

Constructive Trusts In South Carolina:
Equity in its Finest Form As it Relates To Real Property Transfers

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TABLE OF CONTENTS

<u>Section</u>	<u>Page</u>
TITLE PAGE.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii-iv
CONSTRUCTIVE TRUSTS GENERALLY.....	1
CONSTRUCTIVE TRUSTS IN SOUTH CAROLINA.....	3
REQUIREMENTS, DAMAGES, AND EVIDENCE.....	5
PLEADING CONSTRUCTIVE TRUST IN A REAL PROPERTY MATTER.....	6
SUMMARY.....	7

APPENDIX 1

CONSTRUCTIVE TRUST PRAYER IN A REAL PROPERTY MATTER.....	10
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TABLE OF AUTHORITIES

CASES AND SECONDARY SOURCES

<u>Green v. Green</u> , 56 S.C. 193, 34 S.E. 249 (S.C. 1899).....	1, 3, 4
<u>Beatty v. Guggenheim Exploration Co.</u> , 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919)....	1
<u>Taylor v. Holmes</u> , 14 F. 498 (C.C.D.N.C. 1882).....	2
<i>55 S.C.L. Rev. 175. SUEM- Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose.</i> Roger Young & Stephen Spitz. (2003).....	2
<u>Palmetto Lumber Co. v. Risley</u> , 25 S.C. 309, 1886 WL 2511 (S.C. 1886).....	2
<u>Pomeroy's Equity Jurisprudence</u> § 1051.....	2
<u>Smith v. South Carolina Ret. Sys.</u> , 336 S.C. 505, 520 S.E.2d 339 (Ct.App.1999).....	3
<u>SSI Med. Servs. v. Cox</u> , 301 S.C. 493, 392 S.E.2d 789 (1990)	3
<u>Macaulay v. Wachovia Bank of S.C.</u> , 351 S.C. 287, 569 S.E.2d 371 (Ct.App.2002).....	3
<u>Hendrix v. Hendrix</u> , 299 S.C. 233, 383 S.E.2d 468 (Ct. App. 1989).....	3
<u>City of Charleston, S.C. v. Hotels.com, LP</u> , 520 F.Supp.2d 757 (D.S.C. 2007).....	3
<u>Wright v. Craft</u> , 372 S.C. 1, 640 S.E.2d 486 (Ct.App.2006).....	3
<u>McDaniel v. Kendrick</u> , 386 S.C. 437, 688 S.E.2d 852 (Ct.App.2009).....	3
<u>Dye v. Gainey</u> , 320 S.C. 65, 463 S.E.2d 97 (Ct.App.1995).....	4
<u>Bogert. Trusts and Trustees</u> §473. Fraudulent Misrepresentation or Concealment.....	4
<u>Halbersberg v. Berry</u> , 302 S.C. 97, 394 S.E.2d 7 (Ct. App.1990).....	4
<u>McNair v. Rainsford</u> , 330 S.C. 332, 499 S.E.2d 488, (Ct. App. 1998).....	4
<u>Hale v. Finn</u> , 388 S.C. 79, 694 S.E.2d 51 (Ct.App. 2010).....	4
<u>Wolfe v. Wolfe</u> , 215 S.C. 530, 56 S.E.2d 343 (S.C. 1949).....	4

South Carolina Equity: A Practioner’s Guide. S.C. BAR CLE Division. Randolph R. Lowell, Robert L. Reibold, and Shealy B. Reibold. (2010).....4-5

Faulkner v. Faulkner, 257 S.C. 172, 184 S.E.2d 718 (S.C. 1971).5

Sharp v. Kosmalski, 40 N.Y.2d 119, 386 N.Y.S.2d 72 (N.Y. 1976).5

Whitemire v. Adams, 273 S.C. 453, 257 S.E.2d 160 (S.C. 1979).....5

Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559 (S.C. 1987).....5

Searson v. Webb, 208 S.C., 453, 38 S.E.2d 654 (S.C. 1946).....5

79 AMJUR POF 3d 269; § 25 Constructive Trust Formed Because of Abuse of Confidential Relationship Between Transferee and Transferor of Property, Drafting Complaints in Actions to Impose Constructive Trust; Checklist.....6-7

Foster v. Foster, 384 S.C. 380, 682 S.E.2d 312 (Ct. App. 2009).....7

AMJUR PP Conversion § 105.....7

South Carolina Unfair Trade Practices Act. S.C. Code Ann. § 39-5-20(a) (1985).....9

Constructive Trusts Generally

A trust is a manner of holding property where legal and equitable title is separate. A trust generally fits into one of two categories, an express trust and an implied trust. Implied trusts are either resulting or constructive trusts. A resulting trust arises upon the presumed intention of the parties, where the terms of the disposition or accompanying facts establish that beneficial interest is not to go with legal title. Alternatively, a constructive trust arises by operation of law, not because the parties had intended to create a trust, but because the court is enforcing an equitable remedy by imposing a trust on property.

