

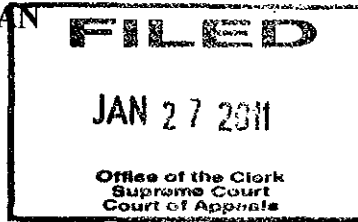
(COPY)

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

MICHAEL JAMES TILLMAN

vs.

DAVID D. MITCHELL



APPELLANT

CA
CAUSE NO. 2010-~~TS~~-01252

APPELLEE

ORAL ARGUMENT NOT REQUESTED

BRIEF OF APPELLEE

Appeal from

Tenth Judicial Chancery Court District
Forrest County, Mississippi
Trial Court Cause No.: 09-0856-GN-F

Trial Judge: Hon. Eugene Fair, Jr.

JERRY A. EVANS

MS Bar No. [REDACTED]

JERRY A. EVANS, P.A.

Post Office Box 1230

Hattiesburg, MS 39403-1230

Telephone: 601-296-1460

Telefax: 601-296-1462

CERTIFICATE OF INTERESTED PERSONS

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

1. Appellant/Plaintiff, Michael James Tillman.
2. Mary Tillman, wife of Michael James Tillman.
3. Appellee/Defendant, David D. Mitchell.
4. Glenda F. Funchess, attorney for Michael Tillman.
5. Jerry A. Evans, attorney for David D. Mitchell.
6. Honorable Eugene L. Fair, Jr., Chancellor, Tenth Chancery District, Forrest County, Mississippi.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE	1
FACTS	4
SUMMARY OF THE ARGUMENT	7
STANDARD OF REVIEW	7
ARGUMENT	
I. Was the trial court correct when it found that Michael Tillman failed to satisfy his burden of proof to show that a constructive trust existed when his brother David Mitchell purchased the house in which Tillman and his wife were living in and renting from Mrs. Nancy Cole?	8
II. Was the trial court correct in not awarding a refund of monies paid by Michael Tillman to David Mitchell?	15
CONCLUSION	16
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

Cases

<i>Adcock v. Merchants & Manufacturers Bank of Ellisville, MS</i> , 207 Miss. 448, 42 So.2d 427 (Miss. 1949)	12
<i>Allgood v. Allgood</i> 473 So.2d 416 (Miss. 1985).....	8, 10
<i>Coney v. Coney</i> , 163 So.2d 692 (Miss. 1964).....	9
<i>In re Administration of the Estate of Abernathy</i> , 778 So.2d 123 (Miss. 2001).....	8, 9, 15
<i>In re Estate of Hood</i> , 955 So.2d 943 (Miss. App. 2007)	8, 10-11
<i>Langham v. Behnen</i> , 39 So.3d 970 (Miss. App. 2010)	15
<i>Lipe v. Souther</i> , 224 Miss. 473, 80 So.2d 471 (1955).....	10
<i>McNeil v. Hester</i> , 753 So.2d 1057 (Miss. 2000).....	9, 15
<i>Niebanck v. Block</i> , 35 So.3d 1260 (Miss. App. 2010)	9
<i>Pitchford v. Howard</i> , 45 So.2d 142 (Miss. 1950).....	10, 11-13
<i>Russell v. Douglas</i> , 243 Miss. 497, 138 So.2d 730 (Miss. 1962)	11-13
<i>Saulsberry v. Saulsberry</i> , 232 Miss. 820, 100 So.2d 593 (1958).....	9
<i>Shumpert v. Tanner</i> , 332 So.2d 411 (Miss. 1976).....	13-14
<i>Simmons v. Simmons</i> , 724 So.2d 1054 (Miss. 1998).....	9

<i>Summer v. Summer</i> , 224 Miss. 273, 80 So.2d 35 (1955).....	10
<i>Union Nat'l Life Ins. v. Crosby</i> , 870 So.2d 1175 (Miss. 2004).....	8

STATEMENT OF THE ISSUES

Appellee David D. Mitchell (hereinafter “David Mitchell” or “Mitchell”) believes that the first two issues as stated by Appellant Michael James Tillman (hereinafter “Michael Tillman” or “Tillman”) are redundant and would rephrase the issues as follows:

- I. Was the trial court correct when it found that Michael Tillman failed to satisfy his burden of proof to show that a constructive trust existed when his brother David Mitchell purchased the house in which Tillman and his wife were living in and renting from Mrs. Nancy Cole?
- II. Was the trial court correct in finding that Michael Tillman was not entitled to a refund of monies paid to David Mitchell?

