NO. COA08-1193

NORTH CAROLINA COURT OF APPEALS

Filed: 4 August 2009

RHONDA M. STREADWICK, Guardian
for GEORGE HOWARD McELRATH,
Plaintiff,

v. Henderson County
No. 05 CVS 76

ROBERT G. WARREN and wife,
VIKI WARREN and MOUNTAIN TOP
FARMS, LLC.,
Defendants.

Appeal by plaintiff from judgment entered 21 December 2007 and from order entered 25 March 2008 by Judge Dennis J. Winner in Henderson County Superior Court. Heard in the Court of Appeals 8 April 2009.

Adams Hendon Carson Crow & Saenger, P.A., by E. Thomison Holman and George Ward Hendon, for plaintiff-appellant.

Miller Marshall Roth, P.C., by Clifford C. Marshall, Jr., for defendants-appellees.

HUNTER, Robert C., Judge.

Plaintiff Rhonda M. Streadwick ("plaintiff" or "Ms. Streadwick") appeals from a 21 December 2007 judgment entered in accordance with jury verdicts, and from a 25 March 2008 "Post Trial Order[,]" which, *inter alia*, upheld the transfer of two properties, respectively known as the "Hoot Owl" property and the "Hogback" property, from her father, George Howard McElrath ("Mr.

McElrath"),[1] to defendant Robert Warren ("Mr. Warren") and defendant Vicki Warren, ("Mrs. Warren").[2] After careful review, we find no error in the judgment and affirm the order.

I. Background

The evidence presented at trial tended to show that Mr. Warren and Mr. McElrath met in 1997; at this time, Mr. McElrath was approximately 84 years old, and Mr. Warren was approximately 50 years old. Ms. Streadwick, Mr. McElrath's only child, testified that at the time the two men met, Mr. McElrath was suffering from coronary heart disease, chronic obstructive pulmonary disease, cataracts, and chronic depression and that his condition continued to deteriorate throughout the period of his association with Mr. Warren. She further testified that, at this time, Mr. McElrath lived alone, her relationship with him was strained, and he was largely living a solitary life.

In his deposition, Mr. Warren testified that he and Mr. McElrath had many common interests, such as hunting, fishing, farming, and wildlife preservation, and that they quickly became friends. The Warrens conducted numerous farming operations in the

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[1] Ms. Streadwick originally brought this appeal in her capacity as her father's guardian. On 24 February 2009, Mr. McElrath died, and Ms. Streadwick was subsequently named executrix of his estate. On 6 April 2009, Ms. Streadwick filed a Motion for Substitution of Party with this Court asking us to substitute her as a party in her capacity as executrix of Mr. McElrath's estate. We allow Ms. Streadwick's motion.

[2] Mr. McElrath conveyed the Hoot Owl property to defendant Mountain Top Farms, LLC ("Mountain Top"), a business entity that was owned by Mr. and Mrs. Warren (collectively, the "Warrens"). Mr. McElrath conveyed the Hogback property to the Warrens directly.

area, and Mr. Warren testified that Mr. McElrath came to their packing house or fields almost every day and that they talked on the phone every day. Mr. Warren further testified that: he and Mr. McElrath had a good and trusting relationship; Mr. McElrath was like a father-figure to him; and he told Mr. McElrath that he loved him. Mr. Warren admitted that he knew that Mr. McElrath had past legal troubles with other individuals relating to the transfer of certain properties owned by Mr. McElrath, and that Mr. McElrath had to engage in litigation to reacquire these properties.

Mr. McElrath owned hundreds of acres of land in Henderson County, dating back to the early to mid 1900's. In addition to living on this property for his entire life, Mr. McElrath generated income from farming and leasing various parcels of his land and occasionally sold tracts from his larger holding.

