertain the truth in this matter.

Under Mississippi law, the affirmative defense of laches bars any claim in which (1) there was a delay in asserting the claim, (2) the delay was inexcusable, and (3) the delay resulted in hardship to the defendant. *See Glass v. Glass*, 726 So. 2d 1281 (Miss. Ct. App. 1998) (setting forth three factors to be considered with regard to a claim of laches). *See also*, JACKSON AND MILLER, ENCYCLOPEDIA OF MISSISSIPPI LAW, § 44:10 (citing *Glass v. Glass*); GRIFFITH, MISSISSIPPI CHANCERY PRACTICE, 2d ed., § 33.

In this case, the Joels had constructive knowledge of the claims asserted herein more than six years prior to the date they filed suit based on their admitted receipt of the Deed and its recordation with the Bolivar County Chancery Clerk. *See McMahon v. McMahon*, 157 So. 2d 494, 500-01 (Miss. 1963) (holding that constructive notice of the making of a deed and the character of the transaction "begins the moment it is lodged with the proper officer for record") (citations omitted). *See also O'Neal Steel*, 797 So. 2d at 876 (holding same and citing *McMahon v. McMahon* therefor). Moreover, the Joels had actual knowledge of their claims against Jimmy for at least one and a half (1 ½) years prior to Jimmy's death in June of 2007. (TT 26 (testimony by Mr. Joel that they "discover[ed] that everything was not like [they] told Jimmy [they] wanted it" in 2005 or 2006 when Mike looked over the papers under his parents' bed, at their request).

The Joels admitted in their Amended Sworn Complaint, which they signed under oath, and in sworn testimony at trial, that they did not read the Deed during the Closing, or upon receipt of the recorded Deed in the mail, or during the four (4) years in which it lay in a box under their bed. (RE 9 & 20; TT 72-73 & 85) The Joels further

admitted that there was nothing to prevent them from reading the Deed, or asking Mr. Meador or Ms. Prescott any questions they had regarding the life estate and Deed, at any time prior to the running of the three-year limitations period – they could have done so, but didn't. (TT 67-69, 71, 73, 85 & 136) Under the circumstances, *i.e.*, where the life estate language in the Deed was clear and unambiguous and so easily understood that even the Joels' son Mike (with only a high school education and absolutely no experience in real estate or legal matters) immediately recognized that it was not how the Joels allegedly understood it to be, the Joels have no excuse for not timely seeking legal advice and or pursuing legal action. (RE 4-5; TT 27-28) Their delay was inexcusable.

Mr. Joels' testimony that he talked to Jimmy four (4) or five (5) times about "straighten[ing] out" the Deed between 2005 and Jimmy's death in 2007, and had "beg[un] to wonder" if he could believe the promises Jimmy allegedly made to "take care of it" after the first three (3) such conversations, provides further support for a finding that the Joels' delay in filing suit was inexcusable. (TT 28-29)

The Joels' failure to file suit until after Jimmy died put Debbie and Jimmy's Estate in a difficult, if not impossible position. Jimmy's Estate could not defend against Mr. Joel's self-serving testimony because Jimmy, the only person besides Mr. Joel who knew what happened and/or what was said regarding the life estate conversations, is dead and cannot speak for himself, and because the rules of evidence do not allow Debbie to speak for him. This is a textbook example of laches. *See* 5 MS Prac. Encyclopedia MS Law § 44:1 (quoting *Comes*, 57 So. at 573). The Joels' delay also made it difficult, if not impossible, for either the chancellor or this Court to ascertain the truth of what Jimmy did or did not discuss with Mr. Joel regarding the legal effect of a life estate on the

Joels' wills. Under these circumstances, "a court of equity [should] not interfere to give relief, but [should instead] remain impassive." *Comes*, 57 So. at 573. Under these circumstances, *i.e.*, when delay has made it "doubtful whether adverse parties can command the evidence necessary to a fair presentation of the case on their part, or if it appears that they have been deprived of any such advantages they might have had if the claim had been seasonably insisted upon," the Joels claims are barred by the doctrine of laches. *Id.*

The Joels had a legal obligation to read the Deed by which they would be legally bound prior to and/or during the 2001 Closing, and to timely act in order to protect their interest in the Property. Given their failure to do either, *i.e.*, their failure to "do equity," it was not fair or equitable to allow the Joels to seek equitable relief on claims that were barred by statute. In this case, equity required that the chancellor "remain impassive" and "not give [the Joels the equitable] relief" they sought. The chancellor erred by not denying the Joels' claims based on laches.

V. The Chancellor Erred in Applying the Legal Requirements for a Constructive Trust

In finding for the Joels, the chancellor ruled that a constructive trust existed as to the remainder interest in the Avery Street Property granted to Jimmy by the Shackelfords. In so ruling, the chancellor committed fundamental errors in his interpretation and application of the law of constructive trusts, and ignored clear and established Mississippi law.

As set forth in detail below, the creation of a constructive trust requires a chancellor to undertake a two-step process. First, a chancellor must find that a confidential relationship exists based on very specific factors laid out by the Mississippi

Supreme Court. Second, and only after the chancellor has found that a confidential relationship exists, he must find an abuse of that confidential relationship. If, and only if, the proponent of the trust proves with clear and convincing evidence both the existence of a confidential relationship and abuse thereof, then a constructive trust may be imposed to remedy unjust enrichment.

As also shown below, the chancellor herein erred by ignoring this procedure, by not considering or applying the Confidential Relationship Factors to find that a trust relationship existed between Jimmy and the Joels, by finding abuse where there was none as defined by this Court's precedent, and by imposing a constructive trust based upon evidence that fell far short of the clear and convincing standard. The chancellor essentially decided that he did not think the Joels' deal with Jimmy was fair, and on this basis, without regard to the overwhelming evidence to the contrary, found a confidential relationship and abuse where none existed. This kind of outcome oriented approach to constructive trust law is impermissible and a clear abuse of discretion.

A. The Chancellor Failed to Apply the Factors for Finding the Existence of a Confidential Relationship on Which a Constructive Trust Must Be Based

The existence of a confidential relationship is a threshold issue, without which a constructive trust cannot be imposed. *See McNeil v. Hester*, 753 So. 2d 1057, 1064 (Miss. 2000) (citation omitted). *See also, Van Cleave v. Fairchild*, 950 So. 2d 1047 at ¶ 29 (Miss. Ct. App. 2007); *Thornhill v. Thornhill*, 905 So. 2d 747, 753 (Miss. Ct. App. 2004) (holding same); *McNeil*, 753 So. 2d at 1064; *Davidson v. Davidson*, 667 So. 2d 616, 620 (Miss. 1995) (holding same); and *Summer v. Summer*, 80 So. 2d 35, 37 (Miss. 1955) (holding same). As stated by the *McNeil* court:

> In order for the chancellor to have properly imposed a constructive trust, he must have found that there was a confidential relationship . . . plus substantial credible evidence that the [defendant] abused the relationship to obtain property which they ought not, in equity and good conscience, hold and enjoy.

McNeil, 753 So. 2d at 1064. This language could not more clear. A chancellor is not authorized to impose a constructive trust until he has found that there was a confidential relationship and that it was abused. *See In re Estate of Hood*, 955 So. 2d 943, 949 (Miss. Ct. App. 2007) (holding, "'It is the relationship plus the abuse of confidence that authorizes a court of equity to construct a trust for the benefit of the party whose confidence has been abused'") (quoting *Thornhill*, 905 So. 2d at 753 (quoting *Davidson*, 667 So. 2d at 620)) (emphasis added).

The proponent of a constructive trust bears the burden of proving both the existence of a trust relationship and the alleged abuse thereof with clear and convincing evidence, *i.e.*,"with an extraordinary degree of certainty and clarity." *Summer*, 80 So. 2d at 37. *See also McNeil*, 753 So. 2d at 1069-70 (finding same); *Davidson*, 667 So. 2d at 620 (finding same); *Planters Bank & Trust Co. v. Sklar*, 555 So. 2d 1024, 1034 (Miss. 1990) (finding same); *Allgood v. Allgood*, 473 So. 2d 416, 421 (Miss. 1985) (finding same); and *Campbell v. Campbell*, 163 So. 2d 649 (Miss. 1964) (finding same).

For a "confidential relationship to exist between two persons, there must be a relation in which one person is in a position to exercise a dominant influence upon the other." *In re Estate of Parker*, – So. 3d –, 2009 WL 2152336 (Miss. Ct. App. July 21, 2009) (finding that, because the party against whom a constructive trust was sought was, in fact, the one who was "weak, ill, and in need of constant care," and was thus not "in a

position to exercise a dominant influence" upon the proponent of the trust, there was no confidential relationship on which to base a finding of a constructive trust). *See also, Van Cleave*, 950 So. 2d at ¶ 17 (holding same and quoting *Mulling v. Ratcliff*, 515 So. 2d 1183, 1191-92 (Miss. 1987)); *Tatum v. Brrentine*, 797 So. 2d 223, 230-31 (Miss. 2001) (holding that a confidential relationship exists between two persons only when one person is in a position to exercise a dominant, overmastering influence on the other). It is not enough that the parties to a transaction are members of the same family. *See, e.g., McNeil*, 753 So. 2d at 1065; *In re Estate of Summerlin*, 989 So. 2d 466, 477 (Miss. Ct. App. August 19, 2008);*Campbell*, 163 So. 2d at 655.

