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

BRIEF FOR APPELLANT STEPHEN D. REFFALT, JR.

ORAL ARGUMENT NOT REQUESTED

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CAUSE NO. 2010-CA-01013

STEPHEN D. REFFALT, JR. APPELLANT

V.

GLORIA F. REFFALT APPELLEE

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 and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Honorable Sandford R. Steckler, Chancellor
2. Stephen D. Reffalt, Jr. Appellant;
3. Gloria F. Reffalt, Appellee;
4. Jimmy McGuire, Attorney for Appellee;
5. M. Channing Powell, Attorney for Appellant;

RESPECTFULLY SUBMITTED, this 8 day of January, 2011.

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Attorney for Appellant,
Stephen D. Reffalt, Jr.

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STATEMENT OF THE CASE

Appellant, STEPHEN D. REFFALT, JR., will be herein after referred to as Stephen and Appellee, GLORIA F. REFFALT, will herein after be referred to as Gloria. Cites in this Brief to "RE.", refer to the Record Excerpts of Appellant, cites to "CP." refer to the Clerk's Papers in the Court file in the Chancery Court, cites to "SCP." refer to the Supplemental Clerk's Papers from the Chancery Court file, cites to "T." refer to the Record Transcript from the Chancery Court and cites to "E." refer to the Exhibits at trial.

A. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

Stephen filed his Complaint for Modification on December 2, 2008, seeking to have the Court clarify the parties' Property Settlement Agreement which discussed his Martin Marietta Retirement. (SCP.1, RE.10). The Lower Court found that Stephen's Complaint can be interpreted as a Complaint for Declaratory Judgment for the purpose of interpreting that which the parties have an issue.(T.6, RE.70). The Court further said it would agree that the parties could try the Complaint to interpret the previous Judgment between the parties regarding the Martin Marietta Retirement. (T.6-7, RE.70-71). Stephen alleged that he was paying more than one-half of his Martin Marietta Retirement to Gloria. Stephen alleged that the Property Settlement Agreement stated that he would pay one-half of his Martin Marietta Retirement to Gloria and they each would be responsible for their own taxes. Further, Stephen requested the Court give him credit for overpayments of retirement that he had made to Gloria and give a Judgment for

the amounts overpaid. (SCP.3-6, RE.12-15). Gloria filed her Answer and Counterclaim on or about January 20, 2009. (SCP.22). The case proceeded to trial on February 12, 2009, and the Court rendered its ruling from the bench. (T. 84-89, RE.89-94). The Court interpreted the Property Settlement Agreement to be that a sum certain was payable to Gloria each month in the amount of $1,594.64 from Stephen's Martin Marietta Retirement. Although this is more than one-half of Stephen's retirement, the Court found that to be the intentions of the parties. A Judgment was filed with the Court on May 7, 2009. (CP. 37-38, RE. 31-32). Stephen filed his Motion to Reconsider Judgment on May 15, 2009. (CP. 39-50). A hearing was held on the Motion to Reconsider on April 16, 2010. After the hearing, the Court stated it would reserve its opinion and look at the case and give its ruling. (T.110-111, RE.97-98). On June 4, 2010, the Court rendered its Order on Motion to Reconsider May 7, 2009, Judgment. (CP.51-53, RE.33-35). In its Order of June 4, 2010, the Court granted part of the Motion to Reconsider in regards to the Profit Sharing Plan, but denied Stephen any relief regarding his Martin Marietta Retirement. Feeling aggrieved, Stephen appeals to this Court.

B. STATEMENT OF THE FACTS

Stephen and Gloria were once husband and wife but were divorced by the Decree of the Chancery Court of Hancock County, Mississippi filed June 22, 1993. (CP. 13-14, RE.38-39). The Decree incorporated the Property Settlement Agreement of the parties filed on August 12, 1992 (CP.4-9, RE.19-24) and the Amendment to the Property Settlement Agreement (CP.10-12, RE.25-27). In the parties' Property Settlement Agreement (CP.4-9, RE.19-24) the parties divided all of their assets

equally. That is to say they divided their assets one-half. That included all of the retirement which had been earned by Stephen. Gloria received one-half of Stephen's assets. One of the assets was Stephen's Martin Marietta Retirement. That was addressed in Paragraph 10 of the Property Settlement Agreement (CP.6, T.19, RE.74). This Property Settlement Agreement was drafted by Gloria. (T.23, RE.76). The provision regarding Martin Marietta discussed that the parties had agreed to accept Level B Income as Stephen's retirement. In fact, the parties had signed an application so that Stephen could receive his retirement. (E.7, RE.60). Because Stephen was married, his Wife was required to agree with him regarding the provision for his retirement. Both parties signed the document and had their signature notarized. This document was signed on April 16, 1992. It provided for a level income option of retirement. The level income option would start with one amount and would later be reduced at the earliest date Stephen would be eligible for Social Security. The amounts would remain level until Stephen was eligible for Social Security then the amount would be decreased and would remain level until his death. (E.7, RE. 60). The parties could have chosen one of the other options which would have provided survivor's benefits or a guaranteed period option or other provisions, but they chose the option of level income so that they could receive the most money. (T.64, RE.85). The Application for Retirement Benefits, Exhibit 7, was signed on April 16, 1992. The Property Settlement Agreement was signed on April 22, 1992. The parties knew and cited in Paragraph 10 of the Property Settlement Agreement that Stephen would be receiving level D income as the monthly benefit option. (CP.6, RE.42) The Property Settlement Agreement was amended on January 7, 1993.

