2009-CA-00328-COAE

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STATEMENT REGARDING ORAL ARGUMENT

As noted in Appellant's opening Brief, the Trial Court in this case found a fraudulent transfer based on the payment of a debt undisputedly owed to the creditor, Verna Mae Carroll. The Trial Court entered a judgment against Verna Mae Carroll for $153,274.65, representing the amount the Court found to have been fraudulently transferred to her. However, it was undisputed at trial that Verna Mae Carroll was legitimately owed this precise sum under a written contract with Roger Carroll.

Thus, oral argument should be granted to discuss whether Mississippi law will allow a transfer to be deemed fraudulent, and a judgment imposed against the transferee, when the transferee was legitimately owed all funds which were transferred.

Oral argument should be granted to discuss this issue as well as which fraudulent conveyance statutes should have been applied in this case.

REPLY ARGUMENT I.

THE TRIAL COURT ERRED IN APPLYING THE UNIFORM FRAUDULENT TRANSFER ACT.

Anna Carroll ostensibly concedes that statutes are not applied retroactively unless the legislation specifically provides for retroactive application. Indeed, a line of cases establishes that statutes are applied prospectively only unless the Legislature unambiguously indicates otherwise. *See, e.g, Jones v. Baptist Mem. Hosp.-Golden Triangle, Inc.*, 735 So. 2d 993, 998 (Miss. 1999); *City of Starkville v. 4-County Elec. Power Ass'n*, 909 So. 2d 1094, 1109 (Miss. 2005).

Anna likewise does not dispute that the Uniform Fraudulent Transfer Act contains no provision making it retroactive. *See* MISS. CODE ANN. § 15-3-101, *et seq.* (Supp. 2008) (*See also* Appellee's Brf. at 8). Rather, Anna claims that the Uniform Act was nevertheless properly applied retroactively in this case since it was an expression of "public policy" by the Legislature and that the Court could apply the Act retroactively under its equitable powers. Both of Anna's assertions are completely unsupported by any law.

The only authority which Anna cites in her argument is *Barbee v. Pigott*, 507 So. 2d 77, 85 (Miss. 1987). The *Barbee* opinion does not stand for the proposition that the Court can apply the Uniform Act retroactively. The *Barbee* Court merely made mention of the Uniform Fraudulent Transfer Act on two occasions in its opinion. *Barbee*, 507 So. 2d at 84. However, while the Court referenced the Uniform Act in passing, the Court did not ***apply*** the Uniform Act. *Id.* at 84. The Court actually applied the predecessor statute as it was in effect at the time. *Id.* at 84. Anna ignores that the *Barbee* Court expressly recognized "[t]he crux of this case, therefore, is whether the conveyance violated Miss. Code Ann. §§ 15-3-3 and 15-3-5." *Id.* Of course, 15-

3-3 and 15-3-5 are the predecessor statutes, which were applied in *Barbee* and which should have been applied in this case.

Verna Mae claims that the Trial Court committed reversible error in actually *applying* the Uniform Act in this case. The Trial Court did not merely mention the Act or analogize the Act to the applicable statues as the *Barbee* Court did. Rather the Trial Court retroactively applied the Uniform Act in the Bench Opinion. Anna's lawyer then prepared a Judgment to hedge as to the applicable law and state that that the Trial Court had applied "both" the Uniform Act and the predecessor statutes. Of course, this too is improper. Any retroactive *application* of the Uniform Fraudulent Transfer Act was contrary to Mississippi law. Such a retroactive application is manifestly what the Trial Court's oral opinion and written Judgment reflect.

