IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OSCAR P. LESTRADE, JR. — APPELLANT

VERSUS — CAUSE NUMBER: 2009-CA-01354

AUDREY A. LESTRADE — APPELLEE

ON APPEAL FROM THE
CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI

APPELLANT'S BRIEF

(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Court may evaluate whether the decision of the Chancery Court of Harrison County was in error.

1. Audrey A. Lestrade
2. E. Foley Ranson, Esq., Attorney for Audrey A. Lestrade
3. Patrick W. Kirby, Attorney for Appellant
4. Butler, Snow, O'Mara, Stevens & Cannada, PLLC

Respectfully submitted this the 10th day of March, 2010.

Oscar P. Lestrade, Jr.
Appellant

BY: Patrick W. Kirby
Patrick W. Kirby
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATEMENT OF THE ISSUES

The issues presented for consideration by this Court are:

1. Whether the modification of the Property Settlement agreement was barred by the applicable statute of limitations.
2. Whether the Plaintiff/Appellee established fraud, duress or unconscionability necessary to justify a modification of the Property Settlement Agreement.
3. Whether the Chancery Court of Harrison County erred in ordering that Mr. Lestrade should have retired at the age of sixty five.
4. Whether retirement benefits earned by Mr. Lestrade after the 1989 divorce are marital property and subject to distribution by modification of a property settlement agreement.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings Below

This is an appeal from a Order of the Chancery Court of Harrison County, Mississippi, modifying the terms of the Property Settlement Agreement entered into between the parties in 1989. While the Property Settlement Agreement is silent as to Mr. Lestrade's date of retirement, the Court below modified the original Agreement to require that Mr. Lestrade retire on his sixty-fifth birthday and granting Mrs. Lestrade a judgment for past retirement benefits despite the fact that Mr. Lestrade has yet to actually retire and has yet to receive any retirement benefits himself. In addition, the court below held that Mrs. Lestrade was entitled to a retirement benefits that Mr. Lestrade earned subsequent to the divorce.

Statement of the Facts

On or about October 5, 1989, the Chancery Court of Harrison County entered a Judgment of Divorce ending the marriage of Audrey and Oscar Lestrade. (R.E.). The Judgment ratified the Property Settlement Agreement entered into between the parties on August 14, 1989. (R.E.). On January 23, 2008, some eighteen (18) years later, Mrs. Lestrade filed her Complaint for Modification of the Property Settlement Agreement. (R.E. 14 -16). In her Complaint, Mrs. Lestrade alleged that she had a "reasonable expectation" that she would begin receiving Mr. Lestrade's retirement benefits when he reached the age of 65. The Property Settlement Agreement entered into between the parties in this matter states in pertinent part, as follows:

> **Husband will pay one-half of his Civil Service Retirement to the Wife and will provide the proper and necessary proof to effect this payment.**

(R.E. 11). This provision clearly does not contain any mandatory retirement age or date.

Plaintiff made no allegations that Mr. Lestrade ever agreed to retire at age 65 nor did she allege that it was the intent of the parties at the time of formation of the Agreement that Mr. Lestrade retire at age 65. Plaintiff's Complaint simply sought to modify the existing Property Settlement Agreement by asking the Court to insert a mandatory retirement age into the eighteen (18) year old agreement.

In addition, no allegations of fraud, duress or unconscionability were made by the Plaintiff that would justify modification of the Agreement. (R.E. 14-16). Plaintiff offered no testimony regarding fraud, duress or unconscionability (Trial Transcript at pp. 43-44). As a result of this lack of testimony, the Court made no findings of fraud, duress or unconscionability which are necessary before a Property Settlement Agreement may be modified.

