IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2010-CA-00125

STUART AEGLER AND WIFE,
JEAN AEGLER **APPELLANTS**

VERSUS

FRANCES GAMBRELL **APPELLEE**

APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
IN CAUSE NO. C2301-08-643(2)

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED.

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FRANCES GAMBRELL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court or Court of Appeals may evaluate possible disqualification or recusal.

1. Stuart Aegler, Appellant;
2. Jan Aegler, Appellant;
3. Frances Gambrell, Appellee;
4. Michael Gambrell, Son of Appellee;
5. Michael D. Haas, Jr., Esq., Attorney for Stuart Aegler and Jean Aegler;
6. Robert T. Schwartz, Esq. and Jeffrey W. Bertucci, Esq., Attorneys for Frances Gambrell.

RESPECTFULLY SUBMITTED,

ATTORNEY OF RECORD FOR
FRANCES GAMBRELL

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STATEMENT OF THE ISSUES

The Appellee, Frances Gambrell, by and through its undersigned counsel of record asserts the following issues for review by this Court:

I. The Chancellor correctly interpreted the term "furnishings" in accordance with the subject contract and the parties' intentions.

II. Finding no ambiguity in the subject contract, the Chancellor, correctly dismissed the Aeglers Counterclaim for rescission of the subject contract.

I. STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below.

This case arises from a real estate contract entered between the Appellants, Stuart Aegler and Jean Aegler (hereinafter collectively the "Aeglers") and the Appellee, Frances Gambrell (hereinafter "Gambrell"), by and through her son and attorney in fact, Michael Gambrell, on June 29, 2007 (hereinafter the "Contract"), by which the Aeglers agreed to purchase Gambrell's home located in Diamondhead, Mississippi. The Contract provided that the appliances in place at the time of the offer would remain with the house. In addition, the Contract included an addendum which allowed Gambrell to remove certain personal property items from the house prior to closing, and all other remaining "furnishings" would remain with the house.

Gambrell commenced her action by Complaint for breach of contract against the Aeglers on October 7, 2008, in order to regain possession of her items of personal property and to recover the costs of the action, including reasonable attorneys fees, which were recoverable under the Contract. The Aeglers filed their Answer, Affirmative Defenses and Counterclaim on November 3, 2008, alleging that there was no meetings of the mind with regard to the terms of the Contract and, therefore, the same should be rescinded. Gambrell timely filed her Answer and Affirmative Defenses to the Aeglers' Counterclaim on November 20, 2008.

Thereafter, on August 11, 2009, Gambrell filed her Motion for Summary Judgment, alleging that the term "furnishings" as stated in the Contract did not entitle the Aeglers to retain her items of personal property located inside the house. A hearing on the matter was held on September 24, 2009, before the Honorable Margaret Alfonso. After considering the arguments of the attorneys and the memorandums filed with the Court, Chancellor Alfonso awarded

summary judgment in favor of Gambrell as to all claims asserted by Gambrell against the Aeglers, and further ordered that Aeglers' Counterclaim be dismissed. Subsequently, the Aeglers timely filed their Motion to Reconsider, which was denied on January 6, 2010.

Aggrieved, the Aeglers filed their Notice of Appeal on February 3, 2010.

B. Statement of Facts

On or about June 27, 2007, the Aeglers made an offer to purchase the home of Gambrell, located at 7616 Fairway Drive in Diamondhead, Mississippi.[1] The original real estate contract between the parties contemplated the sale of the house as well as the "appliances as in place at the time of offer" and "all items permanently attached, unless specifically excluded herein."

The Aeglers' original offer was rejected by Gambrell. However following further negotiations and price increases, the parties agreed that the Aeglers would purchase the subject property from Gambrell for $310,000.00. The Contract was executed on or about June 29, 2007, by Michael Gambrell as attorney in fact for his mother, Gambrell.[2] Included in the Contract was an addendum (hereinafter the "Addendum") which stated that "[s]eller reserves the right to remove certain articles prior to closure and all remaining ***furnishings*** are to remain with the house. (emphasis added)."[3] At no point in time did the Contract or the parties ever contemplate that the Aeglers would acquire any other personal property items owned by Gambrell and the addendum was intended to prevent the same from happening.

