IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2014-CA-00387-COA

DELORIS JACKSON **APPELLANT**

v.

GLENDORA MILLS **APPELLEE**

MOTION FOR REHEARING

COMES NOW the Appellant, Deloris Jackson, by and through her attorney, and files this Motion for Rehearing, asserting, as her basic ground for rehearing, that this Court overlooked or misapprehended both the fact that this case involves gift transactions that are the product of *actual fraud* in equity, *i.e., actual undue influence*, and the applicable law whereby equity declares that any gift transaction which is the product of actual fraud is voidable without the aid of any presumption, as opposed to the equitable rule in the other and more familiar cases where there is no actual fraud and the gift transaction may or may not be valid, but equity raises a rebuttable presumption of undue influence against its validity, shifting the burden of proof to the donee to overcome the presumption by clear and convincing evidence of her own good faith and the donor's full knowledge and independent consent and action; and, in support of this motion for rehearing, Jackson sets forth the following specific inter-related issues of law and fact which had to have been overlooked or misapprehended by this Court:

ISSUE I: This Court overlooked or misapprehended the applicable law and the facts of this case by finding that the chancellor's decision was supported by substantial credible evidence, and by not finding that the chancellor's decision was manifestly wrong, clearly erroneous and based upon her application of the wrong legal standard.

ISSUE II: This Court overlooked or misapprehended the established rule of law that an agent owes a duty of absolute loyalty, good faith and fidelity to her principal, and that any breach of those duties whereby the agent in the exercise of her authority acquires property or an interest

therein belonging to her principal is an actual fraud that is voidable without the aid of any presumption.

ISSUE III: This Court overlooked or misapprehended the fact that, while acting in her capacity as agent for Mrs. Harris and with full knowledge of Mrs. Harris' devise to Jackson under her existing will and that Mrs. Harris' existing bank account was titled jointly in the names of Mrs. Harris, Jackson and Mills, with rights of survivorship, Mills willfully and unjustly enriched herself through self-dealing by conveying the property devised to Jackson and by making gifts to herself of the money in Mrs. Harris' existing bank account with the intention of both unjustly enriching herself and defeating Jackson's devise under Mrs. Harris' will and her rights of survivorship in Mrs. Harris' bank account, thereby acquiring property that should rightfully have belonged to Jackson upon Mrs. Harris' death, and, by virtue of Mills' inequitable and unjust conduct, this Court should have determined that Mills had committed an actual fraud in equity that was voidable without the aid of any presumption and established the requested constructive trusts to prevent Mills' unjust enrichment.

ISSUE IV: This Court overlooked or misapprehended the undisputed fact that the durable power of attorney, executed by Mrs. Harris on August 25, 2003, and appointing Mills to serve as her agent and attorney in fact, did not authorize or allow Mills to make gifts to herself out of Mrs. Harris' estate and did not authorize or allow Mills to invest Mrs. Harris' money in any certificate of deposit that was titled jointly in the names of Mrs. Harris, Mills, and Mills' daughter.

ISSUE V: This Court overlooked or misapprehended the applicable law with respect to the proof that is required in order for a court of equity to uphold and affirm a gift transaction, which is the product of an agent's actual fraud and therefore conclusively voidable without the aid of any presumption, and, by so doing, this Court affirmed the chancellor's erroneous decision, which is based solely upon Mills' self-serving testimony, together with the chancellor's use of her own innate psychic powers to somehow divine Mrs. Harris' true intentions, based upon nothing more that her own assumption of the actual circumstances surrounding the various gift transactions, when there was no clear and convincing evidence that Mrs. Harris ever deliberately intended to confirm and did in fact ratify these gift transactions after all undue influence had been totally removed, with full knowledge of all material facts, including the imperfections of the gift transaction and her right to impeach them.

Jackson contends that these several related issues can be boiled down to the following non-concise, yet quite simple question:

> Where an agent has violated her duty of absolute good faith and loyalty to her principal by willfully engaging in self-dealing without the involvement or participation of her now deceased principal, to make gifts to herself or for her benefit out of her principal's bank account, and where all such gifts are not in her principal's best interest, all such gifts violate the specific provisions of the agent's

> power of attorney, and all such gifts are injurious to another person by severing that third person's long standing rights of survivorship under the principal's existing bank account and devise under the principal's existing will, and where at trial the agent only offers her own self-serving testimony to rebut any presumption of actual fraud, may the chancellor nevertheless consider and accept as true the agent's self-serving testimony, together with the chancellor's own assumption of the circumstances surrounding the disputed gift transactions, to divine both the principal's intention with respect to the agent's self-dealing gifts and whether the agent committed actual fraud or otherwise abused her fiduciary relationship with her principal?

With all due respect, Jackson submits that merely posing this question reveals its obvious negative answer, because surely equity would never countenance and permit such blatantly fraudulent behavior. Yet, by affirming the chancellor, this Court has nevertheless answered the question in the affirmative, necessarily leading one to conclude that this Court must have overlooked or misapprehended the applicable law and facts. Hence, this motion for rehearing.

Jackson's Memorandum of Authorities in support of this Motion for Rehearing follows.

MEMORANDUM OF AUTHORITIES

The Facts

Mrs. Harris was born on February 27, 1906, and died on April 25, 2006, at the age of 100 years. *(Ex. 7).* At the time of her death, she was a resident of Myles Retreat, an assisted living facility, where she had lived since her admission in the Summer, 2003, at age 97. *(T. p. 12).*

Mrs. Harris had one bank account, a checking account, which for many years had been titled jointly in the names of Mrs. Harris and Jackson, as joint tenants with the right of survivorship. *(T. pp. 215-18).* Jackson never deposited or withdrew money from this account.