At the trial of this matter, in response to a question by the Court[1] regarding her understanding of the above provision, Plaintiff testified that she "assumed" Mr. Lestrade would retire at age 65. (Trial Transcript p. 43, lines 16-25). Plaintiff did not offer any testimony that she and Mr. Lestrade ever discussed or agreed that he would retire at 65. Mr. Lestrade then testified that he never represented to Mrs. Lestrade or anybody else that he intended to retire at age 65. (Trial Transcript p. 32, lines 16-18). This testimony was never refuted and remains the only evidence in this record on this subject of the parties' intent for Mr. Lestrade to retire at any certain time.

Plaintiff's counsel stated that "She [Mrs. Lestrade] didn't anticipate, while it's not totally unforeseeable that he might not retire until age 70 or 71, that wasn't contemplated at the time." (Trial Transcript p. 24, lines 12-15). Counsel further stated that,

> "She did not think that he might not retire at normal retirement age. Maybe that should have been put in there. But you can't

[1] Plaintiff did not take the stand in this matter. Her only testimony was in response to questions asked of her by the Court. See Trial Transcript pp 43-44.

> always think of everything that may happen in the future, even though it is reasonably foreseeable."

(Trial Transcript p. 26, lines 5-10). Despite testimony to the contrary, the sole testimony in the record on this subject, and admissions by Plaintiff's counsel that Mr. Lestrade's retirement age "wasn't contemplated at the time" of the formation of the Agreement, the Court found that it was the parties intent that Mr. Lestrade retire at age 65. This finding of the Court is not support by the evidence.

The Court then Ordered Mr. Lestrade to pay retirement benefits to Mrs. Lestrade retroactive to his 65th birthday despite the fact that he has not retired and has received no retirement benefits to which Mrs. Lestrade may be entitled. The Court ordered Mr. Lestrade to pay one-half of his total retirement benefit rather than one-half of the benefit earned during the marriage. Since the marriage, Mr. Lestrade has worked an additional twenty years acquiring retirement points to which Mrs. Lestrade is not entitled. Retirement funds "acquired or accumulated" during the marriage are marital property subject to equitable distribution. However, the funds acquired or accumulated outside of the marriage are not marital property and not subject to distribution.

SUMMARY OF THE ARGUMENT

The three year statute of limitations applicable to the modification of contracts equally applies to the modification of property settlement agreements. *D'Avignon v. D'Avignon,* 945 So. 2d 401, 408 (Miss. Ct. App., 2006). This matter was filed greater than eighteen years after the Property Settlement Agreement was ratified by the Chancery Court. As such, the Plaintiff's Complaint for Modification was barred by the statute of limitations.

"Property settlement agreements entered into by divorcing parties and incorporated into the divorce decree are not subject to modification except in limited situations. *Kelley v. Kelley*, 953 So. 2d 1139, 1143 (Miss.Ct.App. 2007). Findings of fraud, duress or unconscionability are required a chancellor may modify a property settlement agreement." *Woodfin*, 2010 WL 160591, *5 (Miss. App.). In this matter, Plaintiff failed to plead fraud, duress, or unconscionability; failed to offer any testimony regarding fraud, duress, or unconscionability; and as in *Woodfin*, the chancellor failed to make any findings of fraud, duress, or unconscionability. Absent such findings, a Property settlement Agreement may not be modified.

The provision of the Property Settlement Agreement at issue herein is silent as to when Mr. Lestrade is required to retire. Plaintiff offered no testimony whatsoever that Mr. Lestrade's retirement date was ever discussed by the parties. Mr. Lestrade testified that he never intended or agreed to retire at a certain age. In contradiction to the testimony in the record, the Court below found that it was the intent of the parties that Mr. Lestrade retire at a normal and customary age and set that age at 65. The Court then entered an Order retroactively awarding Mrs. Lestrade retirement benefits. However, the meaning of a contract is determined using an objective standard, rather than taking into consideration the subjective intent or a party's belief that may conflict therewith. *Palmere v. Curtis*, 789 So. 2d 126, 131 (Miss. Ct. App. 2001). This Court "is not concerned with what the parties may have meant or intended but rather what they said, for the language employed in a contract is the surest guide to what was intended." *Ivison v. Ivison*, 762 So. 2d 329, 335 (Miss. 2000). The language employed in a contract sets no mandatory retirement age and the Court's insertion of one into the agreement is contrary to law.