The sale of the subject property closed on or about September 1, 2007. By tendering the purchase price, signing the settlement statement and taking possession of the property, the

1 Trial Record, Vol. 1, Pages 64-71; Appelle's Record Excerpt #2.

2 Trial Record, Vol. 1, Pages 72-74; Appellee's Record Excerpt #2.

3 Trial Record, Vol. 1, Page 75; Appellee's Record Excerpt #3.

Aeglers acknowledged the condition of the subject property was acceptable.[4] Prior to and after the sale the Aeglers entered into several verbal agreements with Gambrell in which they assured Gambrell that she would be able to remove her personal property and furniture from the subject property, as Gambrell had been in poor physical health at the time of closing and was then residing out of state.[5] Thereafter, Gambrell made several requests to the Aeglers to retrieve her personal property. Each of those requests was subsequently denied.

The Aeglers remained in possession of all of Gambrell's personal property and possessions for approximately one (1) year. During that time, the Aeglers admitted that they gave away and converted some of Gambrell's personal property, including but not limited to Gambrell's clothing, which was the subject of Gambrell's Complaint.[6] In addition, the Aeglers made no attempt and outright refused to return any of this property to Gambrell, despite the fact that much (if not all) of said property was excluded from the Contract. Instead, the Aeglers required that in order for Gambrell to receive her personal property (including but not limited to: clothes, golf cart, trophies, dishware, silverware, family photos, wall plaques and other items of

4 Trial Record, Vol. 1, Pages 80-83.

5 Trial Record, Vol. 1, Pages 87; Appellee's Record Excerpt #5, Page 19, Lines 2-18 of Stuart Aegler's deposition, See also Trial Record Vol. 2, Page 125 and Appellee's Record Excerpt #8. The Chancellor recognized that the Aeglers contend that they did not conduct negotiations or verbal agreements with Gambrell, but with her son Michael. The Chancellor found the point moot since Michael has power of attorney over his mother and was clearly acting as her agent during all times relevant, including the filing of the Amended Complaint and subsequent pleadings.

6 Trial Record, Vol. 1, Page 95; Appellee's Record Excerpt #5, Page 52, Lines 7-23 of Stuart Aegler's deposition .

personal property), she must agree to rescind the sale of the subject property and refund the Aegler's the purchase price and various other alleged damages.[7]

Left with no other option to regain possession of her property including all of her family mementos, Gambrell filed her Complaint for the same against the Aeglers in the Chancery Court of Hancock County. Thereafter, the Aeglers alleged that they found several defects with the subject property which issues they asserted in the form of a counterclaim.[8] However, the Aeglers admitted that they did not conduct a home inspection prior to the closing and that some (if not all) of the alleged defects occurred after the sale closed.[9] Additionally, prior to executing the Contract and well prior to closing the Aeglers were presented with a property disclosure statement[10] and were advised that the property had been treated for a prior termite infestation. No agreements were made between the parties for Gambrell to make any repairs to the home prior to or after the closing, and the property was accepted by the Aegler's in its "AS-IS" condition.

These facts were presented before the Chancellor in Gambrell's Motion for Summary Judgment and memorandum in support of the same. In support of her motion, Gambrell asserted the following factual allegations before the chancery court: (1) the parties executed the Contract for the sale of the subject property together with "all appliances in place at the time of offer" and

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7 Trial Record, Vol. 1, Pages 92 and 94; Appellee's Record Excerpt #5 Page 39, Lines 13-19 and Page 45, Lines 11-12 of Stuart Aelger's Deposition.

8 Trial Record, Vol. 1, Pages 27-28, Paragraph 11, The Aeglers' Counterclaim.

9 Trial Record, Vol. 1, Page 9; Appellee's Record Excerpt #5, Page 33, Lines 12-24 - Page 34, Lines 1-9 of Stuart Aegler Deposition.

10 Trial Record, Vol. 1, Pages 76-78, Appellee's Record Excerpt #4, true and correct copy of which Property Condition Disclosure.

"all items permanently attached, unless specifically excluded herein"; (2) the parties executed an addendum that allowed Gambrell to recover certain articles prior to closure and all other furnishings would remain with the house; (3) the parties made oral agreements both before and after closing that Gambrell could retrieve her personal property after closing; and (4) that Gambrell's requests to retrieve said personal property were denied by the Aeglers.[11] Upon a hearing thereon, the Chancellor found that the Aeglers did not dispute the execution of the Contract or the Addendum as stated, nor did they dispute that oral agreements were made in which they agreed that Gambrell would be allowed to retrieve certain personal items after the closing. Both counsel for the Aeglers and Gambrell agreed that the determinative issue in the case is the definition of the word "furnishings" and what items the parties intended to remain with the house under the terms of the Contract.

