IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2010-CA-01253-SCT

JANICE C. COOPER		APPELLANT
v.		
CAROLYN C. GUIDO		APPELLEE

REPLY BRIEF OF APPELLANT

JANICE C. COOPER

ORAL ARGUMENT NOT REQUESTED

ON APPEAL FROM THE CHANCERY COURT OF ADAMS COUNTY, MISSISSIPPI

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I. INTRODUCTION

As stated in Appellant Janice Cooper's principal brief filed in this matter, the decision to be made by the Mississippi Supreme Court in this case will turn on whether the Chancellor erred in finding that the February 27, 1998 Antenuptial Agreement ("Agreement") in question was a valid and enforceable contract, as a whole and/or in regards to the no-contest provisions, and whether such agreement or the no-contest terms should be held to be procedurally unconscionable, and therefore unenforceable in this particular fact scenario. If the Chancellor is held to have abused his discretion and been clearly erroneous in determining this factual issue as to the validity of the no-contest provision and/or the agreement as a whole, upon remand the lower court may then proceed to a hearing on the merits of the Appellant Plaintiff's Will Contest, Renunciation of the Will, and Motion to Void Deed of Gift. These proceedings were short-circuited by the decision that the Antenuptial Agreement's no-contest provision precluded these claims, leading to the summary judgment ruling on behalf of the Appellee Carolyn Guido.

The Brief of Appellee Defendant, the daughter of the deceased, relies almost entirely on the document itself and the language contained therein, and attempts to deflect the complaint of procedural unconscionability by asserting that Mrs. Cooper's foreknowledge of a potential Agreement cures all of the procedural defects which were present surrounding the execution of and contained in the document. In spite of any foreknowledge that there could or would be an antenuptial agreement, the actual language and timing of the Agreement still would support the Appellant's contention that the trial judge erred in upholding the Agreement's provisions to extinguish future rights the spouse would have in proceedings to contest her husband's future testamentary documents. Therefore, Appellant Janice Cooper files this, her Reply brief in an

attempt to respond to the allegations contained if the aforementioned Brief of Appellee.

II. REPLY TO APPELLEE'S STATEMENT OF FACTS / SUMMARY OF ARGUMENT

Appellee Carolyn Guido brings out the fact that Appellant Janice Cooper provided information to her soon-to-be husband before he took her to his attorney's office to sign the Antenuptial Agreement. (Depo. of J. Cooper, p. 37, R. 169). Janice Cooper never denied that she did not give him certain financial information to be put in a potential agreement with Mr. Cooper. However, in support of her position that she had no input in its creation, she was clear that she had never seen this 11-page, single spaced document before she was taken to the attorney's office just hours before her wedding. (Depo. of J. Cooper, p. 47, lines 23-25, R. 173).

The document did not even have basic information as to her correct middle initial and first husband's name, which proves that she had no input in the document's creation. Appellee seems to confuse the listing of the tangible items of property to be put in such a document with the terms and conditions of the document itself. Mrs. Cooper had no input into the no-contest provision (or even the other provisions) of the Agreement, and due to the timing of the events in signing the document, did not have a meaningful opportunity to ascertain the meaning of the legal clauses contained therein. Appellee contends on page 2 of her Brief that Mrs. Cooper never protested the Agreement at any time when Mr. Cooper asked her for the information concerning her assets and did not protest it on the morning they travelled to the lawyer's office. These supposed lack of protestations before arriving at the attorney's office are completely understandable, as the Plaintiff is contending that the document and its execution were procedurally unconscionable, and that she had never seen the document or the terms relating to a no-contest provision before arriving at the office.