Finally, while retirement funds "acquired or accumulated" during the marriage are marital assets subject to equitable distribution, retirement funds not "acquired or accumulated

during the marriage" do not fall within the definition of marital assets subject to equitable distribution. *Arthur v. Arthur*, 691 So. 2d 997, 1003 (Miss. 1997). The Court below awarded Plaintiff one-half of all of Mr. Lestrade's retirement benefits although more than twenty years worth of those benefits were earned by Mr. Lestrade outside of the marriage. Because retirement plans are marital property, only those benefits "accumulated or accrued" during the marriage are subject to equitable distribution. The court erred in awarding Plaintiff portions of Mr. Lestrade's retirement benefits earned by him outside of the marriage.

ARGUMENT

A. Standard of Review.

The standard of review applicable to domestic relations matters is generally a deferential one. "Our scope of review in domestic relations matters is limited by the substantial evidence/manifest error rule. *Mizell v. Mizell*, 708 So. 2d 55, 59 (Miss. 1998) (citing *Stevison v. Woods*, 560 So. 2d 176, 180 (Miss. 1990)). "This Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Bell v. Parker*, 563 So. 2d 594, 596-97 (Miss. 1990). This Court is required to respect the findings of fact made by a chancellor which are supported by credible evidence and not manifestly wrong. *Newsom v. Newsom*, 557 So. 2d 511, 514 (Miss. 1990). "However, 'when we review questions of law, a *de novo* standard of review is applied.' *Bayview Land, Ltd. .. State*, 950 So. 2d 966, 972 (Miss. 2006).

Accordingly, "When considering issues of law such as statutes of limitations, this court employs a *de novo* standard of review. *Shaw v. Shaw*, 985 So. 2d 346, 351 (Miss.Ct.App., 2007); *Carter v. Citigroup, Inc.*, 938 So. 2d 809, 817 (Miss. 2006). In addition, "Where the question before us is essentially one of interpretation of a legal text, (i.e. property settlement agreement), our review is *de novo*." *Breezley v. Breezley*, 917 So. 2d 803, 807 (Miss.Ct.App. 2005); *Webster v. Webster*, 566 So. 2d 214, 215 (Miss. 1990). This matter presents the Court with a statute of limitations issue as well as a an interpretation of a property settlement agreement. Thus, the applicable standard of review is *de novo*.

B. Modification of the Property Settlement Agreement was barred by the statute of limitations.

The Mississippi Supreme Court has held that "[a] true and genuine property settlement agreement is no different from any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated into a divorce decree, does not change its character." *East v. East*, 493 So. 2d 927, 931-32 (Miss. 1986). Following this authority, this Court held in *D'Avignon*, that the three year statute of limitations applies to the modification of property settlement agreements. *D'Avignon v. D'Avignon*, 945 So. 2d 401, 408 (Miss. Ct. App., 2006).

The Property Settlement Agreement at issue herein was entered into between the parties on August 14, 1989 and was ratified by the Judgment of Divorce entered by the Chancery Court of Harrison County on October 5, 1989. (R.E. 17-18). Plaintiff filed her Complaint for Modification on January 23, 2008, greater than eighteen (18) years later. (R.E. 14). The statute of limitations for modification of this Agreement has long since passed.

Examining the statute of limitations issue from the point of reference most favorable to the Plaintiff/Appellee, the Chancery Court found that Mr. Lestrade should have retired on his sixty fifth birthday. (R.E. 38). Mr. Lestrade was born on January 1, 1938 and thus turned sixty-five (65) years of age on January 1, 2003. (R.E. 38). Plaintiff filed her Complaint for Modification greater than five (5) years after she alleges, and the court below subsequently found, that Mr. Lestrade should have retired. As such, even when viewed in the light most favorable to the Plaintiff, Plaintiff's Complaint for Modification was barred by the applicable statute of limitations.

