

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MONA CATES,

APPELLANT/CROSS-APPELLEE

VS.

NO. 2010-CA-01939

ELIZABETH SWAIN,

APPELLEE/CROSS-APPELLANT

REPLY BRIEF FOR CROSS-APPELLANT

APPEAL FROM THE DECISION OF THE
CHANCERY COURT OF TATE COUNTY, MISSISSIPPI

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NO ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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APPELLANT/CROSS-APPELLEE

VS.

NO. 2010-CA-01939

ELIZABETH SWAIN,

APPELLEE/CROSS-APPELLANT

CERTIFICATE OF INTERESTED PERSONS

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

- | | | |
|----|---|---|
| 1. | Mona Cates | Appellant/Cross-Appellee |
| 2. | Elizabeth Swain | Appellee/Cross-Appellant |
| 3. | Jonathan S. Masters & law firm of
Holcomb Dunbar, PA | Attorneys of Record for
Appellant/Cross-Appellee |
| 4. | Robert M. Stephenson & law firm of
Locke Lord Bissell & Liddell, LLP | Attorneys of Record for
Appellant/Cross-Appellee |
| 5. | John T. Lamar, Jr. & law firm of
Lamar & Hannaford, P.A. | Attorneys of Record for
Appellee/Cross-Appellant |
| 6. | David M. Slocum, Jr. & law firm of
Slocum Law Firm, PLLC | Attorney of Record for
Appellee/Cross-Appellant |
| 7. | Honorable Percy L. Lynchard, Jr. | Chancellor |

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF ISSUES	v
STATEMENT OF CASE	,1
A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW	1
B. STATEMENT OF THE FACTS	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
A. STANDARD OF REVIEW	2
B. ISSUE #1: WHETHER MISSISSIPPI LAW REPUDIATES SWAIN'S CLAIMS FOR RELIEF	2
C. ISSUE #2: WHETHER THE EVIDENCE AT TRIAL SUPPORTS SWAIN'S UNJUST ENRICHMENT AWARD	4
D. ISSUE #3: WHETHER A CONSTRUCTIVE AND/OR RESULTING TRUST EXISTED BETWEEN SWAIN AND CATES	6
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

STATUTES

Miss. Code Ann. § 93-1-1 (2004)	7-8
Miss. Code Ann. § 97-29-1 (2004)	7-8

CASE LAW

<u>Cases</u>	<u>Page</u>
<i>Davis v. Davis</i> , 643 So.2d 931 (Miss. 1994)	2-4
<i>Hans v. Hans</i> , 482 So.2d 1117 (Miss. 1986)	5
<i>Koval v. Koval</i> , 576 So. 2d 134 (Miss. 1991)	5
<i>McNeil v. Hester</i> , 753 So.2d 1057 (Miss. 2000)	6-7
<i>Mount v. Mount</i> , 624 So.2d 1001 (Miss. 1993)	2
<i>Nichols v. Funderburk</i> , 881 So.2d 266 (Miss.Ct.App. 2004)	2
<i>Sojourner v. Sojourner</i> , 247 Miss. 342, 153 So.2d 803, 807 (1963)	7
<i>Taylor v. Taylor</i> , 317 So.2d 422 (Miss. 1975)	3-4

Constitution

Article 14 Section 263A	1, 2
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STATEMENT OF ISSUES

The issues presented by the Appellant/Cross-Appellee in this Appeal are:

- ISSUE #1: WHETHER MISSISSIPPI LAW REPUDIATES
 SWAIN'S CLAIMS FOR RELIEF.
- ISSUE #2: WHETHER THE EVIDENCE AT TRIAL SUPPORTS
 SWAIN'S UNJUST ENRICHMENT AWARD.
- ISSUE #3: WHETHER A CONSTRUCTIVE AND/OR RESULTING
 TRUST EXISTED BETWEEN SWAIN AND CATES.

