

**IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2010-CA-01939**

MONA CATES

APPELLANT/CROSS APPELLEE

v.

ELIZABETH SWAIN


APPELLEE/CROSS APPELLANT

**ON APPEAL FROM THE CHANCERY COURT
OF TATE COUNTY, MISSISSIPPI,
CHANCELLOR PERCY L. LYNCHARD, PRESIDING**

BRIEF OF APPELLANT/CROSS APPELLEE

Oral Argument Requested

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PERSONS

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

1. Jonathan S. Masters, Esq., Holcomb Dunbar, P.A., counsel for Mona Cates, Appellant/Cross Appellee.
2. Robert M. Stephenson, Esq., Locke Lord Bissell & Liddell LLP, counsel for Mona Cates, Appellant/Cross Appellee.
3. Mona Cates, Appellant/Cross Appellee.
4. John T. Lamar, Jr., Esq., counsel for Elizabeth Swain, Appellee/Cross Appellant.
5. David M. Slocum, Jr., Esq., counsel for Elizabeth Swain, Appellee/Cross Appellant.
6. Honorable Percy L. Lynchard, Jr., Chancellor, Third Chancery Court District.



Jonathan S. Masters

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(b) of the Mississippi Rules of Appellate Procedure, Mona Cates, Appellant/Cross Appellee herein, respectfully requests that oral argument be granted. The issues presented in this appeal would be significantly aided by oral argument inasmuch as this appeal involves crucial issues of (1) whether Mississippi public policy against homosexual relationships, bars a woman who participated in a five year lesbian relationship from receiving, upon dissolution of the relationship, her financial contributions to promote, facilitate and maintain the lesbian relationship, (2) whether lower courts can avoid the proscriptions of Mississippi public policy against homosexual relationships by recharacterizing the relief sought by and granted to a woman from the dissolution of a five year lesbian relationship in which she participated, and (3) the appropriate standard to be applied throughout Mississippi's lower Courts when addressing issues from the dissolution of a homosexual relationship. Due to the broad implications this opinion may have, oral argument should be granted in the case *sub judice* in an effort to promote a just and fair adjudication of the issues presented and to allow dialog with regard to the effect this case will have across Mississippi if this Court allows the granting of relief from the dissolution of a five year lesbian relationship under the guise of the unjust enrichment doctrine.

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STATEMENT OF ISSUES

1. Whether Mississippi Public Policy Against Homosexual Relationships, As Set Forth In Mississippi Constitutional, Statutory and Case Law, Bars A Woman Who Participated In A Five Year Lesbian Relationship From Receiving, Upon The Dissolution Of The Lesbian Relationship, Her Financial Contributions To Promote, Facilitate And Maintain The Lesbian Relationship And One-Half Interest In Personal Property And Real Estate Purchased During the Lesbian Relationship By The Other Participating Woman.

2. Whether Mississippi Courts Can Utilize The Doctrine of "Unjust Enrichment" To Disguise A Property Settlement For A Participant In A Homosexual Relationship Upon The Dissolution Of The Relationship So As To Avoid The Proscription Of Mississippi Public Policy Against Homosexual Relationships And The Promotion, Facilitation And Maintenance Of Those Relationships.

3. Whether The Doctrine Of Unjust Enrichment Requires The Chancery Court To Make An Accounting Of All Financial Contributions Made By Each Party To A Homosexual Relationship For The Promotion, Facilitation And Maintenance Of The Relationship Before Determining Whether A Party To The Homosexual Relationship Has Been Unjustly Enriched By The Other Party Upon Dissolution Of The Homosexual Relationship.

4. Whether The Chancery Court Erroneously Awarded Plaintiff Swain \$44,995 By Finding That Plaintiff Swain, Upon Dissolution Of Her Homosexual Relationship With Defendant Cates, Unjustly Enriched Defendant Cates During Their Five Year Lesbian Relationship By Making Contributions To Promote, Facilitate And Maintain The Relationship In Excess Of The Contributions Made By Defendant Cates.

STATEMENT OF THE CASE¹

Elizabeth Swain (“Swain”) filed a civil Complaint against Mona Cates (“Cates”) in the Chancery Court of Tate County, Mississippi on June 13, 2006. R. 011-015; R. Exc. VI. The Complaint alleged that Swain co-habitated with Cates “at all times prior to” September, 2005; that Swain and Cates were partners and that “at all times [Swain and Cates] enjoyed a confidential and fiduciary relationship between them.” R. 012. According to the Complaint Swain and Cates entered into “several joint ventures” during their co-habitation involving “joint ownership of a 2002 Volkswagen Cabrio, two Chihuahua dogs, and an E-Trade Account.” R. 012. In addition, Swain and Cates purportedly “entered into an agreement” during their co-habitation where Swain would invest proceeds from the sale of real property partially owned by her in Florida towards purchases of real property in Washington and Mississippi “in order to provide both Swain and Cates with a residence.” Finally the Complaint alleged that Swain “contributed substantial monies, materials and labor into the real properties in Washington and Mississippi. *Id.*

As a result of the alleged agreements and monies spent, the Complaint sought imposition of a constructive and/or resulting trust against Cates, compensation for Swain’s alleged interest in the alleged personal property and divestment of Cates’ interest in the alleged Mississippi real estate in accordance with Swain’s alleged interest. Alternatively, the Complaint sought the imposition of a lien upon the Mississippi property alleged therein “in the amount of monies, materials and labor invested by” Swain. R. 013-014.

¹ “R” followed by a referenced number refers to Record Citations. “Tr.” followed by a referenced number refers to pages in the trial transcript. “R. Exc.” followed by a number refers to items in the Record Excerpts accompanying this Brief.

COURSE OF PROCEEDINGS BELOW

On August 27, 2007 Cates moved to dismiss Swain's Complaint. R. 022-059. Cates, in part, based her Motion to Dismiss on the ground that the cause of action alleged in the Complaint contravened Article 14, Section 263A of the Mississippi Constitution which bars the enforcement of asserted rights arising from a homosexual relationship, Section 93-1-1(2) of the Mississippi statutory code which, like the Mississippi Constitution, forbids the enforcement of asserted rights and claims arising from a homosexual relationship and this Court's opinion in *Davis v. Davis*, 643 So.2d 931 (Miss. 1994), barring equitable relief based upon an alleged oral agreement arising from a common law marriage between a man and a woman. *Id.*

Swain opposed Cates' Motion to Dismiss. R. 060-073. In doing so, she argued that "the establishment of a homosexual marriage is not an issue . . . nor is it a prerequisite to [her] claims." R. 062. Rather, according to Swain, the only issues raised by her Complaint involved "a constructive and/or resulting trust and unjust enrichment." *Id.* Significantly, Swain never denied in her opposition that the co-habitation alleged in her Complaint involved a homosexual relationship with Cates or that her alleged "confidential and fiduciary relationship" with Cates arose and entirely was based on her homosexual relationship with Cates. R. 060-073.

On October 3, 2007, the Chancery Court denied Cates' Motion to Dismiss. It stated in material part:

Counsel for the defendant is correct that the Mississippi Constitution prohibits homosexual marriage, and that the appropriate case law, particularly *Davis v. Davis*, prohibits unmarried persons from seeking equitable relief by way of palimony or otherwise. However, although Mississippi law does prohibit homosexual relationships, it does not prohibit homosexuals from entering into joint ventures.

* * *

. . . [E]ven though homosexual marriages and homosexual activity are prohibited by the Mississippi Constitution, as well as the laws,

statutes of the State of Mississippi, there is nothing that would prohibit homosexuals from entering into joint ventures such as this. Certainly, there can be no equitable relief based on that relationship as there would be in a lawful marriage between husband and wife in the state. However, this Court has jurisdiction . . . to determine whether or not a constructive trust or any equitable relief by joint venture or otherwise with respect to the real or personal property in question would be allowed.

R. 088-089; R. Exc. III and IV. In other words, in denying Cates' Motion to Dismiss, the Chancery Court held that Mississippi law barred it from granting equitable relief based on conduct arising from a homosexual relationship between two homosexuals, including any agreements purportedly made during or as part of the homosexual relationship. On the other hand, if a homosexual sought equitable relief based on an agreement with another homosexual, totally separate and apart from any homosexual relationship between the two, the Court had authority to provide equitable relief.

After the Chancery Court's denial of Cates' Motion to Dismiss, Cates and Swain completed pretrial discovery, including providing deposition testimony. Cates and Swain proceeded to trial on September 30, 2010.