Since the *Barbee* opinion does not authorize retroactive application of a prospective statute, Anna's only remaining argument is her assertion that the Trial Court could exercise "its equitable powers to consider and apply this public policy statement by the legislature as to the transaction that occurred at any time, even before the enactment of the statute." (Appellee's Brf. at 8). This argument is, tellingly, unsupported by any legal authority. The Mississippi Courts have consistently held that "an argument unsupported by cited authority need not be considered by the Court." *Entergy Miss., Inc. v. Bolden*, 854 So. 2d 1051, 1057 (Miss. 2003). The Court considers arguments that are unsupported by legal authority to be abandoned. *Grehan v. Miss. Empl. Sec. Comm'n*, 918 So. 2d 774, 775 (Miss. Ct. App. 2005). S*ee also Jones v. Howell*, 827 So. 2d 691, 702 (Miss. 2002).

The reason Anna cites no authority in support of this novel argument is because there is no law supporting her assertion. A claim that a Court can, under the guise of exercising its equitable powers, retroactively apply prospective statutes would amount to a reversal of well

established law. No such exception has ever been grafted onto the bright-line rule that statutes apply prospectively unless the Legislature expressly states otherwise. There is no basis for such an exception as it would circumvent the rule of prospective-only application.

Anna's unsupported arguments are meritless. The Chancellor in this case did not merely cite, consider or discuss the Uniform Fraudulent Transfer Act. The Chancellor expressly applied the Act. This retroactive application of the Act constitutes reversible error. On the basis alone the Trial Court's decision should be reversed.

REPLY ARGUMENT II.

THE SUM OF $153,274.65 WAS OWED TO VERNA MAE AND THE TRANSFER COULD NOT BE FRAUDULENT BASED ON THE UNDISPUTED FACTS.

Anna concedes in her Brief, as she must, that Verna Mae Carroll was owed precisely the sum of $153,274.65 when the funds were transferred to her. Nevertheless, Anna claims that the payment of this very money to Verna Mae was correctly set aside as fraudulent. Anna is wrong.

First, as she does throughout her Brief, Anna claims Verna Mae is presenting an issue of fact instead of a question of law. This is incorrect. The facts of this case are completely undisputed. All Parties agree that: 1) Roger Carroll purchased the gravel business from his parents, Verna Mae and William, for $450,000 of which Roger paid $150,000 at the time of his purchase; 2) Roger made regular monthly payments on the $300,000 debt from his purchase of the business under the Agreement for Sale and Transfer of Assets; 3) Roger later sold the business for $500,000; 4) At the time of the sale Roger owed exactly $153,274.65 to Verna Mae

from his purchase of the business;[1] 5) Verna Mae received a check from the closing of the sale of the gravel businesses for $153,274.65, for satisfaction of the debt.

There is no factual dispute at issue in this case. The dispute is a legal issue: whether, given those undisputed facts, the transfer of $153,274.65 can be set-aside as fraudulent.[2] There was no evidence from which fraudulent intent could be found under these undisputed facts. However, even if this question involved a factual determination, this issue is nevertheless properly before this Court. The Court would simply review the Chancellor's factual findings for clear error. *Powell v. Campbell*, 912 So. 2d 978, 981 (Miss. 2005). That is, if the Chancellor's factual findings are unsupported by substantial credible evidence, or are manifestly wrong, this Court would nevertheless reverse the Chancellor's decision. *Williams v. Farmer*, 876 So. 2d 300, 305 (Miss. 2004).

Since the facts are undisputed that Roger Carroll owed Verna Mae the precise amount transferred to her based on a legitimate pre-existing debt, any determination that the transfer was fraudulent would necessarily amount to clear error. The undisputed facts establish that the transaction was done openly, in the ordinary course of the sale of the business and that the payment to Verna Mae was based on a purchase-money debt owed under a written contract. Thus, even under a deferential standard of review, the Trial Court's decision should nevertheless be reversed.

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[1] William Carroll, Verna Mae's husband, was deceased by the time Roger sold the gravel business. Thus, the debt under the Agreement for Sale and Transfer of Assets was owed exclusively to Verna Mae. (*See* Trial Ex. No. 5; Appellant's R.E. tab 7).

