IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SUPREME COURT DOCKET NO. 2008-TS-01480

CHRISTPHER LAGARDE and
ELIZABETH BOSARGE — **APPELLANTS**

VERSUS

ALAN LAGARDE and
LISA LAGARDE — **APPELLEES**

APPEAL FROM

THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI,
FIRST JUDICIAL DISTRICT

HONORABLE JIM PERSONS, PRESIDING TRIAL JUDGE

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

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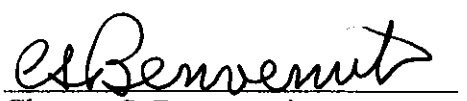
OTHER PARTIES Heirs of the Estate of Mary C. Lagarde	Kevin Lagarde Frank Lagarde, Jr Jules Lagarde Melissa Brannin Robert Andrew Lagarde Mary Hickey



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ii. The court erred in finding the "Gift Equity Letter" acted as symbolic delivery of the equity from Mary C. Lagarde to Alan and Lisa Lagarde.

iii. The Chancellor applied an improper legal standard and was manifestly wrong and clearly erroneous in finding that the "Gift Equity Letter" from Mary C. Lagarde to Alan and Lisa Lagarde was a valid and complete gift and became part of the consideration for the contract of sale between the parties.

iv. The Chancellor erred in granting specific performance of a contract which was not certain and mutual.

v. The Chancellor erred in applying an improper legal standard and was manifestly wrong and clearly erroneous in awarding attorney's fees against Christopher Lagarde and Elizabeth Bosarge.

II. STATEMENT OF THE CASE

Mary Colcough Lagarde (hereinafter, Mary) and her husband Frank W. Lagarde (hereinafter, Frank) on July 28, 1958, purchased a home on St. Charles Street in Bay St. Louis, Mississippi and received title to the property by Warranty Deed as an estate in the entirety with right of survivorship (Exhibit C – part of Appraisal). Frank and Mary reared their nine children, Kevin Lagarde, Frank Lagarde, Jr., Jules Lagarde, Melissa Brannin, Robert Andrew Lagarde, Alan Lagarde (hereinafter, Alan), Christopher Lagarde (hereinafter, Chris), Elizabeth Bosarge,

a/k/a Elizabeth Ann Lagarde (hereinafter, Liz), and Mary Hickey in the home. Frank predeceased Mary on July 1, 1991 (Rec. p. 349). As a result of Frank's death, Mary became the sole owner of the marital domicile (Rec. pp. 47, 349). By 2003, the home was occupied solely by Mary (Rec. pp. 50, 55) and on occasion by one or two of her children who although adults, had been going through some life altering experiences (Rec. pp. 55, 288, 372, 398).

On July 28, 1994, Mary prepared a holographic will (Exhibit AA); the contents of which were unknown to her children until after her death. Under the terms of the will, the home on St. Charles Street was devised to three of her children, Kevin, Christopher, and Elizabeth (Rec. pp. 360, 386).

By the fall of 2003, Mary's eyesight had deteriorated to the point where she was utilizing the assistance of a reading machine which magnified the materials she wanted to read (Rec. p. 129) and she was legally blind (Rec. pp. 351, 421). She had not driven an automobile since the middle 1990's (Rec. pp. 296, 359). She had a congenital heart problem which was described as "she had two holes in her heart" (Rec. pp. 297, 349, 352) and she was on numerous medications (Rec. pp. 120, 129). Her daughter, Liz, assisted her in going to the doctor (Rec. p. 419) and keeping track of her medications (Rec. pp. 130, 349). Mary was born on August 30, 1922, and at the time of her death was eighty-one years old (Rec. p. 48).

In the fall of 2003, Mary began some renovations to the house and obtained a loan from Keesler Federal Savings and Loan to pay for the repairs (Exhibit W, Rec. p. 100). As a result of that experience, she forwarded to her children a letter wherein she made known she was considering downsizing either by selling the house or bringing someone in to share the house with her (Exhibit B).

In July of 2004, Mary's son, Alan, and his wife, Lisa, approached Mary about entering into a contract to sell the St. Charles Street domicile to Alan and Lisa (Rec. p. 52). An appraisal on the property in July of 2004 indicated that the property was valued at $290,000.00 (Rec. p. 68, Exhibit C). A contract between Mary, as seller, and Alan and Lisa, as purchasers, dated October 8, 2004, and prepared by Alan and Lisa Lagarde (Rec. p. 59) was introduced at trial as Exhibit D and showed the purchase price as $250,000.00 and stated that the closing would occur on or before October 30, 2004. The contract was subsequently modified (Rec. p. 59). Neither the original nor a copy of the original of the document signed in October, 2004, without modifications or amendments were introduced at trial (Rec. p. 61). The extent of the modifications and changes to the document were not made plain to the court as no original document was produced, nor were copies of the various versions submitted as evidence so that the court could ascertain the original agreement as opposed to the subsequent modifications which were unilaterally made by Alan and Lisa (Clerk's Papers p. 21). The copies of the contract submitted (Exhibits D, J) were allowed into evidence over objection of Chris and Liz (Rec. pp. 60, 61-64). The amendments or modifications to the Agreement to Purchase or Sell were never initialed or acknowledged by Mary in writing (Rec. pp. 59, 171-176, 414).

