

IN THE COURT OF APPEALS FOR THE STATE MISSISSIPPI

MICHAEL JAMES TILLMAN

APPELLANT

VS.

CASE NO. 2010-CA-01252-COA

DAVID D. MITCHELL

APPELLEE

APPEAL FROM THE CHANCERY COURT OF THE TENTH JUDICIAL DISTRICT
OF FORREST COUNTY, MISSISSIPPI

REPLY BRIEF FOR APPELLANT

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STATEMENT OF THE ISSUES

On page 1 of his brief, Appellee David D. Mitchell argues that there are only two issues raised by Appellant Michael James Tillman rather than the three he cited in his brief. Appellee Mitchell is free to recite or state any issues that are in the most favorable light for his case. In short, Appellant Tillman set forth his reply to the issues raised by the brief of Appellee Mitchell below.

Further, on page 1 of his brief, Appellee Mitchell notes in footnote 1 that Appellee Mitchell and Appellant Tillman are brothers having the same mother but different fathers. Does the fact that the parties have different fathers make them any less brothers? Further, the parties grew up in the same household. There was clearly a relationship. In fact, Appellant Tillman, the least educated, trusted his brother, Appellee Mitchell.

STATEMENT OF THE CASE

On page 3 of his brief, Appellee Mitchell cites where the court entered a judgment of \$4,200.00 representing back rent at the rate of \$300.00 per month for the period covering May 1, 2009 to June 1, 2009. However, there was no evidence, save and except, the testimony of Appellee Mitchell that the \$300.00 represented rent. The testimony of Appellant Tillman was that the \$300.00 per month was the payment on the \$5,400.00 loan, purchase price of the property. (T.63,17,19-21,27-28)

On pages 3 and 4 of his brief, Appellee Mitchell argues that Appellant 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." (emphasis added by Appellee Mitchell) If there is a constructive trust, there is no need to argue back rent. Further, alternately, the request for the return of all monies paid to Appellee Mitchell indicates that if the court found there was no constructive trust, then Appellant Tillman argument is that there was no agreement or meeting of the minds for any type of agreement. Therefore, if there is no agreement to purchase, could there have been an agreement to rent? If so, who has the burden of showing a rental agreement? In short, if there is no agreement, there is no money due.

The only written evidence that Appellee Mitchell was able to present was a receipt marked as Number 2 rent purchase not rent payment. (T. 65; Appellant's Record Excerpt page 94). Appellee Mitchell receipt to Appellant Tillman dated December 9, 2006 and numbered 5 states for Home Payment. Further, Appellee Mitchell testified that he stayed on his brother about making timely payment " ...I tried to stay on him about it because, like I told him at the time I bought that property, I said, '[t]hat is your opportunity to own your own home.'" When questioned about the purchase of the property by Appellant Tillman's counsel, "...I was going to buy this property for my brother." (T. 66,70; Appellant's Record Excerpt page 95) This is consistent with Appellant Tillman position, that the agreement was for the purchase of the property.

FACTS

Appellee Mitchell stated on page 4 of his brief that Appellant Tillman approached him regarding the purchase of the property that was being sold by Mrs.

Nancy Cole. This is correct from the facts and the testimony of the witnesses, Ms. Cole, Appellant Tillman, Mrs. Tillman and Appellee Mitchell. Appellee Mitchell testified when his brother, Appellant Tillman first approached him regarding the purchase of the property, he was not interested in purchasing the property. However, when Appellant Tillman approached Appellee Mitchell the second time, Appellee Mitchell did agree to purchase the property from Ms. Cole. (T.63,65-66,69-70,72-73,86)

Ms. Cole testified she spoke to Appellee Mitchell regarding the purchase of the property. It was during this conversation that Ms. Cole advised Appellee Mitchell that she was selling the property for the price of \$5,000.00 for the benefit of Appellant Tillman. Her rationale was that Appellant Tillman had lived on the property and taken care of the property for approximately nine years. Ms. Cole stated that Appellee Mitchell acknowledged her statement regarding whose benefit she was selling the property and the amount of the sale. Ms. Cole was very much aware that she could have sold the property for more than the \$5,000.00. (T.7-11)