[2] This is precisely the sort of issue which could have been decided on summary judgment, since there were no issues of fact in dispute. *Hill v. Mills*, 26 So. 3d 322, 328 (Miss. 2010) (reciting familiar standard for summary judgment, when "no genuine issue of material fact."). Verna Mae filed a Motion for Summary Judgment arguing this issue, but it was denied by the Trial Court. (R. Vol. 2, p. 187). The Record reveals that there are still no disputed facts in this case.

Since Anna concedes Verna Mae was owed the transferred funds she argues that Roger, not the corporation, owed Verna Mae the debt and the corporation, not Roger, paid the money to Verna Mae. Thus, Anna claims the payment of the debt was somehow rendered fraudulent. This argument is likewise incorrect.

Anna makes a distinction without a difference in hopes of confusing the issue. It does not matter that the funds paid to Verna Mae were paid from the sale of the business. It is dispositive that Verna Mae was legitimately owed the amount paid to her and that the payment was a legitimate ordinary transfer. Anna's argument elevates form over substance to the extreme.

The Record establishes that Verna Mae had nothing to do with Roger's sale of the gravel business for $500,000. Verna Mae and her husband had simply financed Roger's purchase of the business in the amount of $300,000. It is undisputed that Roger was the sole shareholder of the corporation. When the business was sold for $500,000, the sole shareholder's remaining debt from the purchase of the company was paid off. This is the epitome of a legitimate transaction done in the ordinary course of business.

The fact that Verna Mae received payment for the debt in the form of two (2) drafts from the attorney who handled closing the sale of the business is pertinent to show that the transaction was legitimately a part of Roger's sale of the business. Further, this evidence exhibits that Verna Mae had no idea whether the money was being paid directly by Roger, by the corporation on behalf of Roger or by someone else. Verna Mae simply received the attorney's checks in the mail representing payment of the debts owed to her. Verna Mae would not know whether the funds had first been transferred to Roger or whether the funds were paid directly out of the closing. Verna Mae simply knew that the debt legitimately owed to her was paid off when Roger

sold the business. It defies logic to contend that such a transaction amounts to a fraudulent conveyance under Mississippi law.

If Anna's argument were accepted, the single fact which decided this case would be that the debt to Verna Mae was paid directly from the closing of the sale of the business, rather than the corporation cutting a check to Roger and Roger in turn sending the funds to Verna Mae. Anna would apparently concede that she would have no claim had the corporation distributed funds to Roger and Roger then paid Verna Mae. This is illogical. The fact that the legitimate debt was paid to Verna Mae by the closing attorney directly from the closing, instead of adding a step and distributing the funds first to Roger, could not be the deciding factor in this case. This in no way indicates fraud. Quite to the contrary, this fact further exhibits that the transaction was not fraudulent and above-board.

Again in arguing this issue Anna cites precious little law. Anna does not explain how Verna Mae's acceptance of payment for the legitimate debt owed to her when Roger sold the gravel business could possibly be a fraudulent conveyance under either 15-3-3 or the Uniform Fraudulent Transfer Act. As discussed at length in Verna Mae's opening Brief, under an analysis of either statutory framework, the transfer did not meet the criteria for a fraudulent conveyance.

In short, applying the predecessor statutes, the transfer was a bona fide transfer based on good consideration such that it could not be set aside. MISS. CODE ANN. § 15-3-5. Verna Mae can not have had fraudulent intent by accepting payment for a legitimate debt owed on the sale of a business paid at the time her buyer sold the businesses. The transfer was, undisputedly, based on a valid antecedent debt owed to Verna Mae. *See Barbee v. Pigott*, 507 So. 2d 77, 85(Miss. 1987). Mississippi law provides that a debtor has every right to prefer one creditor over

another so long as the debtor's payment is not fraudulent. *See, e.g., Barbee,* 507 So. 2d at 85; *Fargason v. Oxford Mercantile Co.*, 27 So. 877 (Miss. 1900). In order to be "fraudulent" the *sole purpose* of a transfer must be to cheat the transferor's creditors. *See Blount v. Blount*, 95 So. 2d 545, 552 (Miss. 1957).