STATEMENT OF FACTS²

I. THE RELATIONSHIP

For the first ten months of 2000 Swain lived by herself in Waukegan, Illinois. R. 0416-0417; Tr. 85. Swain served in the United States Navy stationed at the Great Lakes Naval Training Center. R. 0416; R. 0437; Tr. 85. While living in Waukegan, Illinois, Swain rented a single family residence. *Id.*

In early 2000, Swain posted a profile of herself on the Internet soliciting a same sex partner. R. 020; R. 032-033; Tr. 84. In that profile, Swain described herself as single, identified

² The facts recited in the Statement of Facts come from the trial testimony and the exhibits admitted into evidence during the trial, including Swain's deposition testimony which was admitted unconditionally without objection as Swain's admissions. Tr. 83.

herself as a lesbian, stated she was seeking another female for a long term relationship and provided she was “[l]ooking for the right one!!” and sought “that special someone – I know you’re out there somewhere.” R. 032-33; R. 0420-0421; Tr. 84-85. Cates responded to Swain’s Internet solicitation by, in part, sending Swain her profile. R. 0421-0424; Tr. 17. At the time Cates responded to Swain, Cates worked as an airline Captain. Tr. 127.

On April 8, 2000, Swain e-mailed Cates stating that she “really enjoyed [Cates’] profile!” R. 0423. Three days after the April 8 e-mail, Swain e-mailed Cates again stating, in part, “Sleep tight and just imagine me there. You’ve got your arms wrapped around me and we both drift off to a peaceful sleep.” R. 0424. At the time of the April 11 e-mail, Swain had not met Cates. Tr. 18. They met for the first time on “Easter of 2000.” Easter in 2000 fell on April 23. Tr. 18.

After meeting Cates, Swain peppered Cates with e-mails professing her love for Cates. Thus, on May 7, 2000, Swain e-mailed Cates stating, in part, “I’m in love for the first time in my life . . . I love you more than anything else . . . I can’t imagine living without you . . . You’re my life.” R. 0425-0426. Then, after two additional amorous e-mails, Swain e-mailed Cates on May 14 stating “I’m enamored with you; sweet on you; keen on you; set on you; stuck on you; sold on you; taken with you; smitten with you; hooked on you; charmed by you; enchanted by you; fascinated with you; totally and utterly in love with you.!” R. 0428-0429. By May of 2000, Swain and Cates established a sexual relationship. R. 0430; Tr. 18.

To Swain, however, her newly formed lesbian relationship with Cates constituted much more than just a sexual relationship. On May 22, 2000, Swain e-mailed Cates telling her “You are my world . . . And more importantly you are my future and it never looked brighter, darling. I can honestly tell you that I have never wanted anything more than I want you as my wife.” R. 0431. (Emphasis added.) Then, shortly after this e-mail, Swain e-mailed Cates on the same day addressing the e-mail “My Wife” and professing “To the woman who has stolen my heart, I have

a dream that we will never part. You entered my world and swept me off my feet, now I walk with you to life's perfect beat. Hand in hand we'll journey through life, when you say I do and become my wife." R. 0432. (Emphasis added.) On June 10, 2000, Swain again characterized her desires for Cates, stating in another e-mail "I want you to know how proud I am to have you as my lover, my significant other and soon my wife." R. 0433. In short, Swain considered her relationship with Cates a matrimonial relationship.

Beyond matrimony, however, Swain wanted her relationship with Cates to last forever and she believed that with Cates, she had established "a long-term love relationship" with "the love of [her] life." R. 0434-0435. Thus, Swain e-mailed Cates on June 24, 2000 stating, in material part, "I have fallen so deeply in love with you that nothing else matters. You have become my life. When I sit and think about the future and you're always a part of my thoughts. I know that we will be next to each other for eternity." R. 0435. Later in a card Swain again told Cates that she loved her, believing that they had established a "bond that will never be broken." R. 0560. In Swain's mind, her co-habitation with Cates formed a confidential and fiduciary relationship between them that Swain wanted and expected to last forever. R. 0557-0558. Contrary to her expectations, however, Swain admitted that her "lesbian relationship" with Cates ended in 2006. R. 0544; R. 0560-0562.³

II. THE FLORIDA RESIDENCE

In late 2000 the Navy transferred Swain to the Naval Station in Pensacola Florida. Tr. 86. Swain spoke to Cates about the transfer as early as May 2000 just after meeting her. R. 036-037; Tr. 18; 86. In her discussions with Cates, Swain spoke of purchasing a single family residence, something she never had done in the past. Tr. 85-86. Pursuant to their discussions, both Swain and Cates looked at houses in the Pensacola, Florida area. Tr. 18.

³ Swain's e-mails appear in R. Exc. V.

For a prolonged period of time after first meeting Cates, Swain told Cates she was single and a committed lesbian, soliciting female partners on the Internet. R. 0443-0444. During the time that they were looking for a Pensacola residence, however, Swain disclosed to Cates that she was “married” to a George Dean. Tr. 18; Tr. 129-130. According to Swain, Dean lived in Harpers Valley, West Virginia “with a friend,” was not in the military, was unemployed and last lived with Swain in 1995. R. 0435-0436; R. 0440; R. 0442; Tr. 87-88. Her marriage to Dean qualified Swain for more financial aid from the military to support her living off base. Tr. 88-89. In turn, the marriage qualified Dean to receive military health benefits as a service member’s spouse. Tr. 88. Thus, from the Navy’s perspective it believed Swain was married to a man. R. 0498; Tr. 88-89.

Swain purchased a single family residence in Pensacola, Florida in December, 2000. R. 0439; Tr. 86. She intended the residence “as a place for both [her] and . . . Cates to reside.” R. 0437. Cates, however, would be a part-time resident. Cates’ job as an airline Captain kept her away from Pensacola for long periods of time. R. 0460. Only Swain lived in the Pensacola residence seven days a week. R. 0461.

In 2001, the first year in which she resided in the Pensacola residence, Swain’s annual income amounted to \$32,400. R. 0480. That income included \$4,000 she received in financial aid from the military to live off base based, in part, on her marriage to Dean. R. 0480-0481; Tr. 88.

Swain purchased the Pensacola residence for \$91,760. Tr. 86-87. Of that amount, she financed \$89,760 through obtaining a mortgage from the military through the Veteran’s Administration. Tr. 20; Tr. 86. Swain’s and Dean’s name appeared on the military mortgage. R. 0440; Tr. 87. Cates’ name did not and could not appear on the mortgage because of Swain’s “marital status.” The military believed that Swain was married to Dean, not involved in a

homosexual relationship with another woman. R. 0498; Tr. 20. Cates, however, financed the remainder of the purchase price for the Pensacola residence by issuing a \$2,000 check to Caldwell Baker in payment of earnest money. Tr. 19; Tr. 86-87. Swain provided no monies of her own to purchase the Pensacola residence. R. 0448; Tr. 89. She could not afford to make any payments. Tr. 180.

The deed for the Pensacola residence listed Swain as the sole owner. R. 0450; Tr. 22; Tr. 89. Though Dean's name appeared on the military mortgage, he made no payments on the mortgage. R. 0446. He never lived in the Pensacola residence. *Id.* Indeed, Dean never signed the mortgage. Rather, Swain signed the mortgage on his behalf. R. 0441. Swain considered herself the sole owner of the Pensacola residence. R. 0450; Tr. 89. Despite the fact that Cates actually provided cash money for the purchase of the Pensacola residence, Swain did not believe Cates had an ownership interest in the residence. R. 0449; Tr. 89. Similarly, Swain did not believe Dean had an ownership interest in the residence even though his name was on the mortgage which made him financially obligated for the payment of the mortgage. R. 0450; Tr. 89. When the residence was sold, Dean received no money from the sale. R. 0454.⁴

At the time Swain purchased the Pensacola residence, she had a personal bank account at Navy Federal Credit. Tr. 89-90. Similarly, Cates had a personal bank account at Union Planters Bank in Memphis, Tennessee. Tr. 90. As part of their discussions about Swain purchasing the Pensacola residence, however, Cates agreed to open an account at the People's First Community Bank in Pensacola, Florida. Tr. 180. In that way, Cates thought that she could track the money

⁴ Swain claimed that Dean's name had to appear on the military mortgage from the Veteran's Administration because of Florida law. R. 0442; Tr. 87. Several uncontested facts undercut her contention. First, only Swain's name appears on the deed to the Pensacola residence. R. 0450; Tr. 22; Tr. 89. Had Florida law required Dean's name on the mortgage most certainly it would have required it on the deed. Moreover, Swain admitted her marital status to Dean prevented Cates from being on the mortgage. Tr. 20. Since the military believed Swain was married to Dean, it is far more probable that Dean's name had to appear on the military mortgage to continue the façade of Swain being married to Dean in order to get the mortgage. Clearly, Dean brought no financial backing for the mortgage. He was unemployed. R. 0440; Tr. 88.

she was providing Swain. Tr. 181. Both Swain's and Cates' name appeared on the account. Tr. 90. As a result, Swain was authorized to withdraw from the Florida account. Tr. 90. Only Cates contributed money to the account. Tr. 93.

