IN THE SUPREME COURT OF MISSISSIPPI

BARNES, BROOM, DALLAS AND McLEOD, PLLC — APPELLANT

v. — No. 2007-CA-00276

ESTATE OF MARILYN I. CAPPAERT — APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Petitioner Barnes, Broom, Dallas, and McLeod, PLLC 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. Harris H. Barnes, III, Esquire, Appellant
2. Walt Dallas, Esquire, Appellant
3. James G. McGee, Jr., of Barnes, Broom, and McLeod, P.A., Attorney for Appellant
4. David M. Sessums, of Varner, Parker and Sessums, P.A., Attorney for Appellee
5. Honorable Vicki R. Barnes, Warren County Chancery Court Judge

Respectfully Submitted,

James G. McGee, Jr.
Attorney for Appellant

IN THE SUPREME COURT OF MISSISSIPPI

BARNES, BROOM, DALLAS AND McLEOD, PLLC — APPELLANT

v.

CA
No. 2007-[redacted]00276

ESTATE OF MARILYN I. CAPPAERT, DECEASED — APPELLEE

On Appeal from the Chancery Court of Warren County, Mississippi

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQEUSTED

Attorney for the Appellant
James G. McGee, Jr. ([redacted]
BARNES, BROOM, and MCLEOD, P.A.
5 River Bend Place, Suite A
Flowood, MS 39232-7618
(601) 981-6336

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STATEMENT OF THE ISSUES

I. Whether a contract was entered into between an estate and an attorney for the administration of the estate and if so, whether failure to pay attorney's fees for work performed during administration is a breach of both that contract and of the executor's duty to pay all known costs of the estate?

II. Whether the basis of fees charged can be considered unreasonable when they are in compliance with the rules of professional conduct, they are reported on a monthly itemized basis for a period of eleven months and the rates were agreed to by the parties prior to entering into the contract?

III. Whether a party is liable for reasonable attorney's fees when court proceedings determined an amount is due on an open account?

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a ruling in the Warren County Chancery Court, in which it was ruled that the fees owed to the Appellant (hereinafter referred to as "BARNES") by the Appellee (hereinafter referred to as "THE CAPPAERT ESTATE") were unreasonable, only allowing fifteen thousand ($15,000) in fees; and, held that BARNES was not entitled to recover the costs of collection (R.E. at 564). The trial court's ruling on the dispositive issues of law are in irreconcilable conflict with general contract theory and the previous opinions and holdings of the Mississippi Supreme Court.

B. Course of Proceedings and Disposition in the Court Below

This is an appeal from BARNES' request to the Warren County Chancery Court to grant fees and restitution in the amount of sixty thousand six dollars and 62/100 ($60,006.62) dollars for full payment of its fees for services rendered in the administration of THE CAPPAERT ESTATE; and, for the costs it has incurred in attempting to collect its administration fees. The Warren County Chancery Court granted fifteen thousand ($15,000.00) in fees.

C. Statement of the Facts

In 2003, after the death of Marilynn I. Cappaert, beneficiaries of the estate and their CPA, Mr. Todd Boolos, met with Harris H. Barnes, III, an attorney at the law firm of Barnes Broom Dallas and McLeod, PLLC. The nature of this meeting was to discuss retaining BARNES for the administration of the estate, to discuss BARNES' fees; and, to discuss the steps necessary in administering the estate. The estate was going to be taxable so an IRS audit was anticipated and discussed in the planning. A Memorandum of Conference (R.E. at 752-753) and Letter Regarding Explanation to Clients of Fee Schedule (R.E. at 754-756) were the result of this initial

meeting. These documents were mailed to THE CAPPAERT ESTATE and such documents set the fee as a fixed cost for a certain anticipated actions known to be necessary for the administration of this estate. The fixed cost was to be charged regardless of the hours spent on those matters and issues. Those actions not listed, or unanticipated, were to be billed at the firm's regular hourly rates.

