2014 WL 1414619 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma.

B. L. COZAD, Personal Representative of the Estate of Irma Nell Rogers, deceased, Plaintiff/Appellant,

v.

Jimmie COZAD, Defendant/Appellee.

No. 112,025.
February 21, 2014.

District Court of Pittsburg County
Honorable James D. Bland
Action for Cancellation of Deed

Appellant's Brief-In-Chief

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***1 STATEMENT OF THE CASE**

This lawsuit was originally filed by Irma Rogers, grantor and lender, against her nephew, Jimmie Cozad, grantee and debtor, on August 24, 2011. Ms. Rogers died on October 13, 2011. By order dated February 29, 2012, B. L. Cozad, Personal Representative, was substituted as the Plaintiff in the place of Irma Rogers. The First Amended Petition was filed on February 29, 2012.

Appellant requested cancellation of a deed dated February 18, 2005, which conveyed 110 acres from Irma Rogers, grantor, to Irma Rogers and Jimmy Cozad, as joint tenants, with the right of survivorship. Appellant requested cancellation of the deed based on undue influence and inadequate consideration.

At the time the deed was made, Irma Rogers was 74 years old. Her nephew, Jimmie Cozad, was 58 years old. Irma was a widow. She had no children. She lived by herself. Her second husband, Harold Rogers, died in 1988. The Appellee lived in his mother's house approximately one-quarter mile from Ms. Rogers. The Appellee started seeing his aunt on a regular basis in 1989, after her husband died.

Ms. Rogers retired from the McAlester Regional Health Center in 1994. The Appellee borrowed a substantial amount of money from his aunt over a period of years from at least 2004 until 2010. He borrowed money on a regular basis. The borrowing of money was a constant deal. He did not make consistent payments to her. The Appellee was added to the checking account and savings account of Ms. Rogers at First National Bank of McAlester on January 11, 2005. Sometimes he wrote checks on her checking account for cash and he kept the cash. The bank accounts at First National Bank were closed by Ms. Rogers in late 2010.

The interest rate for the loans was 10% The Appellee paid Ms. Rogers $100 per month in interest when he made payments. *Jimmie Cozad* used the money from the loans for gambling, ***2** investments in stocks and commodities, the purchase of tools and tires, the purchase of automobiles for himself, and living expenses after he was injured in automobile accident. The Appellee also took his aunt gambling at the casino in McAlester. He would give her $20.00 to gamble, and he would gamble with $100.00. The Appellee stopped paying back the loans to Ms. Rogers in October 2010, because of a letter he received from his aunt stating that she did not want him to contact her. The last payment Appellee made Ms. Rogers was $500.00 on or about October 23, 2010.

Approximately one month after his name was added to the bank accounts, Ms. Rogers conveyed 110 acres to the Appellee, in joint tenancy with her, with the right of survivorship, by deed dated February 18, 2005. The deed was recorded in the office of the Pittsburg County Clerk that same date. Ms. Rogers had inherited the land from her brother.

Jimmie Cozad arranged for the preparation of the deed at the abstract office. Jimmie Cozad wrote out the instructions for the deed on a piece of paper which he gave the abstract office. Jimmie Cozad took Irma Rogers to the First National Bank when he was added as a joint owner on her accounts. Jimmie Cozad took Irma Rogers to the abstract company for the execution of the deed. The Appellee paid no money as consideration for the deed.

Irma Rogers and Jimmie Cozad did not tell any other persons about the bank accounts and deeds. It is obvious that a confidential relationship of trust existed between Irma Rogers and Jimmie Cozad.

The non-jury trial was on February 25, 2013. The trial court made an order on March 12, 2013. Appellant filed a motion for attorney fee and costs on March 22, 2013. On June 11, 2013, the trial court awarded costs but denied fees. The Journal Entry of Judgment was filed July 2, 2013.