Over the three year period Swain and Cates lived in the Pensacola residence, Cates deposited \$32,950 into the Florida account. Tr. 181. According to Swain, both she and Cates agreed that the Florida account would be used to pay living expenses associated with the Pensacola residence. R. 0547; Tr. 91-92. Not surprisingly, checks written on the Florida account reflect payments for such things as utilities, plumbers, pest control, taxes, telephone, furniture and television. R. 0458; R. 0460; Tr. 96-97; Tr. 182-83. In addition, both Swain and Cates made major capital improvements to the Pensacola residence, including remodeling two bathrooms and the kitchen, painting the entire interior of the house, renovating the backyard with new plantings and a sprinkler system and improving the electrical system in the residence. Tr. 26-27. The Florida account helped pay for these improvements. Tr. 26. The Florida account also shows checks issued to Swain's family members. Tr. 96. When the Florida account was closed upon the sale of the Pensacola residence, Cates, with Swain's agreement, received the \$3,580.71, that remained in the account and that originally came from Cates. Tr. 97; Tr. 188.

In addition to funding the payment of living expenses and capital improvements from the Florida account, Cates paid for other Florida expenses through credit card purchases. Tr. 183-184. Those expenses included the purchase of carpet, paint and materials for garden renovation. Tr. 184. These expenditures totaled approximately \$20,000. *Id.*

Swain paid certain expenses attributable to the Pensacola residence from her personal Navy Federal Credit account. Thus, by way of example, she paid in 2001 \$10,246 in local tax payments, mortgage interest payments, real estate tax payments and federal tax payments. R. 0474-0476. She also paid in 2001 \$8,085.27 in mortgage principal payments and \$3,887.16 in

car note payments for a RAV4 she leased. R. 0477-0478; R. 0486. The total of the expense payments Swain paid left her with approximately \$10,000 from her annual income of \$32,400 to pay all other expenses, including but not limited to, food, clothing and gasoline. R. 0477-0478; R. 0480; R. 0486.

The month beginning balances in Swain's personal Navy Federal Credit account during the time she resided in the Pensacola residence reflect that monthly Swain ran low on money. The account read \$1,383.33 in October, 2001; \$671.90 in November, 2001; \$738.54 in December, 2001; \$528.21 in January, 2002; \$831.37 in February, 2002; \$682.67 in March, 2002; \$345.73 in April, 2002 and \$533.59 in May, 2002. Tr. 107-108. Swain attributed the low balances to her principal mortgage payments. Tr. 107. In any event, Swain clearly needed the money Cates provided her in the Florida account and in credit card purchases to support the Pensacola residence.

In addition to helping finance general living expenses at the Pensacola residence, Cates expended other monies for the benefit of Swain. Cates purchased a Volkswagen Cabriot in November 2001. R 0491. Cates paid \$24,666.34 for the vehicle. R. 0491-0492. Swain made no payments on it. *Id.* However, both Cates and Swain appeared on the title for the Volkswagen. R. 0492. Swain drove the car to the Naval Base at which she worked in Pensacola. R. 0491. When Cates and Swain left Florida, Cates sent the Volkswagen to Mississippi. R. 0525.

Cates also financed the purchase of an E320 Mercedes for Swain in 2002. Tr. 41; Tr. 185. The total purchase price of the E320 Mercedes including finance charges amounted to \$38,306.08. R. 0488. The financing documents and the title of the car reflected the names of both Swain and Cates. R. 0488; Tr. 41. Both names appeared on the documents because Swain alone could not afford the Mercedes. Tr. 186. Part of the purchase agreement included a

provision cancelling Swain's car lease on her RAV4 for which she still owed \$10,400. R. 0486; Tr. 185. Thus, the Mercedes purchase relieved Swain of a \$10,400 debt and the obligation to make \$323.93 monthly payments in satisfaction of the \$10,400 debt. R. 0478; Tr. 185.

Cates paid \$11,000 on the purchase agreement for the E320 Mercedes. R. 0489; R. 0525. Swain made no payments on the car. Tr. 41-42. Eventually, Swain traded the E320 Mercedes on the purchase of a \$40,000 Lexus titled in her name alone. R. 0490-0491; Tr. 187. The trade-in value of the E320 Mercedes went to lower the purchase price of the Lexus. R. 0491. Swain could not remember the amount of the trade-in value. *Id.*

Finally, Cates paid the automobile insurance bills for Swain and herself from December 2001 through December 2003. Tr. 0493-0494. Those payments equaled \$5,906.73. R. 0494.

Cates made all the referenced payments because of her homosexual relationship with Swain. Tr. 133-134; Tr. 203. Documented payments total \$55,712.65 (deposits to the Florida bank account of \$32,940, minus the return of the amount remaining in the account when the Pensacola residence was sold, \$3,580.71; earnest money payment on the purchase of the Pensacola residence, \$2,000; the cancellation of Swain's debt on her RAV4 vehicle, \$10,400; payments on the purchase of the E320 Mercedes, \$11,000; and one-half of the car insurance payments, \$2,953.36). This total omits whatever trade-in value Swain received on the E320 Mercedes that cost, without finance charges, \$30,450.04, R. 0488, and the approximate \$20,000 in uncontested credit card purchases Cates made on behalf of Swain while living at the Pensacola residence.

Swain sold the Pensacola residence in September, 2003 for \$109,000. Tr. 28; Tr. 104. Though the sales price exceeded Swain's \$91,760 purchase price for the Pensacola residence, she lost money on the sale of the residence. The costs attributable to the residence included, in part, real estate tax payments, local and state tax payments, mortgage interest payments,

mortgage principal payments and closing costs. Tr. 104-106. Those costs equaled \$115,041.98. Tr. 26-27. At the closing on the sale of the Pensacola residence, Swain received \$32,855.86. Tr. 104. Upon receipt of the money, Swain deposited it into her personal Navy Federal Credit account. Tr. 29; Tr. 89-90.

Prior to selling the Pensacola residence, Swain and Cates discussed where both of them would like next to reside with each other. Tr. 134. Swain could be based in the military either in San Diego, California or Seattle, Washington. *Id.* Cates, as an airline Captain, could fly to both locations. *Id.* They finally agreed on Seattle, Washington as the place of their next residence. *Id.* Thereafter, Swain and Cates looked at homes in the Seattle area. Tr. 135. Eventually, they moved to a residence in Washington. *Id.*

III. WASHINGTON RESIDENCE

The purchase price for the Washington residence equaled \$194,493.58, over double the purchase price of the Florida residence. Tr. 86-87; Tr. 190. Cates alone purchased the Washington residence. Her name alone appears on the Settlement Statement for the purchase of the residence. R. 0507. The residence is deeded in Cates' name alone. *Id.*; Tr. 191. Cates financed the purchase of the residence, in part, through a \$155,900 mortgage solely in her name. Tr. 190. In addition, Cates paid a \$2,500 earnest money payment and, unlike with the Pensacola residence where Swain had no equity in the house at the time of purchase, a \$38,593 cash equity payment to satisfy the full purchase price. *Id.*

Cates made all payments relating to the mortgage on the Washington residence, including real estate tax payments, mortgage interest payments and mortgage principal payments. Tr. 191. The total cost of the Washington residence until the time Cates sold it in 2005 equaled \$233,820.55. Tr. 193-194. Cates alone paid that cost. *Id.* Swain paid nothing. *Id.*

Prior to the purchase of the Washington residence Swain provided Cates a cashier's check drawn on Swain's Navy Federal Credit account for \$34,000. Tr. 135. Cates believed that Swain's check partially reimbursed her for all the monies Cates advanced to Swain in Florida. *Id.* In fact, if Swain had not provided her the \$34,000 Cates never would have moved to Washington. She really wanted to move to Mississippi where her family resided. Tr. 134. Rather than open a separate bank account as she did in Florida, Cates deposited the \$34,000 into her personal account at Union Planters Bank. Tr. 90; Tr. 136. Since she owned the Washington residence, she saw no need to have a joint account with Swain to track Swain's expenditures. Cates told Swain that she, Swain, had to "pay her own way for her items." Tr. 192.

When Cates made her \$38,893 equity payment on the Washington residence, she did not need the \$34,000 from Swain to make the payment. Tr. 190-191. As Cates stated under oath to the mortgage company when she applied for \$155,900 mortgage on the Washington residence, she had significantly more cash in her Union Planters bank account than \$38,000 prior to receiving the \$34,000 from Swain. *Id.* There is no document reflecting that the \$34,000 was anything other than what Cates believed – money to cover expenses. Tr. 113. Just as in Florida where Cates had no ownership interest in the Florida residence but resided with Swain providing monies for the payment of various expenses through the Florida bank account, Swain did the same thing in Washington. Tr. 113. She provided Cates \$34,000 that could be used for the payment of living expenses. In addition, Swain documented another \$8,302 in actual cash outlays while living at the Washington residence. Tr. 35-36. In return, Swain, unlike Cates who lived in Washington periodically because of her flying, lived rent free in Washington for two years, seven days a week, with no obligation to pay the mortgage company, the primary lien holder of the Washington residence, if Cates defaulted on the loan. R. 0530-0531; Tr. 190. Indeed, Swain's bank statements for the period she lived at the Washington residence evidence

that her expenses were significantly less than when she resided in Florida. Tr. 113. She candidly credited her savings to having no obligation to make mortgage payments. R. 0532-0533; Tr. 113. By September 2005, her beginning balance in her personal Navy Federal Credit account equaled in excess of \$20,000, a much greater sum than the \$345.73 Swain had in her Navy Federal Credit account in April 2002 when she resided in Florida. R. 0534; Tr. 107-108.