The Mississippi Supreme Court has set out the following factors ("Confidential Relationship Factors" or "Factors") that "must be considered" in determining whether the alleged dominant influence, dependence and/or trust rise to the level required to find the existence of a confidential relationship,[21] *In re Estate of Holmes*, 961 So. 2d 674, 680 (Miss. 2007) (emphasis added):

(1) whether one party performed necessary services for the other, such as driving him to the grocery store or doctor;

(2) whether one party provided personal care for the other;

(3) whether one party was in control of the financial affairs of the other;

(4) whether one party maintains joint accounts with the other;

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[21] These factors are used to determine the existence of a confidential relationship in two contexts: (1) in actions to set aside an inter vivos property transfer because of undue influence and (2) in actions to recover a property interest through the imposition of a constructive trust. *See, e.g., Van Cleave*, 950 So. 2d at 1047 (applying factors in a will contest involving both a claim to set aside a deed based on undue influence, and a crossclaim for a constructive trust). The analysis is the same in each context, the only difference being who bears the burden of proving undue influence or abuse, once a confidential relationship has been established. *See McNeil*, 753 So. 2d at 1068-69. In the constructive trust context, the plaintiff bears the burden of proof as to both the existence of a confidential relationship and its abuse. *Id.*

(5) whether one is physically or mentally weak; and

(6) whether one party had the other's power of attorney.

See In re Estate of Holmes, 961 So. 2d at 680; *Wright v. Roberts*, 797 So. 2d 992, 998 (Miss. 2001); *In re Estate of Horrigan*, 757 So.2d 165, 171 (Miss. 2000); *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).

The Mississippi Court of Appeals has followed the supreme court's mandate and applied the above-listed Factors in numerous cases. *See, e.g., In re Estate of Hall*, – So. 3d – , 2009 WL 1668494 (Miss. Ct. App. June 16, 2009); *In re Caspelich*, – So. 3d –, 2009 WL 984515, *5 (Miss. Ct. App. April 14, 2009); *Stevens v. Estate of Smith*, – So. 2d – , 2009 WL 514199 (Miss. Ct. App. March 3, 2009); *In re Conservatorship of Simpson*, 3 So. 3d 804 (Miss. Ct. App. Feb. 17, 2009); *In re Estate of Summerlin*, 989 So. 2d at 466. *See also, In re Estate of Parker*, – So. 3d –, 2009 WL 2152336 (Miss. Ct. App. July 21, 2009).

The chancellor in this case did not consider the above listed Confidential Relationship Factors. This failure, in and of itself, is reversible error. *Cf. Ferguson v. Ferguson*[22], 639 So. 2d 921, 927 (Miss. 1994) (holding that a chancellor who fails to apply the "Ferguson Factors" when determining the equitable distribution of property abuses his discretion and thus commits reversible error); *Albright v. Albright*[23], 437 So. 2d 1003,

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[22] This Court in *Faerber v. Faerber*, – So. 3d –, 2009 WL 2152267 (Miss. Ct. App. July 21, 2009), held that the Ferguson Factors are "guidelines" that a chancellor "must" follow when determining how marital properly should be equitably divided. A chancellor's findings in this regard will be reversed and remanded if the chancellor fails to properly consider the facts of his case when applying the Ferguson Factors. *Id.*

[23] This Court has held that a chancellor must expressly make specific findings of fact on the record as to the various Albright Factors, and that it is not enough for the chancellor to simply state that he considered the Albright Factors. *Fulk v. Fulk*, 827 So. 2d 736, 729 (Miss. Ct. App. 2002) (citing (continued...)

1005 (Miss. 1983) (holding that a chancellor who fails to consider and make express findings of fact as to each "Albright Factor" abuses his discretion and thus commits reversible error).

Beyond this, the chancellor herein completely disregarded the undisputed evidence showing that the Joels could not satisfy any of the Factors – evidence from Mr. Joel himself that showed, instead:

(1) The Joels drove themselves to the doctor if and when they needed medical care. (TT 57; RE 36). Mrs. Joel drove herself to the beauty shop, or wherever else she needed to go. (TT 48-49 & 52; RE 27-28 & 31) And, in August of 2001, and up until October of 2006, Mr. Joel worked part time as a driver for local car dealerships, driving cars to or from Tennessee, Alabama, Arkansas, Texas, Louisiana, Missouri and Georgia. (TT 46-47; RE 25-26)

(2) The Joels cooked for themselves, and took care of their house together. (TT 57' RE 36) By Mr. Joel's own admission, the Joels did not depend on anyone for their day to day needs (TT 58; RE 37 (answering, "That's right" to the question, "You would agree that back in 2001, it's fair to say that you and Mrs. Joel were not dependent upon your son, Jimmy Joel, for your every day living"))

(3) The Joels managed their own financial affairs. In August of 2001, the Joels owned stock, had a retirement account, bank accounts, and life

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[23](...continued)
Sobieske v. Preslar, 755 So. 2d 410, 413 (Miss. 2000) and *Hamilton v. Hamilton*, 755 So. 2d 528, 531 (Miss. Ct. App. 1999), respectively). The purpose of this requirement is that express, specific findings of fact "lend some degree of clarity to the chancellor's decision process and thereby make an appellate review possible." *Fulk*, 827 So. 2d at 739.

insurance, all of which they managed, administered, and/or otherwise handled by themselves. (TT 50-53; RE 29-32) The Joels paid their bills themselves, and made all of their own financial decisions, including if and when to buy or cancel insurance policies, to take out a loan, to buy a new car, or to purchase a new house. (TT 52-55; RE 31-34) The Joels, in fact, made all of their own financial decisions, both big and small. (TT 58; RE 37 (regarding financial decisions) & 61 (regarding whether, when, and where to purchase a new house)) The Joels also managed their own legal affairs. Prior to August of 2001, the Joels retained legal counsel to draft their wills, and consulted with attorney Lindsey Meador regarding a potential legal claim. (TT 55-56, 116-17 & 125; RE 34-35) The Joels had also been represented by counsel in numerous house closings prior to August of 2001, and were familiar with the closing process. (TT 10-11) In every instance, the Joels provided their attorneys with all of the information they needed to handle each of these legal matters. (TT 56; RE 35)

(4) The Joels did not maintain any joint accounts with Jimmy. (TT 50-52; RE 29-30)

(5) In August of 2001, the Joels were both in good health. (TT 48 & 56-58; RE 27 & 35-37)

(6) Jimmy never had either Mr. or Mrs. Joel's power of attorney. (TT 55; RE 34)

All of the other witnesses who addressed the issue at trial also testified that the Joels were not in any way dependent upon, or under the influence of, Jimmy. (*See, e.g.*, TT 112 (Jerry Bullock, testifying that he considered the Joels to be competent to handle their own financial affairs, and to be independent "as far as making

judgments"); TT 137 (Lindsey Meador, testifying that the Joels appeared to be competent and independent at the time of the Closing, and did not appear to be acting under Jimmy's influence); TT 158 (Margie Prescott, testifying same); and TT 234 (Debra Joel, testifying that the Joels were not dependent on Jimmy in making decisions, and that the Joels made their own decisions))

Simply put, the evidence is uncontroverted that the Joels were competent and independent in August of 2001. (*See, e.g.*, TT 112, 137, 158, and 234) Mr. Joel's testimony below perhaps summarizes this point best:

> Q: You would agree that back in 2001, it's fair to say that you and Mrs. Joel were not dependent upon your son, Jimmy Joel, for your every day living.
>
> A: That's right.
>
> Q: That would extend to making decisions about finances, is that correct?
>
> A: Right.
>
> Q: That would extend to making decisions about what type of purchases you made, correct?
>
> A: Right.

(TT 58; RE 37)

In summary, the chancellor's failure to consider the mandatory factors for finding a confidential relationship was error in and of itself, and, given the utter lack of any evidence showing Jimmy to be in a position to exercise a dominant influence over the Joels, there was no basis in the record for finding a confidential relationship. Thus, this case should be reversed and rendered.

B. The Chancellor Erred in Finding that a Parent-Child Relationship and/or the "Trust" a Parent Has in a Child, Were Sufficient Bases for Finding a Confidential Relationship

The chancellor's finding of a confidential relationship was based upon Mr. Joel's own, uncorroborated testimony that he trusted his son. As explained above, this was contrary to the Mississippi Supreme Court's mandate that the chancellor consider and apply the Confidential Relationship Factors to such determinations.

Further, as also explained above, the chancellor's finding in this regard was contrary to the well established rule that oral testimony of the proponent of a constructive trust is not sufficient to prove the existence of a confidential relationship or its abuse. *See, e.g., Harris*, 98 So. 2d at 467. *See also, In re Estate of Pope*, 5 So. 3d at 427 (so holding); *Arrington v. Castle*, 909 So. 2d 1135, 1139 (Miss. Ct. App. 2005) (finding the proponent's "mere assertions," without any "direct proof [of abuse]," did not "rise to the level of clear and convincing evidence necessary to prove a constructive trust"); *Sojourner v. Sojourner*, 153 So. 2d 803, 809 (Miss. 1963) (holding that parol "evidence offered to prove [a confidential relationship and/or its abuse] must be received with caution."). Quoting the Mississippi Supreme Court in *Harris*:

> oral proof of . . . facts giving rise to a . . . constructive trust must be received with caution. So reluctant are the courts to ingraft a trust by parol on the legal title to real estate . . . that there is perhaps no better-established doctrine than the one which requires a higher degree of proof in order to establish the trust by parol evidence.