STATEMENT OF THE CASE

This case evolves around a dispute between two brothers, Appellant/Plaintiff Michael Tillman and Appellee/Defendant David Mitchell.¹ Tillman filed suit in Forrest County Chancery Court after Mitchell filed for eviction in Forrest County Justice Court. Tillman sought relief from the chancery court to quiet title. (CR 2)² After the court dismissed the Complaint, Tillman amended his claims, asserting a claim under the theory of constructive trust. (CR 2, 4-59) Alternatively, Tillman requested reimbursement of all monies paid. (CR 9 ¶ 16) Mitchell filed an Answer denying

¹ Tillman and Mitchell are half-brothers, sharing the same mother but not the same father. (TT 63) Tillman is the older of the two brothers. (TT 89) [All page references to testimony taken before the Forrest County Chancery Court on June 17, 2010 shall be designated as “TT.”] Although they grew up in the same household, Tillman was never there and Mitchell does not recall much of a childhood together with Tillman. (TT 69, 79) Nevertheless, Mitchell considers Tillman as his whole brother and has never considered him a half-brother. (TT 69)

² The designation “CR” will hereinafter refer to the Court’s Records, consisting of One Volume and eighty-eight pages, as prepared by the Chancery Court of Forrest County and has already been made a part of the record on appeal. Because the initial Complaint was dismissed, the parties have not designated the Complaint as part of the record. This brief also contains one reference to the Corrected Record Excerpt filed by Tillman. The May 12, 2007 letter from Mitchell to Tillman, which only the first page was attached to the Amended Complaint (CR 19), was entered as Exhibit 3 at trial and is included as P. 84-85 in the Corrected Record Excerpt (CRE).

a constructive trust existed or that Tillman is entitled to any money and asserted a counterclaim for back rent and attorney's fees. (CR 60-68) Mitchell also seeks to have Tillman vacate the premises.

A trial was held on June 17, 2010. After hearing the testimony of the five witnesses called and considering all pleadings and evidence of record, the Court held:

The law is very clear that the existence of a constructive trust must be proven by clear and convincing evidence. The Court finds that that has not been proven and that there is no constructive trust involved in this case. As for the other issues, I have looked at – looked at the pleadings. Both parties asked for money, and both parties asked for expenses, and I will reserve that until I've had the opportunity to review the case a little closer.

(TT 92) As to Tillman's argument that he was entitled to reimbursement on all monies he paid to Mitchell for the purchase of the house, the Court ruled:

You did claim that there was a parol contract in the last paragraph on the bottom of the second page [of the Amended Petition], if I recall, and I am not finding that there is a parol contract for \$5,400 for the purchase of this house. I don't think there is sufficient evidence to prove it, and consequently, I am ruling there is no contract for that figure under these circumstances.

The only evidence I have seen in the record with regard to an agreement putting people on notice that if it is not the agreement, there should be action taken was this letter that was written to [Tillman] confirming that Mr. Mitchell claims to be an agreement, and that is the written contract in the hands of both parties, testified to by both parties that they've read that, had it in their hands the day – specifically May – I believe Mr. Tillman said it was June when he got the letter, but it was dated May.

But I am finding as a matter of fact, and therefore a matter of law, that Mr. Mitchell owns the property. And the other issue of the monetary arrangements of the parties and whether either owes the other money I am taking under advisement, the issue also to include attorney's fees, which I think both parties have pled for, and punitive damages, which I recall both parties have pled for maybe.

(TT 95). Tillman's counsel then affirmed that Tillman made no assertion for attorney's fees. (TT 95-96)

On June 30, 2010, an Order and Final Judgment restating that Tillman had "failed to put forth evidence to establish a constructive trust" and awarding Mitchell a judgment in the amount of \$4,200

for rent from the period of May 1, 2009 through June 1, 2010. (CR 75) A Corrected Order was entered on July 30, 2010, which states in pertinent part:

It was not the intention or finding of the Court that the evidence presented in the case by Michael James Tillman was insufficient, as a matter of law, to allow a finding by the Court in his favor on the issue of the terms of an agreement with his brother regarding the acquisition by his brother of the property in question.

However, it was and is the finding of the Court that based on the evidence, including the credibility and demeanor of the parties, a constructive trust relationship contemplating transfer of the property by David Mitchell to Michael Tillman was not contemplated by the parties and established by the evidence as a matter of fact.

