

2011 WL 12883972 (Okl.Dist.) (Trial Motion, Memorandum and Affidavit)  
District Court of Oklahoma.  
Oklahoma County

Norma J. HALL, individually and as Trustee of the Norma J. Hall Living Trust  
and Kathryn S. Medlin, as Trustee of the Norma J. Hall Living Trust, Plaintiffs,

v.

Bobby Gene CUTSINGER II, Defendant.

No. 2008-8035.  
September 30, 2011.

**Plaintiffs' Response to Defendant's Motion for Partial Summary  
Judgment (As to Residence) and Brief in Support Thereof**

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Plaintiffs Norma J. Hall (“Hall”), individually and as Trustee of the Norma J. Hall Living Trust (the “Trust”), and Kathryn S. Medlin, as Trustee of the Norma Hall Trust, (collectively “Plaintiffs”) hereby respond to Defendant's Motion for Partial Summary Judgment related to the residence (the “Motion”) as follows:

**A. SUMMARY OF RESPONSE**

This is a classic case of **abuse** of the **elderly**. In 2000, Hall was 74 years old, in ill health and practically blind. Her husband was dying of brain **cancer**. She needed help so she turned to her adult son, Bobby Cutsinger (“Cutsinger”). Cutsinger stayed with Hall while her husband was in a nursing home and then moved in after he died. Hall could not manage her day-to-day activities without assistance so Cutsinger and Hall agreed that Cutsinger would live with her rent-free and Hall would pay Cutsinger a “monthly allowance” of \$1,500.00 and pay all of his living expenses. Cutsinger told Hall he would never leave her and would care for her as long as she lived. Cutsinger ultimately took complete control of Hall's financial affairs, was appointed co-trustee of Hall's Trust and obtained title to Hall's home located at 416 Ridge Road, Edmond, Oklahoma (the “home”).

While supposedly helping Hall, Cutsinger proceeded to help himself to Hall's money. Cutsinger commingled hundreds of thousands of dollars of Trust money with his own. Cutsinger used Trust money to pay for personal expenses and a wholesale renovation of the home that he had Hall convey to him. In 2008, Cutsinger announced that Hall could no longer live with him in the home Hall had conveyed to Cutsinger. After Hall moved to Texas to live with her daughter, Hall discovered that Cutsinger was misusing her money so he was removed as trustee. A court-ordered accounting in this lawsuit revealed mismanagement of the Trust and funds that have not been accounted for in excess of \$1,000,000.00.

Plaintiffs sued Cutsinger for breach of fiduciary duty and asked for, among other relief, rescission of the conveyance of Hall's home to Cutsinger.<sup>1</sup> By his Motion, Cutsinger wants the court to declare that he is the “rightful owner” of Hall's home based on two deeds signed by Hall.

This case does not involve an arms length transaction between strangers. This case involves a transfer from an **elderly** widow to her son during the existence of a fiduciary relationship without consideration. Cutsinger is not entitled to summary judgment because:

1. Since Plaintiffs have alleged the existence of a fiduciary relationship between Hall and her Trust and Cutsinger, the transfer of the home to Cutsinger is presumed to be fraudulent and Cutsinger must demonstrate that he complied with his fiduciary duties when the home was deeded to him. Cutsinger's Motion does not address Plaintiffs' fiduciary duty claims. Cutsinger has not established that there is no fact issue regarding the existence and breach of fiduciary duty. Cutsinger has the burden of conclusively negating Plaintiffs' breach of fiduciary duty claim, which he has not met.
2. Even though Cutsinger has the burden of conclusively negating Plaintiffs' fiduciary duty claim, Hall has raised a fact issue on the existence and breach of common law and statutory fiduciary duties. As a result, Cutsinger has not shown that he is entitled to summary judgment on his ownership of the home.
3. Cutsinger's agreement to the entry of a temporary injunction in this case raises a fact issue as to whether the Property is owned by him or is property of the Trust.
4. Cutsinger's Motion argues that even if the deed in 2004 breached the statutory duty not to engage in self-dealing imposed by 60 O.S. § 175.11, he is the rightful owner of the home pursuant to an earlier deed in 2001 when he was not serving as co-trustee of the Trust. This argument fails because (a) a fact issue exists as to whether a fiduciary relationship existed in 2001 and whether the deed violated the common law fiduciary duties flowing from that relationship; (b) a fact issue exists as to whether the 2001 deed was intended to be effectual; and (c) a fact issue exists as to whether the consideration for the 2001 deed failed.

Defendant's request for dissolution of the temporary injunction as it relates to the Property should be denied because Defendant has not shown that the need for the temporary injunction no longer exists, and more importantly, *Defendant agreed* to the temporary injunction.

#### ***B. RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS***

1. Cutsinger's Undisputed Facts Nos. 1, 2, 4, 5, 6, 9, 12 and 14 are undisputed for the purposes of the Motion.
2. Cutsinger's Undisputed Fact No. 3 is undisputed to the extent that at the time the Trust was created Norma J. Hall was one of the owners of the Property, but disputed as to whether she was the sole owner since the deed conveying the Property to the Trust was executed by Norma J. Hall and William H. Hall. *See* Quitclaim Deed filed 10/18/99 in Book 7706, Page 696, Oklahoma County Clerk.<sup>2</sup>
3. Cutsinger's Undisputed Fact No. 7 is disputed for the reason that Plaintiffs take the position that the 2001 deed was not intended to be effective and was ineffectual because of a breach of fiduciary duty and failure of consideration. *See* Sections D and F, *infra*.
4. Cutsinger's Undisputed Fact No. 8 is disputed to the extent of the conclusion that the deed conveyed the Property in 2001, but undisputed to the extent that the deed attached as Exhibit 2 to the Motion was recorded on December 28, 2001. *See* Sections D and F, *infra*.
5. Cutsinger's Undisputed Fact No. 10 is disputed to the extent that it says "Mrs. Hall further stated that she deeded the Property to Mr. Cutsinger in 2001 ..." because the complete deposition response is as follows:  
Q. All right. I think I'll just strike it because I don't think it matters. Did you intend to sign Exhibit 49?  
A. I can't remember now what Exhibit 49 is.