During the conversation with Ms. Cole, Appellee Mitchell never advised Ms. Cole nor Appellant Tillman that he (Mitchell) was purchasing the property to rent to Appellant Tillman or as an investment. In fact, it was apparent that Appellee Mitchell was not from his own testimony. (T.69,82) The issue of renting the property came about when Appellant Tillman asked for a deed. Remember, the property was purchased by Appellee Mitchell in June 2006. The instrument regarding the purchase or rent was presented to Appellant Tillman by Appellee Mitchell on May 12, 2007, this was approximately one year from the date of the actual purchase of the property. (T.17-

22,27-31,75-76;Appellant's Record Excerpt pages 84-85) Appellee Mitchell stated that he gave Appellant Tillman the option to purchase or rent the property in August or September. However, Appellant Tillman denies this. (T.20-22,29-30,65,73-74,76,87-88) The operative question is would Appellant Tillman have wanted to continued to rent the property? No. Appellant Tillman maintains that he was clear that he wanted to own his own property. (T.17)

If Appellee Mitchell's dealings were above board, why did he not state in clear and concise terms the condition under which he was purchasing the property at the time he was talking with Ms. Cole and his brother, Appellant Tillman. Further, if Appellee Mitchell had informed Appellant Tillman and Ms. Cole that he was purchasing the property for investment purposes or to receive rent, Appellant Tillman would not have asked for a deed. (T.19) One also has to consider if Appellee Mitchell had divulged such information, would Ms. Cole have sold the property to him for \$5,000.00?

On page 6 of his brief, Appellee Mitchell stated that "[n]one 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. (TT9)" It appears that, at the time of the purchase of the property from Ms. Cole, no one was aware of the intent of Appellee Mitchell other than Appellee Mitchell.

Appellee Mitchell admits to taking a written agreement to Appellant Tillman on May 12, 2007, this was approximately one year after the initial purchase of the property.

The agreement that Appellant Tillman had from his brother, Appellee Mitchell, was that upon payment of the amount due, he (Mitchell) would convey the property to him (Tillman). (T.9-10,66,73,88-89) The amount due as far as Appellant Tillman knew, was the \$5,000.00, Appellee Mitchell paid Ms. Cole for the property and \$400.00 in back rent. It is clear that once the property was purchased, Appellee Mitchell tried to change the terms and condition of the agreement that were reached at the time of the purchase of the property from Ms. Cole. (T.17,20-22,28,73-74,76,78,88)

Appellee Mitchell argues that there was a discussion of the terms of the agreement with Appellant Tillman in his (Appellee Mitchell's) truck and Appellee Mitchell's son was supposedly present. (T.64,76) However, there was no testimony presented in this matter from Appellee Mitchell's son. Rather, Appellee Mitchell presented Appellant Tillman with a document he drafted in 2007, stating the terms of the agreement. (T.74,76,78,88; Appellant's Record Excerpts pages 84-85) However, the document was not signed by Appellant Tillman nor by Appellee Mitchell and according to Appellant Tillman, this document did not state the terms of the initial agreement that he had with Appellee Mitchell. (T.20-22,28,88)

In discussing the credibility of the testimonies of the parties and witnesses, Appellee Mitchell stated on page 6 of his brief, that Mrs. Mary Tillman "...was not present nor did she take part in the making of the 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)" It is true that Mrs. Tillman was not a part of the negotiations;

however, she recited the same understanding of the agreement that her husband, Appellant Tillman, had. She was very clear that she distrusted Appellee Mitchell and tried to tell her husband, Appellant Tillman so. Because of her distrust and issues regarding payments, Mrs. Tillman purchased a receipt book for Appellee Mitchell to use. (T.35-38,41) To her warnings about Appellee Mitchell, to her husband, Appellant Tillman, Appellee Mitchell confirmed that his brother (Tillman) trusted him and he (Mitchell) trusted him (Tillman). (T.77)