In October 1998, Mr. McElrath executed a deed transferring a 19.43-acre tract of land to the Warrens. Mr. McElrath told Ms. Streadwick that he received $6,000.00 per acre (approximately $120,000.00 total) for this land. Mr. Warren testified that he paid Mr. McElrath $8,000.00 per acre (approximately $160,000 total) for the land and that the majority of this amount was paid in cash. However, the tax stamps on the deed of record indicate the transaction was consummated for $10,000.00 total. Later, in December 1999, Mr. McElrath executed a deed transferring another tract of land, which consisted of approximately 1.34 acres and was adjacent to the 19.43-acre tract, to the Warrens. Mr. Warren

testified that he paid $8,000.00 per acre in cash for that property.

Hogback Property

In May 2000, Mr. McElrath executed a general warranty deed for another tract of land, known as the "Hogback" property, to the Warrens; however, the deed was not recorded until 27 August 2001. The Hogback property consisted of approximately 26 to 28 acres.[3] Mr. Warren testified that he paid Mr. McElrath $120,000.00 for the Hogback property, specifically that he provided two $60,000.00 cash payments in paper bags to Mr. McElrath. However, the $10.00 excise stamp on the deed of record indicates the transaction was consummated for $5,000.00 total. Mr. Warren testified that Mr. McElrath told the attorney who handled the transaction to put the $10.00 excise stamp on the deed because Mr. McElrath "did not want to pay no [sic] taxes . . . ."

Portions of the Hogback transaction were handled by the law firm of Matney & Associates, P.A. ("Matney & Associates"), a firm Mr. Warren had engaged in prior dealings, but one with whom Mr. McElrath had not previously dealt. David E. Matney, III ("Mr. Matney") testified that he and his firm represented Mr. Warren in the transaction, not Mr. McElrath, and that as far as he knew, the sales price for the Hogback property was $10,000.00. In addition, he testified that: Mr. Warren and Mr. McElrath did not utilize a

[3] The deed for the Hogback property does not state its acreage, and the testimony pertaining to its size varied slightly. Ms. Streadwick testified that the Hogback property consisted of 28 acres. Mr. Warren testified that it consisted of 26 or 27 acres.

contract to purchase; neither an appraisal nor a title search were done; he did not see any money exchange hands; and Mr. McElrath was not represented by an attorney. At trial, Robert A. Boylan ("Mr. Boylan"), a licensed real estate broker with approximately twenty years of experience in that field, testified on plaintiff's behalf and stated that, in his opinion, the fair market value of the Hogback property in May 2000 was $350,000.00.

Hoot Owl Property

On 14 June 2000, Mr. McElrath signed a general warranty deed conveying two tracts of land, consisting of approximately 200 acres and known as the "Hoot Owl" property, to Mountain Top.[4] Mr. Warren admitted that at that time, the conveyance was a sham transaction, and neither he nor Mr. McElrath intended the conveyance to be effective. He further admitted that the original purpose of the transaction was to terminate Mr. McElrath's lease with the Hoot Owl Hunting Club. However, Mr. Warren denied coming up with the plan, testified that it was Mr. McElrath's idea, and stated that he merely assisted Mr. McElrath with executing it. Specifically, Mr. Warren stated that Mr. McElrath wanted to terminate the lease due to Mr. McElrath's dissatisfaction with some Hoot Owl Hunting Club members, who had violated rules against killing does and hunting outside of the area permitted by the lease. Ms. Streadwick testified that: (1) similar hunting violation issues had arisen in the past with regard to the Hoot Owl Hunting Club and other hunt

[4] The parties appear to agree that the Hoot Owl property consists of 200 acres; however, the acreage is not specifically listed in the deed.

clubs with whom Mr. McElrath had leases, and these issues had always been resolved without the termination of a lease; and (2) the termination of the Hoot Owl Hunting Club's lease eliminated a substantial portion of Mr. McElrath's annual income.

