IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRYAN KENT HAWKINS	APPELLANT
VERSUS	NO.2008-CA-01774
SUZANNE A. HAWKINS	APPELLEE

APPEAL FROM THE CHANCERY COURT
LAMAR COUNTY, MISSISSIPPI

BRIEF OF APPELLANT BRYAN KENT HAWKINS

ORAL ARGUMENT IS REQUESTED

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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 have been made in order that the Justices of the Supreme Court and/or Judges of the Mississippi Court of Appeal may evaluate possible disqualification or recusal.

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Suzanne A. Hawkins Hattiesburg, Mississippi 39441-0647	Appellee
Honorable Sebe Dale Jr. Chancery Judge Tenth Judicial District P.O. Box 1248 Columbia, Mississippi 39429-1248	

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BRIEF OF APPELLANT BRYAN KENT HAWKINS

COMES NOW Bryan Kent Hawkins, Appellant (hereinafter referred to as "Brewer"), and files his Appeal Brief, and in support thereof would show the following:

I.

STATEMENT OF THE ISSUES

1.) The Chancellor erred as a matter of law in ruling that the Property Settlement agreement in particular paragraph X of said agreement implied that Appellant Bryan Kent Hawkins contracted his right of partition away when he granted Appellee Suzanne Hawkins the " use and occupancy of the homestead of the parties" without limitation.

2.) In the event this court believes the Chancellor was correct in finding that Appellant Bryan Kent Hawkins did contract his right of partition away then the Chancellor erred in not finding that the grant of use and occupancy of the homestead of the parties was unreasonable under the facts and circumstances of this case.

II.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY.

The parties were granted an Irreconcilable divorce by way of Final Judgment of Divorce and Property Settlement executed on March 30th, 1988(R.E.5-11 Vol. .1) Paragraph X. of the property settlement agreement reads as follows:

> ***"That Suzanne A. Hawkins shall be awarded the use and occupancy of the homestead of the parties, together with the furniture, furnishings and appliances contained therein, with the exception of the personal belongings of Bryan Kent Hawkins, and Bryan Kent Hawkins agrees to satisfy and pay the monthly mortgage installments on the homestead, it being understood that taxes and insurance on the homestead are included in the monthly mortgage payment."***

Since the date of divorce Bryan Kent Hawkins has paid the monthly mortgage installments that included the taxes and insurance. The parties had two children Brett Wesley Hawkins born August 2,1971 who is now 38 years and 6 months of age and Todd Ashley Hawkins born April 9,1974 who is now 34 years and 10 months of age. Neither child lives with Suzanne A. Hawkins. The homestead property was held by the parties as Joint Tenants with Rights of Survivorship. Bryan Kent Hawkins filed a Petition for Modification and Partition of the Property with the Chancery court (R.E. 30, 31 Vol.1) and Appellant did not file any responsive pleadings. The parties appeared before the Honorable Sebe Dale in conference and all parties agreed that the issue of partition of the property raised a question of law and the Chancery Court requested an agreement as to the questions the court must answer. The two questions to be determined were as follows:

1.) Does the court have the authority to partite the property in question?

2.) Did Paragraph X of the property settlement agreement create a life estate in the property in favor of Suzanne A. Hawkins?

R.E. 48,49 Vol.1

Both parties presented their respective Memorandum's of Law and rebuttal of the issues. (R.E. 40-44 Vol. 1) and (R.E. 45-47 Vol.1).

The Chancery Court Hon. Sebe Dale ruled that the court does in fact have the right to partite the property pursuant to Section 11-21-3 of; MCA 1972 and further ruled that Paragraph X of property settlement agreement did not create a life estate in favor of Suzanne A. Hawkins. The chancellor ruled that partition could not be granted because in the courts opinion Paragraph X. implied that the parties has agreed not to partition said property. (R.E. 48-50 Vol. 1) From said ruling Appellant appeals.

B. THE STANDARD OF REVIEW

1. The Supreme Court's Standard of Review.

This Court has a limited standard of review when examining a chancellor's findings on appeal. *McNeil v. Hester*, 753 So. 2d. 1057, 1063 (Miss.2000). The findings of a chancellor will not be disturbed on review unless the chancellor was manifestly wrong, clearly erroneous, or applied the wrong legal standard. Id. However, questions concerning construction of contracts are questions of law. *Parkerson v. Smith*, 817 So. 2d 529,532(Miss.2005) Both the Chancellor and both parties agreed the issues before the court turned on a question of law. (R.E. 49 paragraph 5 Vol. 1) The standard of review for questions of law is de novo. Id.