***3** *SUMMARY OF THE RECORD*

Patricia Ross is an employee of the Department of Human Services. She does investigations of abuse and neglect and **exploitation** of vulnerable adults (Tr. at 8). The DHS office received the referral on Irma Rogers on July 5, 2011 from her nephew, Jimmie Cozad (Tr. at 12). Ms. Ross interviewed Jimmie Cozad. The substance of his referral and complaint was that other family members, B.L. Cozad and Raymond Cozad, were **exploiting** Irma Rogers (Tr. at 15-16). Ms. Ross found the

allegation of self-neglect by Jimmie Cozad concerning Irma Rogers was unsupported (Tr. at 23). Further, Ms. Ross found no evidence of any **exploitation** of Irma Rogers by B.L. Cozad and Raymond Cozad, as reported by Jimmie Cozad (Tr. at 25). Based on the DHS Policy Manual, the nature of the referral, her observations of the people she interviewed, and her experience, training, and education, Ms. Ross made a finding of **financial exploitation**. The reason for her finding was it appeared that Jimmie Cozad had used undue influence in attempting to acquire property and money from Irma Rogers (Tr. at 28-29).

"Undue influence" is defined to mean: When a person uses someone else's resources for their own personal gain and desires rather than the person that has the resources (Tr. at 29). The treatment plan recommended by Patricia Ross to Irma Rogers was a referral to seek legal counsel to regain her lost resources (Tr. at 32-33).

During cross examination of Patricia Ross, the trial court reversed himself and sustained a Motion to Strike her finding of **financial exploitation** by Jimmie Cozad (Tr. at 33-36).

Jimmie Cozad began living in the house with his mother in 1998. He lived approximately 1/4 mile from Irma Rogers. He lived closer to her than any other relative (Tr. at 47). Jimmie Rogers was the nephew of Irma Rogers. Irma Rogers had no children (Tr. at 47). Harold Rogers, the husband of Irma Rogers, died on September 7, 1988 (Tr. at 48). After her husband died, Irma Rogers lived by herself. She was born on XX/XX/1930 (Tr. at 49). In ***4** January of 2005, Jimmie Cozad put his name on both the checking account and savings account of Irma Rogers as a joint owner (Tr. at 48). At that time, she was 74 years old (Tr. at 49). Irma Rogers retired from her job at McAlester Hospital in 1994 (Tr. at 50).

Jimmie Cozad wrote on a paper identified as Plaintiff's Exhibit 20 that in October of 2010 he owed his aunt $12,000.00 (Tr. at 54). Besides the $12,000.00 Jimmie Cozad owed Irma Rogers on October 23, 2010, he had borrowed thousands of dollars from her over the years, some of which he had paid back (Tr. at 55-56). Jimmie Cozad borrowed money from Irma Rogers before the deed in question was signed in February of 2005 (Tr. at 56-57).

Jimmie Cozad did not tell any other person that he was borrowing money from his aunt (Tr. at 60). In February of 2005, Irma Rogers signed a deed by which she gave 110 acres of land to Jimmie Cozad and her as joint tenants. Jimmie Cozad did not pay Irma Rogers any money for the land (Tr. at 67-68).

The credibility of Jimmie Cozad is very poor. At trial, Jimmie Cozad testified that he did not take Irma Rogers to the abstract office to sign the deed; that he was not present when the deed was signed; that he did not record the deed; and the he did not tell the abstract office what to put in the deed (Tr. at 68). In his deposition, when Jimmie Cozad was asked about the deed in February of 2005, he testified under oath that he took Irma Rogers to the abstract office to sign the deed; that he did the deed; that he did most of the talking; that he was present when the deed was signed; that he recorded the deed; and that he gave the abstract office notes on what to put in the deed (Tr. at 69; 122-126).

Plaintiff's Exhibit 7 is a letter that Jimmie Cozad wrote Irma Rogers dated May 1, 2007. He mailed the letter to Irma Rogers (Tr. at 70-71). Plaintiff's Exhibit 7 documents that Jimmie Cozad borrowed money from his aunt, that he paid back $6,000.00 over the previous 12 months, ***5** in payments of $500.00 per month. Plaintiff's Exhibit 7 further documents that during one month, he only paid the interest, and none on the principal (Plaintiff's Exhibit 7, Exhibits at 202).

Plaintiff's Exhibit 8 are four letters that Jimmie Cozad wrote Irma Rogers, and either delivered or mailed to her (Plaintiff's Exhibit 8, Exhibits at 203). In these letters, Jimmie Cozad addresses his aunt as "Irma" and "babe". He signs some of the letters "With love, Jim" (Tr. at 72-74). In one of the letters, Jimmie Cozad told his aunt that she should go over the facts of an insurance claim with him before she contacted her insurance agent. Further, he told her how to answer a specific question from the insurance company concerning a cracked windshield and dented left fender. In one letter, Jimmie Cozad told Irma Rogers how to talk to her insurance agent. He also told her what information she should not tell her insurance agent, and he told her that it was best not to mention the accident, that she had just bought the 1982 vehicle and wanted to transfer the insurance coverage (Tr. at 75-76). In the letter, Jimmie Cozad was trying to control what his aunt told and did not tell her insurance agent (Tr. at 77).

