IN THE MISSOURI SUPREME COURT

No. SC91498

ROBERT J. SIMPSON,

Appellant,

v.

ROWENA A. SIMPSON,

Respondent.

Appeal from the Circuit Court of St. Louis County
The Honorable Thomas J. Prebil, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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INTRODUCTION AND SUMMARY

This case presents a question of law involving spousal support obligations arising from an uncontested dissolution of marriage proceeding. Section 452.370 [1] creates a rebuttable statutory presumption that spousal maintenance terminates upon the recipient's remarriage. The presumption is rebutted if the judgment states or the parties otherwise agree in writing that maintenance extends beyond remarriage. Here, the obligor declared under oath and in open court that he had agreed to pay maintenance for 15 years even if the recipient remarried. The obligor's open court agreement is transcribed into writing and is a part of the record. It is unambiguous and is fully consistent with the judgment and the parties' settlement agreement. Missouri has long held that sworn declarations made while under oath in open court are binding and conclusive. The circuit court and the Court of Appeals properly rejected the obligor's claim that maintenance should be terminated.

[1] All statutory references are to the Revised Statutes of Missouri (2011).

STATEMENT OF FACTS

Robert J. Simpson (Husband) and Rowena A. Simpson (n/k/a Bennett) (Wife) were married in June 1981 (LF 10). The parties had two children during their marriage (LF 10, 55). On December 14, 2004, Husband filed a petition for dissolution of marriage in St. Louis County Circuit Court (LF 6).

The parties owned substantial assets and Husband earned an annual income of $375,000 as a physician (LF 31). Wife was earning $12,000 per year at the time of the dissolution of the marriage (LF 31). The dissolution case was pending for one year, during which the parties engaged in formal discovery and had numerous court appearances (LF 3-6, 56). Eventually, the issues in the dissolution of marriage proceedings were settled.

On December 12, 2005, the trial court entered a judgment dissolving the marriage (LF 7-29). The dissolution judgment incorporated into its terms a "Marital Settlement and Separation Agreement" executed by the parties (Agreement)(LF 10-29). The Agreement provided for a division of the parties' property, custodial and support arrangements for the children and spousal maintenance to be paid by Husband to Wife (LF 10-26).

Section VII of the Agreement, entitled "Maintenance" set forth Husband's obligation to pay Wife maintenance as follows:

> … Husband agrees to pay Wife nonmodifiable maintenance in the sum of $12,000 per month for a period of 15 years.
>
> …
>
> The payments shall terminate prior to the expiration of said 15 year period only in the event of the death of either party.

(LF 19).

The judgment (including the incorporated Agreement) did not mention the continuation of maintenance after Wife's remarriage, but that issue was specifically addressed during a hearing conducted by the circuit court on the day the judgment was entered (LF 55-60).

The parties had signed the Agreement prior to the time they testified (LF 57-58). Wife's attorney requested that both parties testify (LF 55). Under questioning by her attorney, Wife acknowledged that she understood the terms of the settlement (LF 55-57). She confirmed that the parties had engaged in intense negotiations over a period of months that eventually resulted in the settlement (LF 56).

Wife testified that she understood that the maintenance she would receive from Husband was *not* subject to modification and would continue for a fixed term of 15 years (LF 56).

Husband's attorney then called Husband to testify (LF 57). Husband was asked whether he understood and agreed with the maintenance obligations he had undertaken:

> Q: All right. You understand, as opposing counsel stated previously, the issues about maintenance?
>
> A: Yes.
>
> Q: And you agree to pay Rowena a set amount of money over a period of time?
>
> A: Yes.
>
> **Q: And whether she gets remarried or not that doesn't change your obligation to make payments?**
>
> **A: Right.**
>
> **Q: And that the only way maintenance terminates is upon your death or her death?**
>
> **A: Correct.**

(LF 58)(emphasis added).

On October 31, 2009, Wife remarried (LF 27, 50). On November 24, 2009, Husband filed a motion asking the circuit court to terminate his obligation to pay Wife maintenance (LF 27-29). Husband cited § 452.370 in support of his request to terminate his maintenance obligation due to Wife's remarriage (LF 27-29). Husband attached as an exhibit to his motion a copy of Wife's marriage license (LF 50).

Wife moved to dismiss Husband's motion to terminate maintenance (LF 51-54). Wife attached to her motion the transcript of the December 12, 2005 hearing (LF 55-60).