Q. It's the trustee's deed that was recorded September 16, 2004?

A. And I deeded the house to him in 2001.

Q. There is a prior —

A. *I do not understand it. I don't remember being signed in two separate years.*<sup>3</sup> (Emphasis Added)

Furthermore, Hall later testified that she did not remember the date she gave Cutsinger the Property:

Q. And do you think the gift occurred approximately when?

A. What's the date on this?

Q. The date on this check is October 18, 2004. The date on the deposit slip is October -

A. 2004?

Q. Yes, ma'am.

A. I gift - I gave him the house and explained to him why. But I cannot remember the date that I gave it to him. And I can't remember who drew up the deed for me to give it to him.

Q. *Do you remember the approximate year?*

A. *I don't remember* – I was ill in that period and I do not remember that. But I know I intended to give it to him and I gave it to him. But, I don't remember him ever bringing these checks to my attention.<sup>4</sup> (Emphasis Added)

6. Undisputed Fact No. 11 is disputed to the extent that it says the Property was conveyed in December 2001, but is undisputed to the extent that it says that Cutsinger was not a trustee of the Trust in 2001. *See* Sections D and F, *infra*.

7. Undisputed Fact No. 13 is disputed as to the reasons for the 2004 conveyance of the Property and whether the conveyance was on the recommendation of “Mrs. Hall's estate planning advisor,” but it is undisputed that the Property was deeded to Cutsinger in 2004.

### ***C. SUPPORTING EVIDENCE***

In support of this response, Plaintiffs are contemporaneously filing an Appendix<sup>5</sup> containing:

Exhibit A - Affidavit of Norma J. Hall (the “Hall Affidavit”)

Exhibit B - Excerpts and exhibits from deposition of Norma J. Hall (“Hall Deposition”)

Exhibit C - Excerpts and exhibits from deposition of Bobby G. Cutsinger, II (“Cutsinger Deposition”)

Exhibit D - Accounting Report of George Keeney, the court-appointed accountant, filed with the Court

Exhibit E - Affidavit of Leland C. de la Garza (Plaintiffs' counsel) attaching Power of Attorney Hall signed making Cutsinger her agent in 1999

These materials are incorporated herein and relied upon in opposition to the Motion.

#### ***D. FACTS SUPPORTING RESPONSE***

The pending lawsuit involves claims related to property of Hall and her Trust. Hall is 85 years old.<sup>6</sup> Hall has been in poor health and suffers from the results of a [stroke](#) in 1995, [high blood pressure](#) and [macular degeneration](#).<sup>7</sup> Because of her [macular degeneration](#), Hall can barely see.<sup>8</sup> Cutsinger has acknowledged that Hall can't read unless the letters are one inch.<sup>9</sup>

On October 8, 1999, Hall, as trustor, created the Norma J. Hall Living Trust, a private express revocable trust (referred to herein as the "Trust").<sup>10</sup> Hall also appointed Cutsinger as her agent under a property power of attorney.<sup>11</sup> Hall was married to William Hall.<sup>12</sup> William Hall was diagnosed with brain [cancer](#) in November 2000<sup>13</sup> and passed away in January 2001.<sup>14</sup> Before his death, Cutsinger started staying at his parents' home to help Hall.<sup>15</sup> After William Hall's death, Cutsinger moved into the home to help to care for Hall.<sup>16</sup> Hall was in poor health and was unable to manage her daily affairs or finances without assistance.<sup>17</sup> Cutsinger began to assist Hall with her finances after moving in.<sup>18</sup> Cutsinger was paid \$1,500.00 per month by the Trust to help with the management of Hall and the Trust's financial affairs.<sup>19</sup>

After Cutsinger moved in and began caring for Hall and helping her with her financial affairs, Hall decided to give her home to her son.<sup>20</sup> Hall had lived at her home since 1980. Cutsinger promised Hall that he would care for her until her death and that he would never leave her. Hall testified in deposition: "he told me both publicly and privately that he would never leave me. That I'm going to be here with you forever, mother and you can't leave me. I'm the best one equipped to take care of you."<sup>21</sup> Cutsinger acknowledged in deposition that "I never expected mother to leave that house ever."<sup>22</sup> Cutsinger also testified that he understood Hall would live at the home until she had to go to the hospital.<sup>23</sup> Hall was concerned that by devoting his time to caring for her, Cutsinger would be left without a home when she died. So, based on Cutsinger's promises to care for her and not leave her, Hall deeded her home to Cutsinger.