Constructive trusts "include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no expressed or implied, written or verbal declaration of the trust." Green v. Green, 56 S.C. 193, 217-218 (S.C. 1899).

In the venerable quote by Judge Cardozo, a "constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919). Constructive trusts often arise because the property was acquired through duress, fraud, undue influence or mistake, misrepresentation, through a breach of fiduciary duty, or through the wrongful disposition of another's property. However, a "constructive trust can oft be overlooked as an equitable remedy. When no express trust is created by the parties, it is the constructive trust that places

the wrongful beneficiary as trustee where “the law holds a person liable to the performance of such trust, whether he is willing or unwilling to accept the situation.” Taylor v. Holmes, 14 F. 498, 509 (C.C.D.N.C. 1882).

Today, constructive trusts appear to be one way the courts apply the time-honored equitable maxims of “equity will not suffer a wrong to be without a remedy,” and “equity regards as done what ought to be done,” when no actual or implied trust was created between the involved parties. 55 S.C.L. Rev. 175 (2003). *SUEM- Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*. Roger Young and Stephen Spitz. For example, when

“one person having money or any kind of property belonging to another in his hands, wrongfully uses it for the purchase of lands, taking title in his own name; or if a trustee or other fiduciary person wrongfully converts the trust funds into a different species of property, taking to himself the title; or if an agent, or bailee, wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name; in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while in the hands of the original wrong doer, but as long as it can be followed and identified in whosoever hands it may come, except into those of a bona fide purchaser for value and without notice; and the court will enforce the constructive trust for the benefit of the beneficial owner or original *cestui que* trust, who has been thus defrauded.” Palmetto Lumber Co. v. Risley, 25 S.C. 309 (S.C. 1886), *citing Pom. Eq.*, § 1051.

As noted above, the doctrine of constructive trust has an extremely wide application. It can extend to “trustees, executors and administrators, directors of corporations, guardians, committees of lunatics, agents using money of their principals, partners using partnership funds, husbands purchasing property with money belonging to the separate estate of their

wives, parents and children, and all persons who stand in fiduciary relations towards others. Equity jurisprudence contains few more efficient doctrines than this in maintaining the beneficial rights of property." Green v. Green, 56 S.C. 193, 217 (S.C. 1899).

Constructive Trusts in South Carolina.

In South Carolina, a constructive trust may be broadly imposed when a party obtains a benefit "which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." Smith v. S.C. Ret. Sys., 336 S.C. 505, 529, 520 S.E.2d 339, 352 (Ct.App.1999), *citing* SSI Med. Servs. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990). An action to declare a constructive trust is an action in equity. Macaulay v. Wachovia Bank of S.C., 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct.App.2002); *see also*, Hendrix v. Hendrix, 299 S.C. 233, 383 S.E.2d 468 (Ct. App. 1989).

A constructive trust arises entirely by operation of law, and without reference to any actual or supposed intentions of creating a trust. Smith v. S.C. Ret. Sys., 336 S.C. 505, 529, 520 S.E.2d 339, 352 (Ct.App.1999); *see also*, City of Charleston, S.C. v. Hotels.com, LP, 520 F.Supp.2d 757 (D.S.C. 2007); McNair v. Rainsford, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (Ct. App. 1998). When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable, for the purposes of the applicable standard of appellate review. Wright v. Craft, 372 S.C. 1, 17-18, 640 S.E.2d 486, 495 (Ct.App.2006).

A constructive trust is often established based upon the violation of a fiduciary duty. McDaniel v. Kendrick, 386 S.C. 437, 688 S.E.2d 852 (Ct.App.2009). This “important form of the trust arises from the acts of persons already possessing some fiduciary character, or standing in some fiduciary relation. Whenever a trustee, or other person in a fiduciary capacity, acting apparently within the scope of his powers--that is, having authority to do what he does--purchases property with trust funds, and takes the title thereto in his own name, without any declaration of trust, a trust arises with respect to such property in favor of the *cestui que* trust or other beneficiary.” Green v. Green, 56 S.C. 193, 217-218 (S.C. 1899).

