THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master in Equity

Case No. 2010-CP-08-4140

Marion Creel, Appellant,

v.

Douglas Creel, Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO CONSIDER DR. HAMMETT'S EXPERT TESTIMONY?

2. DID THE TRIAL COURT ERR IN FAILING TO FIND THAT APPELLANT CLEARLY AND CONVINCINGLY PROVED THERE WAS A UNILATERAL MISTAKE?

3. DID THE TRIAL COURT ERR IN FAILING TO FIND THE TRUSTING AND CONFIDENTIAL RELATIONSHIP IMPOSED DUTIES ON THE SON, WHICH TAKEN TOGETHER WITH THE FATHER'S PHYSICAL AND MENTAL CONDITION, CREATE EXTRAORDINARY CIRCUMSTANCES THAT FIT WHAT IS MEANT BY IMPOSITION IN ANY FORM OF THE PARTY OPPOSED IN INTEREST TO THE REFORMATION OR RESCISSION.

STATEMENT OF THE CASE

On November 19, 2010, Marion Creel commenced an equity action against his son, Douglas Creel, alleging unilateral mistake and breach of fiduciary duties, and seeking rescission of the sale of real estate by father to son, or alternately, reformation of the son's promissory note to father to include the missing term, a five year "call" feature that give Marion the option each five years of the twenty year note to adjust the interest rate up to two percent. Douglas Creel filed an answer and counterclaims on February 1, 2011. The matter was tried before the Master in Equity and testimony heard on January 11th, 2012, May 9th, 2013, and September 30th, 2013. Following the May 9, 2013 hearing, the Court issued an interim Order. In September, 2013, the Court issued another interim Order bifurcating the issue of damages. Following the September 30th hearing, the court ordered the parties to submit memoranda, which were received by the court by December 10, 2013. After receiving a written status inquiry from the Plaintiff, on February 10th the court by brief email advised the parties of his decision in favor of the

Defendant. On April 4th, 2014, the Final Order was filed, but not served on the Plaintiff until April 21, 2014.

FACTS

Testimony of Robin Chavis and Suzette Creel, daughter and wife of the Plaintiff, was heard on January 11, 2012. Marion Creel testified May 9th, 2013. Dr. David Hammett was deposed May 3rd, 2013 and his deposition admitted May 9th. Douglas Creel and Pete Wyckoff, Esq. testified September 30, 2013. Relevant facts from the testimony of each witness follows. Transcript will be referenced as T1, T2, and T3. Hammett's deposition will be D1.

TESTIMONY OF MARION CREEL

Marion Creel testified on May 9th, 2013. He testified he is 76 years old, and got out of school around the sixth grade. (R. p. 62, lines 17-25). He stated one of the reasons he sold the property to his son was due to his health, that he had a stroke and embolism of the brain in September, 2008. (R. p. 63, lines 3-25). He stated he suffered hemorrhaging on the brain, four to five months therapy and home, and he couldn't even read or write, had to get eyeglasses before he could drive, and was seeing double all the time and for four-six months before the glasses helped that some. (R. p. 64, lines 3-22). When asked how else the stroke affect him, he answered the stroke affected his left side and his vision on the left side and still yet today on his left side. (R. p. 64, lines 23-25). He stated Douglas came to the hospital and knew his condition, and after leaving the hospital Douglas called, and Marion told him how he was knocking over water glasses with his left hand and running into walls. (R. p. 65, lines 12-19). He further stated if he got a headache, he couldn't focus at all or read at all and the headaches got worse when he

tried to read. (R. p. 66, lines 1-5). After generally describing his meeting with his children when he asked them to help with the buildings, when asked why he chose Robin and Douglas to give power of attorney to, he answered because he had trust in them. (R. p. 67, line 12-14).

Questioning turned to the sale of the property, and what occurred on March 10th, 2009. Marion stated he and Douglas met at the office, but Marion had forgotten to bring the contract and had left it home. (R. p. 68, line 22-p.69, line 2). He stated he and Douglas had talked about interest payments, and his wife had come up with a payment on the computer: he stated he'd discussed interest payments with Douglas already, and there at the office they went over it again. (R. p. 69, lines 3-9). Marion stated Douglas said he'd type a contract up, and Marion told Douglas to go in the back office and look in a file and get a out a contract that already had a note, which Marion had shown both Douglas and Robin when they'd met about the power of attorney. (R. p. 69, lines 10-15). Marion states Douglas tried to get him to sign some kind of contract, but Marion told him that he would sign a proposal to be taken to Wyckoff immediately so that Wyckoff could draft a contract. (R. p. 69, line19-p. 70, line 1). Then, Marion stated Douglas came back with the proposal and they signed the proposal, and the proposal read a 20 year mortgage with a 5 year call. (R. p. 70, lines 8-12).