Therefore, the Final Judgment should be and is hereby amended to read as follows:

1. That based on the evidence the Court is not convinced of an agreement between the parties which would require establishment of a constructive trust to carry out the intention, and, therefore, the relief sought in the Amended Petition to Establish Constructive Trust is hereby denied;

2. That David D. Mitchell's counterclaim should be granted in part and denied in part.

IT IS, THEREFORE, ORDERED AND ADJUDGED THAT:

1. The Petition to Establish Constructive Trust, as amended, is denied and David D. Mitchell is adjudicated, as against Michael James Tillman and no others, the owner of the property.

2. A judgment in the amount of \$4,200, representing \$300 per month rent from May 1, 2009 to June 1, 2010, shall be entered against Michael James Tillman and in favor of David D. Mitchell;

3. That David D. Mitchell shall be responsible for all unpaid property taxes;

4. That David D. Mitchell's request for attorney's fees and punitive damages are denied.

(CR 80-81) (emphasis original) Tillman has only appealed the finding that his Petition was denied, including the denial of his claim for reimbursement of the monies he paid. (Appellant's Brief, p. 1)

Tillman did not appeal the Court's decision to grant Mitchell's request for back rent owed. The Tillmans continue to live in the house.

FACTS

Counsel for Tillman has taken great liberty with the presentation of the facts and, therefore, Mitchell would demonstrate that the written and oral evidence would show as follows:

Tillman and his wife, Mary, had been renting a house from Mrs. Nancy Cole on Railroad Street in Hattiesburg for about nine years. (TT 6) After her husband passed away in 2003 and Mrs. Cole realized she was losing money based on the amount of taxes and insurance she was paying compared to the rent she was receiving, so she decided to sell the house. (TT 6, 8) According to Mrs. Cole, this was in 2004. (CR 18) When Mrs. Cole told Tillman that he needed to find another place to live, Tillman asked if he could buy the house. (TT 6) However, the Tillmans were unable to afford the purchase of the house. (TT 7, 15-16, 35) Mrs. Cole also had another person who was interested in purchasing the property. (TT 12, 82) First, Tillman asked his sister (who is an attorney) for the money, but would not get involved since she was representing Tillman in a lawsuit against his employer. (TT 15-16) In June of 2006, Mitchell bought the house from Mrs. Cole along with an adjacent piece of vacant property. (TT 11) At the time Mitchell made the purchase, he also paid Mrs. Cole the Four Hundred Dollars (\$400) back rent that the Tillmans owed. (TT 12) On June 2, 2006, Mrs. Cole executed a Warranty Deed to Mitchell. (CR 16)

According to Mitchell, Tillman approached Mitchell around April of 2006 to purchase the property; however, the property had title problems and Mitchell did not want to get involved. (TT 63) Mitchell finally agreed to purchase the property for Five Thousand Dollars (\$5,000) plus the Four Hundred Dollars (\$400) for back rent due and that Tillman would continue to rent the property for Two Hundred Dollars (\$200). (TT 63-64) Then, in late August or early September, Mitchell

gave Tillman the option to purchase the property by paying either Two Hundred Fifty Dollars (\$250) per month for 60 months or Three Hundred Dollars (\$300) per month for 48 months. (TT 64) Mitchell felt this would be better than having Tillman continue paying \$200 in rent and having nothing to show for it. (TT 87) Tillman took the latter option. (TT 65) The monthly payments were not consistent, occasionally being four months behind. (TT 65-66) Other terms of the verbal agreement were that Tillman would pay property taxes, keep the property clean, and to insure the house. (TT 66) Mitchell first placed this agreement in writing in the May 12, 2007 letter. (CR 19,³ TT 66) For two years after the letter, Tillman made the \$300 payments. (TT 66-67) At the time of the June 17, 2010 trial, Tillman was 18 months behind in the payments. (TT 67). Mitchell now considers the agreement terminated and wants Tillman to vacate the premises. (TT 68)

Tillman claims that Mitchell made the payment of Five Thousand Four Hundred Dollars (\$5,400) to Mrs. Cole and that they agreed Tillman would pay Mitchell at Three Hundred Dollars a month. (TT 17, 20) Tillman claims he began paying Mitchell Three Hundred Dollars (\$300) a month in December of 2005. (TT 17)⁴ Tillman further claims he thought Mitchell purchased the property in October of 2005 so he stopped paying Mrs. Cole and began paying Mitchell. (TT 18-19) According to Tillman, June 2007 was the first time Mitchell mentioned a lease agreement and that he wanted Three Hundred Dollars a month for 48 months. (TT 21)⁵ Tillman also claims he

³ Only the first page of the May 12, 2007 letter was attached to Tillman's Amended Complaint as Exhibit D. (CR 19). The two-page letter is designated in the Corrected Record Excerpts at pages 84-85.

