IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

CORA LADELL HELTON KIMBROUGH,	)	
	)	
Plaintiff/Appellee,	)	
	)	C.A. No. 01A01-9507-CH-00318
v.	)	
	)	Sumner Chancery No. 90D-272R3
DONALD HENRY HELTON,	)	
	)	
Defendant/Appellant.	)	

APPEAL FROM THE CHANCERY COURT OF SUMNER COUNTY
THE HONORABLE TOM E. GRAY, CHANCELLOR

William P. Jones
Hendersonville, Tennessee
Attorney for Appellant

Nancy Kay Corley
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Nashville, Tennessee
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REVERSED AND REMANDED

OPINION FILED:

WILLIAM H. WILLIAMS, SENIOR JUDGE

CONCUR:

CRAWFORD, P.J., W.S.

HIGHERS, J.

This case involves a motion for summary judgment arising initially out of a divorce proceeding in the Chancery Court of Sumner County, Tennessee. The decree of divorce was filed on December 20, 1991 and contained therein a marital dissolution agreement between the parties

which provided, *inter alia*, for the payment by the Husband/Appellant to the Wife/Appellee the sum of $50,000 termed as alimony *in solido*. The amount was to be paid over a period of five years in cash of $11,000 first payment, and thereafter beginning February 1, 1992 the sum of $24,000 payable at $400 monthly together with interest from entry of the final decree, and three concurrent future payments of $5,000 each on certain dates specified in the marital dissolution agreement. It was further provided in a subsequent and separate paragraph of the marital dissolution agreement that Husband would pay $200 monthly as rehabilitative alimony for 24 months. This paragraph provided that the payments for rehabilitative alimony would terminate upon Wife's death or remarriage or the conclusion of 24 months. The former clause providing for alimony *in solido* did not contain the death or remarriage clause. Also, the rehabilitative alimony paragraph specifically provided that "said sum shall be taxable to Wife and deductible by Husband." The paragraph providing for alimony *in solido* did not so provide. Paragraphs 10 and 11 state as follows:

> 10. Alimony In Solido. Husband shall pay to Wife alimony in solido in the sum of $50,000.00. Husband shall pay said alimony in solido as follows:
>
> > (a) He shall pay a total of $11,000 cash before or on January 17, 1992. Failure of Husband to pay said $11,000 before or on January 17, 1992 shall be a basis for the Court to set aside this Agreement in its entirety.
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> > (b) Husband shall pay $24,000 at the rate of $400 per month until paid in full, with the first payment due on February 1, 1992. Said sum shall bear interest thirty (30) days after the entry of the Final Decree at the rate of 8% per annum. A portion of each payment shall be interest if accrued. Wife shall provide Husband with an amortization schedule.
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> > (c) Husband shall pay $5,000 plus accrued interest on February 1, 1993, said sum to bear interest from thirty (30) days after the entry of the Final Decree at 8% per annum.
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> > (d) Husband shall pay $5,000 plus accrued interest on August 1, 1993, said sum to bear interest from thirty (30) days after the entry of the Final Decree at the rate of 8% per annum.
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> > (e) Husband shall pay $5,000 plus accrued interest on February 1, 1994, said sum to bear interest from thirty (30) days after the entry of the Final decree in this cause at the rate of 8% per annum.
> >
> > (f) Husband may prepay said alimony in solido at any