In another one of the letters, Jimmie Cozad told his aunt which tag agent to go to in order to change her title. These four letters were mailed by Jimmie Cozad right after his aunt had wrecked her vehicle, probably sometime in 2007 and 2008 (Tr. at 77-78).

Plaintiff's Exhibit 9 is the 1099 tax document for interest income mailed by The First National Bank to Irma Rogers or Jimmie Cozad for the taxable year 2005 (Plaintiff's Exhibit 9, Exhibits at 204). Plaintiff's Exhibit 10 is the 1099 for interest income mailed by The First National Bank to Irma Rogers or Jimmie Cozad for the taxable year 2008 (Plaintiff's Exhibit 10, Exhibits at 205). Plaintiff's Exhibit 11 is a copy of a check on the account at The First National Bank of McAlester, OK, which lists the owners of the account as Irma Rogers and Jimmie Cozad (Plaintiff's Exhibit 11, Exhibits at 206). Plaintiff's Exhibit 12 are various checks drawn on the ***6** checking account owned by Irma Rogers and Jimmie Cozad, some of which were prepared and signed by Jimmie Cozad (Plaintiff's Exhibit 12, Exhibits at 207) (Tr. at 80-86).

Plaintiff's Exhibit 14 is a copy of the Deed dated February 18, 2005, which Appellant seeks cancellation of ((Plaintiff s Exhibit 14, Exhibits at 209). Plaintiff's Exhibit 15 is a Surface Damages Agreement on the subject real property that was signed on March 6, 2008 that had the signature of Jimmie Cozad and Irma Rogers (Plaintiff's Exhibit 15, Exhibits at 210) (Tr. at 88). Plaintiff's Exhibit 16 is a copy of a check in the amount of $1,650.00 made out to Jimmie Cozad only, from Geokinetics, the company named in the Surface Damages Agreement (Plaintiff's Exhibit 16, Exhibits at 211) (Tr. at 89-91).

The only Cozad family member that he told about the deed in question was his mother, who was dead by the time of trial (Tr. at 99). Jimmie Cozad did not tell anyone about the surface damages check, Plaintiff's Exhibit 16 (Tr. at 105).

In August of 2010, Irma Rogers wanted Jimmie Cozad to deed 30 acres of the real property included in the deed in question to her great-nephew, Raymond Cozad, and his wife, Bobbie Cozad. Jimmie Cozad and his wife signed the deed to Raymond and Bobbie Cozad. Jimmie Cozad believed that Raymond and Bobbie Cozad were taking advantage of Irma Rogers (Tr. at 105-106). Jimmie Cozad made the referral to DHS concerning Irma Rogers, Raymond Cozad, and B.L. Cozad on or about July 7, 2011, after he had received letters demanding cancellation of the deed from Amy Harrison, the attorney for Irma Rogers (Tr. at 109; 96-98).

Irma Rogers died on October 13, 2011. She had a close relationship with Bobbie Cozad, the wife of her great-nephew, Raymond Cozad. Before May of 2010, Irma Rogers never told Bobbie Cozad that she had placed Jimmie Cozad on her bank accounts, and that she had signed the deed in question (Tr. at 127-129). Irma Rogers filed a lawsuit to cancel the deed before she died (Tr. at 134-135).

***7** Jimmie Cozad came to the place of employment of Bobbie Cozad twice, and he was agitated, nervous, and shaky. He complained about the 30 acre deed that Irma Rogers, he, and his wife were giving Raymond and Bobbie Cozad (Tr. at 135-137). Bobbie Cozad testified that in her opinion, based on the fact that Irma Rogers obtained a firearm and kept it by her bed, as well as getting her locks changed, that Irma Rogers was afraid of Jimmie Cozad (Tr. at 138).

Raymond Cozad was the great-nephew of Irma Rogers, whom she had a really good relationship with. Irma Rogers never told Raymond Cozad that she had put the name of Jimmie Cozad on her bank accounts or on the deed in question. Further, Irma Rogers never told Raymond Cozad about the amounts of money she had loaned Jimmie Cozad (Tr. at 157-158).