The motions were argued to the circuit court on May 6, 2010 (LF 1). The circuit court considered the arguments of counsel, the memoranda of law filed by each party, the marriage certificate and the transcript of the non-contested hearing (LF 94-95).

On June 2, 2010, the trial court entered an Order and Judgment granting Wife's motion to dismiss, concluding:

> [T]he court finds that … the parties agreed, in writing, that the maintenance to be paid by [Husband] to [Wife] was nonmodifiable, that it would be paid for a term of 15 years, and terminate

> prior to the expiration of 15 years only if one of the parties died. This writing was supported by [Husband's] testimony at the time of the hearing during which he clearly stated his understanding that maintenance would not terminate if [Wife] remarried.

(LF 94-95).

On June 17, 2010, Husband filed a Notice of Appeal (LF 96-97). After briefing and oral argument, the Missouri Court of Appeals, Eastern District, affirmed the circuit court's decision in a *per curiam* order pursuant to Rule 84.16(b). The Eastern District issued a Memorandum Opinion supplementing its order affirming the trial court's judgment.

The Eastern District engaged in a *de novo* review of the circuit court's judgment (Mem. Op. at 2). The Court determined that Wife's motion to dismiss had been converted into a motion for summary judgment since both parties acquiesced in the trial court's consideration of matters outside the pleadings (Mem. Op. at 3). The Court of Appeals affirmed the trial court's judgment and determined that Husband's uncontradicted, sworn testimony rebuts the statutory presumption in § 452.370:

> "An oral admission or agreement, made in open court for the purposes of trial or hearing, and preserved for the record has the same binding force and effect as a written, signed stipulation."

(Mem. Op. at 4-5)(quoting *Unterreiner v. Estate of Unterreiner*, 899 S.W.2d 596, 598 (Mo.App.ED 1995) and *Fair Mercantile Co. v. Union-May Stern Co.*, 221 S.W.2d 751, 755 (Mo. banc 1949)).

Husband applied to this Court for transfer, and on April 26, 2011, this Court sustained Husband's motion and granted transfer.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT HUSBAND'S MAINTENANCE OBLIGATION DID NOT TERMINATE UPON WIFE'S REMARRIAGE BECAUSE:

A. HUSBAND'S SWORN TESTIMONY GIVEN IN COURT AND TRANSCRIBED AS A PART OF THE COURT'S RECORD SATISFIES THE STATUTORY REQUIREMENT OF AN AGREEMENT IN WRITING WHICH REBUTS THE STATUTORY PRESUMPTION THAT MAINTENANCE ENDS WHEN THE RECIPIENT REMARRIES; AND

B. HUSBAND'S SWORN DECLARATION CONFIRMING THAT HIS MAINTENANCE OBLIGATION EXTENDS BEYOND WIFE'S REMARRIAGE IS BINDING UPON HIM AS AN ENFORCEABLE STIPULATION AND A JUDICIAL ADMISSION THEREBY REBUTTING THE STATUTORY PRESUMPTION THAT MAINENANCE ENDS UPON THE RECIPIENT'S REMARRIAGE.

In this action, Husband seeks to disregard his sworn testimony during which he acknowledged in open court his agreement to pay maintenance for fixed term of 15 years, regardless of whether Wife remarried. Husband

negotiated the certainty of that time-frame irrespective of Wife's remarriage, and now seeks to escape from his obligations.

Section 452.370 creates a presumption that is rebuttable if the true facts conflict with the presumed facts. Here, they do, and the trial court correctly denied Husband's motion to terminate maintenance. The transcript of the hearing during which Husband acknowledged his obligation to continue to pay Wife maintenance even if she remarried constitutes a writing sufficient to satisfy the statute.

While neither the circuit court nor the Court of Appeals specifically reached the issue, judicial estoppel bars Husband from disavowing his uncontradicted sworn statement. Husband agreed and testified that his maintenance obligation extends for 15 years, regardless of Wife's marital status. Judicial estoppel prevents Husband from taking the opposite position now.

A. Standard of Review and Procedural Background

The standard of review in this Court is *de novo*. The legal issue involves the interpretation of a statute and no deference is owed to the circuit court. *Spralding v. SSM Health Care of St. Louis*, 313 S.W.3d 683, 686 (Mo. banc 2010). In addition, because the case below was submitted on stipulated facts, the question on appeal is a determination of whether or not the circuit court

drew the proper legal conclusions from the agreed facts. *White v. Director of Revenue*, 321 S.W.3d 298, 308 (Mo. banc 2010).