Marion was shown a copy of an "Offer to Purchase" document, and asked if her recognized it, and he denied that was what he signed, and demanded to see his original signature, stating he'd asked for the original and cannot get it. (R. p. 71, lines 1-19). Marion claimed he never saw the document until after the closing and years later when Wyckoff gave him a copy and when a copy of Wyckoff's file was obtained in discovery:

the document as admitted as a document Marion recognized after the closing. (R. p. 164); (R. p. 71 line 23- p. 73, line 5: p. 75, line 13-p. 76, line 15). A discourse followed and Marion looked a the exhibit and observed that it was attached to a fax cover sheet and showing it was faxed from Georgia on March 19th from Creel Construction Company, and that was not Marion's company. (R. p. 77, line 7- p. 78, line 25).

Topic shifted to the subject of the closing: Marion testified that a contract was suppose to be drafted and signed at Wyckoff's office, but when he got there he had a headache and forgot about it, and he stated he did not realize there wasn't a contract until the following day because he couldn't read the day of the closing because of the headache. (R. p. 80, lines 5-19). Marion stated he had a headache and could not concentrate. (R. p. 81, lines 8-11). He stated he didn't read or see the terms of the promissory note. (R. p. 81, lines 18-21). When asked what was wrong with the note, Marion stated the note didn't have the 5-year call with a two percent cap. (R. p. 83, lines 7-11).

Marion's testimony, especially on pages 23-31, (R. pp. 76-84) should be reviewed closely as during the questioning and answering, Marion was having difficulty concentrating and he was becoming confused and agitated. On page 31, 10-15 (R. p. 84, lines 10-15), the Court became aware and asked if Marion wanted to take a break.

Questioning resumed, and Marion was asked about when he realized there was a mistake. (R. p 85, line 1). Marion's response was a continued response to the previous question, that asked about his reading. (R. p. 85, lines 2-5). When asked if he had anyone with him that day, he stated he did not because he trusted Douglas, and did not bring his wife or daughter because Douglas would say he wasn't trusted; but then

Marion's response drifted away from the question. (R. p. 85, lines 6-24). Asked again when he realized there was a mistake, he answered he could not read because of the headache, and then he digressed, but did respond in a fashion and immediately called Wyckoff's office. (R. p. 86, lines 1-15). Marion was questioned about phone calls he made and asked about contacting and writing Douglas. Marion replied that he spoke with Douglas by phone, and on April 17th, with Suzette Creel's help, wrote a letter mailed by certified mail. (R. p. 155); (R. pp. 87-88).

Questions were attempted about document exhibits. When questioned about the certified mailing to Douglas, when asked to identify what the documents were, he answered the certified mail receipt was something about the light bill. (R. p. 87, line 18-p. 89, line 21). Marion was asked what was intended by sending this mail to Douglas, and Marion answered it was intended to notify the thing was wrong. (R. p. 89, lines 23-25). When asked to read the contents of the second page, Marion attempted to read but was unable. (R. p. 90, lines 1-10). After admission of documents admitted by stipulation, Plaintiff introduced Plaintiff's Exhibit 5, Day 2 (R. p. 168), which was a generally standard closing attorney notice of representation. Marion was asked if he knew what the document means, and Marion gave a confused answer. (R. p. 93, lines 1-13). Next, Marion was asked if he knew whether or not Wyckoff was his attorney for the closing. Marion's answer was not responsive. (R. p. 93, lines 15-21). Marion did state he signed the notice but it had not been read to him and he did not know Wyckoff was not his attorney. (R. p 93, line 22-p. 94, line 8).

Marion was questioned about whether Douglas responded to the letter, and he answered he didn't. (R. p. 94, lines 15-24). When asked if he spoke about this with

Douglas, Marion responded, he answered yes but then digressed, though notably again stating he placed trust in Douglas and Wyckoff. (R. p. 95, lines 1-19). After some testimony concerning the value of the buildings, on pages 49 and 50, that again demonstrates instances where responses digressed, Marion was asked what he did after Douglas failed to respond to the letter. He stated he went to Walker & Reibold and then digressed. (R. p. 98, line 19-p. 99, line 25).

