



**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

SHEILA ANN PENINGER SHAW

APELLANT

VS.

CAUSE NO.2006-CA-01360

MICHAEL GEORGE SHAW

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judge of the Supreme Court of Mississippi may evaluate possible disqualification or recusal.

- | | | |
|----|--------------------------|--------------------------|
| 1. | Michael George Shaw | Appellee |
| 2. | Hon. Thomas L. Zebert | Rankin County Chancellor |
| 3. | Sheila Ann Peninger Shaw | Appellant |
| 4. | Hon. Christopher A. Tabb | Attorney for Appellant |

DATED this the 16th day of March 2007.

Respectfully Submitted,

MICHAEL GEORGE SHAW

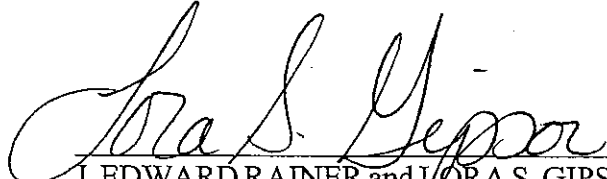

J. EDWARD RAINER and LORA S. GIPSON
Attorneys of Record for Michael George Shaw

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SHEILA ANN PENINGER SHAW

APPELLANT

VS.

CIVIL ACTION NO.2006-CA-01360

MICHAEL GEORGE SHAW

APPELLEE

APPELLEE'S BRIEF

I. STATEMENT OF THE ISSUE:

- A. The Rankin County Chancery Court Correctly Ruled that Michael George Shaw was not in Contempt for not Filing a Rule 8.05 Financial Disclosure.**
- B. The Rankin County Chancery Court Correctly Ruled that Michael George Shaw did not Commit Fraud Against the Court or Against Sheila Ann Peninger Shaw.**
- C. The Rankin County Chancery Court Correctly Ruled that Michael George Shaw did not Fraudulently Conceal the Cause of Action.**

II. STATEMENT OF THE CASE:

A. NATURE OF THE CASE

This civil action comes before this Honorable Court upon a Motion for Contempt and Modification, hereafter referred to as the ("MOTION"), filed herein in the Rankin County Chancery Court by Sheila Ann Peninger Shaw ("Sheila") against Michael George Shaw ("Michael"), and in particular: (1) requesting that the Property Settlement

Agreement entered herein on February 05, 1998, be set aside; (2) requesting that Michael be required to file a complete and accurate financial statement; and, (3) requesting that Sheila be awarded an equitable division of this marital property, together with interest from the date of the Judgment of Divorce. Upon his review of the evidence presented at the hearing in this matter and the briefs submitted by both parties herein, the Chancellor herein, The Honorable Thomas L. Zebert, found in favor of Michael George Shaw on all counts.

B. COURSE OF THE PROCEEDINGS:

1. This civil action was heard on May 12, 2006, whereupon The Honorable Thomas L. Zebert heard testimony from both parties concerning the Motion filed herein on October 24, 2005, by Sheila against Michael. Sheila carried the burden of going forward and began presenting witnesses and documentary evidence. On May 12, 2006, Sheila put on the following witnesses:
 - a. Michael as an adverse witness; and,
 - b. Connie Jones (Michael's former attorney who represented him during the divorce action), who testified and was subsequently cross-examined; and,
 - c. Sheila, who testified on her own behalf and was subsequently cross-examined.
2. Following the testimony of the above witnesses upon Sheila's Motion, the Honorable Thomas L. Zebert instructed both attorneys to submit

briefs instructing Your Honor on the law with regard to: (1) whether the testimony and evidence introduced at the hearing on May 12, 2006, shows by a clear and convincing evidence standard that Michael's failure to file a Rule 8.05 Financial Statement with this Court in the original divorce action perpetrated a fraud on this Honorable Court; and, (2) how the 8-year period of time between the entry of the Final Judgment of Divorce, per the terms and conditions set forth in the Property Settlement Agreement attached thereto, and the filing of this Motion has affected the rights of the parties to bring this action with regard to the (a) statute of limitations, (b) contract law, and (c) availability to modify a Property Settlement Agreement.