> time prior to the due date and upon payment in full, Wife shall acknowledge full payment in writing.
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> Husband acknowledges that the sums set forth above are for Wife's necessary support and maintenance, however, said sum may not be modified or contractual beyond the agreed terms. He further represents that the amount is reasonable and that it is within his means to pay. He acknowledges and agrees that the alimony in solido as set forth above is non-dischargeable in bankruptcy.
>
> 11. Rehabilitative Alimony. Husband agrees to pay to Wife rehabilitative alimony in the amount of $200.00 per month for twenty-four (24) months, due and payable in hand or postmarked on the 10th day of each month beginning January 10, 1992. Said rehabilitative alimony payment is for a twenty-four (24) month interval and may not be extended beyond such term except as set forth below. Said rehabilitative alimony payment shall terminate upon Wife's death or remarriage or at the conclusion of the twenty-four (24) month term, whichever occurs first. Said sum shall be taxable to Wife and deductible by Husband.
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> Wife agrees that she will not seek modification with regard to the rehabilitative alimony so long as Husband keeps his agreements as set forth in this Marital Dissolution Agreement regarding the payment of alimony in solido. If Husband should fail to pay any sums of alimony in solido set forth in this Agreement for any reason, including the filing of a bankruptcy proceeding, to Wife's financial detriment, then Wife shall have the right to seek modification of the rehabilitative alimony provision to provide for the satisfaction and completion of the parties' agreement herein.

Husband proceeded to duly pay according to the terms of the marital dissolution agreement until March 8, 1993 when he filed a bankruptcy petition in Federal Court, Middle District of Tennessee, seeking to discharge the two obligations arising under the marital dissolution agreement, to pay alimony *in solido* plus interest, and rehabilitative alimony. Wife lifted the automatic stay in the federal bankruptcy court as allowed by federal law and filed a complaint in the state divorce court on June 11, 1993, asking the trial court to determine that Husband's obligation to pay Wife alimony *in solido* pursuant to the final decree of divorce is nondischargeable in bankruptcy under 11 U.S.C. § 523(a)(5). Subsequently, the Wife filed a motion for summary judgment. The Husband, in his response opposing the summary judgment motion, declared that the alimony *in solido* was actually a property settlement in disguise. The chancellor granted Wife's motion for summary judgment in whole, the effect of which barred the disputed debts from discharge in the federal bankruptcy court. Husband appealed and is properly before this Court. We reverse and remand this cause for a full evidentiary hearing.

ISSUE

The sole issue presented is:

Whether the chancellor erred in granting summary judgment for the Wife/Appellee.

This is a summary judgment action pursuant to Rule 56.02, Tenn. R. Civ. P. The federal rule[1] is "virtually identical" with Rule 56, Tenn. R. Civ. P. Indeed, the Tennessee Supreme Court in Byrd v. Hall, 847 S.W.2d 208, 214 (Tenn. 1993) so stated and declared the federal cases of Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) to be the applicable law in Tennessee for procedural guidance of the state courts in deciding summary judgment cases. Byrd, 847 S.W.2d at 214. Tennessee trial courts possess concurrent jurisdiction with federal bankruptcy courts to decide the dischargeability of debts to a spouse in connection with a divorce decree. In Houghland v. Houghland, 844 S.W.2d 619 (Tenn. Ct. App. 1992), this Court stated:

> We recognize that the trial court has concurrent jurisdiction with the bankruptcy court to determine the dischargeability of debts of a spouse incurred in connection with a divorce decree (citing cases). Under 11 U.S.C. § 523(a)(5), the determination of dischargeability depends on whether the debt may be characterized as alimony, maintenance, or support. See In re Calhoun, 715 F.2d 1103 (6th Cir. 1983).

Houghland, at 625.

11 U.S.C. § 523(a)(5)(B) states as follows:

> § 523. **Exceptions to discharge**.
> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title . . . does not discharge an individual debtor from any debt. . . .
>
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record . . . or property settlement agreement, but not to the extent that. . . .
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

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[1]Rule 56, Fed. R. Civ. P.

In short, under this federal code section, if the debt is a property settlement, it is dischargeable. If it is actually alimony, maintenance, or support payments to the spouse, it is not dischargeable. State courts may hear and decide such actions, but the state court must apply federal bankruptcy law in deciding dischargeability. See In re Calhoun, 715 F.2d at 1107, which states: "What constitutes alimony, maintenance or support will be determined under the bankruptcy law, not state law."