Harris, 98 So. 2d at 467 (quoting with approval 54 Am. Jur., p. 478, § 620). In *Harris*, the supreme court went on to affirm the chancellor's finding that the proponent of the trust did not meet his burden of proof by presenting no evidence other than his own testimony to support the imposition of a constructive trust. *See id.* The chancellor

herein erred in his application of Mississippi law by basing his finding of a confidential relationship on Mr. Joel's testimony, alone.

The chancellor further erred in finding that a confidential relationship existed between Jimmy and the Joels based the fact that Jimmy was the Joels' son. (*See, e.g.*, R 975; RE 62 (finding a confidential relationship based on "a moral, personal relationship [between Jimmy and] his parents")) This finding flies in the face of established precedent. The Mississippi Supreme Court has repeatedly and consistently held that the parent-child relationship is not a sufficient basis on which to find a confidential relationship.

Quoting the supreme court: "'The relationship of parent and child . . . is not intrinsically one of confidence.'" *Campbell*, 163 So. 2d at 655 (quoting *Saulsberry v. Saulsberry*, 100 So. 2d 593, 599 (Miss. 1958)). *See also In re Estate of Summerlin*, 989 So. 2d at 477 (citing *In re Estate of Lane*, 930 So. 2d 421, 425 (Miss. Ct. App. 2005)); *McNeil*, 753 So. 2d at 1065 (finding same). Indeed, "the parent is presum[ed to be] the dominant party. . .,even [if] the parent is aged, or aged and infirm." *In re Estate of Summerlin*, 989 So. 2d at 477 (citations omitted). *See also Van Cleave*, 950 So. 2d at ¶ 17 (citing *Thomas v. Jolly*, 170 So. 2d 16 19 (Miss. 1964)). Thus, when a parent sues his child seeking a constructive trust, the parent must still prove that a confidential relationship exists between him and child, and must do so by reference to the Confidential Relationship Factors discussed above. *See Campbell*, 163 So. 2d at 655 (quoting *Saulsberry*, 100 So. 2d at 593 and applying the confidential relationship factors to the facts of that case).

The *Campbell* and *Summerlin* cases demonstrate the level to which a family relationship must rise before it will be considered a confidential relationship. The

Campbell case involved a land transaction between a father and son. *See Campbell*, 163 So. 2d at 649. The son was living with his father when his father executed the deed, and had moved in with his father because his father "felt the need of having someone whom he could trust come and live with him and care for him and his wife." *See id.* at 650 & 655. The father was, however, "still able to move around and attend to his business [at the time], but unable to work." *Id.* at 655. This Court affirmed the lower court's finding that even "this evidence was insufficient to show that a confidential relationship existed between [the father and son]." *Id.* (citing *Saulsberry*, 100 So. 2d 593) The proponent of a trust must still prove that the relationship between a father and son is a confidential relationship, and that the defendant abused that relationship; otherwise, no constructive trust will arise. *See id.* Quoting this Court in *Campbell*, "[the father] had a right to convey the property to [his son]."*Id.*

In *Summerlin*, a father deeded a parcel of land to his son to the exclusion of his daughter. *In re Estate of Summerlin*, 997 So. 2d 983 at 468. The daughter filed suit to have the deed set aside on ground that her brother abused his relationship with their father in obtaining the deed. *See id.* The chancellor directed a verdict against the daughter, finding that she had failed to establish a prima facie case for a confidential relationship, without which the chancellor could not impose a constructive trust. *See id.* at 476. The evidence presented (and found to be insufficient as a matter of law) included: the father and son enjoyed a "normal father-son relationship"; the father had health problems that affected his mobility and reduced his independence; the father had trouble driving in a safe manner, and his son, the defendant, had to drive him to the family farm most weekends; the son drove his father to the doctor between twenty (20) and thirty (30) times during the last few years of the father's life; the father had

cataracts; the father was a trusting person who, in the last years of his life" let others control him"; and the son had his father's power of attorney. *See id.* at 470-79. Despite all this, the chancellor found, and this Court affirmed, that the family relationship between the father and son in *Summerlin* was not a confidential relationship because "there was no evidence presented that [the father] depended on [the son] for necessities." *Id.* at 478. This Court went on to find that, "even assuming that the [father-son] relationship . . . could have been described as 'close,'" it did not rise to the level of a confidential relationship because] "there was no evidence indicating that [the son] controlled [his father] in any way as a result of that relationship." *Id.* at 478.

The *Campbell* and *Summerlin* cases show how the chancellor herein should have ruled, *viz.*, that there was no confidential relationship based on either the father-son relationship or the Joels' alleged trust in Jimmy, given the undisputed evidence that the Joels were not dependent on Jimmy for their daily needs, and that Jimmy did not exert a domineering influence over the Joels with regard to their decisions (including the decision to purchase a life estate in the property involved herein). (TT 58, 137, 158) Mr. Joels' uncorroborated testimony, years later, that Jimmy did not explain the meaning of a life estate in a way that the Joels could understand, was insufficient as an evidentiary matter, falling far short of the clear and convincing standard for such proof. *See Harris*, 98 So. 2d at 467; *Arrington*, 909 So. 2d at 1139; *Sojourner*, 153 So. 2d at 809. It was also insufficient as a matter of law, given Mississippi law that a grantee is bound by the terms of a properly delivered and accepted deed.[24] *See Perry v. Bridgetown Community Ass'n, Inc.*, 486 So. 2d 1230, 1232-33 (Miss. 1986) (holding that acceptance

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[24] Jimmy's Estate anticipate that the Joels will try to argue that the Joels did not sign the Deed involved herein, and that this somehow makes a difference. As set forth in detail below, it does not. *See, infra,* at p. 60.

of a deed with notice binds a grantee to the terms of the deed). The chancellor, instead, chose to ignore this Court's clear and controlling precedent on the issues of family relationships and "trust" in constructive trust determinations.

The cases on which the chancellor did rely in finding a confidential relationship on this ground were distinguishable factually, contrary to this Court's precedent, cited above, and the rule established by the Mississippi Supreme Court in *In re Estate of Holmes,* requiring chancellors to consider and apply the Confidential Relationship Factors. *See* 961 So. 2d at 680. The *Anderson v. Kimbrough* case, for example, involved a plaintiff whose trust in a friend was so extraordinary that she signed the deed to her house over to the friend so that he could use the house as collateral to obtain loans for her, with only a promise that he would re-deed the house to the plaintiff at a later date. *See Anderson,* 741 So. 2d at 1045. In *Anderson,* this Court made reference to the parties' arguments regarding constructive trusts, but rejected the plaintiffs' constructive trust theory as inapplicable to the facts of the case. *See id.* at 1045-46 (holding, "We set the constructive trust issues aside because a more specifically relevant doctrine is unavoidably invoked by these accepted facts"). This Court found, instead, that the law of "deeds in lieu of mortgages" controlled and ruled solely on this basis. *See id.* at 1046. Thus, this Court's comments regarding constructive trusts were merely dicta, and did not represent legal authority on which the chancellor properly rely.

Further, this Court has never found testimony of subjective "trust," alone, to be a sufficient basis for finding the existence of a confidential relationship. A confidential relationship may arise based upon trust only if there is clear and convincing evidence that the defendant was "'in a position to exercise dominant influence upon the other because of the latter's dependency upon the former arising . . . through [the alleged]

trust. . . .'" *Spencer v. Hudspeth*, 950 So. 2d 231, 241 (Miss. Ct. App. 2007) (quoting *Foster v. Ross*, 804 So. 2d 1018, 1022-23 (Miss. 2002)). It is for this very reason that the Mississippi Supreme Court has mandated that chancellors apply the objective Confidential Relationship Factors when determining whether or not a confidential relationship exists. A constructive trust is too powerful a remedy, and would be subject to widespread abuse if this Court affirms the chancellor's finding that a constructive trust can be imposed based only upon a party's claim that he "trusted" the person against whom he seeks equitable relief.

The clear and convincing evidence in this case showed that the Joels were not dependent upon Jimmy in any way. (*See* TT 58; RE 37 (testimony by Mr. Joel in which he admitted that he and Mrs. Joel were not dependent upon Jimmy for their every day living, or in making financial decisions, or in making decisions as to what types of purchases they should make) The chancellor erred in finding that a constructive trust can be imposed based on Mr. Joel's subjective testimony of "trust," under circumstances in which the undisputed evidence showed clearly and convincingly that the Joels were not dependent upon Jimmy and Jimmy did not exert a dominant influence over the Joels.

