IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES MALCOLM HARRIS, JR.	**PLAINTIFF/APPELLANT**
V.	**No. 2007-CA-00873**
KIMBROUGHLY (ELAM) HARRIS	**DEFENDANT/APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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 justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. James Malcolm Harris, Jr., Appellant
2. Kimbroughly (Elam) Harris, Appellee
3. Malenda Meacham, Attorney for Appellant
4. Anne Jackson, Attorney for Appellant
5. Martin Zummach, Attorney for Appellee
6. Chancellor Mitchell Lundy of the DeSoto County Chancery Court

Malenda Meacham
Attorney for Appellant

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STATEMENT OF THE ISSUES

Whether the Chancellor erred in interpreting the parties' property settlement agreement and prorating the taxes in a manner requiring James M. Harris, Jr. to pay nearly all the taxes on the property acquired by Kimbroughly Harris under the agreement.

STATEMENT OF THE CASE

During the later part of pendency of the parties divorce proceedings, there was a temporary order under which James M. Harris, Jr. was ordered to pay the property taxes, insurance and maintenance on the Oakwood Lane property which was part of the property to be divided in the divorce proceedings. The parties entered into a Property, Child Support and Child Custody Agreement on December 19, 2006 as a prerequisite to obtaining an irreconcilable differences divorce on December 20, 2006. In late January of 2007, Kimbroughly Harris demanded that her ex-husband, James M. Harris, Jr., pay the property tax bill due before February 1, 2007 on the real property transferred to her under the property settlement agreement incorporated into the divorce decree. When he refused to pay on the grounds that the taxes did not become due until after the agreement became effective and that Kimbroughly had expressly assumed liability for the taxes in the property settlement agreement as a debt on the property transferred to her, she filed a motion for contempt of the temporary order on February 20, 2007. After a hearing on April 10, 2007, the Chancellor issued a judgment finding that James M. Harris, Jr. did not willfully violate a Court order, that the property agreement was ambiguous and ordering that the taxes be prorated to the date of the divorce with James M. Harris, Jr. being responsible for the amount prorated for January 1, 2006 to January 20, 2006. Mr. Harris timely filed his notice of appeal of that judgment.

STATEMENT OF FACTS

The facts in this case are not in dispute. James M. Harris, Jr. (James) and Kimbroughly (Elam) Harris (Kimbroughly) were married on October 23, 1982. (CP[1] 18) James filed for divorce on February 15, 2006. (CP 3, RE 1)

After a hearing, the Chancellor entered a temporary order, on August 30, 2006 nunc pro tunc to June 29, 2006, regarding certain issues pertaining to custody, support for Kimbroughly and property. (Exhibit 2, RE 14-15) Paragraph 4 of the temporary order stated in pertinent part:

> 4. That the Plaintiff, James Harris, has indicated in his testimony that he is willing to be responsible for, hence the court orders that he will continue to be responsible for, the following:
> - reasonable maintenance associated with the marital home at 8935 Oakwood Lane, Olive Branch, MS 38654, including taxes and insurance and care for the pool and grounds.

(Exhibit 2; RE 15)

On December 12, 2006, the tax collector for DeSoto County mailed a tax statement to 8935 Oakwood Lane, Olive Branch, MS 38654. The only due date on the statement stated that taxes were delinquent if not paid by February 1, 2007. An employee from the tax assessor's office testified that in her training she had been taught the taxes were due January 1, 2007 and delinquent if not paid by February 1, 2007. (T. 13-15; Exhibit 1; RE 13) Kimbroughly testified she received it at that address shortly after it was mailed out but she wasn't exactly sure when she got it. She said delivered the statement to the person at the front desk at James' business approximately two days after she received it, probably around December 17, 2006. (T 39-40, 43)

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[1]This brief refers to the record by the following abbreviations: CP = Clerks Papers, T = Transcript of the hearing, and RE = Appellant's Record Excerpts.