Again, the Amendment which was drafted by Gloria or her attorney, provided that the parties had accepted D level income as the monthly benefit option for Stephen's Martin Marietta retirement. (CP.10, RE.46) In the Amendment to the Property Settlement Agreement, the parties stated that Stephen would be receiving approximate monthly retirement of $3,189.26. That was a different amount than was originally stated in the Property Settlement Agreement. Stephen had received a letter from Martin Marietta stating what the amount of his monthly retirement and what it would be changing to the month after he became age 62. (E.8, RE.61). The exact amount that Stephen would be receiving was $3,189.26. It would remain in effect until June 1, 1995. That is the month after Stephen turned age 62 on May 11, 1995. As further stated in the Amendment, the parties agreed that the purpose of the Amendment is strictly for the clarification of the tax responsibilities of the parties. As a result, the parties agreed that the division of the retirement would be considered as alimony for tax purposes and each party would pay their taxes on the portion they received. The Amendment and the Property Settlement Agreement provided that each party would receive one-half of Stephen's Martin Marietta Retirement. The relevant portion of paragraph 10 of the Amendment is as follows:

> The parties have agreed to accept #D-Level Income as the monthly benefit option. This plan will provide the Husband a monthly income of approximately $3,189.26. The Husband will remit to the Wife one-half of this income, being the approximate amount of $1,594.63, on the first day of each month to the Wife commencing on January 1, 1993. These monies will be considered alimony and the Wife will be responsible for her Federal and State tax liability. The Husband can then claim as a tax deduction these alimony payments. The payments will be terminated only by the death of either the Husband or the

> Wife. Both parties intend that the duration of payments will not be effected by the remarriage of either spouse. The parties agree that these terms are irrevocable and may not be modified by a Court of Law in the future.

Petition to Amendment for Joint Complaint for Divorce, paragraph 10 (CP.10, RE. 46).

There was never a discussion of the parties' social security in the Property Settlement Agreement. The only discussion regarding Social Security was that the parties agreed that when they accepted the Level D income option retirement from Martin Marietta that the retirement would decrease on the earliest date that Stephen was able to receive Social Security. (T.64, RE.85). That clearly was the highest payout available to the parties. The document which Stephen sought to introduce at the hearing on the Motion to Reconsider would have clarified the matters for the Court, but the Court refused to allow it into evidence. (E.1 for id., RE.67). The Court could have allowed the document into evidence under Rule 59, the rule under which Stephen filed his Motion to Reconsider. That document is Exhibit 1 for identification to the hearing on April 16, 2010. (RE.67). Stephen testified that the parties chose the retirement with the highest payout. (T.64, RE.85). This chosen retirement had the highest payout even though it would be reduced when Stephen first became eligible for Social Security. The parties divided their assets by one-half to each. They divided the Martin Marietta Retirement one-half each. Gloria drafted the Property Settlement Agreement and made a provision in the Property Settlement Agreement which referenced the retirement option that the parties chose. (T. 23, RE.76). Gloria testified that paragraph 10 was about the division of the Martin Marietta Retirement.

(T.19, RE.74). No where in the Property Settlement Agreement is there any reference to Stephen's Social Security Retirement being paid to Gloria.

A hearing was held where the Court allowed Gloria to give testimony about Stephen's Social Security over the objection of Counsel for Stephen. The Court allowed parol evidence when there had been no discussion of any ambiguity in the contracts. In fact, the Court in its findings never found that there was an ambiguity in the contract. The Court made its interpretation regarding Stephen's Martin Marietta Retirement based on the testimony of Gloria. There is not one word in any provision of the Property Settlement Agreement and the Amendment to the Property Settlement regarding the Social Security of Stephen, or Gloria for that matter.

After the hearing on April 12, 2009, the Court modified the Property Settlement Agreement of the parties so that Gloria would continue to receive the same amount she had been receiving which is $1,594.63. Stephen's Martin Marietta retirement that he currently receives and has been receiving since June 1, 1995, is $2,272.26 per month. If he pays $1,594.63 to Gloria each month, he is paying her over 70% of his Martin Marietta Retirement. Surely the parties never anticipated such a result. The Property Settlement Agreement states that Stephen will pay Gloria one-half of his retirement income.

Paragraph 12 of the Property Settlement Agreement provided that the parties would divide Stephen's Performance Sharing Plan (PSP) jointly and equally. (CP. 6, RE.42). The parties selected a 20 year payout on the PSP. Sometime in 1992 or 1993 Stephen took out all of the PSP. (T.71, RE.87). Gloria knew that Stephen took out all of the PSP at that time. (T.47, RE.82). In fact the parties' 1992 tax return shows

that the retirement was taken out in 1992. Gloria signed this tax return. (E.4, RE.49). As early as 1996, Stephen had taken all of the PSP and it was all gone and none would be paid to Gloria. (T.49, RE.83). Stephen's testimony is that he kept paying more on the retirement than he had to because he was paying the PSP to Gloria that he owed her. (T. 66, RE.86). Stephen made a calculation regarding how much PSP was owed to Gloria. (E.17, RE.65). At the time of the trial, Stephen's calculations show that he overpaid Gloria by $18,893.84. (T.73, RE.88; E.17, RE.65).

Stephen's testimony was that he had no discussions with Gloria regarding paying any of his Social Security to her. His understanding was that his Social Security was his and that he would make no claim to Gloria's Social Security. (T.66, RE.86). Further, Stephen testified that the level income option that they took for Stephen's retirement was the best option with the highest payout in the early years of their retirement and it would give them the maximum amount of money over the shortest years of time. (T.64, RE.85). In fact, Stephen and Gloria discussed the fact that the Martin Marietta would decrease when he first became eligible for Social Security. (T.64, RE.85). When Stephen tried to reduce the Martin Marietta Retirement that he was paying to Gloria to one-half, he received letters from her attorney stating that he would be in contempt if he made such a reduction. (E. 12 and 13, RE. 62-64). Stephen filed his Motion and a hearing was conducted in which the Court found that Gloria should continue to receive the amount that Stephen had been paying. Stephen filed a Motion to Reconsider and the Court granted the portion of the Motion regarding Stephen having paid the PSP in full and denied any

reconsideration of the amount of Martin Marietta Retirement to be paid to Gloria. It was from the Court's Judgments that Stephen appealed. (CP. 54, RE.36).