⁴ Upon being recalled to the stand, Mrs. Cole testified that Mitchell never made any payments to her before the Deed was signed; that Tillman made rent payments to her up through April of 2006. (TT 60) At that time of signing the Deed, Tillman's rent was past due for the months of May and June 2006 which Mitchell paid. (TT 60)

⁵ Both records and/or receipts of both parties actually show that the payments made prior to June 2007 were made in the amount of Three Hundred Dollars (\$300) plus occasional late fees. (CR 20-21, 22-45)

continued making payments to Mitchell until in December of 2009 or January of 2010. (TT 24)⁶ When asked if the agreement was for Mitchell to pay the first year taxes and then Tillman to pay the 2007 taxes in 2008, Tillman responded “No, sir. We had an agreement on nothing.” (TT 29 l. 16)

None of Tillman’s witnesses could verify his version of the agreement. Mrs. Cole had no idea what the agreement between Tillman and Mitchell was. Mrs. Cole only knew that Mitchell was purchasing the property and that when Tillman paid Mitchell for the property that Mitchell would sign the deed over to Tillman. (TT 9)

Tillman presented two other witnesses, his wife Mary, and his friend Ronald Johnson. Mrs. Tillman testified that she never liked the way Mitchell treated her husband. (TT 36) She felt that Mitchell was “just trying to beat us.” (TT 44) Mary was not present nor did she take part in the making any agreement with Mitchell, nor was her name on any of the paperwork. (TT 36, 39) In fact, Mary didn’t “know too much about the agreement they made.” (TT 43) But Mary thought that Mitchell was always trying to scam them. (TT 48)

Contrary to Tillman’s own testimony that he can read and write, Johnson testified that Tillman could not read. (TT 17, 52) When asked about Tillman’s education and intelligence, Mitchell confirmed that Tillman can read and write and that that he has seen Tillman do so. (TT 80) Outraged at the accusation that his brother was not very intelligent, Mitchell testified: “No, he can read. Y’all are acting like he is some kind of idiot. He is not an idiot. He is not. I resent the fact that you [Tillman’s counsel] are trying to make him out as one.” (TT 80)

After hearing the testimony and otherwise receiving evidence, the Court found that Tillman failed to present sufficient evidence to show a clear and convincing manner that a constructive trust existed. (CR 80-81; TT 92, 95) The Court further found that not only was Tillman not entitled to

⁶ However, the records and/or receipts of both parties show that the last payment was made in April 2009. (CR 21, 45)

reimbursement of any funds paid to Mitchell, but that Tillman owed Mitchell for rent from the months of May 1, 2009 to June 1, 2010 in the amount of \$4,200. (CR 81) Again, Tillman has not appealed the decision awarding a judgment for the unpaid rent. (Appellant's Brief, p. 1)

SUMMARY OF THE ARGUMENT

The trial court was correct in finding that no constructive trust existed between the parties and denying Tillman's claim for reimbursement of money he has paid to Mitchell. Even though Tillman has stated three issues on appeal, the first two are redundant and have been consolidated into the question of whether or not the trial court was correct when it found that, based upon the credible evidence and testimony, Tillman has failed to show by clear and convincing evidence that a constructive trust existed. The court was correct in so finding in that Tillman never had an ownership interest in the property and that Tillman instigated Mitchell's purchase. Tillman has shown no confidential relationship or any abuse thereof.

The second issue is whether Tillman is entitled to reimbursement. The trial court found that Tillman had not paid rent since April 2009, in the house he continues to reside in, and awarded Mitchell Four Thousand Two Hundred (\$4,200) as unpaid rent for the months of May 2009 to June 2010.

The trial court's judgment should be affirmed on appeal.

STANDARD OF REVIEW

As the issues are restated, there are two issues in this appeal. The first issue is based upon the Chancellor's finding that Tillman failed to meet his burden of proof to show that a constructive trust existed between Tillman and Mitchell. The second issue, assuming the trial court was correct in the first issue, is based upon the Chancellor's finding that Tillman was not entitled to reimbursement of any monies he paid.