On December 19, 2006, James and Kimbroughly met with their attorneys in a settlement conference and agreed to the terms of a Property, Child Support and Child Custody Agreement. Kimbroughly does not know whether James actually received the tax statement prior to this conference. The agreement was signed, executed, delivered and acknowledged by both James and Kimbroughly on December 19, 2006 before a notary. It which was filed with the Chancery Court on December 20, 2006 as a prerequisite to obtaining an irreconcilable differences divorce. (Exhibit 3, RE 16-32) In regard to division of property and support for Kimbroughly, the agreement provided:

> 14. REAL ESTATE CONVEY. Husband agrees that Wife shall have exclusive use, title and possession of the parties property located at 8935 Oakwood Lane, Olive Branch, MS 38654, described as follows:
>
> *See attached Exhibit A*
>
> Husband further agrees to execute and deliver to Wife any and all deeds and instruments necessary to convey title of said real estate to Wife. Wife agrees to assume liability for all debts on the aforesaid property.[2] ...
>
> 16. DEBTS. The parties agree that the Husband shall be responsible for any and all marital debt accumulated during the marriage. ...
>
> 26. RELEASE. Other than the obligations, agreements and commitments contained in this instrument, the parties hereto mutually release and forever discharge each other of them ever had, now have, or which he or she may here after have against each other or against the estate of the other by reason of any matter, cause or thing prior to the execution of this agreement, it being the manifest intention hereto that henceforth there shall be between them only such rights and obligations as are specifically provided or reserved in this agreement. ...
>
> D. It is further agreed and understood by and between the parties that this is a full and complete contract and division of the same may be submitted to the Court of proper venue and jurisdiction for approval or disapproval by decree or otherwise. ... It is mutually understood and agreed between the parties that this contract shall take effect immediately ... .

(Exhibit 3; RE 25, 26, 29, 30) The portions of Paragraph 14 regarding assumption of debts on the property was drafted by Kimbroughly's attorney. (T. 48)

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[2]Kimbroughly testified that she did read paragraph 14 and she did agree to assume all liabilities on the property although she did not give the provision a lot of thought. (T. 44-45)

This agreement was approved by the Chancery Court and incorporated into a decree of divorce the day after it was signed and the day it was filed, December 20, 2006. (Exhibit 3, RE 16-32)

On January 2, 2007, James executed a quit claim deed as required by the agreement to confirm title to the property in Kimbroughly. (Exhibit 4, RE 33, T 23) Near the end of January, Kimbroughly went to James' office to pick up the first one hundred thousand dollar ($100,000.00) installment on the settlement required by the agreement and designated as lump sum alimony. When she picked up the installment check, the property tax statement was returned to her. (T 25-26, 40-41)

On January 26, 2007, Kimbroughly's attorney demanded that James pay the 2006 property taxes on the real property conveyed to Kimbroughly. (CP 33) On February 20, 2007, Kimbroughly filed a petition for contempt based on James' failure to pay the 2006 property taxes on the property conveyed to Kimbroughly. (CP 10-11)

SUMMARY OF ARGUMENT

Early in his explanation of his reasons for ruling the way he did, the Chancellor stated that if he had been mediating the settlement between the parties, he would have suggested that they split the 2006 taxes because that would have probably been the fair way to settle it. He then said that as he could not talk to the parties and mediate a settlement, he was called upon to decide who had to pay the bill. But in reality, he did what he said he would have done in mediation, i.e., what he thought was fair. He ruled the taxes should be prorated or split between the parties as of the date of the divorce because it was a marital debt. But he was not called upon to mediate the payment of the tax bill or to decide what the parities should a have agreed to in fairness or even to make an equitable distribution of the property tax debt. He was called upon to interpret and

enforce the property settlement agreement as a contract.

But the Chancellor did not interpret or enforce the property settlement agreement as a contract. He did not apply the plain meaning of the language of the contract or the rules of contract interpretation. Nothing in the contract could be viewed as agreeing to a proration of any debt, whether it was debt on the Oakwood Lane property or marital debt. The plain words of the contract called for Kimbroughly to assume the totality of any debt on the Oakwood Lane property, which the Chancellor should have enforced. As to marital property, it called for James to assume the entirety of the marital debt not otherwise specifically addressed. Since nothing in the contract supports the result reached by the Chancellor prorating the taxes, his decision is both based on errors of law and manifestly unsupported by the evidence. Accordingly, his ruling should be reversed.

