HAROLD HENSLEY and wife, LIDIA HENSLEY,	)	
	)	
Plaintiffs/Appellants,	)	
	)	**Sumner County Chancery Court**
	)	**No. 92C-176**
VS.	)	
	)	**Appeal No.**
	)	**01A01-9607-CH-00296**
RONNIE HENSLEY BRITT,	)	
	)	
Defendant/Appellee.	)	

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT FOR SUMNER COUNTY
AT GALLATIN, TENNESSEE

HONORABLE TOM E. GRAY, JUDGE

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AFFIRMED AND REMANDED.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE
BEN H. CANTRELL., JUDGE

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O P I N I O N

The captioned plaintiffs have appealed from a non-jury judgment of the Trial Court in their favor and against the captioned defendant in the amount of $14,607.51. Plaintiffs had sued for $86,000.00, arising out of a series of transactions between the parties.

The plaintiff, Harold Hensley, is the brother of Ronnie Britt, a widow of some means, including a residence and property in Sumner County, Tennessee. Prior to June 23, 1990, plaintiffs, Harold and Lidia Hensley sold their home in Florida and moved into an unfinished "guest house" on the property of defendant. On June 23, 1990, defendant executed a warranty deed conveying to plaintiffs a one-half interest in a log home located on her property. The warranty deed was never recorded. Plaintiffs completed the construction of the guest house and occupied it rent-free for two years. In 1992, defendant sold the log home and appurtent land.

On June 23, 1992, plaintiffs filed this suit alleging:

1. Defendant had sold the log house for $206,000.00 without accounting to plaintiffs for their share received by the unrecorded deed.

2. Plaintiffs spent $86,000.00 in completing construction of the house occupied by them.

3. On June 14, 1991, defendant delivered to plaintiffs a $50,000.00 check which was a gift.

4. Defendant was about to evict plaintiffs from the house occupied by them.

The complaint prayed for judgment for $86,000.00 or, in the alternative, for conveyance of "the aforementioned property" to plaintiffs.

Defendant answered asserting that she had paid plaintiffs $50,000.00 in satisfaction of the cost of completing the house occupied by them and denying any other obligation to them. She also denied delivery of the unrecorded deed to plaintiffs and averred that it was taken from her home without her knowledge or consent.

By counterclaim, defendant sought possession of the house occupied by plaintiffs, a list of personalty in the possession of plaintiffs, and a judgment for $74,582 for money loaned to plaintiffs.

Plaintiffs answered the counter complaint generally denying material allegations thereof; however, they admitted occupation of the house and possession of some of the personalty mentioned in the counterclaim and further admitted that defendant had contributed $11,608.50 to the cost of completion of the house.

On October 13, 1992, after a partial evidentiary trial, the Trial Court ordered the plaintiffs to vacate the house occupied by them and ordered defendant to deposit with the Clerk and Master $86,000 of the proceeds of the sale of the log house.

On November 1, 1992, plaintiffs filed the following motion:

> Plaintiffs move the court for an order permitting them to amend by interlineation their complaint filed herein in the following particulars, to-wit:
>
> By inserting after the end of paragraph 3 of the complaint to read as follows: "That defendant owes plaintiffs the sum of $103,000.00 from the sale."
>
> By inserting after paragraph 2 of the prayer as follows: "That plaintiffs recover from defendant the sum of $103,000.00 as their rightful share of property sold in which" they held a one-half undivided interest."
>
> The grounds for this motion are:
>
> 1. That a gift of real property by deed to the plaintiffs, Hensleys, was made by the defendant, Ronnie Britt.
>
> 2. That the plaintiffs, Hensleys, are entitled to one-half of the proceeds from the sale of the "gift" real property.

On December 14, 1992, the Trial Court entered an order stating:

> This cause came on to be heard on the 7th day of December, 1992 before the Honorable Tom E. Gray, Chancellor, sitting for the Chancery Court of Sumner County, Tennessee upon the Motion of Plaintiffs, HAROLD HENSLEY and wife, LIDIA HENSLEY, to Amend their Complaint.
>
> ORDERED, ADJUDGED AND DECREED that plaintiffs, HAROLD HENSLEY and wife, LIDIA HENSLEY, are granted leave to amend their Complaint.

On March 7, 1995, on motion of defendant, the Trial Court appointed a guardian ad litem for her because of her extreme disability. The guardian ad litem adopted all pleadings filed by counsel for defendant.

Upon a further evidentiary trial without a jury, the Trial Judge found the facts as follows:

> 1. RONNIE HENSLEY BRITT owned improved real estate property in Sumner County, Tennessee which is the subject of this suit.
>
> 2. HAROLD HENSLEY and wife, LIDIA HENSLEY sold their home in Florida and moved to Sumner County,

Tennessee at the invitation of RONNIE HENSLEY BRITT to reside with her. The evidence does not support a finding by the Court that the Hensleys moved to Tennessee pursuant to a contract with Ronnie Hensley Britt to care and provide services for her.