The other case cited and relied upon by the chancellor in finding that a parent-child relationship was a sufficient basis for finding a confidential relationship was *Russell v. Douglas*, a 1962 decision from the Mississippi Supreme Court. *See* 138 So. 2d 730 (Miss. 1962) (cited by the chancellor at R 976; RE 63). In *Russell*, the plaintiff's mother became seriously ill, and her sister came to live with the mother and her son to care for the mother. *Russell*, 138 So. 2d at 731-32. The mother had a life estate in property and, after her death, her sister helped the son avoid foreclosure on the property by paying off

some debt secured by the property. *See id.* Thereafter, the son quitclaimed the property to his aunt. *See id.* At issue in the *Russell* case was whether the aunt held the property as the trustee of a constructive trust. *See id.* at 733. The chancellor ruled that she did not. *See id.* On appeal, the Mississippi Supreme Court reversed the chancellor's ruling, finding that a confidential relationship existed between the son and his aunt given the fact that the aunt had lived with and helped the son with his terminally ill mother, and that the son felt extremely close to his aunt as demonstrated by his attempt to probate a will that would have given his aunt property that would have gone to him. *See id.* at 733-34.

The facts of the case *sub judice* cannot be compared to the facts in *Russell.* In this case, there was no terminal illness that required Jimmy to care for the Joels and/or the Joels to depend upon Jimmy for their daily needs. Nor was there any act on the Joels' part showing either an extremely close relationship with Jimmy, or a dominating influence on Jimmy's part, such as the son's attempt in *Russell* to probate an invalid will in order to give his aunt property that would have gone to him. Nevertheless, the chancellor herein found that a confidential relationship existed between Jimmy and the Joels based on two "facts" he found to be analogous to the facts on which the supreme court based its finding of a confidential relationship in*Russell.* (R 979; RE 66)

First, the chancellor found that the family relationship between Jimmy and the Joels was close because the Joels "agreed to allow [Jimmy] to handle all of the arrangements associated with the purchase of the Avery Street property." (*Id.*) But, the Joels did not present any evidence that Jimmy ever made such an agreement with them. And, the evidence affirmatively showed that Jimmy did not, in fact, "handle all of the arrangements." Mr. Joel and Jimmy went to the bank together to talk with Mr.

Bullock about financing the Joels' purchase of a life estate in the Avery Street Property. (TT 16-18 (testimony by Mr. Joel that Jimmy told him that "we could go to [the bank] and see Jerry Bullock" to work out the financing on the life estate) & 70 (testifying that "Jimmy was mostly handling that with Jerry" (emphasis added))). Mr. Joel actively participated in the loan process, and Mr. and Mrs. Joel both attended and participated in the Closing and signed all the papers. (*Id.*; *see also*, TT 22)

The second fact on which the Chancellor herein found Jimmy's relationship with the Joels to be analogous to *Russell* was that the closing attorney in *Russell* felt the relationship between the son and his aunt was such that he did not find it necessary to confirm with the son that he had agreed to quitclaim the property at issue to his aunt. (R. 980; RE 67) In this case, however, the evidence showed that Mr. Meador did not simply take Jimmy's word for how the Deed should be drawn up. Mr. Meador's assistant actually explained the terms of the Deed to the Joels during the course of the Closing, and confirmed them to be a true and correct statement of their life estate agreement with Jimmy. (TT 130-31, 148 & 156-57)

In short, Mr. Joel's testimony about his alleged trust in Jimmy was, by itself, insufficient to establish a confidential relationship, and there was no evidence that the family relationship between Jimmy and the Joels was such that the Joels were dependent upon Jimmy or that Jimmy exerted a dominant influence over the Joels. The chancellor erred by finding that a confidential relationship existed based on the *Anderson* and *Russell* cases, rather than the *Campbell* and *Summerlin* cases. The chancellor's ruling for the Joels should therefore be reversed and rendered.

C. The Chancellor Erred in Creating a Constructive Trust Based Solely on a Finding of Unjust Enrichment and/or Principles of Equity and Good Conscience

Likewise, the Chancellor erred in ruling that a constructive trust should be imposed on the Avery Street Property based on general principles of unjust enrichment, equity, and good conscience. In this regard, the Chancellor found that a constructive trust should be imposed based solely on "the way that Jimmy obtained his interest in the Avery Street property," without consideration of whether a confidential relationship existed. (R 972; RE 59) This in and of itself is ground for reversal, given the Mississippi Supreme Court's mandate that the confidential relationship be established first, by application of the Confidential Relationship Factors. *See In re Estate of Holmes*, 961 So. 2d at 680.

With regard to unjust enrichment, equity and good conscience (hereinafter collectively "unjust enrichment"[25]) serving as the sole basis for imposing a constructive trust, neither this Court nor the Mississippi Supreme Court have ever adopted such a rule. Under Mississippi law, a constructive trust is a remedy for unjust enrichment that resulted from an abuse of a confidential relationship. *Thornhill*, 905 So. 2d at 753 (holding, "It is the relationship plus the abuse of confidence imposed that authorizes a court of equity to [impose] a [constructive] trust") (cited by the chancellor at R 969; RE 56); *McNeil*, 753 So. 2d at 1064 (holding that a "constructive trust is . . . created for the purpose of preventing unjust enrichment" and a chancellor is without authority to impose a constructive trust unless it has been shown with "clear and convincing proof" that there "is a [confidential] relationship plus the abuse of confidence").

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[25] Because the two-part test for establishing a constructive trust under Mississippi law applies equally to unjust enrichment, "equity," and "good conscience," we address all three together, as one.

The chancellor's reliance on *McCord v. Spradling* to justify his finding of unjust enrichment as a basis for a confidential relationship was misplaced. (R. 969; RE 56) The thrust of *McCord* was that a federal law, the Federal Employees Group Life Insurance Act, did not preempt an ante-nuptial contractual agreement, which everyone agreed was enforceable and clear as to its intent regarding who would receive insurance proceeds in the absence of federal preemption. *McCord v. Spradling,* 830 So. 2d 1188 (Miss. 2002). After finding that the federal law did not preempt the contract, the *McCord* court enforced the contract. *Id.* at 203. In doing so, the Court used some constructive trust language, but provided no explanation as to why it did so in a case that was governed by contract law, and the clear intent of the unambiguous contract. *See, e.g., id.* at 1204 (finding that the simple facts of this case did not "require [the court] to engage in the legal adventure that it has, . . . [the result of which was] the fractured disposition of two appellate courts") (McRae, J., concurring)

As this Court rightly noted in its *Thornhill* decision, the *McCord* decision did not alter long-standing Mississippi constructive trust law, and is limited to its facts, given the court's failure to "apply the criteria for the imposition of the trust," and the total absence of any discussion or analysis of "the confidence that had been abused." *See Thornhill,* 905 So. 2d at 753 (reaffirming the long-standing rule that "'it is the relationship plus the abuse of confidence imposed that authorizes a court of equity to construct a trust for the benefit of the party whose confidence has been abuse'") (quoting *Davidson,* 667 So. 2d at 620). *See also, Spencer v. Hudspeth,* 950 So. 2d 238, 241-42 (Miss. App. 2007) (finding that the Mississippi Supreme Court mandated that the Confidential Relationship Factors "be considered when determining whether or not a confidential relationship exists"); *In re Estate of Hall,* – So. 3d – , 2009 WL 1668494 (Miss.

Ct. App. June 16, 2009); *In re Caspelich*, – So. 3d –, 2009 WL 984515, *5 (Miss. Ct. App. April 14, 2009); *Stevens v. Estate of Smith*, – So. 2d – , 2009 WL 514199 (Miss. Ct. App. March 3, 2009); *In re Conservatorship of Simpson*, 3 So. 3d 804 (Miss. Ct. App. Feb. 17, 2009); *In re Estate of Summerlin*, 989 So. 2d at 466.

Further, one has to ask: where was the unjust enrichment in this case? While it is true that Jimmy "received" a remainder interest in the Property, as previously stated (and shown in detail below) Jimmy gave up his contractual right to obtain fee simple title in the Property at a greatly discounted price by accepting a remainder interest in the Property. The Joels, on the other hand, received a life estate in the Property at a price that was substantially less than fair market value for the Avery Street Property (*compare* RE 2 & TT 178), and were thus able to live in a house that exactly fit their needs and that they could not have afforded to purchase in fee simple. (RE 2; TT 64 & 178) The Joels also received the benefit of and enjoyed the improvements Jimmy made to the house at his own expense. And, it was the belief (whether correct or not) of <u>both</u> the Joels and Jimmy that the life estate, with the first to die provision, would protect the home from Medicaid and overreaching by the Joels' daughter Ann, goals that everybody involved thought were "a good idea." (*See supra*, n. 5; TT 83 & 272-73) The fact that, years later, the Joels decided that they did not like the deal they made with Jimmy, does not mean that Jimmy was unjustly enriched.

The chancellor's findings that Jimmy was unjustly enriched and that a constructive trust should be imposed in the Joels' favor on this basis without corresponding findings of both a confidential relationship and its abuse, were not supported by Mississippi law or the evidence presented at trial. The chancellor erred by finding for the Joels on this ground.