A “constructive trust” arises by operation of law against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means or who in any way against equity and good conscience either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. *Union Nat’l Life Ins. v. Crosby*, 870 So.2d 1175, 1179 n. 1 (Miss. 2004). The determination of the existence of a constructive trust is a matter of law and thus subject to *de novo* review. *In re Estate of Hood*, 955 So.2d 943, 945 (Miss. App. 2007). However, where the chancellor has made a findings of fact, the “scope of review of findings of fact is severely limited. Findings of fact made by a chancellor which are supported by credible evidence, may not be set aside on appeal.” *Allgood v. Allgood* 473 So.2d 416, 421 (Miss. 1985).

Stated another way:

[I]n Mississippi, our standard of review of findings of fact, including those regarding a constructive trust, is limited in that we must not set aside a chancellor’s findings of fact so long as they are supported by substantial credible evidence. However, this Court conducts a *de novo* review of all questions of law. This includes those regarding the applicability of a constructive trust.

In re Administration of the Estate of Abernathy, 778 So.2d 123, 126-127 ¶ 13 (Miss. 2001) (internal citations omitted).

Here, the trial court found that such clear and convincing evidence was not apparent from the testimony and written evidence presented in the case.

ARGUMENT

- I. **Was the trial court correct when it found that Michael Tillman failed to satisfy his burden of proof to show that a constructive trust existed when his brother David Mitchell purchased the house in which Tillman and his wife were living in and renting from Mrs. Nancy Cole?**

The Chancellor was correct when he found, based upon the credible testimony and evidence presented, that Tillman failed to show by clear and convincing evidence that a

constructive trust existed. To prove that a constructive trust exists, the plaintiff bears the burden to show facts by clear and convincing evidence. *Estate of Abernathy*, 778 So.2d at 128 ¶ 20.

Clear and convincing evidence has been defined as follows:

[T]hat weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.

Moran v. Fairley, 919 So.2d 969, 975 (¶ 24) (Miss.Ct.App.2005) (*quoting Travelhost, Inc. v. Blandford*, 68 F.3d 958, 960 (5th Cir.1995)). “Clear and convincing evidence is such a high standard [of proof] that even the overwhelming weight of the evidence does not rise to the same level.” *Id.* (*citing In re C.B.*, 574 So.2d 1369, 1375 (Miss.1990)).

Niebanck v. Block, 35 So.3d 1260, 1264 (Miss. App. 2010). Oral testimony may be provided, but must be received with caution. *Saulsberry v. Saulsberry*, 232 Miss. 820, 100 So.2d 593,600 (1958); *Coney v. Coney*, 163 So.2d 692, 695 (Miss. 1964) (*citing Conner v. Conner*, 238 Miss. 471, 119 So.2d 240 (1960)).

A properly fashioned constructive trust balances inequities that arise where one party, through “fraud . . . duress or abuse of confidence” or other dubious means, acquires title to property that rightfully and equitably belongs to another. *Estate of Abernathy*, 778 So.2d at 127 ¶ 12; *McNeil v. Hester*, 753 So.2d 1057, 1064 ¶ 24 (Miss. 2000); *Simmons v. Simmons*, 724 So.2d 1054, 1057 ¶ 7 (Miss. 1998). Where one buys an asset in the name of another, the asset will be deemed held by the record owner in a resulting trust *for the benefit of the person actually advancing the purchase money*. *Simmons*, 724 So.2d at 1058 (*citing Brabham v. Brabham*, 226 Miss. 165, 172, 84 So.2d 147, 151 (1955)) (emphasis added). When a party urges the court to imply a constructive trust, the court will consider evidence as to the relationship between the parties, their conduct with regard to the

purported trust, and parol evidence attesting to the existence of the trust. *Allgood*, 473 So.2d at 421. The party urging the trust carries the burden of showing clear and convincing evidence that the trust exists. *Id.*

Furthermore, the Mississippi Supreme Court has stated that “[s]ubstantial overreaching or fraud must be shown.” *Id.* (citing *Pitchford v. Howard*, 45 So.2d 142, 147 (Miss. 1950)). “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 abused.” *Lipe v. Souther*, 224 Miss. 473, 484, 80 So.2d 471, 475 (1955) (emphasis added), quoting *Summer v. Summer*, 224 Miss. 273, 80 So.2d 35, 37 (1955).