The Chancellor was presented with an itemized list of all of Gambrell's personal property remaining in the house under the Aeglers' possession. This list included such items as clothing, jewelry, a golf cart, golf clubs, trophies, dishware, silverware, wall plaques, photo albums, among other items.[12] In addition, the Chancellor considered a number of accepted definitions of the term "furnishings," including those from commonly accepted dictionaries. Finally, the Chancellor was presented with the depositions of Stuart Aegler and Michael Gambrell so as to ascertain the individual meanings given to the term "furnishings."

After reviewing the same the Chancellor found that it was clear that the parties did not intend for the Aeglers to retain all of Gambrell's personal property after closing the sale of the subject property. Having found no ambiguity in the Contract, the Chancellor granted Gambrell's

11 Trial Record, Vol. 1 Page 53, Gambrell's Memorandum in Support of Motion for Summary Judgment.

12 Trial Record, Vol. 1, Pages 98-100; Appellee's Record Excerpt #6.

motion for summary judgment, awarding her possession of the items of personal property submitted by Gambrell excluding a few possible exceptions and dismissing the Aeglers' Counterclaim. Aggrieved, the Aeglers filed this appeal.

SUMMARY OF THE ARGUMENT

In the case *sub judice*, the Appellants are attempting to evade their responsibilities and legal obligations under written and oral agreements with the Appellee. It is undisputed that the parties agreed that Gambrell would be afforded the opportunity to recover her personal property both before and after the closing of the sale of the subject property. It is further undisputed that Gambrell's personal property was never a part of the subject transaction or contract to sell.

Having considered the evidence and arguments of the parties, the Chancellor correctly acknowledged that the overwhelming weight of the evidence shows: (1) the parties executed a real estate contract for the sale of the subject property together with "all appliances in place at the time of offer" and "all items permanently attached, (emphasis added) unless specifically excluded herein," which does not include the items requested by Gambrell; (2) the parties executed an Addendum that allowed Gambrell to recover "certain articles" before closing and that all other "furnishings" would remain with the house, (3) the parties made various oral agreements both before and after closing that Gambrell could retrieve her personal property after closing, and (4) Gambrell, despite numerous requests, has been denied possession of said personal property by the Defendants.

Further, the Chancellor properly construed the Contract in accordance with Mississippi law to find that the Contract as a whole is unambiguous. Neither party alleges that the term "furnishings" is ambiguous. Instead the parties disagree as to the term's meaning. After reviewing the four corners of the Contract, giving effect to all of its clauses, the Chancellor

properly determined that the Contract clearly distinguished between "furnishings" and "personalty." Accordingly, the Chancellor did not commit reversible error by interpreting the plain meaning of the Contract to prohibit the Aeglers from retaining Gambrell's personal property. Instead, the Chancellors' interpretation is grounded in principles of construction and supported by substantial evidence. Despite the Aeglers' contentions, they have failed to provide any support that the Chancellor's interpretation of the Contract amounts to reversible error.

Additionally, the Chancellor did not commit reversible error by dismissing the Aeglers' Counterclaim for the Aeglers' failure to include a Certificate of Service. At most, the error was harmless, as the substantive issues of the Counterclaim were adjudicated in the chancery court's order for summary judgment.

Accordingly, the issues asserted by the Aeglers on appeal are without merit, and the judgment of the Chancellor should be affirmed.

ARGUMENT

"This Court's standard of review for a grant or denial of a motion for summary judgment is well-established:

> Our appellate standard for reviewing the grant or denial of summary judgment is the same standard as that of the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure. This Court employs a *de novo* standard of review of a lower court's grant or denial of a summary judgment and examines all the evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of the doubt."

McWilliams v. McWilliams, 970 So. 2d 200, 202 (¶4) (Miss. Ct. App. 2007)(quoting *Arrechea Family Trust v. Adams*, 960 So. 2d 501, 504(¶6) (Miss. Ct. App. 2006).

I. The Chancellor correctly interpreted the plain meaning of the Contract in accordance with the parties' intentions.

There is no dispute that a valid contract existed between the parties to sell the subject property along with "all appliances in place at the time of offer" and "all items permanently attached, unless specifically excluded herein." Instead, both parties agree that this case comes down to construing the terms of the Contract in order to determine which items of personal property, if any, the parties agreed would remain with the subject property after closing under the term "furnishings." More specifically, the only dispute as to law or fact in this case is whether the Chancellor properly interpreted the term "furnishings," as stated in the Contract, to include "wall to wall carpeting, window treatments, mirrors and other such items which are attached to sheetrock rather than hung on walls."[13]

The Aeglers argue in their brief that "furnishings" as provided for in the Contract is ambiguous and should be construed against Gambrell. Further, the Aeglers contend that the Chancellor erred by applying what they perceive as a "common sense" definition of the word "furnishings" to exclude all personal property included in the house after the sale. Gambrell contends that the Chancellor was correct and the evidence supports that "furnishings" is unambiguous and should be interpreted in the context of the Contract as a whole.