Additionally, throughout her brief Appellee repeats that Mrs. Cooper did not raise an

objection to the Antenuptial Agreement until after the death of her husband. This lack of objection is also to be expected, even for the years after the marriage, as Mrs. Cooper was never provided a copy of the Agreement with the no-contest provision in it. (Depo. of J. Cooper, p. 48, R. 174). Since Mrs. Cooper was rushed to sign the document in the hours before her wedding, without knowing the ramifications of or understanding the no-contest provision, she would have no reason to contest it until she became aware of its practical effect, which would not have occurred until after her husband's death. Additionally, the fact that she may or may not have disclosed this Antenuptial Agreement to an attorney when consulting about a potential divorce further supports her contention that she did not have a copy of it or was aware of the legal ramifications of a no-contest provision contained therein.

As for the representation by attorney Donald Ogden, Mrs. Cooper, in her initial brief, already pointed out that this so-called independent attorney was in fact procured by her husband and her husband's attorney, and presumably paid by them. She testified under oath that they were in a rushed situation, having no more than 15 minutes to go over everything, and the "provided" attorney did not go over the document with her and explain the sections and their legal ramifications. Additionally, Mrs. Cooper was never even allowed to be alone with the attorney. (Hearing Testimony of J. Cooper, R. Volume 4 of 4, pp. 34-36 and Depo. of J. Cooper, p. 49, R. 174).

Appellee contends on page 5 of her Brief that in the deposition, in response to the question, "Was there any duress, any threats made to you if you didn't sign this?", Mrs. Cooper stated "Oh, no. No." (Depo. of J. Cooper, p. 36, R. 168). However, this answer is taken out of the context of the question and answer immediately preceding. The full question and answer exchange is as follows:

Q: I know that you told me that you were in a hurry that afternoon. I'm going through your pleadings and you may not know the answers to these because some of them are legal issues. But you've alleged that you were under duress. Do you understand what I'm saying?

A: Well, I was rushed to Debbie Blackwell's office by Wesley, and as you can tell from the 15 minutes that wasn't – for a lay person that certainly wasn't enough time to thoroughly understand this whole document. And with the fact that we needed to be in St. Francisville that afternoon, I was terribly rushed.

Q: I understand you were rushed. Was there any duress, any threats made to you if you didn't sign this?

A: Oh, no. No.

(Depo of J. Cooper, Ex. A to Brief of Appellant, pp. 35-36, R. 168 [p. 35 of Depo. omitted from clerk's record]). Therefore, it is clear from the context of the questions and answers, Mrs. Cooper was responding that she had not received any "threats" if she didn't sign, and she had informed the attorney in the question before that she perceived as being under duress in having to sign the document.

Appellee repeats this contention in her Summary of Argument that Mrs. Cooper's sworn testimony supports the fact that she "executed the agreement at a time when she was under no duress." However, as seen above, Mrs. Cooper related in her sworn testimony exactly how much she was under duress on the morning that she signed the document. (Hearing Testimony of J. Cooper, R. Volume 4 of 4, pp. 34-35 & Depo. of Janice Copper, Ex. "A" to Brief of Appellant, pp. 48-49). All of the evidence in the record and presented through the Brief of Appellant shows that Mrs. Cooper was taken into the attorney's office just a few hours before her wedding in Louisiana, and presented with an 11-page, single-spaced legal document, and had to quickly sign the document in order to get ready for the ceremony at which she was expecting many friends and family from Texas. Certainly there would be duress and pressure to execute the document in order to prevent a last-minute cancellation of the wedding and the attendant

embarrassment. There is no indication in the record that Mr. Cooper or others ever informed Mrs. Cooper that any such document could be signed at a later time or signed with any change that she may wish to negotiate.

III. REPLY TO APPELLEE'S ARGUMENT

A. Standard of Review of Chancellor's Ruling

Appellee appeared to agree with Appellant on the abuse of discretion standard of review, although on page 12 of her brief, Appellee Carolyn Guido makes the argument in the first full paragraph that "the **construction of the contract** and antenuptial agreement can be a matter of law", citing among other cases, *Parkerson v. Smith*, 817 So.2d 529, 532 (Miss. 2002). (emphasis added). This cited case states that "'[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.' (citing *Mississippi State Highway Comm'n v. Patterson Enterprises, Ltd.*, 627 So.2d 261, 263 (Miss. 1993). '**The standard of review for questions of law is *de novo*.**' *Starcher v. Byrne,* 687 So.2d 737, 739 (Miss. 1997)". (emphasis added).

