IN THE SUPREME COURT OF MISSISSIPPI

ROGER SIMMONS, ADDOPTIVE FATHER
OF MATTHEW JORDAN SIMMONS — APPELLANT

V. — CASE NO.: 2007-CA-01624

MARLENE HARRELL — APPELLEE

BRIEF OF APPELLANT

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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 Court may evaluate possible disqualification or recusal.

1. Defendant/Appellant Roger Simmons, Adoptive father of Matthew Jordan Simmons;

2. Plaintiff/Appellee Marlene Harrell

3. R. Ayres Haxton, Esq. – Attorney for the Appellant

4. K. Maxwell Graves Esq.; Walter F. Beesley – Attorneys for the Appellees

5. The Honorable Debra K. Halford, Amite County Chancery Judge

R. Ayres Haxton

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant believes that oral argument would not aid the resolution of the appeal before this Court. The jurisprudence concerning the issues of the instant case has been ably examined and ruled upon by the Mississippi Supreme Court, and oral argument is not needed as the Court has previously stated the law surrounding the admission of parol evidence in the interpretation of a contract and the necessary elements to create a right of survivorship.

STATEMENT OF THE ISSUES

I. Did the lower court err in disregarding the Safety Deposit Box Lease?

II. Did the lower court err in allowing the introduction of parol evidence and relying on said evidence in determining the distribution of the contents of the safety deposit box?

III. Was a Joint tenancy with a right of survivorship created by the Safety Deposit Box Lease?

IV. Did the lower court err in awarding the entirety of the funds in the lock box to the surviving co-signer of the safety deposit box lease?

STATEMENT OF THE CASE

On November 30, 2006, Plaintiff, Marlene Harrell, the maternal grandmother of Matthew Jordan Simmons(Jordan Simmons), filed a petition in Chancery Court to have the contents of a safe deposit box located at First Bank in Liberty Mississippi and jointly held by Marlene Harrell and her recently deceased daughter, Paulette Grover, adjudicated as not part of the estate of Paulette Grover.(R at 18-25). The Defendant/Appellant is Roger Simmons, Administrator of the Estate of Paulette Grover and adoptive father, of the sole heir-at -law to the estate, Jordan Simmons. Marlene Harrell argued that the language of the *Safe Deposit Box Lease*(Lease) created a Joint Tenancy with a right of survivorship in the co-signers, Marlene Harrell and Paulette Grover, and that the contents of the box passed to Marlene Harrell at her daughter's death. (R at 18-25). At the hearing on the petition Marlene Harrell sought to introduce parol and extrinsic evidence to show the Court that she was the sole owner of the $17,000 in cash prior to its placement in the box.(Transcript pg 3 line 17-page 11 line 18). Roger Simmons objected and entered a continuing objection to the introduction of any and all extrinsic and/or parol evidence for the purpose of determining the meaning of the contract and the ownership of the contents of the box. (Transcript pg 3 line 21 and page 4 line 14-16). Roger Simmons argued that the Lease did not create a survivorship interest between the tenants and was not ambiguous, therefore parol evidence was not admissible to resolve the ownership of the contents of the box. (R at 58 and (page 10 line 7-12). On September 6, 2007, the Chancery Court entered an order finding Marlene Harrell to be the sole owner of the $17,000.00 which was the only contents of the safe deposit box. The Chancery Court held "that no adjudication of this issue (survivorship right) is necessary". The Court

based its opinion on parol and other extrinsic evidence introduced at the hearing to show that only Marlene Harrell made entry to the box and the contents of the box was hers prior to its placement in the box and continued to be her property irrespective of the lease agreement which had language to the contrary. Aggrieved, the Defendant filed the instant appeal pursuant to M.R.A.P.4.

STATEMENT OF FACTS

Marlene Harrell and her daughter, Marsha Paulette Foreman Grover (Paulette Grover), signed the "Safe Deposit Box Lease" and "Joint Tenancy" paragraphs of a Safe Deposit Box Lease with First Bank in Liberty Mississippi, dated 10-05-05. (R at 57). The Plaintiff/Appellee, Marlene Harrell has rested her argument on the wording of the Safe Deposit Box Lease (hereinafter Lease). (R at 19,¶ 2). The pertinent paragraphs of the Lease read as follows:

JOINT TENANCY

> **"In addition to agreeing to the foregoing provisions of safe deposit box lease which are hereby made a part of this paragraph, the undersigned agree that each, or either of them is joint owner of the present and future contents of said box and said Bank is hereby authorized to permit access to said box by either of the undersigned and that in the event of the death of either of the undersigned the survivor shall have the right to withdraw said contents and upon said withdrawal said Bank shall be automatically relieved of any further obligation or responsibility to their heirs, legatees devisees or legal representatives of the deceased."**

APPOINTMENT OF DEPUTY

_____ hereby appoint _____ to have access to, control over and the right to withdraw contents of box rented to the undersigned until this authority is revoked in writing. Said deputy shall also have the right from time to time to relinquish said box or substitute another therefore.