A. <u>The Contract is unambiguous.</u>

It is a well settled that contracts are reasonably construed in order to determine the intentions of the contracting parties. *Etheridge v. Ramzy*, 276 So. 2d 451 (Miss. 1973). Further,

13 Trial Record, Vol. 2, Page 128; Appellee's Record Excerpt #7.

it is well settled that the words of a contract should be given a reasonable construction, and that courts "must if possible, ascertain and give effect to the mutual intention of the parties, so far as that may be done without contravention of legal principles." *Hutton v. Hutton*, 239 Miss. 217, 119 So. 2d 369, 374 (1960). "Having found a contract to have been made, an agreement should not be frustrated where it is possible to reach a reasonable and fair result." *Busching v. Griffin*, 542 So. 2d 860, 863 (Miss.1989)(quoting *Jones v. McGahey*, 187 So. 2d 579, 584 (Miss.1966). Further, "[q]uestions concerning the construction of contracts are questions of law that are committed to the court rather than questions of fact committed to the fact finder." *Parkerson v. Smith*, 817 So. 2d 529, 532 (¶7) (Miss. 2002)(quoting *Miss. State Highway Comm'n v. Patterson Enters., Ltd.*, 627 So. 2d 261, 263 (Miss.1993)). Our appellate courts employ the *de novo* standard of review for questions of law. *Starcher v. Byrne*, 687 So. 2d 737, 739 (Miss.1997).

The Mississippi Supreme Court has outlined a three-tiered approach to contract interpretation, stating: "[I]n reviewing [a] document, the court should construe the language in a manner which makes sense to an intelligent layman familiar only with the basics of [the] English language." *Warren v. Derivaux*, 996 So. 2d 729, 735 (¶ 12) (Miss. 2008)(citations and internal quotations omitted). If the court finds ambiguity that cannot be resolved by the four corners of the document, it next resorts to the discretionary application of the canons of construction; and if the ambiguity cannot there be resolved, the court may look to parol and other extrinsic evidence. *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352-53 (Miss.1990). Our supreme court noted, however, that "the so-called three-tiered process is not recognized as a rigid 'step-by-step' process. Indeed, overlapping of steps is not inconceivable." *Id.* at 351 n. 6.

A review of the Chancellor's judgment exhibits that she correctly applied this three-tiered approach to the Contract at issue, finding that the same is clear and unambiguous as a

whole. First, the Chancellor acknowledged that the Aeglers do not dispute the execution of the Contract and Addendum, nor do they dispute the oral agreements allowing Gambrell to retrieve certain personal items after closing. The same is supported by the Aeglers' own statements contained in the record.[14] Further, "[n]either party alleges that the term 'furnishings' is ambiguous; rather, they employ different meanings of the term."[15] Our supreme court has stated that "[t]he mere fact that the parties disagree about the meaning of a contract does not make the contract ambiguous as a matter of law." *Cherry v. Anthony*, 501 So. 2d 416, 419 (Miss. 1987). Further, "[w]hen the language of the . . . contract is clear, definite, explicit, harmonious in all its provisions, and free from ambiguity throughout, the court looks solely to the language used in the instrument itself, and will give effect to each and all its parts as written." *Sumter Lumber Co. v. Skipper*, 183 Miss. 595, 608, 184 So. 296, 298 (1938). Finding the only dispute to be over the meaning of "furnishings," the Chancellor correctly found the overall Contract to be unambiguous as to the overall conveyance of real property made between the parties. As a result, the Chancellor was charged to interpret the parties' intent with regard to "furnishings" as provided for within the context of the Contract.

B. The Chancellor applied the proper definition of "furnishings" in the context of the Contract.

In order to interpret the parties' intent with regard to the "furnishings," the Chancellor looked to the four corners of the Contract. The Chancellor adhered to the proper practice by not focusing on the word itself, but instead examining the same in the context of the entire Contract. *See Point South Land Trust v. Gutierrez*, 997 So. 2d 967, 980 (¶37) (Miss. Ct. App.