Hall signed two deeds, in 2001 and 2004, transferring her home to her son. Also, in 2001 and 2004, Cutsinger executed two promissory notes payable to Hall's Trust for \$135,000.00 in payment for the home. Cutsinger testified the \$135,000.00 was to pay for the home.<sup>24</sup> Cutsinger testified that if he had not paid the \$135,000.00, it would not be his house. "I had to pay her for the house."<sup>25</sup> Despite the confusing existence of the 2001 deed, Cutsinger acknowledged that the agreement to give him the home was made in 2004.<sup>26</sup>

As shown in the facts discussed above, in 2001 Cutsinger occupied a position of trust and confidence with Hall and her Trust and was managing Hall's and her Trust's finances. By 2004,<sup>27</sup> Cutsinger occupied the formal position of co-trustee of Hall's Trust. In 2004, after Cutsinger occupied the position of trustee, he arranged for his mother to give him \$135,000.00 from the Trust so Cutsinger could pay the \$135,000.00 promissory note, thereby paying for the home.<sup>28</sup> So, not only did Hall's Trust give Hall's home to Cutsinger, Hall's Trust gave Cutsinger the \$135,000.00 Cutsinger used to give the appearance that the transfer was not gratuitous.<sup>29</sup>

Forever did not last forever with Cutsinger. In 2008, Cutsinger sent an email to Hall's daughter Katie Medlin telling her: "I'm no longer willing to live with my mother, period, non-negotiable."<sup>30</sup> As a result, Hall had to move to McKinney, Texas to live with her daughter, Katie Medlin.<sup>31</sup>

After Cutsinger gained access to Hall and her Trust's funds, Cutsinger began using Hall's and the Trust's funds as if they were his own. Cutsinger used *Hall's* money to make the following improvements to the home Hall conveyed to Cutsinger:

- \* painted walls
- \* new roof
- \* new fence
- \* new deck
- \* repaired termite damage
- \* replaced windows
- \* replaced carpet (twice)
- \* repaired planter boxes
- \* removed dead trees
- \* replaced concrete around drive and sidewalks
- \* new mailbox
- \* rebuilt pantries
- \* installed a water purification system
- \* new kitchen appliances
- \* new washer and dryer
- \* replaced air conditioning units<sup>32</sup>

Cutsinger used Trust funds to purchase a tub which he then installed at his daughter's house.<sup>33</sup>

Cutsinger used Trust funds to pay for his income taxes and tax preparation service.<sup>34</sup>

While Cutsinger has not admitted to the full extent of his misuse of Hall and the Trust's funds, Cutsinger has admitted to using at least \$60,000.00 for personal purposes.<sup>35</sup>

Cutsinger also used Hall's money to purchase a 2002 Acura, a Denali and a 2009 Acura. After Hall moved to McKinney, Texas and took the 2002 Acura with her to Texas, Cutsinger took \$45,000.00 of Trust funds and bought a 2009 Acura for himself and titled the car in only his name.<sup>36</sup> Cutsinger acknowledges that this expenditure was not authorized by Hall.<sup>37</sup>

Cutsinger has also acknowledged commingling Trust Funds with his own personal funds.<sup>38</sup> In four examples, Cutsinger deposited \$108,000.00, \$100,000.00, \$41,000.00 and \$25,000.00 of Trust funds in his accounts.<sup>39</sup> Cutsinger also borrowed \$50,000.00 of Trust funds with the understanding that he would give it back if asked.<sup>40</sup> Cutsinger did not repay the loan and this court has already granted summary judgment for the Trust on that loan.

After this lawsuit was filed, on Hall's motion, the court appointed CPA George Kenney to do an accounting of Trust funds. On July 20, 2011, Keeney filed his report with the Court. Among other conclusions, Keeney concluded that:

- \* the accounting records for the Trust are not adequate;
- \* the accounting records fail to record the source and nature of receipts, and fail to record the disposition and nature of the expenditures;
- \* \$1,248,334.00 in disbursements could not be traced;
- \* \$1,085,216.00 in receipts could not be traced; and
- \* \$173,832.00 was obtained through checks written to "cash" or to the issuing bank and withdrawals at the time of deposits.<sup>41</sup>

#### ***E. SUMMARY JUDGMENT STANDARD***

Summary judgment is proper only "if it appears to the court that there is no substantial controversy as to the material facts and that one of the parties is entitled to judgment as a matter of law." Rules for Dist. Cts., Okla. Stat. tit. 12, ch. 2, app., Rule 13(e) (Supp. 2007). "Only when the evidentiary materials eliminate all factual disputes relative to a question of law is summary judgment appropriate on that issue." *In re Assessment of Real Prop. of Integris Realty Corp.*, 2002 OK 85, ¶ 5, 58 P.3d 200, 203 (OK 2002). Summary process is properly invoked only when it serves to eliminate a useless trial. *Id.* at 203.

#### ***F. ARGUMENT & AUTHORITIES***

##### **A. The legal setting for fiduciary cases**

In *Byrd v. Marlin*, 258 P.2d 649, 654 (Okla. 1953), the Oklahoma Supreme Court held:

While contracts and dealings between the trustee and the cestui que trust are not absolutely prohibited, generally a trustee cannot take beneficially from the cestui que trust. Equity looks on transactions between a trustee and the cestui que trust with suspicion, and will subject them to the severest scrutiny, and will permit them to stand only when the trustee affirmatively shows that the agreement was entirely fair and advantageous to the beneficiary and that there was no fraud, concealment, undue influence, or unconscionable advantage. Contracts between a trustee and the cestui que trust may be set aside on slight grounds, and the burden of proof is on the trustee to show that he acted in good faith, that all was fair, open and voluntary, and that the contract was well understood.