(R at 57).

Marlene Harrell, Paulette Grover, and bank employee Mary Nation executed the first two paragraphs, but the "Appointment of Deputy" paragraph and subsequent paragraphs of the lease agreement were not signed. (R at 57).

On October 22nd 2006, Michael D. Grover shot and killed his wife, Paulette Grover, and then took his own life at the couple's home at 2436 Smylie Road, Gloster, in rural Amite County. (R. at 54).

On November 30, 2006, Plaintiff, Marlene Harrell, the maternal grandmother of Paulette Grover's fourteen year old son, Matthew Jordan Simmons (Jordan Simmons) filed a petition in Chancery Court to have the contents of a safe deposit box located at First Bank in Liberty Mississippi adjudicated as not part of the estate of Paulette Grover.(R at 18). The safe deposit box was jointly held by Marlene Harrell and her recently deceased daughter, Paulette Grover. (R at 24) A hearing on the Petition was held on March 19, 2007. (Court Reporter's Transcript Vol. 1 at 1). On September 7, 2007, the Chancery Court of Amite County found that "the contents of the Safe Deposit Box #207 were the sole property of Marlene Harrell and that there is no evidence that she ever made any transfer of ownership in such property to her co-tenant, the Decedent herein." (R at 58-59).

SUMMARY OF THE ARGUMENT

The Safety Deposit Box Lease is the only admissible evidence of the agreement between Marlene Harrell and Paulette Grover regarding the money that was placed in their jointly held safe deposit box. No reason was given by the Lower Court as to why it chose to disregard the aforesaid agreement. The Mississippi Supreme Court has repeatedly made clear that "a written contract cannot be varied by prior oral agreements. Moreover, as an evidentiary matter, parol evidence to vary the terms of a written contract is inadmissible "*Carter v. Citigroup, Inc.*, 938 So. 2d 809, 818 (¶ 41) (Miss. 2006) (quoting *Stephens v. Equitable Life Assurance Soc'y of the United States*, 850 So. 2d 78, 83 (¶ 14) (Miss. 2003). The Plaintiff/Appellee has given no reason for the admission of parol evidence. She does not contend that the Safe Deposit Box Lease is ambiguous and has cited no legal authority as to why parol or other extrinsic evidence should be admitted.

The parties entered into a valid enforceable single page contract. (R at 57). Both parties signed the contract agreeing that "each, or either of them is joint owner of the present and future contents of said box." There is no right of survivorship established in the lease agreement. (R at 57). The word "survivor" appears only once in the lease agreement and it is used in the context of providing access to the contents of the box and indemnifying the bank once the contents are removed by the survivor. (R at 57). The word "survivor" is not used to alter the joint ownership interests of the co-signatories, nor does it create a joint tenancy with right of survivorship. (R at 57).

In the paragraph of the lease agreement titled *Appointment of Deput,y* another option was given to the potential parties to the contract. (R at 57). By choosing the

Appointment of Deputy paragraph, the signatories could have foregone the language that said "each, or either of them is joint owner of the present and future contents of said box." By using the *Appointment of Deputy* paragraph the ownership of the contents prior to placement in the box would remain unchanged and the appointed deputy would have no ownership interest in the contents. However, Marlene Harrell and Paulette Grover opted to create a joint ownership interest in the contents with no right of survivorship. As a result of that decision, the $8,500, one half interest in the contents of the box owned by Paulette Grover, became part of her estate at her death.

ARGUMENT

I. Standard of Review

"The findings of a chancellor will not be disturbed when supported by substantial evidence unless there was manifest error or an improper legal standard was applied." *In re Estate of Temple*, 780 So. 2d 639, 642 (¶ 15) (Miss. 2001). However, we review questions of law *de novo*. *Ladner v. Necaise*, 771 So. 2d 353, 355 (¶ 3) (Miss. 2000).

