IN THE SUPREME COURT OF MISSISSIPPI

ROGER SIMMONS, ADDOPTIVE FATHER
OF MATTHEW JORDAN SIMMONS — APPELLANT

V. — CASE NO.: 2007-CA-01624

MARLENE HARRELL — APPELLEE

REPLY BRIEF OF APPELLANT

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I. The Issues Raised by Both Parties to this Appeal are Issues of Law and Can be Resolved Through Analysis of the Language Within the Four Corners of the Lease Agreement.

The Plaintiff, Marlene Harrell, has cited a number of cases from a wide range of jurisdictions to support her contention that the $17,000 in safe deposit box #207 at First Bank in Liberty Mississippi belonged to her. She argues; A. the $17,000 is an invalid inter vivos gift, B. the language of the lease agreement does not affect the ownership of the contents of the box, and C. conversely, the lease agreement does affect the ownership of the contents of the box by creating a Joint Tenancy With a Right Of Survivorship (JTWROS).

In City of Grenada v. Whitten Aviation, 755 So.2d 1208 (Miss.App. 1999) this court held:

> ¶16. The standard of review for questions concerning the construction of contracts are questions of law that are committed to the court rather than to the fact finder. Miss. State Highway Comm. v. Patterson Enters., Ltd., 627 So.2d 261, 263 (Miss. 1993). Appellate courts review questions of law de novo. Legal purpose or intent should first be sought in an objective reading of the words employed in the contract to the exclusion of parol or extrinsic evidence. Cooper v. Crabb, 587 So.2d 236, 239, 241 (Miss. 1991). Thus, the courts are not at liberty to infer intent contrary to that emanating from the text at issue. *Id.* at 241.

The language of the one page Safe Deposit Lease Agreement contract is clear and unambiguous. An objective reading of the agreement and application of Mississippi law will resolve all three of the Plaintiff's contentions.

A. Inter Vivos Gift

The Plaintiff has cited *Chadrow v. Kellman,* 106 A.2d 594 (PA.1954) for the proposition that an inter vivos gift is not complete until actual delivery of the contents of a safety deposit box or a key to the safe deposit box is made. In *Chadrow* the decedent never gave control of the box to the claimant because he kept both keys to the box and did not allow the claimant access. In addition the decedent in *Chadrow* indicated his intent to a bank employee to continue to withhold access to the contents of the box from the claimant. In the matter before this Court both parties had keys and full access to the contents of the box as shown by the execution of the lease and by the inadmissible testimony of Marlene Harrell. (R. at 57) and (Court Reporter's Transcript Vol. 1 at page 6 line 2).

Even though the issue of an invalid inter vivos gift had not been raised by any party to this appeal, it is answered by the Lease Agreement. It is apparent by the language of the agreement that whoever owned the money prior to its being placed in the box, the co-signatories agreed that it was jointly owned once it was placed in the box. It is not necessary to introduce additional parol evidence to interpret the meaning of the language addressing the ownership of the contents of the box. But if such language were allowed into evidence it would establish that both parties had control of and a key to the box.

Chadrow tends to support the position of the Appellant that the language in the lease agreement was sufficient to create joint ownership in the contents of the box. *Chadrow* at 245. The language of the lease clearly and unambiguously states " the undersigned agree that each , or either of them is joint owner of the present and future

contents of said box...." It is not necessary to go outside the four corners of the contract or accept parol evidence to decipher the meaning of these words.

B. Lease Agreement Defines Ownership Interest

The Plaintiff has cited cases from Rhode Island, Arkansas, Illinois and Kentucky to support her contention that the language of the deposit box lease agreement does not affect the ownership of the contents of the box. *Millman v. Streeter*, 66 R.I. 341(1941), *Newton County v. Davison,* 709 S.W. 2d 810 (Ark.1986), *James v. Webb*, 827 S.W.2d 702 (Ky. App. 1991), *In Re Estate of Whitman*, 732 N.E.2d 659 (Ill. 2000). However, in all four of the cases cited by the Plaintiff the language in the lease agreement is different from the language in the case at bar. In the cases cited by the Plaintiff there is no specific language in the agreement stating that the contents of the box are jointly owned by the co-signatories. In each of those cases the lease agreement simply addresses access to and control of the box itself. The contents are not mentioned.

In *Millman,* the language of the lease can be found at the bottom of page 245. It says "We agree to hire and hold Safe No. 7179.....as Joint Tenants" there is no language addressing ownership of the contents. *Id.* at 245.