The Chancellor, after hearing testimony and considering other evidence, found that Tillman failed to meet his burden of showing by clear and convincing evidence that an implied trust in favor of Tillman arose from Mitchell’s purchase of the property from Mrs. Cole. This finding is in line with the Mississippi Court of Appeal’s finding in *Estate of Hood*:

Constructive trust is a means by which one who unfairly holds a property interest may be compelled to convey that interest to another to whom it justly belongs. *In re Estate of Horrigan*, 757 So.2d 165, 170(¶ 25) (Miss.1999). “Such a trust arises by implication from the relationship and conduct of the parties and may be established by parol testimony notwithstanding the statute of frauds.” *Id.* “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.” *Thornhill v. Thornhill*, 905 So.2d 747, 753(¶ 18) (Miss.Ct.App.2004) (quoting *Davidson v. Davidson*, 667 So.2d 616, 620 (Miss.1995)). A constructive trust:

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

Sojourner v. Sojourner, 247 Miss. 342, 353, 153 So.2d 803, 807 (Miss.1963) (quoting 54 Am.Jur. Trusts, § 218). “An abuse of confidence within the rule may be an abuse

of either a technical fiduciary relationship or of an informal relationship where one person trusts in and relies upon another, whether the relation is a moral, social, domestic, or merely personal one.” *Id.* at 354, 153 So.2d at 807-08. “A confidential relationship within the rule need involve neither a promise for the benefit of another nor an express fiduciary relationship.” *Id.*, 153 So.2d at 808.

In re Estate of Hood, 955 So.2d 943, 949 ¶ 21 (Miss. App. 2007).

Tillman cites the cases of *Pitchford v. Howard*, 208 Miss. 567, 45 So.2d 142 (Miss. 1950) and *Russell v. Douglas*, 243 Miss. 497, 138 So.2d 730 (Miss. 1962), in support of his claims. In both cases, the Mississippi Supreme Court found a constructive trust existed. However, both cases are easily distinguishable from the one in which this Honorable Court is now facing.

In *Pitchford*, the widow Pitchford had trouble obtaining additional financing for the home that she was renting to Howard. Howard, who had become a close family friend over the years, proposed that he obtain the loan Pitchford needed based upon his credit. To accomplish this, Howard proposed that Pitchford deed the property to him, that he would obtain the loan and give her funds, and then he would reconvey the property back to her. *Pitchford*, 45 So.2d at 577. Pitchford conveyed the property and Howard was granted the loan. When Howard refused to transfer the property back, Pitchford brought suit asking the court to find a constructive trust. The Mississippi Supreme Court found:

Howard was the moving agent throughout all of the transactions and events of this case. He imposed upon Mrs. Pitchford’s trust and confidence in him to persuade her to let him, after much persistence on his part, after overcoming her reluctance, use her property on which to raise money ... and to borrow money on the property by means of which he enabled himself to get a deed from her to it, with the result that he had obtained her property at what will be a net gain to him...

Pitchford, 45 So.2d at 582. In so finding, the Court stated:

Active conduct on the part of the grantee to bring about the conveyance, especially where there is a fiduciary or confidential relationship between him and the grantor, and the grantee’s subsequent failure to carry out his agreement or promise to hold in trust for reconveyance, tend to show fraud or bad faith on the part of the grantee, so as to raise a constructive trust.

Pitchford, 45 So.2d at 584 (citing *Adcock v. Merchants & Manufacturers Bank of Ellisville, MS*, 207 Miss. 448, 42 So.2d 427, 430 (Miss. 1949) and 54 Am. Jur., page 179, Section 234).

In *Russell*, Russell's mother made an *inter vivos* conveyance of the property to Russell and reserved a life estate for herself. During the mother's prolonged illness, her sister, Douglas, came to stay and to help. Russell had a house built on the land and he and his wife executed a deed of trust in favor of Deeb's Construction Company. Deeb's ended up foreclosing on the property but took no further action during the mother's lifetime. After his mother's death, Deeb's sought to evict Russell. Russell sought help from the same attorney who represented him and Douglas with the estate matters. The attorney negotiated redemption with Deeb's; Douglas and her husband agreed to advance the funds. In exchange, Mr. Douglas had the attorney tell Deeb's to draft the quitclaim deed in favor of Mr. and Mrs. Douglas and then he had the attorney draft a quitclaim deed from Mr. and Mrs. Russell to Mr. and Mrs. Douglas. Russell, believing that his aunt was advancing money on his behalf in an effort to stop the eviction proceedings, executed the quitclaim deed to Mr. and Mrs. Douglas. Upon receipt of the deeds, the Russells were told to vacate the premises. Russell filed suit seeking imposition of a constructive trust.