Also on page 6 of his brief, Appellee Mitchell talks about Appellant's educational level. It was interesting that Appellee Mitchell was so clear on how well Appellant Tillman could read and write but then argued that there was no confidential relationship between the parties because they did not live in the same house for periods of time. Appellee Mitchell even stated that Appellant Tillman spent a great deal of time in Reform Schools and was; therefore, away from the home. (T.69,79-80) If this is true, then how does Appellee Mitchell know how well Appellant Tillman could read, write or understand what he read? Was Appellee Mitchell's outrage relating to accusations that Appellant Tillman was being made to appear as an "idiot" or that it appeared that the evidence was clear that he (Mitchell) had taken advantage of his brother (Tillman)?

SUMMARY OF ARGUMENT

On page 7 of his brief, Appellee Mitchell argues that the court was correct in finding that no constructive trust existed. Clearly, Appellant Tillman argues the reverse and points to the credible evidence set forth below regarding the facts of this case. In support of Appellant Tillman's contention that there was sufficient evidence of a

constructive trust, lets look at the facts: Mrs. Nancy Cole was selling the property that Appellant Tillman and his wife had lived on and taking care of for approximately ten years. Appellant Tillman could not purchase the property in his name because he did not have the credit to get a loan and Ms. Cole wanted cash for the property.

(T.6-7,10,15,35,82) Appellant Tillman went to his sister for assistance in purchasing the property. Sister referred Appellant Tillman to their brother, Appellee Mitchell. (T.15-16,36) Initially, Appellee Mitchell was not interested in purchasing the property. It took Appellant Tillman two occasions to get him to agree to purchase the property because Appellant Tillman told Appellee Mitchell that he would not have any place to live. (T.63,72-73)

Once Appellee Mitchell decided to purchase the property, he had a conversation with Mrs. Nancy Cole, the property owner\seller. She advised Appellee Mitchell that she was selling the property for the benefit for Appellant Tillman. Ms. Cole stated the purchase price for the property was \$5,000.00 plus \$400.00 in back rent. (T.9-10,12) Appellant Tillman was not advised by his brother, Appellee Mitchell, that he would charge him anymore than the purchase price quoted and paid to Ms. Cole. Was this a reasonable assumption on Appellant Tillman's part? Clearly, since Appellee Mitchell never stated otherwise. Appellant Tillman had no way of knowing that Appellee Mitchell was charging him more than \$9,000.00 for financing the property.

The signs of ownership by Appellant Tillman and required by Appellee Mitchell was that he (Tillman) had to pay the taxes and insured the house. (T.22,60,66,80) Renters do not insure houses, they insure their content. Renters do not pay taxes on the

property because they do not have an interest in property. This is the reason that Ms. Cole was getting rid of the property. She was losing money on having to take care of matters that were clearly within the scope of an owner. (T.7-8) Further, Appellee Mitchell had no intention of residing on the property. (T.63,71-73,82,86) Further, he never stated that he was using the property for investment purposes. (T.69,82) Even the Judge, in his decision, found that Appellee Mitchell was required to pay the taxes on the property. (Appellant's Record Excerpt pages 6-7) Why? Because Appellee Mitchell was determined to be the property owner.

Appellee Mitchell also maintains that "Tillman has shown no confidential relationship or any abuse thereof." Appellee Mitchell has not cited nor set forth any definition of a confidential relationship. As stated on page 15 in his Brief, Appellant Tillman, cited the case of Norris v. Norris, and the cases quoted therein, the court held

that it was difficult in defining the burden of establishing the existence of a confidential relationship. See Phillips v. Ford, 250 Miss. 425, 164 So.2d 908 (Miss.1964). However, while the definition may be somewhat elusive, this court has held that the burden of establishing the existence of a confidential relationship lies with the party asserting it.