Similarly, under the Uniform Fraudulent Transfer Act, it is undisputed that Verna Mae received the funds in good faith and for equivalent value, as Roger's debt was satisfied in the same amount he paid her. Thus, under the Uniform Act the transaction could not be set aside. *See* MISS. CODE ANN. § 15-3-113. With respect to the analysis under the Uniform Act, the Court would consider the factors enumerated in Miss. Code Ann. § 15-3-107(2). Anna does not even respond to Verna Mae's arguments regarding the factors in 15-3-107(2). For instance, the Trial Court misapplied subparagraph (a) by viewing Roger Carroll as the transferor for purpose of finding an "insider transaction" but then viewing the corporation as the transferor for purpose of finding that no legitimate debt was owed. Similarly, a proper analysis of the factors in subparagraphs (b) (Roger did not control the money after the transfer), (c) (transfer and obligation were never concealed) and (h) (debtor received equivalent consideration) manifestly exhibit that the transaction was not voidable under the Uniform Act.

Anna offers no response to any of this, other than relying on the fact that Roger was insolvent when he sold the gravel business. Roger's insolvency and the declining gravel business were the reasons he sold the gravel business. The fact that Roger paid some, but not all, of his business debts, including the debt he incurred in buying the business, does not indicate fraud in any respect.

Anna next makes an argument that "the transaction in this case violated the old traditional Mississippi Statute of Frauds." MISS CODE ANN. § 15-3-1. This argument is a red herring.

There was, of course, a written agreement between Roger and Verna Mae evidencing the $300,000 indebtedness. Verna Mae could have sued Roger to collect the debt had he not paid it. Roger, in fact, paid the debt through the closing of his sale of the gravel business. Again, Roger was the sole shareholder of Mississippi Gravel Sales, Inc. Roger Carroll simply paid his fully enforceable debt by having his corporation pay the funds to Verna Mae directly from the sale closing.

Despite her protests to the contrary, Anna refuses to view the payment to Verna Mae consistently. So long as the transfer is viewed consistently it is obvious that it could not be set aside regardless of which law is applied. If Anna was Roger's creditor and Roger transferred the funds to Verna Mae, Anna cannot prevail because Roger legitimately owed the funds to Verna Mae and received exactly equivalent consideration for the transfer. Because of this fatal problem for her case, Anna scales new heights of technicality by claiming that the corporation paid Verna Mae to satisfy Roger's legitimate debt, the corporation was not indebted to Verna Mae for purchasing the business (though its sole shareholder undisputedly was), thus the transaction must be fraudulent.

Of course, the transaction is best viewed as what it really was: Roger's repayment of a debt owed to Verna Mae when he sold the business. Roger simply paid the debt from the closing of the sale of the business from his corporation, of which he was the sole shareholder.

However, even if Anna's elevation of form over substance were accepted, Anna still cannot prevail because Anna was not the corporation's creditor. The fact that the gravel business was marital property has nothing to do with whether Anna was the corporation's creditor. There

is no dispute that Anna was not a creditor of the corporation.[3] Under either the predecessor statutes or the Uniform Act, Anna must be a "creditor" in order to complain of a fraudulent transaction. Anna was no creditor of the corporation. If Roger is removed from the equation (as Anna argues for some of her purposes) and the transfer concerned only the corporation and Verna Mae, the transaction would nevertheless stand since Anna could not complain of any payment made by the corporation since she was not a creditor.

Anna wishes to mix and match the prism through which the transaction is viewed to suit her ends. Anna wants the Court to determine that the transaction was between Roger and Verna Mae for purposes of her being Roger's creditor (which she clearly was). However, for purposes of evaluating whether Verna Mae was owed a legitimate debt, Anna asks the Court to ignore Roger and determine that the corporation made the transfer and it owed no debt. The Court should decline this invitation to distort the facts to produce an absurd result.