3. RONNIE HENSLEY BRITT did present a deed dated June 23, 1990 to HAROLD HENSLEY and wife, LIDIA HENSLEY, as tenants by the entirety, which conveyed to them a one-half interest in the tract of real property. This deed was never recorded, and the one-half interest in the real property was not a gift but was in nature of an equitable mortgage as it was the intent of RONNIE HENSLEY BRITT, HAROLD HENSLEY and wife, LIDIA HENSLEY for the real property to serve as security for the repayment of money the Hensleys were expending for the construction of a house on property owned by RONNIE HENSLEY BRITT.

4. HAROLD HENSLEY and wife, LIDIA HENSLEY expended from their funds $78,906.19 on the construction of a house on property owned by RONNIE HENSLEY BRITT in Sumner County, Tennessee.

5. RONNIE HENSLEY BRITT has reimbursed HAROLD HENSLEY and wife, LIDIA HENSLEY $59,798.68 for said construction costs.

6. RONNIE HENSLEY BRITT had made loans in the amount of $2,500.00 to HAROLD HENSLEY, and this amount shall be a set-off against the balance due to the Plaintiffs from RONNIE HENSLEY BRITT.

7. Plaintiffs, HAROLD HENSLEY and LIDIA HENSLEY, are due $14,607.51 from the monies held by this Court deposited by RONNIE HENSLEY BRITT.

8. The Guardian Ad Litem, Nathan Harsh, is due his fee which shall be assessed as costs to be paid from the funds held on deposit by this Court upon filing an Affidavit of Attorney's Fees by the Guardian Ad Litem.

9. Robert G. Ingrum, Attorney for Defendant, is due his fee which shall be paid from the funds held on deposit by this Court upon filing an Affidavit of Attorney's Fees.

10. The costs of this cause shall be assessed to the Defendant/ Counter-Plaintiff, RONNIE HENSLEY BRITT, to be paid from from RONNIE HENSLEY BRITT, to be paid from the funds held on deposit by this Court.

Judgment was entered accordingly.

On appeal, plaintiffs present the following issues:

> The issues in this case ARE:
>
> a) whether, under the facts and circumstances of the case, an implied contract existed between plaintiffs and the defendant; and
>
> b) whether the contract, if any, was induced by fraudulent misrepresentation; and
>
> b) the measure of damages by a breach of the contract.

The analysis and evaluation of the evidence is complicated by the fact of two trials in the first of which the defendant testified regarding a part of the issues and in the second of which defendant did not testify because she was incapacitated.

Plaintiffs first assert that there is no evidence to support a contractual relationship between them and defendant. This is confusing, because the plaintiff's also insist that they did have an agreement with defendant to come to Tennessee and care for her and her property.

Apparently, plaintiffs assert an agreement to care for defendant and her property and assert that the unrecorded deed was a gift without condition. The answer of defendant denies that the unrecorded deed to them was an absolute conveyance, and insists that it was security for reimbursement of the money they spent finishing the house they occupied without paying rent. The defendant did not testify in support of her allegation that the deed was executed to secure reimbursement of plaintiff for construction costs and never delivered because she was incapacitated at the time of the hearing on this issue.

The defendant did testify at this first hearing that she did not request any services of plaintiffs except the completion of the house they occupied. She further testified that she did not claim any rental for their occupancy of the house, and that she had reimbursed plaintiffs for most, if not all of the construction expenses.

Mr. Hensley testified that the $50,000.00 check was a gift, or "play money;" that the deed was delivered to his wife on July 5, 1990, one day after their arrival in Tennessee; that they never recorded the deed or paid any taxes on the property; that he told defendant that his wife wanted some kind of security, and the deed was that security. He testified verbatim as follows:

> Q. Okay. And if I understood your testimony from Mr. Cole, you didn't particularly care which place you lived in, but if you had money in the little house, you wanted a deed to that; is that right?
>
> A. Yeah.
>
> Q. Okay. So the deed to the big house didn't make any difference to you, the other house that you were going to -- she was going to let you live in, that didn't really make any difference to you just as long as you had a place to live; is that right?
>
> A. That's right.
>
> Q. All right. Now, your attorney has acknowledged in some of your pleadings that Mrs. Britt paid $11,608.50 on a house. Is that figures that you and he came up with off the checks that I provided, or do you know how you got that figure?
>
> A. That was when we first started, so that's four or five years ago. So I don't know how we come up with it. But that was the checks she provided.