ARGUMENT

I. Standard of Review

While appellate Courts will not disturb a chancellor's factual findings unless they are manifestly wrong, unsupported by credible evidence, or the chancellor applied an erroneous legal standard, issues or conclusions of law are reviewed under the de novo standard. Interpretation of property settlement agreements incorporated into divorce decrees are issues of contract interpretation which are issues of law subject to de novo review. *Mason v. Mason*, 919 So. 2d 200, ¶ 7 (Miss. Ct. App. 2005).

II. Kimbroughly Was Responsible for the 2006 Taxes Under the Property Settlement Agreement Incorporated into the Divorce Decree

A property settlement agreement is a contract to be interpreted like any other contract. *Armstrong v. Armstrong*, 836 So. 2d 794 (P10) (Miss. Ct. App. 2002). The Mississippi Supreme

Court has adopted a three-tiered approach to contract interpretation. First, the reviewing Court looks to the language the parties used within the "four corners" of the contract in expressing their agreement. If the Court is unable to obtain a clear understanding of the parties' intent from the words used in the agreement alone, the Court should apply the canons or rules of contract construction. If, and only if, the intent cannot be determined from the language the parties used and the rules of contract, the Court may consider extrinsic or parol evidence. It is only if and when the Court reaches this point without being able to determine the intent of the contract that prior negotiations, agreements and conversations might be considered in determining the parties' intentions in the construction of the contract. *Tupelo Redevelopment Agency v. Abernathy*, 913 So. 2d 278, ¶ 13 (Miss. 2007). This three tiered approach applies to interpretation of property settlement agreements incorporated into divorce decrees in the same manner that it applies to any other contract. *Crisler v. Crisler*, 963 So. 2d 1248, ¶¶ 8-9 (Miss. Ct. App. 2007)

In interpreting an agreement on a particular application of the contract, the Court looks to the contract as a whole in determining the intent of the parties from the language of the contract and the rules of contract construction. *Holloman v. Holloman*, 691 So. 2d 897, 899 (Miss. 1996) While the Court is not bound to accept an absurd construction which no man in his right mind would have agreed to if not compelled by the instruments, the parties are bound to what they promised and agreed to in the written contract. *Crisler* at ¶ 9.

The agreement reached and executed by Kimbroughly and James on December 19, 2006 and incorporated into their divorce decree contains several provisions making it clear that it settled all obligations each owed to the other up to the date of the agreement. In paragraph 26, each released and discharged the other mutually and forever of any obligation

> ever had, now have, or which ... may hereafter have against [the] other ... by

> reason of any matter, cause or thing prior to the execution of this agreement, it being the manifest intention hereto that henceforth there shall be between them only such rights and obligations as are specifically provided or reserved in this agreement. ... (Exhibit 3, RE 29)

Paragraph D near the end of the agreement reiterated the point that no obligations from matters occurring prior to the execution of the property agreement survived the agreement and that the agreement was intended to serve as an immediate accord and satisfaction of all previously arising obligations not carried forward into the property agreement. It stated:

> It is further agreed and understood by and between the parties that this is a full and complete contract ... It is mutually understood and agreed between the parties that this contract shall take effect immediately ... . (Exhibit 3, RE 30)

Any obligations of one party arising from events occurring during the course of the divorce proceeding would be obligations that party had prior to and/or at the time of execution of the property agreement. They would also fall within the phase "any matter, cause or thing." Any obligations James might owe to Kimbroughly as a result of the August 2006 temporary order to pay taxes on the Oakwood Lane property would fall within the phrase "any matter, cause or thing" and would fall within the either the phrases "ever had" and/or "now have." Thus, the contract clearly says that if James owed Kimbroughly anything under the temporary order at the time of settlement and execution of the property agreement, that obligation would be wiped out by the property settlement agreement unless it was "specifically provided or reserved" in the property agreement. There is no specific provision or reservation referring to James' obligation to pay the Oakwood Lane property taxes under the temporary order in the property agreement and stating that the obligation survived and was incorporated into the property agreement. Thus under the plain language of the property agreement, any such obligation was wiped out as part of the accord and satisfaction reached by the agreement.