On June 9, 1997, Mrs. Harris executed her last will and testament, which devised one acre of land, upon which her residence was situated, to Jackson, together with all of her furniture, furnishings and fixtures, except for the personal property and furnishings in one bedroom, which she bequeathed to Mills. Mrs. Harris' will also devised her farm, consisting of 60 acres, more or

less, to Mills, and Mills was also designated as the sole residuary beneficiary under Mrs. Harris' will. (*Ex. 1; T. pp. 22-25*). Mills was aware of the provisions of Mrs. Harris' will. (*T. p. 22*).

On November 11, 2000, Mrs. Harris added Mills' name to her checking account, which then became titled jointly in the names of Mrs. Harris, Jackson, and Mills, with rights of survivorship. Both Jackson and Mills signed the change of account form, along with Mrs. Harris.. (*Ex. 12; R.E. p. 75. pp. 25-29*). No evidence was presented by either party that Mrs. Harris ever changed or intended to change the manner by which the money in her checking account would be owned and distributed upon her death. Mills was fully aware of this account, and that this was the only checking account that Mrs. Harris had. (*T. pp. 25-29*).

On August 25, 2003, while a patient in Baptist Hospital, Mrs. Harris,, at age 97+, executed a durable power of attorney, which appointed Mills to serve as her agent. (Ex 2; *T. pp. 35-42*). According to Mills, the sole purpose of the power of attorney was to enable Mills to make medical decisions for Mrs. Harris. (T. pp. 36-37). Mills had no explanation as to why the attorney had instead prepared a durable general power of attorney. Mills did testify that she thought her authority to act for Mrs. Harris under the power of attorney was unlimited. (*T. p. 63*).

Mills admitted and the trial court found that a confidential and fiduciary relationship existed between Ms. Harris and Mills, as of August 25, 2003, being the date of the durable power of attorney. (*Ex 2; R. pp. 62-84; R.E. pp. 9-31*).

On September 14, 2003, while acting in her capacity as Mrs. Harris' agent and attorney in fact, Mills conveyed Mrs. Harris' farm land, containing 60 acres, more or less, to Percy Nichols for $140,000.00, which consideration was tendered to Mills, as the closing was conducted outside of Mrs. Harris' presence. (*T. pp. 42-48*). Mills deposited all of the net sales proceeds

into Ms. Harris' checking account, which was titled jointly in the names of Mrs. Harris, Jackson, and Mills, with the right of survivorship. (T. *p. 56*).

Then on November 28, 2003, while again acting as Ms. Harris's agent and attorney in fact, Mills withdrew the sum of $50,000.00 from Ms. Harris's checking account and purchased a $50,000.00 certificate of deposit, which was titled jointly in the names of Mrs. Harris, Mills, and Ethel Woodson, as joint tenants with the right of survivorship. Ethel Woodson is Mills' daughter. (*T. pp. 57-68*). Mrs. Harris was not present at the bank when this certificate of deposit was purchased. (*T. pp. 57-68*). This CD was never used to provide for Ms. Harris necessary support and maintenance, (*R. p. 35*), but Mills did use the accrued interest thereon for her own personal benefit. (T. *p. 66*).

Again, on February 14, 2006, which was less than two weeks prior to Mrs. Harris' 100th birthday, Mills, while acting in her capacity as Mrs. Harris' agent and attorney in fact, executed a deed that conveyed Mrs. Harris' remaining land and upon which her residence was situated to Percy Nichols for $47,000.00, which consideration was tendered to Mills, as the closing was conducted outside the presence of Mrs. Harris. (*Ex 4*; *T. pp. 68-78*). On the next day, February 15, 2006, Mills, while acting as Ms. Harris's agent and attorney in fact, used this $47,000.00 to purchase another Trustmark CD, which again was titled jointly in the names of Ms. Harris, Mills, and Mills' daughter, as joint tenants with the right of survivorship. (*T. pp. 68-78*). Mrs. Harris was not present at the bank when Mills purchased this certificate of deposit. (*T. pp. 68-78*). No part of this $47,000.00 CD was ever needed or used to provide for Mrs. Harris' necessary support and maintenance.

In addition, the proof established and the trial court found that, during the course of her service as Mrs. Harris's agent and attorney in fact, Mills made gifts to herself or for her benefit in

the additional total sum of $17,581.25 out of Mrs. Harris' bank account under Mills' management. (*R. pp. 62-84; R.E. pp. 9-31; T. pp. 78-201*). Mills claimed that some of these gifts were actually loans that Mills repaid in cash, but Mills had no receipts or other documents to establish these alleged loans or her repayment thereof. (*T. pp. 78-201*).

Mills was unable to explain how any of the gifts, which she had made to herself or for her own benefit, actually benefited Ms. Harris. (*T. pp. 151-52*). Mills only offered her own self-serving and uncorroborated testimony to establish that she ever made a full disclosure to Mrs. Harris about any of these gifts, or that Mrs. Harris ever consented to and confirmed them with full knowledge of all material facts. Except for Mills' self-serving testimony, there was no evidence that Mrs. Harris participated in or even remotely knew about any of these gifts that Mills had made to herself out of Mrs. Harris' bank account.