The cross-examination of Marion by the defense commencing on P. 58 (R. p. 100) through P. 64 (R. p. 106) is relevant to demonstrate Marion's continuing difficulty attempting to read and comprehend documents he was questioned about by the Defense, and also his difficulty composing responses.

TESTIMONY OF DOUGLAS CREEL

Douglas Creel testified his father had a mild stroke and went to see him in the hospital in the ICU, but was only there for a little while. (R. p. 118, lines 12-22). Douglas admitted that he did meet his father with his sister Robin about managing the building. (R. p. 119, line 19-p. 120, line 3). Douglas testified that he met his father at the building and that he had a laptop and printer and that he drafted an agreement and that his father did not read it, but that Douglas read it to him. (R. p. 121, line 2-p. 122, line 12). He stated that he did become aware that his Dad had concerns after the closing about the late fee and that was changed. (R. p. 123, lines 3-8). When asked if his father had other concerns, Douglas admitted he remembered his father wanted to change the interest rate every five years, which he claimed was not discussed when the agreement was signed, and when his father raised this with him, he didn't respond. (R. p. 123, lines 9-18). He admitted he received the certified letter from his father. (R. p. 123, lines 3-10). When

asked if he received a letter from an attorney's office in May, 2009, Douglas said he could not remember but he was sure he did, and he was asked to read the letter, which he did. (R. p. 124, line 15-p. 127, line 2).

When asked if he responded to the letter, he stated he did not. (R. p. 127, lines 5-6). He also said he only bought the building to help his father out. (R. p. 128, lines 6-12). Douglas claimed he was not aware of his father's ability to read and understand documents following the stroke. (R. p. 129, lines 13-15). Lastly, during Douglas' testimony a question was posed to Douglas concerning Marion's health following the stroke. Defense counsel objected, who stated to the court that it had been testified to by a doctor and that's been in front of the court. (R. p. 129, lines 16-20).

TESTIMONY OF DR. DAVID HAMMETT

Dr. David Hammett stated he is Marion Creel's neurologist and Marion was referred to him as a patient within the past year, he believed by Marion's cardiologist, Dr. Isbell. (R. p. 134, lines 2-13). He testified to his professional licensing, specialty as a vascular neurologist, education and post-graduate work, position as a clinical professor at the School of Medicine, and time in private practice. (R. p. 134, line 14-p. 136, line 1). He stated he reviewed recent MRI pictures of Marion's brain, and also review imaging studies from hospital records from the time of his stroke in the fall of 2008. (R. p. 136, lines 2-15). He stated that from reviewing the imaging Marion's stroke involved bleeding in the brain from a high risk dangerous stroke, and went on in detail to explain where the stroke occurred, and how the stroke affects visual understanding on the left side of his world, and that it is a lingering problem because the stroke leaves permanent damage. (R. p. 136, line 17-p. 139, line 4). Dr. Hammett explained the normal recovery

process for patients who suffer this kind of stroke. (R. p. 141, line 1-p. 143, line 7). Dr. Hammett went on to explain how a stroke of the type Marion experienced would affect competency and what kind of neurologic deficits these stroke victims experience. (R. p. 143, line 8-p. 148, line 25).

During cross-examination, Dr. Hammett about whether or not he had an opinion of Marion Creel's deficits following the stroke but before Dr. Hammett examined Marion, and Dr. Hammett answered beyond any reasonable doubt, based on his assessment of Marion's deficits, the deficits would have been similar, if not worse, prior to his testing. (R. p. 149, line 12-p. 151, line 6). On reexamination, Dr. Hammett stated based on established science an injury of the size Marion suffered will always render neurologic deficit, and it will be visual and visual processing, visual interpretation, visual attention, and visual understanding: and his visual understanding was affected. (R. p. 152, line 19-p. 154, line 1).

TESTIMONY OF SUZETTE CREEL

Suzette Creel testified she observed that following the stroke Marion was in ICU and paralyzed on his left side and it took two-three months before he recovered. (R. p. 47, lines 2-10). She stated she knew about sale of the building by Marion to Douglas, because during February or March of 2009 she helped him with different calculations to come up with an affordable payment, and that in all Marion's loans he usually has terms of so much for a certain amount of time and then its capped. (R. p. 47, line 19-p. 49).

