

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL JAMES TILLMAN

APPELLANT

VS.

CAUSE NUMBER: 2010-TS-01252

DAVID D. MITCHELL

APPELLEE

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

BRIEF FOR APPEAL

(WITH CORRECTED REFERENCES TO RECORD EXCERPTS)

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CERTIFICATE OF INTERESTED PERSONS

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

1. Appellant, Michael James Tillman, is the brother of Appellee, David D. Mitchell.

2. Appellee, David D. Mitchell, is the brother of Appellant Michael James Tillman.

3. Glenda F. Funchess Esquire, is a Regional Managing Attorney for Mississippi Center for Legal Services Corporation and Attorney for Appellant Michael James Tillman.

4. Jerry A. Evans, Esquire, is the Attorney representing Appellee David D. Mitchell.

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STATEMENT OF THE ISSUES

(1) WHETHER THE COURT ERRED IN NOT FINDING THAT A CONSTRUCTIVE TRUST EXISTED BETWEEN THE APPELLANT TILLMAN AND APPELLEE MITCHELL?

(2) WHETHER APPELLANT MET HIS BURDEN OF PROOF OF CLEAR AND CONVINCING EVIDENCE THAT A CONSTRUCTIVE TRUST EXISTED BETWEEN HE AND APPELLEE?

(3) WHETHER APPELLANT WAS ENTITLED TO THE REFUND OF MONIES PAID TO APPELLEE UNDER THE PRESUMPTION THAT THERE EXISTED AN AGREEMENT FOR THE PURCHASE OF PROPERTY?

STATEMENT OF THE CASE

Nature of Case

This case involves an appeal from a decision rendered by the Chancery Court of the Tenth Judicial District of Forrest County, Mississippi. Appellant Michael James Tillman had filed an action against his brother Appellee, David D. Mitchell, for establishment of a constructive trust. At the conclusion of the testimony, the Court announced that it did not find that a constructive trust existed. Further, the Chancellor found that Appellee David D. Mitchell was entitled to \$4,200.00 on his counterclaim which represented rent in the amount of \$300.00 per month for the period covering May 1, 2009 through June 1, 2010.

Course of Proceeding and Disposition in Court and Administrative Hearing Below:

This case is before this Court on an appeal filed by Appellant, Michael James Tillman, from an adverse ruling by the Chancellor of Forrest County, Mississippi. Counselor for Appellant Tillman filed an Amended Pleading for Petition to Establish Constructive Trust against Appellee David M. Mitchell. Alternatively, Appellant Tillman requested that he be reimbursed all expenses related to the purchase of the property. Counselor for Appellee Mitchell filed an Answer and Counterclaim seeking twelve (12) months of rent from Appellant Tillman in the amount of \$300.00 per month for a total sum of \$3,600.00. Appellee David M. Mitchell also requested that the Court remove Appellant Tillman from the property. Appellee Mitchell had previously filed an action on August 11, 2009, in the Justice Court of Forrest County to remove Appellant Tillman from property. Counselor for Appellant Tillman responded to Appellee

Mitchell's Counterclaim by filing an Answer to the counterclaim. Hearing was scheduled and heard before the Court on June 17, 2010.

On June 30, 2010, the Chancellor entered an Order and Final Judgment finding that Appellant Michael James Tillman had "failed to put forth evidence to establish a constructive trust." Said Chancellor also granted Appellee David D. Mitchell a judgment in the amount of \$4,200 of rent which covered the period from May 1, 2009 through June 1, 2010. Counselor for Appellant Tillman filed his appeal to this Honorable Court on July 29, 2010. The Court on July 30, 2010, entered an Order to Correct and Clarify Final Judgment. In this Order, the Court stated the following "[T]hat 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 their intention, and therefore, the relief sought in the Amended Petition to Establish Constructive Trust is hereby denied." The prior relief granted to Appellee Mitchell for \$4,200.00 remained in effect.

It is from the decisions of the Chancellor of Forrest County, Mississippi that Appellant Michael James Tillman timely filed his appeal to this Honorable Court.

STATEMENT OF THE FACTS

Appellant, Michael James Tillman, filed an action in Chancery Court in Forrest County, Mississippi to establish ownership to a parcel of land that he maintains he owns. Appellee Mitchell was only to hold said property in trust until such time as Appellant had repaid the purchase price of \$5,000.00 plus \$400.00 for back rent. The purchase by Appellee Mitchell was necessary because Appellant Tillman was unable to

pay cash to the seller, Ms. Cole, for the purchase of the property. However, his brother, Appellee David D. Mitchell, maintains that he is the owner of said parcel of land and said property should remain titled in his name because Appellant Tillman did not pay him the full purchase price for the property.

When, Appellee Mitchell purchased the property from seller, he did not, initially, advise his brother, Appellant Tillman, that he was charging him more than the \$5,000.00 selling price. Prior to the sell of the property, Appellee Mitchell had a discussion with the property seller, Nancy Cole, who advised him that she was selling the property in question for \$5,000.00 for the benefit of Appellant. Ms. Cole testified that this information was told to Appellee Mitchell because she believed the property was worth more than \$5,000.00. The reason Ms. Cole sold the property for less was because Appellant Tillman and his wife had lived on the property for years and took care of same.