While "a chancellor has great equitable powers, it is not within his or her authority to circumvent the mandate of firmly established case law. . ." *Trim v. Trim*, 2009 WL 1058630, *7.

As this Court stated in *Trim*, the purpose of our laws is to provide guidance, order and finality. A chancellor's grand reservoir of power is not an infinite power and does not equip him or her with the power to disregard clear rules of law. *Id.* Likewise in this matter, the chancellor's equitable powers do not extend so far that the applicable statute of limitations may be disregarded. "The statute of limitations is founded upon wise public policy and no exception ought to be engrafted on it by judicial construction." *Young v. Cook*, 30 Miss. 320 (Miss. Err. & App. 1855).

C. Plaintiff failed to allege or establish fraud, duress or unconscionability that would justify a modification of the Property Settlement Agreement.

"Property settlement agreements entered into by divorcing parties and incorporated into the divorce decree are not subject to modification except in limited situations. *Kelley v. Kelley*, 953 So. 2d 1139, 1143 (Miss.Ct.App. 2007); *Townsend v. Townsend*, 859 So. 2d 370, 376 (Miss. 2003). It is undisputed that a chancery court may modify an award of periodic alimony if there has been a material change of circumstances that "occurred as a result of after arising circumstances not reasonably anticipated at the time of the agreement." *Dix v. Dix*, 941 So. 2d 913, 916 (Miss. Ct. App. 2006). Conversely, with regard to property settlement agreements, the Supreme Court has repeatedly held that "property settlement agreements are fixed and final, and may not be modified absent fraud or contractual provisions allowing modification. *Weathersby v. Weathersby*, 693 So. 2d 1348, 1352 (Miss. 1997)(citing *Mount v. Mount*, 624 So. 2d 1001, 1005 (Miss. 1993); *Brown v. Brown*, 566 So. 2d 718, 721 (Miss. 1990); *East v. East*, 493 So. 2d 927, 931-32 (Miss. 1986)). In *Weathersby*, the Supreme Court stated that:

> In property and financial matters between the divorcing spouses themselves, there is no question that absent fraud, or overreaching, the parties should be allowed broad latitude. When the parties have reached agreement and the chancery court

> has approved it, we ought to enforce it and take a dim view of efforts to modify it, as we ordinarily do when persons seek relief from their improvident contracts.

Weathersby, 693 So. 2d at 1351 (quoting *Bell v. Bell*, 572 So. 2d 841, 844 (Miss. 1990)); *see also Kelley v. Kelley*, 953 So. 2d 1139, 1143 (Miss. Ct. App. 2007)(noting that a property settlement agreement incorporated into a divorce decree is not subject to modification except in limited situations).

Citing this firmly established line of case law, this Court recently reversed the chancellor's decision to modify a property settlement agreement. *Woodfin v. Woodfin*, 2010 WL 160591 (Miss. App.). In *Woodfin*, "the chancellor made no findings of fraud, duress or unconscionability; which is required for the chancellor to modify the property settlement agreement." *Woodfin*, 2010 WL 160591, *5 (Miss. App.).

Likewise in this matter, the chancellor made no findings of fraud, duress or unconscionabilty, necessary findings b efore a chancellor may modify a property settlement agreement. Plaintiff did not allege fraud, duress, or unconscionability in her Complaint for Modification (R.E. 14 – 16) nor did she offer any such testimony at the trial of this matter. Plaintiff's sole allegation was that she had "a reasonable expectation" that she would begin receiving one-half of Defendant's Civil Service Retirement when Defendant reached age 65. (R.E. 15). The entirety of Mrs. Lestrade's trial testimony is contained on pages 43 and 44 of the Trial Transcript. She did not offer any testimony whatsoever alleging fraud, duress or unconscionability of the agreement. Plaintiff failed to plead fraud, duress, or unconscionability; failed to offer any testimony regarding fraud, duress, or unconscionability; and as in *Woodfin*, the chancellor failed to make any findings of fraud, duress, or unconscionability. Because the chancellor made no such findings, necessary to modify a property settlement agreement, the

chancellor's decision to modify this property settlement agreement was not supported by substantial evidence and should be reversed.