The Oklahoma Supreme Court cited *Kernel v. Murrell*, 122 Okl. 22, 250 P. 420, 421 (Okla. 1926) for the following statement of the law:

“The law looks with suspicion upon transactions between trustees and beneficiaries, and, when the cestui que trust sells trust property to the trustee, the burden is placed upon the grantee or trustee to whom such transfer is made to show that the grantor or cestui que trust was in possession of full information and acted upon her own volition or independent advice, and free from all influence of the grantee or trustee to whom such transfer is made.”

See also *Johnston v. McCray*, 254 P. 979, 981-82 (Okla. 1927) (court voided deed based on equitable principal that where it is shown that a property was obtained from a person of advanced years, enfeebled both in body and mind, by a person occupying a fiduciary relationship to the grantor, a presumption of fraud arises, and unless it is 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, and adjudge the property described therein to be in the same legal status as if such contract had never been executed). See also *Brown v. Lambdin*, 1974 Okla. Civ. App. LEXIS 149, 45 O.B.A.J. 1658 (Ct. App. - Okla., Div. 2, 1974) (deed from elderly man voided under equitable principles).

Once it is established that a fiduciary relationship existed, a transaction in which a deed is obtained is presumptively fraudulent. The fiduciary has the burden of showing by clear and convincing evidence that there has been no abuse of confidence, and that he has acted in good faith and that the transaction was perfectly fair and supported by adequate consideration. *Hayes v. Thornsborough*, 180 Okla. 357, 69 P.2d 664, 667 (Okla. 1937); *Moore v. Moore*, 167 Okla. 365, 29 P.2d 961 (Okla. 1934). See also *Gray v. Stephens*, 1955 Okla. 315, 289 P.2d 663, 665 (Okla. 1955) (holding that where a confidential or fiduciary relationship is shown, inadequacy of consideration is shown, and the circumstances surrounding the transaction suggest fraud, mistake, duress, or undue influence, a presumption of fraud arises which must be overcome by the person asserting the validity of the written instrument in question).

Oklahoma courts recognize both formal fiduciary relations, such as trustee/beneficiary, and informal fiduciary relations. See *McDaniel v. Schroeder*, 128 Okla. 91, 261 P. 224, 226 (Okla. 1927).

“The term ‘fiduciary or confidential relation,’ as used in this connection, is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another.” 2 Pom. Eq. Jur., sec. 947.

“Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.” 2 Pom. Eq. Jur. (3d Ed.) sec. 956.

*Id.* The Oklahoma Supreme Court observed in *McDaniel* that “if the parties stand in a relation 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 or knowledge and that the arrangement is fair and conscientious.” *Id.* at 227.

Oklahoma courts have also held that when a person conveys property in consideration for support for life and the grantee fails or refuses to perform, relief of cancellation or rescission may be granted since fraud may be presumed. See *Moffatt v. Moffatt*, 195 Okla. 498, 159 P.2d 531, 533 (Okla. 1945). *Spangler v. Yarborough*, 23 Okla. 806, 101 P. 1107, 1108 (Okla. 1909). In *Moffatt*, 159 P.2d at 533, the Oklahoma Supreme Court stated:

In *Johnson v. Paulson*, 103 Minn. 158, 114 N.W. 739, it is stated that where parents impose confidence in their children, and have conveyed their property to them, relying upon their natural affection to care for and maintain them during the rest of their lives, the courts have attempted to give full effect to the conditions imposed in the grant, and have held the grantees strictly to account. Proper compensation for the breach of such a duty cannot be conferred in money or property, and restoration of the property conveyed may be the only adequate remedy. To the same effect, see *Caldwell v. Mullin*, 101 Colo. 113, 71 P.2d 415; *Carroll v. Combs*, 91 Colo. 73, 11 P.2d 808, and *Barth v. Titus*, 108 Colo. 333, 117 P.2d 480. See complete annotation following *Lucas v. Lucas*, 171 Ga. 806, 156 S.E. 680, 76 A.L.R., at page 742, and *Caramini v. Tegulias*, 121 Conn. 548, 186 Atl. 482, 112 A.L.R., at page 668. In *Oard v. Oard*, 59 Ill. 46, a contract of this character was rescinded by a court of equity upon the ground that the omission of the son to carry out the terms of the agreement was so flagrant that the court assumed the conveyance had been procured with fraudulent intent. A court of equity will set aside such a deed upon the ground of failure of consideration. *Johnson v. Paulson*, *supra*; *Patterson v. Patterson*, 81 Iowa 626, 47 N.W. 768; *Lowman v. Crawford*, 99 Va. 688, 40 S.E. 17.

## **B. Cutsinger has not met his “heavy burden” as movant for summary judgment**

The movant for summary judgment has a “heavy burden;” a court may grant a summary judgment only when it clearly appears that the movant is entitled to summary judgment, viewing the supporting material in the light most favorable to the opponent. See *Sholer v. ERS Mgmt. Group, LLC*, 2011 Okla. 24, 256 P.3d 38 (Okla. 2011). The responding party has no duty to produce evidence to raise a fact issue until the movant has shown there is no genuine issue of material fact. See *First National Bank & Trust Co. v. Kisse*, 1993 Okla. 96, 859 P.2d 502, 505 (Okla. 1993).