Two (2) years after the transaction, Appellee Mitchell presented in writing the terms of the purchase to Appellant Tillman. Said terms were paid \$300.00 per month for 48 months or \$200.00 for 60 months. Appellant Tillman paid \$300.00 per month until such time as he believed he had paid the amount paid to Ms. Nancy Cole for the property. Appellee Mitchell has maintained that since the terms set forth two (2) years after the transaction had not been adhered to, that he is still the rightful owner of the property and was owed money for the time that Appellant had lived on the property. The Court granted Appellee Mitchell rent from May 1, 2009 until June 1, 2010. Appellee Mitchell maintains that no constructive trust exist. Both parties testified that they trusted

the other.

FACTS

Appellant Michael James Tillman sued in the Chancery Court of Forrest County, Mississippi for land that he maintains he is the actual owner. (T.5) (R.11-66) Appellant Tillman was renting the property from Nancy Cole and her husband. The testimony of Ms. Cole, who knew both Appellant Tillman and his brother, Appellee, Mitchell, was that after her husband's death, she told Appellant Tillman that she had decided to sell the property. According to Ms. Cole, Appellant Tillman asked how much was she selling the property and if he could purchase same? Ms. Cole stated that Appellant Tillman told her that he believed his brother would purchase the property for him because he would be unable to obtain a loan because of his work history. Ms. Cole agreed to sell the property to Appellant Tillman for \$5,000.00. She testified that she was aware that the property and house were worth more but she was losing money by having to pay the taxes and maintain the insurance on the property. (T.6-9)

Ms. Cole testified that she spoke with Appellee David D. Mitchell regarding the property. She testified that she told Appellee Mitchell that she was selling the property for \$5,000.00 for the benefit of Appellant Tillman. Ms. Cole agreed to sell a separate parcel of land to Appellee Mitchell for him to build a house. However, she was clear that she was selling the first parcel of land at the price of \$5,000.00 for the benefit of Appellant Tillman. Although the property would be titled in Appellee Mitchell's name, according to Ms. Cole, Appellee Mitchell acknowledged that he understood. "David, I'm selling the place to your brother." He said, "I understand, Ms. Cole. When he pays

me, I will sign the deeds over to him. (T.9-11)

Ms. Cole stated that someone else had an interest in purchasing the property but she did not discuss this any further with that individual. Appellee Mitchell paid the \$5,000.00 for the first parcel of land as well as \$400.00 owed by Appellant Tillman in back rent. When asked if Appellant Tillman had paid rent every month, Ms. Cole stated that he had. Ms. Cole stated that Appellant Tillman told her that he thought his brother had purchased the property earlier and therefore, he did not know that the rent was owed. (T.12-13,26-27,30-32)

Ms. Cole prepared a letter dated April 17, 2009, stating that she had agreed to sell the \$5,000.00 parcel of land to Appellee Mitchell. Ms. Cole stated that she had her daughter to draft the letter and she signed it. Ms. Cole also acknowledged executing the warranty deed to Appellee Mitchell to the property. (T.11-12,14,59-60) (R.25,83)

Appellant Tillman testified that he had been residing at the property for fifteen (15) years. Of the fifteen (15) years, ten (10) of those years, he was renting the property. Appellant Tillman testified that in 2005, Ms. Cole advised him that she would allow him to purchase the property that he had been renting from her for \$5,000.00. However, Ms. Cole was not willing to finance the property. Appellant Tillman stated that he first attempted to obtain the money from his sister, who is an attorney in Baton Rouge, Louisiana. (T.15-16)

Appellant Tillman stated that his sister advised him that because she was handling a lawsuit for him that she could not loan him the money. Appellant Tillman stated that his sister suggested that he contact his brother, Appellee Mitchell. Appellant

Tillman testified that he asked Appellee Mitchell if he could borrow the money and if he would handle the business regarding the sell of the property because he felt his brother, Appellee Mitchell, had more business sense. Appellant Tillman, who only completed the eighth grade and reading and writing skills were described as fair had faith in Appellee Mitchell handling the property matter because he graduated from college. (T.16-17,89)

Appellant Tillman testified that Appellee Mitchell stated that Ms. Cole wanted \$5,400.00 for the property. Appellant Tillman stated that he told Appellee Mitchell that he would repay him the \$5,400.00. According to Appellant Tillman, he told Appellee Mitchell that he would repay the money at the rate of \$300.00 per month. Appellant Tillman started paying the \$300.00 per month in the month of December 2005 until April 2006 when he had a heart attack. Appellant Tillman testified that he reinstated his \$300.00 per month payment in May 2006; although Appellee Mitchell did not purchase the property until June 2006. Appellant Tillman testified that he begun paying Appellee Mitchell in December 2005, because he thought the property had been purchased from Ms. Cole in November 2005, and that is why he stopped paying Ms. Cole rent. (T.18-20,25,29)

Appellant Tillman stated that he paid Appellee Mitchell in cash until May 2006, when he asked him about the deed of trust. Appellant Tillman testified that when Appellee Mitchell told him that he did not have to give him a deed, he started keeping receipts of his payments. In a letter dated May 12, 2007, Appellant Tillman testified that he received a lease agreement from Appellee Mitchell that he was to pay him \$300.00

per month for a total of 48 months. The amount total over \$14,000.00, which did not include the money he had already paid Appellee Mitchell. Appellant Tillman stated that the terms set forth in the letter dated May 12, 2007, came some two (2) years after he and Appellee Mitchell had spoken with Ms. Cole, was not the agreement between he and Appellee Mitchell. (T.19-22,27-29,87) (R.26,74,84)