Appellant Tillman believes that he has more than met his burden of proof that there was a confidential relationship between he and Appellee Mitchell. In the case at bar, Appellee Mitchell and Appellant Tillman are brothers, who grew up together in the same household, and maintained contact with each other. (T.7,16,50,62-63,72,77,79-80,82) Who would a person more likely have a confidential relationship with than a sibling? Appellant Tillman realizes that proving a confidential relationship is just the first step in the process of establishing a constructive trust. Accordingly, Appellant

Tillman directs Appellee Mitchell's attention to page 16 of his brief which cites the case of In the Matter of the Estate of Russell Hood, Deceased, Cheryl D. Horne, v. Bernie O. Parker and Wife, Marilyn S. Parker, 955 So.2d 943 (Miss.2007). In Hood, the court held

that a 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, (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 (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 now, in equity and good conscience to hold and enjoy.

Hood at 949.

STANDARD OF REVIEW

On page 8 of his brief, Appellee Mitchell sets forth the appellate court's scope of review of a Chancellor's decision. Appellant Tillman agrees Appellee Mitchell has set forth the correct standard of review for an appellate court in reviewing a Chancellor's decision, except the Court has held that the review of matters of law will be de novo. Thus, the determination as to whether a constructive trust exist is a matter of law which triggers a de novo review.

Appellee Mitchell cites the case of In re Administration of the Estate of John

Rammie Abernathy, Jr., 778 So.2d 123, for the proposition that “...the trial court found that such clear and convincing evidence was not apparent from the testimony and written evidence presented in the case.” Appellant Tillman agrees that such was the holding in Abernathy. However, the facts were very much distinguishable from the case at bar. In Abernathy, his mother (Frances Abernathy) prepared a will in which she specifically excluded her brothers for whatever reason. Abernathy was the son and only beneficiary. Upon the death of his mother, Abernathy became the beneficiary under his mother’s will. Abernathy died some ten months later without a will. The property that he inherited from his mother descended under the laws of intestate succession to his heirs at law. Therefore, the brothers of the mother, who she had excluded under her will, inherited. The cousins objected stating that Abernathy’s mother’s will created a resulting trust in their favor.

The court held the following:

[a]lthough it is clear that, for some reason, Frances Abernathy was adamant about excluding her brothers, a resulting trust should not be imposed on John Rammie’s estate. Since a resulting trust is an ‘intentional enforcing trust, we would need to know John Rammie’s intention, and that intention is silent. John Rammie had approximately ten months after his mother’s death to prepare his own will. Unfortunately, he did not.

The court continued by stating,

[w]hile 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...

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?

Appellee Mitchell stated that “[t]he 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.” Appellant Tillman maintains that all persons, who testified at a hearing in the case at bar, provided some testimony to establish a constructive trust in this case. (T.9-1,16-17,19,30,35-36,38,50-51,62-63,71-72,82,86) It appeared that the Chancellor in the case at bar was requiring Appellant Tillman to present an actually written agreement between he and Appellee Mitchell. The court held in Russell v. Douglas, 243 Miss. 497, 138 So.2d 730, 733 (Miss.1962),

[w]e hold that the chancellor erred as a matter of law in finding that a specific agreement in detail was necessary before he could find for Appellant, and in failing to take into consideration all of the circumstances involved, including the relationship between appellant and appellee. We hold there was a confidential relation existing between appellant and appellee; although not necessary the kind of fiduciary relationship involved in Ham v. Ham, 146 Miss. 161, 110 So. 583 and cases of that kind.

For information, Ham was a case in which two brothers were involved in a business. They also had a very close and intimate relationship. C.M. Ham initially owned the business but enticed Eugene Ham into returning to Greenville, Mississippi and assisting him with the running of the business. C. M. Ham changed the name of the

business to C. M. And E. G. Ham. After C.M. health begin to fail, by will dated April 23, 1924, C. M. devised most of his property to Eugene who was to pay C. M. \$250.00 per month and to take care of his physician bills as well as funeral expenses. C. M. died on January 17, 1925.