While the February 14, 2006, sale of Mrs. Harris's residential real property to Percy Nichols, which was accomplished by Mills, acting in her capacity as Mrs. Harris' agent and attorney in fact, may have adeemed Mrs. Harris' devise of such property to Jackson under her existing will, Jackson nevertheless contends that Mills' sale of such property within two weeks of Mrs. Harris' 100th birthday and without any need for the sale proceeds to be used for Mrs. Harris' support and maintenance, constitutes an actual fraud in equity against both Mrs. Harris and Jackson, because not only did Mills unjustly enrich herself by investing the entire sales proceed in a CD that was made payable to Mrs. Harris, Mills and Mills' daughter, but Mrs. Harris was also thereby prevented by Mills' actual fraud from making her intended devise of such property to Jackson, who was also victimized by Mills' actual fraud, and, accordingly, Jackson is seeking to have a constructive trust imposed in her favor upon the entire amount of the $47,000.00 CD to prevent Mills' unjust enrichment.

Jackson also contends that Mills' purchases of the two subject CDs were voidable, unauthorized gifts that Mills made to herself, in violation of her duty of absolute good faith and fidelity to her principal, constituting unjust enrichment, and that equity should not allow Mills, in the exercise of her authority as agent, to acquire property or any interest therein rightfully belonging to her principal, without her own full disclosure and her principal's free consent. Moreover, Jackson is contending that Mills' purchase of these two CDs was an actual fraud in equity against her, as, by so doing, Mills willfully severed Jackson's rights of survivorship with respect to the total amount of these two gifts. Jackson sought and continues to seek to have such gifts declared voidable without the aid of any presumption and for constructive trusts to be established in her favor and imposed upon the two CDs, together with accrued interest thereon, in Jackson's rightful percentage thereof, in order to prevent Mills' unjust enrichment by virtue of her having willfully severed Jackson's rights of survivorship in Mrs. Harris' bank account.

In addition, Jackson is contending that the other gifts that Mills made to herself in the total amount of $17,581.25 were also voidable, unauthorized gifts, made in violation of Mills' duty of absolute good faith and fidelity to her principal, constituting unjust enrichment, and that equity should not allow Mills, in the exercise of her authority as agent, to acquire property or any interest therein rightfully belonging to her principal, without her own full disclosure and her principal's free consent. Moreover, Jackson is contending that these other gifts of $17,581.25 were an actual fraud in equity against her, as, by so doing, Mills willfully severed Jackson's rights of survivorship with respect to these other gifts in the total sum of $17,581.25. Jackson sought and continues to seek to have such gifts declared voidable without the aid of any presumption and for a constructive trust to be established in her favor to prevent Mills' unjust enrichment with respect to one-half of the total amount of such gifts, which is the amount that

would have passed to Jackson under her rights of survivorship in Mrs. Harris' checking account, but for the fact that Mills gifted this money to herself prior to Mrs. Harris' death.

The Argument

ISSUE I: This Court overlooked or misapprehended the applicable law and the facts of this case by finding that the chancellor's decision was supported by substantial credible evidence, and by not finding that the chancellor's decision was manifestly wrong, clearly erroneous and based upon her application of the incorrect legal standard.

It is undisputed, and the chancellor so found by clear and convincing evidence, that Mills served as agent and attorney in fact for Mrs. Harris; and it undisputed, and the chancellor so found by clear and convincing evidence, that, in the exercise of her authority as agent for Mrs. Harris, Mills acquired property rightfully belonging to Mrs. Harris by making gifts to or for her own benefit out of Mrs. Harris' bank account. The only disputed fact was whether or not Mrs. Harris participated in, authorized, consented to, or even knew about these several gifts that Mills had made to herself. However, the only evidence that was offered at trial to establish that Mrs. Harris did know about, participated in, authorized, and consented to these several gifts was Mills' own self-serving testimony. And, as set forth in ISSUE II, Mills' self-serving testimony is simply not the clear and convincing evidence that is required to prove Mrs. Harris' confirmation of these gift transaction with full knowledge of all material facts.

As further set forth under ISSUE II, it is fundamental law that an agent owes her principal absolute good faith and fidelity, and she cannot in the exercise of her authority as agent acquire property or an interest therein rightfully belonging to her principal without her own full disclosure and the free consent of her principal. Any breach of this duty of absolute good faith whereby the principal suffers any disadvantage and the agent reaps any benefit is a ***fraud*** for which the agent will be held accountable, either in damages or by judgment precluding the agent from taking or retaining the benefits so obtained. As further set forth in ISSUE II, this fraud is

an actual fraud in equity which is voidable without the aid of any presumption, and may be set aside by either Mrs. Harris or Jackson, because, by virtue of Mills' actual fraud, Jackson was deprived both of her survivorship rights in Mrs. Harris' bank account and her devise of Mrs. Harris' residential real property under Mrs. Harris' existing will; and Mrs. Harris was thereby prevented from doing these intended acts for the benefit of Jackson; and accordingly equity has the power to relieve Jackson, who is the disappointed party, by establishing Jackson's rights as though these acts had been done by Mrs. Harris, and by confirming the title which Jackson would have acquired by virtue of both Mrs. Harris' devise under her existing will and her rights of survivorship in Mrs. Harris' bank account. .

