

No. 12-1250-1

TWELFTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

* * * * *

SHEILA McCLAIN,)

Plaintiff-Appellee,)

v.)

STERLING McCLAIN,)

Defendant-Appellant.)

From Cumberland County

No. 11 CVD 9646

* * * * *

DEFENDANT-APPELLANT'S BRIEF

* * * * *

CLERK COURT OF APPEALS
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NORTH CAROLINA COURT OF APPEALS

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SHEILA McCLAIN,)	
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STERLING McCLAIN,)	
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Defendant-Appellant.)	

* * * * *

DEFENDANT-APPELLANT'S BRIEF

* * * * *

ISSUES PRESENTED

- I. DID THE TRIAL COURT ERR IN FAILING TO APPLY A PLAIN READING OF THE TERMS OF THE SEPARATION AGREEMENT AND IN CONCLUDING THAT PLAINTIFF'S ACTIONS DID NOT TERMINATE DEFENDANT'S CONTRACTUAL ALIMONY OBLIGATION?

- II. DID THE TRIAL COURT ERR IN FINDING AS A FACT THAT LIVING IN MR. BRYAN'S HOME DOES NOT CONSTITUTE A TERMINATING EVENT UNDER THE PARTIES' SEPARATION AGREEMENT?

STATEMENT OF THE CASE

Plaintiff Sheila McClain ("Mrs. McClain") commenced this action by filing a Complaint and issuing a Summons on 10 November 2011. (R. pp. 2-21). During the 5 April 2012 Civil Session of District Court for the Twelfth Judicial District held in Fayetteville, Cumberland County, North Carolina, Judge A. Elizabeth Keever presided over the hearing. (R. p. 57).

On 7 June 2012, the Honorable A. Elizabeth Keever entered a final Order. (R. pp. 27-30). On 9 July 2012, Defendant Sterling McClain ("Mr. McClain") timely entered his Notice of Appeal. (R. pp. 31-32). The court reporter timely certified the transcript was complete on 7 August 2012. (R. pp. 35-36). Mr. McClain timely served the Proposed Record on Appeal on 11 September 2012. (R. p. 41).

The Record was settled by agreement and docketed on 16 October 2012. (R. pp. 39; 1).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The Order entered in this cause on 7 June 2012 (R. pp. 27-31) resolved the alimony claim between the parties, is a final judgment, and appeal therefore lies to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF THE FACTS

The parties were married on 21 May 1975, separated on or about 19 September 2008, and divorced on 8 September 2010. The parties entered into a Separation Agreement on 30 April 2010. (R. pp. 7-20). The Separation Agreement provided that Mr. McClain would pay to Mrs. McClain alimony, which would terminate upon "Wife's living with an unrelated male for a period in excess of five days." (R. pp. 12-13).

On or about April 2011, Mrs. McClain began living with Mr. Bob Bryan, to whom she was not related, for a period in excess of 5 days, and provided care to his wife. (Trans. pp. 4-5; 8-11). Mr. McClain stopped paying alimony because he believed that Mrs. McClain's decision to live with Mr. Bryan terminated his alimony obligation. (R. p. 4); (Trans. pp. 7-8). Mrs. McClain then instituted this action, seeking an order "directing Defendant to specifically perform the terms and provisions of the parties' Agreement ..." (R. p. 5).

The trial court found as a fact that "Plaintiff was employed by [Mr. Bryan] as an in home care provider for his wife ..." (R. p. 28). The trial court found as a fact that this did not constitute a terminating event under the parties' Separation agreement, as the parties did not intend that an employer/employee relationship was "living with an unrelated male person in excess of 5 days.'" (R. p. 28, FOF # IV).

STANDARD OF REVIEW

When a contract is "in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact," the intention of the parties is a question of law. Lane v. Scarborough, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973). A ruling on that issue by the trial court is reviewed de novo. Harris v. Ray Johnson Constr. Co., 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) (a matter of contract interpretation raising a question of law is reviewed de novo).

