IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2010-CA-01013

STEPHEN D. REFFALT, JR. APPELLANT

V.

GLORIA F. REFFALT APPELLEE

APPEAL FROM THE CHANCERY COURT OF
HANCOCK COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT STEPHEN D. REFFALT, JR.

ORAL ARGUMENT NOT REQUESTED

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ARGUMENT

Appellant STEPHEN D. REFFALT, JR. ("STEPHEN") files his Reply Brief to the Brief of Appellee GLORIA F. REFFALT ("GLORIA"), and responds to the legal argument of Gloria. Gloria did not provide a Statement of Facts, therefore, she has relied on Stephen's Statement of the Facts for this particular case. Stephen files his reply to certain arguments made by Gloria.

I. THERE WAS MANIFEST ERROR BY THE COURT.

A. AMBIGUITY.

Gloria relies on the fact that the Court stated it could "draw several different interpretations" from the Agreement, as meaning that the Court found the Agreement to be ambiguous. Further, Gloria relies on the statement in the Judgment that the Agreement was subject to more than one (1) interpretation.[1] Further, Gloria stated that the provision in the contract was ambiguous and that the Lower Court then proceeded to apply the 3-tier approach to the contract construction. Gloria is wrong, the Chancellor never applied the 3-tier approach to contract construction. First, the Chancellor never looked to the entire Agreement. He said that if he were dividing the

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[1] See arguments in Appellee's Brief at page 9. "The Chancellor in his Bench Ruling stated that he could 'draw several different interpretations' from the Agreement (T.86, RE.91) - and 'having more than one possible interpretation or meaning', is the very definition of the word 'ambiguous'. Moreover, the May 7, 2009 Judgment states that the Agreement was...subject to more than one interpretation."

property at a divorce trial, that he would divide all of the things down the middle. (T.109-110).

Gloria argues that the contract provision is ambiguous and the Court was proper in making an interpretation of the intent of the parties when the Agreement was drafted. Gloria says the Court can go outside of the contract and make a determination as to the intent of the parties. The Court did not perform a 3-tier approach to the contract construction. Had the Court done so, it would have analyzed the entire Property Settlement Agreement from the four corners. The Court would have tried to determined what the intent of the parties was by looking at the whole contract and not just part of one paragraph. The parties testified that Gloria drafted the contract to provide that she would receive one-half (1/2) of the Martin Marietta retirement. She referred to the fact that they had selected a level income retirement option. Had the Court looked at the entire contract, it would have seen and determined that the parties had intended to divide all of their assets by one-half(1/2). In fact, that is exactly what was done. That includes the Martin Marietta retirement being divided by one-half.

If the Court found that there was an ambiguity in the contract, it did not make a finding regarding the ambiguity. Further, Gloria has never stated where she found the ambiguity in the contract. Gloria said the provision providing for the Martin Marietta retirement was ambiguous, but never stated where the ambiguity could be

found. Gloria says that the social security retirement of Stephen was supposed to supplement his Martin Marietta retirement so that he would continue to have level income. Can it be that Gloria is referring to her own language that says "the parties have agreed to accept #D-Level Income as the monthly benefit option"? (RE.46, E.2).

Gloria seeks to use the language that she drafted in the contract for a finding that she created an ambiguity by describing the type of retirement that the parties agreed that Stephen would receive. The fact is, there is no ambiguity in describing the retirement plan as the #D-Level Income monthly benefit option. That is simply stating what the parties have already agreed to prior to the Property Settlement Agreement being written. The words Level Income are used to describe the benefit option, not to describe the amount Gloria will receive for the rest of her life. The fact is, the parties did sign a document that said they would receive the Level Income option. (RE.60, E.7).

The paragraph regarding the Martin Marietta Retirement, paragraph 10 of the Amendment, also describes the percentage of the retirement that Gloria will receive. (RE.46). The provision describes the plan as a monthly payment plan and that Gloria will receive one-half (1/2) of the income of the plan. The salient words are "the plan will provide the Husband a monthly income...the Husband will remit to the Wife one-half (1/2) of this income....". (E.2, RE.46). That is the defining part of how the

Martin Marietta Retirement will be divided. There is no ambiguity in that part of the contract.