As set forth under ISSUE III, a constructive trust is a fiction of equity created for the purpose of preventing unjust enrichment by one who holds legal title to property which, under principles of justice and fairness, rightfully belongs to another; it is simply a means recognized in our law where under one who unfairly holds a property interest may be compelled to convey that interest to another to whom it justly belongs. Thus, where an agent in the exercise of her authority as agent has committed an actual fraud in equity by breaching her duty of absolute loyalty, good faith and fidelity to her principal and has thereby acquired property rightfully belonging to her principal, the agent has been unjustly enriched and should be held accountable by the creation of a constructive trust to prevent the agent's unjust enrichment.

The chancellor's decision in this case is manifestly wrong and clearly erroneous, because she applied the wrong legal standard, without substantial evidence in the record to support her decision. First of all, the chancellor failed to recognize that this case involves an actual fraud in equity that is voidable without the aid of any presumption; secondly, the chancellor failed to recognize that Mills was guilty of unjust enrichment; and thirdly, the chancellor failed to

establish the requested constructive trusts to prevent Mills' unjust enrichment. Instead, the chancellor erroneously treated this case as though it involved a mere presumption of undue influence, which was rebuttable by Mills, the donee, by clear and convincing evidence of her own good faith, and of Mrs. Harris' full knowledge and independent consent and action. Thus, the chancellor erroneously relied upon the following passage from *McNeil v. Hester*, 753 So.2d 1057 (Miss. 2000):

> McNeil's argument is misplaced. As *Madden* states, where the presumption of undue influence arises, a gift is presumed *invalid*, and unless the donee rebuts the presumption, the conveyance must *fail*. *Madden*, at 618-19. This Court has applied this presumption only in cases where a party has challenged the validity of a transaction, seeking to set aside the transaction as invalid. McNeil argued before the trial court and before this Court, that, though the gift to the executors is valid, a constructive trust should be imposed under principles of equity. McNeil does not argue that the gift is invalid. The presumption discussed in *Madden* does not apply where a party's only requested relief is the imposition of a constructive trust.

753 So.2d at 1068; to reach its determination that no presumption of undue influence arises in a case where the only requested relief is the imposition of a constructive trust. However, the case *sub judice* does not involve any rebuttable presumption of undue influence to invalidate a gift made by the submissive party to the dominant party in a confidential relationship; rather, this case involves gifts which are the product of *actual fraud* in equity and are voidable without the aid of any presumption. Furthermore, the facts in this case are readily distinguishable from the facts in *McNeil*, which involved no agency relationship, and "McNeil offered no evidence of fraud, duress, abuse of confidence, or any type of unconscionable conduct, concealment or questionable means on the part of the executors." *Id.*, 753 So.2d at 1070. Contrary to the facts in *McNeil*, in this case Jackson was at all times endeavoring to have these several gift transactions which Mills made to herself out of her principal's bank account determined to be actual frauds in equity and declared voidable without the aid of any presumption. And, as also

set forth in ISSUE II, the chancellor was manifestly wrong and clearly erroneous, when she applied the wrong legal standard, without substantial evidence in the record, to support her decision, based solely on Mills' self-serving testimony, that Mrs. Harris consented to and authorized Mills to make the disputed gifts to herself out of Mrs. Harris' bank account. Clearly, since Mills' self-serving testimony is insufficient as a matter of law to rebut even the presumption of undue influence, its insufficiency is ever more pronounced when offered to establish Mills' full disclosure to Mrs. Harris and Mrs. Harris' free consent and confirmation of the voidable transactions, which, as set forth in ISSUE II, is required to establish the *bona fides* of a transaction that is voidable without the aid of any presumption.

By affirming the chancellor's decision, this Court likewise overlooked and misapprehended the same applicable law and facts, as did the chancellor.

ISSUE II: This Court overlooked or misapprehended the established rule of law that an agent owes a duty of absolute loyalty, good faith and fidelity to her principal, and that any breach of those duties whereby the agent in the exercise of her authority acquires property or an interest therein belonging to her principal is as an actual fraud that is voidable without the aid of any presumption.

It is fundamental law that an agent owes his principal absolute good faith and fidelity, and he cannot in the exercise of his authority as agent acquire property or interest therein rightfully belonging to his principal without full disclosure and free consent of his principal. *McKinney v. King*, 498 So.2d 387, 389 (Miss.1986); *Consumers Credit Corp of Miss. v. Swilley*, 243 Miss. 838, 138 So.2d 885 (1962); *VanZandt v.VanZandt*, 227 Miss. 528, 86 So.2d 466 (1956); *McDowell v. Minor*, 158 Miss. 788, 131 So.2d 278 (1930).

In *VanZandt, supra,* the Court cited with approval 3 C.J.S., Agency, § 138, which provides as follows: "The relationship of principal and agent, being confidential and fiduciary in character, demands of the agent the utmost loyalty and good faith to his principal. Any breach of

this good faith whereby the principal suffers any disadvantage and the agent reaps any benefit is a fraud for which the agent will be held accountable, either in damages or by judgment precluding the agent from taking or retaining the benefits so obtained." 861 So.2d at 538.

Following up upon this concept of actual fraud in equity, Mr. Pomeroy states:

> Every fraud, in its most general and fundamental conception, consists in obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith in the broad meaning given to the term by equity, -- the *bona fides* of the Roman law. Furthermore, it is a necessary part of this conception that the act or omission itself, by which the undue advantage is obtained, should be *willful*; in other words, should be knowingly and intentionally done by the party; but it is not *essential* in the equitable notion, although it *is* in the legal, that there should be a knowledge of and an intention to obtain the undue advantage which results. . . . . The following description is perhaps as complete and accurate as can be given so as to embrace all the varieties recognized by equity: Fraud in equity includes all willful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another may be obtained.