Concerning the loan closing, Suzette testified after the closing she assisted Marion to review the closing documents because he could not read and digest them by himself, a day or two after, when he showed her the paperwork and they noticed mistakes. (R. p.

50, line 10-p. 51, line 4). She stated she sent a fax to the closing attorney and sent a certified letter and attachment of a sample note with a "call" feature to Douglas, and this correspondence was offered and admitted as Plaintiff's Exhibit 2, Day One (R. p. 163). (R. p. 51, line 4-p. 53, line 4). She read the letter, sent April 17, which was mailed certified to Douglas Creel, that asked Douglas to follow up with the attorney to correct the late fee and promissory note and that also attached is a contract of how the contract should have read if the one for – this warehouse was used as an example. (The example included an option to adjust the interest rate after five years). (R. p. 51, lines 7-15). She stated between before and after April 17th that Marion called both Douglas and Wyckoff trying to address the problem, but that she assisted Marion with anything that had to be written. (R. p. 54, line 6-p. 55, line 21). Lastly, on direct examination, she testified that Marion called attorneys to try to get Wyckoff and Douglas to change the terms of the contract with the "call;" and when asked what was meant by "call," she explained that anything she calculated for Marion on the computer was figured with an interest rate for five years with a two percent increase. (R. p. 56, line 12-p. 57, line 8).

TESTIMONY OF PETE WYCKOFF

Pete Wyckoff testified on September 30th, 2014 and parts of his testimony support the Plaintiff. Wyckoff testified that he got a phone call from Marion Creel where Marion told him that he did agree with the terms. (R. p. 112, lines 10-15). When asked if he recalled when Marion Creel called, Wyckoff stated he didn't recall when, but did have a recollection he called and said that the terms were not correct. (R. p. 113, lines 4-10).

Wyckoff stated typically sellers, as Marion was, do not read the note, that the terms are explained to the buyer. (R. p. 113, lines 20-24). Also relevant was Wyckoff's

explanation that every time he does a closing, he puts the buyers to his left and the sellers to his right, (R. p. 114, lines 3-7), because this put Wyckoff to Marion's left in the area Dr. Hammett explained is where Marion experienced the visual understanding deficits. Lastly, Wyckoff was asked to review and read the "Offer to Purchase" document, and when questioned about whether it called for the parties to execute a formal sales contract, Wyckoff responded that in his opinion the "Offer" document contained all the requirements of a binding agreement, so it was not necessary to sit down and draw up "a bunch of whereases and wherefores and that kind of stuff." (R. p. 116, line 23-p. 117, line 25).

TESTIMONY OF ROBIN CHAVIS

Robin Chavis testified Marion Creel is her father and Douglas Creel is her half-brother. (R. p. 29, lines 22-25). She stated her father had a stroke in September, 2008. R. p. 30, line 6). She stated she observed a lot of short-term memory loss after he returned home. (R. p. 31, line 22-p. 32, line 2). She stated that she believed in November, 2008, her father called her and she and Douglas met him, and that Marion said he wanted her and Douglas to have power of attorney for the building that is subject of this action, to collect rents and perform upkeep. (R. p. 32, line 12-p. 33, line 7). She stated Marion showed them the power of attorney. (R. p. 34, line 23-p. 35, line 3). She stated her Marion told them he was giving them power of attorney because he didn't feel like he was able to do it. (R. p. 35, lines 13-14). She testified she saw her father at least once a month and observed that for several months noticed Marion continued to have problems with short-term memory, and that there has been improvement but that it was very slow at first. (R. p. 36, line 18-p. 37, line 18). Lastly, she stated her father had

about a sixth or seventh grade education but reads on a third or fourth grade level. (R. p. 45, lines 2-13).

ARGUMENTS

1. BECAUSE THE COURT ADMITTED DR. HAMMETT'S DEPOSITION, AND THE DEFENDANT DID NOT CONTEMPORANEOUSLY OBJECT TO THE ADMISSION OF THE DEPOSITION ON THE GROUNDS THAT DR. HAMMETT HAD NOT BEEN QUALIFIED AN EXPERT, IT WAS ERROR FOR THE COURT TO FIND DR. HAMMETT WAS NOT AN EXPERT AND CONSIDER HIS EXPERT OPINION