That Swain was married to Dean did not prevent her name from appearing on the deed for the Washington residence if she, in fact, were an investor in the residence. Tr. 115. Spouses can have investments independent of the other spouse. *Id.* Being on the deed, however, would have required Swain to be on the mortgage, placing her assets possibly at risk in the event of a mortgage default. Moreover, Swain always could divorce Dean. They had not lived together since 1995. Tr. 28. Divorce from Dean was the last thing Swain wanted while still in the military. As Swain candidly admitted “Him and I had talked about it right after I got out.” R. 0508. In fact, Swain and Dean divorced in either 2007 or 2008 after Swain had left the military. R. 0542. While still in the military, however, Dean meant money to Swain in the form of military benefits. Tr. 88-89. Divorce would have ended those benefits.

IV. MISSISSIPPI RESIDENCE

In 2005, Swain became eligible for retirement from the Navy. R. 0542. At that time, Swain and Cates discussed the future of their lesbian relationship. R. 0544; R. 0560; Tr. 201. Swain asked Cates to stay with her in Washington while Swain remained in the Navy in order to qualify for greater pension benefits. Tr. 201. Cates rejected Swain’s request, stating she wanted to move back to Mississippi. Tr. 134; Tr. 201. Cates encouraged Swain to remain in the military and “go wherever her next place was.” Swain “flat out refused” saying she would not allow Cates to leave her. Tr. 201. Swain wanted her lesbian relationship with Cates to last forever. R.

0544; R. 0557-0558; R. 0560. Thus, Swain agreed to retire from the Navy to join Cates in Mississippi. R. 0542.

Cates sold the Washington residence for \$300,000 in September 2005. R. 070. The sale documents reflect that Cates alone owned the residence. R. 0513. Swain's name appears nowhere on the sale documents. R. 0514. Swain's federal tax returns reflect that Swain did not claim joint ownership of the Washington residence. R. 0511-0513.

Cates bought a residence in Mississippi for \$350,000 in September 2005. R. 0346; Tr. 194. The Settlement Statement for the purchase shows only Cates as the buyer. R. 0346; R. 0535. The warranty deed underlying the purchase shows Cates as the sole owner of the Mississippi residence. Tr. 114.

Cates financed the purchase of the Mississippi residence, in part, through a \$190,000 mortgage. Tr. 194. The mortgage application reflects Cates as the sole borrower. R. 0536; Tr. 114; Tr. 196. The Promissory Note for the mortgage shows Cates as the sole owner of the Mississippi residence. R. 0537; Tr. 114. Swain has no document reflecting that she was either a joint owner in the Mississippi residence or a joint venturer with Cates in the purchase of the residence. R. 0540.

In addition to the mortgage, Cates paid \$153,479.60 in cash on the purchase of the Mississippi residence. R. 0346; Tr. 195. That amount, tendered by Cates at the closing, paid for the closing costs. R. 0346; Tr. 173. At the time Cates tendered the \$153,479.60 at the closing, she had \$211,448 in her personal Union Planters bank account. Tr. 195. Cates' grandmother also advanced Cates \$10,000 by check to pay the earnest money on the purchase. Tr. 167. The earnest money check bore the notation "earnest money for Mona Cates." *Id.* Swain attended the closing on the Mississippi residence. Tr. 171-172. She neither signed anything at the closing nor objected to anything. Tr. 172. According to the real estate agent that brokered Cates'

purchase of the Mississippi residence, Cates bought the residence. Tr. 173. Swain had no interest in it. *Id.*

When Swain retired from the Navy in September 2005, her only income constituted her Navy retirement benefits. R. 0542-0543. Those benefits amounted to \$1,505.97 monthly or \$18,402.91 annually. R. 0542-0543; Tr. 64. Swain never worked while she resided in Mississippi. Tr. 0560.

Not surprisingly, Cates paid all mortgage payments on the Mississippi residence. R. 0539; Tr. 196-197. By March 2006, Cates had paid \$168,899.60 toward the purchase of the Mississippi residence. Tr. 198. She also incurred and paid \$13,021.49 in expenses attributable to the Mississippi residence up to the time she and Swain terminated their lesbian relationship in March 2006. R. 0543-0544; R. 0560-0561. Thus, Cates paid \$181,921.09 in costs attributable to the Mississippi residence by March 2006 when Swain left Mississippi. Tr. 198.

Swain resided at the Mississippi residence rent free from September 2005 until March 2006, when she and Cates terminated their lesbian relationship. R. 0541-0543. By Swain's own admission, from the time she arrived in Mississippi, she "was drinking somewhat heavily." Tr. 67. The drinking led Swain to argue with community residents, making her unpopular with the neighbors. Tr. 199. Swain also refused to get a job. *Id.* These factors resulted in the termination of Swain's and Cates' lesbian relationship. R. 0543-0544; R. 0560-0562.

With her lesbian relationship with Cates over, Swain faced living on approximately \$18,000 a year without a job. R. 0544; R. 0560-0561. When she left Mississippi in April 2006, Swain had received only \$4,849.18 in retirement benefits. R. 0543-0544. She accordingly stayed with her parents needing "to restart [her] life" and "to get [herself] together." R. 0544. After Swain left Mississippi, however, she returned to her old ways, posting an updated profile on the Internet soliciting women to enter into a lesbian relationship with her. R. 0570. Swain

admittedly lied again in the profile, stating she never has been married. *Id.* According to Swain, the profile constituted an “advertisement” in which she represents “myself as a lesbian.” *Id.*

At the end of her relationship with Cates, Swain documented \$10,125 in expenses she paid that were attributable to the Mississippi residence. R. 0541-0543; Tr. 51-56.⁵ Those costs pale by comparison to the \$181,921.09 in costs Cates paid by April 2006 when Swain left.

V. E-TRADE ACCOUNT

Before meeting Swain, Cates had an E-Trade Stock Trading Account. After the aircraft hijacking of September 11, 2001, Cates, an airline pilot, placed Swain’s name on the E-Trade account with a right of survivorship in case Cates fell victim to a terrorist act. Tr. 140. Swain never made a contribution to the account. When their lesbian relationship ended in March 2006, Swain, unbeknownst to Cates, liquidated the stock account with directions to send the proceeds to her Navy Federal Credit account. Tr. 141-42. Cates discovered the liquidation before the funds were transferred to Swain’s Navy Federal Credit account. *Id.* Upon discovery, Cates cancelled the transfer order and redirected the proceeds of the stock liquidation to her Union Planters account. *Id.* At the same time, Cates closed the E-Trade account. R. 0553. Swain agrees that Cates had absolute authority to close the account, directing the proceeds of the account to her personal account. R. 0553-0554. Swain has no written agreement giving her an interest in the proceeds of the E-Trade account. R. 0553. According to Swain, she tried to seize the E-Trade account proceeds “because I ended up with absolutely nothing financially from what

⁵ Swain claims that she intended a \$5,000 check written by her and deposited into Cates personal Union Planters bank account to pay for closing costs on the Mississippi residence. In fact, Swain said that the \$5,000 check “was added to the closing costs.” Tr. 51. The facts do not support the claim.

Cates paid the closing costs with a \$153,479.60 payment at closing. R. 0346; Tr. 172; Tr. 195. Swain, who was at the closing did not offer the \$5,000 check at the closing to pay for closing costs. Tr. 171-172; Tr. 199. The notation “closing costs” on the check was not on the check after Cates endorsed it upon Swain’s request. Tr. 199-200. Swain deposited the check. Nevertheless, Cates received \$5,000 from the negotiation of the check regardless of whether it paid closing costs. Thus, the \$5,000 is included in Swain’s documented costs for the Mississippi residence.

I had invested, and so honestly, I was trying to get something back.” Tr. 60. Stated another way, Swain tried to obtain monies to which she never contributed because her five plus year lesbian relationship with Cates, a relationship that she wanted to last forever, had ended and as a result she knew that the life she had lived during that relationship was over. R. 0543-0544; R. 0557-0558; R. 0560-0562.