The undisputed facts show that Verna Mae was owed the sum of $153,274.65 by Roger Carroll as of the date he sold the gravel business. Verna Mae was paid precisely this sum from the proceeds of Roger's sale of the business. Based on the undisputed facts and stipulations in the Record, the payment to Verna Mae was not a fraudulent conveyance.

The Trial Court erred in finding a fraudulent conveyance and in imposing a judgment against Verna Mae. The Trial Court's decision should be reversed and rendered.

[3] The Uniform Act, for instance, defines "creditor" as "a person who has a claim" and "debtor" as "a person who is liable on a claim." MISS. CODE ANN. §15-3-101. The corporation was not liable on any claim to Anna. Anna was thus not the corporation's creditor.

REPLY ARGUMENT III.

ANNA WAS JUDICIALLY ESTOPPED FROM PROCEEDING TO TRIAL DUE TO A PENDING ACTION IN ANOTHER COURT CLAIMING THE CASE HAD BEEN SETTLED.

Anna's only response to Verna Mae's argument that she was judicially estopped from pursuing her claim because she alleged the case had been settled in a separate action was that Anna did not benefit from the inconsistent allegations in the Circuit Court case.

The Mississippi Supreme Court has held that "[j]udicial estoppel normally arises from the taking of a position by a party that is inconsistent with a position previously asserted." *Banes v. Thompson*, 352 So. 2d 812, 815 (Miss. 1977). The doctrine of judicial estoppel should operate to preclude a plaintiff from pursuing a case in one Court with designs to retreat from that position in the event of an adverse ruling. *Derr Plantation, Inc. v. Swarek*, 14 So. 3d 711, 721 (Miss. 2009) (Randolph, J., concurring). This Court in *Scott v. Gammons*, 985 So. 2d 872, 877 (Miss. Ct. App. 2008) explained as follows:

> Judicial estoppel precludes a party from asserting a position, benefiting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation.

Scott, 985 So. 2d at 877.

In *Scott*, plaintiffs were involved in an automobile accident in which either Conway or Gammons was the driver of the offending vehicle. *Id.* at 873. The plaintiffs, in a Chancery Court action, took the position that Conway was the driver and received a settlement. *Id.* at 877. Plaintiffs subsequently filed a separate suit against Gammons in Circuit Court claiming he had been the driver. *Id.* at 873. The Court of Appeals held that the plaintiffs were barred by the doctrine of judicial estoppel from pursuing the claims in the Circuit Court action under the theory of judicial estoppel. *Id.* at 877.

Scott is on-point in this case. Anna filed this claim against Verna Mae, but subsequently claimed that all her claims against Roger and Verna Mae were settled.[4] Anna then filed a Circuit Court action seeking damages based on the alleged failure to consummate the settlement. Anna was, therefore, barred from claiming that the case had not been settled and in proceeding with the Chancery Court action.

Anna's argument that she received no benefit from her inconsistent allegations is disingenuous. Anna filed the Circuit Court action claiming settlement just ten (10) days before the Chancery Court trial. (*See* Trial Exhibit No. 6; T. Vol. 1, p. 120-21). The Circuit Court action was pending at the time this case was tried in Chancery Court. (*Id.*). Only after the Chancery Court ruled in Anna's favor, and awarded her a judgment, did Anna decide to dismiss the Circuit Court case. (R. Vol. 4, p. 454).

Anna benefited from her inconsistent allegations in the two separate proceedings by maintaining a fall-back position. In the event the Chancery Court ruled against her claims she could simply retreat to the Circuit Court case seeking damages based on Verna Mae's alleged failure to consummate a settlement. If, on the other hand, she prevailed in the Chancery Court case she could dismiss the Circuit Court Complaint. Anna benefited from the inconsistent allegations by securing a second bite at the apple in the event she did not win the Chancery action. Since the Chancellor found that the largest of the two (2) payments to Verna Mae was fraudulent (which, as discussed above, was error), Anna simply dismissed the Circuit Court Complaint, satisfied with the result in Chancery Court.