Gloria drafted the contract and did not mention anything about receiving part of Stephen's social security to make up for any decrease in the amount of retirement he would receive from Martin Marietta at the time that he was first eligible to receive Social Security. Gloria testified that the Martin Marietta Retirement would decrease when Stephen first became eligible for Social Security. (T.16,22, RE.72,75). Stephen testified about the fact that the parties discussed the retirement would decrease when he first became eligible for Social Security. (T.64, RE.85).

The parties knew that Stephen's Martin Marietta Retirement was going to decrease when he first became eligible for Social Security. Of that fact, there is no doubt. There is no ambiguity in the fact that the parties selected the Level Income option which provides Stephen's retirement will decrease when Stephen first becomes eligible for Social Security. The income would still be level throughout the contract period. His retirement was a certain amount until such time as he turned 62. Then it was decreased to an amount and it remains that amount until such time as he dies. That is why it is described as #D-Level Income option. The term "#D-Level Income" was used in the Property Settlement Agreement to describe the type of retirement that the parties selected. (E.7, RE. 60). There is no ambiguity in that description.

Gloria testified that she and Stephen divided all of their assets down the middle. She further agreed that there is no discussion in the Property Settlement Agreement regarding Social Security. (T.25, RE.78). Again, the question arises, "where is the ambiguity?"

In the first tier of contract construction, the Court should look at the entire contract to determine the intent of the parties. Gloria testified that they were dividing their assets 50%. (T.25, RE.78). She further testified that the contract she drafted or that her lawyer drafted, divided the Martin Marietta Retirement 50% to each. (T.31, RE.80).

The Court did not address the contract as a whole to arrive at the parties intent. If the Court found that there was an ambiguity regarding the Martin Marietta Retirement provision of paragraph 10 of the Property Settlement Agreement and the Amendment thereto, it would have to make a finding that after looking to the four corners of the contract that it could not determine the intent of the parties. The intent had been testified to already. The Court heard testimony that the parties intended to divide their assets down the middle and in fact did divide their assets down the middle. It was divided 50% to each. Further, the Court heard that the Martin Marietta Retirement was to be divided 50% to each. The Court could have stopped there and ruled that Gloria was entitled to only 50% of Stephen's Martin Marietta

Retirement whatever that amount was. The Court did not address the first tier of contract construction.

The Court according to Gloria, found that there was an ambiguity. The Court then did not apply the first Canon of Contract Construction, which is that any ambiguities are construed against the maker. Gloria testified that she drafted the original Property Settlement Agreement and that her lawyer drafted the Amendment, but that she looked over it. (T.24,26; RE.77,79). The parties had the information in Exhibit "7" and Exhibit "8" when the Property Settlement Agreement was drafted and when the Amendment to the contract was drafted. Regardless of whether Gloria testified to having knowledge of Exhibit "8", she knew the amount of Stephen's monthly retirement because she put it into the Amendment to the Property Settlement Agreement. Gloria did not provide in the Amendment that in the event that Stephen's retirement decreased, she would receive part of his Social Security to supplement the retirement income. Yet she wants the Court to believe that was the discussion of the parties and their intent. The Court found that was the intent of the parties from her intent. Stephen's testimony was entirely different from that. He testified there was no discussion about his Social Security being part of the retirement or that Gloria would receive any of his Social Security. (T.66, RE.86). Stephen's understanding was that his Social Security was his and that Gloria's was hers. That is his interpretation of the intent of the contract and that is the way the Court should have

held when it construed any ambiguity against the maker. *Wood v. Wood*, 35 So. 3d 507, 513 (¶11) (Miss. 2010).

Further, the fact that Stephen might receive Social Security in the future was an uncertainty. There was no certain date that Stephen was going to receive Social Security. He could have received Social Security at age 62 or he could have waited to get the most benefit at age 70. This was an uncertainty. However, it was certain that Stephen's retirement was going to be reduced at age 62, the time that he would first be eligible for Social Security. That is the document that the parties signed. (E.7; RE.60). Gloria's expectation is that Stephen would receive Social Security retirement at age 62, the date when his Martin Marietta retirement would be reduced. This describes her expectation of when he would receive Social Security, not the intent of the parties. Her mistaken expectation about Stephen's future and his Social Security retirement is not grounds to reform their contract or to find an ambiguity. Gloria had an expectation of a future event, rather than a past or present material fact. The Court was wrong to use Gloria's expectation to form the intent of the parties. *Lestrade v. Lestrade*, 49 So. 3d 639, 643 (¶14) (Miss. Ct. App. 2010). The *Lestrade* Court told the lower Court that it cannot, with an equitable decision, reform contracts relating to retirement. The Court further stated that unless the retirement date is specified in the contract that the Court cannot draw an intent as to the date that the person is supposed to retire. *Lestrade*, 49 So. 3d at ¶12.