3. Upon Judge Zebert's review of the respective briefs of both parties, Judge Zebert entered the Court's Findings of Fact and Conclusions of Law, finding in favor of Michael George Shaw on all counts.

C. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW.

1. On March 22, 1996, Sheila filed a Complaint for Divorce in the Chancery Court of Rankin County, Mississippi.
2. Michael completed a draft copy of his 8.05 Financial Statement and furnished an unsigned copy of said 8.05 Financial Statement to counsel for Sheila.

3. The parties subsequently reached an agreement for the division of marital property and payment of child support, child custody, etc., pursuant to a Property Settlement Agreement.
4. Said Property Settlement Agreement was duly signed and acknowledged by both parties, signed by both attorneys of record, and was subsequently entered herein on February 5, 1998, as a part and parcel of the Final Judgment of Divorce.
5. On March 15, 2005, Michael filed a Petition for Modification of Former Judgment of Divorce, seeking to reduce his child support obligations and terminating his obligation to provide health insurance for the minor children, as he had encountered a material change in circumstances as same pertained to his income, and allegations that Sheila had enrolled the parties' minor children through the insurance program offered by the State of Mississippi, *i.e.*, CHIPS/Medicaid.
6. Whereupon Michael's Motion for Modification was denied by the Chancery Court of Rankin County, Mississippi.
7. On October 24, 2005, Sheila filed a Motion for Contempt and Modification against Michael, wherein she prayed for the Court to equitably divide the alleged "undisclosed" marital property (Penske 401K).

8. Upon a trial in this action and the submission of a brief by both respective parties, the Honorable Chancellor Thomas L. Zebert found as follows: (a) Michael did not commit fraud against either this Court or Sheila; (b) the statute of limitations had expired with regard to Sheila's claim for modification of the Property Settlement Agreement; and (c) Sheila's request for modification was in the nature of marital property and assets and was, therefore, non-modifiable.
9. Whereupon Sheila filed her Notice of Appeal with the Supreme Court of the State of Mississippi.

III. SUMMARY OF THE ARGUMENT

Michael responds to the allegations made herein by Sheila in her Appellant's brief alleging that the Chancery Court of Rankin County, Mississippi, erred in the following respects: 1) in not finding Michael in contempt of Court for his failure to file an 8.05 financial disclosure statement, and awarding the appropriate sanctions to Sheila; 2) in not finding that Michael committed fraud against the Court and/or Sheila; and, 3) in not finding that Michael had fraudulently concealed the cause of action from Sheila.

A finding of contempt against Michael herein requires that this Court differentiate between *fraud against a party* and/or *fraud against the Court*. Herein Sheila alleges that Michael is in contempt for failing to file a Rule 8.05 Financial Statement and further alleges that his failure to disclose same constitutes both fraud against her and the Court. The Supreme Court defined the elements of fraud as follows: "**There must be clear and**

convincing evidence that shows a representation, its falsity, its materiality, the speaker's knowledge of its falsity or ignorance of the truth, the speaker's intent that it should be acted upon by the other party and in the manner reasonably contemplated, the hearer's ignorance of its falsity, the hearer's reliance on the truth, his right to relay and his consequent and proximate injury. *Stringfellow vs. Stringfellow*, 451 So.2d 219 at 221. Under this relevant case law, Michael asserts, based on information and belief, that he did not commit fraud against the Court and/or Sheila.

Further, The Court of Appeals in *Brown vs. Johnson*, addressed the failure of a party to disclose assets in both answers to the discovery requests and the Rule 8.05 Financial Statement. The Court of Appeals determined, “[S]uch allegations are in the nature of claims of fraud against a party to the proceeding rather than the kind of fundamental interference with the administration of the justice system that would amount to the more serious and more narrowly defined fraud upon the court.” *Brown vs. Johnson*, 822 So.2d 1072 at 1073 (COA 2002). The Mississippi Court of Appeals further stated in *Brown*, “Fraud on the Court...is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statement or perjury. It has been held that allegation of nondisclosure in pretrial discovery will not support an action for fraud on the Court. It is thus fraud where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function—thus where the impartial functions of the Court have been directly corrupted.” *Brown vs. Johnson*, 822 So.2d 1072 at 1073 (COA 2002). Michael asserts that

if the Court finds that any fraud exists, then it is in the nature of fraud against Sheila and not fraud upon the Court.