The facts as stated above may seem to be somewhat complex. The facts are really simple. Both Stephen and Gloria signed an application for Stephen's Martin Marietta Retirement. They selected an option that would pay a certain amount until Stephen first became eligible for Social Security. The option they chose provided for a level income to be received until the earliest date that Stephen was eligible for Social Security, then to be reduced and level income to be received until his death. Both parties signed that document and it was notarized on April 16, 1992. (E.7, RE.60). The parties signed their Property Settlement Agreement on April 22, 1992, and referenced that option they chose for Stephen's retirement and stated they would each receive one-half. There was a tax computation where Stephen would take out taxes from Gloria's share. That seemed a little complex so the parties amended the Property Settlement Agreement and stated that each would receive one-half of Stephen's retirement and they would treat that as alimony paid to Gloria and deducted by Stephen because Stephen would be taxed on the entire amount. The parties still agreed to divide the Martin Marietta Retirement by one-half. That is what paragraph 10 is all amount, to divide the Martin Marietta Retirement by one-half. The parties had divided their other assets by one-half in their Property Settlement Agreement and that is what they did with this asset as well. The Court modified Paragraph 10 of the parties' Property Settlement Agreement to take into consideration Social Security received by Stephen to give part of his Social Security to Gloria. There was never any mention of Social Security in the entire Property Settlement Agreement nor the

Amendment thereto. Gloria is only entitled to one-half of Stephen's Martin Marietta Retirement and no more. It is just that simple.

SUMMARY OF THE ARGUMENT

The parties made a Property Settlement Agreement to divide Stephen's Martin Marietta Retirement by one-half. Stephen paid more than one-half of his retirement to Gloria after it was reduced on the earliest date that he was eligible for Social Security. The parties knew that the retirement would decrease on the date that Stephen was eligible to receive Social Security and they signed a document that selected that option. (E.7, RE.60) They referenced the option that they chose in their Property Settlement Agreement and stated one-half of that would be paid to Gloria. The relevant portion states:

> The parties have agreed to accept #D-Level Income as the monthly benefit option. This plan will provide the Husband a monthly income of approximately $3,189.26. The Husband will remit to the Wife one-half of this income, being the approximate amount of $1,594.63, on the first day of each month to the Wife commencing on January 1, 1993. (E.2, RE46)

The parties knew the amount that Stephen would be receiving at the time he retired. The parties also knew that this would decrease on the earliest date that Stephen was eligible for Social Security. Paragraph 10 of the Amendment states that the parties agreed to Level Income as the monthly befit option, which would provide Husband a monthly income and he would remit to Wife on-half of this income monthly. Clearly the parties intended that Stephen would remit to Gloria one-half of his Martin Marietta Retirement. After all, the parties were trying to divide his Martin Marietta Retirement as they divided all of their other assets. That is, they to divided

his Martin Marietta Retirement by one-half each as they had divided all of their other assets.

The Court accepted parol evidence over the objection of Counsel for Stephen regarding social security for Stephen. Gloria further provided parol evidence regarding how she thought that played into her receiving a level income. That was convenient for her to say at that time so that she would continue to receive the money she had been receiving. The fact is, Gloria signed the application selecting the retirement option for Stephen's Martin Marietta Retirement. (E.7, RE.60). Gloria also prepared or her attorney prepared an Amendment to the Property Settlement Agreement agreeing to receive only one-half of Stephen's Martin Marietta Retirement. (T.31, RE.80; E.2, RE.46). The Amendment was only for the Martin Marietta Retirement and how to divide it. The Amendment to the Property Settlement Agreement divided the Martin Marietta Retirement by one-half, just as the parties intended to do. The Court allowed parol evidence before it ever found that there was an ambiguity in the Property Settlement Agreement. There is no ambiguity in the Property Settlement Agreement, nor the Amendment thereto. It is clearly stated that Husband will remit one-half of his retirement income to Wife. When you take the Property Settlement Agreement and the Amendment as one agreement, which is what it is, it is easy to see that the parties divided their current assets by one-half. The assets they had at the time they were divorcing they divided by one-half. There is no reference to any assets the parties would have after retirement. There is no reference to Social Security. The parties were dividing their current assets and that is what they did.

The Court amended, altered or redrafted the amendment to the Property Settlement Agreement. The Court stated that "I just don't see any possible equity in doing it a different way". (T.108, RE.96). The Court went on to state that if it "took all of the current income of the parties and divided it by two, Gloria would be receiving about what she is being paid currently", that is 70% of Stephen's retirement. The Court said he thought she was entitled to that. (T.108, RE.96). The Court further stated that he didn't know any other equitable way to do it but to give Gloria the amount that she is being paid presently. That is 50% of Stephen's retirement when he first retired and not the reduced amount. The Court further stated that it seemed like Gloria anticipated having a level income. The Court said that was the only equitable way he could see it. (T.110, RE.97).

The Court did not use in its ruling an objective standard at looking at the contract between the parties. Rather, the Court took into consideration a subjective intent of a parties' belief that was in conflict with the plain meaning of the contract. Further, the Court did not delineate the three tier process for contract interpretation and the Court did not use the three tier process for determining the intent of the provision regarding the Martin Marietta Retirement. Moreover, the Court would have been required to find that there was an ambiguity in the provision regarding the Martin Marietta Retirement before the Court could interpret it any way other than one-half to Stephen and one-half to Gloria. The Court never found an ambiguity in the contract. The Court reformed the Property Settlement Agreement and actually drafted a contract for the parties regarding Stephen's Social Security. The Court used an equitable modification to that. Moreover, if there was an ambiguity in the

provision regarding the Martin Marietta Retirement and how it was to be divided, that ambiguity is to be construed against the maker. That maker is Gloria. It is clear that Stephen intended to divide his Martin Marietta Retirement with Gloria by one-half. Any ambiguity should be construed against Gloria. Since there was never any mention in the Property Settlement Agreement of Social Security and the division thereof and since there was never any meeting of the minds of the parties with regard to Social Security, the Court was in error in adding Stephen's Social Security to the retirement to give to Gloria one-half of the original amount of Stephen's retirement. The Court made a contract regarding Social Security when there was no agreement of the parties.