In its order, the Court found, in paragraph 11, that Dr. David Hammett did not testify as an expert and that his testimony should be given little or no weight. Doctor Hammett, MD was deposed on May 3rd, 2013. On May 9th, 2013, Dr. Hammett's deposition was offered into evidence. (App. R. p. 11, lines 17-23). The Defendant stated his opposition to admission of the deposition, but did not object that Dr. Hammett was not qualified as an expert. (App. R. p. 11, line 24- p. 12, line 3). The Defendant objected to timeliness and surprise. A colloquy followed between the court and respective counsel, and the court admitted the deposition, and provided the Defense time to obtain all relevant medical records and the option to retain his own expert. (App. R. p. 13, line 4-p. 19, line 14). By order dated May 9, 2013, (R. p. 14), the court confirmed Dr. Hammett's deposition was admitted, that the Plaintiff would provide medical records, and the Defendant may call any medical witness in reply. In other words, the court cured the issued and the Defense was in agreement. Lastly, during Douglas Creel's testimony, a question was posed to Douglas about his knowledge of the severity of Marion's stroke. Defense counsel objected and stated, "Your Honor, it's been testified to through by a doctor and that's been in front of you and issues of mental competency have been ruled on." (R. p. 129, lines 16-20). The Defense cannot have it both ways.

Furthermore, the following excerpts from Dr. Hammett's deposition indicate he should be considered an expert witness. At the outset of the deposition, Dr. Hammett was questioned by the Plaintiff, and on Page 6 (R. p. 134):

Q: You're Marion Creel's physician?

A: I'm his neurologist.

...

Q: ... Are you licensed in South Carolina?

A: Yes.

Q: Ok. And you're a physician?

A. Yes.

Q: And – and what are your areas of practice?

A: So I'm a specialist in neurology and then actually a vascular neurology specialist -- a stroke specialist.

Q: A stroke specialist?

A: I did a fellowship in vascular neurology.

Thereafter, Dr. Hammett was questioned about his formal education and then work on the faculty at the School of Medicine in Columbia. (R. p. 135, lines 2-23). Then, Dr. Hammett was examined and cross-examined about Marion Creel's stroke. During cross-examination, Dr. Hammett was questioned about his assessment of Marion Creel's neurological functions and deficits cause by the stroke. (R. p. 149, line 12-p. 152, line 4), and stated that beyond a medical doubt, Marion Creel's present deficits were present during times relevant to this case. On re-examination, Dr. Hammett was questioned

about established science concerning injuries to this area of the brain, and on Page 30, (R. p. 153), Dr. Hammett answered:

A; Okay. Yes. In an adult patient, an injury to the occipital lobe and the parietal lobe will always – an injury of this size will always render neurologic deficit. It will always be visual and visual processing, meaning visual interpretation, visual attention, visual understanding. So it is just a – a—an appreciation that an object is in this side of the world in the – on the left side of someone's visual field that there is something there. It is then interpreting what that is, what it means, and how it relates to anything else that it might relate to, and that's where the extent of the injury that I see in his brain is relevant because it is more than just the visual field itself and involves processing.

In conclusion, because the Defense failed to contemporaneously object that Dr. Hammett was not qualified as an expert, because the Court admitted the deposition, because during Douglas' testimony the Defense conceded the doctor's testimony, and because Dr. Hammett is a licensed vascular neurologist who specializes in strokes and is Marion Creel's physician, it was error to dismiss his testimony. Further, Dr. Hammett gave his medical opinion based on established science and stated that in his opinion Marion Creel has neurologic deficits that affect his left-side visual processing and understanding, and beyond medical doubt these deficits were present during times relevant to this case.

II. BECAUSE APPELLANT ESTABLISHED FACTS THAT CLEARLY SHOW UNILATERAL MISTAKE, IT WAS ERROR TO IGNORE THESE FACTS AND FAIL TO HOLD THERE WAS A UNILATERAL MISTAKE

Several South Carolina cases have addressed relief based on unilateral mistake, and in *Truck South, Inc. v. Patel*, 339 S.C. 40, 49, 528 S.E.2d 424, 429 (2000), the South Carolina Supreme Court wrote:

> In order to rescind an instrument on the grounds of mistake, the proof must be by evidence that is clear and convincing. *Smothers v. Richland Memorial Hosp.*, 328 S.C. 566, 493 S.E.2d 107 (Ct.App.1997) (citing *Blanton v. Blanton*, 284 S.C. 250, 325 S.E.2d 340 (Ct.App.1985)) ...Unilateral mistake is not by itself grounds for rescinding the contract unless the mistake has been induced by fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to rescission, without negligence on the part of the party claiming rescission, or where mistake is accompanied by very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement.