II.

ARGUMENT

A. SUMMARY OF THE ARGUMENT.

1.) The Chancellor erred as a matter of law in ruling that the Property Settlement agreement in particular paragraph X of said agreement implied that Appellant Bryan Kent Hawkins contracted his right of partition away when he granted Appellee Suzanne Hawkins the " use and occupancy of the homestead of the parties" without limitation.

2.) In the event this court believes the Chancellor was correct in finding that Appellant Bryan Kent Hawkins did contract his right of partition away then the Chancellor erred in not finding that the grant of use and occupancy of the homestead of the parties was unreasonable under the facts and circumstances of this case.

B. The Chancellor erred as a matter of law in ruling that the Property Settlement agreement in particular paragraph X of said agreement implied that Appellant Bryan Kent Hawkins contracted his right of partition away when he granted Appellee Suzanne Hawkins the " use and occupancy of the homestead of the parties" without limitation

This court has long held that a Property Settlement Agreement entered into by the parties and subsequently approved by the court and incorporated into a final judgment is an enforceable contract. Harris v. Harris, 988 So. 2d 376; citing East v. East, 493 So. 2d 927,931-32(Miss.1986) Contract interpretation, as a question of law, is reviewed de novo. Warwick v. Gautier Utility Dist., 738 So. 2d. 212, 215 (Miss.1999). In Harris Id this court held "that it is a question of law for the court to determine whether a contract is ambiguous. In the event of an ambiguity, the subsequent interpretation presents a

question of fact for the trier of fact which we review under a substantial evidence/manifest error standard." Id

The Chancellor correctly ruled as a matter of law in interpreting paragraph X of the agreement as follows:

"2. Specifically, and with clarity, paragraph X of the Agreement provided to the following:

"That Suzanne A. Hawkins shall be awarded the use and occupancy of the homestead of the parties, together with the furniture, furnishings and appliances contained therein, with the exception of the personal belongings of Bryan Kent Hawkins, and Bryan Kent Hawkins agrees to satisfy and pay the monthly mortgage installments on the homestead it being understood that taxes and insurance on the homestead are included in the monthly mortgage payment."

The Court notes and determines that there is nothing ambiguous as to the terms of the award and absolutely no language of limitation.

The learned chancellor was correct in his ruling as a matter of law that the property settlement award and the language of paragraph X was **clearly not ambiguous** and did not contain **any language of limitation**.

As this court has previously held in *Royer Homes of Miss., Inc v. Chandeleur Homes, Inc* 857 So. 2d 748, "Contract construction and interpretation requires that the court first consider whether the contract is ambiguous. If the contract is determined to be ambiguous, the subsequent interpretation of the contract presents a question of fact and is reviewed on appeal under the deferential substantial evidence/manifest error standard. Id at 752. **Alternatively, if the contract is unambiguous, this Court must accept the**

plain meaning of a contract as the intent of the parties. Ferrara v. Walters, 919 So. 2d 876,882. (Miss.2005). In this case the court found that the contract was not ambiguous and did not contain limiting language (R.E. 48 Vol 1) therefore the court should have accepted the plain meaning of the contract and the intent of the parties that it did not limit the right of partition and should have ruled that partition of said property was proper pursuant to Section 11-21-3, MCA 1972.

Instead the chancellor attempted to rewrite the contract by ruling that an" agreement not to partition is implied." (R. E. 50 Vol.1). Clearly, this ruling ignores settled case law. As previously stated, " **if the contract is unambiguous, this Court must accept the plain meaning of a contract as the intent of the parties** *Ferrara v. Walters*, 919 So. 2d 876,882. (Miss.2005). The Chancellor correctly found that the contract was unambiguous and should have found that without language limiting the right of partition that Bryan Kent Hawkins could partite said property. The Chancellor erred in ruling that an implied contract not to partite the property existed. Certainly, a provision as important as contracting away a person's right of partition should be unambiguously spelled out in a contract and not implied. .

The Chancellor erred in relying on the following case:

"In the case of Weiner v. Pierce, 203 So.2d 598, 603 (Miss.1967), we expressly stated:

> Although the statute gives joint owners the right to have their property partitioned, the right is not one that cannot be restricted or limited for a reasonable length of time by contract, will, or deed. It is a well settled general rule that the right of partition may be limited by the provisions of the deed under which the parties claim and that joint owners may contract that their property will not be partitioned for a reasonable length of time.

We have held that property settlements under divorce actions are binding on the parties if fair, equitable and supported by consideration. See Stone v. Stone, 385 So.2d

610 (Miss.1980), and Bunkley & Morse's, Amis on Divorce and Separation in Mississippi, ss 11.03 and 16.09.