D. The Chancellor Erred in Finding That Jimmy Was the Joels' Gratuitous Agent and That Such an Agency Relationship Can Serve as a Basis for the Creation of a Constructive Trust

As a preliminary matter, the Joels did not assert a claim against Jimmy's Estate based on gratuitous agency and did not plead or argue such a claim in the court below. (See RE 6 & 13) The Joels advanced this theory for the first time in their proposed findings of facts and conclusions of law. (R 981; RE 68) Therefore, the chancellor erred by finding that a constructive trust should be imposed based upon a gratuitous agency theory. *See Witt v. Mitchell*, 437 So. 2d 63, 65 (Miss. 1983) (holding that "the chancellor erred by deciding the case upon a theory not in issue under the pleadings") (citing 89 C.J.S. Trial, § 633b, p. 464 (1955) (stating, "It is improper to make findings outside the scope of the issues made by the pleadings; and where such findings are made, they are nugatory. . . .; they must be disregarded)); *Barnes v. Barnes*, 317 So. 2d 387, 389 (Miss. 1975) (holding that "no valid decree can go outside of the boundary prescribed by the pleadings and proof") (citation omitted); GRIFFITH, MISSISSIPPI CHANCERY PRACTICE, 2d ed., § 564, pp. 586-87 (stating the rule that the "power of the court . . . will not move beyond the scope of the cause as presented by the pleadings"). Accordingly, the Chancellor's findings based on a "gratuitous agent" theory, and his ruling that a constructive trust should be imposed based thereon, should be summarily rejected and reversed.

Even if it were not error for the chancellor to grant relief on a theory the Joels did not plead or prove, the chancellor nevertheless erred in his application of the law of gratuitous agency. First, Jimmy was not a gratuitous agent. And, second, even if he were, such is not a proper basis for finding the existence of a confidential relationship.

Under Mississippi law such a relationship arises only if there is: (1) a promise to do something; or (2) conduct that one should realize will cause (a) another "reasonably to rely upon the performance of definite acts of service," and (b)another to refrain from doing such acts himself, or making arrangements for them to be done by other available means. *Lee Hawkins Realty, Inc. v. Moss*, 724 So. 2d 1116, 1119 (Miss. Ct. App. 1998).

The chancellor based his finding that Jimmy was the Joels' gratuitous agent on several "facts," including: Jimmy "assumed responsibility for having the deed prepared" (R 981; RE 68); the Joels "made no independent arrangements associated with the preparation of a deed [or] ask any questions about the deed they ultimately received" (R 982; RE 69); and the Joels "were justified in relying on Jimmy [to arrange to have the Deed drawn up] because he was more sophisticated when it came to real estate matters [and] his knowledge with regard to real estate law was superior to [the Joels]." (R 981; RE 68) However, the evidence did not support, much less show clearly and convincingly, any of these "facts" on which the chancellor relied.

As a preliminary matter, the Joels did not argue, or make any attempt to show, that Jimmy promised to take care of having the Deed prepared. The chancellor's finding on the issue of gratuitous agency must therefore have been based on the "engag[ing] in other conduct" prong of the test for gratuitous relationships, e.g. assuming responsibility for having the deed prepared. However, in this case, Mr. Joel and Jimmy met with their attorney, together, prior to the Closing, and Mr. and Mrs. Joel attended the Closing. (TT 18, 90, 129, 142-43, 148, 151 & 164) And, most significantly, Mr. Joel testified that he did not even know that Jimmy had met with Mr. Meador to discuss the Deed until five (5) years after the Closing, after the Joels asked Mike to read

the Deed. (TT 21) Given this testimony, which the chancellor ignored, it was impossible for the Joels to have refrained from "mak[ing] independent arrangements for the preparation of the Deed" or to have refrained from asking Mr. Meador or Ms. Prescott any questions regarding the Deed prior to or during the Closing, because they knew that Jimmy had "assumed responsibility" for doing so. They didn't know it at the time! The chancellor's finding that the Joels relied upon Jimmy's alleged conduct and refrained from acting, themselves, in reliance on Jimmy, was clearly erroneous.

As for Jimmy's "sophistication" and "knowledge" as to real estate matters and/or real estate law, the only evidence presented at trial was the testimony of Mr. Joel and Mr. Meador. (TT 89 & 116) Mr. Joel testified that he assumed Jimmy knew more about real estate transactions and real estate law because Jimmy was a home builder. (TT 89) Mr. Joel admitted, however, that Jimmy never did anything to indicate to him that he had more knowledge about real estate and real estate transactions than the Joels. (*Id.*) Jimmy never "come out and told [us that] in so many words." (*Id.*) As for Mr. Meador, he only testified that Jimmy knew that title passes to the remainderman upon the death of the life tenant. (TT 116) Mr. Meador could not, and did not, testify as to whether Jimmy was more "sophisticated' or had more "knowledge" as to real estate matters or real estate law than the Joels.

On this point, it must also be remembered that in practically every land transaction, one of the parties likely has more experience than the other. This is not the issue in a case like the one at bar. The issue is whether the Joels were dependent on Jimmy such that they could not make their own decisions or inquiries. They were not, according to Mr. Joel's own testimony. (TT 58; RE 37) And, further, they were not

novices in real estate transactions. As stated above, they had bought and sold numerous houses themselves prior to this transaction. (TT 49-50; RE 28-29)

Given the Joels' failure to present any evidence as to Jimmy's "sophistication" or "knowledge" other than Mr. Joels' own testimony that he assumed Jimmy knew more than he did about real estate transactions and/or law, the chancellor erred by finding clear and convincing evidence to support this "fact."

* * *

Based on the foregoing, the chancellor erred in finding Jimmy was a gratuitous agent of the Joels. However, even if this were not the case, and assuming only *arguendo* that Jimmy was the Joels' gratuitous agent for purposes of preparing the Deed, the chancellor nevertheless erred by finding that a confidential relationship arose based on Jimmy's "fiduciary duty" to the Joels as their gratuitous agent.[26]

Under Mississippi law, a gratuitous agent is not held to the same degree of care and diligence as that of an agent for hire. *Sunflower Compress Co. v. Clark*, 145 So. 617, 618 (Miss. 1933). A gratuitous agent "is under a duty to the principal to act with the care and skill which is required of persons [who are] not agents performing similar gratuitous undertakings for others." RESTATEMENT (FIRST) OF AGENCY § 379(2) (2009). That is,

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[26] The terms "fiduciary" and "confidential relationship" are sometimes used synonymously, but in the context of constructive trusts, the terms are defined by the higher standard for finding the existence of a confidential relationship. Quoting this Court's definition of "fiduciary" and "confidential relationship" in *Spencer v. Hudspeth*, 950 So. 2d at 241:

> Whenever there is a relationship between two people in which one person is in a position to exercise dominant influence upon the other because of the latter's dependency upon the former arising either from weakness of the mind or body, or through trust, the law does not hesitate to characterize such a relationship as fiduciary in character.

(quoting *Foster v. Ross*, 804 So. 2d 1018, 1022-23 (Miss. 2002)). Thus, even assuming *arguendo* that a "fiduciary" relationship arose between Jimmy and the Joels based on an agency theory, such a relationship would not constitute a confidential relationship given Mr. Joel's admission that he and Mrs. Joel were not dependent on Jimmy in any way. (*See* TT 58; RE 37)

a gratuitous agent owes his principal a general duty of due care – not a fiduciary duty as the chancellor held herein. *See Century 21 Deep South Prop., Ltd. v. Corson*, 612 So. 2d 359, 368 (Miss. 1992); *Long v. Patterson*, 22 So. 2d 490, 492 (Miss. 1945). *See also Higgins Lumber Co. v. Rosamond*, 63 So. 2d 408 (Miss. 1953) (holding a duty of reasonable care for a gratuitous undertaking only arises if the principal detrimentally relied upon the gratuitous agent's undertaking). It is the agent for hire who owes his principal a fiduciary duty. *See Lee Hawkins Realty*, 724 So. 2d at 1121 (finding that a realtor and real estate agency, as paid agents or agents for hire, owed their client a fiduciary duty) (cited by the chancellor at R 981). Therefore, even if Jimmy had given the Joels his lay opinion as to the legal effect of a life estate on their wills, this does not mean that Jimmy owed the Joels the same duty an attorney owes his client in giving legal advice (*i.e.*, a fiduciary duty).

As previously stated, no Mississippi appeals court has ever held that a gratuitous agent's duty is a fiduciary duty, or that a constructive trust can be imposed based on an abuse of a gratuitous agent's duty of due care. A great deal more than a general duty of due care is required. The proponent of a constructive trust bears the burden of proving with clear and convincing evidence both the existence of a confidential relationship and the alleged abuse thereof. *See McNeil*, 753 So. 2d at 1069-70; *Davidson*, 667 So. 2d at 620 (finding same); *Planters Bank*, 555 So. 2d at 1034; *Allgood*, 473 So. 2d at 421 and *Campbell*, 163 So. 2d at 649. Further, a chancellor must consider the Confidential Relationship Factors in finding that a trust relationship exists. *In re Estate of Holmes*, 961 So. 2d at 680.

The chancellor herein erred by considering and ruling upon a theory that the Joels did not plead, erred by not considering or applying the Confidential Relationship

Factors in determining whether a confidential relationship existed on which to impose a constructive trust, erred by finding that Jimmy was the Joels' gratuitous agent, and erred by finding that a gratuitous agent owes his principal a fiduciary duty. The chancellor's findings on this issue should, therefore, be reversed as plain error.

VI. The Chancellor Erred in Finding Clear and Convincing Evidence of Abuse on Which to Create a Constructive Trust

As previously stated, "[i]t is the confidential relationship plus the abuse of confidence imposed that authorizes a court of equity to [create a] construct[ive] trust. . . ." *McNeil*, 753 So. 2d at 1064 (internal quotes omitted). Assuming only *arguendo* that a confidential relationship existed between Jimmy and the Joels, the Joels' claim for a constructive trust should still have been denied by the chancellor based on the Joels' failure to prove that Jimmy abused any such relationship.