Although none of the cases cited for this proposition of a question of law is a case involving antenuptial agreements, Appellees seem to be presenting conflicting arguments as to whether the proper standard for review by the Supreme Court is a deferential abuse of discretion standard or a *de novo* review of the trial court's decision. Appellant Janice Cooper would disagree that this case *sub judice* is a contract construction case. The parties are not in dispute about the language contained in the Antenuptial Agreement and what the terms are or mean; the dispute between the parties is over the procedure and way the contract was presented and signed, and whether such actions which occurred caused there to be procedural unconscionability. However, if the Supreme Court did in fact conduct a *de novo* review, such a determination would

surely be in the Appellant's favor, as the Appellant has met the even higher abuse of discretion standard on appeal in seeking to overturn the ruling of the Chancellor.

B. Issue of the Antenuptial Agreement

Appellee contends by implication that it is somehow suspicious or untoward that Appellant Janice Cooper waited until "the lips of J. Wesley Cooper were sealed by death" before she elected to institute litigation by filing a will contest and a renunciation of the will. The obvious response to such an assertion is that it is axiomatic that only upon the death of the testator may such actions be filed in the first place. Miss. Code Ann. §91-5-25. As pointed out previously, Mrs. Cooper testified that she was not given a copy of the Antenuptial Agreement when signed or at any time afterward. Therefore, it is natural that she would not have sought to examine it or have it overturned, if, as she testified, she was not aware of the legal ramifications of the document, especially as to the no-contest clause.

C. Reply to Section on Chancellor's Ruling

The Appellee, Carolyn Guido, in her brief submitted the caselaw in which our Court has held that an antenuptial agreement is enforceable as is any other contract in Mississippi. *Mabus v. Mabus*, 890 So.2d 806, 818 (Miss. 2003); *Estate of Hensley v. Estate of Hensley*, 524 So.2d 325, 327 (Miss. 1988); et al. However, as pointed out in the Brief of Appellant, our Court has gone on to say that it has "imposed the **requirement of fairness** in the execution of such contracts". *Mabus*, 890 So.2d at 818-19 (citing *Est. of Hensley*, 524 So.2d at 328). (emphasis added). "Antenuptial settlements, **when fairly made**, are favored by the courts." *Est. of Hensley*, 524 So. 2d at 327. (emphasis added). The key question to be addressed by this Court is whether the Chancellor abused his discretion and was clearly wrong in his determination that the circumstances surrounding the execution of this Antenuptial Agreement was fair and not

procedurally unconscionable.

In addition to the *Mabus* case, Appellee also cited *Ware v. Ware*, 7 So.3d 271 (Miss. App. 2008) in her brief to uphold the terms of the Antenuptial Agreement and for the proposition that a party is under an obligation to read a contract before signing and that independent counsel is not a necessary prerequisite for a valid antenuptial agreement. In the Brief of the Appellant, pages 16-18, the Appellant Janice Cooper distinguished those two cases from the case *sub judice*, and pointed out the distinctions in those cases which were not present here, namely the procedurally unconscionable nature of having a bride, in the hours before her out-of-town wedding, sign an 11-page, single-spaced document taking away her spousal rights forever.