In 68 C. J. S., Partition s 44, we find the following:

The general rule is well settled that partition will not be granted at the suit of one in violation of his own agreement, since the agreement operates as an estoppel against the right to partition. An agreement within the operation of this rule may be oral where it has been so far performed that to allow its repudiation would be tantamount to allowing the commission of a fraud, but not otherwise. The agreement not to partition may be implied as well as express; and will be readily implied and enforced if such implication proves necessary to secure a fulfillment of an agreement between the cotenants, or if the granting of partition would destroy the estate sought to be partitioned. "

The Chancellor correctly found that the paragraph X of the property settlement agreement was not ambiguous and did not contain limiting language. In *Weiner* Id. The court specifically stated **" that joint owners may contract that their property will not be partitioned for a reasonable length of time"** The Chancellor ruled that the contract was not ambiguous and did not contain any limiting language. If there is not limiting language restricting the right of partition and the contract provision is not ambiguous then the court cannot find that the parties contracted away there right of partition. The contract in question was not ambiguous and therefore the court incorrectly ruled that an implied contract existed limiting Bryan Kent Hawkins right to have the property partitioned.

B. In the event this court believes the Chancellor was correct in finding that Appellant Bryan Kent Hawkins did contract to limit his right of partition then the Chancellor erred in not finding that the grant of use and occupancy of the homestead of the parties and the implied restriction of partition was unreasonable under the facts and circumstances of this case.

As this court has held "In the case of Weiner v. Pierce, 203 So.2d 598, 603 (Miss.1967), we expressly stated:

> Although the statute gives joint owners the right to have their property partitioned, the right is not one that cannot be restricted or limited for **a reasonable length of time** by contract, will, or deed. It is a well settled general rule that the right of partition may be limited by the provisions of the deed under which the parties claim and that **joint owners may contract that their property will not be partitioned for a reasonable length of time.**

The final judgment of divorce and property settlement was approved and filed of record on March 31,1988. Since the date of said judgment Bryan Kent Hawkins has paid the monthly mortgage installments on the homestead including the taxes and insurances. (R.E. 9 Vol. 1) The parties had two children Brett Wesley Hawkins born August 2,1971 who is now 38 years and 6 months of age and Todd Ashley Hawkins born April 9,1974 who is now 34 years and 10 months of age. Neither child lives with Suzanne A. Hawkins. The Chancellor erred in not considering that it has

been 20 years since the final judgment and property settlement was filed of record and it has been 13 years and 10 months since the last child was under the age of 21. If this court believes that the Chancellor was correct in finding an implied contract not to partition the property then it must find that 20 years is an unreasonable length of time to restrict Bryan Kent Hawkins right of partition.

III.

CONCLUSION

When this Court reviews the ruling of the Chancellor as a question of law on a De novo basis. It must find that the Chancellor erred in his application of the law based upon his own finding that the contract provision was unambiguous and did not contain limiting language. If a contract in unambiguous they the chancellor should have found that the parties did not contract to limit Bryan Kent Hawkins right of partition. The chancellor erred in finding an implied contract where the contract is unambiguous.

If this court agrees with the chancellor's finding that an implied contract existed limiting Bryan Kent Hawkins right of partition then the court must find that said limitation which has existed for 20 years is now void as being unreasonable.

WHEREFORE, PREMISES CONSIDERED, Appellant, Bryan Kent Hawkins prays that after the Court considers the foregoing, that the Court will reverse the finding of the chancellor restricting Bryan Kent Hawkins right of partition and render a decision that partition is proper and that the property held as joint tenants with rights of survivorship shall be partitioned and the equity divided equally between the parties after

cost and fees of said partition, and any all other relief that Bryan Kent Hawkins may be entitled.

Respectfully Submitted,

BRYAN KENT HAWKINS
APPELLANT

BY: _____
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V.

CERTIFICATE OF SERVICE

I, Timothy Farris, attorney for Appellant, Bryan Kent Hawkins, do hereby certify that I have this date served a true and correct copy of the above and foregoing document by United States Mail, with postage prepaid to the following persons at their regular business address:

Ms. Betty Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, Mississippi 39205-0249

Hon. Ray T. Price
P.O. Box 1546
Hattiesburg, Mississippi 39403-1546

Honorable Sebe Dale Jr.
Chancery Judge
Tenth Judicial District
P.O. Box 1248
Columbia, Mississippi 39429-1248

This 24th day of February 2009.

TIMOTHY FARRIS

ADDENDUM