The Court found a confidential relationship existed between Russell and Douglas because Douglas had spent considerable time in Mississippi in connection with Russell's mother's illness; that Russell and Douglas had a joint lockbox; that Russell agreed Douglas would inherit another piece of his mother's property even though the will was invalid and his share of the inheritance would be diminished; that the parties shared the same attorney, who recognized that the parties had a close relationship and did not question the arrangements when asked to have the deeds prepared in favor of Douglas; and that Russell never understood that he was losing his property. *Russell*, 138 So.2d at 733.

Unlike both *Pitchford* and *Russell*, Tillman never had an ownership interest in the subject property. Tillman did not convey his interest to Mitchell because his only interest in the subject property was that of a renter, not an owner. (TT 6, 15) Nor did Mitchell initiate or instigate the acquisition of the property. In fact, it was Tillman who suggested that Mitchell purchase the property so that Tillman and his family could continue to live there. (TT 63) For several months, Mitchell resisted. (TT 63) When Mitchell finally agreed to purchase the property from Mrs. Cole, both Mitchell and Mrs. Cole were represented by separate attorneys. (TT 8) All agreed that Tillman and his wife would continue living on the property, which they did and continue to do so. (TT 10, 86) At the time of trial, the court found that the Tillmans had not paid any rent since April 2009 and awarded a judgment in favor of Mitchell in the amount of Four Thousand Two Hundred Dollars (\$4,200) representing rent from May 1, 2009 through June 1, 2010. (CR 75, 80-81)

Rather, the instant case is more similar to that of *Shumpert v. Tanner*, 332 So.2d 411 (Miss. 1976). In that case, Tanner could not purchase a house because his credit was insufficient so his future sister-in-law purchased the house. Although the case does not discuss from whom the property was purchased, the facts are clear that Tanner did not, and never had, an ownership interest in the property. Similarly to this case, Tanner claimed Shumpert purchased the home and that when his credit was “stout enough,” Shumpert would convey the property to him. *Shumpert*, 332 So.2d at 411-412. The case boiled down to a “he said, she said” scenerio. The Court found that there was insufficient evidence to establish a trust and quoted the chancellor:

We may never know what the facts are, all we can depend on is what was said from the witness stand. There may be a big difference between the actual facts and what was said from the witness stand. But what was said from the witness stand was all that we have.

Shumpert, 332 So.2d at 412.

The chancellor in this case was faced with a “he said, he said” situation. Ultimately, the chancellor found that Tillman did not meet the burden of proving by clear and convincing evidence facts sufficient to establish a constructive trust. Nor has Tillman shown that outside of the sibling relationship, that Tillman placed any confidence or trust upon Mitchell. Tillman also claims that a confidential relationship existed between Tillman and Mitchell because there was an “uneven level of education between the parties.” See Appellant’s Brief, p. 24. However, Tillman testified that Mitchell was not the type of person that the family went to for advice. (TT 90) Tillman has shown no overreaching on behalf of Mitchell or any abuse of the non-existent confidential relationship.

Tillman further relies on *Estate of Abernathy*, 778 So.2d 123 (Miss. 2001) in support of his claim. In *Abernathy*, John Abernathy was the executor of his mother’s estate. His mother expressly provided in her will that her brothers were not to take anything under the will. Abernathy became the sole heir to his mother’s estate. However, Abernathy died intestate before his mother’s estate was closed. Abernathy left no spouse or children, which meant that the two brothers excluded in his mother’s will would inherit the mother’s estate and that of her son through intestate succession. Abernathy’s cousins, the children of a third brother who predeceased the mother, filed suit seeking to impose a constructive trust on the mother’s estate claiming that Abernathy held the inheritance in trust for them. The Mississippi Supreme Court found no constructive trust existed and that the focus was not on the mother’s intention, but that of the son. The Court held:

While the law recognizes that there is no method known to the law by which to make people prudent ..., every person must be presumed to know the law, and the absence of some misrepresentation or illegal concealment of facts, the person must abide by the consequences of his contracts and actions ... [I]n the absence of fraud, deceit, or fiduciary relations of some kind, the court cannot relieve a person from the consequences of his acts merely because he has not acted prudently or diligently...

Estate of Abernathy, 778 So.2d at 129 ¶ 22, citing *McNeil v. Hester*, 753 So.2d 1057, 1067 (Miss. 2000). Since the son left no will, his intentions were not clear and that his estate (including what he inherited from this mother's estate) would be passed intestate.