After this meeting, and the receipt of the above letters, Mr. Todd Boolos, CPA representing THE CAPPAERT ESTATE, told BARNES to commence work (R.E. at 751). Therefore, it is clear that BARNES and THE CAPPAERT ESTATE entered into a binding agreement regarding the administration of THE CAPPAERT ESTATE. Under the agreement, BARNES was to serve as the estate's attorney and THE CAPPAERT ESTATE was to compensate BARNES according to the fees negotiated and agreed upon prior to beginning the administration. BARNES conducted the administration pursuant to the terms of the agreement, including addressing a number of problems resulting from the unilateral acts of the estate's beneficiaries. For his work, BARNES submitted itemized monthly bills to THE CAPPAERT ESTATE in accordance with his customary billing procedures (R.E. at 182- 215). At no time during the administration of the estate or upon receipt of a monthly bill did any Executor or member of THE CAPPAERT ESTATE complain or dispute the work or fees.

BARNES served as the estate's attorney for eleven (11) months before being terminated by the Executor of the estate without reason or notice. During this period, BARNES accumulated total fees on an open account payable from the estate in the amount of twenty one thousand, two hundred forty three and 69/100 ($21,243.69) dollars. As of August 13, 2004, eighteen thousand one hundred and 11/100 ($18,100.11) dollars had accrued. These fees were reviewed and approved by the Executor of the estate who subsequently filed a sworn petition requesting payment to BARNES (R.E. at 86). However, because of the duplicitous acts of

beneficiaries of the estate, the Court was unable to approve such payment. The remaining three thousand, one hundred forty three and 58/100 ($3,143.58) dollars was incurred for services performed for the administration of the estate subsequent to August 13, 2004. To date, THE CAPPAERT ESTATE has not remitted any payment to BARNES to be applied to against its open account.

After termination of BARNES and prior to bringing suit, BARNES sent a statement demanding payment via certified mail (R.E. at 216). After this request was ignored by THE CAPPAERT ESTATE, BARNES brought his claim before the Warren County Chancery Court. Testimony by BARNES in those proceedings went uncontradicted as to the work performed, time to perform, and expenses generated on this matter (R.E. at 638-684). Also, uncontradicted was BARNES' testimony that the work performed on anticipated estate administration matters was billed according to the quote initially given (R.E. at 603).

In attempting to collect its administration fees, BARNES has incurred significant legal costs. BARNES has been forced to incur the costs of litigating this matter in a full trial before the Warren County Chancery Court. As of August 18, 2006, BARNES has incurred collection costs of thirty eight thousand, seven hundred sixty two and 93/100 ($38,762.93) dollars.

SUMMARY OF THE ARGUMENT

BARNES will establish that THE CAPPAERT ESTATE owes attorney's fees to BARNES for work performed in administering THE CAPPAERT ESTATE. This fact is evidenced from THE CAPPAERT ESTATE's own admissions in its Answer to BARNES' Complaint (R.E. at 157). The attorney's fees owed are based on the quoted amount given initially and not on a full hourly rate. The only hourly rates that were charged were for the services performed beyond the stated scope of the representation.

The failure to pay BARNES represents a breach of contract by THE CAPPAERT ESTATE. The failure to pay BARNES is also a breach of the Executor's duty to pay all known costs of the Estate. Furthermore, BARNES is entitled to collect any and all costs arising from his attempts to collect the balance due from THE CAPPAERT ESTATE, pursuant to Mississippi Code.

ARGUMENT

I. THE CAPPAERT ESTATE DID ENTER INTO A BILATERAL CONTRACT WITH BARNES AND THE FAILURE OF THE CAPPAERT ESTATE TO PAY ATTORNEY'S FEES FOR WORK PERFORMED IN ADMINISTERING THE ESTATE RESULTS IN A BREACH OF CONTRACT.

A. Evidence Sustaining the Existence of an Enforceable Agreement. The Supreme Court of Mississippi has determined six requirements for a valid contract. Those elements being "(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation." *Lanier v. State,* 635 So.2d 813, 826 (Miss. 1994) (*overturned on other grounds by* Twillie v. State, 892 So.2d 187 (Miss. 2004). The Court has further expanded these requirements by holding a contract unenforceable if the material terms are not sufficiently definite. *Leach v. Tingle,* 586 So.2d 799, 802 (Miss. 1991). Finally, in regards to price, the Court has stated that it is an essential term that must be stated with specificity. *Id.* at 803.