Appellant Tillman stated that he paid Appellee Mitchell all the money he owed him according to the original agreement. Once he had repaid the \$5,400.00, Appellant Tillman testified he stopped paying Appellee Mitchell. Appellee Mitchell advised Appellant Tillman that he was paying off a loan. Appellant Tillman stated that he responded to Appellee Mitchell's May 12, 2007, letter and asked for verification that he was paying off a loan. Appellant Tillman stated that he has never received a response from Appellee Mitchell to his letter. At the time, Appellant Tillman stopped paying Appellee Mitchell, he had paid approximately \$10,000.00. (T.29-30,32-33)

Appellant Tillman testified that Appellee Mitchell advised him that he need to pay the taxes for 2007 on the property. Taxes for the years 2008 and 2009 have not been paid. Appellant Tillman stated that the property is in disrepair and he is unable to purchase insurance or get any assistance because he is not able to provide any documentation that he was the owner of the property. Appellant Tillman stated that Appellee Mitchell has not been to the property and has not made any repairs to the property. (T.22-24) (R.26,74-75)

Mary Tillman, the wife of Appellant Tillman, testified that she and Appellant Tillman had lived on the property since 1997, and that Ms. Cole offered to sell the

property to them for \$5,000.00. Mrs. Tillman and Appellant Tillman were paying rent to Ms. Cole in the amount of \$200.00 per month. Because the Tillmans were unable to come up with the cash money to purchase the property, Mrs. Tillman stated she and Appellant Tillman decided to ask his family. Mrs. Tillman stated that Appellant Tillman's sister was asked; however, she did not have the money. According to Mrs. Tillman, Appellant Tillman, over her objection, asked his brother, Appellee Mitchell. Mrs. Tillman stated she objected to asking the Appellee Mitchell because he did not treat Appellant Tillman like he was a brother. (T.34-36)

Mrs. Tillman testified that Appellant Tillman was to repay the \$5,000.00 that was borrowed from Appellee Mitchell. The payments were \$300.00 per month. Mrs. Tillman stated that payments were initially made to Appellee Mitchell in the form of cash and later money orders. Mrs. Tillman stated that often Appellee Mitchell would not provide a receipt even though she purchased a receipt book for Appellee Mitchell. Mrs. Tillman wanted a receipt because she feared Appellee Mitchell was trying to defraud her husband, Appellant Tillman. (T.37-38,41,43-44,48-49) (R.28-52, 91-115)

Testimony was provided by Ronald Johnson. Mr. Johnson stated that he knew Appellant Tillman and Appellee Mitchell. Mr. Johnson stated that Appellant Tillman does not read or write well. He stated that he helped Appellant Tillman with advice and reviewing the documents related to the matter he is in court about. Mr. Johnson's testimony was that Appellant Tillman did not graduate from school; however, Appellee Mitchell graduated from USM and has been involved in a number of business ventures.

Mr. Johnson stated that he has had to review and explain the documents involving this Court proceeding to Appellant Tillman. (T.50-53)

Testimony from Appellee Mitchell was that when Appellant Tillman asked him to purchase the property, he advised him that he did not want to get involved because there were problems with the title to the property. Appellee Mitchell stated that Appellant Tillman told him that Ms. Cole was going to sell the property to someone else if he did not purchase it. According to Appellee Mitchell, Appellant Tillman stated that if he purchased the property, he, Appellant Tillman, would continue to rent it from him. Appellee Mitchell stated that he agreed and paid Ms. Cole \$5,000.00 for the property plus \$400.00 for past due rent. Appellee Mitchell stated that there was no discussion of Appellant Tillman purchasing the property until either late August or early September. Appellee Mitchell testified that the discussion of the purchase of the property took place in his truck in the presence of his son. Appellee Mitchell stated that he advised Appellant Tillman that he could purchase the property for the sum of \$250.00 for 60 months, \$300.00 for 48 months or Appellant Tillman could have continued to pay him \$200.00 for rent. Appellant Tillman chose to pay \$300.00 per month. (T.63-65,72-73,87)

Appellee Mitchell introduced a document marked Number 2, dated September 2006, which has the following words written on same "rent purchase." Appellee Mitchell stated that September 2006, is when Appellant Tillman agreed to the purchase terms. Appellee Mitchell testified that Appellant Tillman was consistently late, sometimes as much as four (4) months. Appellee Mitchell stated that he told Appellant Tillman that he had to keep the property clean, purchase insurance and pay the taxes on

the property. Appellee Mitchell stated that Appellant Tillman asked him several times to provide him with the balance as well as the terms and conditions. Appellee Mitchell stated that he provided Appellant Tillman with the agreement which was not challenged until some two (2) years later. During this time, Appellee Mitchell stated that Appellant Tillman continued to make the \$300.00 payment. (T.65-66,80-81) (R.26,74,84,75,85)

Appellee Mitchell stated that Appellant Tillman stopped making payments and is approximately 18 months behind. According to Appellee Mitchell, Appellant Tillman owes \$5,400.00 plus \$1,800.00 in late fees. Appellee Mitchell stated that he paid the taxes in 2007 and Appellant Tillman paid the taxes in 2008. Appellee Mitchell stated that he has not been on the property after he saw old cars and junk in the yard. Appellee Mitchell stated that he did not receive any rent from Appellant for the months of December 2005 to March 2006. Appellee Mitchell is asking the Court for back rent. Appellee Mitchell also stated that he considered the agreement to purchase the property between he and Appellant Tillman terminated. Upon questioning by Appellant Tillman's attorney, Appellee Mitchell stated that he has a Bachelor of Science degree from William Carey College in the field of business administration. He further stated that he was not in the rental property business as some believed. (T.67-69,81) (R.67-73)