14 Trial Record, Vol. 1, Pages 87; Appellee's Record Excerpt #5, Page 19, Lines 2-18 of Stuart Aegler's Deposition.

15 Trial Record, Vol. 2, Page 127; Appellee's Record Excerpt #7. See also Appellant's Brief, Page 5.

2008)(citations omitted)(stating the contract should be read as a whole to give effect to all of its clauses). First, the Chancellor recognized that the Contract provides for both "fixtures" and "furnishings."[16] Specifically, the contract states that the sale was to include the subject property together with "all appliances in place at the time of offer" and "all items permanently attached, unless specifically excluded herein" (emphasis added). Then, the Chancellor recognized that the Addendum allows Gambrell to remove "certain articles" from the subject property and all other "remaining furnishings" would stay with the subject property.[17] Whether the "certain articles" to be removed referred to certain furnishings or personal property is not stated. However, based on her review of the Contract, the Chancellor correctly noted that if the term "certain articles" was meant to encompass something other than furnishings, "there would be no reason to include the word *remaining*" (emphasis added).[18]

Gambrell would assert that the Chancellor's reading correctly interprets the plain and ordinary meaning of the Addendum as it represents what would be read by a reasonable lay person in reconciling the term "furnishings" with the other provisions of the Contract that provided for what property stays with the house after the sale. *See Belager-Price v. Lingle*, 28 So. 3d 706, 711 (¶9) (Miss. Ct. App. 2010)(citing *Perkins*, 558 So.2d at 352.)([I]n reviewing a contract, the reviewing court should construe the ordinary meaning of the contract as would be read by a lay person of reasonable intelligence). Additionally, the Chancellor's interpretation is supported by the general principals that apply to real estate contracts. Generally, "[a]bsent a provision to the contrary, sellers of realty are entitled to take items of personal property with them and are required to leave fixtures behind." George Lefcoe, Real Estate Transactions, Ch. 6

16 Trial Record, Vol. 2, Page 126; Appellee's Record Excerpt #7.
17 *Id.*
18 *Id.*

at 137 (5th ed. 2005). "Unless the parties contract otherwise, personal property, such as furniture, and anything else not affixed belongs to the seller after the closing." *Id.* "The buyer is only entitled to keep personal property contracted for as part of the deal." *Id.* Accordingly, the default rule allows Gambrell to retain possession of all personal property located in the subject property at the time of closing unless contracted otherwise. Based upon the same, the only logical and reasonable reading of the Addendum is that Gambrell would be permitted to remove certain furnishings from the subject property prior to closing.

Having determined that the Contract and Addendum clearly allowed certain furnishings and other personal items to be removed by Gambrell, the Chancellor turned her attention to what furnishings were intended to remain with the house. The Contract does not provide for the specific disposition of any "certain articles" other than furnishings remaining in the house subsequent to closing. There is no mention as to Gambrell's personal property. The Aeglers argue that any item remaining in the house after the closing constitutes a furnishing, including every item of personal property, clothing, memorabilia, trophies, golf cart and generally everything present in the subject property at the time of sale. They rationalize this argument on the basis that they agreed to purchase the home after their previous home and personal belongings were destroyed by a fire.[19] Therefore, in exchange for the purchase price, the Aeglers allege that they expected to receive replacement property for everything that they lost in the fire.[20] However, this purported definition of "furnishings" offered by the Aegler's (to include all

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19 Trial Record, Vol. 1, Pages 84-85; Appellee's Record Excerpt #5, Page 8, Lines 22-25 - Page 9, Line 1 and Lines 22-25 - Page 10, Lines 1-7 of Stuart Aegler Deposition .

20 Trial Record, Vol. 1, Page 87, Appellee's Record Excerpt #5, Page 18, Lines 20-25 - Page 19, Line 1 of Stuart Aegler Deposition.

personal property situated inside the house) is not in sync with any of the generally accepted definitions presented before the Chancellor by either party.