Furthermore, even if James' obligation under the temporary order were carried forward into some other provision of the agreement as argued by Kimbroughly, Kimbroughly agreed to pay the taxes specifically on the Oakwood Lane property under the terms of paragraph 14. She testified at trial that she did agree to paragraph 14 which contains a provision specifically obligating her to assume any outstanding "liability for all debts on the aforesaid property." By statutory law, taxes are a debt which run with the land. Miss. Code Ann. § 27-35-1(1) (2002) states "taxes shall be a charge upon the land or personal property taxed ... ." It goes on to say that the State and County possess a lien on the land for the taxes which is prior even to the City's lien for property taxes. This statute makes it very clear that property taxes are "debts on" the specific property. Thus, Kimbroughly explicitly agreed to assume the liability for any outstanding taxes on the property as of December 19th and any tax liability which arose thereafter.

Paragraph 14 containing Kimbroughly's agreement to assume liability for any debts on the property is very specific to just the Oakwood Lane property. Thus, it is a far more specific provision than the marital debt provision relied upon by Kimbroughly. One of the canons of contract construction is that specific provisions control over more general inconsistent provisions. *Union Planters Bank, N.A. v. Rogers*, 912 So. 2d 116, ¶ 10 (Miss. 2005) Therefore, paragraph 14 controls over the more general language of paragraph16 on marital debts.

Given the explicit statement in Miss. Code Ann. § 27-35-1(1) that property taxes are a charge upon the land and Kimbroughly's express agreement on December 19, 2006 in paragraph 14 of the agreement to assume any debts on the land which was approved by the Court and incorporated into the divorce decree, there is no ambiguity concerning liability for the property taxes on the Oakwood Lane property. Her attorney, who drafted the language regarding Kimbroughly's assumption of debt on the property as much as admitted to the Chancellor that the

tax bill falls squarely within this provision. He told the Chancellor that when she came to him with the tax bill dispute "I just looked at Ms. Harris, I said 'Sounds like you need to sue me for malpractice.'" (T. 50, lines 6-8)

Moreover, the Chancellor never went through any part of the *Abernathy/ Crider* analysis for interpreting the contract. He never referred in any way to any of the canons of contract construction. He simply declared without analysis of the contract language or the rules of contract construction that the matter was ambiguous because neither party wilfully violated the decree and each honestly believed his or her post divorce interpretation of the agreement. Thus, the Chancellor erred on an issue of law in finding the agreement ambiguous.

Ambiguity is not based on the subjective understandings of the parties after the fact as to what they think they agreed to or disagreements or misunderstandings after the contract was entered into about how it applies in a specific situation. Nor does the fact that each party argues a different interpretation of the contract mean that the contract is ambiguous. The existence or lack of ambiguity must be based on an analysis of the objective evidence, such as the language of the contract, rather than the subjective thoughts and expectations of the parties, which are irrelevant, unless the contract itself is ambiguous. *Caldwell Freight Lines, Inc. v. Lumbermens Mut. Cas. Co.*, 947 So. 2d 948, ¶¶ 38-39 (Miss. 2007)

Even if the agreement were ambiguous, the Chancellor still erred. Ambiguous provisions should be interpreted against the drafter. Since Kimbroughly's attorney drafted the part of ¶ 14 concerning debts on the property, it must be construed against her if it is ambiguous. *Banks v. Banks*, 648 So. 2d 1116, 1121 (Miss. 1994); *Mason* at ¶12. The Chancellor found ambiguity but did not construe this provision against Kimbroughly.

III. James Was Not Responsible For the Taxes Under the Temporary Support Order

Under Miss. Code § 27-41-1, property taxes are "due, payable and collectable" on February 1st of the year following the date of assessment and levying by the tax collector. Under the statute, taxpayers have the option of prepaying after December 26 of the year of assessment, but the statute uses only the February 1st next year language in connection with the due date for taxes. Under the clear language of Miss. Code § 27-41-1, the 2006 taxes were not due until after the property agreement was executed, after the divorce was final, and even after James quit claimed the property to Kimbroughly.