B. THE CHANCELLOR'S INTERPRETATION OF THE PROPERTY SETTLEMENT AGREEMENT WAS NOT REASONABLE.

Gloria cites *Harris v. Harris*, 988 So. 2d 376 (Miss. 2008), as her authority for the Court writing Social Security into the parties' Property Settlement Agreement. Gloria states that there is no merit to Stephen's argument that the Court should not construe or interpret the provisions of the Martin Marietta contract to include Social Security[2]. She states Stephen's argument has no merit. However, the facts in *Harris* are not of the same as in this case. In *Harris*, there had been a temporary agreement where the Husband was to pay the property taxes on the Wife's property that she got in the Property Settlement. The Court went back to that Order when it was determining what debts were. That is not the case here. Here we have a Property Settlement Agreement that was drafted by Gloria or her lawyer. It is those documents that we are to examine. We do not have another Order. Gloria's reliance on *Harris* is misplaced. Again as Gloria states, the *Harris* Court found that the Lower Court applied the canons of contract construction. Here, there was no construction. There were no canons fired.

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See arguments in Appellee's Brief at 12. "Appellant argues that, because the Agreement does not expressly refer on its face to the party's Social Security, the Court is not permitted to construe or interpret any term of the Agreement that relates to Social Security."

Gloria does admit in her Brief that the parties agreed that the Martin Marietta Retirement would be divided in half. [3] With this statement that the parties have agreed to divide the retirement by 50%, Gloria then chooses to say that there should be something more than 50% of the retirement. Stephen's Martin Marietta retirement was reduced when he became eligible for Social Security. Gloria wants more than 50% of what Stephen is currently receiving, although she had agreed and drafted that she would get 50%.

Gloria cites *Wood v. Wood*, 35 So. 2d 507 (Miss. 2010) as her authority that the Court could decide to change the percentage of the amount of the retirement that Gloria would be receiving from 50% to a larger percentage after Stephen first became eligible to receive his Social Security pursuant to the plan the parties selected. The fact is, Stephen is paying 70% of his Martin Marietta Retirement to Gloria. (T.92). The Court ordered Stephen to continue to pay $1,594.63 per month to Gloria. (RE.32). Exhibit "8" shows that Stephen is receiving $2,272.26 per month from Martin Marietta. (RE.61). Gloria is receiving more than 70% of Stephen's Martin Marietta Retirement.

Gloria's reliance on *Wood* is misplaced. The *Wood* Court found that a retirement plan was to be divided a certain dollar amount to Wife and a certain dollar

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[3] See argument in Appellee's Brief at 13. "Here, Stephen and Gloria had agreed that the Martin Marietta Retirement would be divided in half, and that the amount of the Retirement would be reduced when Stephen first became eligible for Social Security."

amount to Husband. Before the retirement plan could be divided, the bottom fell out of the market and the retirement plan was no longer worth what it had been at the time the Property Settlement Agreement was signed. Prior to the divorce being granted, the retirement plan had lost value so that it could not be divided as stated in the Property Settlement Agreement. The Court in *Wood* found that it was the intent of the parties that each would receive a certain percentage of the retirement. The Court then divided the retirement at the time that the parties were in Court by the percentages.

The attorney for Melissa Wood, the Wife, had drafted the agreement. As such, the Court found that the agreement should be construed against her interpretation that the dollar value to her should be enforced. *Wood v. Wood*, 35 So. 3d, 507, 513 (¶11) (Miss. 2010). The Court found that although the dollar values had fluctuated, the parties had intended that each receive a certain percentage of that retirement. As such, the lower Court fashioned a remedy so that the parties would receive their percentage as provided in the Property Settlement Agreement. Here, there is no doubt that the parties intended to divide the Martin Marietta Retirement by 50%. They divided all of their other assets by 50%, and they also divided the Martin Marietta Retirement one-half to each party. Stephen was to pay one-half (1/2) from the Martin Marietta plan that the parties selected to Gloria as long as he and she were alive. There was no mention of Social Security and the Court was in error when it

imputed Social Security into the contract. The Court changed, reformed or modified the contract to include Stephen's Social Security into the Martin Marietta Retirement when there was absolutely no mention of it by Gloria when she drafted the documents. The Court construed the ambiguity that Gloria wants to find in the Martin Marietta provision against Stephen rather than herself. The Court was wrong in so doing.