VI. THE CHANCERY COURT DECISION

Upon the close of evidence, the Chancery Court requested that the parties provide it the fifty-one (51) exhibits admitted in evidence, including the one hundred sixty-four (164) page Swain deposition. Tr. 212. The Court then stated “[g]ive me about 30 minutes in chambers and I’ll give you an opinion.” *Id.*

After the recess, the Court returned and first made factual findings. The findings included, in material part:

- (1) Swain and Cates “became acquainted in . . . 2000, and subsequently moved in a home in Pensacola, Florida. Tr. 213.
- (2) Swain, in part, financed the purchase of the Pensacola residence through a mortgage. Tr. 213.
- (3) Cates contributed to the purchase of the Pensacola residence by providing “\$2,500.” Tr. 213.
- (4) Swain and Cates resided in the Pensacola residence with Swain paying the mortgage and Cates “contributing to utilities and home bills as needed.” Tr. 213.
- (5) Swain sold the Pensacola residence in 2003, receiving “net proceeds” from the sale “totaling approximately \$38,000.” Tr. 213-24.
- (6) Swain provided Cates the \$38,000 received by her from the sale of the Pensacola residence to purchase a “subsequent home” in Washington. Tr. 214.
- (7) Cates titled the Washington residence in her name and paid all mortgage payments regarding the Washington residence. Tr. 214.

- (8) Swain paid certain living expenses attributable to the Washington residence. Tr. 214.
- (9) In 2005 Cates and Swain moved to Mississippi. Tr. 214.
- (10) Cates purchased a Mississippi residence after the Washington residence was sold.
- (11) Cates used the “net equity” from the sale of the Washington residence - \$143,500 – and “other funds,” including a mortgage, to finance the purchase of the Mississippi residence for \$350,000. Tr. 214.
- (12) The Mississippi residence was titled in Cates’ name alone. Tr. 214.
- (13) Swain “contributed” \$5,000 toward the purchase of the Mississippi residence “at closing.” Tr. 214.
- (14) Swain paid \$4,495 to add carpet to the Mississippi residence. Tr. 215.
- (15) Swain left the Mississippi residence “for the last time” in March, 2006. Tr. 215.

The Chancery Court’s findings of fact omit clearly established facts highly relevant to the allegations of Swain’s Complaint. Thus, Swain and Cates just did not become “acquainted in . . . 2000 and subsequently [move] in a home in Pensacola, Florida.” Tr. 213. Rather, Swain and Cates established a lesbian relationship from which everything else flowed approximately six months later, including the purchase of residences and cars and the payment of expenses attributable to those purchases. *Infra.* pp. 3-6. Swain considered her lesbian relationship a matrimonial affair which she hoped and thought would last forever. *Id.* When the lesbian relationship ended with Cates, Swain found herself unemployed, having to live on approximately \$18,000 in retirement benefits and to “restart her life.” R. 0543-0544.

Besides omitting critical facts to the proper resolution of the case, the Chancery Court misstated other facts. Cates did not contribute \$2,500 to the purchase of the Pensacola residence. She paid \$2,000 in an earnest money payment. *Infra.* p. 7; Tr. 86-87. Cates not only contributed

“to utilities and home bills,” she provided Swain \$29,359.29 to pay for expenses attributable to the Pensacola residence, including capital improvements and to provide money to Swain’s family members, \$11,000 to help finance the purchase of an E320 Mercedes for Swain, \$2,953.32 for the payment of car insurance for Swain, the means to cancel a \$10,400 debt owed by Swain on a car lease and a gift of the trade-in value of the E320 Mercedes on the purchase of a \$40,000 Lexus. *Infra.* pp. 6-11. Swain did not receive \$38,000 in “net proceeds” from the sale of the Pensacola residence. Rather, she received \$32,855.86. Swain did not provide Cates the \$38,000 Swain received from the sale of the Pensacola residence. She provided her \$34,000 from her Navy Federal Credit account. *Id.* Swain did not contribute \$5,000 toward the purchase of the Mississippi residence. Swain gave Cates a \$5,000 check to endorse after the closing on the Mississippi residence. Swain subsequently deposited the check into Cates’ Union Planters bank account. *Infra.* p. 16 n. 4.

Upon completion of its fact finding, the Chancery Court made the following conclusions of law:

- (1) Swain failed to prove by clear and convincing evidence the basis for a constructive trust since neither fraud or ill will were shown as required by this Court’s decision in *Alford v. Fairchild*, 785 So.2d 1064 (Miss. 2001) Tr. 215-216.
- (2) Swain failed to prove by clear and convincing evidence the basis of a resulting trust requiring Cates to hold title of either the Washington residence or the Mississippi residence on behalf of Swain as required by this Court’s decision in *Allgood v. Allgood*, 473 So.2d 419 (Miss. 1985). Both Swain and Cates lived in the Washington and Mississippi residences; enjoyed the benefits of both residences and contributed to the residences through the payment of mortgages and living expenses. Tr. 216.
- (3) Cates was unjustly enriched by taking from Swain the \$38,000 in equity proceeds received by Swain from the sale of the Florida residence as an investment in the Washington residence; the \$5,000 paid by Swain for the closing on the

Mississippi residence and the \$4,449 of carpet installed by Swain in the Mississippi residence. Tr. 216-217.

- (4) Cates is entitled to a credit of \$2,500 against the unjust enrichment received by her from Swain. Tr. 217.
- (5) Cates owes Swain \$44,995 in payment of the unjust enrichment Cates received from Swain. Tr. 218.
- (6) Both Cates and Swain are liable for the attorney fees respectively incurred by them. Tr. 218-219.

With respect to the issues of constructive trust and resulting trust, the Chancery Court correctly denied that relief, though not for all the right reasons. The Chancery Court, however, clearly erred in awarding Swain any monies in payment of purported unjust enrichment provided Cates. In doing so, the Court violated Mississippi constitutional, statutory and case law barring monetary awards arising from the dissolution of a homosexual relationship. Alternatively, if unjust enrichment awards are permissible from the dissolution of a homosexual relationship, the Chancery Court erroneously provided Swain with an unjust enrichment award without first crediting Cates with the monies and other benefits she provided Swain over their five year lesbian relationship; failed to provide Cates an unjust enrichment award for the monies and benefits she gave Swain, all of which far exceeded the monies and benefits Swain gave to Cates, and failed to award Cates attorney fees incurred by Cates in the case. Finally, the Court, correctly denied Swain's attorney fees request. *See, generally*, R. Exc. II.

SUMMARY OF THE ARGUMENT

Mississippi constitutional, statutory and case law bars the equitable relief sought by Swain's complaint. Swain bases her claim for relief on "a confidential and fiduciary relationship" arising from a five year homosexual relationship she enjoyed with Cates which included, among other things, "joint ownership" in various personal property items and an agreement "to provide . . . Swain . . . with a residence." R. 012; R. 0557-0558. Article 14,

Section 263A of the Mississippi Constitution, barring the enforcement of asserted rights arising from a homosexual relationship; Section 93-1-1(2) of the Mississippi statutory code, forbidding the enforcement of asserted rights and claims arising from a homosexual relationship and this Court's decision in *Davis v. Davis*, 643 So.2d 931 (Miss. 1994), denying equitable relief based upon an alleged oral agreement arising from a common law marriage between a man and a woman, all preclude the relief Swain seeks in her complaint. Mississippi's public policy, as determined by applicable Mississippi law, condemns homosexual relationships and any conduct, including judicial action, that would act to promote, facilitate or maintain such relationships. Providing Swain upon the dissolution of her homosexual relationship with Cates monetary relief for her financial contributions to promote, facilitate and maintain the homosexual relationship and one-half interest in personal property and real property purchased by Cates during the homosexual relationship contravenes Mississippi public policy.

The doctrine of "unjust enrichment" cannot be utilized to thwart Mississippi's public policy against homosexual relationships by disguising a property settlement to a participant in a homosexual relationship upon the dissolution of the relationship. To hold otherwise would allow judicial evisceration of Mississippi's constitutional and statutory proscriptions against homosexual relationships and common law marriages. Literally thousands of claims would flood the Mississippi Chancery Courts, seeking "equitable relief" which, by its actual name – property settlement arising from the dissolution of a homosexual relationship – would be unavailable to Mississippi litigants. In turn, the flood engulfing the Mississippi Chancery Courts would include palimony suits characterized as unjust enrichment claims.

Assuming the doctrine of unjust enrichment can serve as a basis of providing a monetary award and property settlement arising from the dissolution of a homosexual relationship, the Chancery Court erroneously entered an unjust enrichment award against Cates in favor of Swain

based upon Swain's purported financial contributions to promoting, facilitating and maintaining her lesbian relationship with Cates. An unjust enrichment award requires an underlying accounting of the monies and benefits exchanged between the participating parties in a relationship that would credit the parties with all of their respective contributions and only provide the party having contributed the most with a basis for a monetary award. Here, the Chancery Court improperly credited Swain with certain purported financial contributions while failing to credit Cates with all the monies and benefits she provided Swain during their five year lesbian relationship. Had the Chancery Court properly credited Swain and Cates with their respective contributions, Cates would have been entitled to an unjust enrichment award in the amount of \$303,985.31. The Chancery Court's failure to conduct the appropriate accounting resulted in an inappropriate unjust enrichment award to Swain.