John N. Pomeroy, Jr., *Equity Jurisprudence*, 3rd Ed. § 873 (1905).

Thus, since any breach of an agent's duty of absolute loyalty, good faith and fidelity to her principal, whereby the agent reaps any benefit at the expense of the principal, is an actual fraud, the same is voidable without the aid of any presumption. Mr. Pomeroy explains and distinguishes this concept from the well known rebuttable presumption of undue influence, as follows:

> It was shown in the preceding section that if one person is placed in such a fiduciary relation towards another that the duty rests upon him to disclose, and he intentionally conceals a material fact with the purpose of inducing the other to enter into an agreement, such concealment is an actual fraud, and the agreement is voidable without the aid of any presumption. <u>We are now to view fiduciary relations under an entirely different aspect; there is no intentional concealment, no misrepresentation, no actual fraud</u>. The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over

> the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and by thereby overcoming the presumption. (Emphasis added).

John N. Pomeroy, Jr., *Equity Jurisprudence*, 3rd Ed. § 956 (1905).

Furthermore, in the context of an agency relationship, Mr. Pomeroy expounds upon this concept of actual fraud, which renders the transaction voidable without the aid of any presumption:

> Equity regards and treats this relation in the same general manner, and with nearly the same strictness, as that of trustee and beneficiary. The underlying thought is, that an agent should not unite his personal and his representative characters in the same transaction; and equity will not permit him to be exposed to the temptation, or brought into a situation where his own personal interests conflict with the interests of his principal, and with the duties which he owes to his principal. In dealings without the intervention of his principal, if an agent for the purpose of selling property of the principal purchases it for himself, or an agent for the purpose of buying property for the principal buys it for himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable; it will always be set aside at the option of the principal; the amount of consideration, the absence of undue advantage, and other similar features are wholly immaterial; nothing will defeat the principal's right of remedy except his own confirmation after full knowledge of all the facts. (Emphasis added).

John N. Pomeroy, Jr., *Equity Jurisprudence*, 3rd Ed. § 959 (1905).

In addition, according to Mr. Pomeroy, even in those cases where there is no agency relationship but there is some other confidential or fiduciary relation, actual undue influence, as opposed to the rebuttable presumption of undue influence, is and constitutes actual fraud in equity:

> There are two classes of cases to be considered, which are somewhat different in their external forms, and are governed by different special rules, and which still depend upon the single general principle. The first class includes all those instances in which the two parties consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealing some conveyance, contract, or gift. To such cases the principle literally and directly applies. The transaction is not merely voidable, it *may* be valid; but a presumption of its invalidity arises, which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of

> independent consent and action. The second class includes all those instances in which one party, purporting to act in his fiduciary character, deals with himself in his private and personal character**,** as where a trustee or agent to sell sells the property to himself. Such transactions are voidable at the suit of the beneficiary, and not merely presumptively or *prima facie* invalid**.** Nevertheless, this particular rule is only a necessary application of the single general principle. The circumstances show that there could not possibly be the good faith, knowledge, and free consent required by the principle, and therefore the result which is a rebuttable presumption in the first class of transactions becomes a conclusive presumption in the second. . . . . (Underlined emphasis is added.)

John N. Pomeroy, Jr., *Equity Jurisprudence,* 3rd Ed. § 957 (1905).

Furthermore, Mr. Pomeroy also recognizes that an actual fraud in equity may affect a third person, rather than or in addition to an immediate party to the transaction, and that, in such cases, equity has the power to relieve the defrauded third person:

> I shall conclude this discussion of actual fraud by enumerating some of the well-settled instances of the jurisdiction which deserve a special mention. In several of them the fraud affects third persons rather than the immediate party to the transaction; but in all a fraudulent intention, or what equity regards as tantamount to such an intention, is a necessary element, and they may all, therefore, be properly grouped under the head of actual fraud. . . . . *Preventing acts for the benefit of another:* The jurisdiction in the case of intended testamentary gifts fraudulently prevented extends to other analogous cases. Where one party has been prevented by fraud from doing an intended act for the benefit of another, equity may relieve the disappointed party by establishing his rights as though the act had been done, and by confirming the title which he would thereby have acquired. (Emphasis added).

John N. Pomeroy, Jr., *Equity Jurisprudence,* 3rd Ed. § 919 (1905).

Mills only offered her own self-serving and uncorroborated testimony to establish that Mrs. Harris authorized and consented to each of the gifts that Mills made to herself out of Mrs. Harris' bank account. Clearly, Mills' self-serving testimony is insufficient. In those cases where there is no actual fraud, rendering the transaction voidable without the aid of any presumption, but there is nevertheless some confidential relation that does exist and a gift is made by the submissive party to the dominant party in such relationship, the law raises a presumption of

undue influence to invalidate the gift and shifts the burden of proof to the donee to prove by clear and convincing evidence his own good faith and the donor's full knowledge and independent consent and action. *Murray v. Laird*, 446 So.2d 575, 578 (Miss. 1984), as modified in *Mullins v. Ratcliff*, 515 So.2d 1183, 1193 (Miss. 1987). And, in these other cases involving only a presumption of undue influence, "[T]he law requires the beneficiary to prove other than from himself that the gift was in truth and fact what the giver wished and not the result of any undue influence or improper action by the beneficiary." *Madden v. Rhodes*, 626 So.2d 608, 624 (Miss. 1993). "Put more simply, when a Court of Equity is faced with a large gift to a dominant party by the weaker in a confidential relationship, it must hear from someone besides the beneficiary or receive clear and convincing evidence beyond that from the lips of the beneficiary, that it is, in truth and in fact, what the donor wished to do on his own." *Id.*, 626 So.2d at 625. The evidence that is sufficient to overcome the presumption that the gift was the product of undue influence and, therefore, void must be something more than the self-serving testimony of the recipient. *In Re Estate of Hall*, 32 So.2d 506, 521 (Miss.App. 2009). "We will recognize the later ratification of actions procured by undue influence only when we are confronted by clear and convincing evidence that ratification is, in fact, intended." *Madden,* 626 So.2d at 624.