The Court should be reversed and this case remanded so the Court can determine the amount of retirement that comes from Martin Marietta, the amount that has been paid to Gloria in excess of what should have been paid and the amount that Gloria is to receive and how she is to repay Stephen for any amounts that have been overpaid.

The fact that Stephen continued to pay Gloria the amount that he began paying her when the parties divorced even after his retirement was reduced, does not mean that the Court should make him continue to pay that amount. Stephen testified that he owed Gloria Profit Sharing Plan ("PSP") monies that he had taken out and spent. He owed Gloria in excess of $55,000.00 and he paid that by continuing to pay her the same amount of retirement as he paid when they were divorced. Stephen knew he was paying too much and he asked Gloria to reduce it. She talked to him about the PSP and he continued to make those payments. When he figured he had paid all of the PSP he went to her again about a reduction and she denied it. That is when this

case started. (T.66, RE.86). Stephen made calculations which shows the amount of payments on the PSP and overpayments that he made to Gloria. (E.18, RE.66) (E.17. RE.65).

It is not a reasonable conclusion to find that the parties intended that Gloria's share of the Martin Marietta Retirement would be supplemented by Stephen's Social Security. It is not a reasonable conclusion to find that Gloria would receive the same amount of retirement from Martin Marietta from the date of the divorce until the time either she or Stephen died. The term #D-level income was merely a description of the retirement plan that the parties chose. Gloria drafted the Agreement and she knew what she was talking about when she drafted it. She knew that the retirement was going to decrease and she knew that the income would be level until it was reduced and then it would be level until either she or Stephen died.

Gloria says that the Chancellor found substantial evidence to support a finding that there was a mistake in the divorce agreement. She cites no place in the record where the Court made such a finding. Gloria stated that the Property Settlement Agreement was intended to and did divide the parties property in half. Gloria drafted the contract and there was no mistake in the drafting of the contract. If there was a mistake, it was in the making of the contract, which is not a basis of reformation in Mississippi. The contract is construed against Gloria and if she alleges a mistake in the drafting of the contract, it would have been her mistake not Stephen's.

Therefore, her reliance on a mistake in the contract is misplaced. *Ivison v. Ivison*, 762 So. 2d, 329, 336 (¶21, 22) (Miss. 2000).[4]

C. THE COURT ERRED IN NOT REHEARING THE EVIDENCE.

The Court erred when it did not receive the evidence which showed the retirement plan that the parties selected. That is shown as Exhibit "1" for identification to the rehearing. (RE.67-69). Further, the Court erred in not looking at the evidence in regards to the retirement plan that the parties selected.

II. CONCLUSION

Stephen has demonstrated that the Court committed reversible error and this case should be remanded to the Chancery Court to determine the amount of retirement that Gloria should receive, the amount of retirement that Stephen has overpaid and how that overpayment will be paid back to Stephen.

The Court failed to utilize the first tier in Contract Construction by looking at the four (4) corners of the contract to determine the intent of the parties. After that, the Court failed to apply the canons of contract construction, particularly the one regarding construing ambiguities against the maker. If the Court found an ambiguity, it construed it against Stephen rather than Gloria, the maker of the contract. In finding a ambiguity and in construing the contracts, the Court was making a

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For a more thorough analysis of the issue regarding reformation because of mistake, please see the discussion in Appellant's Brief on pages 25 and 26.

determination of law. That determination of law is reviewed *de novo* and this Court should find that there is not that high level of deference given to the Chancellor as this Court would in an ordinary divorce. This Court should review the matters *de novo* to determine that there is no ambiguity in the contract, thus reversing the Court and remanding it to the Chancellor for proper determination.

RESPECTFULLY SUBMITTED, this 29th day of March, 2011.

STEPHEN D. REFFALT, JR.

BY: M. Channing Powell
M. CHANNING POWELL

CERTIFICATE OF SERVICE

I, M. Channing Powell, do hereby certify that I have this date mailed, postage pre-paid and properly addressed, a true and correct copy of the foregoing REPLY BRIEF FOR APPELLANT to counsel of record and Chancellor as follows:

Jimmy McGuire
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Honorable Sandford R. Steckler
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SO CERTIFIED this 29th day of March, 2011.

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