In addition to rescission, where the mistake is unilateral, equity may grant reformation under strong and extraordinary circumstances which would make it a great wrong to enforce the agreement. *Sims v. Tyler,* 276 S.C. 640, 643, 281 S.E.2d 229 (1981). *Alderman v. Bivin*, 233 S.C. 545, 552, 106 S.E.2d 385, 389 (1958) further provides:

> The rule as to when a contract may be reformed or rescinded is fully set forth in *Jumper v. Queen Mab Lumber Co.*, 115 S.C. 452, 106 S.E. 473, 475, as follows:
>
> 'A contract may be reformed or rescinded, as the justice of the case may require, upon the ground of mistake, under these circumstances: (1) Where the mistake is mutual and is in reference to the facts, or supposed facts, upon which the contract is based; (2) where the mistake is mutual and consists in the omission or insertion of some material element affecting the subject-matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it; (3) where the mistake is not mutual, unilateral, and has been induced by the fraud, deceit, misrepresentation, concealment, or imposition in any form of the party opposed in interest to the reformation or rescission, without negligence on the part of the party claiming the right; (4) where the mistake is not mutual, but unilateral, and is accompanied by very strong and extraordinary circumstances, showing imbecility or something which would make it a great wrong to enforce the agreement, sustained by competent testimony of the clearest kind. *Kennerty v. Etiwan Phosphate Co.*, 21 S.C. 226, 53 Am.Rep. 669; *Forrester v. Moon*, 100 S.C. 157, 84 S.E. 532.

The Court in *Alderman,* at p. 390, also wrote: "We do not undertake to catalogue the conditions which will give rise to equity jurisdiction. We simply say the mere mistake of one party alone is not sufficient to avoid the contract." Therefore, Marion Creel was required to show that he made a mistake, and either "fraud, deceit, misrepresentation, concealment, or imposition in any form of the party opposed in interest to the reformation or rescission; or, the mistake was accompanied by strong and extraordinary circumstances showing imbecility or something which would make it a great wrong to enforce the agreement. The following facts from the record clearly and convincingly show that Marion made a mistake, and so it was error for the Master to ignore these facts and conclude "[t]he evidence was not clear and convincing that there was a unilateral mistake."

The standard for the fact-finder is "firm belief:" In *Anonymous (M-156-90) v. State Bd. of Medical Examiners*, 496 S.E.2d 17, 329 S.C. 371 (S.C. 1998), the South Carolina Supreme Court wrote:

> Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.' [Cites omitted].

The testimony presented meets the clear and convincing standard because:

Marion Creel did not become aware of the mistake until after the April 9th closing occurred because he stated he did not sign or read the note at the closing, according to both his testimony and Wyckoff's. At the closing, Marion had a headache and was sitting to the right of Wyckoff, and therefore, Wyckoff was to Marion's left. Marion suffered a stroke that left neurologic deficits that principally affect his visual processing

and understanding on the left side of this world, according to Dr. Hammett. Marion, who read at a third or fourth grade level before the stroke, testified to his reading problems. During his testimony, when asked to read and understand documents presented, he was confused and unable to make sense of what he was being asked to read. Marion stated that within a few days after the closing, he was able to read the note and when he became aware of the missing term he believed was included, he took immediate action to call Douglas and Wyckoff. Both Douglas and Wyckoff testified Marion contacted them about problems with the terms of the note. Marion, with the help of his wife, Suzette, sent a fax to Wyckoff and a letter by certified mail to Douglas requesting the issue be corrected. By early May, 2009, when the problem had not been corrected, Marion contacted Russell Blankenship of the Walker & Reibold firm and Blankenship wrote Douglas a letter.

Marion did not read the "offer to purchase" also called the "proposal" or agreement document that lead to the mistake in drafting the note. He left the contract he had prepared, with his wife's help, at home. Douglas admits he then drafted a document and read it to his father. Marion contested his signature and although he requested to see his original signature, the original was not produce. Nevertheless, even if the original had been produced, it does not mean that a mistake did not occur.