The closing did not occur on or before October 30, 2004 (Rec. p. 71-72, 74). On November 9, 2004, Mary executed an instrument titled "Gift Equity Letter." A copy of the document was introduced at trial as Exhibit G. In the "Gift Equity Letter" Mary was purported to make a gift of equity in the domicile of $50,000.00 to Alan and Lisa Lagarde to be applied towards the purchase price of the property upon closing (Rec. p. 84-90). The document was prepared by Alan's loan broker (Rec. pp. 168, 199). The said "Gift Equity Letter" was

unilaterally modified by Alan's loan broker so as to increase the amount of the purported gift to $51,200.00 (Rec. p. 170). The amendments or modifications to the "Gift Equity Letter" were never initialed by Mary nor did she acknowledge the amendments in writing (Rec. pp. 170, 171, 415).

Neither Alan nor Mary published the Agreement to Purchase or Sell (Rec. pp. 90, 158), the modified Agreement to Purchase or Sell (Rec. pp. 236, 257), the Gift Equity Letter or the modified Gift Equity Letter to any of Alan's siblings during Mary's lifetime (Rec. pp. 90, 236-237, 286, 298, 304, 310, 353, 408).

According to Alan and his wife, Lisa, the closing of the sale was set for January 12, 2005 (Rec. pp. 101, 192). On January 11, 2005, Mary unexpectedly died (Rec. p. 105).

After Mary's death no action was taken by Alan and/or his wife, Lisa, or by any of the other siblings until November 21, 2005, when a Petition to Probate Will, for Letters Testamentary and for Other Relief was filed by Kevin Lagarde to open Mary's estate (Rec. p. 410). Thereafter on November 29, 2006, Kevin Lagarde, his brother Christopher Lagarde, and sister Elizabeth Bosarge, were appointed as the Joint Executors of Mary's estate (Rec. p. 12, Clerk's Papers P. 41).

On September 9, 2006, Alan and Lisa filed a Complaint for Specific Performance and Other Relief against the estate (Clerk's Papers p. 1). An Order was entered in the Estate file being Hancock County Chancery Cause Number C2301-05-794 (2) wherein the court determined that the proper parties to this lawsuit under the terms of Mary's Last Will and Testament, were Kevin Lagarde, Christopher Lagarde, and Elizabeth Bosarge individually, as they would, under the Last Will and Testament of Mary, own the marital domicile in the event

that Alan and Lisa's suit for Specific Performance failed. The court denied the request of Christopher and Elizabeth to require the estate to pay for the defense of Alan and Lisa's lawsuit and authorized Christopher and Elizabeth to defend the suit in their own names. Kevin filed an answer wherein he admitted the allegations of the complaint and requested to court to enforce the contract to sell the home to Alan and Lisa (Clerk's Papers p. 31).

In their Amended Complaint for Specific Performance and Other Relief (Rec. Excerpts p. 22) filed January 8, 2007, Alan and Lisa alleged that they had a contract to purchase the home from Mary for $256,000.00 with gift equity of $51,200.00 from Mary. They further alleged that Mary was to have the right to live in the home for the remainder of her life. The Amended Complaint further alleged that the closing was delayed because of Mary's desire to avoid incurring an early payment penalty as to her existing mortgage from Keesler Federal Savings. Alan and Lisa sought to enforce the contract, a copy of which is attached as Exhibit A to their complaint (Rec. Excerpts p. 26). Exhibit A to the Amended Complaint consisted of an Agreement to Purchase or Sell which was dated October 8, 2004, by Alan and Lisa and dated October 8, 2004, by Mary C. Lagarde (Rec. Excerpts p. 26). The document contained numerous strike throughs and included what purported to be handwritten amendments. The third page of Exhibit A to the Amended Complaint is a Good Faith Estimate dated October 11, 2004 (Rec. Excerpts p. 28). The document entitled "Gift Equity Letter" is a part of Exhibit A and contains Paragraph a.) wherein the amount of the purported gift is stricken through and a hand written increase of the purported gift to $51,200.00 (Rec. Excerpts p. 29). None of the amendments to the documents were acknowledged by Mary (Rec. pp. 168-179).

On July 20, 2007, Elizabeth Bosarge and Christopher Lagarde, by and through their

attorney, filed an Answer (Clerk's Papers P. 35) alleging as affirmative defenses the Statute of Frauds, termination of the contract by virtue of the fact it did not close on or before October 30, 2004, and that the contract failed for want of consideration. The Appellants denied a contract existed and further denied the existence of a gift of equity in the home (Clerk's Papers p. 35). The first day of trial occurred on August 28, 2007, and the trial was completed on its second day on October 4, 2007 (Clerk's Papers p. 40).

Although many of the siblings testified, the only testimony received at trial as to the actual terms of the purported agreement, the negotiations, the reasons for delay in closing, and the amendments or changes to the contract documents was from Alan Lagarde (Rec. p. 40, et seq). The other siblings testified that the contract documents were never published to them during their mother's lifetime (Rec. pp. 90, 236-237, 286, 298, 304, 310, 332, 333, 341).