The heirs of C. M. filed suit to set aside a deed executed by C. M to Eugene. The bases for the lawsuit was that "...the deed is sought to be canceled is that when it was executed the relations between C. M. And Eugene Ham were of such a fiduciary nature as to make the execution of such a deed prima facie fraudulent and void." This case basically turned on the issue of whether C. M. execution of the deed was an independent act and whether "...by showing that in making the deed the grantor acted on the advice of a competent person, disconnected from the grantee and devoted wholly to the grantor's interest." court held that "when such a relation exists, and the parties thereto, and that it was executed of his own independent consent and action." Ham at 585.

However, the only evidence presented by Appellee Mitchell as to his rental agreement with Appellant Tillman was presented by Appellee Mitchell. (T.63-64,76) For which Appellant Tillman denies. (T.16-17,19-22-24,27-29,33) The most credible witness, which supported evidence of a constructive trust, was that of Ms. Nancy Cole, who was the owner\seller of the property. Ms. Cole was very clear that she was selling the property for \$5,000.00, which was below the amount she could have received for the property because it was for the benefit of Appellant Tillman, who had lived on the property for approximately nine years and had taken care of the property. She made her

intentions clear to Appellee Mitchell. Appellee Mitchell acknowledged this. (T.6-10)

On page 9 of his brief, Appellee Mitchell states the following:

A properly fashioned constructive trust balances inequities that arise where one party, through 'fraud ... duress of abuse of confidence' or other dubious means, acquire title to property that rightfully and equitably belongs to another. *Estate of Abernathy*, 778 So.2d at 127 Paragraph 12; *McNeil v. Hester*, 753 So.2d 1057,1064...(Miss.2000); *Simmons v. Simmons*, 724 So.2d 1054,1057... (Miss.1998). Where one buys an asset in the name one party, 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.

Where would we find more of an inequity than a poor individual who goes to a sibling for help to retain property that he considers his home. This individual can barely afford the payments for the property and the sibling knows this prior to purchasing the property but agrees to purchase the property. This sibling states to the owner\seller that he was going to convey the deed to the individual. The individual later finds out that his sibling has betrayed him and now states that he is a renter and attempts to evict him from the property that he believes is being held for his benefit. This individual having gone against his wife, who has seen that his sibling is not trust worthy. Rather, the individual trusts his brother. (T.77)

Ms. Cole's testified that she advised Appellee Mitchell that she was selling the property for \$5,000.00 for the benefit of Appellant Tillman. Ms. Cole stated that Appellee Mitchell acknowledged his understanding. (T.9-10) If Appellee Mitchell had

intended to purchase the property simply to rent it back to Appellant Tillman, it would appear that Appellee Mitchell would have stated same to Ms. Cole and Appellant Tillman. Rather, Appellee Mitchell acknowledged Ms. Cole's condition for sale of the property for the \$5,000.00. (T.9-10) Further, Appellee Mitchell's own statements establish that he, initially, had no interest in purchasing the property. Appellee Mitchell agreed to purchase the property when his brother, Appellant Tillman, approached him the second time and stated if the property was sold to someone else, he would not have any place to live. (T.63-64,70,72-73,77,82,86)

Appellant Tillman believes the Appellee Mitchell's quotes from the cases of In the Estate of Hood and In re Estate of Horrigan found on page 10 of his brief sums up his position. In short,

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 (Paragraph 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 vs. Thornhill*, 905 So.2d 747, 753, (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.

On page 13 Appellee Mitchell argues that the two leading cases that Appellant Tillman cited in support of the finding a constructive trust, Pitchford and Russell were distinguishable from the case at bar. Rather, Appellee Mitchell maintains that the case

of Shumpert v. Tanner, 332 So.2d 411 (Miss.1976) was more in line with Appellant Tillman's facts. Lets review the facts and law as set forth in each of the cases below.

In the case of Pitchford, Appellee agreed to place the property in his name to allow Appellant to obtain money to purchase another property. The property that was conveyed to Appellee was placed as a lien for the loan that was secured. The initial issue was whether Appellant had clean hands. However, the court found that there was no intent by Appellant to defraud the lending institution because the loan was secured. Appellee was the instigating party in this matter and had failed to live up to an earlier agreement regarding his rental of the property. After the property had been conveyed to Appellee, Appellee was to later return the property to Appellant. However, after several attempts by Appellant to get Appellee to reconvey the property, Appellant filed suit. The court found a confidential relationship as well as a constructive trust.