Although Wife's motion was denominated a motion to dismiss, both parties acquiesced in the circuit court's consideration of materials outside the pleadings. Husband presented the circuit court with Wife's marriage license, confirming her remarriage (LF 50). Wife presented and the circuit court considered the transcript of the December 2005 non-contested hearing (LF 55-60). Accordingly, the motion to dismiss was automatically transformed into a motion for summary judgment. Rule 55.27(a); *Brown v. Simmons*, 270 S.W.3d 508, 510-11 (Mo.App.SD 2008)(cited in the Eastern District's Memorandum Opinion at 2-3); *see also ADP Dealer Services Group v. Carroll Motor Co.*, 195 S.W.3d 1, 6 (Mo.App.ED 2005). A motion for summary judgment is purely an issue of law which is reviewed *de novo*. *ITT Commercial Finance Corporation v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

B. Section 452.370.

Section 452.370 addresses the judicial modification of maintenance provisions, and includes the following rebuttable presumption in subsection 3:

> Unless otherwise agreed in writing ***or*** expressly provided in the judgment, the obligation to pay

> future statutory maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

§ 452.370 (emphasis added).

The operative portion of the statute is phrased in the disjunctive and does not use a defined term or a legal term of art. Instead, it employs plain and ordinary language: *in writing*.[2] A writing is the "intentional recording of words that may be viewed or heard with or without mechanical aids," and it "includes hard-copy documents, electronic documents on computer media, audio and videotapes, e-mails, and any other media on which words can be recorded." *Black's Law Dictionary* (9th ed. 2009). The intent of the statute is obviously to ensure there is adequate proof of the existence of an agreement to extend maintenance beyond remarriage. Here, there is definitive proof confirmed by the sworn testimony of the obligor himself.

[2] If the legislature had intended that a marital settlement and separation agreement was the only document in which such an agreement to extend maintenance could be made, the statutory term of art "separation agreement" (specifically referenced in § 452.325) would have been utilized, rather than the more general words "in writing."

C. A Rebuttable Statutory Presumption is not Determinative if there is an Irrefutable, Binding Agreement to the Contrary.

Husband cannot claim that there was no agreement between the parties to extend maintenance beyond remarriage. Instead, he contends that the agreement he made is not binding on him. He asserts that his agreement was oral and that the statutory presumption is rebutted only if such an agreement is included in the court's judgment or the parties' settlement agreement. The trial court and the Court of Appeals correctly rejected these arguments because even if his statement had not been transcribed, an open-court sworn declaration of a party is as binding on him as a written agreement.

Consider, initially, the limitations of a rebuttable presumption:

> [A] rebuttable presumption is a rule of law by which the finding of a basic fact gives rise to a presumed fact's existence, unless the presumption is rebutted. *Rebuttable presumptions are not evidence, and are never indulged in against established facts.*

31A CJS EVIDENCE. § 207 *Conclusive and Rebuttable Presumptions* (emphasis added). Recently, in *Deck v. Teasley*, this Court analyzed the effect of the rebuttable statutory presumption in § 490.715. This Court explained that "when a presumption is rebutted, it disappears from the case and the fact-finder

receives the issue free from any presumption." *Deck v. Teasley*, 322 S.W.3d 536, 540 (Mo. banc 2010) (citing *Duff v. St. Louis Mining & Milling Corp.*, 255 S.W.2d 792, 793-94 (1953)). This confirms that a presumption is not determinative if there is evidence sufficient to support a finding contrary to a presumed fact. *Id.* Here there is irrefutable testimony by Husband confirming his agreement to continue paying maintenance regardless of Wife's marital status.

Missouri's most basic rules of statutory construction favor pragmatic interpretation of statutory provisions. This Court has often declared that the "primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning." *South Metropolitan Fire Protection District v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009)(quoting *State v. McLaughlin*, 265 S.W.2d 257, 267 (Mo. banc 2008)). And, "[r]ules of statutory construction cannot be rigidly applied," but, rather, the "main purpose of these rules of statutory construction is to determine legislative intent and give meaning to the language." *Id.* Where an ambiguity exists, the Court should "attempt to read the statute in a way that does not render an absurd result." *Rozelle v. Rozelle*, 320 S.W.3d 225 (Mo.App.ED 2010).