The evidence at trial was that none of the changes were acknowledged in writing by Mary Lagarde (Rec. p. 168-179, Clerk's Papers p. 44). Paragraph 17. of the original Agreement to Purchase or Sell requires that the document cannot be changed except by written consent (Exhibit D) as an additional provision. The purchase price was amended, the amount of the down payment appears to have been amended and the handwritten change in Paragraph 3. required Mary to pay $4,100.00 in closing costs (Exhibit D). None of the amendments and changes to the documents was initialed by Mary and the evidence was uncontroverted that she did not agree to them in writing (Rec. p. 170-176).

Over the objection of the Appellants' attorney, Alan was allowed to testify that his mother agreed to all of the purported amendments to the contract documents (Rec. p. 86) and that she was to acknowledge the amendments on the day of closing (Rec. p. 170). Alan was allowed

to introduce copies of the documents stating that the originals had been lost at his attorney's office in Hurricane Katrina (Rec. p. 87-90). He explained that the reason the transaction did not close on or before October 30, 2004, was that Mary wanted to avoid a prepayment penalty on her Keesler Federal Credit Loan (Rec. p. 98). A copy of the Keesler Federal Credit Union documents were entered in evidence as Exhibit V and stated that if the loan was paid in full, within the first twelve months, the borrower would be required to repay Keesler Federal Credit Union all of the closing costs incurred. Exhibit V indicates that Mary obtained the loan on November 6, 2003. Under cross examination by the Appellants' attorney, Alan admitted he was not prepared to close on or before November 7, 2004, and in fact was still gathering documentation, appraisals, and information for his bank as late as January of 2005 (Rec. pp. 191-198). No testimony was presented at trial to indicate that demand was ever made upon the Executors, the heirs-at-law, or Mary's devisees under the terms of her will for a closing. No evidence was presented at trial to prove that the purchasers were ready, willing, and able to fulfill their obligations under the purported contract documents. The demand of Alan and Lisa in their complaint was for the court to specifically enforce the contract and "Gift Equity Letter" attached to their Amended Complaint as Exhibit A.

III. SUMMARY OF THE ARGUMENT

The Appellants would show unto the court that the purported gift of Mary Lagarde to her child, Alan, and his wife, Lisa, was revocable by Mary and that Mary had not parted with all present and future legal power and dominion over any equity in her home and therefore the purported gift did not survive Mary's death. The Appellants argue that the contract Alan and Lisa sought to enforce was in fact found by the Chancellor to be unenforceable. That the

extensive amendments or modifications found in the contract submitted by Alan and Lisa was not valid. The Appellants will argue that because of the extensive changes to the original contract, the remaining document has no force and effect.

The Appellants argue that because there was no contract, the Chancellor was in error in awarding attorney's fees against the Appellants as attorney's fees can only flow through the contract itself. However, even if this court found agreed with the Chancellor, that the original contract survived the amendments, it is not the contract which Alan and Lisa sought to enforce. The contract that Alan and Lisa sought to enforce was found by the Court to be unenforceable so therefore no attorney's fees should have been awarded.

IV. ARGUMENT

i. **The Chancellor erred in applying an improper legal standard and was manifestly wrong and clearly erroneous in finding that the "Gift Equity Letter" from Mary C. Lagarde to Alan and Lisa Lagarde survived Mary C. Lagarde's death.**

ii. **The court erred in finding the "Gift Equity Letter" acted as symbolic delivery of the equity from Mary C. Lagarde to Alan and Lisa Lagarde.**

iii. **The Chancellor applied an improper legal standard and was manifestly wrong and clearly erroneous in finding that the "Gift Equity Letter" from Mary C. Lagarde to Alan and Lisa Lagarde was a valid and complete gift and became part of the consideration for the contract of sale between the parties.**

The Appellants shall herein jointly argue the foregoing three statements of issues dealing with the validity of the "Gift Equity Letter" from Mary C. Lagarde to Alan and Lisa Lagarde as the law regarding all three issues is interconnected.

The testimony was uncontroverted at trial and the court properly found that Mary C. Lagarde never acknowledged in writing the hand written amendments to the purported "Gift Equity Letter" submitted by Alan and Lisa as part of the contract they sought to have the court

specifically enforce.

The Court properly found that the unilateral amendments or modifications to the Gift Equity Letter were unenforceable (Rec. Excerpts p. 19), however the Chancellor did in his judgment decide that the "Gift Equity Letter" of $50,000.00 was enforceable in this case (Rec. Excerpts p. 16). In order to enforce the "Gift Equity Letter" of $50,000.00 (Exhibit G), Alan and Lisa were charged with proving by clear and convincing evidence that an enforceable gift exists under Mississippi law. In the case of Guilder v First National Bank of Greenville, 214 So. 2d 681 (Miss. 1968) wherein payees of certain checks written by a decedent which were written obviously prior to her death but cashed after her death, the Chancellor pointed out that the payees would be entitled to the proceeds of the checks only if the documents could be interpreted to be (1) a valid testamentary devise, (2) a valid gift causa mortis, (3) a valid gift inter vivos, or (4) extra compensation for services rendered.