### **1. Cutsinger had not negated the existence of a fiduciary relationship**

Since Plaintiffs sued Cutsinger for breach of fiduciary duty and requested rescission of the conveyance of Hall's home to Cutsinger, Cutsinger was required as part of his “heavy burden,” to present evidence showing there is no genuine issue of material fact as to the nonexistence of a fiduciary relationship at the time of the conveyance. Cutsinger presented no evidence to negate the existence of a fiduciary duty. Cutsinger merely presented evidence that he received two deeds to the home, one before he became a co-trustee of the Trust and one after and that Hall was competent and intended to give him the home. This proof does not conclusively negate the existence of a fiduciary relationship, or the breach of fiduciary duty.

#### **(a) Cutsinger offered no evidence to establish that he was not in a fiduciary relationship when the 2001 deed was signed**

“The existence of a fiduciary or confidential relationship is usually highly fact-specific and determined by a jury.” *Schovanec v. Archdiocese of Oklahoma City*, 2008 Okla. 70, 188 P.3d 158 (Okla. 2008). Cutsinger offered no proof that he was not a fiduciary when the 2001 deed was executed. The absence of any evidence showing there was no fiduciary relationship in 2001 and the holding in *Schovanec* precludes summary judgment as to the 2001 deed.

#### **(b) Cutsinger's proof establishes the existence of a fiduciary relationship when the 2004 deed was signed and a breach of the Oklahoma Trust Act**

Cutsinger's proof establishes that Cutsinger was a fiduciary when the 2004 deed was signed. Cutsinger offered the Second Amendment to the Trust as Exhibit 4 to his Motion. The Second Amendment made Cutsinger a co-trustee of the Trust on May 26, 2004. Since the 2004 deed was signed on August 24, 2004 (see Exhibit 5 to Motion), which is after Cutsinger was made a co-trustee, Cutsinger's own evidence either established, or raised, a fact issue that the deed was signed while Cutsinger was



in a fiduciary relationship and that he violated 60 O.S. § 175.11, which prohibits a trustee from directly or indirectly buying property from the trust. 60 O.S. § 175.57 authorizes this court to remedy Cutsinger's breach by voiding the transfer in order to recover the trust property.

Cutsinger's evidence also raised a fact issue as to whether Cutsinger breached his common law fiduciary duties. Cutsinger is not entitled to summary judgment as to the residence unless the Court concludes that Cutsinger has conclusively established that he obtained title to Hall's home in 2001, without a breach of fiduciary duty, and the 2004 deed can be ignored. As discussed above, Cutsinger has not met his burden of conclusively negating the existence of a fiduciary relationship when the 2001 deed was signed.

**(c) Plaintiffs have raised a fact issue on the existence of a fiduciary relationship when the 2001 and 2004 deeds were signed**

While not required to do so because of the failure of Cutsinger's summary judgment proof, Hall is supporting her Response with evidence that in 2001, when the first deed was executed, a confidential relationship existed between Hall and her Trust and Cutsinger, and that in 2004, when the second deed was executed, a formal fiduciary relationship already existed.

A confidential relationship exists whenever trust and confidence are placed by one person in the integrity and fidelity of another. *See In the Matter of the Estate of Billie Caicco*, 1998 Okla. LEXIS 141, \* 15 (Okla. 1998) (unpubl. op.); *Estate of Maheras*, 1995 Okla. 40, 897 P.2d 268 (Okla. 1995). *See also* Oklahoma Jury Instructions Civil No. 26.2. An agency creates a fiduciary relationship. An agent's obligation to his principal "demands strictest integrity, good faith, and most faithful service." *Wilcox v. Reynolds*, 169 Okla. 153, 36 P.2d 488, 492 (Okla. 1934). An agent owes his principal the duty of diligence, integrity and skill." *Weleetka Light & Water Co. v. Burlison*, 42 Okla. 748, 142 P. 1029, 1030 (Okla. 1914).

As recited in the Hall Affidavit (Plaintiffs' Appendix, Ex. 1) and discussed in Section D above, Cutsinger moved into Hall's home before William Hall died and then continued to live in the home after Hall's death. Hall was **elderly**, in ill health, practically blind due to **macular degeneration**, and needed assistance with day-to-day living activities and managing her financial affairs. Before William Hall's death, Cutsinger began to care for Hall and handle her financial affairs. Cutsinger already held a power of attorney for Hall, which she signed in 1999 when the Trust was created, that provided Cutsinger broad authority to act as agent for Hall.<sup>42</sup> Hall relied on Cutsinger to purchase groceries, drive her around, prepare meals, purchase prescription drugs, receive and review mail and bills, pay bills and to manage her money, including the money and investments in her Trust. Hall placed complete trust and confidence in her son. These facts raise a fact issue as to the existence of a confidential relationship and require submission of the issue to a jury, thereby precluding summary judgment.

**2. Cutsinger has not negated the existence of a breach of fiduciary duty**

**(a) Cutsinger has not negated his breach of fiduciary duty**

Cutsinger relies solely on the two deeds to show his ownership of the home. Cutsinger has not addressed Hall's claim of breach of fiduciary duty and rescission other than to point out that the first deed was in 2001 before Cutsinger became a formal trustee of Hall's Trust. However, that evidence alone does not negate Plaintiffs' claim that Cutsinger breached fiduciary duties arising out of both informal and formal fiduciary relationships.

**(b) Plaintiffs' evidence raises a genuine issue of material fact as to breach of fiduciary duty**

Whether Cutsinger was in an informal confidential relationship or a formal fiduciary relationship, he owed fiduciary duties to Hall and the Trust. At the threshold, Cutsinger owed duties of loyalty and performance to Hall and her Trust, which include

the duty to refrain from self-dealing and to make full disclosure. *See* Oklahoma Jury Instructions Civil No. 26.3, Committee Comments.