STATEMENT OF CASE

A. NATURE OF CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

The Appellant reincorporates the Nature of Case, Course of Proceedings and Disposition in Court Below contained in the Brief for Appellee/Cross-Appellant previously filed with this court.

B. STATEMENT OF THE FACTS

The Appellant reincorporates the Statement of Facts contained in the Brief for Appellee/Cross-Appellant previously filed with this court and will refrain from rehashing the same facts in this Reply Brief.

SUMMARY OF ARGUMENT

Article 14 Section 263A of the Mississippi Constitution has absolutely no application to the case at bar because the establishment of a homosexual marriage is not an issue before the court, nor is it a prerequisite to the Swain's claims. The Chancellor was correct in finding the unjust enrichment of Cates by Swain. This Court should affirm the decision of the Chancellor as well as grant an additur for a judgment in the amount of \$48,542.58. Additionally, this Court should award Swain reasonable attorneys' fees and costs incurred in this matter. Alternatively, Mississippi law clearly recognizes a constructive trust and/or resulting trust under certain circumstances. It is apparent that a constructive trust and/or resulting trust did in fact exist between Swain and Cates. As a result, this Court should award Swain a

judgment against Cates in excess of \$76,755.56, plus tax Cates with the costs of Court, and award Swain reasonable attorneys' fees.

ARGUMENT

A. STANDARD OF REVIEW

The Appellant reincorporates the Standard of Review contained in the Brief for Appellee/Cross-Appellant previously filed with this court.

B. ISSUE # 1: WHETHER MISSISSIPPI LAW REPUDIATES SWAIN'S CLAIMS FOR RELIEF.

The pleadings in this matter address solely the issues of a constructive and/or resulting trust and unjust enrichment. Article 14 Section 263A of the Mississippi Constitution has absolutely no application to the case at bar because the establishment of a homosexual marriage is not an issue before the court, nor is it a prerequisite to the Swain's claims. Further, the learned Chancellor astutely found that Cates had been unjustly enriched. (Appellant/Cross-Appellee's R., Tab 2). The findings of the Chancellor made no mention of palimony or an equitable division of marital assets. (Appellant/Cross-Appellee's R., Tab 2).

The Appellant/Cross-Appellee relies heavily upon *Nichols v. Funderburk*, 881 So.2d 266, 270 (Miss.Ct.App. 2004) and *Davis v. Davis*, 643 So.2d 931, 935-936 (Miss. 1994). The Appellate court affirmed the decision of the Chancellor in both of these cases. On appeal the Chancellor's findings will not be reversed unless manifestly wrong. *Davis*, 643 So.2d at 934; citing *Mount v. Mount*, 624 So.2d 1001, 1004 (Miss. 1993). In the case at bar, the

Chancellor clearly distinguished the issues of unjust enrichment and constructive and/or resulting trust from any claim for palimony as a result of an alleged homosexual relationship. (Record, PP. 88-89).

Additionally, the facts of this case are easily distinguished from *Davis*. In *Davis*, the Appellee purchased a house for the Appellant, remodeled and furnished the house, and purchased a vehicle for the Appellant after the dissolution of their relationship. *Davis*, 643 So.2d at 935. Cates still has the parties' Mississippi house titled in her name and has possession of the Mississippi house as well as possession of the vast majority of the parties' jointly acquired personal property. The Chancellor in this case rightfully found that Cates was unjustly enriched at the expense of Swain due in large part to the fact that Cates has possession of the fruits of the parties' labor.