D. The Chancery Court of Harrison County erred in modifying the Property Settlement Agreement to require that Mr. Lestrade retire at the age of sixty five.

"Property settlement agreements are contractual obligations." *West v. West*, 891 So. 2d 203, 210 (Miss, 2004). "When parties have reached an agreement and the chancery court has approved it, the appellate court ought to enforce it and take a dim view of efforts to modify it, as we ordinarily do when persons seek relief from their improvident contracts. *Id.* at 211. The meaning of a contract is determined using an objective standard, rather than taking into consideration the subjective intent or a party's belief that may conflict therewith. *Palmere v. Curtis*, 789 So. 2d 126, 131 (Miss. Ct. App. 2001). This Court "is not concerned with what the parties may have meant or intended but rather what they said, for the language employed in a contract is the surest guide to what was intended." *Ivison v. Ivison*, 762 So. 2d 329, 335 (Miss. 2000).

The Property Settlement Agreement entered into between the parties in this matter states as follows:

> **Husband will pay one-half of his Civil Service Retirement to the Wife and will provide the proper and necessary proof to effect this payment.**

(R.E. 11). This provision is silent as to when Mr. Lestrade would retire.

In her Complaint for Modification, Plaintiff alleged that she "at the time of the entry of the Judgment of Divorce, she had a reasonable expectation that she would begin receiving one-half of Defendant's Civil Service Retirement when Defendant reached age 65." (R.E. 15). At the trial of this matter, in response to a question by the Court regarding her understanding of the

above provision, Plaintiff testified that she "assumed" Mr. Lestrade would retire at age 65. (Trial Transcript p. 43, lines 16-25). Plaintiff did not offer any testimony that she and Mr. Lestrade ever discussed or agreed that he would retire at 65. On the contrary, Mr. Lestrade testified that he never represented to Mrs. Lestrade or anybody else that he intended to retire at age 65. (Trial Transcript p. 32, lines 16-18).

Plaintiff's counsel argued that "She [Mrs. Lestrade] didn't anticipate, while it's not totally unforeseeable that he might not retire until age 70 or 71, that wasn't contemplated at the time. (Trial Transcript p. 24, lines 12-15). Counsel further argued that,

> "She did not think that he might not retire at normal retirement age. Maybe that should have been put in there. But you can't always think of everything that may happen in the future, even though it is reasonably foreseeable."

(Trial Transcript p. 26, lines 5-10).[2] Despite the clear testimony Mr. Lestrade never represented, intended or agreed to retire at 65 and argument that neither Mrs. Lestrade nor her counsel anticipated this issue, the Court held that "It may require some further interpretation to clarify when that [retirement age] would be, but I am going to set it at age 65." (Trial Transcript p. 48, lines 3-5). In its Order of Modification,

> The Court [found] the intent of the parties as expressed in the contract provision recited hereinabove was that Plaintiff would begin to receive one-half of Defendant's Civil Service Retirement at a reasonable and customary time which the Court finds to be at Defendant's reaching age 65.

(R.E. 38). This finding of the parties "intent" is not consistent with the testimony of the parties nor is it consistent with the argument made by counsel for the Plaintiff. The record is devoid of any evidence that would support the Court's finding that the parties intended that Mr. Lestrade retire at age 65. All of the evidence in this record is to the contrary. This finding by the Court is

[2] It is undisputed that E. Foley Ranson, attorney for the Plaintiff Audrey Lestrade, drafted the Property Settlement Agreement at issue herein. (R.E. 46).

not supported by any credible evidence, much less substantial evidence, and therefore should be reversed.