B.L. Cozad is the Personal Representative of the Estate of Irma Rogers. He continued the prosecution of this case against Jimmie Cozad in the name of the estate after her death. Irma Rogers was his aunt (Tr. at 167-168). Irma Rogers never told B.L. Cozad about putting Jimmie Cozad on her bank accounts and the deed. Irma Rogers never told B.L. Cozad about the money that Jimmie Cozad was borrowing from her (Tr. at 170).

*8 ARGUMENTS AND AUTHORITIES

PROPOSITION 1: THE FINDING THERE WAS NO CONFIDENTIAL RELATIONSHIP WAS CONTRARY TO THE CLEAR WEIGHT OF THE EVIDENCE, AND THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DID NOT SHIFT THE BURDEN OF PROOF TO THE APPELLEE.

The Appellant proved a confidential relationship between Irma Rogers and Jimmie Cozad by a preponderance of the evidence. A presumption of invalidity of the deed dated February 18, 2005 arose. The trial court erred when it did not shift the burden of proof to the Appellee to show affirmatively that the transaction was fair and free from undue influence. The Appellee did not meet this burden of proof, and this Court should reverse the trial court, and grant judgment for the Appellant cancelling the deed.

The trial court initially allowed Patricia Ross, Department of Human Services employee, to testify to her opinion that Jimmie Cozad had **financially exploited** Irma Rogers. The opinion of Ms. Ross was based on the DHS Policy Manual, the nature of the referral, her observations of the people she interviewed, and her experience, training, and education. During cross examination of Patricia Ross, the trial court reversed its previous ruling, and sustained a Motion to Strike her finding of **financial exploitation** by Jimmie Cozad. This was an abuse of discretion by the trial court, and contrary to the clear weight of the evidence. Under 12 O.S. § 2701, if a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
1. Rationally based on the perception of the witness;

2. Helpful to a clear understanding of the testimony or the determination of a fact in issue; and

3. Not based on scientific, technical, or other specialized knowledge within the ***9** scope of Section 2702 of Title 12.

The trial court believed the opinion of Patricia Ross was based solely on hearsay from family members. The trial court erred because Ms. Ross had other reasons for her opinion besides the statements from the family members.

Appellant relies upon the case of *Cummings v. Garris,* 1961 OK 85, 362 P.2d 1106. In this case the administratrix of the aunt sued the defendant to recover monies advanced to the nephew at various times. Included in the monies advanced was the amount of $5,000.00 which the nephew gave a personal note for. The aunt later cancelled the personal note. The jury returned a verdict for the administratrix against the nephew for the amount of the monies advanced, less the $5,000.00. The Oklahoma Supreme Court set forth the following rules:
“When a plaintiff attacks the validity of inter vivos gifts for fraud and undue influence, the burden of proof is upon the plaintiff in respect thereto. However, a presumption of invalidity on such ground arises in a case of gift to one in a dominant position, such as a fiduciary or one in a relation of trust and confidence.”

“Where a relation of trust and confidence exists between the parties, the extreme age and infirmity of the grantor together with slight evidence of circumstances from which it may inferred that the gift or conveyance was the product of coercion, will suffice to shift the burden of proof from the grantor and require the beneficiary to show affirmatively that the transaction was fair and free from undue influence. And this rule applies not only to those who bear a formal relation of trust to those with whom they deal, but in every case where there has been confidence reposed which invests the person trusted with an advantage in treating with the person so confiding.”

The trial court should have cancelled the deed based on undue influence and inadequate consideration. A relationship of confidence and trust existed between Ms. Rogers and her nephew, Jimmie Cozad. Under well settled Oklahoma law, once Appellant proved the confidential relationship, the burden of proof shifted to the Appellee. A presumption of invalidity arises where a confidential or fiduciary relationship exists between the grantor and grantee.