Further Michael asserts that Sheila filed her Motion outside the relevant statute of limitations. Fraud against a party, governed by the statute of limitations as set out in Rule 60(b)(1), states: **“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) fraud, misrepresentation, or other misconduct of an adverse party...[t]he motion shall be made within a reasonable time and for reasons (1),(2) and (3) not more than six (6)months after the judgment, order, or proceeding was entered or taken.”** *M.R.C.P. Rule 60*. The Final Judgment of Divorce was entered herein on February 05, 1998; therefore if this action is in the nature of fraud against a party, the statute of limitations expired on or about August 05, 1998. Mississippi statute provides **“[A]n action founded on a domestic judgment or decree rendered by any court of record in this state, shall be brought within seven (7) years next after the rendition of such judgment or decree, and not after, and an execution shall not issue on any judgment or decree after seven years form the date of the judgment or decree.”** *Miss. Code Ann § 15-1-43* (1972, as amended).

Michael further asserts that the property settlement agreement entered into by both parties is non-modifiable under Mississippi Law with respect to property division. **“A true and genuine property settlement agreement is no different from any other contract.** The mere fact that it is between a divorcing husband and wife, and incorporated in a divorce

decree, does not change nor alter its character.” *East v. East*, 493 So.2d 927, 932 (Miss. 1986); and, *In re Estate of Kennington*, 204 So.2d 444, 449 (Miss 1967). Agreements created in the process of the termination of the marriage by divorce are contracts, “[M]ade by the parties, upon consideration acceptable to each of them, and the law will enforce.” *McManus v. Howard*, 569 So.2d 1213, 1215 (Miss 1990); and, *Hopson v. Hopson*, 851 So.2d 397 (Miss COA 2003). Therefore, Michael contends the said Property Settlement Agreement entered into by Sheila and Michael constitutes a valid enforceable contract between them.

In the case of *HeartSouth, PLLC vs. Boyd*, 865 So.2d 1095 (Miss 2003), “The Supreme Court’s analysis when confronted with a contract is three-tiered.” **“First, the Court will attempt to ascertain intent by examining the language contained within the ‘four corners’ of the instrument in dispute.”** *Pursue Energy Corp. v. Perkins*, 558 So.2d 349 (Miss.1990) (citing *Pfisterer v. Noble*, 320 So.2d 383, 384 [Miss.1975]). **Second, “[i]f examination solely of the language within the instrument’s four corners does not yield a clear understanding of the parties’ intent, the court will [implement]...applicable ‘canons’ of construction.”** *Pursue Energy Corp.*, 558 So.2d at 352, (citing *Clark v. Carter*, 351 So.2d 1333, 1334 & 1336 [Miss.1977]). **Third, “if intent remains unascertainable (i.e., the instrument is still considered ambiguous), then the court may resort to [the]...consideration of extrinsic or parol evidence.”** *Pursue Energy Corp.*, 558 So.2d at 353. The property settlement agreement entered into by both parties clearly stated that both parties waived any and all claims to any IRA, pension plans, retirement plans, etc. Therefore

under Mississippi Contract Law, Michael asserts that Sheila waived any and all present and future rights to any pension, IRA or retirement fund that he might possess.