In order to establish abuse, "substantial overreaching or fraud must be shown" and the proponent of the trust must prove every "fact necessary to establish [the trust with] . . . clear and convincing evidence." *Hans v. Hans*, 482 So. 2d 1117, 1122 (Miss. 1986). The only proof presented by the Joels to show abuse by Jimmy was Mr. Joel's own testimony. (R 954; RE 41) As previously discussed, testimony by the proponent of a trust is insufficient as a matter of law to prove either the existence of a confidential relationship or its abuse. *See Harris*, 98 So. 2d at 467 (quoting with approval 54 Am. Jur., p. 478, § 620) (holding "a higher degree of proof [is required] in order to establish [a] trust by parol evidence"). *See also, Sojourner*, 153 So. 2d at 809 (Miss. 1963); and 8 MS Prac. Encyclopedia MS Law § 73:2. The chancellor nevertheless found, and erred as a matter of law by finding, that Mr. Joel's testimony regarding Jimmy's alleged representations and/or conduct constituted clear and convincing evidence of an

"abuse of confidence" on which a constructive trust could and should be created. (R 954-55, 969-71, 973-76; RE 41-42, 56-57 & 60-63) The chancellor further erred in his application of the substantive standard for "abuse" in the context of constructive trusts.

"To establish a constructive trust, it is necessary to prove something more than mere negligence. . . ." 8 MS Prac. Encyclopedia MS Law § 73:2 (citation omitted). "[S]ubstantial overreaching or fraud must be shown." *In re Estate of Horrigan*, 757 So. 2d 165, 170 (Miss. 1999) (citing *Pritchford*, 45 So. 2d at 147); *Calcote v. Calcote*, 583 So. 2d 197, 199 (Miss. 1991); *Hans*, 482 So. 2d at 1122. "Overreaching" is generally defined as "an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties." BLACK'S LAW DICTIONARY 1104 (6th ed. 1990). Overreaching is thus equivalent to the dominant influence test for the confidential relationship prong of a constructive trust claim. *See, e.g., In re Estate of Parker*, – So. 3d –, 2009 WL 2152336 (Miss. Ct. App. July 21, 2009) (defining "confidential relationships" in terms of dominance and applying (without citation) the Confidential Relationship Factors thereto)).

As set forth above, the Joels presented no evidence that Jimmy exerted a dominating influence over the Joels in connection with the Avery Street Property transaction. The evidence, instead, showed that the Joels were independent, competent, and did not rely on Jimmy or anyone else to assist them in their everyday needs. There being no evidence of overreaching on Jimmy's part, the chancellor's finding of "abuse" must therefore have been based upon fraud or something akin to fraud, *i.e.*, more than mere negligence but less than outright fraud. *See, e.g.*, 8 MS Prac. Encyclopedia MS Law at § 73:2.

The "facts" on which the chancellor based his finding of abuse by Jimmy were: misrepresentations allegedly made by Jimmy that allegedly led the Joels to believe that a life estate could be sold or devised; and that Jimmy did not "pay anything toward the purchase price" of the Avery Street Property. (R 971; RE 58) The first of these facts found by the chancellor is incorrect, and the second is both incorrect and irrelevant.

Regarding the alleged representations, the chancellor found, based only upon parol evidence in the form of testimony by Mr. Joel, that the statements Jimmy allegedly made to the Joels regarding the effect of a life estate on their wills were misrepresentations.[27] However, Mississippi law requires that any finding of a misrepresentation be based upon proof that the representation was both false, and reasonably relied upon by the party to whom the representation was made.[28] *See Holland v. Peoples Bank & Trust Co.*, 3 So. 3d 94, 100 (Miss. 2008) (setting forth elements of fraudulent and negligent misrepresentation claims, among which are the requirements that the representation be false, the speaker know it to be false or is ignorant of the truth, intent that the representation should be acted upon, reliance by the hearer, and a right to rely thereon).

The representations attributed to Jimmy were not false. Mr. Joel testified that Jimmy told him, "Daddy, the life estate won't change anything about that," when asked if the Joels' "wills [would] still [be] in effect" and if they could "sell if [they] need

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[27] Fraudulent misrepresentation must be proved with clear and convincing evidence. *See Holland v. Peoples Bank & Trust Co.*, 3 So. 3d 94, 100 (Miss. 2008). When, as in this case, the proponent of a constructive trust attempts to show abuse of a confidential relationship, negligent misrepresentation must also be proved with clear and convincing evidence. *See, e.g., Hans*, 482 So. 2d at 1122 (holding that every fact necessary to prove a constructive trust must be proved with clear and convincing evidence).

[28] Regardless of whether the alleged statements are denominated negligent misrepresentations, fraudulent misrepresentations, or even fraud, the Joels were still required to show that the alleged representations were false. *See, e.g., Holland*, 3 So. 3d at 100-01.

to." (TT 22) In fact, a life estate can be sold like any other interest in real property, with or without the consent of the remainderman.[29] 51 Am. Jur. 2d Life Tenants and Remaindermen § 84 (stating rule that a "tenant for life is the possessor of an independent estate in which he . . . may convey his . . . entire interest. . . ."). *See also, Kyle v. Wood*, 86 So. 2d 881, 883 (Miss. 1956) (finding in a case involving the sale of real property by a life tenant, "In the absence of limitation, power to sell or dispose of property carries authority to transmit the full quantum of the estate held by the donor") (internal quotes deleted, citation omitted). And, the Joels' wills would still "be in effect", *i.e.* valid and subject to probate, if they purchased a life estate in the Avery Street Property. These truthful answers Mr. Joel attributed to Jimmy simply did not constitute "abuse," as that term is used in the context of constructive trusts.

Moreover, Mr. Joel's testimony that he understood Jimmy's alleged answers regarding the legal effect of the life estate on the will to mean that the life estate would be set up so that the house would pass to the Joels' three children in equal shares, upon the Joels' deaths[30], *i.e.* , that each of the three children would be named as remaindermen in the Deed, is inconsistent with his testimony that he and Jimmy never discussed how the remainder interest should be set up in the Deed. (*Compare* TT 16 & 25-26; *see also* TT 83-84) Mr. Joel's conflicting testimony as to this, the central issue of this case, could not reasonably have been found to constitute clear and convincing

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[29] A life tenant can also mortgage his life estate, just as the Joels did in this case. *See, e.g.*, 512 Am. Jur. 2d Life Tenants and Remaindermen § 117.

[30] Mr. Joel further testified that he wanted the remainder interest to be held by one of his children, who would serve as an "executor" in charge of splitting the remainder interest three ways after the Joels died. (TT 299-300, 315 & 318-19) It may be reasonably inferred from this statement that the Joels intended for Jimmy to play a similar role as the remainderman. However, because the Joels waited until after Jimmy died to bring their lawsuit against his estate, Jimmy cannot clarify the issue by testifying as to what he and the Joels discussed, or as to his understanding of the agreement and the intent behind the agreement.

evidence of fraud or any other conduct on which "abuse" can be based. At most, this testimony showed that the Joels' alleged lack of understanding as to the effect of a life estate on their wills was more than likely caused by Mr. Joel's confusion, and not Jimmy's alleged answers.

Most significantly, the chancellor never found that Jimmy in any way intended to mislead the Joels. Rather, the chancellor used terms such as "Jimmy explained," or "[Jimmy] incorrectly informed," when discussing Jimmy's alleged statements to the Joels. (*See, e.g.*, R 955 & 969; RE 42 & 56) Further, and regardless of whether Jimmy's alleged answers were true, false, or were intended to mislead, the Joels were not entitled to rely upon Jimmy's alleged answers, under the circumstances presented herein. Under Mississippi law, "a person is under an obligation to read [legal documents by which he will be bound] and will not as a general rule be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading [the legal document]." *Holland,* 3 So. 3d at 100 (so holding with regard to claims of negligent and fraudulent misrepresentation in the context of a written contract). "As a matter of law, one may not reasonably rely on oral representations, whether negligently or fraudulently made by . . . , which contradict the plain language of [legal documents by which one is bound]." *Ballard v. Commercial Bank of DeKalb,* 991 So. 2d 1201, 1207 (Miss. 2008). *See also Brown,* 809 So. 2d 776 (holding that a party to a real estate transaction cannot avoid the consequences of the deal he made in connection with the transaction if he was given an opportunity to review the terms of the warranty deed and elected not to do so).

As previously stated, the life estate language in the Deed was clear and unambiguous, providing: "we [(the Shackelfords)] . . . hereby convey . . . a life estate

interest unto JAMES H. JOEL and wife, MARGARET R. JOEL, with the remainder interest to JIMMY J. JOEL." (TT 128-29; RE 4-5) The evidence presented at trial showed that the Joels were shown the Deed during the Closing, and its material terms, *e.g.*, the life estate language, were read to, and explained to, the Joels. (TT 130-31, 14 & 156-57). The evidence further showed that the Joels did not attempt to read the Deed prior to the Closing, or at any time during the three-year statute of limitations period that followed the Closing. (TT 85) And, according to Mr. Joel, when they finally got around to reading the Deed in 2005 or 2006, it was immediately apparent that the life estate language in the Deed did not convey to the Joels what Mr. Joel understand and/or expected it to convey. (TT 27-28) Had the Joels been vigilant, as both equity and law require, this action could have been avoided altogether.[31] (*See, e.g.*, TT 24-25 (testimony by Mr. Joel that he would have stopped the Closing if he had known or been told about the life estate language in the Deed))

Under these circumstances, the Joels' alleged reliance on the statements attributed to Jimmy was, as a matter of Mississippi law, unreasonable. The chancellor, therefore, erred by finding abuse on Jimmy's part.