The Chancellor considered several definitions of "furnishings" submitted by Gambrell and the Aeglers. When applied to a home or building, Webster's Dictionary defines "furnishings" as "the furniture, carpets, and the like for a room, apartment, etc." Michael Agnes, Webster's New World College Dictionary, 575 (4th ed. 1999). Black's Law Dictionary does not specifically define household "furnishings." It does however define "household furniture" which in essence encompasses the same definition, that being "that which furnishes or with which anything is furnished or supplied; whatever must be supplied to a house to make it habitable, convenient, or agreeable . . ." Henry Campbell Black, M.A., Black's Law Dictionary, 804 (Rev. 4th ed. 1968). Certainly by its very definition, it was made clear to the Chancellor that the term furnishings does not include every item located within a home, but rather the items which make a home livable. At the most, this would generally include carpet, furniture and the like. However, the Chancellor correctly noted that based upon the statements of the parties and other provisions of the Contract, the same was more limited in this case. The Chancellor recognized and the evidence supports that it is unfathomable that the parties intended the word "furnishings" to include Gambrell's personal property located in the house on the day of closing, such as clothing, jewelry, her golf cart and other items as there is a very fundamental difference between "furnishings" and "personal property or possessions."

The Aeglers' spend considerable time in their brief arguing that the definition of "furnishings" utilized by the Chancellor was a "common sense" definition which is outside the authority of Mississippi law. However, the Aeglers have taken the Chancellor's statement out of context. After recognizing the definitions discussed hereinabove, the Chancellor stated "[t]here

is also a common sense, practical definition of furnishings that must be considered. For example, by no stretch of the imagination would a golf cart be considered a furnishing; a motorized vehicle would be specified separately if intended in the purchase price." In fact this statement is not an attempt to define furnishings at all but rather an attempt to clarify the Chancellor's point that there is a clear difference in the Contract and Addendum between "furnishings" and "personalty," just as there is between "furnishings" and "fixtures."[21] As previously stated, personal property was clearly not conveyed to the Aeglers' in the Contract. Therefore, the Chancellor was simply recognizing that "the Aeglers' contention that 'furnishings' is inclusive of personal property is not a **reasonable reading of the plain language** of the Contract." There is nothing wrong with this interpretation as the Chancellor was charged to read and interpret the Contract's terms as a reasonable lay person would. *See Belager-Price v. Lingle*, 28 So. 3d at 711 (¶9). Notwithstanding the same, Gambrell would assert that the Chancellor was permitted to apply a "common sense" definition based on the language of the Contract and evidence before her, as the same has previously been utilized by our appellate courts. *See Wooten v. Mississippi Farm Bureau Ins. Co.*, 924 So. 2d 519, 522 (¶11) (Miss. 2006) and *Allstate Ins. Co. v. Chicago Ins. Co.*, 676 So.2d 271, 275 (Miss. 1996).

Accordingly, the Chancellor's interpretation of the meaning of the term "furnishings," in the context of the parties' Contract, is well within the parameters of Mississippi law.

C. The Chancellor's findings are supported by substantial evidence.

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21 Trial Record, Vol 2., Page 127; Appellee's Record Excerpt #7. See also the Chancellor's Order Denying Motion to Reconsider on Page 153-54, Paragraph 3, Appellee's Record Excerpt #8, wherein the Chancellor reiterates that the recitation of Webster's New College Dictionary definition of "furnishings" is meant to distinguish between personalty and furnishings, not that said definition should be utilized exclusively.

The Aeglers also allege that Chancellor erred by failing to construe any deficiencies in the Contract against Gambrell. The Aeglers focus on the provision in the Addendum that allegedly required Gambrell to remove "certain articles" from the house prior to closing. The Aeglers attempt to wash their unclean hands by arguing that Gambrell somehow waived her claim to possession of those items by failing to retrieve the same prior to closing. Ironically, after spending most of their brief asking this Court to construe the Contract as written to the exclusion of extrinsic evidence, they now urge this Court to determine the reasonableness of Michael Gambrell's actions (based on extrinsic evidence) in connection with the Contract. Gambrell would assert that the Aeglers cannot have it both ways. Should this Court consider extrinsic evidence, Gambrell would assert that the Aeglers have conveniently chosen to ignore certain evidence presented to the Chancellor, and her findings thereon, which contradict their accusations.

In this case, the Chancellor was presented with considerable evidence that a collateral oral agreement existed between the Aeglers and Gambrell to exclude certain personal property from the sale of the subject property. Stuart Aegler has admitted that he executed the Addendum that stated that Gambrell was permitted to remove certain items of personal property from the house and all other furnishings would remain.[22] Despite not having any conversations with Gambrell as to what he intended "furnishings" to include, Stuart Aegler asserts that his definition would include carpet, chairs, pictures on the wall, and "the things that make a house a home."[23] This falls in line with one definition of furnishings. However, Stuart Aegler fails to

22 Trial Record, Vol. 1, Page 87; Appellee's Record Excerpt #5 Page 17, Lines 2-9 of Stuart Aegler Deposition.

23 Trial Record, Vol. 1, Page 87-88; Appellee's Record Excerpt #5, Page 20, Lines 15-25 - Page 21, Lines 1-17 of Stuart Aegler Deposition.

acknowledge how his definition conforms to the context of the Contract. Additionally, he admits that he verbally agreed to allow Gambrell to remove her personal property after the closing.