Pitchford v. Howard et al, 208 Miss. 567, 45 So.2d 142 (Miss.1950)

In the case of Russell, the court found that there was a confidential relationship between the Appellant and his aunt because his aunt had come and stayed with his mother, Appellee's sister, when she became terminally ill. The parties shared a locked box and the Appellant "... endeavored to have a will giving appellee 20 acres of land probated although this would result in appellant's portion of his mother's estate being diminished." Russell at 733.

Appellee agreed to redeem property that would have prevented appellant from being foreclosed upon. Appellee had foreclosing party to prepare the deed in her name and also had Appellant to sign a deed over to her for the property. Appellant's, who

was less sophisticated in this matter, understanding and belief was that the Appellee would reconvey the property to him after he paid her the money that was owed. After Appellee received the above deeds, she sought to evict Appellant. In the case of Shumpert, the court was clear when it stated that there was disparity in the testimony and the actual facts.

The Appellee Tanner claimed that Appellant Shumpert had purchased the property for him because his credit was not good enough to make the purchase. According to Appellee Tanner, he made the down payment as well as the mortgage notes. According to Appellee Tanner, Appellant Shumpert was to convey the property to him upon him being able to borrow the money to purchase the property. However, when the property was up for foreclosure, Appellee Tanner acknowledged that Appellant Shumpert paid the money to prevent foreclosure. Appellant Shumpert and her witness, who was her sister and the former partner to Appellee Tanner, testified that she purchased the property as an investment.

Appellant Shumpert maintained that she paid the down payment and that Appellee Tanner and her sister were to live on the property paying rent which would have amounted to the mortgage note. The court held,

[w]e are of the opinion, and so hold, that the evidence did not rise to that degree of clarity required to establish a resulting trust. In other words, the evidence was not clear and convincing. The chancellor recognized this. In his opinion he said, '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.'"

The court continued by stating that

[e]ven if the evidence had been clear and convincing that Tanner paid the down payment and had an agreement with Shumpert that she would convey the property to him after his credit was sufficient for him to finance the transaction, still Tanner would not be entitled to the relief prayed for. There is no proof that Tanner's credit would enable him to borrow the money to purchase the house. The decree appealed from requires Shumpert to deed the property to Tanner upon Tanner's payment of \$481 that Shumpert had paid to avoid foreclosure. That would leave Shumpert liable for the mortgage notes until 1999 with all the implications involved in such liability. It would be inequitable to burden Shumpert with this liability. She would be subject to a deficiency judgment in a case of foreclosure.

Shumpert at 412.

Based upon the above cases, it appears that Appellee Mitchell is also saying that there must be an actual conveyance of property before there can be a constructive trust. This is not the case. Russell at 733. It is clear that the facts in the case at bar are more in line with Pitchford and Russell not Shumpert.

In the case at bar, there was a purchase of property by Appellee Mitchell on behalf of his brother Appellant Tillman. (T.63-64,70,72-73,77,82,86) The property was sold by the owner\seller for less than what she knew to be the fair market value because she wanted Appellant Tillman to continue to live on the property that he had taken care of for approximately nine years. (T.6-7,9-10) Appellee Mitchell stated that he would convey the property to Appellant Tillman when he paid for the property. (T.9-10,64,73)

There was never any indication that the cost of the property to Appellant Tillman was going to be more than the \$5,400.00 that Appellee Mitchell paid for the property until Appellee Mitchell presented Appellant Tillman with his Agreement dated May 12, 2007. Appellant Tillman refused to sign the agreement because he stated that the terms set forth in the agreement were not the original terms that the parties had agreed to.