It is clear that the parties intended to divide the Martin Marietta Retirement one-half to each. They selected a retirement option where the retirement would be greater in the early years and decrease when Stephen was first eligible for Social Security. This gave the parties the highest payout. They referenced that retirement option selection in the Property Settlement Agreement and divided that retirement by one-half. They could have selected a retirement that would have been the same on the first day of retirement until Stephen's death. That would have been the same amount all the way through the retirement years, but it would have been a lesser amount initially. Clearly, Gloria would have received no more than half of the retirement had they selected that option. When looked at in that regard, the parties selected the option that would give them the highest payout even though there was going to be a reduction later. They still would share one-half of whatever the retirement was. The Court clearly erred when it took into consideration Stephen's

Social Security. Further, Stephen asked for a refund of amounts that he has paid to Gloria. Since this matter was filed in December, 2008, he has paid her in excess of $5,000.00 each year since the filing. Clearly, he would be entitled to $10,000.00 when this Court reverses the Chancery Court. The Chancery Court was in error in requiring Stephen to pay more than one-half of his Martin Marietta Retirement to Gloria. The Court should be reversed and there should be a determination made as to the amounts that are owed by Gloria to Stephen and how that will be paid to him.

ARGUMENT

STANDARD OF REVIEW

The standard of review in domestic relations cases is generally a deferential one.

> This Court is limited when reviewing a chancellor's decision on appeal. *Townsend v. Townsend*, 859 So.2d 370, 371-72(¶ 7) (Miss.2003). The chancellor's opinion will not be disturbed "when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Id.* (quoting *McBride v. Jones*, 803 So.2d 1168, 1169(¶ 7) (Miss.2002)).

Williams v. Williams, 37 So.3d 1196, 1199 ¶ 6 (Miss. Ct. App. 2009).

However, the Court gives a *de novo* review to questions of law. "Our standard of review is *de novo* in passing on questions of law." *Amiker v. Drugs for Less, Inc.*, 796 So.2d 942, 945 ¶ 7 (Miss. 2000).

DISCUSSION OF THE LAW

I. THE CHANCERY COURT ERRED WHEN IT ALLOWED GLORIA D. REFFALT TO PRESENT PAROL EVIDENCE OF STEPHEN D. REFFALT'S SOCIAL SECURITY TO SHOW THE INTENT OF THE PARTIES REGARDING THE PROVISION OF THEIR PROPERTY SETTLEMENT AGREEMENT DIVIDING STEPHEN D. REFFALT'S MARTIN MARIETTA RETIREMENT.

The fact that the Chancellor allowed parol evidence by Gloria was an error. The fact the Chancellor allowed Gloria to express her intent of the contract regarding Social Security was not merely a rule of evidence but it was also substantive law. As such, this Court must take a *de novo* review of that matter.

> "The rule that the terms of a written contract or conveyance cannot be varied or added to by parol evidence is not merely a rule of evidence, but is one of substantive law, and, in measuring the rights of the parties to a written contract or conveyance which, on its face, is unambiguous and expresses an agreement complete in all its essential terms, the writing will control." *Kelso v. McGowan*, 604 So.2d 726, 730 (Miss.1992) (quoting *Edrington v. Stephens*, 148 Miss. 583, 584-114 So. 387, 389 (1927)). As to matters of law, our standard of review is *de novo*. *Davidson v. Davidson*, 667 So.2d 616, 621 (Miss.1995)

Smith v. Smith, 872 So.2d 74, 78-79 ¶ 15 (Miss. Ct. App. 2004).

The Court never specifically stated that there was an ambiguity in the Property Settlement Agreement or in the Amendment to the Property Settlement Agreement discussing the Martin Marietta Retirement of Stephen. The Court did state that if it read the Amendment regarding the Martin Marietta Retirement it could draw several interpretations. (T.86, RE.91). The Court then stated that "if I pick part of it I'm going to get that and Gloria would receive one-half of $3,248.33 minus the federal and state taxes." (T.86, RE.91). The Court went on to make findings regarding the

intentions of the parties. However, the Court never found that there was an ambiguity in the contract. Since this Property Settlement was unambiguous, the Court should have interpreted the contract the way it was written. The Court should not have allowed parol evidence to express the intent of Gloria regarding sharing Stephen's Social Security. No where in the Property Settlement Agreement is there any statement regarding Stephen's Social Security. Gloria was using parol evidence to try to bring Stephen's Social Security into the paragraph that discusses Stephen's Martin Marietta Retirement, when asked what the paragraph was about. (T.16, RE.72). Counsel for Stephen objected to Gloria giving testimony stating that Social Security was involved in paragraph 10 concerning Stephen's Martin Marietta Retirement. (T.16, RE.72). The Court overruled the objection and allowed Gloria to continue to testify that part of Stephen's Social Security would be used as additional retirement for her. (T.17, RE.73). This was Gloria's testimony. (T.25, RE.78).

The Court erred when it allowed the parol evidence in regarding the paragraph in the Property Settlement Agreement and the Amendment to the Property Settlement Agreement, paragraph 10, which discussed Stephen's Martin Marietta Retirement. There was no finding that there was an ambiguity in the contract to allow Gloria to tell the Court what her intent was in writing that paragraph. In fact, Gloria did write the paragraphs regarding Stephen's Martin Marietta Retirement and she wrote the Property Settlement Agreement. She had a lawyer to look over those documents, but she wrote them. (T.24, RE.77). In fact, Gloria drafted the document and divided all of the assets down the middle. (T.25, RE.78). Gloria testified that her lawyer drafted

the Amendment to the Property Settlement Agreement. (T.26, RE.79). Gloria even admitted that their agreement regarding Stephen's retirement from Martin Marietta said that "[i]t says he is going to give me one-half of his retirement income, regardless." (T.31, RE.80).