Because prevailing Mississippi law uniformly and loudly proscribes the relief sought by Swain under any circumstances – a property settlement upon the dissolution of a homosexual relationship for her financial contributions to promoting, facilitating and maintaining the relationship – the Chancery Court also improperly denied Cates' request for attorney fees.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews issues of law including the failure to apply the correct legal standard *de novo*. *Simpson v. State Farm Fire & Cas. Co.*, 564 So.2d 1374, 1377 (Miss. 1990). With respect to findings of fact, this Court defers to factual findings of the Chancery Court unless the Chancery Court fails to make factual findings supported by the evidence or is clearly erroneous in the findings it does make. *Davis v. Davis*, 643 So.2d 931, 934 (Miss. 1994); *Nichols v. Funderburk*, 881 So.2d 266, 268 (Miss. Ct. App. 2004).

II. THE CHANCERY COURT VIOLATED MISSISSIPPI PUBLIC POLICY IN PROVIDING SWAIN MONETARY RELIEF FROM THE DISSOLUTION OF HER FIVE YEAR LESBIAN RELATIONSHIP WITH CATES

Mississippi public policy, grounded on Mississippi constitutional, statutory and case law, repudiates homosexual relationships and the provision of property rights to the participants in those relationships when the relationships dissolve. Section 263A of the Mississippi Constitution defines “marriage” as being “between a man and a woman” and states clearly and emphatically that “a marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in [Mississippi] and is void and unenforceable under the laws of [Mississippi]. Article 14 § 263A of the Mississippi Constitution. Consistent with, and in support of Section 263A of the Mississippi Constitution, the Mississippi legislature amended Section 93-1-1(2) of the Mississippi Domestic Relations Act. That statute now provides that “any marriage between persons of the same gender is prohibited and null and void from the beginning [and] [a]ny marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.” Miss. Code Ann. § 93-1-1(2) (2004).

Since Mississippi rejects homosexual marriages, it necessarily prohibits the provision of property rights to participants in a homosexual marriage upon the termination of the marriage. Under applicable Mississippi law “marriage” is essential to the existence of property rights that can be subject to an equitable division when a relationship ends. *Nichols v. Funderburk*, 881 So.2d 266, 270 (Miss. Ct. App. 2004). Thus, if there is no valid marriage, there can be no property rights arising from the invalid marriage.

In addition to homosexual marriages, Mississippi shuns cohabitation as a basis for creating property rights for the cohabitants. As far back as 1956, Mississippi abolished by statute, common law marriage or mere cohabitation as a basis for the creation of property rights.

Miss. Code Ann. § 93-1-15(1). Mississippi courts consistently have denied property rights to men and women who “merely cohabit” without any evidence of a formal commitment to marriage. *Davis v. Davis*, 643 So.2d 931 (Miss. 1994) (thirteen year co-habitation between a man and a woman); *Nichols v. Funderburk*, 881 So.2d 266 (Miss. Ct. App. 2004) (fourteen year co-habitation between a man and a woman). For even greater reason when Mississippi constitutional and statutory law bans homosexual marriages under any circumstances, courts must refuse to find homosexual cohabitation as a basis for the creation of property rights upon the dissolution of the cohabitation. The reason for the refusal is best expressed in *Ross v. Goldstein*, 203 S.W. 3d 508 (Tex. App. 2006), a Texas case. There, a same sex partner, after the death of his mate, tried to defend his seizure of property belonging to the dead mate against claims of the decedent’s estate. Among other things, the surviving same sex partner claimed “a constructive trust” and his entitlement to an equitable remedy based on the fact that he enjoyed “. . . a marriage-like relationship . . .” with the decedent, “. . . had embarked on a joint venture . . .” with the decedent and “. . . had acquired the sought after assets together and owned them jointly . . .” with the decedent. The Texas Court emphatically rejected the claim, stating:

[The surviving partner argues] that his proposed equitable remedy is proper to address a reality of life for same-sex couples, and that it is not against this State’s public policy. There are two democratically approved statements of Texas public policy to guide our course on this question. The first is Texas Family Code Section 6.204 which states that it is contrary to the State’s public policy to recognize or give effect to a same-sex marriage or civil union. The second, and weightier, is Article 1, Section 32 of the Texas Constitution, which states that marriage is between one man and one woman only and no state or political subdivision of this State may create or recognize any legal status identical or similar to marriage. Tex. Const. Art .1 § 32. Our State’s public policy is unambiguous, clear, and controlling on the question of creating a new equitable remedy akin to marriage. We may not create such a remedy.

Ross v. Goldstein, 203 S.W. 3d at 514. So too is the public policy of Mississippi unambiguous, clear and controlling – homosexual cohabitations create no property rights for the participants in those relationships upon their dissolution. *See Davis v. Davis*, 643 So.2d 931, 934, 936 (Miss. 1994) (“ . . . public policy questions . . . are best left to the legislative process . . . [and] [o]ur legislature has not extended the rights enjoyed by married people to those who choose merely to cohabit”); *Nichols v. Funderburk*, 881 So.2d 266, 271 (Miss. Ct. App. 2004) (following *Davis v. Davis*).

The evidence clearly shows that Swain bases her claim for relief on her five year lesbian relationship with Cates. Swain met Cates through Swain’s Internet solicitation for a woman to enter a long-term lesbian relationship with her. R. 020; R. 032-033; R. 0421-0424; Tr. 17. Upon meeting Cates in April, 2000, Swain regularly sent her e-mails in which Swain professed her love of Cates and her belief that they had established a love relationship between them that would last for eternity. R. 0425-0426; R. 0428-0429. Indeed, Swain began calling Cates “my life,” “my world,” “my wife,” “my lover” and “my significant other.” R. 0425-0426; R. 0431-0433. A sexual relationship ensued in May 2000 and after approximately eight months from the time they first met and established a sexual relationship, Swain and Cates moved into Swain’s Florida residence. R. 0437; R. 0439; R. 0461.

Before Swain purchased the Florida residence, she and Cates agreed that Swain would purchase the Florida residence through a military mortgage and Cates would open a Florida bank account into which Cates would deposit monies to pay for costs attributable to the home independent of the home mortgage. R. 0547; Tr. 26-27; Tr. 91-92; Tr. 180. Only Swain’s name appeared on the title for the Florida residence. R. 0450; Tr. 22; Tr. 89. Both Swain’s and Cates’ names appeared on the Florida bank account and both were authorized to withdraw monies from the account. Tr. 90-93. However, only Cates deposited money into the Florida account. Tr. 93.

At the same time, both Swain and Cates maintained independent bank accounts in their respective names only. Tr. 89-90. Approximately \$29,359.29 was disbursed from the Florida account in support of the Florida residence. Tr. 97; Tr. 181; Tr. 188.

While Swain and Cates resided in Florida, Cates paid a \$2,000 earnest money payment for Swain on the purchase of the Florida residence. Tr. 19; Tr. 86-87. Cates also purchased a Volkswagen Cabriot for \$24,666.34. R. 0491-0492. Swain made no payments on the Volkswagen. *Id.* However, both Cates and Swain appeared on the title. R. 0492. Swain drove the car to work. R. 0491. In addition, Cates bought a E320 Mercedes. Tr. 41; Tr. 185. She purchased the Mercedes for Swain though both her name and Swain's name appeared on the title. *Id.* In finalizing the purchase, Cates satisfied a \$10,400 car note for a RAV4 owned by Swain. Cates paid \$11,000 toward the purchase of the Mercedes. R. 0489; R. 0528. Swain made no payments on the Mercedes. Tr. 41-42. Swain ultimately used the Mercedes as a trade-in vehicle for the purchase of a Lexus that was titled in her name alone. R. 0490-0491; Tr. 187. Finally, Cates spent \$2,953.36 for car insurance for Swain while she and Swain resided in Florida. R. 0493-0494.

The purchase of the Florida residence by Swain, the payment of costs attributable to the Florida residence and all the other monies Cates spent in Florida that directly benefited Swain, promoted, facilitated and maintained the lesbian relationship between Swain and Cates. Had there not been a lesbian relationship, none of the listed expenditures would have happened. Even with Cates' support, Swain struggled to support the Florida residence. Her monthly bank balances in her personal account hovered between approximately \$345 and \$1,400. Tr. 107-108. Her yearly income, including military benefits, equaled approximately \$32,000. R. 0477-0478; R. 0480; R. 0486.

All the expenditures attributable to the Washington and Mississippi residences, purchased after the sale of the Florida residence by Swain, also promoted, facilitated and maintained the lesbian relationship between Swain and Cates. With respect to the Washington and Mississippi residences, Cates purchased those residences in her name only and paid all mortgage costs attributable to the residences. R. 0346; R. 0507; R. 0513-0514; R. 0531; Tr. 14; Tr. 191. Swain paid some expenses attributable to the residences. Tr. 113. Her payment of expenses, however, did not prevent her from increasing her savings while she resided in Washington and Mississippi. Her monthly balances increased to approximately \$20,000. Tr. 107-108. Swain candidly credited her increased savings with having significantly lower expenses in Washington and Mississippi. R. 0532-0533; Tr. 113. She lived in the Washington and Mississippi residences rent free. R. 0530-0531; R. 0541-0543; Tr. 190. When her lesbian relationship with Cates ended in 2006, Swain left Mississippi. R. 0544; R. 0560-0562.