Appellant Tillman stopped making payments after he had paid the \$5,400.00 to Appellee Mitchell. When Appellant Tillman requested a deed, Appellee Mitchell produced a document, which he referred to as a *Lease Purchase Agreement*, that he subsequently maintained were the conditions of Appellant Tillman purchasing the property. However, Appellant Tillman was to pay \$9,000.00 over the \$5,000.00 purchase price to Appellee Mitchell. (T.16-17,19-22,24,27-29,33,88) Interestingly, Appellee Mitchell incorporated within the cover letter dated May 12, 2007 that accompanied the alleged *Lease Purchase Agreement* the following statement to Appellant Tillman: *As you recall, I purchased this home from Ms. Cole for the benefit and use of you and your family.* (Appellant's Record Excerpt pages 74-75)

In short, Appellant Tillman believes that some of the best evidence from which the court should have found a constructive trust were based upon many of the arguments Appellee Mitchell set forth in his brief. The only testimony that presented to the contrary that this was not a constructive trust was presented by Appellee Mitchell. However, Appellee Mitchell's testimony and actions only established that there should have been a constructive trust. (T.9-10,63-64,70,72-73,77,82,86) He was in a confidential relationship with Appellant Tillman, he agreed to convey property to Appellant Tillman upon him paying for the property, he had Appellant Tillman paying the taxes on the property and he wanted Appellant Tillman to insure the home on the property. (T.29,66) These are actions that a person is a home owner. Appellee Mitchell's actions were abusive of his less educated brother, Appellant Tillman.

**II. WAS THE TRIAL COURT CORRECT IN FINDING THAT
MICHAEL TILLMAN WAS NOT ENTITLED TO A REFUND
OF MONIES PAID TO DAVID MITCHELL?**

Appellee Mitchell stated on page 15 of his brief that Appellant Tillman was renting from Ms. Cole and continued to rent from Appellee Mitchell. This does not make any sense and is contrary to the testimony that was provided in court. (T.9-10,73) Appellee Mitchell recites cases that espoused the principles of unjust enrichment and each case fits the facts and situation involving Appellee Mitchell against his brother, Appellant Tillman.

CONCLUSION


Appellant Tillman believes that he has met his burden as set forth by law, i.e. clear and convincing evidence of not only a confidential relationship between brothers but also an abuse of that relationship in the purchasing of the property from Ms. Nancy Cole by Appellee Mitchell. Appellee Mitchell does not dispute that once the property was paid for that he would convey the property to Appellant Tillman. However, Appellee Mitchell did not advise Appellant Tillman until May 12, 2007, which was approximately one year from the date of the purchased of the property from Ms. Cole, of the fact that he was charging him \$9,000.00 above what he paid for the property.


Further, Appellant Tillman and his wife were paying what they believed to be toward the repayment of the \$5,400.00 loan from Appellee Mitchell to retain the property; however, at the last minute they were informed by Appellee Mitchell that their payments were to be considered as rent. Interestingly enough, although the lower court found that Appellant Tillman owed \$4,200.00 for rent for the fourteen (14) month

period, from May 1, 2009 June 1, 2010, he, nevertheless, did not remove Appellant Tillman from the property. This is after Appellee Mitchell argued that Appellant Tillman had not paid the money monthly and was behind. The Court found that Appellee Mitchell was responsible for the payment of taxes on the property.

Finally, in his closing, Appellee Mitchell requested additional rent from Appellant Tillman. However, Appellee Mitchell failed to cross claim an appeal and Appellant Tillman maintains that Appellee Mitchell is not entitled to same in this action or any other.

RESPECTFULLY SUBMITTED,

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CERTIFICATE

I, Glenda F. Funchess, Attorney for Appellant, do certify that I have this day, mailed through the United States Postal Service, postage pre-paid, a true and correct copy of the Appellant's Reply Brief to the following parties at their last known addresses:

1. Honorable Jerry Evans
Attorney for Appellee
Post Office Box 1230
Hattiesburg, MS 39403-1230
2. Honorable Eugene Fair
Chancellor of the Tenth Judicial District
Post Office Box 872
Hattiesburg, MS 39403-0872

This the 7th day of March, 2011.



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