In the light of the pleadings, the issues before the Trial Court and this Court were and are:

1. What was the purpose and intent of the warranty deed to a one-half interest in the log house?

2. What was the purpose and intent of the $50,000 check delivered to plaintiffs?

3. What, if any money is due the plaintiffs from defendant?

The second issue will be discussed first for a reason that will later appear. As stated, Mr. Hensley testified that the $50,000.00 check was a gift of "play money." Mrs. Britt testified that it was reimbursement of construction expenses. The Trial Judge who saw and heard the witnesses in person credited the testimony of Mrs. Britt and disregarded that of Mr. Hensley on this subject. In the absence of compelling evidence to the contrary, this Court is bound by the decision of the Trial Judge. *State ex rel. Balsinger v. Town of Madisonville*, 222 Tenn. 272, 282, 435 S.W.2d 803, 807 (1968). *Hudson v. Capps*, Tenn. App. 1983, 651 S.W.2d 243, 246. There is no compelling evidence to the contrary. Therefore, this Court must affirm the finding that Mrs. Britt told the truth about the check and other reimbursements, and that Mr. Hensley did not tell the truth on the same subject.

On the first issue, the defendant is at somewhat of a disadvantage because her testimony is not available. However, the circumstances support her position. An obligation to reimburse expenses incurred at her request and the admitted desires of plaintiffs for security for reimbursement, the admitted facts that the deed was never recorded and that no taxes were ever paid thereon by plaintiffs, and the lack of any evidence of the exercise of dominion or control or collection of rent by the plaintiffs are all telling circumstances militating against an absolute conveyance.

Another significant circumstance is that the original complaint, filed on June 23, 1992, prayed only for the $86,000.00 construction expenses, or, in the alternative, for a conveyance of "the above mentioned property" to plaintiffs, and the amendment to request one-half of the proceeds of the sale of property did not occur until November 1, 1992. The decision of the Trial Judge as to credibility on the check issue is a circumstance supporting his decision on the deed issue under the rule of "Falsus in uno, falsus in omnibus," that is, if a witness is found to have testified falsely as to one fact, the court is justified in disregarding other testimony of that witness as untrue, even though the other testimony is uncontradicted. *Frierson v. Galbreath*, 80 Tenn. (12 Lea) 129 (1883), *Buchanan v. Harris*, Tenn. App. 1995, 902 S.W.2d 941.

In 12 Thompson on Real Property, Thomas Edition, 1994, § 101.08(a) p.p. 502 and 503, is found the following text:

> For centuries, equity has received proof that deeds purporting to convey an absolute legal and equitable interest were, in fact, meant to grant only a security interest and, upon a finding of such intent, has recognized an equity of redemption in the grantor.
>
> - - -
>
> The evidence that security only was intended may be written or oral. The statute of frauds is not a bar to proof by parol that a deed absolute on its face was meant as a mortgage.
>
> - - -
>
> Proof that the conveyance was intended as security must establish that the grantor was indebted to the grantee and that the conveyance was intended by the grantor as a security device.
>
> - - -
>
> Intent that the transfer create only a security interest can be established circumstantially. Among the factors to be considered on the question of intent are (1) the existence of a debt, (2) the relationship between the parties, (3) the availability of legal advice, (4) the sophistication and circumstances of the parties, (5) the adequacy of consideration and (6) the possession of the property. Where the grantor continues to occupy the premises and to pay the property taxes and hazard insurance premiums and where the consideration received by the grantor is much less than the value of the property, the inference is particularly strong that a security device was intended.

To the same effect is an extensive article on absolute deeds as equitable mortgages in 59 CJS Mortgages §§ 18-70, p.p. 53-110.

In *Edwards v. Hunt*, Tenn. App. 1982, 635 S.W.2d 696, this Court affirmed a judgment holding an absolute deed to be a mortgage, but modified to award damages instead of title to the property because title had been conveyed to an innocent purchaser.

The circumstances stated and the application of the "falsus in uno" rule produce adequate support for the finding of the Trial Court that the unrecorded deed was not an absolute conveyance but security for an obligation.

This Court is satisfied to affirm the finding of the Trial Judge that the unrecorded deed was an equitable mortgage to be discharged by payment of the secured debt.

The third issue is resolved by the disposition of the first and second together with the previously stated rule as to the conclusiveness of the finding of the Trial Court on issues of credibility. There is adequate evidence to support the finding of the Trial Judge as to the balance due plaintiffs for construction costs.

The judgment of the Trial Court is affirmed. Costs of this appeal are taxed against the plaintiffs. The cause is remanded to the Trial Court for necessary further proceedings.

AFFIRMED AND REMANDED

_____
HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

_____
SAMUEL L. LEWIS, JUDGE

_____
BEN H. CANTRELL, JUDGE