The Mississippi Supreme Court was presented with a similar issue in *Chism v. Omile*, 124 So. 2d 286 (Miss. 1960). In *Chism*, the parties entered into a contract to trade real properties, by which the buyer agreed to convey the seller a café and hotel and the furnishings therein, and the seller agreed in return to convey to the buyer a 428-acre ranch, certain designated farming equipment, and the furniture in the house on the ranch except "personal things." *Id.* at 579-80. The seller surrendered possession of the ranch and ranch home to the seller with the understanding that she would later remove the "personal things" left in the home. *Id.* at 580. Thereafter, the buyer was permitted by the seller to remove some clothing and other small items but the seller refused to allow the buyer to remove certain other items of personal property which the buyer claimed she reserved as "personal things," namely, a dining room suite, bedroom suite, television, and various other items listed in the pleadings. *Id.* at 580-81.

On appeal, the court found that "[t]he chancellor was fully justified in finding that while there was no mutual mistake and complainant was not entitled to reformation of her conveyance, the intention of the parties was that the 'personal things' excepted by [the buyer] from the conveyance consisted of the dining room suite, bedroom suite, television, and other items sued for by [the buyer]." *Id.* at 581. In so finding, the court determined that the parties had a collateral oral agreement concerning the personal property located in the ranch house. *Id.* at 582. More specifically, the court noted that the seller and her witnesses testified as to the oral understanding between herself and the buyer, and that the parties agreed which personal property

would be excepted. Therefore, it was not necessary to list in the contract the excepted items because both of them understood what was meant by "personal things." *Id.*

The "personal things" in *Chism* are analogous to the "certain articles" provided for in this case. Keeping in mind the general rule that a seller is entitled to retain his or her personal property upon the closing of real estate, the only way that the Aeglers could obtain any of Gambrell's personal items within the home was by specifically including them in the Contract, or by separate bill of sale. It is obvious from the evidence presented to the Chancellor that the Aeglers failed in this regard and no such documentation exists. Instead, they attempt to rely solely on the word "furnishings" in the contract addendum as their sole proof of entitlement.

However, the Chancellor correctly recognized that this evidence is not sufficient to entitle the Aeglers to every single item that is currently in the house. Even in taking the most liberal interpretation of the definition (which Gambrell does not concede), the word "furnishings" would, at most entitle, the Aeglers to the carpet and furniture that is in the house. It most certainly would not include nor was it intended in the Contract to include: clothing, plaques, trophies, china, jewelry, golfing equipment, a golf cart, and all other items or personal effects listed in Exhibit "G" to Gambrell's Memorandum in Support of Motion for Summary Judgment, and for which the Aeglers retained possession thereof.[24]

There being substantial, credible, evidence to support these findings, this Court should not reverse the same on appeal. *Par Indus., Inc. v. Target Container Co.*, 708 So. 2d 44, 47 (Miss. 1998); *see also Chantey Music Publ'g, Inc. v. Malaco, Inc.*, 915 So. 2d 1052, 1055 (Miss. 2005)(stating in a contract case that "where the judge has sat as the fact-finder, we afford deference to the findings of the trial judge"). Further, the Chancellor having followed the proper

24 See Trial Record, Vol. 1 at Pages 98-100; Appellee's Record Excerpt #6.

approach for construction of contracts and applying all appropriate legal standards and relevant facts to its construction, this Court should not disturb its interpretation of the meaning "furnishings" in the context of the Contract. *Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n*, 964 So. 2d 1100, 1107 (Miss. 2007)(reviewing court should not disturb the trial judge's findings of fact "unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied). The Aeglers' issue is without merit.

II. Finding no ambiguity in the subject contract, the Chancellor correctly dismissed the Aeglers' Counterclaim for rescission of the Contract.

The Aeglers next argue they are entitled to reversal based on the Chancellor's dismissal of the Aeglers' Counterclaim. In support of the same, they contend that the Chancellor erred by basing the dismissal on the Aeglers counsel's failure to attach a Certificate of Service to their Counterclaim. Gambrell would assert that the error on the part of the Chancellor, if any, was harmless due to the fact that the merits of the Aeglers' Counterclaim were adjudicated by the Chancellor in its Judgment in favor of Gambrell.