There has been no suggestion from the testimony at trial in this matter that the "Gift Equity Letter" was a testamentary devise, a gift causa mortis, or an extra compensation for services rendered. No evidence to support any such interpretation was presented at trial therefore the "Gift Equity Letter" in order to be effective, must be a valid inter vivos gift. In the Guilder v First National Bank of Greenville, 214 So. 2d 681 (Miss. 1968) case, the Mississippi Supreme Court states the following:

> The check and written document given to appellant were not effective as gifts inter vivos or gifts causa mortis. In order to perfect such a gift the property proposed to be transferred by gift must have been delivered so that the donor surrendered all dominion over it during her lifetime; or the gift must have been made in contemplation of death in case of a gift causa mortis. The facts show that the appellant did not come into possession of the money until after the death of Miss Rosenfeld, nor were the checks given in contemplation of death. Gidden v. Gidden, 176 Miss. 98, 167 So. 785 (1936); Johnson v. Grice, 140 Miss. 562, 106 So. 271 (1925); Pace v. Pace, 107 Miss. 292, 65 So. 273 (1914); Meyer v. Meyer,

106 Miss. 638, 64 So. 420 (1914). This is especially true as to checks.24 Am.Jur. Gifts s 95 (1939); 38 C.J.S. Gifts s 55 (1943); 38 C.J.S. Gifts ss 82, 102 (1943). Moreover, the rule established in this state is that a gift of money by a check which is not cashed until after the death of the maker is revoked by the death of the maker of the check. Smythe v. Sanders, 106 Miss. 382, 101 So. 435 (1924); Yates' Estate v. Alabama-Mississippi Conference Ass'n of Seventh-Day Adventists, Inc., 179 Miss. 642, 176 So. 534 (1937).

The following cases make it very plain that under Mississippi law, the requirements of an inter vivos gift are (1) a donor competent to make a gift, (2) a voluntary act on the donor's part with intention to make a gift, (3) a gift which is complete with nothing left to be done (4) delivery of property by donor and acceptance by donee, (5) a gift which is gratuitous and irrevocable. Each of these elements must be shown by clear and convincing evidence by the purported donee. The cases cited for the benefit of the court are as follows:

a. Jenkins v Jenkins, 278 So. 2d 446 (Miss. 1973) wherein a wife, after the death of her husband, sought to have established as a gift, shares of stock which were transferred into her name by her husband; however the stock certificate was endorsed in blank by the wife and returned to the husband who held the stock certificate throughout his lifetime. The Mississippi Supreme Court found that it was not a completed gift inter vivos even though the corporation held the stock in the wife's name on its stock transfer books, that there was not a completed gift inter vivos.

b. Carter v State Mutual Federal Savings and Loan Association, 498 So. 2d 324 (Miss. 1986) wherein Bessie Thomas opened an account at a bank in the name of her grandniece and another account in the name of her sister, and a third account in the name of a niece and continued to maintain control over all of the

accounts during her lifetime. Upon the death of Bessie, the grandniece, sister, and niece attempted to claim ownership of the accounts, the Mississippi Supreme Court found that there was no gift inter vivos because the purported donor failed to surrender all dominion over and interest in the property. Citing the case of Guilder v First National Bank of Greenville, 214 So. 2d 681 (Miss. 1968), the Supreme Court stated that in order to find a valid inter vivos gift, there must be clear and convincing proof of all five elements.

b. McClellan v McCauley, 158 Miss. 456, 130 So. 145 (Miss. 1930), the Mississippi Supreme Court found that there was no gift inter vivos where a father loaned money to a non-relative and took back promissory notes and deeds of trust to secure payments made payable to his daughters. Upon the father's death, the daughters attempted to obtain possession and rights under the notes. In determining whether there was a gift inter vivos, the Mississippi Supreme Court found the facts in the case answer in the negative. "There was never delivery, actual, constructive or symbolic, of these notes to the payee named therein. The testator exercised complete dominion over them from their inception to the date of his death when he disposed of them or the proceeds thereof by the terms of his will." Id at 147.

c. Johnson v Collins, 419 So. 2d 1029, (Miss. 1982) wherein a husband transferred certificates of deposit to his wife contingent upon obtaining a divorce. The husband died before the divorce was granted and the court found that no inter vivos gift occurred. The Court stated:

> To constitute a valid gift inter vivos, the purpose of the donor to make the gift must be clearly and satisfactorily established. Raley, et al. v. Shirley, 228 Miss. 631, 89 So.2d 636 (1956). The burden was on appellee to prove every element requisite to constitute a valid inter vivos gift. *Matter of Collier, supra.* This she failed to do. The evidence failed to sustain by clear and satisfactory proof that the gift *was a voluntary act* on decedent's part with the intention to make a gift and also failed to establish the *gift was complete with nothing left to be done.*
>
> In our opinion, the learned chancellor was manifestly wrong in his finding that decedent made a valid inter vivos gift of the certificates of deposit to appellee. The transfer of the ownership of the certificates was conditioned upon the obtaining of a divorce which did not occur, due to Collins' untimely death on November 9, 1980. It is undisputed by the parties that this condition or event did not occur; therefore, the gift must fail, because the gift was not complete with nothing left to be done. Id at 1031.