It would be an absurd and inequitable result if Husband were able to reap the other benefits of his bargain but escape from his agreement to pay maintenance for 15 years irrespective of Wife's remarriage. The statute should not be applied in a manner which disregards irrefutable evidence of the parties' intentions.

D. Husband's Transcribed Sworn Declaration is – in and of itself – an Agreement in Writing Extending his Maintenance Obligation Beyond Wife's Remarriage.

Husband's argument is premised on the incorrect assumption that a binding agreement to extend maintenance beyond the recipient's remarriage can occur only in the parties' settlement agreement or the court's judgment. This is not the case because the disjunctive language in the statute contemplates that something other than a judgment or settlement agreement can satisfy the requirement of a writing. Some other writing can satisfy the statute and a sworn, open-court declaration which is transcribed into writing rebuts the statutory presumption.

This Court's decision in *Cates v. Cates*, makes it clear that there are two available methods to rebut the statutory presumption: (1) to provide express language in the judgment (which may or may not incorporate a separation agreement); or (2) to otherwise "agree in writing." *Cates v. Cates*, 819 S.W.2d

731, 736-37 (Mo. banc 1991); § 452.370 RSMO. In *Cates*, this Court specifically discussed these "two ways" the statute can be rebutted.

The origins of § 452.370 confirm that clear evidence of an agreement between the parties is all that is required to rebut the statutory presumption. Section 452.370 was a part of the original Dissolution of Marriage Act codified in Missouri in 1973. The section is based upon Section 316 of the Uniform Marriage and Divorce Act, ULA, MARRIAGE & DIVORCE §316 (1970). As explained in the comments to §316, this section "authorizes the parties to agree in writing or the court to provide in the decree that maintenance will continue beyond the death of the obligor or the remarriage of the obligee." *Id.*

Husband seeks to avoid the consequences of his sworn acknowledgement that his maintenance obligation survives Wife's remarriage by classifying his open court, sworn admission as merely parole evidence or "transcribed oral testimony." Yet, Husband's testimonial agreement to pay Wife regardless of her marital status is a stand-alone, binding agreement. It need not "amend" the parties' settlement agreement or the circuit court's dissolution judgment, as Husband contends (App. Br. at 17-18). Moreover, Husband's sworn admission need not be admissible parole evidence so as to be included within the judgment or settlement agreement. Husband's statement is a self-contained, express agreement to extend his maintenance beyond Wife's remarriage.

Furthermore, even if considered strictly as oral evidence, Husband's statement is admissible. The parole evidence rule only "prohibits the use of oral evidence to contradict or change the terms of a written, unambiguous and complete contract." *Norden v. Friedman*, 756 S.W.2d 158, 163 (Mo. banc 1988). The rule "does not prohibit evidence of agreements entered into *after* the contract was executed." *George F. Robertson Plastering Company v. Magidson*, 271 S.W.2d 538, 541 (Mo. 1954)(emphasis original)(*cited in Warrenton Campus Shopping Center, Inc. v. Adolphus*, 787 S.W.2d 852, 855 (Mo.App.ED 1990)). Husband's effort to re-cast his sworn declaration as inconsequential parole evidence is unavailing because his admission came after his execution of the Agreement.

The trial court concluded here that Husband and Wife had exercised the authority the statute allows, and had agreed that Husband would continue paying Wife maintenance for the agreed-upon fixed term of 15 years, even if she remarried. The evidence of the parties' agreement is the transcript of their non-contested hearing wherein Husband agreed that the settlement he had just entered into required him to pay Wife maintenance for 15 years even if Wife remarried.

It would defy logic to conclude under the facts presented here, that the transcript – typewritten words on 8½ x 11 paper – is not a "writing" for

purposes of § 452.370. It would elevate form over substance to find that the written transcript of Husband's sworn testimony is not a writing sufficient to confirm the parties' Agreement.

Husband relies exclusively on the Southern District's opinion in *In re Marriage of Rea*, 773 S.W.2d 230 (Mo.App.SD 1989), to support his contention that the Husband's transcribed sworn testimony is not a writing sufficient to rebut the statutory presumption in § 452.370. While *Rea* contains a sentence which seemingly supports Husband's argument, a close examination of the decision reveals its inapplicability to this case.

Rea did not involve a maintenance obligation. Ms. Rea relied upon her own testimony to support a claim that Mr. Rea had agreed to pay her a property division payment in 10 *equal* annual installments. The word "equal" was not in the original agreement, and Mr. Rea contended that was not his intention. Ms. Rea could rely only upon her own testimony to support her assertions, and this was ultimately insufficient. This result would most assuredly have been different if Mr. Rea himself had testified and unequivocally declared this to have been his intention.