In *Newton County v. Davison,* the Court addressed the language of the lease at the top of page 112. "[W]e find that the agreement between the parties was only for rental of the safe deposit box and not for the disposition of its contents." (*Id.* at 112). The Court in *Newton County v. Davison* goes on to address another Arkansas case *Black v. Black*, 199 Ark. 609, 135 S.W. 2d 837, in order to distinguish *Newton County v. Davison* from cases like *Black* and the case at bar. The Court in *Davison* said where there is language addressing the ownership of the contents there is a presumption of ownership but where

there was no language stating that property placed in the box is joint property there is no such presumption. *Newton County v. Davison* at 112. In *Black v. Black*, "the lease agreement signed by the parties renting the box specifically stated that the property placed in the box is joint property and upon the death of either joint tenant the property passes to the survivor. Such an agreement is missing here." *Id.* In the case at bar there is language in the lease agreement that specifically states that the contents of the box are joint property but unlike *Black,* there is no additional language creating a survivorship interest. While *Newton County v. Davison* is distinguishable from the case at bar it does serve to point out that there are three possible scenarios. 1. No language as to the ownership of the contents as in *Newton County,* 2. Ownership language that creates a survivorship interest as in *Black,* or 3. Ownership language that does not create a survivorship interest as in the case at bar.

In *James v. Webb* the safe deposit box lease does not contain any language establishing joint ownership of the present and future contents of the box as does the agreement in the case at bar. It simply establishes joint control of access to the box and provides for relinquishment of the box by either of the co-signatories. The Court in *Webb* says "The rule followed in most jurisdictions is that the deposit of articles in a jointly leased or used safe-deposit box of itself

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works no change in title **unless there is an express agreement that the contents of the box shall be joint property.**" *Id* at 704,705 (emphasis added). That language establishing joint ownership is present in the case at bar and distinguishes it from *James v. Webb.*

In *Whitman,* an Illinois case, again there is apparently no language addressing the ownership of the contents of the safe deposit box at issue. The Court holds that in Illinois the burden is on the Estate to show ownership of the contents of the box. *Id.* at 729. That burden would certainly be met by the plain language of the lease in the case at bar. In addition, the Court in *Whitman* "failed to see the relevance" in the fact that one of the parties to the lease of the box "regularly gained access to the box and was seen placing cash in, and removing cash from, the box." *Id.* The Plaintiff here would like to place some significance on who and how often the box was accessed. *Whitman* gives no relevance to such extrinsic evidence. *Id.*

C. There is no JTWROS

The Plaintiff argues in direct contradiction to the position she has previously taken, that the language of the Lease agreement does affect the ownership of the contents of the safe deposit box. In her first argument, the Plaintiff took the position that the contents of the box was entirely hers. Now she argues that she created a joint tenancy in the contents and created a right of survivorship in the tenants. The Defendant agrees with the Plaintiff that the language of the lease agreement is the sole source to determine the ownership of the contents of the box. The Plaintiff has deconstructed the paragraph of the lease that provides for joint ownership of the contents of the box. She argues that the language "in the event of the death of either of the undersigned the survivor shall have the right to withdraw said contents" creates a JTWROS. The Plaintiff continues to confuse access to the box and its contents with ownership of the contents. Every foreign jurisdiction she has cited and every Mississippi case she has cited, as well as the A.L.R. distinguishes between the language in a safe deposit box lease which addresses control of

the box and language that addresses ownership in the contents of the box. Annotation 40 A.L.R. 3d 462, 465 Section (1971), Annotation 14 A.L.R. 948, 954 Section 2(1950). It is possible to contract simply for joint access to the contents of the box. The Plaintiff cited several cases above where the lease agreements strictly dealt with access to the contents. She used the law in those jurisdictions as it relates to leases that do not address the ownership of the contents to show that the ownership of the contents is not affected by the lease. Now she is taking the opposite position. She is suggesting that language that clearly deals with access to the contents of the box creates an ownership interest in the contents. She has cited no Mississippi law to support her contention that access equals an ownership interest.

In *Wolfe v. Wolfe,* 42 So.2d 438(Miss.1949) the language conveying land "unto Willis Wolfe and Della Wolfe and the survivor of them." bares no resemblance to the language in the case at bar. In *Wolfe* property is being conveyed to a survivor while the lease agreement here permits access to the box and its contents. There is no conveyance of ownership.

The Estate of Baker v. Baker, 760 So.2d (Miss.2000) addresses a securities account not a safe deposit box. It stands for the proposition that lawful evidence or definite proof is required to overcome the presumption against a Joint Tenancy With Right Of Survivorship. Id at 762 (¶12). "While individual certificates were apparently marked with the initials JTWROS, the original account was not- at least Mrs. Baker could not prove that it was, and the burden was on her in this instance." *Id* at 763 (¶13). *Baker* demonstrates the importance of specific language necessary to overcome the presumption against a right of survivorship. *Id In re Estate of Holloway*, 515 So.2d 1217,

In re Issaacson 508 So.2d 1131 (Miss.1987) *Leverette v. Ainsworth,* 199 Miss. 652 (1945) and *Stephens v. Equitable Life Assurance Soc'y of the United States*, 850 So. 2d 78 (Miss. 2003) are cited in *Baker* to bolster that position. *Id* at 762 (¶12).