Temporary orders made in the progress of a cause for purposes of sustaining the status quo or for the safety and preservation of property that is the subject of the suit are merged into and are extinguished by the final judgment or decree except for some unusual limited purposes not at issue in this case. *Kimball, Raymond & Co. v. Alcorn & Fisher*, 45 Miss. 145, 148 (1871) The provisions of the temporary order which required James to pay for taxes, insurance, and maintenance on the real property were provisions for the safety and preservation of the property, the division of which was a subject of the suit. Thus, these provisions of the temporary order concerning the property do not survive the final decree, particularly in regard to items not due by statute until after the final decree transferred ownership of the property.

IV. The Chancellor's Decision Was Based on Errors of Law

The Chancellor explained his reasoning behind his order in his discussion with counsel and his ruling from the bench at the end of the hearing. He said he would have agreed with James' counsel in her argument that the provisions of the agreement concerning the Oakwood Land property incorporated in the divorce decree were like a purchase contract for the sale of real estate under which the new owner would be responsible for paying the taxes when they came due

had it not been for the existence of the temporary order which was in effect up to the date of the agreement incorporated in the final decree. But because he considered the terms of the temporary order, which is outside the four corners of the property settlement agreement, he found that the property agreement was not like a contract to convey in regard to the taxes despite Kimbroughly's agreement to pay the debts that were a charge on the property. (T. 48-49)

He erred in looking to the temporary order, which was not even a prior agreement between the parties, in interpreting the meaning of the parties agreement as to how debts between them related to the property would be handled. This was contrary to both the plain language of the agreement and the rules of contract construction. Thus, his ruling was based on errors of law.

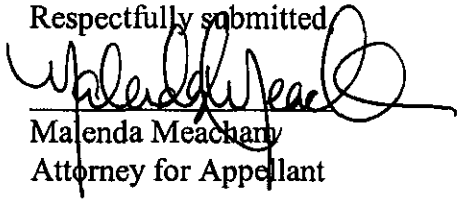
Moreover, if the terms of the temporary order concerning the Oakwood Lane property are to be considered in deciding what the meaning of paragraph 14 of the property settlement agreement is, then the fact that the order only included taxes, maintenance and insurance because there was no mortgage debt on the property must be taken into consideration. It was well known to both parties and both attorneys that there was no mortgage or similar debt on the Oakwood Lane property. The language which Kimbroughly's counsel drafted stating "Wife agrees to assume liability for all debts on the aforesaid property" would be meaningless if it did not refer to matters like taxes and insurance which relate to the property but which are only paid once or twice a year as there were no other kinds of debts on the property for her to assume. It is one of the rules of contract construction that if it can reasonably be done, the construction must be adopted which gives meaning to each phrase and clause considered in light of the circumstances of the parties when they entered into the agreement. *Thornhill v. System Fuels, Inc.*, 523 So. 2d 983, 990 (Miss. 1988). In order to give effect to the clause drafted by Kimbroughly's attorney

under which she was to assume liability for the debts on the Oakwood Lane property, that debt had to include the taxes and insurance James had previously been required to pay under the temporary order which ceased to have effect when the divorce became final and the property agreement became effective prior to the first date mentioned in the statute for payment of 2006 taxes and prior to the due date in the statute and on the notice for payment of the taxes at issue here.

CONCLUSION

This case is a contract interpretation and enforcement case. It is not an equitable division case. The Chancellor failed to apply the law in regard to interpreting contracts and failed to enforce the plain language of the contract. Instead, he prorated the tax debt as he explained he would have recommended to the parties had he been mediating their property settlement agreement. Instead of applying contract law as required by this Court's precedent, he reached his result based on what he thought was fair and equitable as he would have done in an equitable division case. No interpretation of the plain language of the contract could reach the result the Chancellor reached. Accordingly, his ruling should be reversed. As Kimbroughly assumed the tax debt under the plain language of paragraph 14, James respectfully requests this Court to reverse and render judgment in his favor.

Respectfully submitted,



Malenda Meacham
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Of Counsel:
L. Anne Jackson

CERTIFICATE OF SERVICE

I, Malenda Meacham, attorney for Appellant, James Malcolm Harris, Jr., hereby certify that I have this day caused to be delivered by United States Mail, postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellant, James Malcolm Harris, Jr. to:

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CERTIFIED, this the 21st day of December, 2007.

Malenda Meacham