Appellee Mitchell was asked if he had purchased a home before. To which, Appellee Mitchell responded, yes. He was asked if he received a deed from the purchase of his home, Appellee Mitchell stated, "[w]hen we bought the property you automatically get a deed. That is right." Appellee Mitchell admitted that he agreed to

purchase the property for Appellant Tillman. His precise statement was, "I told him that I was going to buy this property for my brother." Appellee Mitchell stated that when Appellant Tillman first told him of the amount Ms. Cole was going to sell him the property for, he initially was not interested in purchasing the property. However, when Appellant Tillman approached him the second time regarding the purchase of the property, Appellant Tillman stated did not know who Ms. Cole may sell the property to and where he would live. At this time, Appellee Mitchell agreed to purchase the property. However, there was no written contract between Appellee Mitchell and Appellant Tillman. Appellee Mitchell reason for the delay of entering into a contract with Appellant Tillman when he purchased the property was that he, Appellee Mitchell, did not want to incur any additional legal fees. (T.70-73)

Appellee Mitchell testified that he told Appellant Tillman that this was an opportunity for him to own his home and that he could either pay him \$250.00 per month for five (5) years or \$300.00 per month for four (4) years and that once the payments were made, he would give him, Appellant Tillman, a deed. Appellee Mitchell argues there was an Agreement that was submitted to Appellant Tillman in 2007. However, Appellee Mitchell admitted that the document he provided to Appellant Tillman in 2007 was not signed by neither himself nor Appellant Tillman. As to writing receipts to Appellant Tillman, Appellee Mitchell stated although he did not always write receipts to Appellant Tillman, he kept up with payments in a book at his residence. (T.74-76) (R.26, 31, 34, 36, 38, 74-75, 84)

Appellee Mitchell stated that Appellant Tillman could read and write although he

stated that Appellant Tillman was constantly in trouble and had been in penal institutions. Appellee Mitchell further stated that he had not been on the property in question because Appellant Tillman threaten to shoot him. According to Appellee Mitchell, he would allow Appellant Tillman to have the property rather than get shot over it. Appellee Mitchell stated that his sister, who was handling a legal matter for Appellant Tillman, made one (1) payment on behalf of Appellant Tillman in the amount of \$300.00. (T.79-81,83,85) (R.35)

SUMMARY OF ARGUMENTS

This case is a simple one. The issues are simple as well. The Court has to determine whether the Appellant Michael James Tillman has established by clear and convincing evidence the establishment of a constructive trust which requires that there be confidential relationship between the parties. What can be more of a confidential relationship than brothers who resided in the same household and who trusted each other? Appellant Tillman was trying to purchase the property he and his wife had resided upon for years after learning that the owner, Ms. Nancy Cole, was going to sell the property. After Appellant Tillman advised Ms. Cole of his interest in the property, Appellant Tillman first approached his sister for the money to purchase the property because he did not have the cash to pay Ms. Cole for the property. Appellant Tillman's sister referred Appellant Tillman to their brother, Appellee Mitchell. Appellee Mitchell and Ms. Cole had a discussion wherein Ms. Cole stated that she was selling the property at \$5,000.00 for the benefit of Appellant Tillman. This was important because it was clear from Ms. Cole's testimony that she believed the property was worth more than

what she was selling the property.

At no point, during the transaction for the sell of the property, did Appellee Mitchell informed Appellant Tillman that he was charging him more than the purchase price of the property. It was not until two (2) years later that Appellee Mitchell advised Appellant Tillman that he had to lease purchase the property and had to pay him either \$300.00 per month for 48 months or \$200.00 per month for 60 months. Appellant Tillman believes equity dictates a finding of not only a confidential relationship between the parties but that there was deceit on the part of Appellee Mitchell in dealing with his brother, Appellant Tillman, who was less educated and trusting of Appellee Mitchell due to Appellee Mitchell's business sense and education. Based upon same, Appellant Tillman believes that the facts set forth above establishes that a constructive trust existed between he and Appellee Mitchell.

Should the court not find a constructive trust, Appellant Tillman believes that he is entitled to a full refund of all monies paid to his brother, Appellee Mitchell because there was no meeting of the minds as same relates to the purchase of the property from owner\seller, Ms. Nancy Cole. Appellant Tillman further believes that equity would dictate a refund of his money.

ARGUMENTS AND LAW

INTRODUCTION

Although normally matters involving property must be in writing, in establishing a constructive trust, the court has held that a constructive trust is not subject to the Statute of Frauds. William Wallace Allred vs. Wiley Fairchild, Fairchild-Windham

Exploration Company, A Partnership, John M. Fairchild, Michael B. Moore, Mark A. Fairchild, as the Trustees of the Marie I. Fairchild Life Insurance Trust and the Marie I. Fairchild Life Insurance Trust, 785 So.2d 1064,1070 (Miss.2001). See also Sample v. Romine, 193 Miss. 706, 9 So. 2d 643 (1942)

Appellant Tillman recognizes that the burden of proof is clear and convincing in the establishment of a constructive trust. Further, the burden of proof in establishing that a resulting trust should be created is on the proponent of the will. In short, the proponent must establish the facts by clear and convincing evidence. Shumpert v. Tanner, 332 So.2d 411,412 (Miss.1976) See also In the Administration of the Estate of John Rammie Abernathy, Jr., Deceased, 778 So. 2d 123 (Miss.2001)