While Marion may have signed this document, based on his mental and physical condition, and trusting and confidential relationship with Douglas, if he did sign it, he is entitled to be excused. *Regions Bank v. Schmauch,* 582 S.E.2d 432, 440, 354 S.C. 648 (S.C.App. 2003) provides precedent related relief when a person signs a written document without reading it:

> A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981); *Evans v. State Farm Mut. Auto. Ins. Co.*, 269 S.C. 584, 587, 239 S.E.2d 76, 77 (1977). A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986); [354 S.C. 664] *Sanders v. Allis Chalmers Mfg. Co.*, 237 S.C. 133, 139-40, 115 S.E.2d 793, 796 (1960); *Stanley Smith & Sons v. D.M.R. Inc.*, 307 S.C. 413, 417, 415 S.E.2d 428, 430 (Ct.App.1992). One who signs a written instrument has the duty to exercise reasonable care to protect himself. *Maw v. McAlister*, 252 S.C. 280, 285, 166 S.E.2d 203, 205 (1969); *Evans*, 269 S.C. at 587, 239 S.E.2d at 77; *DeHart v. Dodge City of Spartanburg*, 311 S.C. 135, 139, 427 S.E.2d 720, 722 (Ct.App.1993).
>
> This rule is subject to the exception that if the party is ignorant and unwary, his failure to read the document may be excused. *Burwell*, 288 S.C. at 40, 340 S.E.2d at 789; *Thomas v. Am. Workmen*, 197 S.C. 178, 182, 14 S.E.2d 886, 887 (1941); *Austin v. Indep. Life & Accident Ins. Co.*, 296 S.C. 156, 160, 370 S.E.2d 918, 921 (Ct.App.1988). However, our court very strictly construes this exception. *Burwell*, 288 S.C. at 40, 340 S.E.2d at 789. In determining whether a party can be classified as ignorant and unwary, an individual's education, business experience and intelligence are all considered. *Burwell*, 288 S.C. at 40, 340 S.E.2d at 789-90.

Thomas, cited by *Burwell*, also lists as factors a Court should consider the "mental and physical condition" of the parties. In full, *Thomas, at 182* reads, relevantly:

> Whether or not reliance upon a representation in a particular case is justifiable or excusable, what constitutes reasonable prudence and diligence with respect to such reliance, and what conduct constitutes a reckless or conscious failure to exercise such prudence, will depend upon the various circumstances involved, such as the form and materiality of the representations, the respective intelligence, experience, age, and mental and physical condition of the parties, and the relation and respective knowledge and means of knowledge of the parties. [Cites omitted].

Marion was almost 72 years old, in the process of recovering from a stroke that left permanent damage and neurologic deficits, and had a trusting relationship with Douglas. Even if Douglas' having power of attorney did not impose duties on Douglas, the fact he

would grant power of attorney demonstrates trust. Further, Marion trusted Douglas because he was his son. Douglas testified his father trusted him. Taken together, the evidence that there was a unilateral mistake is strong enough to meet the clear and convincing standard of proof.

III. BECAUSE PROOF OF UNILATERAL MISTAKE MAY BE MADE BY SHOWING AN IMPOSITION IN ANY FORM OF THE PARTY OPPOSED IN INTEREST TO THE REFORMATION OR RESCISSION, OR VERY STRONG AND EXTRAORDINARY CIRCUMSTANCES, IT WAS ERROR TO NARROWLY READ THE ELEMENT TO REQUIRE A SHOWING OF FRAUD, DECEIT, OR CONCEALMENT IN LIGHT OF THE PARTIES' RELATIONSHIP OF TRUST AND APPELLANT'S CONDITION

In addition to proving there was a unilateral mistake, there has to be proof that something in the conduct of the party opposing rescission or reformation warrants granting relief, such as fraud, misrepresentation, concealment, or imposition of the party opposed to rescission or reformation, without negligence on the part of the party claiming the right. *Truck South, Alderman, supra.* Alternately, relief can also be granted by showing very strong and extraordinary circumstances, showing imbecility or something which would make it a great wrong to enforce the agreement. *Id.*

Appellant concedes there was not evidence of fraud, deceit, misrepresentation, or concealment, because all that is in the record is conflicting testimony. Douglas testified no "call" feature was discussed, and Marion is adamant it was discussed and agreed to, orally, before Douglas drafted the March 10th document. However, Marion and Douglas did have a father-son relationship where Marion reposed trust in Douglas, and Douglas admitted there was trust reposed in him. An excerpt from *Regions Bank, supra,* provides:

> A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct.App.1988). "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." O'Shea v.

> Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); Island Car Wash, Inc. v. Norris, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct.App.1987). A relationship must be more than casual to equal a fiduciary relationship. Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct.App.1988).
>
> As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. Brown v. Pearson, 326 S.C. 409, 423, 483 S.E.2d 477, 484 (Ct.App.1997); Steele, 295 S.C. at 295, 368 S.E.2d at 94. The other party must have actually accepted or induced the confidence placed in him.

Here, there was clear and convincing proof of a fiduciary relationship because it is clear and uncontroverted that Marion appointed Douglas with powers of attorney, and Douglas accepted. Marion clearly stated he trusted his son and so behaved. Douglas clearly admitted his father trusted him. Finally, this is clearly a father-son relationship. So, while the Master did properly find there was no fraud, misrepresentation, or concealment, he did fail to consider the parties' relationship and whether this special relationship and Douglas' conduct in light of it. The Appellant submits this relationship fits with what is meant by "imposition of the other party" and the "catalogue" which will give rise to equity jurisdiction.

By their nature, fiduciary relationships impose duties and legal presumptions. "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992). Legal presumptions include, in the context of contested deed or will cases, a presumption of invalidity and burden shifting once the fiduciary relationship is established. *See Howard v. Nasser*, 613 S.E.2d 64, 364 S.C. 279 (S.C.App. 2005). Our Courts have interchanged the terms fiduciary or confidential relationship, but in either case, once the relationship is established, the burden shifts to

the other party to show an absence of undue influence. *See, e.g., Dixon v. Dixon*, 608 S.E.2d 849, 362 S.C. 388 (S.C. 2005).

These parties' relationship predated the day the March meeting, and continued beyond the April closing. It did not become clear to Marion that the trust reposed had been breached until Douglas inexplicably ignored Marion's appeals to remedy the mistake some time after the closing. It is clear that Marion sent Douglas a certified letter and Douglas clearly testified he did not respond. It is also clear that Marion retained an attorney who wrote Douglas, and that Douglas received the Blankenship letter, and did not respond. Douglas had a duty to act in good faith and with due regard, and inexplicably, he did not do so. It was not until he was haled into court to testify that he would provide a curt explanation, and nothing more.

Marion testified to his sense of injury that goes beyond money. There is no evidence of neglect on his part. He was not aware of his neurologic deficits until he was referred to Dr. Hammett in late 2012. If equity would not intervene to reform the note, then equity could intervene to rescind the transaction. If such relief is granted, the trial court would take up the rescission freshly, as damages had been bifurcated by the court, in a September, 2013 Order. (R. p. 10). If not based on a finding of imposition by Douglas, this Court may also consider whether these facts constitute strong and extraordinary circumstances which would make it a great wrong to enforce the agreement, as an alternate basis to rescind. Rescission is fundamentally fair to Douglas and he stated, under oath, "I only bought the building to help him out." Question: "So you really did this to help your father?" Douglas' answer, "Absolutely." If taken at his word, after having heard his father's heart-felt anguish and the toll this dispute has taken on him, and yet he fails now to help, this

Court has cause to and grounds to help. *Biven v. Watkins,* 313 S.C. 228, 437 S.E.2d 132 (Ct. App. 1993)

CONCLUSION

This Court may view the evidence to determine facts in accordance with its own view of the evidence, as both an action for mistake and action for breach of fiduciary duty, when relief sought is equitable, fall under this standard of review. *Townes Associates, Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1996); *Dupont v. Southern Nat'l Bank of Houston,* 288 S.C. 312, 342 S.E.2d 590 (1986)(an action alleging mistake is in equity); *Biven v. Watkins,* 313 S.C. 228, 437 S.E.2d 132 (Ct. App. 1993)(action is at law unless relief sought is equitable). The Appellant respectfully requests the court consider the issues presented and find that a rescission or reformation is warranted and grant Marion Creel relief. For reasons stated, this Court should reverse the judgment of the Master.

Respectfully Submitted,

September 30, 2014

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master in Equity

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Marion Creel, Appellant,

v.

Douglas Creel, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

September 30, 2014

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PROOF OF SERVICE

I certify that I have served three copies of the Final Brief of Appellant on Douglas Creel by depositing a copy of it in the United States Mail, postage prepaid, on October 1, 2014, addressed to his attorneys of record, Grover Seaton, Esq, P.O. Box 38, Moncks Corner, SC 29461, and Michael M. Murphy, III, 105 Carolina Ave., Moncks Corner, SC 29461.

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