The Supreme Court provided in Stone vs. Stone, 385 So.2d 610 at 612 (Miss. 1980) that provisions with regard to child and espousal support were modifiable by the Court system, even though property settlement agreements are typically contractual in nature and non-modifiable. Barton vs. Barton, 790 So.2d 169 at 172 (Miss. 2001). A 401(K) is marital property that is subject to equitable division by the chancellor. Godson vs. Godson, 816 So.2d 420 (Miss. App. 2002). Michael takes the position that his 401(K) was marital property (for which Sheila had full knowledge of and previously disclaimed her rights to, as evidenced by her signature on the Property Settlement Agreement, and therefore, since the parties' divorce was granted over seven (7) years ago, this issue is not subject to modification. Therefore it is our position that said Property Settlement Agreement entered herein on February 05, 1998, is non-modifiable with respect to the 401(K) retirement plan because said retirement plan is in the nature of a marital asset, which the parties previously contracted to divide.

IV. ARGUMENT

A. **The Rankin County Chancery Court Correctly Ruled that Michael George Shaw was not in Contempt for his Failure to File a Rule 8.05 Financial Disclosure.**

Sheila alleges in her brief that Michael committed fraud against both her and the Court by failing to disclose his 401(K) retirement plan. Michael responds to her allegations and asserts that a finding of contempt against him would first require this Court to bifurcate two (2) issues: 1) Whether Michael's failure to file a Rule 8.05 Financial Statement constitutes

fraud against Sheila; and, 2) Whether Michael's failure to file a Rule 8.05 Financial Statement constitutes fraud against the Court. These two (2) issues, although used interchangeably throughout this case, require differing elements of proof and further are governed by differing statutes of limitations.

In examining the relevant facts to determine if fraud has been committed in this action, at the hearing on Sheila's Motion for Contempt and Modification filed against Michael, Sheila testified, under oath, that she had, in truth and in fact, received and reviewed a copy of Michael's Rule 8.05 financial statement (unsigned) wherein Michael had indicated, under the subsection entitled "monthly deductions," that a deduction from his payroll check in the amount of \$209.15, was withheld from his monthly paycheck. On the copy of the Rule 8.05 Financial Affidavit provided by Michael to Sheila, Michael had interlined thereon the exact words, "401 retirement (my option);" however Sheila further testified that despite reviewing this Rule 8.05 Financial Affidavit, she failed to recognize this deduction as a 401(K) retirement plan as the notation thereon did not contain the letter "K" as a part of the "401." *Record at 52: 13-23.* To further dispute Sheila's allegations that she knew nothing of Michael's retirement account, she testified that she signed the parties' joint income tax returns for the years 1995 and 1996—which clearly gave the parties a tax deduction associated with this said retirement account. In fact, when the 1995 joint tax return was completed by the tax preparer for and on behalf of the parties, there was a written statement therein from the tax preparer, indicating that all tax information used in the preparation of the said tax return had been obtained by him from Sheila. *Record at 57:10-19; 57:8- 67:23.* Given the above

referenced facts, Michael asserts that the Rankin County Chancery Court was correct in finding that he did not commit fraud against either Sheila or the Court.

The Supreme Court defined the elements of fraud as follows, **“There must be clear and convincing evidence that shows a representations, its falsity, its materiality, the speaker’s knowledge of its falsity or ignorance of the truth, the speaker’s intent that it should be acted upon by the other party and in the manner reasonably contemplated, the hearer’s ignorance of its falsity, the hearer’s reliance on the truth, his right to relay and his consequent and proximate injury.** *Stringfellow vs. Stringfellow*, 451 So.2d 219 at 221. Michael alleged, and Sheila acknowledged, that Michael did, in fact, provide to Sheila for her review an unsigned copy of his Rule 8.05 Financial Statement (a copy of which was provided to this Court through the designation of the record). As set out above, and to reiterate to this Honorable Court, Michael, in his own handwriting on Page 2 of the unsigned Rule 8.05 Financial Affidavit, wrote “401 retirement (my option)” under the “Itemized Monthly Deductions” section therein, interlined out beside Item Number 4 entitled “Mandatory Insurance.” In the amount column, Michael indicated the monthly deduction of \$209.15, clearly setting out and indicating that the sum of \$209.15, per month, was deducted from his paycheck and applied toward a retirement plan offered through his employer. During the marriage of the parties, Sheila had full access to any and all of their financial information (via tax return information, paycheck stubs, etc.), as well as during the parties’ separation phase pending the finalization of their divorce, she again had access to this financial information when she was provided with an unsigned copy of Michael’s Rule 8.05 Financial