The 14 June 2000 deed and certain other documents pertaining to the Hoot Owl property, including a deed of trust for one million dollars, were prepared by attorneys with Matney & Associates. Both the deed and the deed of trust were recorded on 15 June 2000. Mr. Matney testified that prior to the execution of these documents, both Mr. Warren and Mr. McElrath told him that they wanted to terminate the Hoot Owl Hunting Club's lease. He further testified that "Mr. Warren asked [him] to look at [the lease], because [Mr. Warren] was trying to help Mr. McElrath and wanted [Mr. Matney] to tell [Mr. McElrath] what [he] thought." Mr. Matney further stated that: Mr. Warren, not Mr. McElrath, was the firm's client in this transaction; he told both men that the lease could only be terminated via a genuine sale of the property; and Mr. Warren and Mr. McElrath indicated their intent to proceed with the sale. Mr. Matney also stated that, in his opinion, if the original transaction was a sham, both Mr. McElrath and Mr. Warren were creating it and that both men understood that the focus or the purpose of the Hoot Owl transaction was to terminate the lease. On 20 June 2000, Peter Henry ("Mr. Henry"), an associate with Matney & Associates and the closing attorney on the Hoot Owl transaction, sent a letter to the Hoot Owl Hunting Club informing them that the lease "is now null and void." In addition, Mr. Matney sent Mr.

Warren a letter regarding the Hoot Owl transaction, which stated, *inter alia*: "You were more concerned with the termination of the lease Hoot Owl Club [sic] which we did on your behalf."

According to Mr. Warren, subsequent to June 2000, he and Mr. McElrath decided to proceed with and ratify the sale of the Hoot Owl property. According to the Warrens, Mr. McElrath decided that the one million dollar sales price was too high, and he agreed to sell the property to them for $650,000.00. In August and September 2001, another attorney, S. Janson Grimes ("Mr. Grimes")[5] prepared certain documents pertaining to the sale of the Hoot Owl property to Mountain Top. These documents included: (1) a deed of trust for $590,000.00 from the Warrens to Mr. McElrath, dated 15 August 2001; (2) a promissory note from the Warrens to Mr. McElrath for $590,000.00, dated 15 August 2001; (3) a signed deed of trust from the Warrens to Mr. McElrath for $60,000.00, dated 15 August 2001 and recorded 11 September 2001; (4) a "Substitution of Trustee[,]" signed by Mr. McElrath on 27 August 2001 and recorded 11 September 2001; and (5) a "Release Deed[,]" signed by Mr. McElrath and Mr. Grimes on or about 27 August 2001 and recorded 11 September 2001, which released Mountain Top from its obligation on the one million dollar deed of trust.[6] Mr. Warren testified that it was Mr. McElrath's idea to contact Mr. Grimes to look over and assist with

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[5] Mr. Grimes prepared the deeds for the 19.43-acre and 1.34-acre tracts, which the Warrens purchased from Mr. McElrath. Mr. Grimes did not testify at trial.

[6] Plaintiff does not challenge the validity of these documents.

the transaction. Mr. Boylan testified that the fair market value of the Hoot Owl property on 14 June 2000 was $1.76 million.

In March 2002, federal authorities searched the Warrens' offices and home and seized the business records of their companies. The Warrens were subsequently indicted and convicted of crop insurance fraud. During the federal investigation, Mr. McElrath was called to testify before the grand jury, and the Assistant United States Attorney asked him questions pertaining to the Hoot Owl property and its ownership. In his testimony, Mr. McElrath stated that the Hoot Owl property consisted of approximately 155 acres. With regard to the ownership of this property, the following exchange occurred between the prosecuting attorney and Mr. McElrath:

> Q Did you transfer title to Mr. Warren of that parcel, that 155-acre parcel? Is he the titled owner now? Did you sell it to him or give it to him?
>
> A I -- I agreed to let him have it and the deal probably is -- will be rather open, as far as I know -- he will take it, as far as I know.
>
> Q Who owns that property now?
>
> A Well, as it is, under the agreement, I'd say Robert Warren, and it was surveyed, I believe, approximately 12 acres, the old Riley Whitaker place. This was all in one tract, and I accepted that approximately 12 acres.
>
> Q I'm talking about the 155-acre parcel. Did you transfer that to the Warrens?