In proving a constructive trust, Appellant Tillman recognizes that the burden is on him to prove a confidential relationship between the parties. The court in the case of In the Matter of the Will and Testament of Edward B. Launius, Linda Launius Gallagher v. Gladys Warden, the University of Mississippi Foundation, Administrators of the Stephen E. Launius Scholarship Fund, Martha Brown and Mary Louise Holmes, 507 So.2d 27, 31 (Miss. 1987), cited the case of Norris v. Norris, 498 So.2d 809 (Miss.1986), wherein the court stated

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 (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. Harris v. Sellers, 446 So.2d 1012 (Miss.1984); Jeter v. Culp, 343 So.2d 1226 (Miss.1977); Moore v. Stone, 208 So.2d 585 (Miss.1968); Green v. Frazier, 242 Miss. 315, 135 So.2d 399 (1961); Lawrence v. Lawrence, 217 Miss. 250, 63 So.2d 825 (1953); Cresswell v. Cresswell, 164 Miss.

871, 884-87, 140 So. 521 (1932).

ISSUES

I

WHETHER THE COURT ERRED IN NOT FINDING THAT A CONSTRUCTIVE TRUST EXISTED BETWEEN THE APPELLANT TILLMAN AND APPELLEE MITCHELL?

Before one can discuss a constructive trust, there has to be a definition. The court in the case of In the Matter of the Estate of Rosa Lee Davidson: Jimmy L. Davidson, Administrator of the Estate of Rosa Lee Davidson and Jimmy L. Davidson, Individually, v. Donald Davidson, Peggy M. Davis, Tim Davidson, Terry Davidson, Todd Davidson, and Tammy Davidson, 667 So.2d 616, 620 (Miss.1995) citing the case of Saulsberry v. Saulsberry, 223 Miss.684, 78 So.2d 758 (Miss.1955), defined a constructive trust as:

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

The Court has also held in 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 943,949 (Miss.2007),

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.

See also Willis E. Calcote v. Bobbie Bert Calcote, 583 So.2d 197 (Miss.1991)

The Court continued in its ruling citing the case of Sojourner v. Sojourner, 247 Miss. 342, 353, 153 So.2d 803,807 (Miss.1963) (quoting 54 Am.Jur. Trusts, section 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.

Again citing In re Administration of the Estate of John Rammie Abernathy, Jr., Deceased, the court held,

Additionally, this Court has held that both constructive and resulting trusts are creatures of equity. Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc., 716 So.2d 200, 206 (Miss.1998). Id. at 127.

The Court in Abernathy also cited Sojourner v. Sojourner, holding that

[A] constructive trust is one that arises by operation of law against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable

means, or who is any way against equity and good conscience, either obtained or holds legal right to property which he ought not, in equity and good conscience, hold and enjoy. This Court has also defined resulting trusts as: implied by law from the acts and conduct of the parties and the facts and circumstances which at the time exist and surround the transaction out of which it arises. Broadly speaking, a resulting trust arises from the nature or circumstances of consideration involved in a transaction whereby one person becomes invested with a legal title but is obligated in equity to hold his legal title for the benefit of another, the intention of the former to hold in trust for the latter being implied or presumed as a matter of law, although no intention to create or hold in trust has been manifested, expressly or by inference, and there ordinarily being no fraud or constructive fraud involved. Church of God Pentecostal, Inc., 716 So.2d at 207 (citing 76 Am.Jur.2d Trusts section (1992)). A resulting trust is basically an "intention-enforcing trust. In other words, a resulting trust is designed to give effect to the actual intention of a party although that intention was not directly expressed. Simmons v. Simmons, 724 So.2d 1054, 1056 (Miss.Ct.App.1998)

Id. at 127-128. See also Willis E. Calcote v. Bobbie Bert Calcote, 583 So.2d 197 (Miss.1991)

Appellant Tillman and Appellee Mitchell were not only brother who grew up together. Therefore, Appellant Tillman believed he could borrow the money he needed to maintain his resident from his brother, Appellee Mitchell, and be treated fairly. In short, he trusted his brother. (T.77) This was so even though his wife had expressed her concern about seeking any assistance from Appellee Mitchell. Mrs. Tillman testified that she did not believe Appellee Mitchell treated Appellant Tillman as a brother. Appellant Tillman's response to his wife's concern was "...[H]e said he didn't have no choice, so he asked him anyhow." (T.36)

Appellee Mitchell acknowledged that Appellant Tillman paid the taxes on the property for the year 2008. According to Appellant Tillman, as of the date of the

hearing, which was June 17, 2010, the taxes for the years of 2008 and 2009 had not been paid. (T.23,67,81,135-136) (R.116-151) If Appellant Tillman was not the property owner, then he should not have been paying taxes. This was reinforced, as a part of both Court Orders, wherein the Chancellor found that Appellee Mitchell was responsible for the payment of the taxes on the property. (T.137,142-143) In short, it would appear that given ownership of property is designed by the payment of taxes, if Appellee Mitchell was not purchasing the property for the benefit of his brother, Appellant Tillman, then there would not have been an expectation on Appellee Mitchell's part that Appellant Tillman would be paying the property taxes. Sometime during Appellee Mitchell's ownership of the property, he sought to evict Appellant Tillman from the property in the Justice Court of Forrest County, Mississippi. Appellant Tillman believe this was done because he did not have insurance on the property. (T.22 ,66,80) (R.55-56