If Mills' self-serving testimony is insufficient to overcome even the presumption of undue influence, then certainly it is even more inadequate and insufficient to establish by clear and convincing evidence her own full disclosure to Mrs. Harris and Mrs. Harris' free consent and confirmation of the gift transaction with full knowledge of all material facts, which is the required proof to sustain the transactions.

Accordingly, both the chancellor and this Court were manifestly wrong, clearly erroneous, and applied the incorrect legal standard by failing to determine that the disputed

transaction constituted actual fraud in equity and were voidable without the aid of any presumption, and by failing to establish the requested constructive trusts to prevent Mills' unjust enrichment.

ISSUE III: This Court overlooked or misapprehended the fact that, while acting in her capacity as agent for Mrs. Harris and with full knowledge of Mrs. Harris' devise to Jackson under her existing will and that Mrs. Harris' existing bank account was titled jointly in the names of Mrs. Harris, Jackson and Mills, with rights of survivorship, Mills willfully and unjustly enriched herself through self-dealing by conveying the property devised to Jackson and by making gifts to herself of the money in Mrs. Harris' existing bank account with the intention of both unjustly enriching herself and defeating Jackson's devise under Mrs. Harris' will and her rights of survivorship in Mrs. Harris' bank account, thereby acquiring property that should rightfully have belonged to Jackson upon Mrs. Harris' death, and, by virtue of Mills' inequitable and unjust conduct, this Court should have determined that Mills had committed an actual fraud in equity that was voidable without the aid of any presumption and established the requested constructive trusts to prevent Mills' unjust enrichment.

Mills' creation of the $50,000.00 certificate of deposit and the $47,000.00 certificate of deposit constituted gifts to herself out of her principal's property. *Weaver v. Mason*, 228 So.2d 591 (Miss. 1969). See also *Stephens v. Stephens*, 193 Miss. 98, 8 So.2d 462 (1942), (where it was announced that a joint bank account created a joint tenancy with the right of survivorship and constituted an effectual consummation of a gift with the bank as the performance agent of the donor and donee); *In Re Lewis' Estate*, 194 Miss. 480, 13 So.2d 20 (1943), (which held that the establishment of the joint bank account created a joint ownership *in praesenti* regardless of which of the named joint tenants had previously owned the funds.) In addition, the general rule appears to be that "where a joint tenancy account in a bank is made payable to either depositor or survivor, the account passes to the survivor upon death of the joint tenant. *Estate of Huddleston*, 755 So.2d 435, 439 (Miss. Ct. App. 1999) (citing *Strange v. Strange*, 548 So.2d 1323, 1327 (Miss. 1989)). In addition, Mills' distribution of another $17,581.25 to herself or for her benefit out of Mrs. Harris' bank account also unquestionably amount to gifts that Mills made to herself.

Where an agent has breached her duty by self-dealing, *i.e.*, making gifts to herself out of her principal's bank account, the agent has been unjustly enriched. "The doctrine of unjust enrichment 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." *Dew v. Langford*, 666 So.2d 739, 745 (Miss. 1995) (quoting *Hans v. Hans*, 482 So.2d 1117, 1122 (Miss. 1986). "A constructive trust is a means recognized in our law where under one who unfairly holds a property interest may be compelled to convey that interest to another to whom it justly belongs." *Barriffe v. Barriffe*, 153 So.3d 613, 618 (Miss. 2015); *Sojourner v. Sojourner*, 247 Miss. 342, 153 So.2d 803, 807 (1963).

A constructive trust is a fiction of equity created for the purpose of preventing unjust enrichment by one who holds legal title to property which, under principles of justice and fairness, rightfully belongs to another. *Allgood v. Allgood*, 473 So.2d 416 (Miss. 1985); *Russell v. Douglas*, 243 Miss. 497, 138 So.2d 730 (1962). "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." *Saulsberry v. Saulsberry*, 223 Miss. 684, 690, 78 So.2d 758, 760 (1955). *See also Alvarez v. Coleman*, 642 So.2d 361, 367 (Miss. 1994); *Planters Bank & Trust Co. v. Sklar*, 555 So.2d 1024, 1034 (Miss. 1990); *Sojourner v. Sojourner*, 247 Miss. 342,153 So.2d 803, 807 (1963). Clear and convincing proof is necessary to establish a constructive trust.

Sklar, 555 So.2d at 1034 (citing *Allgood v. Allgood, supra*; *Shumpert v. Tanner*, 332 So.2d 411, 412 (Miss. 1976)). Fraud need not be shown. *Russell v. Douglas,* 243 Miss. 497, 505-06, 138 So.2d 730, 734 (1962).