Elements one, two, three, four and six are clearly met and are not in dispute. The dispute is whether or not THE CAPPAERT ESTATE assented to the contract. In proving this assent to the lower court, BARNES fully established that THE CAPPAERT ESTATE agreed to and negotiated terms for employing BARNES to serve as the attorney for the estate in conducting the administration of the estate. Such terms were negotiated by or through Mr. Todd Boolos, certified public accountant for THE CAPPAERT ESTATE, and/or Michael Cappaert, beneficiary of THE CAPPAERT ESTATE. Both parties received and reviewed the Memorandum of Conference (R.E. at 752-753) and Letter Regarding Explanation to Clients of Fee Schedule (R.E. at 754-756). The Memorandum of Conference memorialized the meeting with the same parties that took place earlier that week and discussed the extent and terms of the representation that was to be delivered by BARNES. The Letter Regarding Explanation to

Clients of Fee Schedule explained the cost of the anticipated representation. The Memorandum of Conference is compelling evidence that the representation was expected to continue up to the closing of the Estate.

The meetings between BARNES and THE CAPPAERT ESTATE's representatives, along with the subsequent Memorandum of Conference and Letter Regarding Explanation to Clients of Fee Schedule, culminated in a recorded acceptance of the employment relationship and all its terms and conditions. These actions created a bilateral contract between the parties and demonstrate certain and clear assent on the part of THE CAPPAERT ESTATE to terms in which BARNES was to perform the estate administration services and acceptance of a definite price structure under which THE CAPPAERT ESTATE was to pay for those services.

B. Authority of a Third Party with Apparent Authority to Enter into a Binding Agreement. THE CAPPAERT ESTATE argues that Mr. Boolos, CPA for THE CAPPAERT ESTATE, lacked authority to enter into a binding contract on behalf of the estate. In determining the scope in which an agent can bind its principle, the Mississippi Supreme Court, in *Steen v. Andrews*, 223 Miss. 694, 78 So.2d 881, 883 (Miss. 1955), held:

> The power of an agent to bind his principal is not limited to the authority actually conferred upon the agent, but the principal is bound if the conduct of the principal is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe the agent to have the power he assumes to have. The agent's authority as to those with whom he deals is what it reasonably appears to be. So far as third persons are concerned, the apparent powers of an agent are his real powers. 2 C.J.S., Agency, §§ 95, 96.

In determining whether or not apparent authority exists in a particular instance, the Court applies a three pronged test showing (1) acts or conduct of the principal indicating the agent's authority, (2) reasonable reliance upon those acts by a third person, and (3) a detrimental change in position by the third person as a result of that reliance. *Christian Methodist Episcopal Church v. S & S Construction Co., Inc.*, 615 So.2d 568, 573 (Miss. 1993); *Alexander v. Tri-County Co-op*, 609 So.2d 401, 403 (Miss. 1992); *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1181 (Miss. 1990); *Clow Corp. v. J.D. Mullican, Inc.*, 356 So.2d 579, 582 (Miss. 1978).

The testimony given in the Chancery Court proves BARNES was reasonable in his interpretation of the relationship between Mr. Boolos and THE CAPPAERT ESTATE. In his testimony before the Warren County Chancery Court, BARNES stated that he believed Mr. Boolos was vested with the authority granted by the estate to enter into a contract with BARNES on behalf of THE CAPPAERT ESTATE (R.E. at 595-603). BARNES' belief was substantiated by the fact that he was aware that Mr. Boolos had a long standing working relationship with the Cappaert family and also by the fact that Mr. Boolos was the certified public accountant employed by the estate (R.E. at 374). Also, Mr. Boolos was present in the initial conference between representatives of THE CAPPAERT ESTATE and BARNES and Mr. Boolos was clearly carbon copied on the Memorandum of Conference and Explanation of Fees letters.

THE CAPPAERT ESTATE made no attempt to distance themselves from their association with Mr. Boolos and never made known to BARNES any limitations on their relationship as principle and agent. Mr. Boolos' presence at meetings, receipt as a "carbon copy" on mailings, and hiring by THE CAPPAERT ESTATE to be the CPA of the estate, are three methods in which THE CAPPAERT ESTATE knowingly allowed Mr. Boolos to work on their behalf with BARNES. These acts together prove a continuous and ongoing relationship between the parties and foster a reasonable belief that Mr. Boolos was vested with the requisite

authority to enter into an agreement on behalf of the estate. It was under this reasonable assumption that BARNES recognized Mr. Boolos as acting on behalf of THE CAPPAERT ESTATE.