In addition to the evidence, Swain's very complaint in this case shows that Swain bases her claim for relief on her five year lesbian relationship with Cates. The complaint alleges that Swain and Cates were "cohabitants," "partners" and "enjoyed a confidential and fiduciary relationship between them." R. 012. Swain concedes that her e-mails to Cates pledging her love, dedication and commitment "reflect" and "evidence" her relationship with Cates as alleged in her complaint. R. 0558; R. Exc. VII.

Swain's complaint also claims Swain's joint ownership in the Volkswagen Cates purchased while residing with Swain in Florida and an E-Trade account. With respect to the Volkswagen, as stated above, Cates, not Swain, purchased the Volkswagen. Swain made no payments on it. Swain, however, enjoyed the use of the vehicle and had her name placed on the title just as a spouse would share title to a vehicle purchased by the other spouse. Cates also constituted the only investor in the E-Trade account, though Swain's name also appeared on the

account. Swain contributed nothing to the account. Yet, not only did she claim joint ownership in the account, Swain tried, unsuccessfully, to seize all the money from the account when her lesbian relationship with Cates ended in 2006. She claimed that when her lesbian relationship with Cates ended, she had “absolutely nothing financially” and “was trying to get something back.” Tr. 20. At that time, Swain was not working, living rent free and subsisting on her annual retirement benefits of approximately \$18,000. Finally, Swain claimed joint ownership in Cates’ two dogs.

Swain’s joint ownership allegations in the complaint concerning property in which she had no financial interest mirror claims for the division of marital property upon the dissolution of a marriage. In that regard, Swain candidly described the end result she sought in this case in an admission made during discovery:

I am entitled to my portion of any and all property, monies or other tangible items acquired during my constructive and resulting trust [with Cates].

Swain admitted that the referenced trust was based on her five year lesbian relationship with Cates. R. 049; R. 0550; R. Exc. VIII.

Finally, the complaint alleges that a purpose of Swain’s cohabitation, partnership and confidential and fiduciary relationship with Cates was to provide Swain a residence. R. 012. As this Court found in *Henderson v. Henderson*, 43 So.2d 871, 872 (Miss. 1950), “one of the fundamental duties growing out of the law of domestic relations is the duty of the husband to support the wife – and [provide] . . . a place of abode as a suitable home.” The alleged purpose of Swain’s cohabitation, partnership and confidential and fiduciary relationship with Cates fits perfectly within the law of domestic relations.

Because Swain seeks relief as a result of the dissolution of her five year lesbian relationship with Cates, Mississippi public policy, as enunciated in constitutional, statutory and

case law, bars Swain from obtaining any relief. The Chancery Court ignored the overwhelming evidence showing that Swain founded her claim for relief on the dissolution of her five year lesbian relationship with Cates. The Chancery Court's failure to address the evidence is, at best, perplexing, particularly in light of the Court's ruling on Cates' motion to dismiss Swain's complaint. There, the Court explicitly recognized that Mississippi law barred providing equitable relief to a participant in a dissolved homosexual relationship. Yet, when confronted with evidence establishing the basis for Swain's claim, the Court ignored it, finding merely that Swain and Cates "became acquainted in . . . 2000 and subsequently moved in a home in Pensacola, Florida." Tr. 213.

Findings of "becoming acquainted" and "moving in together" should not, do not and cannot end the inquiry. Rather, it is the "how," the "what" and the "why" of the acquaintanceship and the shared residences that decide the question of whether Swain can obtain relief without violating Mississippi's public policy against homosexual relationships. Specifically, it was incumbent upon the Chancery Court to determine how Swain and Cates became acquainted, what was the nature of the relationship between Swain and Cates and why did Swain and Cates reside together. It did not.

The record clearly establishes that Swain and Cates had a five year lesbian relationship which, in turn, caused both Swain and Cates to expend monies to promote, facilitate and maintain that relationship. Cates' expenditure of money that directly benefited Swain, including funding a Florida bank account to assist Swain's purchase of a Florida residence in which they both resided, buying an E320 Mercedes for Swain which Swain eventually traded in on a purchase of a Lexus, purchasing and alone financing the purchase of residences in Washington and Mississippi in which she and Swain both resided could have had no other purpose than to promote, facilitate and maintain her lesbian relationship with Swain. Certainly, Cates'

expenditures had no business purpose under the Mississippi Partnership Act (defining a partnership or joint venture as an “association of two or more persons to carry out as co-owners a business for profit”). Miss. Code Ann. § 79-13-202. (Emphasis added.) Moreover, Cates’ expenditures, and for that matter Swain’s expenditures for the purchase of residences titled in their individual names and financed by mortgages in their respective names alone provided no right of mutual control and joint obligations and liabilities, all of which are essential factors to the existence of a legal partnership or joint venture. *Hults v. Tillman*, 480 So.2d 1134, 1146 (Miss. 1985); *see also* Miss. Code Ann. §§ 79-13-306(1) and 79-13-401(f). Thus, the evidence totally undercut the one issue that the Chancery Court found viable when it ruled on Cates’ motion to dismiss Swain’s complaint – the possible existence of a joint venture between two homosexuals totally independent of a homosexual relationship between the two homosexuals.

Once their five year lesbian relationship ended, neither Swain nor Cates had a basis to seek relief from each other for monies spent or for personal and real property acquired, sold or kept during their five year lesbian relationship. Mississippi public policy prohibits such relief. Courts cannot ignore or misconstrue facts and mischaracterize causes of action, including turning a claim for the division of property upon the dissolution of a homosexual relationship into an unjust enrichment lawsuit, to avoid the proscriptions of clearly applicable law and public policy. To allow otherwise would empower courts to eviscerate Mississippi public policy and openly to violate the will of the Mississippi legislature, something this Court specifically prohibited in *Davis v. Davis*, 643 So.2d 931 (Miss. 1994). It also will result in a flood of Chancery Court claims misrepresenting the true nature of the relief sought. Property settlements from the dissolution of homosexual relationships will appear as unjust enrichment claims. Similarly, banned palimony suits where the plaintiff participated in an outlawed common law marriage or heterosexual cohabitation will be brought under the rubric of the unjust enrichment doctrine.

The Chancery Court in this case erroneously failed to make factual findings established by the evidence and to apply the appropriate and applicable law to the actual underlying facts. Accordingly, the Chancery Court's September 30, 2010 judgment awarding Swain an unjust enrichment award from the dissolution of her five year lesbian relationship with Cates must be reversed on the ground that Swain's complaint seeks relief from the dissolution of a homosexual relationship barred by Mississippi's public policy. Attorney fees and costs should be awarded to Cates.

III. THE CHANCERY COURT ERRONEOUSLY AWARDED SWAIN \$44,995 AS AN UNJUST ENRICHMENT AWARD

The doctrine of unjust enrichment applies where there is no legal contract but an equitable entitlement on behalf of a person to money and/or property that is in the possession of another but "in good conscience and justice . . . ought to belong to the other person." *Hans v. Hans*, 482 So.2d 1117, 1122 (Miss. 1986). In computing an unjust enrichment award, courts credit all amounts rightfully belonging to the respective parties to reach a sum constituting "unjust enrichment." *Koval v. Koval*, 576 So.2d 134, 138 (Miss. 1991) (crediting monies paid on a loan before awarding the balance as unjust enrichment). Thus, unjust enrichment requires an accounting of all monies and/or property provided by the respective parties to each other to determine the amount that "good conscience and justice" dictate should be provided as unjust enrichment. *Id.*

The Chancery Court, assuming that the doctrine of unjust enrichment could be utilized to disguise a property settlement from the dissolution of a five year lesbian relationship between Swain and Cates, awarded Swain \$44,995 as unjust enrichment. According to the Court, Cates had been "enriched at the expense of" Swain during their five year lesbian relationship. Tr. 217. The unjust enrichment award included (1) a \$38,000 payment purportedly made by Swain to Cates of Swain's "equity proceeds" from the sale of her Florida residence; (2) a \$5,000 payment

Swain provided Cates purportedly “for the closing” on Cates’ Mississippi residence; and (3) a \$4,449 payment Swain made for carpet in Cates’ Mississippi residence. Tr. 217-218. Against the sum total of these three amounts, the Court credited Cates with an alleged \$2,500 payment she made on Swain’s behalf to satisfy an earnest money payment required for the purchase of Swain’s Florida residence.

In making the unjust enrichment award, the Chancery Court erred in the amounts used to reach the award. It also applied erroneous arithmetic to arrive at the award. Most importantly, however, the Court failed to credit both Swain and Cates with all monies spent by each to benefit the other and to promote, facilitate and maintain their lesbian relationship. Had the Court credited the amounts spent by both Swain and Cates during their five year lesbian relationship to promote, facilitate and maintain that relationship, Cates, not Swain, would have been entitled to an unjust enrichment award of \$303,985.31.