As Mills admitted that she made the disputed gifts to herself out of Mrs. Harris bank account, while acting in the exercise of her duties as agent for Mrs. Harris, Jackson provided the clear and convincing proof necessary to establish Mills' breach of her duty of absolute good faith and fidelity to Mrs. Harris, Mills' unjust enrichment resulting from such breach, and Jackson's entitlement to have the requested constructive trust established and imposed to prevent Mills' unjust enrichment.

Yet the chancellor, basing her decision on unsubstantial evidence and the wrong legal standard, failed to establish the requested constructive trusts, and by so doing the chancellor was manifestly wrong and clearly erroneous. Hence, by affirming the chancellor's decision, this Court also has overlooked or misapprehended the applicable law and facts in this case.

ISSUE IV: This Court overlooked or misapprehended the undisputed fact that the durable power of attorney, executed by Mrs. Harris on August 25, 2003, and appointing Mills to serve as her agent and attorney in fact, did not authorize or allow Mills to make gifts to herself out of Mrs. Harris' estate and did not authorize or allow Mills to invest Mrs. Harris' money in any certificate of deposit that was titled jointly in the names of Mrs. Harris, Mills, and Mills' daughter.

The General Durable Power of Attorney, which was executed by Mrs. Harris on August 25, 2003, and appointed Mills to serve as Mrs. Harris's agent and attorney in fact, consists of only two unnumbered paragraphs and specifically provides as follows:

> KNOW ALL MEN BY THESE PRESENTS, that I, ELEASE HARRIS, a resident of Madison County, Mississippi, a citizen of the United States, have made, constituted and appointed, and by these presents do make, constitute and appoint GLENDORA MILLS, 3451 Nashville Street, Jackson, Mississippi 39213, my true and lawful attorney, for me and in my name, place and stead . . . *to open accounts in my name, or in the name of my said attorney, as my attorney in fact; . . . to make gifts within the per donee exclusion amount as set forth in*

> *Section 2503(b) of the Internal Revenue Code as now set forth or hereafter amended;*. . . hereby giving and ratifying to my said attorney full power and authority to do and perform all and every act and thing whatsoever necessary to be done in the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney may do pursuant to this power.

As set forth in §87-3-7(1), *Mississippi Code Annotated* (1999), "a letter of attorney to transact any business need only express plainly the authority conferred." Jackson contends that the terms and provisions of this power of attorney must be strictly construed against Mills. In 2A C.J.S., Agency, § 151(b) (1972), the rule of strict construction is stated as follows:

> As a general rule, powers conferred upon an agent by a formal instrument, such as a power of attorney, are to be strictly construed. Authority thus bestowed is never to be extended by intendment or construction beyond what is in terms given or is necessary to effectuate that which is given, and this rule is particularly applicable in the construction of powers relating to realty. Although general powers are allowed a greater liberality of construction, special powers may not be enlarged unless clearly so intended.

Id. Under this rule of strict construction, Mills only had the authority to open bank accounts that were titled solely in the name of Mrs. Harris or solely in the name of Mills, in her capacity as agent and attorney in fact for Mrs. Harris, which provision was designed to prevent Mills from doing exactly what she did, *i.e.*, making gifts to herself out of Mrs. Harris' existing bank account. Accordingly, Mills breached this specific duty by titling the two certificates of deposit that she purchased jointly in the names of Mrs. Harris, Mills and Mills' daughter, with the right of survivorship.

And under this same rule of strict construction, Mill had no authority to make these disputed gifts to herself. The durable power of attorney from Ms. Harris to Mills specifically provided that Mills could only make "gifts within the per donee exclusion amount as set forth in Section 2305 of the Internal Revenue Code as now set forth or hereafter amended." Jackson contends that this POA provision plainly conferred Mills with the authority to make gifts to

others, but did not plainly or expressly confer Mills with the authority to engage in self-dealing by making gifts to herself. Moreover, §87-3-7(2), *Mississippi Code Annotated* (1999) provides as follows with respect to an agent's gifting:

> If any power of attorney or other writing (a) authorizes an attorney-in-fact or other agent to do, execute or perform any act that the principal might or could do, or (b) evidences the principal's intent to give the attorney-in-fact or agent full power to handle the principal's affairs or deal with the principal's property, the attorney-in-fact or agent shall have the power and authority to make gifts in any amount of any of the principal's property to any individuals or to any organizations described in Sections 170 (c) and 2522 (a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts.

As Ms. Harris was charged with knowledge of the law when she executed the durable power of attorney, *Pearson v. Pearson*, 252 Miss. 724, 173 So.2d 666 (1965), Jackson contends that the durable power of attorney must be read and interpreted together with §87-3-7(2); and that, by so doing, one should rightly determine that Ms. Harris intended to limit the amount of any gift made by Mills to the annual per donee exclusion amount, as set forth in the Internal Revenue Code (being at all relevant times the sum of $10,000.00), but she did not intend to remove the statutory provision that any gift made by her agent had to be in accordance with [her] personal history of making or joining in the making of lifetime gifts, which statutory provision would thus continue to remain in full force and effect.

In any event, in 2003 Mills used her principal's money to purchase a $50,000.00 CD which was titled jointly in the names of Mrs. Harris, Mills, and Mills' daughter with the right of survivorship, which constituted a gift to Mills in excess of the $10,000.00 annual exclusion amount under the IRS Code, and again in 2006 Mills used her principal's money to purchase a $47,000.00 CD which was also titled jointly in the names of Mrs. Harris, Mills, and Mills' daughter with the right of survivorship, which constituted another gift to Mills in excess of the

$10,000.00 annual exclusion amount under the IRS Code. Moreover, Mills was unable to explain how either of these gifts benefited Mrs. Harris. Nor did Mills ever offer any evidence pertaining to Mrs. Harris history of making or joining in the making of lifetime gifts.