In *Madden v. Rhodes*, 626 So.2d 608 (Miss.1993) the Statute referred to and cited is Miss. Code Ann. §81-5-63. *Id.* at 616. 81-5-63 does not address safety deposit box leases. It states, "The term "deposit" as used in this section shall include, but not be limited to, any form of deposit or account, such as a savings account, checking account, time deposit, demand deposit or certificate of deposit, whether negotiable, nonnegotiable or otherwise. In *Madden*, the only mention of the language in the safe deposit box rental agreement is the testimony of the Bank employee, Linda Taylor, who filled out the rental agreement. *Madden* at 612. Her testimony regarding the safe deposit box account was that "she always set up accounts with more than one name as 'joint tenants, with right of survivorship' unless otherwise specified." *Id.* If the lease agreement in the case at bar had been set up using the language "joint tenants with a right of survivorship" this case would not be before this court.

Finally, the Plaintiff cites three more foreign Jurisdictions. In *Kulbeth v. Purdom,* 805 S.W.2d 622 (Ark. 1991) the Supreme Court of Arkansas found the language in a lease identical to the lease in the case at bar created a JTWROS. The Arkansas Court relaxed the standard set by statute and common law in the majority of states. It equated the right to withdraw the contents of the box with ownership of the contents. *Kubeth* is the only case cited by the Plaintiff that supports her position that the language in the agreement signed by Marlene Harrell and Paulette Grover created a JTWROS in the contents of the safe deposit box.

In *Steinhauser v. Repko*, 277 N.E. 2d 73 (1971) the language clearly meets the requirements in Mississippi law for creating a JTWROS, stating;

> Where the decedent placed currency in a safe deposit box which was rented from the bank pursuant to a lease agreement signed by the decedent and his sister-in-law as "joint tenants with right of survivorship," which agreement also recited that all property placed in such box was declared to be the joint property of both lessees and upon the death of either passes to the survivor, and the only testimony concerning the statements of the decedent made at the time such arrangement was made confirmed his intention to establish a right of survivorship, it is effective to vest title in such survivor upon his death.

In re Langley. 546 N.E. 2d 1287 (Ind.1989) the language of the lease agreement clearly meets the requirements in Mississippi law for creating a JTWROS by addressing the ownership of the contents of the box. The lease agreement states;

> 2. When two or more persons join in the execution of this agreement, said Safe **and its contents** during their joint lives shall be held and owned by them jointly and severally, and either of them without the other may have access to, and may surrender said Safe, and upon the death of either, the Safe, its entire contents, and all right of access thereto shall belong exclusively to the survivor or survivors.

(emphasis added)

CONCLUSION

The Plaintiff has argued that the $17,000 in the safe deposit box is hers and no part of it should go to her grandson through her daughter's estate. She then argued in the alternative that she and her daughter established a JTWROS which, in the event of her death, would cause the entire $17,000 to go to her daughter. A more symmetrical explanation and one that conforms to the language of the lease agreement and Mississippi law is that the mother and daughter placed the money in the box as joint owners. In the event of the death of either owner the outcome would be the same. The survivor would access the box and $8,500 would go to the Harrells and $8,500 would go to the Grovers.

If the money was hers and she wanted to maintain total ownership, Marlene Harrell could have accomplished that by choosing the alternative "Appointment of Deputy" language in the lease. She did not. It is unreasonable to think that the mother and daughter would agree to an arrangement which produced such diverse outcomes. There is no reason given in any of the documents before this Court to disregard or abrogate the lease agreement. A primary purpose of the parol evidence rule is to protect the integrity of an agreement made between parties when one of those parties is no longer able to defend her position. Therefore, the Appellant respectfully requests that this Court reverse the Chancery Court's decision and award one half of the $17,000, which was placed in the Safety Deposit Box, to the Estate of Marsha Paulette Foreman Grover.

This the 6th day of May, 2008

Respectfully Submitted,

Roger Simmons, Adoptive Father
Of Matthew Jordan Simmons

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth hereinafter, a true and correct copy of the above and foregoing document was caused to be served via U.S. mail on the following:

The Honorable Debbra K. Halford, Esquire
Amite County Chancery Court Judge
P.O. Box 578
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Dated this the 6th day of May, 2008

R. Ayres Haxton