When a trial court sits without a jury, this Court reviews "the trial court's findings of fact to determine whether they are supported by substantial evidence." Shipman v. Shipman, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. (internal quotation omitted). If the trial court's findings of fact are supported by substantial evidence, then those findings "are conclusive on appeal if there is evidence to support them" Pulliam v. Smith, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998) (internal quotation omitted).

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO APPLY A PLAIN READING OF THE TERMS OF THE SEPARATION AGREEMENT AND IN CONCLUDING THAT PLAINTIFF'S ACTIONS DID NOT TERMINATE DEFENDANT'S CONTRACTUAL ALIMONY OBLIGATION.

(Issues # 3, 5, 6)

Contractual interpretation can be made by using objective or subjective standards. The objective standard places the primary emphasis on the words used by the parties in their contract rather than inquiring into the parties' mental processes when they entered into the contract. See Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009).

The objective standard is appropriate in this case because the terms of the Separation Agreement are clear and unambiguous. If the language agreement is clear and explicit, "the construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written." Hemric v. Groce, 169 N.C. App. 69, 76, 609 S.E.2d 276, 282 (2005). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." Helms v. Schultze, 161 N.C. App 404, 409, 588 S.E.2d 524, 527 (2003). Construction of contract is matter of law for court and it "cannot look beyond the terms of the contract to determine the

intentions of the parties." Hartman v. Hartman, 80 NC App 452, 454, 343 SE2d 11, 13 (1986).

The term "living with an unrelated male person in excess of 5 days" is unambiguous. It is undisputed that Mrs. McClain is unrelated to Mr. Bryan and that she lived in his home for more than 5 days. (Trans. pp. 4-5; 8-11). An application of objective interpretation of the Separation Agreement leads to the conclusion that Plaintiff's living with Mr. Bryan terminated Mr. McClain's alimony obligation.

The parties (albeit through their attorneys) chose the language in the Separation Agreement. They chose to use the term "living with an unrelated male person in excess of 5 days." They could have used the term "co-habitation," which has a legally distinct meaning, including the requirement that the couple holding themselves out as man and wife. Alternatively, the parties could have chosen a period of time greater than 5 days, signifying a more long-term relationship. The parties' choice of such a modest time period undermines the suggestion that a romantic relationship was required to constitute "living with" a male person. However, the parties did not make either of these choices. Nonetheless, the trial court did precisely what Hartman instructs not to do, and looked "beyond the terms of the contract to determine the intentions of the parties."

Hartman, 80 N.C. App. at 454, 343 S.E.2d at 13.

A contract is "an attempt by market participants to allocate risks and opportunities. [The court's role] is not to redistribute these risks and opportunities as [it sees] fit, but to enforce the allocation the parties have agreed upon." United Air Lines, Inc. v. ALG, Inc. 916 F. Supp. 793 (N.D. Ill. 1996). The Separation Agreement apportioned risk. If Mr. McClain had agreed that alimony would end upon Mrs. McClain's co-habitation with a male, Mr. McClain would have had to prove something far more difficult to end his alimony obligation. In that case, Mr. McClain would have to prove the relationship of the parties, which is a more difficult thing to do than merely providing that Mrs. McClain was living with a man to whom she was not related. Proving the nature of the relationship between Mr. Bryan and Mrs. McClain is precisely what the trial court required Mr. McClain do, even though this was more than he had bargained for.

The Separation Agreement was "in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact," the intention of the parties is a question of law. Lane, 284 N.C. at 410, 200 S.E.2d at 624. Hence, the trial court erred in adding language to in under the guise of interpretation, and should have concluded that Mrs. McClain's living with Mr. Bryan terminated Mr. McClain's alimony obligation.

II. THE COURT BELOW ERRED IN FINDING AS A FACT THAT LIVING IN MR. BRYAN'S HOME DOES NOT CONSTITUTE A TERMINATING EVENT UNDER THE PARTIES' SEPARATION AGREEMENT.