> A As it is, it goes to Mr. Warren, but the deal -- as far as I know, he accepted it and it was my desire to sell it to him.

Regarding payment for the Hoot Owl property, Mr. McElrath stated that he had only received a $10,000.00 check for the property, the papers pertaining to the transaction were all in Mr. Warren's hands, and that he had never seen the $590,000.00 promissory note. When asked why he would transfer "a lot of valuable property" to the Warrens, when "there wasn't much going [his] way," Mr. McElrath responded:

> Well, the answer to that is, the best I can tell you, I'm not so much interested in what I get out of the property. I'm interested in making a wildlife sanctuary out of it, and there was a good bit of discussion with lifetime privileges, lifetime rights, which I have a lot of other property which I'm making a wildlife sanctuary. And this is on Causby's Creek, and there's no hunting, no anything, and Mr. Warren contributes an awful lot of protection, food and everything. I also do the same thing. There's no hunting, no anything, and just left like nature set it up, which I know that is different, but the intentions of all that, I didn't care to receive a lot of money. Mr. Warren, I trust him, and this would not be subject to change. But the main goal is a wildlife sanctuary.

On 14 January 2005, Timothy Mullinax, then-guardian for Mr. McElrath, filed a complaint in Henderson County Superior Court asserting claims for, *inter alia*: (1) the imposition of a constructive trust in Mr. McElrath's benefit as to the Hogback and Hoot Owl properties, based on fraudulent conduct, breach of fiduciary duty, and "other wrongful conduct"; (2) constructive

fraud; and (3) fraud. A trial on these and other matters was held in October and November 2007.

Following the presentation of the evidence, the trial court denied plaintiff's motion for directed verdict, which asserted that the deed to the Hoot Owl property was void as a matter of law because at the time the 14 June 2000 deed to the Hoot Owl property was signed and recorded, both Mr. McElrath and Mr. Warren knew it was a sham transaction and did not intend to complete the transaction. In addition, plaintiff requested the trial court to submit his constructive trust claims to the jury and to instruct the jury regarding said claims, but the trial court denied this request.

The jury found, *inter alia*, that: (1) neither the execution nor delivery of the May 2000 deed for the Hogback property were procured by undue influence; (2) the Warrens had not taken advantage of a position of trust and confidence to procure the execution or delivery of said deed; (3)the parties mutually agreed to change the transaction pertaining to the Hoot Owl property to a real sale in August 2001; (4) said agreement regarding the Hoot Owl property was not procured by undue influence; and (5) the Warrens had not taken advantage of a position of trust and confidence to get Mr. McElrath to agree to change the Hoot Owl property transaction to a real sale. In its judgment, the trial court stated that "pursuant to the Verdict of the Jury, the Plaintiff" was not to recover anything for, *inter alia*, the constructive trust claims, the constructive fraud claims, and the fraud claims.

On 25 January 2008, plaintiff filed a "Motion For Judgment Notwithstanding The Verdict And In The Alternative For New Trial[.]" In this motion, plaintiff again asserted that: (1) the 14 June 2000 deed that transferred the Hoot Owl property to Mountain Top was void as a matter of law and therefore, ineffective to transfer the property to the Warrens; and (2) the trial court erred by not submitting the constructive trust claims to the jury. The trial court denied this motion in an order entered 25 March 2008. This appeal followed.

II. Analysis

A. Hoot Owl Deed: Void or Voidable

On appeal, Ms. Streadwick first contends that the trial court erred by denying her motion for directed verdict and her post-trial motion for judgment notwithstanding the verdict to set aside the deed to the Hoot Owl property as void. As discussed *infra*, we disagree.

> The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, [the Supreme Court of North Carolina] has required the use of the same standard of sufficiency of evidence in reviewing both motions.

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (citations omitted).