d. Raley v Shirley, 228 Miss. 631, 89 So. 2d 636 (Miss. 1956), wherein the sole and only heir-at-law of an estate agreed, in writing, in an instrument prepared by an attorney, to share the estate of her deceased sister with her half brothers and half sisters, who were not heirs-at-law. The sole and only heir-at-law subsequently changed her mind before any distribution from the estate. The half brothers and half sisters attempted to enforce the document of gift. The court found that there was no gift inter vivos and stated the following:

> In the case of Meyer v. Meyer, 106 Miss. 638, 647-649, 64 So. 420, 424, this Court said:
>
> "To constitute a valid gift *inter vivos*, the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual, constructive, or symbolical delivery without power of revocation.'20 Cyc. 1193.'A mere promise or declaration of intention to give, however clear and positive, is not enough to constitute a valid gift *inter vivos*. The intention must be consummated, and carried into effect, by those acts which the law requires to divest the donor and invest the

> donee with the right of property. Complete and unconditional delivery is essential to the perfection of such a gift for when the donor retains dominion over the property, or where a *locus poenitentiae* remains in him, there can be no legal title and perfect donation, and this rule has been held particularly applicable to parol gifts, and is founded upon grounds of public policy and convenience, to prevent mistake, imposition, and perjury. Delivery to be effectual must be according to the nature and character of the thing given, and hence may be actual or constructive according to the circumstances. There must, however, be a parting by the donor with all present and future legal power and dominion over the property.'20 Cyc. 1195; Thompson v. Thompson, 2 How. 737;Wheatley v. Abbott, 32 Miss. 343;Conner v. Hull, 36 Miss. 424;Young v. Power, 41 Miss. 197;Carradine v. Collins, 7 Smedes & M. 428. * * *
>
> 'If B. is in possession of property belonging to A., A. may direct him to give it to C., and, when delivered to C. by B., C's title thereto becomes perfect; but until so delivered, C. has no title at all; the ownership remains in A., and he may revoke B.'s authority to deliver it to C.'
>
> [9] In the case of Gidden v. Gidden, 176 Miss. 98, 110, 167 So. 785, 790, this Court said: 'In Thornton on Gifts and Advancements, p. 173, Mississippi is set out in the notes as standing alone in holding that the delivery to the donee of a deed of gift is not sufficient alone to convey the title. Whether that be true or not, and whether the rule in this state be good or bad, according to reason, we do not think it ought to be changed now. It is not a mischievous, harmful rule; the donee loses nothing, the donor simply 'plays Indian' and takes back what he attempted to give before the donee gets his hands on it.'

Therefore it appears that Mississippi is not only in the minority but is the sole State which abides by the rule that until the donor parts with all dominion and control over the purported inter vivos gift, the donor is free to withdraw the gift and any attempt to make such a gift is revoked by the death of the donor.

In the case at bar, the "Gift Equity Letter" is not a completed inter vivos gift as there was no delivery nor was the gift completed with nothing left to be done. The "gift" was contingent

on closing the sale which did not occur and the purported $50,000.00 equity gift was revoked by Mary's death. The purported gift by Mary to Alan and Lisa was contingent upon the transfer of title of Mary's domicile. This did not occur before Mary's death and the transfer of the gift was not completed. At the time of her death Mary maintained all equity in her home. Therefore there was no gift. Any claim to $50,000.00 in equity in the property by the Plaintiffs was extinguished as a result of Mary's death.

As to the "Gift Equity Letter" the Chancellor in his Findings of Fact found as follows:

15. Alan testified that $50,000.00 of the purchase price was to be paid with a gift of equity in the home of Mary C. Lagarde. Alan and Lisa also provided testimony showing that an additional unwritten consideration for the purchase of the home was Mary's right to live in the home for the remainder of her life at no cost so long as she desired (Rec. Excerpts p. 6).

17. That Mary executed a Gift Equity letter in the amount of $50,000.00 on November 9, 2004, evidencing her intent to extend the initial closing date (Rec. Excerpts p. 7).

20. The Gift Equity Letter was also modified by striking through the initial amount of $50,000.00 and writing in, by hand, a new amount of $51,200.00. This modification was also initialed by Alan and Lisa on the letter. Mary Lagarde did not sign off on these modifications prior to her death ((Rec. Excerpts p. 7,8).

In his Conclusions of Law, the Chancellor found as follows, to-wit:

35. After the contract was executed, the parties agreed to add further consideration to their agreement and memorialized further promises they made in regard to the transaction in the form of the Gift Equity Letter and their agreement to allow Mary Lagarde to live in the house as long as she so desired ((Rec. Excerpts p. 15)

36. The Gift Equity Letter, signed and executed by all parties, effectively transferred $50,000.00 in equity Mary Lagarde had in the property to Alan and Lisa. According to its terms, this equity was to be used to purchase the subject property. In their Proposed findings of Fact and Conclusions of Law, Chris and Liz claim the gift of equity did not constitute a valid inter vivos gift because it was "not a completed inter vivos gift as there was not delivery nor was the gift completed with nothing to be done and in fact the "gift" was contingent on closing the transaction and the purported $50,000.00 equity gift was revoked by Mary's death." The Supreme Court has set forth the requirements of an inter vivos gift as follows:

> "To constitute a valid gift inter vivos, the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual, constructive, or symbolical delivery without power of revocation." 20 Cyc. 1193. "A mere promise or declaration of intention to give, however clear and positive, is not enough to constitute a valid gift inter vivos. The intention must be consummated, and carried into effect, by those acts which the law requires to divest the donor and invest the donee with the right of property. Complete and unconditional delivery is essential to the perfection of such a gift for when the donor retains dominion over the property, or where a locus poenitentiae remains in him, there can be no legal title and perfect donation, and this rule has been held particularly applicable to parol gifts, and is founded upon grounds of public policy and convenience, to prevent mistake, imposition, and perjury. Delivery to be effectual must be according to the nature and character of the thing given, and hence may be actual or constructive according to the circumstances. There must, however, be a parting by the donor with all present and future legal power and dominion over the property." 20 Cyc. 1195; Thompson v. Thompson, 2 Howard 737; Wheatley v. Abbott, 32 Miss. 343; Conner v. Hull, 36 Miss. 424; Young v. Power, 41 Miss, 197; Carradine v. Collins, 7 S. & M. 428.
>
> Meyer v. Meyer, 64 So. 420, 424 (Miss. 1913).

(Rec. Excerpts p. 16, 17)

37. The Gift Equity Letter makes it clear that Mary Lagarde intended to give a gift of equity to Alan and Lisa. Equity is intangible and cannot be physically delivered from one party to another. The letter acted as the symbolic delivery of the equity from Mary Lagarde to Alan and Lisa. Since it was to be used as consideration in the sale of the property, it was directly attached and became a part of the contract for the sale of land upon its delivery to Alan and Lisa. The contract to sell the property is enforceable and the remedy for breach is specific performance, therefore Mary Lagarde relinquished all control over the equity when she delivered the Gift Equity Letter to Alan and Lisa. The Court finds the Gift Equity letter was a valid and complete gift to Alan and Lisa and became part of the consideration for the contract. (Rec. Excerpts p. 16)

In the Court's Conclusions of Law, the Chancellor found that there was consideration given by Alan and Lisa to Mary Lagarde in exchange for this "Gift Equity Letter" of $50,000.00.

That consideration being the right of Mary to continue to live in her home after the closing and transfer of ownership to Alan and Lisa. Neither of these promises is enforceable. Mary could not enforce a right to use of the real property as she had nothing in writing and the promise was barred by the Mississippi Statute of Frauds, Miss. Code Ann. §15-3-1. The purported gift from Mary to Alan and Lisa had not been completed. Mary had not parted with all present and future legal power and dominion over the property. Meyer v Meyer 64 So. 2d (Miss. 1913)

It is of note that the Chancellor in his Finding of Facts and Conclusions of Law, finds that the "Gift Equity Letter" acted as the symbolic delivery of equity from Mary Lagarde to Alan and Lisa. That it was used as consideration for the sale of the property as it became attached to and part of the contract of sale of land upon its delivery to Alan and Lisa (Rec. Excerpts p. 16). In support of this proposition, the court cites the case of Meyer v Meyer, a portion of which is set out hereinabove. However, Meyer specifically states "There must however be a parting by the donor of all present and future legal power and dominion over the property" Meyer at 424. Mary was free to revoke the "gift" at any time prior to the closing as shown in the cases cited hereinabove. The purported gift was contingent upon and would only be completed if the sale of the property was finalized. Therefore the Chancellor's finding that the "Gift Equity Letter" is enforceable is clearly erroneous based upon an improper legal standard and is manifestly wrong.

vi. The Chancellor erred in granting specific performance of a contract which was not certain and mutual.

There is no question but that the request for relief by Alan and Lisa in their complaint is premised upon the existence of a document which must satisfy the Statute of Frauds. Alan and Lisa sought to specifically enforce the contract for the sale of real property attached to their

Amended Complaint as Exhibit A (Rec. Excerpts p. 22). Thus their requested relief is controlled by the requirements of Miss Code Ann. §15-3-1 which states in pertinent part:

> An action shall not be brought whereby to charge a Defendant or other party:
>
> (c) upon any contract for sale of lands, tenements, or herditaments or the making of any lease thereof for a longer term than one year...
>
> unless in each of said cases the promise or agreement upon which such action may be brought with some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or signed by some person by him or here thereunto lawfully authorized in writing.

In the case of Kervin v Biglane, 144 Miss. 666, 110 So. 232 (Miss 1926), the Mississippi Supreme Court in 1926 was requested to determine whether a contract was adequate to grant specific performance to a purchaser. The court stated as follows:

> In the case of Nickerson v. Fithian Land Co., 118 Miss. 722, 80 So. 1, it is said: "In order to avoid the statute of frauds, the agreement in writing must be certain, or capable of being made certain by reference to something else whereby the terms and subject-matter of the agreement may be ascertained with reasonable precision; otherwise, it cannot be carried into effect by decree of the court." Fisher v. Kuhn, 54 Miss. 480; McGuire v. Stevens, 42 Miss. 724, 2 Am. Rep. 649.