The fact that the power of attorney document did not specifically authorize Mills' to make the disputed gifts to herself is important because it demonstrates Mills' willful intention to withdraw as much money as possible from Mrs. Harris' bank account and reinvest it in such a way as to defeat Jackson's rights of survivorship in order to insure that the entire amount of each CDs would go to Mills upon the death of Mrs. Harris, and for good measure, Mills also titled each CDs in her daughter's name upon the off chance that Mills might happen to predecease Mrs. Harris.

These relevant matters were also wholly overlooked or misapprehended by this Court.

ISSUE V: This Court overlooked or misapprehended the applicable law with respect to the proof that is required in order for a court of equity to uphold and affirm a gift transaction, which is the product of an agent's actual fraud and therefore conclusively voidable without the aid of any presumption, and, by so doing, this Court affirmed the chancellor's erroneous decision, which is based solely upon Mills' self-serving testimony, together with the chancellor's use of her own innate psychic powers to somehow divine Mrs. Harris' true intentions, based upon nothing more that her own assumption of the actual circumstances surrounding the various gift transactions, when there was no clear and convincing evidence that Mrs. Harris ever deliberately intended to confirm and did in fact ratify these gift transactions after all undue influence had been totally removed, with full knowledge of all material facts, including the imperfections of the gift transaction and her right to impeach them.

As herein above set forth, where an agent, in her representative capacity, is dealing with herself, in her individual capacity, and the agent acquires some benefit or advantage at the expense of the principal, the transaction is voidable without the aid of any presumption, and nothing will defeat the principal's right of remedy, except the principal's own confirmation after full knowledge of all the facts. John N. Pomeroy, Jr., *Equity Jurisprudence*, 3rd Ed. § 959 (1905).

With respect to the required proof to establish a valid confirmation, Mr. Pomeroy has this to say:

> Whenever a confirmation would itself be subject to the same objections and disabilities as the original act, a transaction cannot be confirmed and made binding; for confirmation assumes some positive, distinct action or language, which, taken together with the original transaction, amounts to a valid and binding agreement. . . . . If the party originally possessing the remedial right has obtained full knowledge of all the material facts involved in the transaction, has become fully aware of its imperfection and of his own right to impeach it, or ought, and might, with reasonable diligence, have become so aware, and all undue influence is wholly removed so that he can give a perfectly free consent, and he acts deliberately, and with the intention of ratifying the voidable transaction, then his confirmation is binding, and his remedial right, defensive or affirmative, is destroyed. If, on the other hand, the original undue influence still remains, or if the act is simply a continuation of the former transaction, or if the party wrongly supposes that the original contract or transaction is binding, or if he has not full knowledge of all the material facts and of his own rights, no act of confirmation, however formal, is effectual; the voidable nature of the transaction is unaltered.

John N. Pomeroy, Jr., *Equity Jurisprudence,* 3rd Ed. §964 (1905).

In the case at bar, Mills' self-serving testimony never even addressed Mrs. Harris' confirmation of and intention to ratify any of these disputed gift transaction, which, as we have seen, were the product of her agent's actual fraud and voidable without the aid of any presumption. Mills never testified that Mrs. Harris had obtained full knowledge of all the material facts involved in the transactions, nor that Mrs. Harris had become fully aware of all of their imperfection and of her own right to impeach them, nor did Mills ever testify that all of her undue influence upon Mrs. Harris had been wholly removed so that Mrs. Harris could give a perfectly free consent, nor did Mills ever testify that Mrs. Harris had acted deliberately and with the intention of ratifying the voidable transactions. Rather, the evidence showed that Mills' original undue influence still remained in full force and effect, and that Mrs. Harris did not ever have full knowledge of all the material facts and of her own rights. Thus, there was never any

valid and effectual confirmation by Mrs. Harris, and the voidable nature of the transaction was never altered.

Thus, by affirming the chancellor's decision in this case, this Court overlooked and misapprehended these relevant facts and the applicable law with respect thereto.

Conclusion

In its zeal to affirm the chancellor's decision, this Court overlooked or misapprehended the facts and the applicable law in almost as many ways as a country dog can go to town. Accordingly, Jackson requests that she be granted a rehearing, so that her case can be properly considered and decided upon a recognition of the fact that Mills breached her duty of absolute good faith and loyalty to Mrs. Harris, while serving as Mrs. Harris' agent and attorney in fact, in order to gain financial advantages at the expense of her said principal, which constitutes *actual fraud* in equity, *i.e.*, *actual undue influence*, which is voidable without the aid of any presumption. Accordingly, *McNeil v. Hester* has no application. And, since Mills was unjustly enriched by her actual fraud against both Mrs. Harris and Jackson, appropriate constructive trusts should have been established and imposed to prevent Mills' unjust enrichment.

Thus, Jackson requests that upon rehearing, the decision of the chancellor will be reversed and rendered or, if necessary, reversed and remanded to the trial court for whatever additional hearings may be necessary or required in order to erect and impose the constructive trusts as requested by Jackson to prevent Mills' unjust enrichment.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Motion for Rehearing with the clerk of the Court using the MEC system which sent notification of such filing to the following:

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This the 22nd day of January, 2016.

/s/ J. M. Ritchey
J. M. RITCHEY