The sum total of the unjust enrichment amounts awarded by the Court (\$38,000, \$5,000 and \$4,449) with the credit to Cates of \$2,500, does not equal \$44,995. Rather, the total is \$44,949. However, even that amount is incorrect since Swain never paid Cates \$38,000 of equity proceeds from the sale of her Florida residence. Rather, Swain received \$32,855.86 from her sale of the Florida residence which she deposited into her personal Navy Federal Credit bank account. Tr. 104. She thereafter drew a \$34,000 cashier’s check on her account and gave that check to Cates. Tr. 30. Moreover, Cates did not pay a \$2,500 earnest money payment. She made a \$2,000 payment. Tr. 31. With the correct amounts (\$34,000, \$5,000, \$4,449 minus \$2,000), substituted for the Court’s figures, the total of the items awarded by the Court as unjust enrichment equal \$41,449.

The \$41,449 figure fails to provide credit for all payments made by Swain and Cates during their five year lesbian relationship regarding the three different residences in which they

lived. Crediting Swain and Cates with the amounts each paid while they resided together in Florida, Washington and Mississippi results in a much different unjust enrichment award, not only as to amount, but also as to whom the award should be provided.

In Florida, Swain purchased that residence through a military mortgage. She paid all costs attributable to the mortgage, including principal payments, interest payments, real estate tax payments and a mortgage pay-off payment at the time Swain sold the residence. Cates lived in the Florida residence rent free. The total costs paid by Swain pertaining to the purchase of the Florida residence equaled \$115,041.95. Cates also made payments in Florida that benefited Swain. She paid a \$2,000 earnest money payment on the purchase of the Florida residence for Swain. She purchased an E320 Mercedes for Swain that cost with finance charges \$38,306.08. R. 0488. In doing so, Cates paid off a \$10,400 car note on which Swain was making monthly payments of \$323.93. R. 0478; Tr. 185. Cates paid \$11,000 toward the purchase of the Mercedes. R. 0489; R. 0525. Swain made no payments. Cates gave the Mercedes to Swain who used its trade-in value to purchase a Lexus. Cates also made insurance payments for Swain in the amount of \$2,953.36 and undocumented credit card purchases of approximately \$20,000. Finally, Cates alone funded a Florida bank account that was used to support the Florida residence. Of the monies deposited into the Florida account, \$29,359.29 was spent in support of Swain's Florida residence. The total amount of documented expenditures Cates made in Florida to benefit Swain equals \$55,712.65. If the \$55,712.65 spent by Cates in Florida is subtracted from the \$115,041.95 Swain spent on the purchase of the Florida residence, the difference is \$59,329.30. That amount represents monies spent by Swain in excess of the monies paid by Cates.

The Washington residence represents an entirely different situation from the Florida residence. In Washington, Cates purchased the Washington residence in her name alone and

made all payments relating to the purchase, including an equity payment, mortgage principal payments, mortgage interest payments, real estate tax payments and the mortgage pay-off payment at the time the residence was sold. The total costs paid by Cates on the Washington residence equaled \$233,820.55. Tr. 193-194.

Swain lived in the Washington residence rent free. She documented \$42,302 in payments attributable to the Washington residence. Included in those payments were a \$34,000 cashier's check she provided Cates when Cates purchased the residence and \$8,302 in checks for miscellaneous expenses. Though Swain referenced her bank statements for the period she lived in Washington as reflecting other expenses she paid attributable to the Washington residence, those statements fail to reveal expenses that, on their face, pertain to the Washington residence. Expenses incurred at Dominos Pizza, HiWay Market, gas stations, Albertsons' grocery store, various restaurants and like places, really cannot be tied to the upkeep of the residence. Rather, they pertain to Swain's personal upkeep. *See, e.g.* R. 0273-0344. Not surprisingly, Swain's savings significantly increased while she lived in Washington, a circumstance that she candidly admitted resulted from having sold her Florida residence.

When Swain and Cates moved to Mississippi upon the sale of the Washington residence, Cates purchased a Mississippi residence. Cates' name alone appeared on the purchase documents and the title for the Mississippi residence. She paid all costs attributable to the purchase of the residence, including an equity payment, mortgage principal payments, mortgage interest payments and real estate tax payments. In addition, Cates paid \$13,021.49 in other costs for the upkeep of the Mississippi residence before she and Swain terminated their five year lesbian relationship. Cates' costs for the Mississippi residence totaled \$181,921.09 when Swain left Mississippi. Swain lived in the Mississippi residence rent free. She, however, documented \$10,125 in costs that she paid for the Mississippi residence until she and Cates terminated their

five year lesbian relationship. Included in those costs, was a \$4,449 expense for carpet in the Mississippi residence.

The costs Cates paid in Washington and Mississippi attributable to the residences in those two states equal \$415,741.64. The total documented costs paid by Swain in Washington and Mississippi total \$52,427. When you combine the cost figures for Cates and Swain from Washington and Mississippi with the costs paid by them in Florida, the results reflect that Cates paid total costs of \$471,454.29 and Swain paid total costs of \$167,468.98. Those costs represent monies spent by both Cates and Swain to promote, facilitate and maintain their five year lesbian relationship. They also show that if anyone was unjustly enriched, it was Swain – not Cates. The unjust enrichment of Swain totals \$303,985.31 – the difference in costs that Cates paid over Swain. Interestingly, this analysis mirrors the accounting that would take place in determining an equitable division from the dissolution of a marriage. Regardless, any unjust enrichment award requires an accounting of all monies and/or property involved between two or more parties. Absent such an accounting, any purported unjust enrichment calculation falters from a lack of completeness.

Assuming the doctrine of unjust enrichment may be used to thwart Mississippi's public policy against homosexual cohabitation, the Chancery Court's unjust enrichment award to Swain suffers from a total lack of analysis of all relevant expenditures made by both Cates and Swain, but particularly Cates, in Florida, Washington and Mississippi. Consequently, this Court must reverse the award and remand the case to the Chancery Court with direction to consider all expenditures made by Cates and Swain, consistent with the above referenced numbers, to support the residences in Florida, Washington and Mississippi.

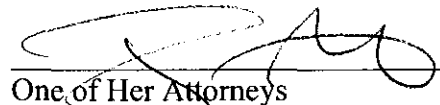
CONCLUSION


For the reasons stated in Section II above, the September 30, 2010 judgment of the Chancery Court should be reversed. For the reasons stated in Section III above, the September 30, 2010 judgment of the Chancery Court should be reversed and remanded with directions to recompute amounts pertaining to unjust enrichment in favor of Cates. Attorney fees and costs should be awarded to Cates.

Respectfully submitted, this the 6th day of April, 2011.

MONA CATES

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CERTIFICATE OF FILING AND SERVICE

We, Jonathan S. Masters of Holcomb Dunbar P.A., one of the attorneys for Appellant/Cross-Appellee Mona Cates, and Janet Brower, actual mailer of the Brief of Appellant/Cross-Appellee Mona Cates, certify that we have this day forwarded via regular mail the original and three copies of the foregoing Brief of Appellant/Cross-Appellee Mona Cates to the Clerk of the Mississippi Supreme Court at 450 High Street, Jackson, MS 39205-0249, and one (1) true and correct copy of the same to the following individuals:

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This the 6th day of April, 2011.



JONATHAN S. MASTERS



JANET G. BROWER

APPENDIX

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- V. Miss. Code Ann. § 93-1-1(2)(2004)
- VI. Miss. Code Ann. § 93-1-15(1)

I. Article 14 Section 263A of the Mississippi Constitution

Marriage defined as only between a man and a woman.

Marriage may take place and may be valid under the laws of this State only between a man and a woman. A marriage in another State of foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this State and is void and unenforceable under the laws of this State.

II. Miss. Code Ann. § 79-13-202(a)

Formation of partnership

Except as otherwise provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intended to form a partnership.

III. Miss. Code Ann. § 79-13-306(a)

Partner's Liability

Except as otherwise provided in subsections (b) and (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

IV. Miss. Code Ann. § 78-13-401(f)

Partner's Rights and Duties

Each partner has equal rights in the management and conduct of the partnership business.

V. Miss. Code Ann. § 93-1-1(2)(2004)

Incestuous Marriages Void

Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.

VI. Miss. Code Ann. § 93-1-15(1)

License and Solemnization Required

No marriage contracted after April 5, 1956 shall be valid unless the contracting parties shall have obtained a marriage license as otherwise required by law, and unless also the marriage, after such license shall have been duly issued therefore, shall have been performed by or before any person, religious society, institution, or organization authorized by sections 93-1-17 and 93-1-19 to solemnize marriages. Failure in any case to comply with both prerequisites aforesaid, which shall also be construed as mandatory and not merely directory, shall render the purported marriage absolutely void and any children born as a result thereof illegitimate.