This appeal is from the action of a state trial court upon a motion for summary judgment decided procedurally under Rule 56, Tenn. R. Civ. P., but under substantive statutory bankruptcy law. Regardless, the wording of Rule 56(c), Fed. R. Civ. P., and Rule 56.03, Tenn. R. Civ. P., are identical. The pertinent portion of each states:

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

Also, Rule 56(e), Fed. R. Civ. P., and Rule 56.05, Tenn. R. Civ. P., are practically identical. The pertinent portion of each provides that the adverse (non-moving) party "may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. . . ." See Byrd v. Hall, 847 S.W.2d at 210.

It is clear then that the trial court, in its consideration of a motion for summary judgment, is limited to the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . ." There can be no evidentiary hearing entailing findings of fact. Indeed, under the rules of summary judgment jurisprudence, the trial court cannot weigh the evidence and judge the credibility of the deponents. The trial court must accept the facts alleged by the adverse (non-moving party) as true. See Byrd v. Hall, id., at 212. Therefore, the presumption of correctness of finding of facts under Rule 13(d), Tenn. R. App. P., does not come into play. Rule 13(d) states:

> **Findings of fact in civil actions.** Unless otherwise required by statute, review of findings of fact by the trial court in civil actions

> shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. . . .

This review is, therefore, *de novo* without the presumption of correctness. Further, this Court is not bound by conclusions of law by the lower court. See Adams v. Dean Roofing Co., 715 S.W.2d 341, 343 (Tenn. Ct. App. 1986); Carter v. Krueger, 916 S.W.2d 932, 935 (Tenn. Ct. App. 1995).

In arriving at our decision in this case, we are mindful of the tenets set forth in Byrd v. Hall, id., as to the proper summary judgment analysis to be applied in Tennessee. We quote:

> . . . [T]he party seeking summary judgment must carry the burden of persuading the court that no genuine and material factual issue exists; that the nonmoving party must affirmatively demonstrate with specific facts that there is indeed a genuine and material factual dispute; that the court must view the evidence in favor of the nonmoving party and allow all reasonable inferences in his favor; that trial judges are not to weigh the evidence; that the critical facts are those deemed 'material' under the substantive law governing the case; and that summary judgment is to be used only when the resolution of the case depends upon the application of a legal principle, such that there is nothing to submit to the trier of fact to resolve in favor of one party or the other.
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> Rule 56 comes in to play only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Thus, the issues that lie at the heart of evaluating a summary judgment motion are: (1) whether a factual dispute exists; (2) whether the disputed fact is material to the outcome of the case; and (3) whether the disputed fact creates a genuine issue for trial. (emphasis in original).
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> First, when the facts material to the application of a rule of law are undisputed, the application is a matter of law for the court since there is nothing to submit to the jury to resolve in favor of one party or the other.
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> Second, to preclude summary judgment, a disputed fact must be 'material.' A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed. Therefore, when confronted with a disputed fact, the court must examine the elements of the claim or defense at issue in the motion to determine whether the resolution of that fact will effect the disposition of any of those claims or defenses.

* * * *

> Third, when the evidence or proof in support of or in opposition to a summary judgment motion establishes a disputed fact, and the fact is material, as we have defined that term, the court must then determine whether the disputed material fact creates a genuine issue within the meaning of Rule 56.03. Proceeding from the premise that Rule 56 is intended to avoid unnecessary trials, the test for a 'genuine issue' is whether a reasonable jury could legitimately resolve that fact in favor of one side or the other. If the answer is yes, summary judgment is inappropriate; if the answer is no, summary judgment is proper because a trial would be pointless as there would be nothing for the jury to do and the judge need only apply the law to resolve the case. In making this determination, the court is to view the evidence in a light favorable to the nonmoving party and allow all reasonable inferences in his favor.
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> * * * *
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> Fourth, the party seeking summary judgment has the burden of demonstrating to the court that there are no disputed, material facts creating a genuine issue for trial, as we have defined those terms, in that he is entitled to judgment as a matter of law. A conclusory assertion that the nonmoving party has no evidence is clearly insufficient.
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> * * * *
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> The Plaintiff (non-moving party) [sic] is not required to prove his entire case by a preponderance of the evidence at the summary judgment stage. He need only raise genuine issues of material fact, making summary judgment inappropriate. Nothing more is required of the Plaintiff as the nonmoving party.