Further, the Court in *Davis* looked to *Taylor v. Taylor*, 317 So.2d 422 (Miss. 1975), which involved a void marriage, for clarification of the existence of equitable rights and remedies in a situation of a cohabitative relationship. The court in *Taylor* commended the Chancellor for acting with decent regard for the sensibilities of humanity demanded. *Davis*, 643 So.2d at 934; citing *Taylor*, 317 So.2d 422. In *Taylor*, the Chancellor was faced with the dissolution of a long term cohabitative relationship which left one of the parties adrift in a new world with little or no benefits from the assets acquired during the relationship. *Id.* The Chancellor is uniquely positioned with the ability whether the

strict letter of the law ought not to require him to ignore that he is dealing with human beings. *Id.* Matter of fact, the Chancellor's award of support to the "wife" in *Taylor* was affirmed by the Mississippi Supreme Court. *Id.*

Swain clearly has an actionable claim. This Court should affirm the decision of the Chancellor and award Swain attorneys' fees and costs for this appeal as well as attorneys' fees and court costs incurred in the Chancery Court proceedings.

C. ISSUE # 2: WHETHER THE EVIDENCE AT TRIAL SUPPORTS SWAIN'S UNJUST ENRICHMENT AWARD.

Cates correctly points out the mathematical mistake by the Chancellor. The addition and subtraction of the figures enunciated by the Chancellor in his Order dated October 25, 2010 would equal a total judgement in favor of Swain in the amount of \$44,949.00, not \$44,995.00. The inaccuracy of the Chancellor's addition and subtraction is undisputed.

In regards to the \$38,000.00 equity investment into the Washington home, it appears that the Chancellor is referencing the down payment listed on the Settlement Statement for the purchase of the Washington home, which true figure is \$38,593.58. (Appellant/Cross-Appellee's R., Tab 2; Appellee/Cross-Appellant's R., p. 48). Cates also correctly points out that Swain tendered a certified check in the amount of \$34,000.00. (Appellee/Cross-Appellant's R., p. 41). Further, the earnest money investment into the Washington property is listed at \$2,500.00, which was actually a loan from Swain. (Appellee/Cross-Appellant's R., p. 25, 48).

However, the testimony at trial indicated that Cates paid \$2,000.00 for the earnest money for the Florida home. (Appellee/Cross-Appellant's R., p. 10).

Based on these ambiguities, it appears that the Chancellor's calculation should be \$38,593.58 (which represents the down payment on the Washington home) plus \$2,500.00 (which represents the earnest money for the Washington home provided by Swain) less \$2,000.00 (which represents the earnest money for the Florida home provided by Cates) plus \$5,000.00 (which represents proceeds for the Mississippi house provided by Swain) plus \$4,449.00 (which represents the purchase of carpet for the Mississippi home by Swain). (Appellant/Cross-Appellee's R., Tab 2; Appellee/Cross-Appellant's R., p. 10, 25, 48). Under this calculation, the total judgment should be \$48,542.58.

Unjust enrichment is an equitable remedy closely associated with implied contracts and trusts. *Koval v. Koval*, 576 So.2d 134, 136 (Miss. 1991); quoting *Hans v. Hans*, 482 So.2d 1117 (Miss. 1986). The doctrine of unjust enrichment or recovery in quasi-contract applies to situations where there is no legal contract but where 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, the courts imposing a duty to refund the money or the use value of the property to the person to whom in good conscience it ought to belong. *Id.* Clearly, Cates is in possession of the Mississippi home in which the Chancellor found

that Swain has a vest interest as a result of her investment in the parties acquisition of various parcels of real property.

Cates' calculations ignore the fact that the figures listed fail to acknowledge the simple fact of the increasing equity in real property which is currently held solely by Cates. The Chancellor considered all of the facts which are being rehashed by Cates and found that the more appropriate analysis under the theory of unjust enrichment rested in tracing the equity through the various pieces of real property. Therefore, the Chancellor's decision is founded in and supported by the trail of equity investments into the various parcels of real property.

Cates is clearly in possession of money or property which in good conscience and justice she should not retain but should deliver to Swain. Good conscience requires that it is the duty of Cates to refund a minimum amount of \$48,542.58 to Swain.

This Court should affirm the decision of the Chancellor, grant an additur, and award Swain a judgment in the amount of \$48,542.58 due the unjust enrichment of Cates by Swain. Additionally, good conscience would lead this Court to require Cates to pay Swain's attorneys' fees and costs for this appeal as well as attorneys' fees and court costs incurred in the Chancery Court proceedings in order to obtain her refund of her money.