In the case of Pitchford v. Howard et al., 208 Miss.567, 45 So.2d 142,147-148, (Miss.1950), which involved the conveyance of property by a widow to another to obtain a loan on the property for the widow, the court required the reconveyance of the property to the widow, holding,

This is not a suit merely to enforce performance of an oral contract to convey land. It is moreover, a suit to establish a constructive trust under the statute on statute on Trusts and Confidence, as to which, the statute itself provides, that a constructive trust can arise although some of its phases may rest in parol....See Sample et al. v. Romine, 193 Miss. 706, 8 So.2d 257, 262, 9 So.2d 643, 10 So.2d 346, where we stated: The trust arises and results by operation of law from the facts and circumstances attending the transaction and the relation of the parties. This is true even though as a part of the original understanding it was orally agreed title should be taken in one of the parties, if there are other facts and circumstances surrounding the transaction which cause

a trust to result....As was said in Thomas et al. v. Thomas, 62 Miss.531: 'It is well settled by authority that where, on the facts proved, a trust would result in the absence of an express agreement, the fact that such agreement was made will not prevent the trust from arising.'

The subject of constructive trusts is intimately associated with that of fraud. Rightly understood, a 'constructive trust' is only a mode by which court of equity work out equity and prevent or circumvent fraud and overreaching.

As stated by the Court in Russell,

A constructive trust is a fiction of equity. It is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. The equity must shape the relief, and courts are bound by no unyielding formula.... It arises regardless of intention or agreement, express or implied. Rimmer v. Austin, 191 Miss.664, 4 So.2d 224; Pitchford v. Howard, 208 Miss. 567, 45 So.2d 142. The trust is raised by implication of law. Fraud need not be shown. Adcock v. Merchants & Manufacturers Bank, 207 Miss. 448, 42 So.2d 427.

The existence of the confidential relationship between appellant and appellee under the circumstances prohibited appellee from becoming unjustly enriched at appellant's expense....'It is...unjust enrichment under cover of the relation of confidence, which puts the court in motion.' See also Farano v. Stephanelli, 7A.D.2d 420, 183 N.Y.S.2d 707.

The case that Appellant Tillman has argued on point is that of Leroy Russell and Wife, Mary Frances Russell v. Gladys Posey Douglas, 243 Miss. 497, 505, 138 So.2d 730 (Miss.1962). Russell set forth, in detail, matters to be considered by the court in determining a constructive trust. The facts in the case are that Mrs. Quinn, mother of Leroy Russell, deeded to him property but retained a life estate for herself. Russell had Deeb Construction Company build a shell home on said property at the cost of

\$2,000.00. Deeb Construction Company received a deed of trust from Russell. Mrs. Quinn retained the life estate did not sign a deed of trust to Deeb Construction Company. Although, Russell defaulted on the deed of trust conveyed to Deeb Construction Company, he and his wife remained on the property. Deeb Construction Company could not obtain the property because of Mrs. Quinn's life estate. Ms. Quinn became ill and Gladys Posey Douglas, her sister, returned to the State from Texas to be with her. Mrs. Quinn. Being very close to her sister, Ms. Douglas remained in the State until her death. Russell and Ms. Douglas jointly hired an attorney to handle the estate.

After the death of Mrs. Quinn, Deeb Construction Company instituted an eviction action against Russell. Russell sought assistance from the jointly hired attorney regarding the eviction. At some point, there was a discussion between Russell, Ms. Douglas and her husband about advancing Russell the money to settle the eviction action by Deeb Construction Company. Initially, Deeb Construction Company was to executed the deed in Russell's name. However, the jointly hired attorney, after consulting with Ms. Douglas and her husband, told Deeb Construction Company to execute the deed in Ms. Douglas' name. Ms. Douglas' husband telephoned Russell and advised him and his wife to meet them at the attorney's office to execute a quitclaim deed to Ms. Douglas. Although all parties were in the attorney's office, it was never explained to Russell and his wife the action of executing the quitclaim deed. After the deed had been executed by Russell and wife, the attorney had Deeb Construction Company to execute deed to Douglas. Ms. Douglas and husband then executed a document telling Russell to vacate

the property. Although it appears that Russell received the notice to vacate, he never acknowledged Ms. Douglas as owner of the property and offered to return her money plus interest.

The Court noted that Russell was not as sophisticated as Douglas' husband, who was a college graduate and retired. On the other hand, Russell completed the 11th grade and had no experience in property transaction. A real estate appraiser valued the property at a least three (3) times the value of what Douglas and husband paid for the property. The court noted that Russell received nothing in executing the deed. In its holding, the court stated the following,

We 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 that there was a confidential relation existing between appellant and appellee, although not necessarily the kind of fiduciary relationship involved in Ham v. Ham, 146 Miss. 161, 110 So. 583, and cases of that kind.

Appellee in her testimony endeavored to testify that she and appellant were not so close but the undisputed facts establish a confidential relation. Appellee was extremely close to appellant's mother, Mrs. Quinn, and had spent considerable time in Mississippi in connection with Mrs. Quinn's terminal illness. After Mrs. Quinn's death, appellee and appellant had a joint lockbox. Appellant obviously felt very close to his aunt, the appellee, because he 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. Appellant and appellee had the same attorney, and it is clearly shown that the attorney considered the relationship between appellant and appellee such that he did not find it necessary to inquire into what agreement they had in connection with redemption of the property from Deeb. Attorney Cohn had done all that was done to work out the settlement with Deeb in behalf of appellant, and he

understood that appellee would provide the money. When appellee's husband asked that the deeds be made to appellee instead of appellant, the attorney regarded the relationship as such that he did not think he needed to inquire as to what arrangements they had between them or that it was necessary to explain the effect of the transaction to appellant. We are also confident that appellant, under all the facts and circumstances of this case, believed and had reason to believe, that his aunt, the appellee, was putting up the money for his benefit. The reason manifestly shows that he never understood, or had any reason to understand, that he was losing his property. We hold, therefore, that there was a confidential relation between appellant and appellee and that the appellant relied on this relationship in allowing the title to this property to be placed in his aunt's name. Courts construe the term 'confidential relationship' liberally in favor of the confider and against the confidant for the purposes of raising a constructive trust. Adcock v. Merchants & Manufacturers Bank, 207 Miss. 448, 42 So.2d 427.