Byrd v. Hall, 847 S.W.2d at 214-17.

CONTENTIONS OF THE PARTIES

A thorough perusal of the pleadings and affidavits filed by both parties in the cause discloses as follows:

Wife/Appellee, as the moving party, relies upon the final divorce decree and the provisions of the marital dissolution agreement to support her motion for summary judgment. She contends that the final decree of divorce of December 20, 1991 granted her an absolute divorce on grounds of irreconcilable differences and by incorporation approved the marital dissolution agreement signed by both parties that provided for payment of two types of alimony to her. One type, under paragraph 11, was short-term rehabilitative alimony providing for payments at $200 a month for two years or until death or remarriage by Wife. It is the contention of Wife/Appellee that this paragraph was for the purpose of supplementing her immediate earning capacity. The second type, in paragraph 10,

was for alimony *in solido* of $50,000 payable in accordance with a payment schedule set out in the agreement and was an effort to assist her in continuing her standard of living at the level she had enjoyed during the marriage. There was no termination clause by death or remarriage. Wife further states that the appellant personally acknowledged under oath that the alimony *in solido* [sic] was for her necessary support and maintenance, and he did so with the advice and consent of his attorney. She further alleges that the appellant filed for bankruptcy on March 8, 1993 and listed the alimony and rehabilitative alimony as a debt for discharge in the amount of $37,259.55 plus interest.

Husband/Appellant, as the nonmoving party, countered by stating in his response and the affidavits of his attorney and himself that he did agree to the rehabilitative alimony as provided in paragraph 11 of the marital dissolution agreement and that was the only alimony agreed to by him. He stated there were no discussions that the alimony *in solido* (property settlement) in paragraph 10 was necessary for plaintiff (wife/appellee) to continue a certain standard of living. Husband's affidavit further stated that "none of the payments pursuant to paragraph 10 of the marital dissolution agreement made to plaintiff were taxable to her nor deductible for me because they were payments for property settlement." Attached to Husband/Appellant's affidavit as an exhibit are copies of checks paid by him to Wife/Appellee for years 1992 and 1993 in which checks for rehabilitative alimony in the amount of $200 each were so marked and checks in the amount of $400 each were marked "property settlement." Attached as Exhibit B to the affidavit are the 1991 and 1992 federal income tax returns for Husband/Appellant and as Exhibit C are the 1991 and 1992 federal income tax returns of the Wife/Appellee. No deductions are shown on Husband's returns for the $400 payment and no corresponding amounts are listed as alimony on the Wife/Appellee's return. The affidavit of Husband/Appellant explains the other payments reflected by the respective returns of each in which all were made pursuant to the provisions set out in the marital dissolution agreement. Husband/Appellant contends that the $50,000 amount found in paragraph 10 was a property settlement in disguise as it was agreed that Wife/Appellee would receive $50,000 in cash payments in lieu of any property or business interest. He submits that his "affidavit and other evidence" raise a genuine issue of material fact precluding summary judgment.

CONCLUSION

Wife/Appellee insists that Husband/Appellant is judicially estopped from repudiating his

agreement made under oath and contained in the marital dissolution agreement incorporated into the final divorce decree. No authority allowing the state doctrine of judicial estoppel in federal bankruptcy court is cited in support of her contention. We do not agree that the state rule of judicial estoppel should apply to bar a hearing on the merits under federal bankruptcy law of dischargeability of a debt.