In any event, this Court "is not concerned with what the parties may have meant or intended but rather what they said, for the language employed in a contract is the surest guide to what was intended." *Ivison v. Ivison*, 762 So. 2d 329, 335 (Miss. 2000). The actual language in the Agreement is silent as to when Mr. Lestrade must retire. Because the Court's Order of Modification was not supported by substantial evidence, the Order should be reversed.

At the very least, rather than attempt to discern the subjective intent of the parties, the Court should have followed the well established rules of contract interpretation. The Mississippi Supreme Court has established a three-tiered process for contract interpretation. *Persue Energy Corp. v. Perkins*, 558 So. 2d 349, 351 (Miss. 1990). The process is as follows:

> First, we look to the "four corners" of the agreement and review the actual language the parties used in their agreement. *Id.* at 352. When the language of the contract is clear or unambiguous, we must effectuate the parties' intent. *Id.* However, if the language of the contract is not so clear, we will, if possible, "harmonize the provision in accord with the parties' apparent intent." *Id.* Next, if the parties' intent remains uncertain, we may discretionarily employ canons of contract construction. *Id.* at 352-53. Finally, we may consider parole or extrinsic evidence if necessary. *Id.* at 353.

West, 891 So. 2d at 210-11.

The actual language the parties used in their Agreement, as cited above, does not impose any mandatory retirement age on Mr. Lestrade. Following the three tiered process outlined above, the Court should first determine if the language of the contract is clear or unambiguous. *Id.* at 532. The Court below did find that the contract [Property Settlement Agreement] is clear on its face. (Trial Transcript p. 47, lines 27-29). As a result of the finding that the contract was clear, the Court "must effectuate the parties'

intent" and enforce the contract as written. *Id.* In this case, no mandatory retirement date was contained in the Agreement and none should be retroactively inserted.

While the finding that the contract was clear on its face should end the analysis, for the sake of argument, the next step of the three tiered process requires that the Court, "if possible, harmonize the provisions in accord with the parties' apparent intent." *Id.* As discussed above, Plaintiff did not offer any testimony that she and Mr. Lestrade ever discussed or agreed that he would retire at 65, she merely "assumed" that he would. (Trial Transcript pp. 43-44). On the contrary, Mr. Lestrade testified that he never represented to Mrs. Lestrade or anybody else that he intended to retire at age 65. (Trial Transcript p. 32, lines 16-18). In addition, Plaintiff's counsel argued that "She [Mrs. Lestrade] didn't anticipate, while it's not totally unforeseeable that he might not retire until age 70 or 71, that wasn't contemplated at the time. (Trial Transcript p. 24, lines 12-15). Counsel further argued that,

> "She did not think that he might not retire at normal retirement age. Maybe that should have been put in there. But you can't always think of everything that may happen in the future, even though it is reasonably foreseeable."

(Trial Transcript p. 26, lines 5-10). All of the testimony in the record demonstrates that a mandatory retirement age for Mr. Lestrade was never even discussed, much less intended by the parties.

The next step, "if the parties' intent remains uncertain, the Court may employ canons of contract construction. *Id.* 352-53. One such canon is the "well established principle of contract construction that vague and ambiguous terms are always construed more strongly against the party drafting the agreement." *Banks v. Banks*, 648 So. 2d 1116, 1121 (Miss. 1994)(citing *Globe Music Corp. v. Johnson*, 84 So. 2d 509, 511 (Miss. 1956). It is not disputed that E. Foley Ranson, attorney for Plaintiff Audrey Lestrade drafted the Agreement at issue herein. Mr.

Ranson argued at the trial that "Maybe that [mandatory retirement age] should have been put in there. But you can't always think of everything that may happen in the future, even though it is reasonably foreseeable." (Trial Transcript p. 26, lines 5-10). A mandatory retirement age was not put in the Agreement. The drafter himself argued that maybe he should have put it in. This principle of contract construction requires the Court to construe the Agreement in favor of Mr. Lestrade.