II. The Lower Court Erred in Disregarding the Safety Deposit Box Lease.

In its Order of September 6, 2007, the Amite County Chancery Court found "based on the evidence presented, the contents of the First Bank Safe Deposit Box #207 were the sole property of Marlene Harrell and there is no evidence that she ever made any transfer of ownership in such property to her co-tenant, the Decedent herein." (R at 58,¶ 4). The Safety Deposit Box Lease is the only admissible evidence of the agreement between Marlene Harrell and Paulette Grover regarding the money that was placed in their jointly held safe deposit box. No reason was given by the Lower Court as to why it chose to disregard that agreement. This Court addressed the issue of contract construction in *Dejean v. Dejean*, 2005-CA-00409-COA (Miss.App. 10-30-2007), citing *In re Will of Roland*, 920 So. 2d 539, 541 (¶ 11) (Miss.Ct.App. 2006) (citing *Estate of Blount v Papps*, 611 So.2d 862, 867 (1993)). "A trial court begins its review with looking first within the "four corners" of the document at issue. If there exists no ambiguity within the writing, then further analysis is proscribed." *In re Will of Roland*, 920 So. 2d at 541 (¶ 11). Here, no argument has been made that the Lease is ambiguous, yet the terms of the Lease have been disregarded.

III. The Lower Court Erred in Allowing the Introduction of Parol and Extrinsic Evidence to Vary the Meaning of a Clear and Unambiguous Contract.

This court has repeatedly made clear that "It is a well-settled principle of contract law that "a written contract cannot be varied by prior oral agreements. Moreover, as an evidentiary matter, parol evidence to vary the terms of a written contract is inadmissible." *Carter v. Citigroup, Inc.*, 938 So. 2d 809, 818 (¶ 41) (Miss. 2006) (quoting *Stephens v. Equitable Life Assurance Soc'y of the United States*, 850 So. 2d 78, 83 (¶ 14) (Miss. 2003)." This Court went on to say "Although parol evidence is sometimes admissible when there has been, among other things, a showing that a contract contains ambiguous language, here there has been no such showing. Neither party has even suggested that there is any ambiguity in the agreement."

In a similar case, *Cooper v. Crabb*, 587 So. 2d 236, Justice Robertson addresses the issue of parol testimony at page 241:

> Where the language of a legal text is without gross ambiguity, neither parol testimony nor other extrinsic evidence are admissible to show meaning. The rule proceeds from common sense premises, here, that resurrecting the mind of the deceased and deciphering its thoughts four years after the fact is an enterprise fraught with hazard and not just because it is pursued by the self-interested.

In Cooper like the case here before the Court, a Grandmother is claiming under alleged will substitutes (joint tenancy with right of survivorship (JTWROS) while the grandchildren argue that the disputed funds are a part of the estate. id at 236. In Cooper, there is a clear unambiguous survivorship provision. id. Here, while the parties have agreed that the Lease is not ambiguous, there is no survivorship provision and hence no JTWOS.

The Safe Deposit Box Lease agreement at issue in this case is clear and unambiguous. (R at 57). It establishes the terms and parties to the lease in the heading and first two paragraphs which are signed by Marlene Harrell and an officer of the Bank, Mary Nation. (R at 57). In the next paragraph titled "Joint Tenancy" it defines the co-signatories' ownership rights in the contents of the box by saying "each, or either of them is joint owner of the present and future contents of said box.". The Joint Tenancy paragraph is signed by Marlene Harrell and Paulette Grover. .(R at 57). The next paragraph titled "Appointment of Deputy" provides for an alternative arrangement which designates a "deputy" and confers no ownership rights on the deputy. The Appointment of Deputy paragraph was not executed by Marlene Harrell or Paulette Grover. (R at 57). The use of the "Joint Tenancy" paragraph rather than the "Appointment of Deputy" paragraph indicates that the signatories had a choice and had reached a meeting of the minds.

At the hearing on March 19, 2007, to determine ownership of the contents of the safe deposit box, the Plaintiff, Marlene Harrell, was allowed to testify over the continuing objection of the Defendant, Roger Simmons, as to the source of the funds that were placed in the box, who placed said funds in the box, and other matters calculated to influence the Court as to how the contents of the box should be awarded. (Court Reporter's Transcript Vol. 1 at page 3 line 21 - page 4 line 13). The entirety of Marlene Harrell's testimony was obviously calculated to influence the Court regarding the source of the funds placed in the box. It includes uncorroborated and self serving testimony regarding matters that are irrelevant to the interpretation of the lease agreement and none of which suggest an alternative interpretation of the plain meaning of the agreement. At

the end of the testimony, Marlene Harrell launched into a diatribe of recriminations of the Defendant, Roger Simmons. At that point, the Court stopped the testimony for a noon recess in order that Ms. Harrell could "get under control." No further testimony was taken. (Court Reporter's Transcript Vol. 1 at page 8 line 27). The Defendant did not seek to rebut the parol evidence offered by the Plaintiff but reiterated his standing objection and noted to the Court that the only party capable of rebutting Ms. Harrell's self serving testimony was her deceased daughter, Paulette Grover. (Court Reporter's Transcript Vol. 1 at page 10 line 7).