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[4] The decision in *Parmley v. 84 Lumber Co.*, 911 So. 2d 569, 573 (Miss. Ct. App. 2009) stands for the proposition that settlements are simply contracts which are enforceable according to their terms. The point is if Anna claims in one Court there was a settlement reached and seeks damages based on the contract, she cannot inconsistently deny the settlement and go forward with her "settled" claims in another forum.

During trial in this case Anna testified that she did not recall filing the Circuit Court action claiming that this very case had been settled. (T. Vol. 1, p. 120). However, the Circuit Court Complaint expressly alleged that this case, and Anna's divorce action against Roger, was settled on April 14, 2008. (Trial Ex. No. 6, ¶ 17; R. Vol. 4, p. 384). This is precisely the sort of chicanery which the doctrine of judicial estoppel prohibits. Anna could not claim that a case was resolved by settlement, and seek damages for alleged breach of that settlement, while simultaneously denying that the case had settled and proceeding to trial.

The Trial Court never heard or ruled on Verna Mae's Motion to Dismiss, or Alternatively for Summary Judgment, Based on Judicial Estoppel. The Trial Court erred in not deciding the Motion in Verna Mae's favor and dismissing the case based on the doctrine of judicial estoppel.

Accordingly, for this reason as well, the judgment of the Chancery Court should be reversed and rendered.

CROSS APPEAL ARGUMENT

THE TRIAL COURT DID NOT ERR IN REFUSING TO SET ASIDE THE TRANSFER OF $38,497.64 SINCE THE RECORD ESTABLISHES THIS TOO WAS A BONA FIDE TRANSFER LEGITIMATELY OWED TO VERNA MAE CARROLL.

Anna's issue on cross-appeal, unlike the others raised in this appeal, does attack the Chancellor's factual findings. Anna argues that there was no proof that Verna Mae really owned the equipment she was paid for and that there was no proof of the value of the equipment. The Record belies both statements.

First of all, Verna Mae testified that she and her husband had operated two (2) distinct gravel businesses – Carroll's Gravel and Mississippi Gravel Sales, Inc. (T. Vol. 2, p. 193). Verna Mae and her husband sold Mississippi Gravel Sales, Inc. to Roger, but not Carroll's Gravel. *(See id.)*. Verna Mae and her husband had retained a few pieces of equipment located

on the opposite side of a river from Mississippi Gravel Sales, Inc.'s operation for use in the event they decided to go back into the gravel business later in life. (Id. at 194). Verna Mae and her husband continued to own that equipment, although Roger began using it in operating his gravel business. (*Id.*).

When Roger sold the business he paid Verna Mae the sum of $153,274.65, representing the purchase-money indebtedness from his purchase of the business. (*Id.* at 193). Roger separately paid Verna Mae the sum of $38,497 for the equipment he sold along with the business which had belonged to Verna Mae and her late husband. (*Id.* at 203-04). Verna Mae explained:

> Q: Do you understand or have an understanding of why that money [$38,497] was transferred?
>
> A: Well, it was some piece of equipment that was at the pit that was sold with the other equipment that was supposed to have been Bill's and mine.
>
> Q: Well, let me see if I understand that. It was at the gravel pit, this equipment?
>
> A: Yes, it was.
>
> Q: How was it not the property of Mississippi Gravel Sales, Inc., or was it?
>
> A: No, it wasn't. It was Carroll's Gravel and it was just stuff that my husband had kept because he thought he might go back into the gravel business.

(T. Vol. 2, p. 204).

Roger Carroll likewise testified that his father had decided to keep the equipment, a portable screening plant and wash plant, to operate a "sideline business." (T. Vol. 2, p. 175). Roger testified that he did not acquire the portable screening plant and wash plant when he bought the Mississippi Gravel Sales, Inc. (*Id.* at 174-75). However, when Roger sold the business to Mississippi Gravel Sales, LLC, he sold the equipment with the business. (*Id.*). Roger explicitly testified that $38,497.65 was a reasonable price for the equipment. (*Id.* at 176).