Typically, a constructive trust “results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution. Fraud is an essential element, although it need not be actual fraud.” Dye v. Gainey, 320 S.C. 65, 68, 463 S.E.2d 97, 99 (Ct.App.1995); *See also*, Halbersberg v. Berry, 302 S.C. 97, 106, 394 S.E.2d 7, 13 (Ct. App.1990), holding that a “constructive trust arises against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained or holds the right to property which he ought not in equity and good conscience hold and enjoy.” If misrepresentation is proven, a constructive trust will be imposed by the court. Bogert. Trusts and Trustees §473. Fraudulent Misrepresentation or Concealment.

Requirements, Damages and Evidence

A claim for imposition of a constructive trust is not an independent cause of action, and does not include the imposition of punitive damages. Hale v. Finn, 388 S.C. 79, 694 S.E.2d 51 (Ct.App. 2010). When someone wrongfully takes the property of another and converts it into a new form or transfers it, a constructive trust arises and it follows the property or the proceeds from its sale. Wolfe v. Wolfe, 215 S.C. 530, 56 S.E.2d 343 (S.C. 1949). In some jurisdictions other than South Carolina, the party seeking to impose a constructive trust must reimburse the defendant for both the purchase price and other expenses incurred in connection with the property as a condition precedent to the constructive trust. South Carolina Equity: A Practitioner's Guide. S.C. BAR CLE Division. Randolph R. Lowell, Robert L. Reibold, and Shealy Boland Reibold. (2010).

The doctrine of constructive trust is “a creature of equity jurisprudence, raised without regard to intention, to prevent unjust enrichment,” and “does not arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment.” Faulkner v. Faulkner, 257 S.C. 172, 175-76, 184 S.E.2d 718, 720 (1971).

Many South Carolina cases plead unjust enrichment, and put forth the equitable remedies of constructive trust and, in the alternative, *quantum meruit*, and while the court sometimes conflates these two equitable remedies, it should be noted that they are not the same.

In “the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment,”

and “most frequently, it is the existence of a confidential relationship which triggers the equitable considerations leading to the imposition of a constructive trust.” Sharp v. Kosmalski, 40 N.Y.2d 119, 386 N.Y.S.2d 72 (N.Y. 1976).

The evidence necessary to support the imposition of a constructive trust must be clear, convincing, and unequivocal, and not simply a preponderance thereof; the trial court may find facts in accordance with its own view of the evidence. Whitemire v. Adams, 273 S.C. 453, 257 S.E.2d 160 (1979). The plaintiff bears the considerable burden of establishing the existence of the constructive trust. In contrast with express trusts, the existence of a constructive trust can be established through parol evidence, despite the statute of frauds. Lollis v. Lollis, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (S.C. 1987); Searson v. Webb, 208 S.C., 453, 38 S.E.2d 654 (S.C. 1946). Notably, in actions at equity, the appellate court, under a broad standard of review, may find the facts of the case in accordance with its own view of the evidence.

Pleading Constructive Trusts in A Real Property Matter

To plead for the imposition of a constructive trust, there must be an identifiable *res* for the trust to fasten upon, and that the property over which the constructive trust is asserted be traceable to the *res*. In an action or proceeding to impose a constructive trust on a property predicated by the transferee's abuse of a confidential relationship with the transferor, the complaint, petition, or declaration should contain, among other things, allegations concerning the following matters:

- Residence or other jurisdictional facts, if required;
- Facts regarding venue of action, if required;

- Diversity of citizenship and amount in controversy, if complaint is to be filed in federal court as diversity action;
- Statute pursuant to which action is brought, if applicable;
- Facts establishing confidential relationship between transferee and transferor of the property in question;
- Facts describing the conveyance of the property to the transferee;
- Understanding or agreement between transferor and transferee concerning reason for conveyance of property;
- Facts showing undue influence, fraud, or other wrongful conduct by transferee in inducing transferor to convey the property;
- Breach of understanding or agreement by transferee;
- Unjust enrichment of transferee; and,
- Prayer for relief.

79 AMJUR POF 3d 269; § 25, Constructive Trust Formed Because of Abuse of Confidential Relationship Between Transferee and Transferor of Property, Drafting complaints in actions to impose constructive trust; Checklist.