As a formal trustee, Cutsinger owed the Trust “utmost good faith.” “A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” *See State ex ret Okla. Bar Ass'n v. Clausing*, 2009 Okla. 74, 224 P.3d 1268 (Okla. 2009). Under the Oklahoma Trust Act, a trustee may not engage in self-dealing. 60 O.S. §§ 175.11 and 175.65.

The facts presented by Plaintiffs raise a genuine issue of material fact as to whether Cutsinger breached his fiduciary duty in connection with the conveyance of Hall's home as a result of:

- (a) Cutsinger's self-dealing with the home;
- (b) Cutsinger's renegeing on his promise to care for Hall for life causing Hall to have to leave her home;
- (c) Cutsinger's structuring the conveyance as a purchase when the purchase price was to be funded by the Trust itself;
- (d) Cutsinger's failure to perform on the 2001 promissory note; and
- (e) Cutsinger's ongoing mismanagement of the Trust, commingling of Trust monies, misappropriation of Trust monies and his failure to disclose all of this to Hall.

The self-dealing relates specifically to the home. Cutsinger caused the home to be transferred to him during the existence of both a confidential relationship and a formal trust relationship. By doing so, Cutsinger violated his common law and statutory fiduciary duties. In addition to the self-dealing relating to the home, Cutsinger engaged in wide-spread self-dealing with Trust monies without disclosure to Hall. It is unlikely Hall would have given her home to Cutsinger had she known what Cutsinger was doing with her and her Trust's money.

In 2008, while Hall was still very much alive and in need of Cutsinger's care and financial management, Cutsinger announced that he would no longer live with Hall and other arrangements for care had to be made. As a result, Hall had to move to Texas where her daughter lived in order to receive care and assistance. Notwithstanding that Cutsinger broken his promise to care for Hall and that Hall would live in her home as long as she lived, Cutsinger wants to keep Hall's home. As discussed above, this is precisely the type of situation that must be evaluated under the close scrutiny given to the conduct of a fiduciary. *See Moffatt*, 159 P.2d at 533.

Hall and Cutsinger have both testified that their expectation was that Cutsinger would care for Hall and Hall would live in her home as long as she lives. Nevertheless, Cutsinger repudiated the basis for the conveyance of Hall's home by renegeing on his promise to care for Hall and his declaration that he was no longer willing to live with his mother, “period, non-negotiable.” Permitting Cutsinger to retain the home in light of his repudiation of his promise to care for his mother would be unjust and inequitable and the Court has the equitable power to provide redress by voiding the conveyance. A genuine issue of material fact exists as to whether Cutsinger promised to care for Hall and to let her live in her home for the rest of her life and whether Cutsinger renegeed on that promise.

It is undisputed that Cutsinger structured the conveyance of the home as a purchase, not a gift, and that Cutsinger failed to pay consideration for the home until 2004, when he paid with a check that said “buying residence @ 416 Ridge Rd.”<sup>43</sup> This structure explains why there were two deeds. The first deed was not supported by consideration since the consideration failed when Cutsinger did not pay the note given for the deed. He then caused a new note to be signed and delivered and a new deed to be executed after the new note was signed.

Cutsinger has admitted that he was purchasing the home and had to pay the \$135,000.00 purchase price in order to get the home.<sup>44</sup> Cutsinger admitted that no payments were made on the first note.<sup>45</sup> Cutsinger treated the first deed and first promissory note as a nullity when he caused a new deed and new note to be executed in 2004. Given that Cutsinger treated the first deed and note as a nullity, a genuine issue of material fact exists as to whether the first deed was procured through a breach of fiduciary duty and whether it was intended to be effective.

#### **4. The Agreed Temporary Injunction raises a fact issue as to whether conveyances were intended to be effective**

Hall and her Trust sued Cutsinger for breaching formal and informal fiduciary duties. In addition to pleading for actual damages, Hall requested “*rescission of the transfer of the Residence to Defendant since the transfer of the Residence was accomplished by breach of fiduciary duties and breach of trust, including but not limited to violations of 60 Okl. St. ¶ 175.11.*”<sup>46</sup> In order to protect this requested relief, Hall applied to the Court for injunctive relief.

On August 5, 2009, Cutsinger *agreed* to the entry of a temporary injunction that contained the following relief:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant, Bobby Gene Cutsinger, II, shall be restrained and enjoined from (i) spending any monies of the Trust (defined as the Norma J. Hall Living Trust) and of Norma J. Hall, including monies of the Trust or Hall that were converted into assets in the name of Defendant, and (ii) selling, encumbering, or wasting any tangible *real* and personal *property of the Trust, including the real property commonly referred to as 416 Ridge Road, Edmond, Oklahoma 73034, and the 2009 Acura automobile bearing VIN # JH4KB26679C000792.* (Emphasis Added)

The temporary injunction treats the home as property of the Trust. The temporary injunction alone raises a fact issue as to whether the home is rightfully owned by Cutsinger. Cutsinger agreed to an injunction that enjoined him from “selling, encumbering, or wasting any tangible real and personal *property of the Trust, including* the real property commonly referred to as 416 Ridge Road...”