In citing the cases purportedly supporting its position, the Appellee presents the argument as if a person is always bound by all the language in any contract that he or she signs, regardless of the any terms contained therein, the underlying language used or the procedure done to effectuate the agreement. However, this Court has determined on many occasions that contracts entered into and the terms contained therein are unenforceable due to procedural unconscionability. As pointed out in her primary brief, "[t]here are five factors a court will consider when determining whether a contract is procedurally unconscionable: '1) lack of knowledge; 2) lack of voluntariness; 3) inconspicuous print; 4) complex legalistic language; 5) disparity in sophistication or bargaining power; [and] 6) lack of opportunity to study the contract and inquire about the contract terms.'" *Covington v. Griffin*, 19 So.3d 805, 817 (Miss. App. 2009) (citing *MS Credit Ctr., Inc. v. Horton,* 926 So.2d 167, 177(¶ 30) (Miss.2006)). It can be argued that all factors are present in this case. Appellant Janice Cooper, on pages 19-20 of her initial Brief, detailed how this situation fit all of the factors which would lead to a ruling that the Chancellor abused his discretion and was clearly in error in not finding that the no-contest

provision of the Antenuptial Agreement was procedurally unconscionable. It should be noted that the provision of the no-contest clause did not stand out from the document in any conspicuous way – no underlining, no larger font, nothing - even though such a clause would purportedly have the effect of denying Mrs. Cooper her legal rights to contest her husband's estate.

The Appellant cited *Stephens v. Equitable Life Assurance Society of the United States*, 850 So.2d 78 (Miss. 2003) for the proposition that a person is bound by a contract whether or not the person reads any or all of it. However, in *Vicksburg Partners, L.P. v. Stephens,* 911 So.2d 507, 517 (Miss. 2005), the Court stated that it is to "examine the circumstances surrounding the overall formation of the contract in which the subject clause is contained" in determining procedural unconscionability. "Procedural unconscionability looks beyond the substantive terms which specifically define a contract and focuses on the circumstances surrounding a contract's formation." *Id.* Therefore, the Appellee's claim that Mrs. Cooper is stuck with the terms of what she signed regardless of how the contract came to be signed is not a complete statement of the law in the State of Mississippi, else there would not be the multitude of cases supporting the proposition that certain terms in contracts may not be enforced if the contract formation was procedurally unconscionable.

The Appellee contended on page 17 of her brief that it would be dangerous for the Court to allow the rescission of the no-contest portion of the contract due to the fact that one of the contracting parties died, and to allow such would destroy the value of all contracts. However, the crucial issue in this case was the condition under which Mrs. Cooper executed the Agreement. An examination of the record reveals that the only evidence offered by either side as to what actually happened on the day of the Agreement's execution was offered through

testimony of Mrs. Cooper. The opposing side did not offer any evidence from anyone in attendance on that date, not the attorneys that were involved, staff members or anyone else with any knowledge of the events. The Appellee only offered the document itself, in spite of the fact that what was contained in the document is not in dispute, but rather the manner in which it was created and presented to the parties.

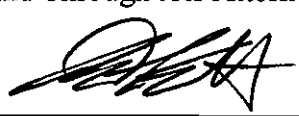
IV. CONCLUSION

The Appellant would repeat her contention that this Court has strived to ensure that those citizens who give up their right to a jury trial through arbitration provisions are afforded some measures of protection to make sure that the giving up of this precious right is done willingly, knowingly and with a full understanding of the legal ramifications therefrom. Therefore, the same procedural safeguards should be in place to secure those spouses who are potentially giving up no less important rights regarding the estate of their departed loved one.

For these reasons and those set out in the initial Brief of Appellant, Janice Cooper hereby contends that the trial court erred in granting summary judgment in this matter, and the proper remedy of this Court is to reverse the ruling of the Chancellor and remand for proceedings whereby Mrs. Cooper may proceed on her pleadings to challenge the will or renounce it entirely and take her statutory share, to void the Deed of Gift at issue, and to proceed on other issues which may have been affected by the granting of the summary judgment.

RESPECTFULLY SUBMITTED this, the 18th day of January, 2011.

JANICE C. COOPER, Appellant
By and Through Her Attorney,



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CERTIFICATE OF SERVICE

I, Rick D. Patt, certify that I have this date served by first class mail, postage prepaid, a true and correct copy of the above and foregoing **Reply Brief of Appellant** on the following:

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This the 18th day of January, 2011.

Rick D. Patt