South Carolina is not a notice pleading state, and pleading constructive trusts requires substantial detail and citations within the complaint, with particular emphasis placed upon the alleged fraud or misrepresentation which formed a material basis of the real estate transaction, and a narrowly constructed prayer for relief.

In Foster v. Foster, 384 S.C. 380, 682 S.E.2d 312 (Ct. App. 2009), the court found just such a fraudulent transaction. The Foster court imposed a constructive trust to set aside a deed by which an elderly father conveyed his home to a non-existent trust established by one of his children, and also ordered the return of monies which his children had transferred from an account they held jointly. Id. In Foster, which was affirmed by the South Carolina Supreme Court in 2011, the court took particular note of the fact that there was no evidence

that any of these transfers were in fact used to pay for their father's nursing home bill, as the children asserted. In cases where there are multiple layers of fraudulent activity, the courts can also utilize constructive trusts in concert with an accounting action, especially in cases where there is unjust enrichment and those proceeds must be disgorged.

The broad power of a constructive trust, as demonstrated by Foster v. Foster, 384 S.C. 380, 682 S.E.2d 312 (Ct. App. 2009), even extends into the areas of real estate *vis-a-vis* bankruptcy. In bankruptcy proceedings, the request for an imposition of a constructive trust for the benefit of plaintiff over the real estate proceeds, together with interest, can even be accompanied by a requested order subrogating the plaintiff to the rights of any and all creditors of defendants who received any part of the sale proceeds in full or partial satisfaction of an obligation owed by the defendant. AMJUR PP Conversion § 105.

As noted above, a broad prayer for relief cannot be considered as the basis for a constructive trust. In terms of a model, the prayer for the imposition of a constructive trust can be somewhat difficult to find. A model prayer for the imposition of a constructive trust in real property matter is provided in Appendix 1 of this paper. Based upon the facts of the case, the complaint might also raise a statutory cause of action under the South Carolina Unfair Trade Practices Act (SCUPTA), which provides for treble damages in addition to attorney fees. S.C. Code Ann. § 39-5-20(a) (1985).

SUMMARY

Today, individuals and families are fighting against a weak economy and many are saddled with the economic results of real estate transactions and new construction which were not executed with an eye to either good faith, or fair dealing. Based upon the flurry of

real estate and construction-related litigation currently on-going in South Carolina, it appears quite likely that constructive trusts will arise more and more as the fall-out from the construction boom continues.

As developers, general contractors, builders, realtors, real estate brokers, bankers, and other fiduciaries breach their duties owed to buyers, the courts will be confronted with the issue of how to remedy the bereaved. In addition, the sellers themselves now have a statutorily imposed duty of under the doctrine of *caveat venditor*, and must disclose any and all possible problems on the real estate disclosure form which has been required in every transaction since 2004.

While some of the solutions to these cases will be found in law, equitable remedies appear to be more adequately suited to address these fact intensive lawsuits. The underlying solution will be to follow the equitable maxims “equity will not suffer a wrong to be without a remedy” and “equity regards as done what ought to be done.” Undoubtedly, one way the courts will apply these maxims and protect South Carolina’s consumers will be to impose constructive trusts upon those who come to a real estate transaction with unclean hands and misrepresentation, and leave with unjustly gained profits.

Appendix 1:

Model Prayer Requesting the Court Impose A Constructive Trust in a Real Property Matter

By reason of the fraudulent misrepresentations and otherwise wrongful manner in which the Defendants _____ obtained the proceeds from the sale of their real estate located at _____, Defendant _____, has no legal or equitable right, claim, or interest therein to said proceeds, but instead Defendant _____ is an involuntary trustee holding unjustly obtained profits therefrom in a constructive trust for the Plaintiff _____, with the duty to convey the same to Plaintiff forthwith.

WHEREFORE, the Plaintiff _____ prays that this Court issue its Order granting judgment to the Plaintiff against the Defendants for the following relief:

1. For an order requiring the imposition of a constructive trust in favor of Plaintiff, consisting of all revenues derived from the fraudulent real estate sale, as alleged above, to prevent unjust enrichment to Defendant, and order that such monies and proceeds be paid over and transferred in full to Plaintiff;
2. For all costs of this suit and reasonable attorney's fees incurred by Plaintiff to the extent provided by law;
3. For any interest as may be provided by law;
4. For any incidental and special damages; and,
5. For any such further relief as this Court deems just and proper.