Here, Ms. Streadwick contends that because the undisputed evidence establishes that neither Mr. McElrath nor Mr. Warren intended the Hoot Owl transaction to be effective at the time the deed to the Hoot Owl property was executed on 14 June 2004, said deed is void as a matter of law regardless of whether Mr. McElrath later changed his mind and intended to sell the Hoot Owl property to the Warrens. In other words, Ms. Streadwick appears to contend that even if Mr. McElrath intended to convey the Hoot Owl property to defendants in August 2001, he had to re-execute the deed in order for the conveyance to be effective.

In support of this argument, Ms. Streadwick cites a single case, *Cutts v. McGhee*, 221 N.C. 465, 20 S.E.2d 376 (1942), in which the Supreme Court of North Carolina addressed whether a gift deed that is not recorded within two years of its execution is void, (as provided by statute), even though the grantor acknowledged the deed and filed it for registration approximately three and a half years after the execution. That Court held that, pursuant to statute, the deed became void when it was not recorded within two years of execution and that the grantor's acknowledgment of the execution did not qualify as a re-execution. *Id.* at 466, 20 S.E.2d at 376. In sum, *Cutts* establishes that a gift deed needs to be re-executed in order to be valid as between the grantor and grantee when the gift deed is not recorded within two years of its execution, an issue specifically controlled by statute. Because the issue

presented in *Cutts* was a very narrow one and the instant case does not involve the delayed recordation of a gift deed, we find *Cutts* to be inapposite and do not believe it controls the issue before us.

In addition, Ms. Streadwick asserts that the 14 June 2000 deed to the Hoot Owl property fails for lack of delivery. Once again, she contends that this argument is supported by the fact that both Mr. Warren and Mr. McElrath originally intended the Hoot Owl transaction to be a sham. Other than citing several cases regarding the general requirements for a deed, Ms. Streadwick does not cite any case law which establishes, as a matter of law, that a new deed must be executed where a grantor and grantee both originally engage in a real estate transaction for an ill purpose, but later decide to ratify the prior act of conveyance and delivery. Consequently, we find this argument unconvincing.

The Warrens contend that Ms. Streadwick's assertion that the Hoot Owl deed is void due to the initial fraudulent purpose is contrary to long-standing North Carolina law regarding fraudulent conveyances, and that as between Mr. McElrath and the Warrens, the deed was voidable, not void. As discussed *infra*, we agree.

"A thing is void, which is done against law at the very time of doing it, and when no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself, after it is done." *Martin v. Cowles*, 18 N.C. 29, 32 (1834). As a general rule, "a conveyance made to defraud creditors is effectual against the

bargainor, and all others, except creditors seeking to subject the property to their demand . . . ." *Saunders v. Lee*, 101 N.C. 3, 6, 7 S.E. 590, 592 (1888); *see also Hallyburton v. Slagle*, 130 N.C. 482, 487, 41 S.E. 877, 879 (1902) ("The general rule is that one can not take the benefit of his own fraud; that whatever effect it may have upon creditors and others, he is bound by such transactions; that, as to him, they are as *good and binding* as if there had been no fraud."). As the Supreme Court of North Carolina has stated, where a grantor has fraudulently conveyed land to a grantee in order to defraud his creditors,

> [p]ublic policy, as expressed through the law, has not penalized such a transaction by declaring the deed utterly void as against all persons and for all purposes, but has expressly limited the remedy to the aggrieved creditor and has left the deed as it stands between the parties. The law does not go to the extent of putting the grantor back in *statu quo*—a position of advantage which he could not secure by an independent action against the grantee with whom he would be, on that theory, *in pari delicto*.

Lane v. Becton, 225 N.C. 457, 461, 35 S.E.2d 334, 336 (1945).

While we are aware that the June 2000 sale of the Hoot Owl property was purportedly undertaken as a sham to defraud a leaseholder as opposed to a creditor, we think that the rationale from the above cited cases applies with equal force. Consequently, we conclude that as between Mr. McElrath and the Warrens, the deed to the Hoot Owl property was voidable, not void.