More importantly, *Rea* involves the strict limits of a *nunc pro tunc* order. This Court has consistently held that the power to issue *nunc pro tunc* orders is limited to circumstances where there was "some error or inadvertence" in the

"original entry" of a judgment. *Pirtle v. Cook*, 956 S.W.2d 235, 240 (Mo. banc 1997). The *Rea* Court concluded only that testimony by the obligee did not constitute a part of the written record sufficient to allow the circuit court to enter an order *nunc pro tunc* to alter its own judgment. *In re Marriage of Rea*, 773 S.W.2d at 234.[3]

Husband seizes upon the Southern District's language in *Rea* to attempt to apply it here. Yet, while the law applicable to *nunc pro tunc* orders is narrow, specific and requires proof of the error on the record, the inquiry here is far broader. There need only be an agreement in writing to rebut the statutory presumption.

E. Husband's Oral Statement Made in Open Court for the Purpose of the Entry of the Judgment of Dissolution has the Same Binding Force and Effect as a Signed Written Agreement.

This Court has frequently reaffirmed that statements made under oath in open court are always binding. Most recently, in *Akers v. City of Oak Grove*,

[3] *Unterreiner v. Unterreiner*, 899 S.W.2d 596 (Mo.App.ED 1995) distinguished *Rea* because the Unterreiners' entire settlement agreement was an oral stipulation made in court. *Unterreiner* thus confirms the binding effect of sworn stipulations and, as such, supports affirming the circuit court's judgment.

246 S.W.3d 916 (Mo. banc 2008), the Court cited its own long-standing precedent:

> An oral admission or agreement, made in open court for purpose of the trial or hearing, and preserved in the record, has the same binding force and effect as a written, signed stipulation.

Id. at 922 (citing *Fair Mercantile Co. v. Union-May-Stern Co.,* 221 S.W.2d 751,755 (Mo. 1949)). These in-court, sworn admissions have more "solemnity and better protection to the rights of the parties than an ordinary contract made out of court." *Fair Mercantile*, 221 S.W.2d at 755.

Missouri courts have frequently held that non-written expressions of intent satisfy statutory requirement that they be "in writing." *See, e.g. May v. State*, 718 S.W.2d 495, 497 (Mo. banc 1986) (this Court held that a criminal defendant waived his right to counsel by offering his waiver orally, in open court and on the record, even though § 600.051 requires a criminal defendant to make a written signed waiver); *Adams v. Moberg*, 205 S.W.2d 553, 559 (Mo. 1947) (this Court enforced an oral contract for the devise of real property, despite the fact that § 474.320 (wills) and § 432.010 (sale of land) requiring a writing); *Schweizer v. Patton*, 116 S.W.2d 39, 42 (Mo. 1937) (this Court compelled specific performance on an oral agreement to devise property);

Stoetzel v. Continental Textile Corporation of America, 768 F.2d 217, 222 (8th Cir. 1985)(interpreting Missouri law, the Eighth Circuit Court of Appeals held that the trial court properly relied on a judicial admission to remove contract from the writing requirements of § 432.010). *Lukas v. Hays*, 283 S.W.2d 561, 566 (Mo. 1955) (this Court upheld an oral agreement of adoption in spite of the writing requirement of § 432.010); *Taylor v. Coberly*, 38 S.W.2d 1055, 1062 (Mo. 1931)(also enforcing an oral contract of adoption); *Peirick v. Peirick*, 641 S.W.2d 195, 196-97 (Mo.App.ED 1982) (the court enforced an orally-stipulated property settlement read in open court between parties in a dissolution of marriage, even though §452.325 provides for "written separation agreement"); *Markwardt v. Markwardt*, 617 S.W.2d 461, 462 (Mo. App.ED 1981) ("this court believes that an oral stipulation should be as binding as a written contract when the oral agreement is entered into in open court by parties represented by able counsel and the agreement is spread upon the record"). Each of these cases reaffirms the fundamental principle that parties will be bound by their unequivocal declarations, even if made orally.

No Missouri cases concerning the § 452.370 statutory presumption have ever confronted the basic principle that a party will not be relieved of obligations freely undertaken under oath in open court. decided have contrasted this Husband's Brief relies heavily on *Cates v. Cates* and *Maddick v. Deshon*.