> Also found in the Kervin case is the following language:
>
> Our court is committed to the doctrine announced in Waul v. Kirkman, 27 Miss. 823, wherein Mr. Justice Handy, as the organ of the court, said:
>
> "The rule upon this point is well settled to be that the memorandum, in order to satisfy the statute, must contain the substantial terms of the contract expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence. Boydell v. Drummond, 11 East, 142 [and other authorities]. For otherwise all the danger of perjury, intended to be guarded against by the statute, would be let in. And when reference is made in the memorandum to another writing, it must be so clear as to prevent the possibility of one paper being substituted for another. 1 Sug. Vend., 94; Smith v. Arnold, 5 Mason (U. S.) 416, Fed. Cas. No. 13,004."

In the case of Phelps v Dana, 121 Miss. 697, 83 So. 745 (1920), the Mississippi Court was requested to grant specific performance of a series of correspondence which the purchaser sought to specifically enforce as a contract between the parties, the following language is found:

> In Welch v. Williams, 85 Miss. 301, 37 South. 561, our court said:
>
> "The elementary general rule, as frequently enunciated in reference to the enforcement of specific performance of contracts, so far as relates to the particular branch of the subject here presented for consideration, is that the contract must be specific and distinct in its terms, plain and definite in its meaning, and must show with certainty that the minds of the parties had met and mutually agreed as to all its details upon the offer made upon the one hand, and accepted upon the other. If any of these requisites be lacking, specific performance will not be decreed by a court of equity."

Also in the Phelps case, the Mississippi Supreme Court spoke to the requirement of tender of performance in order to entitle a purchaser to specific performance.

> It is manifest that the details of the transaction would have to be settled by further agreement. Again the acceptance was not accompanied with the cash payment nor with executed papers sufficiently explicit to have closed the transaction by their acceptance by the appellee. Before a specific performance will be decreed the tender of performance on the part of the appellant, that is to say, the payment of the money and the delivery of the notes, must be made to the other party at her place of business or residence, and this was never done. Robinson v. Weller, 81 Ga. 704, 8 S. E. 447.

In deciding the Phelps case the Mississippi Supreme Court quoted from the Robinson v Weller Georgia case as follows:

> "It is true that a contract can be made by correspondence through the mail, *** as well as when the parties are together, and the same rules will apply in either case. But, in order to make any sort of contract, the offer of the seller must be accepted by the purchaser, unequivocally, unconditionally, and without variance of any sort. There must be a mutual consent of the parties thereto, and they must assent to the same thing in the same sense. An absolute acceptance of a proposal, coupled with a condition, will not be a complete contract; because there does not exist the requisite mutual assent to the same thing, in the same sense. Both parties

must assent to the same thing, in order to make a binding contract between them.

In determining whether or not parol evidence should be allowed to vary the terms of a written contract by parol evidence, the Mississippi Supreme Court stated in the case Sharpsburg Farms, Inc. v Williams, 363 So. 2d 1350 (Miss 1978):

> In Fuqua v. Mills, 221 Miss. 436, 73 So.2d 113 (1954), this Court, in again defining the parol evidence rule, quoted with approval from Kendrick v. Robertson, 145 Miss. 585, 111 So. 99 (1927):
> "(T)he rule that the terms of a written contract or conveyance cannot be varied or added to by parol evidence is not merely a rule of evidence, but is one of substantive law, and, in measuring the rights of the parties to a written contract or conveyance, which, on its face, is unambiguous and expresses an agreement complete in all of its essential terms, the writing will control. Jones, Commentaries on Evidence, Vol. 3, par. 434; Wigmore on Evidence, Vol. 4, pars. 2400 and 2425."221 Miss. at 450, 73 So.2d at 119.

The Appellants submit that the documents submitted by Alan and Lisa as the contract between the parties were found by the Chancellor to be unenforceable in the following particulars, to-wit:

> The modifications to the initial contract included the change in the purchase price by striking through the $250,000.00 amount and hand writing $256,000.00 beside the previous price, the hand writing of $51,200.00 on the line regarding the cash down payment at closing, and the hand circling that the seller will pay the closing cost with the $4,100.00 written to the right of the line regarding closing costs. The contract also has the handwritten initials of Alan and Lisa next to these aforementioned modifications. Although testimony was provided stating that parties mutually agreed to the modifications, Mary Lagarde never signed off on those modifications. The modified contract is silent as to what further consideration was given for the modifications to be valid. Since Mary Lagarde never signed the contract, there is no evidence the modifications were the result of any bargained for return promise. The Court finds Alan and Lisa failed to show consideration to support the modifications of the initial contract making the modifications unenforceable (Clerk's Papers p. 56).

Alan and Lisa did not request alternative relief of the court to enforce the contract as it existed on October 8, 2004 (Rec. p. 59). Alan and Lisa sought specific performance of a contract

the Chancellor found unenforceable. The Mississippi Supreme Court has identified requisites to granting a judgment of specific performance as found in the case of Aston v William Robinson, 49 Miss. 349 (Miss. 1973) :

> The jurisdiction of a court of equity to enforce, specifically, a contract, though it is said to rest in judicial discretion, yet it is exercised according to sound and fixed rules, and within certain defined limits; but is controlled largely by the circumstances of the individual case. Ash v. Daggy, 6 Ind., 259; Griffith v. Frederick County Bank, 6 Gill. & John., 424. The requisites upon which this equity arises are, the performance must be necessary; there must be a valuable consideration; it must be practicable; the agreement must be certain and mutual. Ordinarily it will not be exerted in reference to agreements about chattels, because the law esteems that ample compensation can be made in damages, for a breach.