There is no ambiguity in the contract that the parties entered into regarding Stephen's Martin Marietta Retirement. Gloria stated that she was to get one-half of his retirement income regardless. However, the Court allowed her to give parol evidence when there was no ambiguity. The Court should not have allowed Gloria to use parol evidence to modify, vary, add-to or change the method of the division of Stephen's Martin Marietta Retirement. When the contract is unambiguous and expresses an agreement complete in all of its essential terms, then the contract controls. *Smith,* 872 So.2d at 78 (¶15).

The Court should not have allowed Gloria to express her intent of the contract with parol evidence. The Court should not have used parol evidence to modify the contract, when there was no ambiguity in the contract. The Court was in error in overruling Stephen's objection to Gloria giving testimony of how the Social Security leveled out his Martin Marietta Retirement. The Court should be reversed on that matter. Additionally, any ambiguity in the contract should be construed against Gloria, the maker. That is a universal rule of construction that the Court uses when the terms of a contract are ambiguous. *Banks v. Banks*, 648 So.2d 1116, 1121 (Miss. 1994). Therefore, in the event this Court finds that there was an ambiguity in the contract, that ambiguity should have been construed against Gloria. When the Court construes the paragraph regarding the Martin Marietta Retirement, paragraph 10 of

the Property Settlement Agreement and the Amendment to the Property Settlement Agreement, the Court can not help but understand that the parties were intending to divide Stephen's Martin Marietta Retirement one-half to each party based on the option for retirement that the parties had selected. If there is an ambiguity in the paragraph regarding the division of Stephen's Martin Marietta Retirement, it should be construed against Gloria. This retirement asset was to be divided one-half to each, no more, no less and that is the construction the Court should take because that is the construction that would be construed against Gloria's idea that she has expressed with parol evidence. As previously discussed, the Court allowing parol evidence is substantive law and should be reviewed *de novo* .

The property settlement agreement drafted by Gloria states that the parties have prepared the agreement cooperatively and they fully and honestly disclosed all of their assets, income and financial situations. (CP.7, RE.43). Further, the agreement provided that it was the full and entire agreement by and between the parties regarding their marital rights and obligations. (CP.8, RE.44). Further, the particular paragraph regarding Stephen's retirement provided that the terms were irrevocable and may not be modified by a Court of law in the future. (CP.10, RE.46). Both parties agreed that paragraph 10 divided Stephen's Martin Marietta Retirement and had no mention of his Social Security in it. Both parties agreed that this paragraph discussed the division of the Martin Marietta Retirement. (T.22, RE.75). With that in mind, it was error for the Court to admit parol evidence, to modify the agreement based upon the Court's imputed intent of the parties. *Ivison v. Ivison*, 762 So.2d 329, 335 (¶18) (Miss. 2000).

II. THE PARTIES' PROPERTY SETTLEMENT AGREEMENT AND AMENDMENT TO THE PROPERTY SETTLEMENT AGREEMENT REGARDING STEPHEN'S MARTIN MARIETTA RETIREMENT WAS A VALID UNAMBIGUOUS CONTRACT AND THE COURT ERRED BY REWRITING THEIR AGREEMENT.

A. The Parties' Property Settlement Agreement Incorporated into the Judgment of Divorce is a Binding Court Approved Contract Between the Parties. The Supreme Court has held that property settlements in divorce are contracts that should be upheld by the court.

> A divorce agreement is "no different from any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character." *East v. East*, 493 So.2d 927, 931-32 (Miss.1986). Similarly, in *Bell v. Bell*, 572 So.2d 841, 844 (Miss.1990), we held that when parties in a divorce proceeding have reached an agreement that a chancery court has approved, we will enforce it, absent fraud or overreaching, and we take a dim view of efforts to modify it just as we do when persons seek relief from improvident contracts.

Ivison v. Ivison, 762 So.2d 329, 334 (¶14) (Miss. 2000); *Williams v. Williams*, 37 So.3d 1196, 1200 (¶ 8) (Miss. Ct. App. 2009); *Lestrade v. Lestrade*, ... So.3d ....., 2010 WL 4456911 (¶10) (Miss. Ct. App. Nov. 9, 2010).

Gloria and Stephen entered into a Property Settlement Agreement, which was filed in the Hancock Chancery Court on August 12, 1992. Their Property Settlement Agreement was signed on April 22, 1992. (CP.4-9, RE.40-45). The Property Settlement Agreement was amended by Petition filed with the Hancock Chancery Court on January 7, 1993. The parties signed the Amendment on the 30th day of December. The Amendment was to amend paragraph 10 regarding Stephen's Martin Marietta Retirement. The Amendment stated that all paragraphs in the Property

Settlement Agreement would remain in full force and effect as to all other aspects. (CP.11, RE.47). Gloria drafted the Property Settlement Agreement. (T.23, RE.76). In the Property Settlement Agreement, the parties agreed that they prepared the Agreement cooperatively and that they fully and honestly disclosed all of their assets. (CP.7, RE.43). Moreover, the parties agreed that the document was the entire agreement and settlement between the parties. (CP.8, RE.44). Further, in the Amendment to the Property Settlement Agreement the parties agreed that the terms of the Property Settlement regarding Stephen's Martin Marietta Retirement were irrevocable and could not be modified by a Court in the future. (CP.10, RE.46). The Court approved both the Property Settlement Agreement and the Amendment thereto in its Decree filed with the Court on January 22, 1993. (CP.13-14, RE.38-39).