With regard to the second "fact" on which the chancellor found abuse, *i.e.*, Jimmy's alleged failure to "pay one penny" toward the purchase of the house (R. 971; RE 58), the evidence again showed otherwise. As previously stated, Jimmy was the original owner of the Avery Street Property, having built and sold the house to the Shacklefords. (TT 239-40) In fact, Jimmy contributed his valuable equity in the Property

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[31] It should be noted that the Joels did not allege, plead, or attempt to present any evidence to support, a claim of fraudulent concealment. Nor could they. The undisputed evidence showed that the Joels accepted delivery of a copy of the recorded Deed within a few days of the Closing. (RE 3, 9 & 20; TT 26) Nothing was concealed; the Joels had everything in their possession that they needed to protect their legal rights, had they timely attempted to do so.

to the purchase. The undisputed evidence showed that, if Jimmy had closed on his contract with the Shackelfords by himself, thereby obtaining fee simple title in the house, he would have had approximately $20,500 in equity in the Property given the difference between the appraised value of the house and the price Jimmy negotiated for its buy-back. (TT 246 & 253) Had it not been for Jimmy's contribution of his equity in the Avery Street Property, the Joels could not have afforded to pay the price at which the property would have been listed if the Shackelfords had put the house up for sale on the open market as Jimmy and Debbie recommended they should. (TT 64 (testimony by Mr. Joel that they could not afford to purchase a house listed at $105,000, which they looked at prior to the Avery Street house); TT 240 (testimony by Debbie Joel that she ran a market analysis on the property in August of 2001, which showed that the Shackelfords could have listed the house for $115,000-$120,000, if they wanted to); & TT 178 (expert testimony showing the appraised value of the Avery Street house in August of 2001 was $115,000))

Thus, Jimmy's contribution to the purchase of the Avery Street Property totaled a great deal more than "one penny." Jimmy invested his $20,500 in equity toward the purchase of the house and received a remainder interest in exchange therefor. It was Jimmy's equity that enabled the Joels to live in a house they could not have otherwise afforded. The Court erred by finding that Jimmy did not pay "one penny" for his remainder interest in the house.

Further, objectively speaking, there is no reason to believe that the Joels did not want the deal as it was when they closed. The Joels were independent, made their own financial and legal decisions, and had bought and sold numerous houses in the past. They got a nice house in a nice neighborhood, for life, at a reduced price, when

they could not afford to purchase fee simple title in the house. By agreeing to let the Joels purchase a life estate in the Avery Street Property, Jimmy and Debbie tied up their equity for the life of the Joels, and gave up liquidity in tens of thousands of dollars in profits and rental income that they would have earned during the life of the Joels – a substantial amount of consideration.[32] Jimmy and Debbie had absolutely no obligation to share their equity with Mike and Ann, who contributed nothing to the purchase of the house, or its maintenance. Plus, the testimony is clear that the Joels wanted the life estate because of Medicaid concerns, and that they did not want their daughter Ann to serve as a remainderman. (TT 83 & *supra* at n. 5) The fact that the Joels decided more than five years later, after the statute of limitations had run on their claims of fraud and/or misrepresentation, that they did not like their deal with Jimmy does not mean that it was not the deal to which they agreed or that a constructive trust should be imposed because they now feel like it was a bad deal. For these, and all the reasons stated above, the chancellor erred by finding that Jimmy abused any relationship he may have had with his parents.

VII. The Chancellor Erred by Vesting Fee Simple Title in the Avery Street Property to the Joels

In ruling for the Joels, the chancellor held that "the only way to accomplish what the [Joels] intended" was "for the Court to find that fee simple title should be vested in

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32 The undisputed expert testimony at trial established that Jimmy's rental income from the Avery Street Property would have totaled $56,332.75 as of the date of trial. (TT 223; Ex. 20 at 191) Danny Barfield, the expert who calculated Jimmy's lost rental income, came to this number by applying the amount of rent the Property could be expected to generate per month to a mortgage loan in the amount of the purchase price, and subtracting the balance on the loan at the time of trial from the fair market value as of June 19, 2009, when it was last appraised. (*See id.* at 193; TT 225-27) The numbers on which Mr. Barfield relied, e.g. the rental value and appraised value, were provided to him by persons whom the chancellor accepted as qualified to testify (and did testify) as to rental values in the subject market and real estate appraisal. (TT 171; TT 242, 244 & 250)

[the Joels.]" (R 967; RE 54) However, and assuming only *arguendo* that the chancellor properly imposed a constructive trust based upon the evidence presented at trial, this is clearly not what the Joels intended when they agreed with Jimmy to purchase a life estate in the Avery Street Property. At most, the Joels were confused about the remainderman, not that they were getting a life estate. As previously stated, Mr. Joel testified that the Joels wanted to protect the Property from Medicaid should one of them need to move into a nursing home for extended care. (TT 14 & 83) This could only be accomplished through a life estate. Moreover, Jimmy's Estate presented substantial evidence at trial that Mr. Joel told Debbie and her sons on multiple occasions after Jimmy's death that they (the Joels) wanted to keep the house in a life estate with the only change being to the remainderman language in the Deed. (TT 260, 283-84, 299-300 & 310-12)

Given this testimony, the chancellor went too far in fashioning a remedy and, thus, abused his discretion. Under Mississippi law, "[w]here a 'chancellor's award is not supported by substantial evidence but rather on the chancellor's mistaken view of the evidence,' the chancellor's judgment must be reversed." *Industrial and Mechanical Contractors of Memphis, Inc. v. Tim Mote Plumbing, LLC*, 962 So. 2d 632, 637 (Miss. Ct. App. 2007) (quoting *Browder v. Williams*, 765 So. 2d 1281, 1287-88 (Miss. 2000)). With his finding that "the only way for [the Joels'] instructions to Jimmy to be carried out . . . is for the Court to find that fee simple title should be vested in [the Joels,]" (R 9067), the chancellor erred by disregarding the undisputed and substantial evidence to the contrary from Mr. Joel himself that the Joels knew they were purchasing a life estate and that the life estate would provide protections against Medicaid, as well as the evidence of what Mr. Joel requested after Jimmy's death.

At most, the proper remedy (assuming *arguendo* that the Joels were entitled to a remedy) would have been to leave the life estate in place, but reform the Deed to change the remainderman language therein. However, even then, the equities do not favor an equal split among Mike, Ann, and Jimmy's sons. Jimmy's Estate should be reimbursed for the equity Jimmy contributed to the purchase of the Avery Street Property, its appreciation to date, and the money Jimmy spent on improvements and repairs to the Property, before Mike and Ann are awarded any share in the Property.

VIII. In the Event This Court Affirms the Chancellor's Decision to Grant the Joels' Request for a Constructive Trust, the Chancellor's Decision to Deny the Counterclaim Asserted by Jimmy's Estate Should Be Reversed

As set forth in detail above, the chancellor's ruling in favor of the Joels on the constructive trust claim should be reversed. However, even if it is not reversed, the chancellor's ruling against Jimmy's Estate on its counterclaim for an equitable lien in the Property should be reversed. The maxim "he who seeks equity, must do equity" applies not only to the doctrine of laches, as stated above, it also describes the dual nature of every equitable claim. *Comes*, 57 So. at 573. Equity must be even-handed, taking no more than is required from a defendant and giving more than is requested (and proven to be deserved) by a plaintiff.

The undisputed evidence presented at trial showed that Jimmy developed the Avery Street Property, built the house, sold it to the Shackelfords, and entered into a contract to buy it back from them at a set price of $1,000 more than they paid Jimmy for the house. For all intents and purposes, the house and the equity in the house were Jimmy's to do with as he would. The undisputed evidence further showed that Jimmy would never have sold the house to the Joels, outright, at a discounted price, but

instead would have returned it to his rental inventory or sold the house for a profit (which he would have reinvested) had the Joels not accepted his offer to allow them to purchase a life estate in the Property.

Jimmy's Estate put on undisputed expert testimony[33] as to the appraised value of the Avery Street Property at the time of the Closing, and testimony as to the price at which a market analysis showed the Property could have been listed for had the Shackelfords chosen to sell the property on the open market, as opposed to accepting Jimmy's buy-back offer. (TT 178 (testimony showing the appraised value to have been $115,000); TT 240 (testimony that a market analysis showed the house could have been listed for between $115,000 and $120,000)) The Joels did not present any expert testimony to the contrary. This undisputed expert testimony showed that, had Jimmy gone through with the buy-back of the Avery Street Property by himself, as was his right under the contract (RE 2), his equity in the Property as of August 2001 would have been $20,500 (TT 246)

Further, it was undisputed that Jimmy spent more than $8,000 to improve, repair, and/or maintain the Property between August of 2001 and June of 2007 (when Jimmy died). (TT 81-82, 144, 209-10, 254-55; Ex. 12 at 112-23)

In ruling against Jimmy's Estate on its counterclaim for an equitable lien in the Property and/or for reimbursement of the amount Jimmy invested in the house (*i.e.*, Jimmy's equity, its appreciation between 2001 and the date of trial, and the cost for improvements to the house paid for by Jimmy between the Closing and the time of Jimmy's death), the chancellor chose to ignore all of the above-referenced testimony. (R 982-83; RE 69-79) The chancellor found, instead, that the market value of the house in

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[33] The Joels did not call any experts to testify as to the value of the house.