The doctrine of judicial estoppel precludes a party who has made sworn statements in a judicial proceeding from subsequently contradicting the sworn statements in a later judicial proceeding. See, e.g., Sartain v. Dixie Coal & Iron Co., 150 Tenn. 633, 266 S.W. 313 (1924).

11 U.S.C. § 523(a)(5) states that an individual debtor is not discharged from any debt to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of such spouse or child, but not to the extent that:

> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support. (emphasis added).

11 U.S.C. § 523(a)(5)(B).

We think the above language clearly places the duty upon the bankruptcy court or, as here, the state court to establish the true nature of the debt. The state doctrines of *res judicata*, collateral estoppel, or judicial estoppel would all bar consideration of the federal bankruptcy law from further inquiry if such doctrines were given full faith and credit in the bankruptcy court. See In re Helm, 48 B.R. 215, 218-19 (Bkrtcy. W.D. Kentucky 1985).

There has not been a full evidentiary hearing on the merits at the state or federal level concerning the dischargeability of the obligation in the case *sub judice*. This is a vital point under federal bankruptcy law. See, e.g., In re Helm, at 218. In Helm, former husband as debtor filed complaint seeking determination of his contractual "maintenance" obligation. It was held that neither the doctrine of *res judicata* nor collateral estoppel barred the court from considering the issue of the true nature of debtor husband's obligation. The court said:

> Under the doctrine of collateral estoppel, four criteria must be met before a determination is conclusive in a subsequent proceeding: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and

> (4) the determination must have been essential to the judgment. (emphasis added) (citing authorities).
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> * * * *
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> The doctrine of *res judicata* bars a later suit when (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involved the same cause of action; and (4) both suits involved the same parties or their privies. (emphasis added) (citing authorities).

Helm, id., at 219.

For the same reasons stated in Helm, id., applying federal bankruptcy law and not state law, we hold that the doctrine of judicial estoppel would not be applicable because the case *sub judice* has never been decided upon its merits and as such to apply the state law would act to bar the federal right to inquire into the true nature of the debt in question. Such an inquiry was not an issue and would have been meaningless or superfluous in the earlier state action for divorce in this case. We, therefore, hold that the doctrine of judicial estoppel is not applicable to the consideration of this issue.

Wife/Appellee relies heavily upon the cases of Fitzgerald v. Fitzgerald, 9 F.3d 517 (6th Cir. 1993) and In re Pinkstaff, 163 B.R. 504 (Bkrtcy. N.D. Ohio 1994). We do not find either case to be dispositive of the issue in this case. Fitzgerald basically limited Calhoun and the "present needs" test to those situations involving the assumption of former spouses' debts where there was no designation of the nature of the debt as alimony, maintenance, or support and further ruled out the "needs" test where obligations were specifically designated as alimony and was intended by the parties as such (emphasis added). Quoting Fitzgerald, id, at 521:

> Unlike Calhoun, where it was necessary to determine whether something not denominated as support in the divorce decree was really support, here the only question is whether something denominated as alimony is really alimony and not, for example, a property settlement in disguise.

Fitzgerald, id., did not involve a motion for summary judgment which raises under Rule 56, federal or state, an entirely different issue, i.e., has the non-moving party under Rule 56.03, T.R.C.P., raised a genuine issue of a disputed material fact that cannot be resolved as a matter of law. If so, then the issue must be decided by trial. If not, then no further inquiry is required and the moving party is awarded the judgment. Unlike Fitzgerald, this Court is merely deciding the question of

whether the granting of a summary judgment by the trial court was proper. We are not deciding the issue of dischargeability after a full hearing on the merits.

A fortiorari, in Fitzgerald, the legal issue is not the same as here. The obligation in Fitzgerald was designated as alimony and it was undisputed that the parties intended it to be alimony. Husband relied upon the "present needs" test of Calhoun, id., and the fact that Wife was self-supporting at time of divorce to defeat her objection to dischargeability. Fitzgerald changed the federal law in regard to the "present needs" test by restricting its applicability as heretofore pointed out. In so doing, Husband's contention in Fitzgerald failed and the debt was not dischargeable. We find Fitzgerald to be of no help in deciding this case.