Affidavit—which evidenced same. And despite Sheila’s testimony that she failed to recognize the deduction listed on Michael’s Rule 8.05 Financial Affidavit as not being a retirement account because it lacked the letter “K” thereon, she had employed an attorney to represent her interest in their divorce action, who certainly could have explained the document to her if she had questions concerning same. Further, there was ample opportunity for Sheila to petition the Court for any such additional information regarding Michael’s financial matters if she deemed any of his financial information to be incomplete or inaccurate. It is difficult to comprehend that one spouse could be held liable for the ignorance of the other. Likewise, Michael asserts that the Chancery Court of Rankin County correctly ruled that he did not commit fraud upon either Sheila or the Court.

In further responding to Sheila’s allegations, The Court of Appeals in *Brown vs. Johnson*, addressed the failure of a party to disclose assets in both answers to the discovery requests and Rule 8.05 Financial Statement. The Court of Appeals determined, “[S]uch **allegations are in the nature of claims of fraud against a party to the proceeding rather than the kind of fundamental interference with the administration of the justice system that would amount to the more serious and more narrowly defined fraud upon the court.**” *Brown vs. Johnson*, 822 So.2d 1072 at 1073 (COA 2002). The Mississippi Court of Appeals further stated in *Brown*, “**Fraud on the Court...is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statement or perjury.** It has been held that allegation of nondisclosure in pretrial discovery will not support an action for fraud on the Court. It is thus fraud where the

court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function—thus where the impartial functions of the Court have been directly corrupted.” *Brown vs. Johnson*, 822 So.2d 1072 at 1073 (COA 2002). This action directly deals with pretrial discovery or Sheila’s allegation of the lack thereof. Sheila alleges that Michael committed fraud against this Court by failing to disclose his 401(K) retirement in both his Rule 8.05 Financial Statement and his answers to Interrogatories. The above referenced case clearly states that fraud against the Court is not based on fraudulent documents or fraud between the parties. *Id.* at 1073. Sheila alleges in her Petition that Michael failed to accurately depict his financial information on his Rule 8.05 Financial Statement and again in his answers to Interrogatories. This allegation essentially states that Michael’s 8.05 Financial Statement and answers to Interrogatories as presented to her in their original form are fraudulent documents. According to the case law set forth above, the evidence does not show by a clear and convincing standard that Michael committed fraud upon this Honorable Court. According to the reasoning of the Court of Appeals under the case of *Brown*, fraudulent documents and other attempted fraud with respect to the opposite party should be in the nature of fraud against a party, rather than fraud against the Court. Clearly given the above case law, there is no fraud against the Court because this matter was settled outside of the presence of the Court, and was entered herein, jointly by both parties, as a divorce on the ground of *Irreconcilable Differences*; therefore, the remaining issue for which this Court should address is whether fraud against a party exists under the

reasoning set forth in the case of *Brown*. *Brown vs. Johnson*, 822 So.2d 1072 at 1073 (COA 2002).

In the case of *Kalman vs. Kalman*, the Mississippi Court of Appeals held, “**Uniform Chancery Court Rule 8.05 requires a detailed and truthful disclosure of both parties finances. Under the plain language of this Rule, the 8.05 disclosure is mandatory unless “excused by Order of the Court for good cause.”** *Kalman vs. Kalman*, 905 So.2d 760 at 764 (COA 2004). The Court of Appeals further states, “**[E]ach party in every domestic case involving economic issues and/or property division shall provide the opposite party or counsel, if known [enumerated financial disclosure.]**” In the present case, although Michael did not file his Rule 8.05 Financial Statement with the Court, he did provide Sheila with his Rule 8.05 Financial Statement (which she acknowledged in her testimony as receiving and reviewing), in compliance with the requirements the Court of Appeals set forth in *Kalman*. *Id.* Sheila had access to Michael’s Rule 8.05 Financial Statement that was furnished to her by him, and she even introduced the said Rule 8.05 Financial Statement as Plaintiff’s Exhibit “1.” It is not Michael’s responsibility to make sure that Sheila adequately reviewed his Rule 8.05 Financial Statement, nor is it his responsibility to make certain that she understood same. Therefore, Michael asserts that the Rankin County Chancery Court correctly ruled that he committed NO fraud against the Court and/or Sheila.