D. ISSUE # 3: WHETHER A CONSTRUCTIVE AND/OR RESULTING TRUST EXISTED BETWEEN SWAIN AND CATES.

The determination of the existence of a constructive trust is

a matter of law and thus subject to de novo review. *McNeil v. Hester*, 753 So.2d 1057, 1063 (Miss. 2000). Cates incorrectly states the appropriate standard of review for the determination of the existence of a constructive trust. This Court has unequivocally stated that the determination of the existence of a constructive trust is subject to de novo review by this Court.

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. *Sojourner*, 153 So.2d at 808. Cates focuses solely on the sexual aspect of her relationship with Swain while ignoring the obvious trusting and reliant six (6) year relationship that existed between the two parties. 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. *Sojourner*, 153 So.2d at 808.

Cates asks the Court to focus on Sections 93-1-1 and 97-29-1 of the Mississippi Code of 1972, Annotated, as amended, for support of her position that her relationship with Swain cannot support a confidential relationship. Interestingly enough, all of the relationships listed by Cates as involving relationships recognized by Mississippi law as a basis to create a confidential relationship recognized under a constructive trust would be precluded from

marital rights under on Section 93-1-1 of the Mississippi Code of 1972, Annotated, as amended. The fact that Cates is asking this Court to preclude consideration of a constructive trust on the basis that the relationship would not be afforded the opportunity to united in marriage is preposterous. Clearly, constructive trusts and marriages are two completely different legal entities which the Mississippi legislature and judicial system has continually recognized as being separate and apart.

As more clearly enunciated in the Brief for Appellee/Cross-Appellant, a constructive trust existed between Swain and Cates. The Court should award Swain a minimum sum of \$71,755.56, which represents one-half of the proceeds from the sale of the Washington home that was subsequently invested into the Mississippi property, and give Swain credit for her payment of closing costs on the Mississippi house in the amount of \$5,000.00. (Appellee/Cross-Appellant's R., pp. 43-45). Swain's share for the real estate investments that arose from the constructive and/or resulting trust would be at least \$76,755.56. Additionally, the principles of equity require that Swain be awarded attorneys' fees and costs incurred for this appeal as well as attorneys' fees and court costs incurred in the Chancery Court proceedings in order to recover her portion of the constructive trust.

CONCLUSION

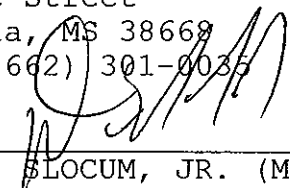
For the reasons stated in the Brief for the Appellee/Cross-Appellant and in this Reply Brief for Cross-Appellant, this court should affirm the Chancellor's decision that Cates was unjustly enriched by Swain as well as grant an additur for a judgment in the amount of \$48,542.58. Additionally, the Court should tax the costs of Court to Cates and award Swain reasonable attorneys' fees and costs incurred in this matter. Alternatively, the Court should recognize that a constructive and/or resulting trust existed and award Swain a an equitable division of the assets of the constructive and/or resulting trust, with a minimum sum of \$76,755.56 plus attorneys' fees and costs incurred in her efforts to regain property that rightfully belonged to her.

Respectfully submitted,

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CERTIFICATE OF SERVICE

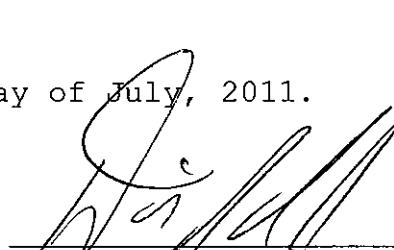
I, David M. Slocum, Jr., attorney for Appellee/Cross Appellant, Elizabeth Swain, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief for Cross-Appellant to:

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So certified, this the 22nd day of July, 2011.



DAVID M. SLOCUM, JR.