Finally, the three tiered process allows the Court to consider parole or extrinsic evidence if necessary. *Id.* at 353. All of the evidence in the record shows that Plaintiff and her counsel never anticipated that Mr. Lestrade would not retire at a certain age. Mr. Lestrade's testimony is clear that he never discussed, intended or agreed to retire at any certain age.

The Court below found that the language of the Property Settlement Agreement was clear on its face. Such a finding requires the Court to enforce the clear language used in the Agreement. However, instead of enforcing the contract as written as the law requires, the Court Ordered a modification of the Agreement to include a mandatory retirement age for Mr., Lestrade. The Court's Order was not support by credible evidence and should be reversed.

E. Retirement Benefits earned by Mr. Lestrade after the 1989 divorce are not marital property and therefore not subject to equitable distribution.

"Marital property is defined as 'any and all property acquired or accumulated' during the marriage." *Traxler v. Traxler*, 730 So. 2d 1098, 1101-02 (Miss. 1998). "For purposes of dividing marital property, retirement plans are considered marital assets." *Carrow v. Carrow*, 741 So. 2d 200, 202 (Miss. 1999); *Coggin v. Coggin*, 837 So. 2d 772, 775 (Miss. Ct. App. 2003). While retirement funds "acquired or accumulated" during the marriage are marital assets subject to equitable distribution, retirement funds not "acquired or accumulated during the marriage" do

not fall within the definition of marital assets subject to equitable distribution. *Arthur v. Arthur*, 691 So. 2d 997, 1003 (Miss. 1997).

The Court herein found that Mr. Lestrade worked in Civil Service employment for thirty-seven (37) years and became eligible for retirement benefits beginning at age 65. (R.E. 38). The Court further found that Mr. Lestrade was eligible for retirement benefits of $40,00.00 per year for the five years preceding the trial. Id. Based on its modification of the Property Settlement Agreement, the Court then awarded Plaintiff a Judgment in the amount of $100,00.00 (calculated at $20,000.00 per year for the past five years). (R.E. 39). Despite the fact that Mr. and Mrs. Lestrade had been divorced for greater than twenty (20) years at the time of the trial, the Chancellor modified the Property Settlement Agreement to award Mrs. Lestrade one-half of Mr. Lestrade's total retirement rather than one-half of the retirement benefits that were actually "acquired or accumulated" during the marriage and therefore subject to equitable distribution.

While it is undisputed that pursuant to the original Property Settlement Agreement Mrs. Lestrade is to receive one-half of the Civil Service Retirement "acquired or accumulated" during the marriage, any and all retirement benefits earned by Mr. Lestrade after October 5, 1989, the date of the divorce, are not marital assets and not subject to equitable distribution. Based on the clearly established law that assets, such as these retirement benefits, are not marital assets not subject to equitable distribution, the Order of Modification entered by the Chancery Court of Harrison County should be reversed.

CONCLUSION

For the foregoing reasons, Appellant Oscar P. Lestrade, Jr. requests that the Court reverse the Order of Modification entered by the Chancery Court of Harrison County, Mississippi and to grant him any and all other relief to which he may be entitled.

Respectfully submitted, this, the 10 day of MARCH, 2010.

OSCAR P. LESTRADE, JR

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CERTIFICATE OF SERVICE

I, Patrick W. Kirby, hereby certify that I have delivered a true and correct copy of the above and foregoing Appellant's Brief, via United States Mail, to:

E. Foley Ranson, Esq.
P.O. Box 848
Ocean Springs, Mississippi 39566-0848

I further certify that I have caused to be delivered by United States Mail, first class, postage prepaid, the original an four (4) copies of this Brief along with a copy of this brief on digital media, to:

Kathy Gillis, Clerk
Mississippi Supreme Court
P.O. Box 249
Jackson, Mississippi 39205-0249

SO CERTIFIED, this, the 10th day of March, 2010.

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