Applying that reasoning to the instant case, Tillman is presumed to know the law and to be prudent in managing his affairs. He has made no showing that would impose a legal duty upon Mitchell to hold the property in question for him in trust. Thus, the trial court was correct in finding that based upon the evidence presented, there was no agreement between the parties regarding the transfer of the property to Tillman. (CR 80-81) Therefore, the chancellor's decision denying Tillman's request for constructive trust was correct and should be affirmed.

II. Was the trial court correct in finding that Michael Tillman was not entitled to a refund of monies paid to David Mitchell?

Prior to the transaction involved in this lawsuit, Tillman and his wife had been renting the property from Mrs. Cole. After Mrs. Cole transferred ownership of the property to Mitchell, Tillman continued to reside in and to rent the property. However, Tillman now seeks reimbursement of the money he has paid to Mitchell under the theory of unjust enrichment.

"An unjust-enrichment action is based on a promise, which is implied in law, that one will pay a person what he is entitled to according to 'equity and good conscience.' " *1704 21st Avenue, Ltd. v. City of Gulfport*, 988 So.2d 412, 416 (¶ 10) (Miss. App. 2008). "Thus, the action is based on the equitable principle 'that a person shall not be allowed to enrich himself unjustly at the expense of another.' " *Id.* "Unjust enrichment only applies to situations where there is no legal contract and 'the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another.' " *Powell v. Campbell*, 912 So.2d 978, 982 (¶ 14) (Miss. 2005).

Langham v. Behnen, 39 So.3d 970, 976 ¶ 14 (Miss. App. 2010).

The facts of this case do not lend themselves to a recovery by Tillman. Justice and fairness require Tillman to pay a reasonable compensation to the landowner for his use and enjoyment of the premises. Tillman has made no improvements to the house or land nor, with the exception of one

year, has he paid the taxes. (TT 22-23, 39-40, 67, 81) The last payment from the Tillmans to Mitchell was made in April 2009. (CR 21, 45) Since that time, the Tillmans have continued to reside on the property. (TT 15, 34) The trial court awarded Mitchell a judgment in the amount of Four Thousand Two Hundred Dollars (\$4,200) representing rent from May 1, 2009 through June 1, 2010. (CR 81) Tillman has not appealed that award. (See Appellant's Brief, p. 1.)

Therefore, there is no basis in law or in fact upon which to grant Tillman's request for a refund and Tillman's claim for reimbursement should be dismissed.

CONCLUSION

The chancellor correctly determined that the facts did not support a finding of constructive trust in this situation. Taking into consideration all of the credible evidence and testimony presented, Tillman has not met the burden of proof to show by clear and convincing evidence that the property Mitchell purchased from Mrs. Cole should now be titled in Tillman's name. Nor has Tillman shown any legal basis in which he should be entitled to reimbursement of any monies he has paid. Rather, as the trial court held and Tillman has not appealed, Tillman owes Mitchell \$4,200 as back rent from May 1, 2009 to June 1, 2010. Tillman and his wife have continued to live in the house rent-free since that judgment was taken and Mitchell should also be awarded further rent accordingly. The July 30, 2010 judgment should be affirmed.

DATED this the 27th day of January, A.D., 2011.

Respectfully submitted,

DAVID D. MITCHELL



JERRY A. EVANS

JERRY A. EVANS (MS Bar No. [REDACTED])
JERRY A. EVANS, P.A.
Post Office Box 1230
Hattiesburg, Mississippi 39403-1230
Telephone: 601-296-1460
Telefax: 601-296-1462

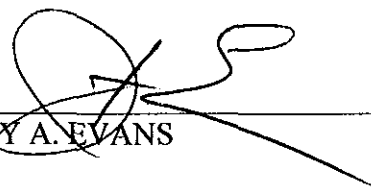
CERTIFICATE OF SERVICE

I, Jerry A. Evans, attorney for Appellee/Defendant, do hereby certify that I have on this day caused to be served, via hand delivery, a true and correct copy of the foregoing *Brief of Appellee* the original and three (3) copies to the Office of the Clerk, 450 High Street, Jackson, Mississippi 39201-1082, and via U.S. Postal Service, postage prepaid, to:

Honorable Eugene Fair
Chancellor
Post Office Box 872
Hattiesburg, Mississippi 39403-0872

Ms. Glenda F. Funchess
Post Office Drawer 1728
Hattiesburg, Mississippi 39403

SO CERTIFIED on this, the 27th day of January, A.D., 2011.



JERRY A. EVANS