Michael further alleges that he is not in contempt of Court, as Sheila’s action was filed outside of the relevant Statute of Limitations; therefore, same should be dismissed. Fraud against a party is governed by the statute of limitations set out in Rule 60(b)(1) which states,

“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) fraud, misrepresentation, or other misconduct of an adverse party...[t]he motion shall be made within a reasonable time and for reasons (1),(2) and (3) not more than six (6)months after the judgment, order, or proceeding was entered or taken.” *M.R.C.P. Rule 60.* The Final Judgment of Divorce was entered herein on February 05, 1998; therefore if this action is in the nature of fraud against a party, the statute of limitations expired on or about August 05, 1998.

Further, Mississippi statute provides **“[A]n action founded on a domestic judgment or decree rendered by any court of record in this state, shall be brought within seven (7) years next after the rendition of such judgment or decree, and not after, and an execution shall not issue on any judgment or decree after seven years form the date of the judgment or decree.”** *Miss. Code Ann § 15-1-43* (1972, as amended) This statute provides a “catch all” seven (7) year statute of limitations for any and all decrees, judgments or orders in domestic cases. In the case at hand, even under the broad language of this statute, the statute of limitations expired on February 5, 2005, and this action was not timely filed with this Court until eight (8) months later in October of 2005.

Michael further asserts that he is not in contempt of this Court as Sheila is not entitled to a modification of the property settlement agreement with regard to marital assets and property division, as said agreement is a valid enforceable contract between the parties herein, and is further non-modifiable by the Court. “A true and genuine property settlement

agreement is no different from any other **contract**.” *East v. East*, 493 So.2d 927, 932 (Miss. 1986); and, *In re Estate of Kennington*, 204 So.2d 444,449 (Miss 1967). The mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change nor alter its character. *Id.* Agreements created in the process of the termination of the marriage by divorce are contracts, “made by the parties, upon consideration acceptable to each of them, and the law will enforce.” *McManus v. Howard*, 569 So.2d 1213, 1215 (Miss 1990); and, *Hopson v. Hopson*, 851 So.2d 397 (Miss COA 2003). Therefore, the said Property Settlement Agreement entered into by Sheila and Michael constitutes a valid enforceable contract between these parties.

In the case of *HeartSouth, PLLC vs. Boyd*, 865 So.2d 1095 (Miss 2003), “The Supreme Court’s analysis when confronted with a contract is three-tiered.” “First, the Court will attempt to ascertain intent by examining the language contained within the ‘four corners’ of the instrument in dispute.” *Pursue Energy Corp. v. Perkins*, 558 So.2d 349 (Miss.1990) (citing *Pfisterer v. Noble*, 320 So.2d 383, 384 [Miss.1975]). Second, “[i]f examination solely of the language within the instrument’s four corners does not yield a clear understanding of the parties’ intent, the court will [implement]...applicable ‘canons’ of construction.” *Pursue Energy Corp.*, 558 So.2d at 352, (citing *Clark v. Carter*, 351 So.2d 1333, 1334 & 1336 [Miss.1977]). Third, “if intent remains unascertainable (*i.e.*, the instrument is still considered ambiguous), then the court may resort to [the]...consideration of extrinsic or parol evidence.” *Pursue Energy Corp.*, 558 So.2d at 353. To determine whether the said Property Settlement Agreement constitutes an express agreement to relinquish any right that either of the parties