IV. The Safe Deposit Box Lease Agreement Created No Survivorship Right in the Co-signatories.

In her *Petition to Adjudicate Safe Deposit Box as Not Part of the Estate,* Marlene Harrell has erroneously concluded that the language of the Lease creates a Joint Tenancy with Right of Survivorship (JTWROS).(R at 19). While the language in the paragraph headed "Joint Tenancy" establishes joint ownership in the present and future contents of the box and provides for withdrawal of the contents by the survivor in the event of the death of one of the joint owners and indemnifies the Bank, nowhere do the words Joint Tenants with Right of Survivorship (JTWROS) appear in the Lease.(R at 57).

In her petition, Marlene Harrell attempts to give some significance to the record the Bank kept to document access to the box. (R at 56). The entrance record is extrinsic evidence and even if it were admissible for the purpose of interpreting the intent of the Lease, it is irrelevant. By the terms of the Lease, once property was placed into the box it was jointly owned. No law has been cited by the Plaintiff/Appellee that supports the proposition that failure to seek access to the box by one of the signatories would create a JTWROS or that authority to remove the contents of the box would create a JTWROS.

Nor does the fact that only one of the parties placed the money in the box change the plain meaning of the Lease. Any number of explanations could be made as to why Paulette Grover, the eventual victim of a murderous spouse, might enlist her mother's help in secreting money in a safe deposit box. However, those explanations would be inadmissible parol evidence.

The Supreme Court addressed the creation of a JTWROS in *Madden v. Rhodes*, 626 So.2d 608, 616 (Miss.1993) citing *Duling v. Duling's Estate*, a 1951 case saying:

> The general rule of law seems to be that in instances where a joint tenancy has been created by a clear and unambiguous agreement, and the evidence of the existence of a contrary intention is not present, the Courts have held that a true joint tenancy has been created with respect to the contents of a safe deposit box and the surviving tenants become vested with title thereto.

Duling v. Duling's Estate, 211 Miss. 465, 479, 52 So.2d 39, 45 (1951).

The general rule stated in *Duling* addresses " instances where joint tenancy has been created by clear and unambiguous language."*Id.* In *Duling* the safe deposit box agreement contained the words; all property...in said box....so long as it is contained therein,....belong(s) to the lessees jointly as joint tenants with right of survivorship therein,". *Id* at 472. The Court clarified *Duling* in *In Re Administration Of Estate Of Abernathy,* 778 So.2d 123,128(¶ 24) (Miss. 2001). In *Abernathy,* the Court cited *Duling* but went on to say "Our Court has held that a distinguishing characteristic of a joint tenancy is a right of survivorship. In other words, Deposit Guaranty seems to have mistakenly referred to McLellan and Abernathy as joint tenants when, in fact, no rights of survivorship were actually created." As lately as February 2006, the Court spoke to JTWROS in *Ferrara v. Walters*, 919 So.2d 876, 882 (¶ 15) (Miss. 2006) saying:

> We note that there was no indication from

> the deed as to what kind of estate was created, i.e., a tenancy by the entirety, joint tenancy or a tenancy in common. Further, the deed was without any reference to rights of survivorship or otherwise. To this end, we have held that in the absence of any survivorship provision, a joint tenancy will not be presumed. *In re Baker,* 760 So.2d 759,762 (Miss 2000) (citing *In re Issaacson* 508 So.2d 1131, 1134 (Miss. 1987).

The Plaintiff/Appellee is apparently relying on the language of the Lease that states that in the event of the death of either of the undersigned the survivor shall have the right to withdraw the contents of the box. (R at 57). However, there is clearly no manifest intention to create a survivorship right through the lease agreement. It simply establishes joint ownership in the contents and provides for access to the box and indemnification of the bank in the event of the death of one of the signatories.

CONCLUSION

The clear unambiguous lease agreement duly executed by Marlene Harrell and Paulette Grover, deceased, provides that the present and future contents of the safety deposit box was jointly owned by Marlene Harrell and Paulette Grover. There is no language in the lease that creates a survivorship interest. 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 1st day of April, 2008

Respectfully Submitted,

Roger Simmons, Adoptive Father
Of Matthew Jordan Simmons

R. Ayres Haxton Esq. ([redacted]

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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
Meadville, Mississippi 39653

K. Maxwell Graves Jr., Esquire
P.O. Box 607
Meadville, Ms 39653

Dated this the 1st day of April, 2008

R. Ayres Haxton