In the Property Settlement Agreement, the parties divided all of their assets down the middle. (T.25, RE.78). They entered into a Property Settlement Agreement which disposed of all of their assets, including Stephens' Martin Marietta Retirement. The document was silent regarding the parties' Social Security. There was no mention of Social Security in the Property Settlement Agreement or the Amendment thereto. (T.25, RE.78).

The parties did not believe that there was fraud, duress or unconscious ability in the Property Settlement Agreement. There was no finding of fact that there was any fraud, duress or unconscious ability in the Property Settlement Agreement or the Amendment. Where the Chancellor made no finding of fraud, duress or unconscious ability, the Court should enforce the Property Settlement Agreement of the parties. *Woodfin v. Woodfin*, 26 So.3d 389, 395 (¶¶28-29) (Miss. Ct. App. 2010).

This Court should reverse the lower Court's Judgment in modifying the Property Settlement Agreement and failing grant the Motion to Reconsider on the Judgment regarding the Martin Marietta Retirement of Stephen.

B. The Agreement is Clear and Unambiguous; Therefore, the Chancellor Must Enforce the Terms as Written.

The Trial Court never found that there was any ambiguity in the contract. Further, the contract was clear and unambiguous.

> A "court is obligated to enforce a contract executed by legally competent parties where the terms of the contract are clear and unambiguous." *Merchants & Farmers Bank v. State ex rel. Moore*, 651 So.2d 1060, 1061 (Miss.1995). As stated in *Delta Pride Catfish, Inc. v. Home Ins. Co.*, 697 So.2d 400, 404 (Miss.1997), the parties are bound by the language of the contract where a contract is unambiguous. "The mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law." *Id.*
>
> When a contract is clear and unambiguous, 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." *Shaw v. Burchfield*, 481 So.2d 247, 252 (Miss.1985). When this Court interprets a contract, we "look to the contract for its meaning, not what a party thereto may have thought it meant. The standard is objective, measured by the language of the contract, not by the subjective intent or belief of a party which conflicts with meaning ascertained by the objective standard." *Landry v. Moody Grishman Agency, Inc.*, 254 Miss. 363, 375, 181 So.2d 134, 139 (1965). We are "concerned with what the contracting parties have said to each other, not some secret thought of one [that was] not communicated to the other." *Mississippi State Highway Comm'n v. Patterson Enters., Ltd.*, 627 So.2d 261, 263 (Miss.1993).

Ivison v. Ivison, 762 So.2d 329, 335 (¶¶ 16-17) (Miss. 2000)

In this case the Property Settlement Agreement and Amendment specifically state how Stephen's Martin Marietta Retirement is to be divided. It is one-half to Gloria and one-half to Stephen. The parties had selected an option with Martin Marietta that started with one amount and was reduced when Stephen first became eligible for Social Security. (E. 7, RE.60). The amount that Stephen was to receive when he first retired on May 1, 1993, was $3,189.26. That is the number that is shown in the Property Settlement Agreement. At age 62, Stephen's retirement would be reduced to $2,272.26. That is shown in Exhibit 8. The parties signed the Application for Retirement Benefits from Martin Marietta on April 16, 1992. Both parties had to sign the agreement because they were married. (E. 7, RE.60). The parties then entered into a Property Settlement Agreement on April 22, 1992. (CP.8, RE.44). The parties amended paragraph 10 of the Property Settlement Agreement on December 30, 1992. (CP.11, E.2, RE.45).

Both Stephen and Gloria decided to take a retirement that would be reduced at the earliest date that Stephen was eligible for Social Security. They even referred to their agreement to take that retirement option in their Amendment to the Property Settlement Agreement. (CP.10, E.2, RE.46).

> The parties have agreed to accept #D-Level Income as the monthly benefit option. This plan will provide the Husband a monthly income of approximately $3,189.26. The Husband will remit to the Wife one-half of this income, being the approximate amount of $1,594.63, on the first day of each month to the Wife commencing on January 1, 1993. These monies will be considered alimony and the Wife will be responsible for her Federal and State tax liability. The Husband can then claim as a tax deduction these alimony payments. The payments will be terminated only by the death of either the Husband or the

> Wife. Both parties intend that the duration of payments will not be effected by the remarriage of either spouse. The parties agree that these terms are irrevocable and may not be modified by a Court of Law in the future. (E.2, RE.46)

Gloria agreed that she and Stephen divided all of their assets down the middle. She further agreed that there is no mention in the Property Settlement Agreement regarding Social Security. (T.25, RE.78). 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). Further, he testified that he had no discussions with Gloria regarding her getting any of his Social Security. His understanding was that his Social Security was his and Gloria's was hers. (T.66, RE.86). Again, Gloria prepared the Property Settlement Agreement. (T.23, RE.76). Had she intended to provide that she would get a portion of Stephen's Social Security when the retirement was decreased at the time when Stephen first became eligible for Social Security, she could should have put that in the Property Settlement Agreement. Then Stephen could have changed it if that was not his intention. He would never have agreed to give her part of his Social Security. He was dividing his retirement with her and she knew it was going to decrease. Any ambiguity should be construed against Gloria.

There is no mistake in the drafting of the document nor a scrivener's error. At the trial, the parties discussed that Exhibit 7 in evidence showed the option they selected for Stephen's retirement as Option B. The document that they had reviewed, which the Court would not allow into evidence at the Motion to Reconsider is Exhibit 1 for the hearing on April 16, 2010. (RE.67). In that document, the parties circled and selected Option D which showed a larger amount of money in the years before

Stephen became eligible for retirement with a reduction at age 62. That is where Gloria got the Option D. The Court would not allow any evidence at the hearing on the Motion to Reconsider. Had the Court allowed it, it would have seen that Option D is what they selected and that Gloria knew there was going to be a reduction.