Failure to include a certificate of service on any pleading to be served to an attorney in a civil action is a violation of M.R.C.P. 5(b) as well as U.C.C.C.R. 2.06. U.C.C.C.R. 2.06 provides that:

> all pleadings, motions, or applications to the court, except the initial pleading or indictment, must be served by any form of service authorized by Rule 5 of the Mississippi Rules of Civil Procedure on all attorneys of record for the parties, or on the parties when not represented by an attorney, and the person filing the same **shall also file an original certificate of service certifying that a correct copy has been provided to the attorneys** or to the parties, the manner of service, and to whom it was served. Except as allowed by this rule or allowed by the court for good cause shown, the **clerk may not accept for filing** any document which is not accompanied by a certificate of service.

(emphasis added). It is undisputed that the Aeglers failed to include a Certificate of Service in their Answer and Counterclaim confirming that the same was served to counsel for Gambrell. As a result, the Aeglers' Counterclaim should not have been accepted to be filed by the court clerk as mandated by Rule 2.06. Accordingly, the Chancellor did not err by dismissing the Counterclaim as the same was defective and should not be deemed to have been filed.

Notwithstanding, Gambrell would assert that any error of the Chancellor in this regard was harmless and did not prejudice the Aeglers. An error may be found harmless if it did not affect the ultimate judgment of the court. *Morris v. Morris*, 783 So. 2d 681, 692 (¶41) (Miss. 2001). The Aeglers assert in their brief that "[t]he Chancery Court's reasoning (Record Excerpt 154-155) acknowledges the need to present [further] evidence . . . ." In fact, no further evidence needs to be presented as the Chancellor has ruled on all substantive issues in this case in its order awarding summary judgment in favor of Gambrell.

By their own admission, the Aeglers state that their Counterclaim requests that the chancery court adjudicate the disputed matter involving the sale of the subject property and the furnishings described in the Contract and Addendum. The Counterclaim further asserts that the Contract contains an ambiguity regarding the meaning of "furnishings" and, therefore, the Contract should be rescinded. Having found that there was no ambiguity in the Contract, the Chancellor's judgment serves as an adjudication of the claims asserted by the Aeglers in their Counterclaim. Accordingly, the Aeglers issue is without merit as said judgment is unaffected by the Chancellor's decision to dismiss the Counterclaim for Rule 2.06 violations.

CONCLUSION

Our law with regard to real estate generally holds that a seller of property is entitled to retain his or her personal property upon closing, unless contracted otherwise. In this case, the

only items of personal property that were included in the contract were "appliances in place at the time of offer" and "all items permanently attached, unless specifically excluded herein." An Addendum was made to the contract in which Gambrell took affirmative measure to exclude certain personal property from the contract and stated that all other "furnishings" would remain with the property. Even using the most liberal definition, "furnishings" would constitute carpets and/or furniture, and not every item of personal property within the home.

In examining the four corners of the Contract, the Court recognized that there was a reasonable and fundamental difference set forth in the provisions of the Contract between "furnishings" and "personalty." Accordingly, the Chancellor found that the plain and ordinary meaning of "furnishings" in the context of the Contract did not encompass personal property. This interpretation was supported not only by principals of Mississippi law but also by the overwhelming weight of the evidence before the chancery court.

In viewing the evidence, in the light most favorable to the Defendants, it is clear that Aeglers have retained possession of personal property for which they are not legally entitled. It is unfathomable based on the language of the Contract and testimony of the parties that any reasonable person could believe that the parties intended that the term furnishings encompass anything other than that which was provided by the Chancellor. Truthfully, the Aeglers have used this opportunity to strong arm Gambrell, by holding her possessions hostage until she rescinds the Contract. This Court should not condone such behavior.

Additionally, by finding no ambiguity in the Contract, the Court adjudicated the substantive issues raised by the Aeglers in their Counterclaim. The Contract cannot be rescinded, and as a result, the Chancellor's decision to dismiss the Counterclaim was warranted. For the foregoing reasons, the judgment of the Chancery Court of Hancock County should be

affirmed, and all costs of this appeal should be assessed to the appellant.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I, ROBERT T. SCHWARTZ, attorney for the Plaintiff, do hereby certify that I have this date served the foregoing Appellee's Brief via first class mail the following addresses:

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This July 20th, 2010.

_____
JEFFREY W. BERTUCCI