might have at the time they entered into a Property Settlement Agreement between themselves, we must apply the Supreme Court's three-tiered approach to a contract. The first application requires an examination of the language contained in paragraph 3 of the said Property Settlement Agreement in the instant case, which states, "**to relinquish any claim that they might now have, or may have had in the future, against any...IRA accounts, pension funds, retirement funds...**" The language clearly states that the parties have contracted and agreed to give up any and all present and future rights that either might have against *any* retirement, pension or IRA that either party might hold. This language provides a clear understanding of the agreement duly signed and acknowledged by both parties. The parties again agreed in paragraph 22(A) of the said Property Settlement Agreement, which states, "**Subject to the provisions of this agreement, each party has remised, released, and forever discharged, and by these presents does for himself or herself and his or her heirs, legal representative, executors, administrators, and assigns, release and forever discharge the other of and from all causes of action, claims, rights or demands whatsoever, at law or in equity, which either of the parties hereto ever had or now has against the other, except any or all causes of action for divorce or separation now pending or hereafter sought by the other**" and the parties state in Paragraph 22(B), "**Each party releases, waives and relinquishes any and all rights which he or she may now have or may have in the future.**" Since the language of the said Property Settlement Agreement provides a clear understanding based on that language alone, it is not necessary to move to the second tier of the Court's analysis. Therefore, under contract law, Sheila waived any and

all present and future rights to any pension, IRA or retirement fund that Michael might possess.

The Supreme Court provided in *Stone vs. Stone*, 385 So.2d 610 at 612 (Miss. 1980) that provisions with regard to child and espousal support were modifiable by the Court system, even though property settlement agreements are typically contractual in nature and non-modifiable. *Barton vs. Barton*, 790 So.2d 169 at 172 (Miss. 2001). A 401(K) is marital property that is subject to equitable division by the chancellor. *Godson vs. Godson*, 816 So.2d 420 (Miss. App. 2002). As marital property, Michael's 401(K) is not in the nature of support for their children or for Sheila, but merely to equitably distribute the parties' marital assets. Therefore it is our position that said Property Settlement Agreement entered herein on February 05, 1998, is non-modifiable with respect to the 401(K) retirement plan because said retirement plan is in the nature of a marital asset, which the parties previously contracted to divide their marital assets, including said 401(K) retirement plan.

B. The Rankin County Chancery Court Correctly Ruled that Michael George Shaw did not Commit Fraud Against the Court or Against Sheila Ann Peninger Shaw.

As set out above, the Mississippi Court of Appeals stated in *Brown*, "**Fraud on the Court...is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statement or perjury.** It has been held that allegation of nondisclosure in pretrial discovery will not support an action for fraud on the Court. It is thus fraud where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial

function—thus where the impartial functions of the Court have been directly corrupted.”

Brown vs. Johnson, 822 So.2d 1072 at 1073 (COA 2002). This action directly deals with pretrial discovery or Sheila’s allegation of the lack thereof. Sheila alleges that Michael committed fraud against this Court by failing to disclose his 401(K) in both his Rule 8.05 Financial Statement and his answers to Interrogatories. The above referenced case clearly states that fraud against the Court is not based on fraudulent documents or fraud between the parties. *Id.* at 1073. According to the case law in *Brown* set forth above, the evidence does not show by a clear and convincing standard that Michael committed fraud upon this Honorable Court. *Id.*

Fraud against a party is defined by the Court of Appeals in Brown vs. Johnson, addressing the failure of a party to disclose assets in both answers to the discovery requests and Rule 8.05 Financial Statement. The Court of Appeals determined, “[S]uch allegations are in the nature of claims of fraud against a party to the proceeding rather than the kind of fundamental interference with the administration of the justice system that would amount to the more serious and more narrowly defined fraud upon the court.”