Both parties agree that the Property Settlement says nothing about Gloria receiving any portion of Stephen's Social Security. Both parties agree that paragraph 10 discusses Stephen's retirement from Martin Marietta and that each will receive one-half. Gloria testified that she thought that Stephen's Social Security would make a portion of the retirement so that she would continue to receive the same amount that she began receiving at the time he retired. Stephen testified that Gloria knew there was going to be a decrease in the Martin Marietta Retirement at the time he became eligible for Social Security. The document that they signed shows that Stephen's Martin Marietta Retirement was going to reduce at the time that he became eligible for Social Security. (E. 7, RE.60). Further, the Property Settlement Agreement states that the parties collectively prepared the Agreement and fully disclosed all of their incoming finances to one another and that the agreement was the entire settlement and full agreement of the parties. Further, the Martin Marietta paragraph had a provision that it was irrevocable and could not be modified by a Court.

In this case, the parties do not differ on what the agreement says. They disagree on whether or Stephen's Social Security should be part of his Martin Marietta Retirement. Since the provision regarding the retirement was not ambiguous, this Court should not have allowed parol evidence and should not have altered or amended the parties Property Settlement Agreement. The lower Court

erred when it modified the parties Property Settlement Agreement based its own imputed intent of the parties. *Lestrade*, 2010 WL 4459611 at ¶10. The Lower Court found the intent of Gloria. His finding described Gloria's expectation rather than the parties' intent. *Lestrade* at ¶19. Therefore, the lower Court's Judgment and Judgment on the Motion to Reconsider regarding the Martin Marietta Retirement should be reversed.

C. The Chancellor erred by reforming the contract.

The Chancellor should not have reformed paragraph 10 of the partie's Property Settlement Agreement because there was no mutual mistake.

> We recognize that a valid contract may be reformed in some instances where a mistake has been made. *Allison v. Allison*, 203 Miss. 15, 20, 33 So.2d 289, 291 (1948). The general rule in this state and elsewhere is that reformation of a contract is justified only (1) if the mistake is a mutual one, or (2) where there is a mistake on the part of one party and fraud or inequitable conduct on the part of the other. However, "[t]he mistake that will justify a reformation must be in the drafting of the instrument, not in the making of the contract." *Johnson v. Consolidated Amer. Life Ins. Co.*, 244 So.2d 400, 402 (Miss.1971).

Ivison, v. Ivison 762 So.2d at 335, 336 (¶ 21).

Neither Stephen nor Gloria claim that there has been a scrivener's error in paragraph 10 of the Property Settlement Agreement as amended. They both agreed they selected a level income option as shown in Exhibit 7, which they both signed and had their signatures notarized. Both agree that the retirement option they selected would have a decrease in income on the earliest date that Stephen became eligible for Social Security. That D level income monthly benefit option was provided for in the Property Settlement Agreement and in paragraph 10 as amended. The parties agreed

to divide all of their assets down the middle and that is what they did in their Property Settlement Agreement even in the Amendment in paragraph 10 which provides for Stephen's Martin Marietta Retirement. The parties divided the retirement down the middle. No language is present in the Property Settlement Agreement regarding Stephen's Social Security supplementing Gloria's portion of Stephen's Martin Marietta Retirement. Gloria wants to have her share of the Martin Marietta Retirement supplemented by Stephen's Social Security. She knew that there was a decrease in the Martin Marietta Retirement at the time he became eligible for Social Security. (T.16, RE.72). She agreed to that option as shown as by Exhibit "7". She knew or should have known what the income amounts would be when Stephen retired on May 1, 1992, and when he became eligible for Social Security and the retirement was decreased on June 1, 1995. (E.8, RE.61). Stephen testified that Gloria knew about the decrease in his retirement. (T.64, RE.85). Further, he stated that the document was in the house and that she knew about all of the documents. (T.63, RE.84). Since there is no language in the Property Settlement Agreement or Amendment thereto regarding Stephen's Social Security and since the provision in paragraph 10 referencing Stephen's Martin Marietta Retirement refers to how it would be decreased, there is no mutual mistake. The only mistake there could have been would have been in making of the contract. There was no mistake in the drafting of the contract. The mistake in the making of the contract is not at basis for reformation under Mississippi Law. *Ivison* 762 So.2d at 336 (¶ 22), *Lestrade* at ¶19. The Chancellor erred in reforming the parties divorce agreement because there was no mutual mistake.

D. The Chancellor erred by Modifying the Agreement.

The parties must have a meeting of the mind before the Court can add any provision to the Property Settlement Agreement.

> It is fundamental in contract law that courts cannot make a contract where none exists, nor can they modify, add to, or subtract from the terms of a contract already in existence. *Wallace v. United Miss. Bank*, 726 So.2d 578, 584-85 (Miss.1998). A court cannot "draft a contract between two parties where they have not manifested a mutual assent to be bound." *A. Copeland Enterprises v. Pickett & Meador, Inc.*, 422 So.2d 752, 754 (Miss.1982).

Ivision v.Ivision, 762 So.2d at 336 (¶ 23)

As previously stated, there was no language in the Property Settlement Agreement regarding Stephen's Social Security. The parties agreed to a retirement that gave them the most money in the early years and a decrease when Stephen became eligible for Social Security. That particular option of retirement was referred to in the Property Settlement Agreement. Gloria drafted the Property Settlement Agreement and her lawyer may have drafted the amendment, but it was approved by Gloria. Had the parties intended that there be any reference to Stephen's Social Security it would have been in the Property Settlement Agreement. The Property Settlement Agreement is devoid of any reference to Stephen's Social Security. The parties agreed on how the assets they had at the time they divorced would be divided. One of the assets was Stephen's Martin Marietta Retirement. It was provided for in Paragraph 10 of the Property Settlement Agreement and the Amendment thereto. It provided that each party would receive one-half of the plan income they had selected. There was no mention of Gloria receiving part of Stephen's Social Security to

supplement her one-half of the retirement when Stephen became eligible for Social Security. For the Court to make the determination that she would continue to receive the amount of retirement she was receiving at the time Stephen first retired would be to reform the contract. The Court found that it was the intent of the parties that the amount Gloria received at the beginning of Stephen's retirement as stated in the amendment to the Property Settlement Agreement would be what she would receive for the rest of her life or until Stephen died. To make that intent, the Court would have to add a provision that says that Gloria is receiving one-half of Stephen's retirement in X amount but regardless of what happens to his retirement she would still receive the same amount until he dies or she dies.