2001 was $94,500, the price at which Jimmy contracted to buy back the house from the Shackelfords, based upon an abstract statement made by the expert appraiser retained by Jimmy's Estate, John Fiser, regarding the textbook definition of "market value," that the true value of the Avery Street Property at the time of the Closing was the price at which "a willing buyer will sell to a willing buyer." (R 964; RE 51 (finding the expert appraiser's statement that this was "the definition of market value" as an admission that the sales price was a better indicator of a property's fair market value than an appraisal based on comparable sales in the market)) This was clearly an erroneous finding based on testimony taken out of context, given the expert appraiser's testimony that family transactions were not good indicators of market value because other considerations are often at play. (TT 195)

In finding that the contract price at which Jimmy agreed to buy back the Avery Street Property ($94,500) represented the fair market value of the Property[34], the chancellor further erred by disregarding undisputed evidence showing that:

- ✓ this amount was established by Jimmy in his original contract with the Shackelfords in 1999 (the buy-back offer) (TT 239-40 & RE 1);
- ✓ Jimmy and Debbie advised the Shackelfords in 2001 when they accepted the buy-back offer that a market analysis showed that the house could be listed for

[34] The chancellor's later ruling that the Joels paid "significantly [more]" than fair market value for their life estate based on Mr. Fiser's testimony that the appraised value of the life estate would have been "significantly less" shows the chancellor's ruling as to the counterclaim asserted by Jimmy's Estate to have been arbitrary and capricious. (R 966; RE 53) There can be no other explanation, given the chancellor's opposite ruling based on identical evidence as to the fair market value of fee simple title in the Avery Street Property. (*See, e.g.*, R 965; RE 52 (rejecting the testimony of an expert appraiser as to the fair market value of the Avery Street Property, and finding instead that the best indication of the Property's value was the price at which Jimmy agreed to buy-back the Property from the Shackelfords))

between $115,000 and $120,000, and encouraged the Shackelfords to sell the house themselves (TT 240-42); and

✓ the Joels and Jimmy agreed to the $94,500 for the life estate (TT 14-15, 74, 244-45 & 249).

Likewise, the chancellor erred by relying on the in-house "valuation" listed on the loan documents prepared by Mr. Bullock for loan purposes, which Mr. Bullock admitted was not supported by an appraisal, but was instead merely a recitation of the contract price. (R 965; RE 52; TT 105(testimony by Mr. Bullock in which he explained that he was not concerned about the value of the Avery Street Property because the Joels were putting up as collateral for the loan both the Avery Street Property and the house they owned on North Bayou Road,*i.e.*, the Bank was overcollateralized)

The chancellor's finding that the fair market value of the Avery Street Property was $94,500 at the time of the Closing and that Jimmy thus had no equity in the Property to contribute as consideration for his remainder interest in the Property (R 983; RE 70), also ignored testimony by Mr. Meadow and Mr. Fiser that Jimmy was a good and astute businessman who "tried to get top dollar" when selling houses he built. (TT 185; TT 115) Such testimony shows that the price at which Jimmy sold the Avery Street Property to the Shackelfords represented the market value of the house in 1999, but it did not show or in any way support the chancellor's finding that the buy-back price offered by Jimmy in 1999 represented the market value of the house in August of 2001. Quite the opposite. A good and astute businessman like Jimmy buys low and sells high. The chancellor's finding to the contrary was not supported by the evidence presented at trial.

The chancellor's finding that all of the improvements made by Jimmy to the house were intended as gifts to the Joels was also arbitrary and capricious, given the undisputed evidence to the contrary. The only evidence presented as to Jimmy's intent was testimony by Debbie Joel, who testified unequivocally that, with the exception of one small project that was a birthday present to Mrs. Joel, none of the improvements made by Jimmy to the Avery Street Property were gifts. (TT 256) The sole purpose of Jimmy's spending more than $8,000 on the Property was to protect his remainder interest in the house. (*See id.*; TT 144, 209-10, 254-55; Ex. 12 at 112-23) The Joels did not present any evidence to the contrary, and the chancellor's finding to the contrary was baseless.

If, in the end, the chancellor's ruling that a constructive trust should be created in the Joels favor is affirmed, the chancellor's ruling against Jimmy's Estate on its counterclaim should be reversed. Equity would not be served by giving the Joels the equity and improvements Jimmy invested in the house. To hold otherwise would be to punish Jimmy for offering his parents a life estate in a house and property he developed, sold, and contracted to buy back, when he was under no obligation to do so – when the undisputed evidence showed that he could have returned the Property to his rental inventory and earned more than $56,000 to date. (TT 283 & Ex. 20 at p. 191) The result of holding otherwise will amount to a windfall for the Joels.

In the event the Joels are given fee simple title in the Avery Street Property, this Court should reverse the chancellor's finding against Jimmy's Estate on its request that an equitable lien be imposed as to the equity Jimmy contributed toward the Joels' purchase of the house and the money he spent to improve the house. Under Mississippi law, a "equitable lien" would not divest the Joels of title or possession to the Property.

Lindsey v. Lindsey, 612 So.2d 376, 380 (Miss. 1992) (quoting 51 Am. Jur. 2d *Liens* § 23 (1970) (emphasis in original); *see also MacDonald v. MacDonald*, 698 So.2d 1079, 1085 (Miss. 1997). It would, however, preserve for Jimmy's sons his right in equity to recoup Jimmy's investment in the Property, should it ever be sold. *See* 51 Am. Jur. 2d Liens § 30 (2008) (defining an equitable lien as " a right . . . over a thing, which constitutes a charge or encumbrance upon it, so that the very thing itself may be proceeded against . . . and either sold or sequestered under a judicial decree, and its proceeds in the one case, or its rents and profits in the other, applied upon the demand of the person in whose favor it exists.") (citations omitted).

Given the overwhelming and undisputed proof presented by Jimmy's Estate in support of its counterclaim for an equitable lien in the Property, the chancellor erred by ruling against Jimmy's Estate on this issue.

CONCLUSION

This is, indeed, a precedent-setting case. The chancellor herein set aside a six-year old deed based on nothing more than Mr. Joel's own testimony that he and Mrs. Joel agreed to purchase a life estate in real property because they "trusted" their son Jimmy to correctly explain the meaning of a life estate, but were mistaken in their understanding of Jimmy's explanation. And, in creating a constructive trust in the Joels' favor, the chancellor ignored this Court's precedent requiring clear and convincing proof of both a confidential relationship and its abuse, as well as the mandatory procedure for finding such a relationship (the Confidential Relationship Factors).

The Mississippi Supreme Court has rightly set a high standard for creating constructive trust. That standard clearly not met herein. As stated in the Introduction hereto, if the chancellor's ruling herein is not reversed and the original Deed put back

into place, every land transaction between family members, friends and others in like situations will be subject to attack based on a constructive trust theory, even after the accused party has died. If affirmed, this Court's opinion herein will severely undermine the certainty of contracts and deeds by relaxing the clear and convincing standard of proof for establishing constructive trusts, and will transform what had been an objective inquiry into the alleged bases for establishing a constructive trust into a purely subjective process.

For these and all the reasons set forth in detail above, Appellants hereby request that this Court reverse the chancellor's ruling, and render a ruling in favor of Appellants.

THIS, the 24th day of August, 2009.

Respectfully submitted,
DEBRA JOEL AND LINDSEY MEADOR

BY: _____

CHARLES E. ROSS (MSB#
BILL LOVETT (MSB#
KATHERINE A. HALL (MSB
THEIR ATTORNEYS

OF COUNSEL:
WISE CARTER CHILD & CARAWAY, P.A.
600 Heritage Building
401 East Capital Street
Post Office Box 651
Jackson, Mississippi 39205-0651
Telephone: (601) 968-5500
Facsimile: (601) 968-5593

CERTIFICATE OF SERVICE

I, Charles E. Ross, one of the attorneys for Appellants Debra Joel and Lindsey Meador, do hereby certify that I have this day filed this, their Brief of Appellant, with the clerk of this Court, and have served a copy of this Brief via United States Mail, postage prepaid, on the following persons at the addresses shown:

Gerald H. Jacks
Kathy Clark
Jacks, Adams & Norquist, P.A.
Post Office Box 1209
Cleveland, Mississippi 38732
Telephone: 662-843-6171
ATTORNEYS FOR PLAINTIFFS

The Honorable William Willard
Post Office Box 22
Clarksdale, Mississippi 386144
CHANCERY COURT JUDGE FOR THE SECOND JUDICIAL DISTRICT OF BOLIVAR COUNTY, MISSISSIPPI

This the 24th day of August, 2009.

CHARLES E. ROSS