Although THE CAPPAERT ESTATE disputes whether Mr. Boolos had such authority, it offered no proof in the court proceedings below to refute the fact that BARNES believed such authority existed. It also offered no proof that they took action to prevent the representation once acceptance had been made. Work was done for eleven months; bills were submitted to the Executor of the Estate; the Executor filed a petition to approve fees; the estate should be stopped from denying the existence of a contract. Therefore, it is indisputable that apparent authority in Mr. Boolos was created by law and such authority vested with Mr. Boolos by which he could enter into a binding contract on behalf of the estate.

C. Breach of the Agreement. The facts presented by BARNES sufficiently prove THE CAPPAERT ESTATE breached the bilateral contract by not paying anything for the services performed. THE CAPPAERT ESTATE disputes how long the representation was to continue; but, representation did continue in fact up until September 17, 2004, when the Order Allowing Withdrawal and Substitution of Counsel was entered by the Warren County Chancery Court (R. E. at 129). Prior to that Order, BARNES had completed eleven (11) months of services towards the administration of THE CAPPAERT ESTATE, and has yet to be paid for any of the work completed. During this eleven (11) month period, BARNES documented and billed the amounts due on the "open account" and has reported those amounts accurately to this Court and to THE CAPPAERT ESTATE.

For the above reasons, BARNES requests that this Court find sufficient evidence to hold a binding contract was in fact created and that THE CAPPAERT ESTATE breached said contract and therefore owes damages in the amount of the total fees owed on the "open account."

II. THE CAPPAERT ESTATE'S DEFENSE OF UNREASONABLENESS IS UNFOUNDED AND WITHOUT MERIT

BARNES believes that without a doubt, there was a binding contract between the parties and that contract should be upheld. However, BARNES would like to address THE CAPPAERT ESTATE'S defense asserting a theory of reasonableness in justifying its breach of the contract with BARNES.

Applying the general freedom of contract theory, both parties were free to negotiate contract terms and the ultimate decision to enter into contract and begin work with each other was a matter of choice and not requirement. As stated above, the terms of the agreement were clear and unambiguous; and, THE CAPPAERT ESTATE freely and knowingly entered into their association with BARNES. If the administration had proceeded as anticipated, THE CAPPAERT ESTATE would only have had to pay the quoted amount given initially. Unforeseen acts and actions caused by the Executor and the beneficiaries complicated the administration; and, therefore increased the cost of administration.

The only explanation THE CAPPAERT ESTATE offered as to why the fees are unreasonable has been that "they just are." The expert they provided was grossly unqualified to judge the value of estate administration as he had not handled an estate in many years because others in his firm handled the probate work. Furthermore, THE CAPPAERT ESTATE was unable to establish a standard by which the reasonableness of fees should be measured.

In absence of a standard put forth by THE CAPPAERT ESTATE, BARNES supports his fee based on THE CAPPAERT ESTATE's failure to prove the fees were unconscionable. This is the broadest standard and unconscionability has been defined as "an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." *Entergy Miss., Inc. v. Burdette Gin Co.,* 726 So.2d 1202, 1207

(Miss. 1998). The abundance of attorneys in the area provided THE CAPPAERT ESTATE with plenty of meaningful choices as who could perform the administration responsibilities for the estate. Further, without THE CAPPAERT ESTATE providing any evidence that the contract terms unreasonably favored BARNES, THE CAPPAERT ESTATE failed to prove a basis for which the fees should be deemed unreasonable. Therefore, without some form of evidence to the contrary, BARNES' fees should be found reasonable and should be granted by this Court. To determine otherwise would serve only to unjustly enrich THE CAPPAERT ESTATE who employed BARNES for over eleven (11) months, but has not rendered even a penny of compensation to BARNES for the services he performed.

The reasonableness of BARNES' fee is demonstrated by the following factors:

A. Proper Representation of Amount Due. THE CAPPAERT ESTATE unreasonably delayed the payment process by claiming that there was no itemized amount given to it as required by Miss. Code Ann. § 11-53-81 (1972). However, BARNES turned over all records to THE CAPPAERT ESTATE regarding fees, amount of time expended, and explanations of work done (R.E. at 182-215). The information was reasonably itemized by BARNES to reflect an accurate description of the charges presented. However, it is worth noting that the majority of the fees were at a fixed price and that the monthly itemized bills were sent merely to inform THE CAPPAERT ESTATE as to what work was being performed for the estate. BARNES did expend special efforts to make the bills as self explanatory and descriptive to THE CAPPAERT ESTATE as possible. THE CAPPAERT ESTATE received those bills for eleven months and had no trouble with their specificity prior to raising the issue at trial. The argument that the bills are not itemized is simply contrary to what the evidence reflects.