In an action contesting the validity of a gift, the burden of establishing fraud or undue influence typically rests with the plaintiff. However, if the alleged gift is made to one in a ***10** dominant position such as a fiduciary or one in a relation of trust and confidence. then a presumption of invalidity arises. *Cummings v. Garris,* 1961 OK 85, 362 P.2d 1106. It is well established that, in such circumstances, even slight evidence from which the Court could infer coercion will suffice to shift the burden of proof, and require the beneficiary to show affirmatively that the transaction was fair and free from undue influence, *Cummings, supra.*

When the legal presumption of undue influence has arisen by showing confidential relations, whether in dispositions of property inter vivos or by will, the burden of proof is upon the party seeking receiving the benefit to rebut the presumption. *White v. Palmer,* 1971 OK 149, 498 P.2d 1401; *Moore v. Moore.* 29 P.2d 961 (Okla. 1934). Where the parties stand in the relationship of trust and confidence, and the party in whom the confidence is reposed obtains an apparent advantage over the other in a transaction between them, such transaction is presumed to be void, and the burden of proof is upon the party who seeks to support it to show by clear proof that he has taken no advantage of his influence and that the transaction is fair and conscionable. *Clinton v. Miller, 186 P. 932 (Okla. 1919).* Transactions between persons occupying fiduciary or confidential relations to each other in which the stronger or superior party obtains advantage over the other should not be upheld, and in actions involving validity of such transactions the burden of proof is cast on the superior party to establish the perfect fairness of the transaction and that the consideration was adequate.

There is no question that Ms. Rogers and Mr. Cozad enjoyed a confidential relationship at the time of the loans and the deed. Jimmie Cozad was trying to keep his relationship with Irma Rogers all to himself. After Ms. Rogers conveyed 30 acres to a great nephew and his wife, and after she closed the accounts at First National Bank, Jimmie Cozad made a complaint to adult protective services with the Oklahoma Department of Human Services. His complaint was investigated by Patricia Ross, who testified it was unsubstantiated.

***11** Appellant will now discuss several cases which support his position the deed should have been cancelled for undue influence and inadequate consideration. In the case of Gray v. Gray. 1969 OK 125, 459 P.2d 181, the trial court cancelled deeds given by a land owner to one of his children, to the exclusion of the other three children. The action was brough by the land owner and his three children. They alleged the one child had taken unfair and illegal advantage of his close, fiduciary, and confidential relationship with the grantor to secure the deeds. The Oklahoma Supreme Court concluded that the record established that the grantee intruded himself into a position of trust and then misrepresented matters to the grantor to put his siblings in a bad light and to unduly influence the grantor. The trial court was affirmed. The Court stated the following rule:

> "Fraud and undue influence will not be presumed, but ordinarily must be proven by clear, cogent, and convincing testimony. However, where fraud and undue influence are alleged and facts sufficient to show inadequacy of consideration and a confidential relationship are proven, the one occupying such a position of confidence will be required to go forward and make a full and complete disclosure showing absolute good faith and that there was no fraud or undue influence practiced in a transaction between the parties."

In *Clinton v. Miller, 186 P. 932 (Okla. 1919),* the patient sued his physician for cancellation of a deed. The trial court cancelled the deed. The Oklahoma Supreme Court affirmed. The court found there was a confidential relation of physician and patient and the consideration for the transfer was a mere $1.00, which the Court found unconscionable. Although inadequate consideration is not ordinarily a basis for rescission, the Court cancelled the deed because of the parties' relationship and because the grantee clearly took advantage of the grantor. The Oklahoma Supreme Court stated the following rules:
"While ordinarily a deed may not be cancelled for inadequacy of consideration alone, it will be cancelled where a confidential relation exists, and the evidence shows that an advantage was taken."

"Transactions between persons occupying fiduciary and confidential relations to each in which the stronger or superior party obtains advantage over the other should not ***12** be upheld, and in actions involving validity of such transactions, the burden of proof is cast on the superior party to establish the perfect fairness of the transaction and that the consideration was adequate."

In *Roberts v. Humphreys,* 1960 OK 222, 356 P.2d 370, the landowner sued her sister and nephew in an action to cancel a warranty deed conveying a 160 acre farm to the sister and nephew with a reserved life estate. The landowner claimed to have made the conveyance under duress and the undue influence of her sister. The trial court granted judgment for defendants. The Oklahoma Supreme Court reversed with directions to render judgment for the landowner cancelling the deed. The Oklahoma Supreme Court stated the following rule:

> "A confidential relationship may arise by reason of kinship and where said relationship operates largely to cause the substitution of the will of the grantee for that of the grantor, the deed will be cancelled. Where a grantor of advanced age, who is feeble in body and mind, transfers property to one who occupies a fiduciary relationship to him a presumption of fraud arises which unless successfully rebutted by showing absolute fairness and good conscience in the transaction and clear understanding thereof by the grantor, a court of equity will vacate and set aside such deed or contract."