Alan and Lisa made substantial modifications to the contract indicated by both the handwritten alterations and fill in the blank modifications made to the document which they submitted with their complaint, the document which the Chancellor found to be unenforceable. Alan and Lisa did not request the court for authority to amend the relief sought in their complaint and continued to insist that the document which the court found unenforceable should be specifically enforced. The court did not enforce the contract which they sought to enforce, but in fact created a new contract utilizing the document attached to Exhibit A of the Amended Complaint culling out those portions the court believed where unilateral modifications by Alan and Lisa, incorporating into this new contract the "Gift Equity Letter" and based on parol evidence by Alan, the right of his mother to live in the house for the balance of her life, incorporated into this new contract to be specifically enforced. Appellants argue that no legal authority exists for the Chancellor to craft this new contract and order specific enforcement of same.

v. **The Chancellor erred in applying an improper legal standard and was manifestly wrong and clearly erroneous in awarding attorney's fees against Christopher Lagarde and Elizabeth Bosarge.**

It is well settled Mississippi law that attorney's fees are awarded a party only in limited circumstances. A discussion of the attorney's fees issue is found in Sports Page Incorporate v Punzo, 900 So. 2d 1193 at page 1230 as follows, to-wit:

> Mattina cites to the case of *Sentinel*, 743 So.2d at 970-71(¶ 50). The *Sentinel* case declared, consistent with prior precedent, that in general attorney's fees may be awarded in two circumstances: (1) where the contract or a statute provides for attorney's fees or (2) where the losing party's conduct was outrageous enough to warrant punitive damages. The court there said, specifically:
>
> "It is well settled that attorney's fees are not to be awarded unless a statute or other authority so provides." *Mississippi Dep't of Wildlife, Fisheries & Parks*, 740 So.2d at 937. "In breach of contract cases, attorney fees generally are not awarded absent provision for such in the contract or a finding of conduct so outrageous as to support an award of punitive damages." *Garner v. Hickman*, 733 So.2d 191, 198 (Miss.1999). As discussed below, the record did not support an instruction against Seaboard/St. Paul for punitive damages, and none are claimed against Sentinel/Centre. The contracts in this case contained no provision governing the award of attorneys' fees. Under the general law in Mississippi, Kimmins was not entitled to attorneys' fees in this case.
>
> *Sentinel*, 743 So.2d at 971 (¶ 51).
>
> As the quote above demonstrates, the contract involved in *Sentinel* did not provide for attorney's fees, and the record of the case did not support an award of punitive damages. Therefore, the court concluded that attorney's fees were not proper.
>
> *Sentinel*, thus, stands for the proposition that in the absence of contractual or statutory provision or conduct that would support an award of punitive damages, attorney's fees ordinarily will not be proper. Mattina and Punzo both agree that their contract did not provide for attorney's fees, and the trial judge below held that Mattina's conduct did not support an award of punitive damages. ***1204** Therefore, under the general rule, as stated in *Sentinel*, attorney's fees should not have been awarded to Punzo. Id 1203.

The Appellants would therefore show unto the court that the contract which Alan and Lisa sought to enforce was in fact unenforceable as found by the Chancellor in his judgment (Clerk's Papers p. 56). The Appellants would show unto the court that the underlying contract which the Chancellor found to be enforceable was not sought to be enforced by Alan and Lisa. No demand was ever made upon the executors to appear and close the transaction pursuant to the contract which the Chancellor found was enforceable. There was no specific finding of fact by the Chancellor that it was necessary to initiate litigation on behalf of Alan and Lisa to enforce the only contract he found enforceable, therefore no attorney's fee should have been awarded Alan and Lisa from the Appellants.

V. CONCLUSION

The Appellants would show unto the court that the Chancellor was clearly erroneous, manifestly wrong in utilizing improper legal standards in finding that a contract existed between the parties. The Appellants further argue that if this court agrees that the Chancellor was correct in finding that a contract existed, that the Chancellor was clearly erroneous, manifestly wrong and utilized an improper legal standard in finding that the "Gift Equity Letter" survived the death of Mary C. Lagarde and further was in error when the Chancellor found that the gift was irrevocable. The Appellants further argue that the Chancellor found that contract which Alan and Lisa Lagarde sought to enforce is not the contract that the court found to be a valid and

CERTIFICATE OF SERVICE

I, the undersigned attorney for the Appellants, Christopher Lagarde and Elizabeth Bosarge, hereby certify that I have on this date mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of the Appellant to the following parties of interest:

ATTORNEY FOR THE APPELLEE:	Timothy L. Murr Perry, Murr, Teel & Koenenn Post Office Box 7158 Gulfport, Mississippi 39506-7158
PRESIDING TRIAL JUDGE:	Hon. Jim Persons Chancellor Post Office Box 457 Gulfport, Mississippi 39502
COURT OF APPEALS: (4 copies)	Court of Appeals Post Office Box 249 450 High Street Jackson, Mississippi 39205-2847

SO CERTIFIED this the 10th day of February, 2009.

/s/ Benvenutti

CLEMENT S. BENVENUTTI