Brown vs. Johnson, 822 So.2d 1072 at 1073 (COA 2002). Our case was settled outside of the presence of the Court and was entered herein as a divorce on the grounds of *Irreconcilable Differences*. If there is any fraud to be found, according to the law set forth above, it must be examined as fraud against a party and not that of fraud against the Court. The Supreme Court defined the elements of Fraud as follows, “**There must be clear and convincing evidence that shows a representations, its falsity, its materiality, the speaker’s knowledge of its**

falsity or ignorance of the truth, the speaker's intent that it should be acted upon by the other party and in the manner reasonably contemplated, the hearer's ignorance of its falsity, the hearer's reliance on the truth, his right to relay and his consequent and proximate injury. *Stringfellow vs. Stringfellow*, 451 So.2d 219 at 221. Michael completed a Rule 8.05 Financial Statement (a copy of which is contained in the designation of record previously presented to this Honorable Court), and he submitted an unsigned copy to Sheila for her review and that of her attorney.

In the case of *Kalman vs. Kalman*, the Mississippi Court of Appeals held, “**Uniform Chancery Court Rule 8.05 requires a detailed and truthful disclosure of both parties finances. Under the plain language of this Rule, the 8.05 disclosure is mandatory unless “excused by Order of the Court for good cause.”** *Kalman vs. Kalman*, 905 So.2d 760 at 764 (COA 2004). The Court of Appeals further states, “**[E]ach party in every domestic case involving economic issues and/or property division shall provide the opposite party or counsel, if known [enumerated financial disclosure.]**” In the case at hand, although Michael did not file his Rule 8.05 Financial Statement with the Court, he did, however, provide Sheila with an unsigned copy of same, in compliance with the requirements set forth by the Court of Appeals in *Kalman. Id.* Therefore, it is Michael's assertion that the Rankin County Chancery Court correctly ruled that he did not commit fraud against the Court or Sheila by failing to file a Rule 8.05 Financial Statement with the Court.

C. The Rankin County Chancery Court Correctly Ruled that Michael George Shaw did not Fraudulently Conceal the Cause of Action.

Michael did not attempt to conceal his 401(K) with Penske Trucking. If Michael intended to conceal this information from Sheila, he would not have listed the monthly deduction of \$209.15 and referenced in his own handwriting 401(K) on his Rule 8.05 Financial Statement. Both Sheila and her counsel of record had ample opportunity to examine this Rule 8.05 Financial Statement and the pay stubs of Michael before entering into a Property Settlement Agreement, which specifically waived both parties' rights to any pension, IRAs, etc., belonging to the other. If Sheila (or her attorney) had any question with regard to the unsigned copy of Michael's Rule 8.05 Financial Statement, said question(s) should have been addressed by either of them prior to the parties entering into said Property Settlement Agreement and jointly consenting to the entry of a divorce on the sole ground of Irreconcilable Differences. Based on the relevant facts and legal argument set forth in the preceding paragraphs, the Rankin County Chancery Court correctly ruled that Michael did not fraudulently conceal the cause of action.

V. CONCLUSION


The Ruling of the Chancery Court of Rankin County, Mississippi, should be affirmed and upheld by this Honorable Court based on the relevant facts and Mississippi Law showing that Michael did not commit fraud against either this Honorable Court or Sheila, and that the statute of limitations has expired with regard to Sheila's claim for modification of the Property Settlement Agreement. Further, this Honorable Court should find that Sheila's request for

modification is in the nature of marital property and assets and is therefore non-modifiable by this Honorable Court.

DATED this the 16th day of March 2007.

RESPECTFULLY SUBMITTED,

MICHAEL GEORGE SHAW, APPELLEE



J. EDWARD RAINER and LORA S. GIPSON
Attorneys for Michael George Shaw

CERTIFICATE OF SERVICE

The undersigned does hereby certify that she has this the 7th day of March caused to be mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Appellee's Brief to:

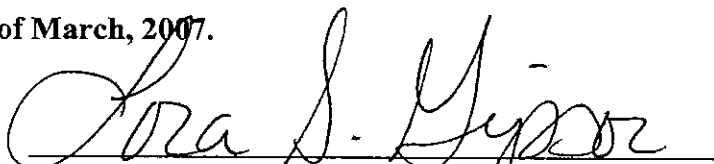
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And

Honorable Thomas L. Zebert, *Chancellor* [Retired]
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DATED, this the 16th day of March, 2007.


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