In *Marshall v. Grayson,* 166 P. 86 (Okla. 1916), the grantor sued her daughter and others in an action for the cancellation of deeds. The trial court dismissed the petition and overruled a motion for new trial. The Oklahoma Supreme Court reversed the judgment for defendants and remanded for further proceedings on the question of fraud. The Oklahoma Supreme Court stated the following rule:

> "The principal of equity holds that where there is a total want or gross inadequacy of consideration, slight evidence of fraud, overreaching, or undue influence, will justify the cancellation of deeds the execution and enforcement of which shocks the conscience of the chancellor. Ordinarily mere inadequacy of consideration is not sufficient, in itself, to justify a court in cancelling a deed, yet, when the inadequacy is so gross as to amount to fraud, or, in the absence of other circumstances, to shock the conscience and furnish satisfactory and decisive evidence of fraud, it will be sufficient grounds for cancelling a conveyance or contract, either executed or executory; the rule being based upon the theory that fraud, and not inadequacy of price, is the sole reason for the interposition of equity."

***13** In *Owens v. Musselman,* 121 P.2d 998 (Okla. 1942), the heirs of the landowner filed an action to cancel two warranty deeds against tenants who had obtained warranty deeds for the consideration of $10.00 and love and affection shortly after a hospital stay by the landowner. The heirs alleged that the tenants did not permit them to visit the decedent, or inform them of her death. The heirs sought to quiet title to the property and to cancel the deeds on the grounds of fraud and undue influence. The trial court sustained a demurrer filed by the tenants. The Oklahoma Supreme Court held that a confidential relationship between the tenants and the decedent had been proven by the heirs. The Court further held that inadequate consideration was paid for the property. Because a prima facie case for undue influence was shown by the heirs, the Court held that the trial court erred in sustaining the tenants' demurrer. The Oklahoma Supreme Court stated the following rules:

"While it is ordinarily true that fraud and undue influence will not be presumed, because generally people are honest and just in their dealings and will not practice fraud or undue influence, and while it is also ordinarily true that fraud and undue influence must be proven by clear, cogent and convincing testimony, however, one occupying a position of confidence and trust should and will be required to make a full and complete disclosure showing his good faith in transactions between the parties. Such transactions are subject to very close scrutiny. It is natural that one will seek to serve his own interest as against the interest of another; so it is to be expected that in any transaction each party thereto will accept the benefits of his influence or power to drive an advantageous deal. One occupying a confidential relationship in transactions between himself and the one reposing the confidence has an obligation to himself and also owes a duty to the one with whom he is dealing, and, therefore, an unfair advantage in favor of the one in whom confidence is reposed will be presumed."

"When confidential relations existing between two persons result in one having an influence over the other and a business transaction takes place between them, resulting in a conveyance to a person holding the influence over him, the law presumes everything against the transaction and leaves the burden of proof upon the person benefited to show that confidential relation

has been as to that transaction suspended, and that it was as fairly conducted as between strangers. Where the parties stand in the relationship of trust and confidence, and the party in whom in the confidence is reposed obtains an apparent advantage over the other in a transaction between them, such transaction is presumed to be void, and the burden of proof is upon the party who seeks to support it to show by ***14** clear proof that he has taken no advantage of influence and that the transaction is fair and conscientious."

The trial court based its Order on *Hamburg v. Doak,* 251 P.2d 510 (Okla. 1952) and *Treece v. Treece,* 1961 OK 259, 366 P.2d 625. Each of these cases are factually distinguishable from the case at bar. In *Hamburg v. Doak,* supra, the children of the grantor filed suit to cancel a deed their father had given to his wife while he was in the hospital. In affirming judgment for the wife, this Court ruled the judgment was not against the weight of the evidence because there was no evidence of a fiduciary relationship that imposed the burden of proof on the wife. *In Treece v. Treece, supra,* the mother sued to cancel a deed she had given her son. In affirming judgment for the son, this Court stated there was no evidence showing a confidential relationship between the mother and son which would have shifted the burden of proof.

PROPOSITION II: THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR ATTORNEY FEES.

The Appellant proved the Appellee borrowed several thousands of dollars from her from 2004 through 2010. The Appellant also proved that the Appellee made payments to her of principal and interest in payment of the loans pursuant to an oral agreement. There was no promissory note or negotiable instrument. By Appellee's own admission, he owed Irma Rogers $12,000.00 in October of 2010. The trial court awarded Appellant $12,514.00, plus interest, for the unpaid loans. This portion of the judgment was not appealed by the Appellee.