(Issues # 1, 5, 6)

The court below found as a fact: "living in the home of Mr. & Mrs. Bryan as a[n] in home care provider does not constitute a terminating event under the parties' Separation agreement, as the parties did not intend that an employer/employee relationship was 'living with an unrelated male person in excess of 5 days.'" (R. p. 28, FOF # IV). However, there was no evidentiary basis for this finding of fact, and it cannot be sustained on appeal. See Pulliam, 348 N.C. at 625, 501 S.E.2d at 903.

The trial court looked to the parties' subjective intent to interpret the Separation Agreement language: "living with an unrelated male person in excess of 5 days." The trial court found as a fact:

the parties did not intend that an employer/employee relationship was "living with an unrelated male person in excess of 5 days."

(R. p. 28, FOF IV).

Setting aside whether this is the appropriate inquiry, the Record does not support this finding of fact. Mrs. McClain stated: "I thought it was a job, not living with a male." (Trans. p. 6). Mrs. McClain did not make any other statement

about what her understanding of the Separation Agreement. This statement is insufficient evidence to establish that the parties did not "intend that an employer/employee relationship was 'living with an unrelated male person in excess of 5 days,'" as the trial court found as a fact. (R. p. 28, FOF # IV).

In any event, Mrs. McClain's self-serving statements about her understanding about the meaning of a term in the Separation Agreement should be tempered with her admission that she did not read the agreement carefully. She testified: "I read it [the separation agreement] very quickly. I was called to the office -- go down to his office, sign it, and that was it." (Trans. p. 12). Mrs. McClain's hurried and incomplete review of the Separation Agreement wholly undermines the trial court's finding of fact regarding her intent. If she hardly read the document, how can she have any intent as to the specific terms in it?

Mr. McClain testified:

- 19 Q. At the time you signed the agreement ----
20 A. Yes.
21 Q. did you intend to have your wife's alimony
22 terminated if she worked as an in-home healthcare
23 provider?
24 A. I -- no.

(Trans. p. 24).

One can be an in-home healthcare provider without living in the patient's house. Hence, Mr. McClain's statement he did not intend his wife's alimony to terminate if she worked as an in-

home healthcare provider, is not conclusive of the fact that he did not "intend that an employer/employee relationship was 'living with an unrelated male person in excess of 5 days,'" as the trial court found as a fact. (R. p. 28, FOF # IV).

Moreover, Mr. McClain further testified:

4 Q. Did you intend that if she resided with a male
5 not related with her, that it would terminate alimony?
6 A. Yes.

(Trans. p. 25). His testimony in this regard was made without qualification and undermines the trial court's finding of fact that the parties did not "intend that an employer/employee relationship was 'living with an unrelated male person in excess of 5 days,'" (R. p. 28, FOF # IV).

The trial court's finding of fact that the parties did not "intend that an employer/employee relationship was 'living with an unrelated male person in excess of 5 days,'" (R. p. 28, FOF # IV) is not supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," as required by Shipman, 357 N.C. at 474, 586 S.E.2d at 253.

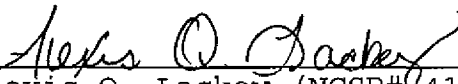
CONCLUSION

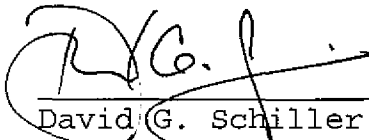
The trial court's misapplication of the law as stated herein above has prejudiced and harmed Defendant. For the reasons stated hereinabove, this Court should reverse the trial court's Order.

Respectfully submitted, this the 10th day of December, 2012.

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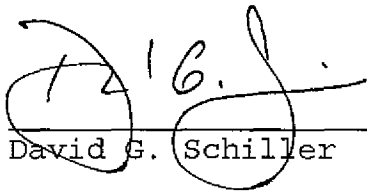
Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I, David G. Schiller, do hereby certify that on this date a copy of the foregoing document, **DEFENDANT-APPELLANT'S BRIEF**, was served on the counsel indicated below by depositing the same in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the U.S. Postal Service, properly addressed:

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This the 10th day of December, 2012.



David G. Schiller