Yet neither case, nor any other case cited by Husband required the court to consider the effect of the maintenance obligor's own testimony unconditionally agreeing that his maintenance obligation would continue even if his former spouse remarried.

In *Cates*, the recipient spouse was required to resort to indirect references, trying, in vain, to place into her former husband's mouth the words which were so clearly stated by Husband in this case. Ms. Cates tried to convince the court of the parties' original intentions based on inference, innuendo, strained interpretations, claims of ambiguity and similar uncertain proof. No such uncertainty is present here.

In *Maddick*, Ms. Deshon could only attempt to rebut the statutory presumption by claiming that words stricken and then initialed in the separation agreement created a "negative inference" that supported her position. *Maddick v. Deshon*, 296 S.W.3d 519, 526 (Mo.App.WD 2009). *Maddick* reaffirmed that negative inferences, claims of ambiguity and other such indirect proof are not sufficient to rebut the statutory presumption. *Id.* It is impossible to imagine that the result would have been the same if Mr. Maddick had himself clearly stated, under oath, that he had agreed that his maintenance obligations extended beyond Ms. Deshon's remarriage.

F. Judicial Estoppel Prevents Husband from Disavowing his Prior Express Judicial Admission that his Maintenance Obligation Continues for 15 years Regardless of Wife's Remarriage.

Husband obtained benefits in the original proceeding in consideration for his agreement to pay Wife maintenance beyond her remarriage. Among other things, he secured a *non-modifiable* maintenance award and the certainty of a fixed term – something which is extraordinarily difficult, if not impossible, to obtain absent a compromise and settlement. This is true because Missouri cases establish that the "judicial preference is for a maintenance award of unlimited duration" at dissolution. *Lincoln v. Lincoln*, 16 S.W.3d 346, 347 (Mo.App.WD 2000). Having agreed to pay maintenance for 15 years even if Wife remarried, in consideration for the other settlement terms, Husband should be barred by judicial estoppel from now evading his obligation to pay for the full term.

Judicial estoppel "applies to prevent litigants from taking a position in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits from such a contrary position at that time." *Besand v. Gibbar*, 982 S.W.2d 808, 810 (Mo.App.ED 1998). In *Jeffries v. Jeffries*, the Court of

Appeals explained that "[t]he doctrine of judicial estoppel has been established in Missouri, and is designed to preserve the dignity of the courts and insure order in judicial proceedings." *Jeffries v. Jeffries*, 840 S.W.2d 291, 293 (Mo.App.ED 1992). Judicial estoppel "embodies the notions of common sense and fair play," and "holds that a person who states facts under oath during the course of a trial is estopped to deny such facts in a subsequent suit." *Egan v. Craig*, 967 S.W.2d 120, 126 (Mo.App.ED 1998). Here, the doctrine should bar Husband from taking a diametrically contrary position and obtaining benefits in both the earlier proceeding and this action.

Husband's testimony is also binding on him as a judicial admission. According to the Missouri Supreme Court, "[a] judicial admission is an act done in the course of judicial proceedings that concedes for the purpose of litigation that a certain proposition is true." *Moore Automotive Group, Inc. v. Goffstein*, 301 S.W.3d 49, 54 (Mo. banc 2009)(citing *Hewitt v. Masters*, 406 S.W.2d 60, 64 (Mo. 1966)). This doctrine too supports the trial court's conclusion.

Thus, Husband's unequivocal agreement to pay Wife maintenance for a fixed term of 15 years regardless of her remarriage is binding and enforceable.

CONCLUSION

For all of the foregoing reasons, the judgment of the trial court should be affirmed.

Respectfully submitted,

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Dated: July 25, 2011

RULE 84.06 CERTIFICATION

I hereby certify, pursuant to Rule 84.06(c) of the Missouri Rules of Civil Procedure, that Respondent's Substitute Brief was prepared using Microsoft Word, in 14-point Times New Roman font and that it contains 4,917 words, as determined by the Microsoft Word word-counting system in compliance with Rule 84.06(b) and Local Rule 360(c). I also certify that the CD-ROM of the Brief filed with the Court and served on all parties have been scanned for viruses and are virus-free.

_____

James P. Carmody

CERTIFICATE OF SERVICE

I certify that two hard copies of this Respondent's Substitute Brief including the Appendix and one copy of Respondent's Substitute Brief on a CD-ROM were served on each of the counsel identified below by hand delivery (except as noted) on July 25, 2011:

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APPENDIX