If the deed to the Hoot Owl property was voidable and not void, the Warrens argue that they and Mr. McElrath could later mutually agree to ratify the deed and the sale, a point which

plaintiff's counsel conceded at oral argument. The Warrens contend that the parties' mutual intent to ratify the 14 June 2000 Hoot Owl deed and proceed with the sale of the Hoot Owl property is supported by: the August 2001 documents pertaining to the Hoot Owl property; Mr. McElrath's 2003 sworn grand jury testimony; and an October 2002 receipt, indicating that Mr. McElrath accepted $60,000.00 cash as a partial payment for the Hoot Owl property.

We agree with the Warrens that when the evidence is viewed in the light most favorable to them, the issue of whether the parties later decided to ratify and consummate the transaction in August 2001 was properly before the jury. Hence, the trial court did not err in denying Ms. Streadwick's motion for a directed verdict or her post-trial motion for judgment notwithstanding the verdict to set aside the deed as void.

B. Constructive Trust

Next, Ms. Streadwick contends that the trial court's refusal to submit the claims for the imposition of a constructive trust to the jury and to instruct the jury on said claims was based on a misapprehension of law, specifically an erroneous belief that a finding of dishonesty or fraud is necessary to support the imposition of a constructive trust. Relying heavily on this Court's decision in *Rhue v. Rhue*, 189 N.C. App. 299, 658 S.E.2d 52 (2008), Ms. Streadwick claims that there was substantial evidence of both a "'breach of duty'" by Mr. Warren, including a breach of a fiduciary duty, as well as "'other circumstances' making it

inequitable" for the Warrens to retain the Hoot Owl and Hogback properties.

The Warrens note that the trial court did submit to the jury the issues of: (1) whether the Warrens utilized undue influence to get Mr. McElrath to convey the Hoot Owl and Hogback properties to them; and (2) whether the Warrens took advantage of a position of trust and confidence to procure Mr. McElrath's execution or delivery of the deeds for these properties. The Warrens assert that given that the jury resolved these issues in their favor, it would have been inappropriate for the court to impose a constructive trust because absent the conclusion that the Warrens committed some form of fraud or abused their position of trust and confidence, the imposition of constructive trusts on these properties lacked adequate factual foundation. Finally, the Warrens assert that even assuming, *arguendo*, that the trial court erred by failing to instruct the jury on the constructive trust issue, plaintiff cannot show that this error was prejudicial.

"A trial judge *must* submit any alleged claim to the jury for consideration if the evidence at trial, when viewed in the light most favorable to the proponent, supports a reasonable inference as to each element of that alleged claim." *Kinsey v. Spann*, 139 N.C. App. 370, 373, 533 S.E.2d 487, 491 (2000). "[A] claimant may expressly sue to establish a constructive trust, based on a legal theory justifying its creation." *Weatherford v. Keenan*, 128 N.C. App. 178, 179, 493 S.E.2d 812, 813 (1997), *disc. review denied*, 348 N.C. 78, 505 S.E.2d 887 (1998). Whether a constructive trust is

supported by the evidence can properly be a question for the jury. *See Newton v. Newton*, 67 N.C. App. 172, 176, 312 S.E.2d 228, 230 (holding that the trial court erred in allowing the defendant's motion for judgment notwithstanding the verdict where the jury's verdict finding a constructive trust was supported by the evidence and remanding the case for entry of judgment in accordance with the jury's verdict), *disc. review denied*, 310 N.C. 745, 315 S.E.2d 703 (1984). "The facts giving rise to a constructive trust must be established by evidence that is clear and convincing." *Upchurch v. Upchurch*, 128 N.C. App. 461, 464, 495 S.E.2d 738, 740, *disc. review denied*, 348 N.C. 291, 501 S.E.2d 925 (1998).

> A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. . . . [A] constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing. It is an obligation or relationship imposed irrespective of the intent with which such party acquired the property, and in a well-nigh unlimited variety of situations. Nevertheless, there is a common, indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is some fraud, breach of duty or other wrongdoing by the holder of the property, or by one under whom he claims, the holder, himself, not being a bona fide purchaser for value.