In the case of In re Pinkstaff, 163 B.R. 504 (Bkrtcy. N.D. Ohio 1994), the matter was before the federal bankruptcy court upon Kathleen Pinkstaff's motion for summary judgment on her complaint as a creditor to except two of the listed debts of Lawrence Pinkstaff from discharge under 11 U.S.C. § 523(a)(5). The debtor (former husband) had filed a petition in bankruptcy in December, 1991. The parties were previously divorced on May 24, 1991. On April 28, 1992, Kathleen filed an exception to discharge two of the obligations ordered in the divorce decree of the Ohio State Court of Common Pleas. As in this case, Pinkstaff was a summary judgment case but in federal bankruptcy court; however, the similarity of facts and the law to be applied stops there. In Pinkstaff, the bankruptcy court, citing Fitzgerald, id., found that an independent determination by the divorce court after a contested hearing clearly denominated that the attorney fees of the Wife were alimony and the water bill in dispute was for support. Pinkstaff ceased further inquiry upon the divorce court's declaration and held the two debts to be nondischargeable. The Husband contested the state divorce action, but did not contest the summary judgment. He maintained that the two debts were not alimony or support obligations.

In the case at bar, the chancellor, at the time of the uncontested divorce action, simply recited in the divorce decree the provisions between the parties as set out in the marital dissolution agreement. There was no independent finding upon the merits by the chancellor determining the true nature and character of the $50,000 obligation contained in paragraph 10 of the agreement. Additionally, Husband/Appellant in case at bar is contesting the applicability of the summary judgment rule by disputing a material fact set out in the marital dissolution agreement. As heretofore noted, this raises a separate and entirely different issue for consideration by this Court. Here, the

divorce action in the trial court was not contested on the merits as was Pinkstaff, hence there were no independent findings by the divorce court.

We think the issue in this case is decided by the case of Byrd v. Hall, 847 S.W.2d at 211, where the Supreme Court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. (citing authorities). In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings, but must set forth specific facts showing that there is a genuine issue of material fact for trial. (emphasis in original). 'If he does not so respond, summary judgment . . . shall be entered against him.' Rule 56.05. If the motion is denied, the moving party 'has simply lost a preliminary skirmish and must proceed to trial.' Williamson, 549 S.W.2d at 372.

Taking the Husband/Appellant's allegations set forth in the pleadings, affidavits, and exhibits in a light most favorable to him as the non-moving party and allowing all reasonable inferences in his favor in the strongest legitimate sense, we find initially that the Wife/Appellee as the moving party has not carried the burden of demonstrating that there are no disputed material facts creating a genuine issue for trial. See Byrd v. Hall, id. at 215.

On the other hand, we find that the non-moving party, Husband/Appellant, has met his obligation under Rule 56.05, T.R.C.P., by showing that there is, indeed, material disputed facts creating a genuine issue that must be resolved by the trier of fact. We, therefore, find that a factual dispute exists, the disputed fact is material to the outcome of the case, and the disputed fact creates a genuine issue for trial. The issue for determination is, to-wit: "Did the parties to the marital dissolution agreement actually intend that the $50,000 amount set out in paragraph 10 of such agreement be alimony *in solido* or a property settlement?"

In making this determination, we are mindful that the issue of credibility of witnesses and the exhibits will obviously be a major factor to the decision in the trial court. Only the trier of fact possesses the power to make that determination. We do not. The action of the trial court in granting summary judgment is reversed and the cause remanded for trial on the merits. Costs are taxed to the Wife/Appellee.

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WILLIAM H. WILLIAMS, SENIOR JUDGE

CONCUR:

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W. FRANK CRAWFORD, P.J., W.S.

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ALAN E. HIGHERS, J.