A constructive trust is a fiction of equity. It is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. The equity must shape the relief, and courts are bound by no unyielding formula. Bogert, Trusts and Trustees, Sec. Ed., Sec. 471. It arises regardless of intention or agreement, express or implied. Rimmer v. Austin, 191 Miss. 664, 4 So.2d 224; Pitchford v. Howard, 208 Miss. 567, 45 So.2d 142. The trust is raised by implication of law. Fraud need not be shown. Adcock v. Merchants & Manufacturers Bank, 207 Miss. 448, 42 So. 2d 427.

The existence of the confidential relationship between appellant and appellee under the circumstance prohibited appellee from becoming unjustly enriched at appellant's expense. Bogert, Trusts and Trustees, 2d 3d, Sec. 496. In Sinclair v. Purdy, 235 N.Y. 245, 139 N.E. 255, Judge Cordoza said: "It is...unjust enrichment under cover of the relation of confidence, which puts the court in motion. See also Farano v. Stephanelli, 183 N. Y. S. 2d 707.

The Chancellor, in this matter, initially issued an Order And Final Judgment on June 30, 2010. In that Order, the Chancellor found, in part, that Appellant "Michael

James Tillman failed to put forth evidence to establish a constructive trust and, therefore, the relief sought in the Amended Petition to Establish Constructive Trust is hereby denied.” (R.8) After Appellant Tillman filed his appeal on July 29, 2010, the Chancellor filed an Order to Correct and Clarify Final Judgment on July 30, 2010. In that Order, the Court stated he was correcting and clarifying the Judgment entered on June 30, 2010.

The Chancellor found that,

[I]t 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 the 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 under the terms advanced by Michael Tillman as opposed to that testified to by David Mitchell was not contemplated by the parties and established by the evidence as a matter of fact.

(R.6-7)

Appellant Tillman believes from the evidence that was presented in his case, he met his burden of proof and established by clear and convincing evidence that a constructive trust exist between he and his brother, Appellee Mitchell. Russell at 505. Clearly, much of that proof centers around the closeness of the relationship between the Appellant Tillman and Appellee Mitchell, who are brothers, and the uneven level of education between the parties. Further, there was direct communications between the parties and the seller of the property regarding the seller’s reasoning for selling the

property for less than fair market value. The seller, Ms. Cole stated, on a number of occasions that she was selling the property for the benefit of Appellant Tillman, who had lived on and taken care of the property for a number of years. (T.6-10,17,50-51,69)

Appellant Tillman believes that based upon the above facts and case law, the Chancellor erred in denying his claim for the establishment of a constructive trust. The Court in the case of In re Administration of the Estate of John Rammie Abernathy, Jr., 778 So.2d 123 (Miss.2001), citing Allgood v. Allgood, 473 So.2d 416,421 (Miss.1985), held that an “Appellate Court will 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.” Seymour v. Brunswick Corp., 655 So.2d 892 (Miss.1995); Harrison County v. City of Gulfport, 557 So.2d 780,784 (Miss.1990). See also In the Matter of the Estate of Rosa Lee Davidson: Jimmy L. Davidson, Administrator of the Estate of Rosa Lee Davidson and Jimmy L. Davidson, Individually, v. Donald Davidson, Peggy M. Davis, Tim Davidson, Terry Davidson, Todd Davidson, and Tammy Davidson, 667 So.2d 616 (Miss.1995); Nancy Clay Madden v. Farley Rhodes, Executor of the Estate of Andrew A. Sierra, Deceased, and Farley Rhodes, Individually, 626 S0.2d 608 (Miss. 1993)

II

WHETHER APPELLANT MET HIS BURDEN OF PROOF OF CLEAR AND CONVINCING EVIDENCE THAT A CONSTRUCTIVE TRUST EXISTED BETWEEN HE AND APPELLEE?

To establish a constructive trust the court has held that “ [P]roof of facts necessary to establish a trust by implication of law, i.e., a constructive or resulting trust, must be clear and convincing.” Calcote at 199.

The Court has held that the clear and convincing evidence standard has been satisfied by proof that the facts alleged are ‘highly probable.’ Century Clinic, Inc. and Katrina Tang v. United States of America, 2000 WL 34013955 (U.S.), 120 S.Ct. 1420, *5 (2000). See also Colorado v. New Mexico, 467 U.S. 310, 316 (1984). In the case of Londa Molden and April Avery v. Mississippi State Department of Health, 730 So.2d 29, 37 (Miss.1998), the court defined clear and convincing evidence by citing the case of Riddle v. Mississippi State Bd. of Pharmacy, 592 So.2d 37 (Miss.1991) The court held as follows, “The Riddle Court expressed the scope of judicial review as follows: The judicial eye looks to see whether a fair-minded fact finder might have found the **evidence clear and convincing** that the offense had occurred.”