Wilson v. Development Co., 276 N.C. 198, 211-12, 171 S.E.2d 873, 882 (1970). A finding of fraud or dishonesty is not necessary to support the imposition of a constructive trust where a "plaintiff

establishes a 'breach of duty' or 'some other circumstance making it inequitable' for the defendant to retain his property interest." *Rhue* 189 N.C. App. at 307, 658 S.E.2d at 59 (quoting *Wilson*, 276 N.C. at 211, 171 S.E.2d at 882).

Here, when plaintiff requested the trial court to submit the constructive trust claim with regard to the Hogback property to the jury, the following exchange occurred:

> THE COURT: That's a legal question.
>
> [PLAINTIFF'S COUNSEL]: Pattern [jury instruction] has it that way.
>
> THE COURT: Well, what I've got it -- I'm going to tell you that if [the jury] answer[s] either of the first issue about undue influence or about constructive fraud "yes" as to the Hog Back property, I am going to rule that you all are entitled to recision without the mention of what a constructive trust is.

Later, when plaintiff requested that the trial court submit the constructive trust claim regarding the Hoot Owl property to the jury, the trial court indicated its belief that the constructive trust issue/instruction appeared to be duplicative of plaintiff's claims for undue influence and constructive fraud, based on an abuse of trust or confidence. Ultimately, the trial court concluded: "I am not going to give this issue about [a] constructive trust. I think there's nothing for the jury to decide about that, it's up for me to decide about it based on their decisions."

At the outset, we note that here, it is difficult to discern if the trial court decided not to submit the constructive trust issue to the jury based on the erroneous belief that said issue is

always a question of law, or because the court did not believe that plaintiff had produced sufficient evidence to support submitting the issue to the jury.

Plaintiff's complaint asserts that the claims for a constructive trust are supported by Mr. Warren's fraudulent conduct, the breach of his fiduciary duty to Mr. McElrath, and "other wrongful conduct," and that the Warrens obtained title to the Hoot Owl and Hogback properties as a result of this conduct. Following the presentation of the evidence at trial, the trial court appeared to conclude that plaintiff's constructive trust claim were supported by two legal theories: (1) undue influence and (2) constructive fraud, based on the abuse of a position of trust or confidence. Our Supreme Court has broadly defined a fiduciary relationship

> as one in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . .,[and] it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other*.

Dalton v. Camp, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001) (alteration in original) (internal quotation marks omitted) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). In other words, a breach of a fiduciary duty entails an abuse of a position of trust or confidence. Regarding the issue of whether defendants abused a position of trust or confidence to acquire these properties, the trial court instructed the jury that

it had to find that plaintiff proved by the greater weight of the evidence that "a relationship of trust and confidence existed between [Mr.] McElrath and [Mr.] Warren" and that Mr. Warren "used his position of trust and confidence to bring about" the transfer of the Hogback and Hoot Owl properties "to the detriment of [Mr.] McElrath and for the benefit of the defendants." Regarding the relationship of trust and confidence, the court instructed the jury that "[s]uch a relationship exists where one person places special confidence in someone else, who in equity and good conscience must act in good faith and of due regard to such person's interest." Given that the trial court's instructions encompass the underlying factual questions of whether a fiduciary relationship existed and whether it was abused, and that the jury resolved this issue in defendants' favor, we agree with the Warrens that the trial court did not err by not submitting to the jury the specific issue of whether a constructive trust should be imposed based on a breach of fiduciary duty.

Next, as noted *supra*, plaintiff relies heavily on *Rhue* to argue that sufficient evidence of "some other circumstance" existed here, which required the trial court to submit the constructive trust issue to the jury. In *Rhue*, this Court held that a claim for unjust enrichment can qualify as "'some other circumstance'" and that an unjust enrichment claim can provide a basis for the imposition of a constructive trust. *Id.* at 305, 658 S.E.2d at 58 (quoting *Wilson* 276 N.C. at 211, 171 S.E.2d at 882). As discussed

infra, because we conclude that *Rhue* is distinguishable from the instant case, we find plaintiff's argument to be without merit.