#### **5. Plaintiffs' evidence raises a genuine issue of material fact as to whether the 2001 deed was intended to be effective**

Cutsinger argues that 60 O.S. ¶ 175.11 does not apply to this case because the first deed was signed before Cutsinger was named a co-trustee. Plaintiffs do not dispute that two deeds were recorded purportedly transferring the Property to Cutsinger, one in 2001 and one in 2004, after Cutsinger was appointed as co-trustee of the Trust. The deeds are very similar and cover the same real property interest.

When Cutsinger was asked in deposition about the first deed, he testified as follows:

Q. Let me show you Exhibit 25. Exhibit 25 is a trustee's deed for the Ridge Road residence, correct?

A. This is a 2001 trustee deed. That's what it says here. Yes. Recorded by Parman & Associates. This was probably the first - I'm sure this was the first money that she spent with them to try to get me the house and to balance it up for 7 or \$8,000.

They just - let me change the word. Wasted. She just wasted the money with them.

Q. All I asked you was is that the deed that transferred the Ridge Road to you, Ridge Road residence to you?

A. No, that deed was in 2004. This might have been - might have been something that - it's a deal that Parman set up on the first. It's a different amendment than the last one. This is one of them.

Q. This is not an amendment, this is a deed.

A. Excuse me. I'm trying to answer that. There's another trustee's deed that's after this three years.

Q. Okay.

A. This was her first attempt to give me the house.

Q. Well, why did you have her make another attempt?

A. Because the first one did not stop it from appreciating in value on the tax records. It would have taken out – it's a \$135,000 house. He had me paying fictitiously. This was all supposed to be I'm going to set this up to where your son is supposed to make a \$10,000 amount of payment to you. He doesn't have to. But in case something happens, you won't have to transfer the house back. You can just say he passed away and it will still be like in your name.

And I said that was fine.

And then it got to be where the house, it was going up, they would just come and say, "You've got to pay this off or it wasn't my home."

And so mother went to another attorney. I brought him.

Q. When is it that you and your mother agreed that you would receive the house?

A. Mother told me after I had been there about a year to – This is 2001. She didn't tell me in 2001.

Q. When?

A. The date on this where it says two-thousand – 12/28/01, I have no earthly idea. This says it's recorded to Norma J. Hall.

And I'm reading it. I just don't –

Yeah, see where it says, "I hereby grant, sell, convey, and confirm that Bobby Cutsinger, an individual at 416 Road, Grantee, all the trust, right, title, and interest in and to the following described property."

Q. When –

A. But she took it out of the trust in 2004.

Q. When did your — you and your mother reach the agreement that she was going to give you the house?

A. **She gave me the house in 2004.**<sup>47</sup> (emphasis added)

Cutsinger explained in his deposition that an attorney had prepared a \$135,000.00 promissory note that required payments related to the conveyance of the Residence, that Cutsinger didn't make any payments on the note.<sup>48</sup> Cutsinger sought another attorney's advice and received counsel from attorney Richard Farris. Cutsinger received an explanation from Farris confirming that he had an original note dated December 21, 2001, to the Trust and then a replacement note and no payment had been made on the note.<sup>49</sup>

Cutsinger had Hall write a check from her personal checking account on October 14, 2004, giving Cutsinger \$135,000.00, which Cutsinger in turn paid to the Trust by a check dated October 18, 2004, for the same amount and in the memo section of the check, Cutsinger wrote: "buying residence @ 416 Ridge Rd."<sup>50</sup> Cutsinger explained that if he hadn't given Hall the \$135,000.00, "It wouldn't have been my house. I had to pay her for the house."<sup>51</sup> Cutsinger testified in deposition that he purchased the Property for \$135,000.00.<sup>52</sup>

Cutsinger's deposition and exhibits from his deposition explain the reason for the two deeds. Cutsinger was purchasing the residence. Cutsinger borrowed \$135,000.00 from the Trust in 2001, but never paid the note. So, in 2004, in order to pay the note and complete the purchase, Cutsinger had Hall give him \$135,000.00, which Cutsinger then paid to the Trust to complete his purchase of the house.

The evidence before the Court raises a genuine issue of material fact regarding whether the first deed was ineffectual because Cutsinger treated it as such, or because the deed was not supported by consideration since Cutsinger admitted he was buying the Property and made no payments until after the replacement note was signed in May 2004, and paid in October 2004, using Hall's money.

Finally, while inadequacy of consideration for a deed is not sufficient to justify setting aside a deed, a substantial failure of consideration is a good ground for setting aside a deed. *See Myers v. Diehl*, 1961 Okla. 239, 365 P.2d 717, 722-23 (Okla. 1961).

### **CONCLUSION**

Cutsinger has not demonstrated that he is entitled to summary judgment as to the home as a matter of law. Cutsinger has not met his summary judgment burden of proof. In any event, genuine issues of material fact exist as to whether:

- (1) a fiduciary relationship existed between Hall and her Trust and Cutsinger in 2001 when the first deed was signed;
- (2) the first deed was intended to be effective;
- (3) the consideration for the conveyance failed; and
- (4) Cutsinger breached his common law and statutory fiduciary duties in connection with the conveyance of Hall's home to Cutsinger.

Therefore, Cutsinger is not entitled to summary judgment.

Summary Judgment, and for such other relief to which Plaintiffs are entitled.