Clearly the parties never came to an agreement regarding Gloria receiving any of Stephen's Social Security to supplement her one-half of his retirement. It was never mentioned in the Property Settlement Agreement and the parties never had an agreement to that affect. Thus, there was no contract between the parties regarding this issue. The trial Court should not have interpreted the agreement to add a provision to the existing divorce agreement. *Ivison* at 336 (¶25); *Lestrade* at ¶13.

The Court found that Gloria believed she would be receiving part of Stephen's Social Security to Supplement her portion of the retirement so that her retirement portion would never be reduced. The Court further found that Stephen had been paying Gloria the same amount that he first began paying even after his retirement was reduced. The Court found that both parties must have believed that Gloria would still receive the same amount as long as retirement was available to her until Stephen or she died. Steve explained that he owed Gloria some of the PSP which he had not

paid and he was continuing to pay the same amount in the retirement as he always paid so that he would pay her the PSP. (T.66, RE.86). As the Court noted, she let the statute of limitation expire on her and Stephen should not have paid her the amount of PSP that he did. However, Stephen did pay that and he over paid her. Stephen's made calculations which shows the amount of overpayments and PSP that he made to Gloria. (E.18, RE.66) and (E.17, RE.65) He had overpaid Gloria $18,893.84 as of the date of the hearing on February 12, 2009. (T.73, RE.88).

III. THE COURT ERRED WHEN IT DID NOT ALLOW EVIDENCE AT THE MOTION TO RECONSIDER.

Stephen filed his Motion to Reconsider Judgment on May 15, 2009. (CP. 39-50). This Motion was filed within ten (10) days of the Judgment and therefore it is treated as Motion to Alter to Amend the Judgment under M.R.C.P. 59 (e). *Street v. Street,* 936 So.2d 1112, 1008 (¶15) (Miss. Ct. App. 2006). The Court could have heard the Motion to Reconsider and allowed in evidence and testimony at the hearing. *Street,* 936 So.2d at 1008 (¶14). Stephen asked the Court to mark Exhibit "1" for identification at the April 16, 2010, hearing. (RE.95). Had the Court allowed testimony or allowed the Exhibit into evidence, the Court could have determined that the level income document that the parties had referred to as D level income was in actuality correct. When the parties testified at trial, the document that they had in evidence was Exhibit "7", which showed a B optional form of retirement benefit level income option. The parties thought that they had made a mistake in that they had referred to D level income when it should have been B level income. Exhibit "1" at the hearing on April 16, 2010, shows that the parties had selected D level income.

(RE.67) Further, the parties knew that there was going to be a reduction after age 62 because it was so stated in the document. There was no mistake. The Court should have allowed Exhibit "1" into evidence at the hearing on April 16, 2010.

CONCLUSION

The evidence shows that the parties selected a retirement option for Stephen to receive his Martin Marietta retirement. The Property Settlement Agreement and the Amendment thereto drafted after the parties chose Stephen's retirement option shows that the parties intended to divide this retirement in half. There never was any discussion of Gloria receiving any of Stephen's Social Security or receiving 70% of his retirement after it was reduced when Stephen was eligible for Social Security. The Court incorrectly determined the intent of the parties when there was no ambiguity in the Property Settlement Agreement. Further, there was no mistake when the contract was drafted. Gloria drafted the contract and her lawyers looked over it. The contract itself says that the parties collectively drafted the documents and agreed to it. Had there been any contract regarding Stephen's Social Security, it would have been in the Property Settlement Agreement. It was not there and it was improper for the Court to modify the parties Property Settlement Agreement based upon the Court's imputed intent of the parties. The parties never had a meeting of the mind regarding Stephen's Social Security supplementing his Martin Marietta retirement so that there would not be a decrease in the amount received by Gloria when retirement decreased pursuant to the option that the parties selected. It was improper for the court to rewrite the contract when there was no meeting of the minds regarding Stephen's Social Security. It was improper for the Court to rewrite the contract when

the parties clearly stated in the Amended paragraph 10 of the Property Settlement Agreement that the retirement was based on the option level that they selected. For the Court to say that Gloria's amount of Stephen's Martin Marietta retirement would never reduce would be to rewrite that provision of the contract that they selected. They selected a retirement provision that would pay them the most money in the early years of their retirement and then would decrease when Stephen was first eligible for Social Security. For the Court to say that Gloria's portion never would be reduced would be rewrite the contract that Gloria and Steve made with Martin Marietta, would rewrite the contract that they made with one another in the Property Settlement Agreement and would give Gloria 70% of Stephen's Martin Marietta Retirement. The parties never intended for that to occur and that intent can not be drawn from the documents presented at Court and from the testimony at trial. The Court was clearly in error when it rewrote the contract for the parties. This Court should reverse the lower Court and should Order that a hearing be held to determine how much back payment is due from Gloria to Stephen.

RESPECTFULLY SUBMITTED this 8 day of January, 2011.

STEPHEN D. REFFALT, JR.

BY: 
M. CHANNING POWELL

CERTIFICATE OF SERVICE

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

Jimmy McGuire
PO Box 808
Waveland, MS 39576

Honorable Sandford R. Steckler
PO Box 659
Gulfport, MS 39502
Hand-Delivered

SO CERTIFIED this 8 day of January, 2011.

M. CHANNING POWELL

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