The Appellant filed a Motion for Attorney Fees pursuant to 12 O.S. § 936. This action provides that in any civil action on an open account, a statement of account, account stated, note, bill, or negotiable instrument, the prevailing party shall be allowed a reasonable attorney fee. The Appellant's attorney submitted his Affidavit setting forth his hours, a description of his services, and the reasonable hourly rate for the community. At the hearing, the Appellee did not ***15** contest the reasonableness of the attorney fee, but only argued the Appellant was not entitled to the recovery of an attorney fee. The trial court denied Appellant's Motion for Attorney Fee, ruling that the loan pursuant to an oral agreement was not an open account, statement of account, or account stated.

The evidence demonstrates that the Appellee borrowed different amounts of money from his aunt at different times. The evidence further demonstrated that both the Appellant and the Appellee kept ledgers concerning the amounts of the loans, payments, interest, and dates. The evidence further revealed that Appellee would pay the loan down, borrow more money, and make more payments of principal and interest. The evidence further revealed that Appellee sometimes made payments of $500.00 per month. The Appellant submits this was a civil action to recover on an open account, statement of account, or account stated.

In the case of *Federal National Bank & Trust Co. v. Shanon Drilling, Inc.,* 1988 OK 90, 762 P.2d 928, the bank sued the guarantors who had signed written guaranty agreements. The guarantors had not signed a promissory note or negotiable instrument. The guarantors proved they had an oral agreement with the bank that the bank would not fund the loan until the guarantors received an assignment of their one-eighth interest. The trial court ruled the guaranty agreements were unenforceable, because the condition precedent of the oral agreement was not performed. The trial court granted judgment in favor of the guarantors, and awarded the guarantors attorney fees. In its opinion, this Court found the trial court properly awarded attorney fees to the guarantors as the prevailing parties citing 12 O.S. § 936. Because there was no note, bill, or negotiable instrument executed between the bank and guarantors, this Court must have affirmed the award because it was an action to collect an outstanding loan balance, which was an open account, statement of account, or account stated.

***16** An award of attorney fees to a prevailing party under 12 O.S. § 936 is mandatory. *American Superior Feeds v. Mason Warehouse*, 1997 OK CIV APP 43, 943 P.2d 171. The trial court erred when it refused to award Appellant reasonable attorney fees.

*17 CONCLUSION

In conclusion, the Appellant, B. L. Cozad, Personal Representative of the Estate of Irma Rogers, deceased, requests the Court to reverse the Journal Entry of Judgment concerning the cancellation of the deed dated February 18, 2005. A confidential relationship of trust existed between Irma Rogers and Jimmie Cozad based on the following facts:

1. Irma Rogers was the aunt of Jimmie Cozad.

2. She lived alone.

3. She had no children.

4. She was 74 and he was 58 when the deed was signed.

5. Before the deed was signed, he borrowed several thousands of dollars from her.

6. He took her to abstract company where the deed was prepared.

7. He gave the abstract company written instructions in his writing for the preparation of the deed.

8. He paid no consideration for the deed.

9. Approximately one month before the deed was signed he had his name added to his aunt's bank accounts.

10. Irma Rogers and Jimmie Cozad never told any family members about adding his name to the bank accounts, and the execution of the deed.

11. Irma Rogers was afraid of Jimmie Cozad and kept a gun by her bed.

12. Jimmie Cozad wrote letters to his aunt in which he controlled and instructed her how to handle an insurance claim, and addressed her as “babe” and “with love”.

13. After his aunt requested cancellation of the deed, Jimmie Cozad made a frivolous referral to the Department of Human Services that other relatives had **financially exploited** Irma Rogers.

***18** The trial court should have shifted the burden of proof to the Appellee to show that the deed was a fair and impartial transaction. The Appellee did not meet his burden of proof, and this Court should grant judgment for the Appellant which cancels the deed. Finally, the trial court abused its discretion when it denied Appellant's Motion for Attorney Fees. The Appellant was the prevailing party on the claim to recover the outstanding loan balance. The loan balance was an open account, statement of account, or account stated. This Court should reverse the trial court and award the Appellant attorney fees in the amount of $6,036.20.