In *Rhue*, this Court concluded that sufficient evidence existed to support a jury verdict that the plaintiff, who had co-habitated with the defendant for over twenty years, was entitled to a constructive trust in her favor over certain properties titled solely in the defendant's name. *Id.* at 300, 306-08, 658 S.E.2d at 55, 58-59. However, in *Rhue*, unlike the instant case, the plaintiff's complaint specifically asserted a claim for unjust enrichment. *Id.* at 300, 658 S.E.2d at 55. Furthermore, in *Rhue*, the unjust enrichment claim, that in turn supported the imposition of a constructive trust, was supported by considerable evidence that the defendant had repeatedly promised the plaintiff that he acquired these parcels of land for their mutual benefit and that the plaintiff had provided numerous benefits to the defendant in reliance upon these promises. *Id.* at 305-08, 658 S.E.2d at 58-59. Specifically, this Court stated:

> Besides [the] promises [the] defendant made, [the] plaintiff provided numerous benefits to [the] defendant. She improved his property by helping to build [a home on one parcel]. She also assisted [the] defendant in improving his garage. She worked alongside [the] defendant in his business, kept up his home, and raised [the defendant's son from a prior marriage and his grandson]. During the time [the] plaintiff conferred these benefits, [the] plaintiff relied on [the] defendant's promise that she would share in the results of their mutual efforts in the business and property ownership. . . . It would be inequitable for the defendant to benefit from [the] plaintiff's reliance on his promise that the property was to be used for their mutual benefit. [Consequently,] . . . we find

> sufficient evidence of such a promise and her reliance on that promise to survive a motion for a directed verdict.

Id. at 305-06, 658 S.E.2d at 58 (citation omitted). In other words, in *Rhue*, the defendant's promises to the plaintiff and the benefits that the plaintiff conferred upon the defendant in reliance upon these promises were what constituted the "common element . . . [of] other wrongdoing by the holder of the property," which is necessary to establish a claim for a constructive trust and which supported submitting the constructive trust issue to the jury. *Wilson* 276 N.C. at 212, 171 S.E.2d at 882.

Here, Ms. Streadwick highlights the following evidence to support her constructive trust claim as to the Hoot Owl property: (1) the very close relationship between Mr. McElrath and Mr. Warren; (2) Mr. McElrath's advanced age and health condition; (3) the frequency and extent of time that Mr. Warren spent with Mr. McElrath, especially when compared with the time Mr. McElrath spent with other individuals; (4) the assistance and advice that Mr. Warren provided to Mr. McElrath regarding the management and preservation of his properties and estate matters; (5) Mr. Warren's knowledge of and participation in the June 2000 sham transaction; (6) the limited documentation pertaining to the monies that the Warrens purportedly paid for the property; and (7) the testimony that the alleged purchase price of $650,000.00 was well below the fair market value of 1.76 million dollars. With regard to the Hogback property, she highlights: (1) the close relationship between the Mr. Warren and Mr. McElrath; (2) the use of a law firm

and attorneys, with whom Mr. Warren, but not Mr. McElrath, had prior dealings to effectuate the Hogback conveyance; (3) Mr. McElrath's lack of legal representation; (4) the failure to obtain an appraisal; and (5) the testimony regarding the disparity between the purchase price and the fair market value of the property. This evidence is rooted in and supports the legal theories of undue influence and constructive fraud, based on an abuse of trust and confidence, and as stated *supra*, the jury resolved these issues in defendants' favor. However, it does not establish, nor did Ms. Streadwick allege, that Mr. Warren made any promises to Mr. McElrath to induce him to convey these properties to the Warrens or that Mr. McElrath relied upon said promises in conveying these properties to them. Accordingly, we hold that the trial court did not err by not submitting plaintiff's constructive trust claims to the jury and by not instructing the jury on said claims.

No error in judgment; order affirmed.

Judges McGEE and BEASLEY concur.

Report per Rule 30(e).