Appellant, Michael James Tillman, maintains that there was clear and convincing evidence presented to the Chancellor for him to find that a constructive trust existed between the parties. The evidence that established same is as follows:

Appellant Tillman lived on the property for a number of years. The owner of the property, Ms. Nancy Cole, after the death of her husband, decided to sell the property.

Appellant Tillman desired to purchase the property because same had been his home. Ms. Cole offered to sell the property to Appellant Tillman but wanted cash. Appellant Tillman did not have the cash and sought to raise the money, first by contacting his sister and later his brother, Appellee Mitchell. (T.6-8,15-17)

Appellee Mitchell was not aware that the property was up for sell until advised by his brother Appellant Tillman. Appellee Mitchell had no interest in the property. (T.63) He never stated to the court or anyone else that the property was being used for investment purposes. Further, prior to Ms. Cole selling the property and Appellee Mitchell agreeing to purchase same, the two (2) parties had a conversation wherein Ms. Cole stated that she was selling the property for \$5,000.00 for the benefit of Appellant Tillman. According to Ms. Cole, Appellee Mitchell acknowledged that he understood. (T. 7-10) At no point during the purchase of the property, did Appellee Mitchell state that the purchase price of the property was anything beyond the \$5,400.00, he actually paid for the property. (T.20-21,29,74-76)

Appellant Tillman continued to make payments to Appellee Mitchell of \$300.00 per month and only stopped making payments when he had repaid the \$5,400.00. Sophistication on the part of Appellee Mitchell in this transaction was clear because he told Appellant Tillman of the amount of the payments per month but he did not advise Appellant Tillman of the total amount of the payments he would make which would have totaled more than the \$5,400.00 paid by Appellee Mitchell. (T.17,21-22,24,29,87)

III

WHETHER APPELLANT WAS ENTITLED TO THE REFUND OF MONIES PAID TO APPELLEE UNDER THE PRESUMPTION THAT THERE EXISTED AN AGREEMENT FOR THE PURCHASE OF PROPERTY?

Appellant Tillman maintains that he believes the evidence establishes that there was a constructive trust. However, if the court finds there was not a constructive trust, Appellant Tillman believes he is entitled to a refund of the payments he made to Appellee Mitchell because he lost the benefit of what he believed was his bargain because there was no meeting of the minds. (T.75,94)

Appellant Tillman was not aware of any term of the repayment of the loan by Appellee Mitchell other than he had to repay Appellee Mitchell \$5,400.00. At the time of the purchase of the property, Appellee Mitchell never stated any terms different from what Appellant Tillman stated above until some two (2) years later after he had been paying on the property. (T.20-22,27-28,73-76,78,88) In the case of 1704 21ST Avenue, Ltd vs. City of Gulfport, Mississippi, 988 So.2d 412,416 (Miss.2008), the court held that a “claim for ‘unjust enrichment’ is a modern denotation for the doctrine of ‘quasi-contract.’” The court continues by stating that

[A]n 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.’ 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.’ It is an obligation created by law in the absence of any agreement; therefore, it is an implied in law contract.

See also Leroy Russell and Wife, Mary Frances Russell v. Gladys Posey Douglas, 243 Miss. 497, 138 So.2d 730 (Miss.1962)

Clearly, it is unfair for Appellee Mitchell to receive the money for the property as well as the property. The entire transaction regarding the property was for the benefit of Appellant Tillman. However, the person who has received nothing in this matter has been Appellant Tillman.

CONCLUSION

Appellant Michael James Tillman believes that the evidence supports that a constructive trust was established between he and Appellee David D. Mitchell. The parties are brother, who grew up together, living in the same household. Appellee Mitchell being the most educated of the parties, was trusted by his brother in handling the purchase of property sold by owner, Nancy Cole. Prior to selling the property to Appellee Mitchell, Ms. Cole felt it necessary to have a discussion with him about the sell of the property. Ms. Cole advised Appellee Mitchell that she was selling the property for \$5,000.00 for the benefit of Appellant Tillman. At no point during the conversation with Ms. Cole or Appellant Tillman, did Appellee Mitchell state that he was going to require Appellant Tillman to pay more than the selling price of property. Appellant Tillman paid \$300.00 per month for the property until such time as he believed he had repaid his brother, Appellee Mitchell, the purchase price of the property.

Appellant Tillman believes the Court in Allred summed up the case by stating The determination of the existence of a constructive trust is a matter of law and thus, subject to do novo review.

In harmony with the equitable purpose of constructive trusts, we are careful not to apply too narrow a definition of confidential relationship. 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.

Allred at 1069.

Based upon the facts of this case and the law, Appellant Tillman believes that he has met his burden of establishing a confidential relationship and establishment of a constructive trust. Appellant also believes that it is clear from the facts in the case at bar, that the decision of the Chancellor is not supported in equity or law and a constructive trust should be found or he is entitled to a refund of all monies paid to Appellee Mitchell.

RESPECTFULLY SUBMITTED,

BY: 

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CERTIFICATE OF SERVICE

I, Glenda Funchess, Attorney for Appellant, do hereby certify that I have this date mailed, postage paid, by United States mail, a true and correct copy of the Appellant's Brief to the following parties at their last known addresses:

1. Honorable Jerry Evans
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Post Office Box 1230
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2. Honorable Eugene Fair
Chancellor of the Tenth Judicial District
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This the 10th day of December 2010.



GLENDA FUNCHESS