Respectfully submitted,

<<signature>>

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#### Footnotes

- 1 The Court is requested to take judicial notice of the Amended Petition filed by Plaintiffs in this action wherein Plaintiffs have sued Cutsinger for breaches of fiduciary duty.
- 2 The court is asked to take judicial notice of this deed. A copy of the deed is attached hereto as Exhibit 1.
- 3 Hall Deposition, APX Ex. B, p. 150, l. 19-p. 151, l.3.
- 4 Hall Deposition, APX Ex. B, p. 143, l. 1 - l. 17.
- 5 References to Plaintiffs' Appendix are abbreviated as APX.
- 6 Hall Affidavit, APX Ex. A, para. 2.
- 7 Hall Affidavit, APX Ex. A, para. 6.
- 8 Hall Affidavit, APX Ex. A, para. 6.
- 9 Cutsinger Deposition, APX Ex. C, p. 181, l. 22-p. 182, l. 1.
- 10 Hall Affidavit, APX Ex. A, para. 4.
- 11 De la Garza Affidavit, APX Ex. E, Ex. 1.
- 12 Hall Affidavit, para. 4; Hall Deposition, p. 10, l. 16 – 24.
- 13 Hall Affidavit, APX Ex. A, para. 6.
- 14 Hall Affidavit, APX Ex. A, para. 4; Hall Deposition, APX Ex. B, p. 10, l. 16 – 24.
- 15 Hall Affidavit, APX Ex. A, para. 8; Cutsinger Deposition, APX Ex. C, p. 86, l. 12 – 15.
- 16 Hall Affidavit, APX Ex. A, para. 7.
- 17 Hall Affidavit, APX Ex. A, para. 6.
- 18 Hall Affidavit, APX Ex. A, para. 7.
- 19 Hall Affidavit, APX Ex. A, para. 8, Hall Deposition, APX Ex. B, p. 75, l. 16 – p. 76, l. 9; Cutsinger Deposition. APX Ex. C, p. 114, l. 8 – 13.

- 20 Hall Affidavit, APX Ex. A, para. 9.
- 21 Hall Deposition, APX Ex. C, p. 105, l. 1 - 15.
- 22 Cutsinger Deposition, APX Ex. C, p. 204, l. 15 - p. 205, l. 10.
- 23 Cutsinger Deposition, APX Ex. C, p. 330, l. 23 - 25.
- 24 Cutsinger Deposition, APX Ex. C, p. 17, l. 1 - 9.
- 25 Cutsinger Deposition, APX Ex. C, p. 331, l. 23 - p. 332, l. 1.
- 26 Cutsinger Deposition, APX Ex. C, p. 317, l. 5 - 17.
- 27 Cutsinger testified that he was of the opinion that he was acting as trustee of the Trust before May 26, 2004, the date of the Second Amendment to the Trust Agreement appointing him as co-trustee. *See* Cutsinger Deposition, APX Ex. C, p. 360, l. 20 - 24.
- 28 Cutsinger Deposition, APX Ex. C, p. 329, l. 22 - p. 330, l. 4; Ex. 32.
- 29 Cutsinger Deposition, APX Ex. C, p. 22, l. 7 - 22.
- 30 Hall Deposition, APX Ex. B, p. 104, l. 6 - 12; Ex. 7.
- 31 Hall Affidavit, APX Ex. A, para. 2 and 9.
- 32 Cutsinger Deposition, APX Ex. C, p. 208, l. 12 - p. 211, l. 5.
- 33 Cutsinger Deposition, APX Ex. C, p. 285, l. 23 - p. 287, l. 3.
- 34 Cutsinger Deposition, APX Ex. C, p. 341, l. 15 - p. 342, l. 19.
- 35 Cutsinger Deposition, APX Ex. C, p. 351, l. 17 - p. 353, l. 19; Ex. 36.
- 36 Cutsinger Deposition, APX Ex. C, p. 163, l. 17 - p. 172, l. 17; p. 336, l. 11 - p. 339, l. 8.
- 37 Cutsinger Deposition, APX Ex. C, p. 165, l. 20 - 22.
- 38 Cutsinger Deposition, APX Ex. C, p. 250, l. 11 - p. 269, l. 3; p. 288, l. 2 - p. 290, l. 4.
- 39 *Id.* *See also* Cutsinger Deposition, APX Ex. C, p. 297, l. 11 - 24.
- 40 Cutsinger Deposition, APX Ex. C, p. 311, l. 19 - p. 313, l. 24.
- 41 *See* APX Exhibit D.
- 42 De la Garza Affidavit, APX D, Ex. 1.
- 43 Cutsinger Deposition, APX Ex. C, Ex. 27, 32; p. 319, l. 20 - p. 332, l. 1; p. 21, l. 14 - p. 22, l. 22.
- 44 Cutsinger Deposition, APX Ex. C, p. 17, l. 1 - p. 17, l. 5).
- 45 Cutsinger Deposition, APX Ex. C, p. 323, l. 4 - p. 325, l. 7.
- 46 Plaintiffs' First Amended Petition and Application for Injunctive Relief, ¶ 22.
- 47 Cutsinger Deposition, APX Ex. C, p. 314, l. 16 - p. 317, l. 8.
- 48 Cutsinger Deposition, APX Ex. C, p. 323, l. 4 - p. 325, l. 7.
- 49 Cutsinger Deposition, APX Ex. C, Ex. 29; *see also* Ex. 26.
- 50 Cutsinger Deposition, APX Ex. C, Ex. 27, 32; p. 319, l. 20 - p. 332, l. 1; p. 21, l. 14 - p. 22, l. 22.
- 51 Cutsinger Deposition, APX Ex. C, p. 331, l. 13 - p. 332, l. 1.
- 52 Cutsinger Deposition, APX Ex. C, p. 17, l. 1 - p. 17, l. 5).