Roger paid Verna Mae the balance of the sale proceeds, $38,497.65, representing payment for the equipment he had sold that still belonged to her. (*Id.* at 173-74).

First of all, with respect to this issue also, Anna has failed to cite a single authority in support of her argument. (*See* Appellee's Brf. at 15-17). Anna cites no legal authority which she claims shows that this payment to was fraudulent. (*Id.*). Again, as the cross-appellant, Anna was required to cite authority to support her assignment of error. *See, e.g., Edmonds v. Edmonds*, 935 So. 2d 980, 988 (Miss. 2006) ("an appellant has a duty to provide authority and support of an assignment of error") (internal quotation omitted). The Court in *Edmonds* held that an argument was procedurally barred because of the lack of any authority cited in support of the argument. *Edmonds*, 935 So. 2d at 988. Under the same reasoning as in *Edmonds*, the Court should decline to address Anna's cross appeal because of the absence of any legal authority. Anna's assignment of error is procedurally barred.

However, procedural bar aside, Anna's argument is clearly meritless. As noted with respect to the other claims, this fraudulent transfer claim is subject to Miss. Code Ann. § 15-3-3 and 15-3-5. Section 15-3-5 provides that a transfer is not fraudulent where the transfer is bona fide and based on good consideration. Just as in the analysis of the other issues in this case, in order to be set aside as fraudulent both the transferee and the transferor must have harbored fraudulent intent. *See Graham v. Graham*, 35 So. 874 (Miss. 1903); *see also Barbee*, 507 So. 2d at 85.

The payment of $38,497.65 to Verna Mae represented payment for the equipment Roger sold with the gravel business that Roger did not own. The testimony in the Record is, indeed, ***undisputed*** that Verna Mae owned the equipment and was thus entitled to be paid for it when Roger sold it along with the business. There is no evidence establishing that anyone other than

Verna Maw owned the equipment. This is a bona fide transfer based on good consideration within the meaning of section 15-3-5. Roger's testimony that the sum of $38,497.65 represented a fair value for the equipment is likewise uncontraverted in the Record. Verna Mae could not possibly have harbored fraudulent intent by being paid fair value for equipment which she owned. The Chancellor was manifestly correct in concluding that this conveyance was not fraudulent.

Anna's argument that there was no evidence that Verna Mae actually owned the portable screening plant and wash plant is clearly contradicted by testimony from both Roger and Verna Mae, who were the only two people alive who could know who owned the equipment. Likewise, Anna's assertion that there was no evidence of the value of the equipment ignores Roger's testimony as to the value of the equipment. Anna conveniently ignores the Record evidence that is fatal to her claim.

Anna finally argues that the Settlement Statement is the "best evidence" that the equipment was owned by Mississippi Gravel Sales, Inc., and not Verna Mae as both Roger and Verna Mae testified. There are myriad problems with this argument. First, it ignores Verna Mae and Roger's testimony and deems the testimony not credible. Of course, as fact-finder, the Chancellor evaluates the credibility of the witnesses. *Simmons v. Jaggers*, 914 So. 2d 693, 696 (Miss. 2005) holding "[w]hen a trial judge sits as the finder of fact, he or she has the sole authority to determine the credibility of witnesses."). The Chancellor evaluated the credibility of the witnesses and concluded that Verna Mae owned the property. There is no basis for reversing the Chancellor's decision in this regard.

Second, the argument is illogical, as an exhibit to the Settlement Statement clearly reflects that the equipment was indeed owned by Verna Mae. The Settlement Statement provides as follows:

> Purchase of Kolman Portable Screening Plant & Shop Built Wash Plant
> PAYOFF AMOUNT $ 38497.65

(Trial Exhibit 8). The Settlement Statement thus recognizes that Verna Mae owned the equipment. The Settlement Statement does not refute that Verna Mae owned the equipment, it just shows that the equipment was transferred to Mississippi Gravel Sales, LLC as part of the sale.

Finally, aside from being wrong, Anna's argument that the Settlement Statement is the "best evidence" is also procedurally barred. Anna did not object to Verna Mae's testimony that she and her husband had retained ownership of the subject equipment. (*See* T. Vol. 2, p. 203-04). Anna waived any objection based on a claim that the Settlement Statement was the "best evidence" of ownership by failing to contemporaneously object at trial. *Evans v. City of Aberdeen*, 926 So. 2d 181, 185 (Miss. 2006) (holding "in order to preserve error for appellate review, a contemporaneous objection must be made, and if no objection is made, the appellant waives the error"); *Daley v. Hughes*, 4 So. 3d 364, 368 (Miss. Ct. App. 2008) ("It is well-settled law that the failure to make a contemporaneous objection waives the right of raising the issue on appeal.")

Just like the payment of $153,274.65, the undisputed evidence adduced at trial showed that the payment of $38,497.65 was a sum legitimately owed to Verna Mae Carroll. The payment was a bona fide transfer based on good consideration. It was doubtlessly proper for Roger to pay Verna Mae for the equipment at the time he sold her equipment. Thus, the Chancellor did not err in finding that the transfer of the $38,497.65 was not fraudulent.

In this respect only, the Chancellor's decision should be affirmed.

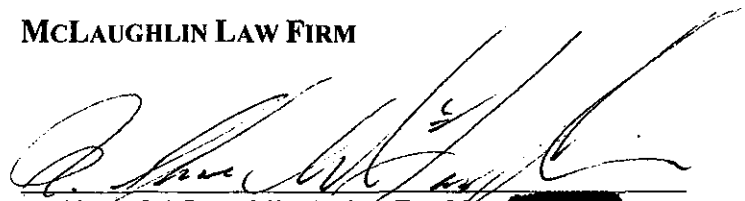
CONCLUSION

The Chancellor erred in finding that the payment of $153,274.65 to Verna Mae was a fraudulent conveyance for multiple reasons, not the least of which is that the debt was undisputedly owed to her. It was undisputed at trial that Verna Mae had no involvement in the transaction, other than retrieving the payment of a valid debt from her mailbox. The undisputed evidence at trial showed that the sum was transferred to Verna Mae to satisfy Roger Carroll's purchase-money debt from his purchase of the business. The Trial Court's decision to set aside the payment of a valid debt, and impose a judgment against the creditor who accepted the payment, manifestly constitutes reversible error. Accordingly, the Trial Court's decision should be reversed and rendered on direct appeal.

As to the issue on cross-appeal, the Trial Court correctly found that Verna Mae's acceptance of the sum of $38,497.65 was not a fraudulent transfer. Again here, the undisputed evidence showed that this sum was for the value of Verna Mae's equipment which Roger sold along with the business. There was no evidence whatsoever that this transaction was fraudulent. Therefore, the Trial Court's decision should be affirmed on cross-appeal.

RESPECTFULLY SUBMITTED, this the 9th day of April, 2010.

MCLAUGHLIN LAW FIRM

By: 

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CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant / Cross-Appellee in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Combined Reply Brief of Appellant and Brief of Cross-Appellee Verna Mae P. Carroll** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

S. Carter Dobbs, Jr.
Attorney At Law
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Hon. Talmadge D. Littlejohn
Chancellor
Post Office Box 869
New Albany, Mississippi 38652

This the 9th day of April, 2010.

R. Shane McLaughlin

CERTIFICATE OF FILING

I, J. Suzanne Bishop, Paralegal for McLaughlin Law Firm, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Combined Reply Brief of Appellant and Brief of Cross-Appellee Verna Mae P. Carroll** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

This, the 9th day of April, 2010.

J. Suzanne Bishop