THE CAPPAERT ESTATE further argued that the amounts shown as due are not the correct amounts due. However, THE CAPPAERT ESTATE received from BARNES the

balance due to BARNES in eleven separate bills dating back to November 25, 2003 (R.E. at 182-215). At no time prior to the termination of BARNES' representation did THE CAPPAERT ESTATE contact BARNES to inform him or discuss whether BARNES' work was accurately reflected in his billings. There was never a discussion as to the adequacy of the work or the fees reflected in those aforementioned bills.

Regardless of what THE CAPPAERT ESTATE may contend, there has been no indication that BARNES somehow incorrectly determined the amounts due. The bills are itemized by day and the time is calculated by computer. No human error has affected the billing system. The amount due is correct. Therefore, the statutory requirement of correctness is fulfilled by BARNES and leaves the question of correctness as a purely argumentative point.

B. THE CAPPAERT ESTATE Agreed to BARNES' Fees. The evidence establishes that prior to any work being performed by BARNES, THE CAPPAERT ESTATE did receive BARNES' Memorandum of Conference (R.E. at 752-753) and Letter Regarding Explanation to Clients of Fee Schedule (R.E. at 754-756) that explained the scope of representation and the amount charged for that representation. Therefore, it was to be expected that work by BARNES would continue to be performed until the matters addressed in the Memorandum of Conference were satisfied and that any work performed and money subsequently owed, would relate to those letters and be applied to THE CAPPAERT ESTATE open account with BARNES.

The comment to Mississippi Rules of Professional Conduct Rule 1.5, states that, among other things, to have a reasonable fee the Attorney can furnish, "the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth." The Memorandum of Conference and Letter of Explanation to Clients of Fee Schedule explained both the customary fee schedule and clearly set forth the basis and rate of the fee.

The Memorandum of Conference clearly indicates what the representation is to entail, and sets forth the range of fixed costs ($8,500 to $12,000). Furthermore, the Memorandum of Conference states that BARNES' fixed costs were to include the following, "[t]o the extent that there is no audit by the Internal Revenue Service, to then close the estate, distribute the assets, assign the properties to the respective beneficiaries, make notations in the limited partnership agreement to reflect these transfer's and finalize the closing of the estate by obtaining receipts and notices from beneficiaries" (R.E. at 752-753).

In the Memorandum of Conference, it is stated that the estimated cost does not include time spent in conferences or meetings, which will be billed at the normal rate of two hundred and twenty-five ($225.00) dollars per hour (R.E. at 752-753). The Memorandum of Conference further states that the estimated fees do not include cost of copies, long distance telephone calls, conferences with financial planners or certified public accountants, postage, recording fees, transfer fees, filing fees and/or any other out-of-pocket expense (R.E. at 752-753). THE CAPPAERT ESTATE has not submitted any proof to indicate that Mr. Boolos did not review both the Memorandum of Conference or the Letter of Explanation to Clients of Fee Schedule.

THE CAPPAERT ESTATE agreed to the fixed fee range of $8,500 to $12,000 for the administration of the estate and further agreed to pay BARNES two hundred and twenty-five dollars ($225.00) dollars per hour for work done. The range of estimated fixed costs for the services listed in the Memorandum of Conference was extremely close to the actual amount that was requested in the Petition for Attorneys Fees; except for the extraordinary events that happened due to the unilateral acts of the Beneficiaries. THE CAPPAERT ESTATE now refuses to pay BARNES, even though BARNES charged THE CAPPAERT ESTATE for much of the work at a much lower rate of one hundred forty ($140.00) dollars per hour for Mr. Purvis' work.

The evidence proves that THE CAPPAERT ESTATE knew of the cost of representation by BARNES, and that BARNES did not catch THE CAPPAERT ESTATE unaware. It was foreseeable that the cost of administration could increase when matters become complicated, especially since BARNES warned THE CAPPAERT ESTATE of the possibility of such a situation in the Memorandum of Conference. Furthermore, a large percentage of the excess fees were caused by the acts of THE CAPPAERT ESTATE's beneficiaries. As such, THE CAPPAERT ESTATE entered into this agreement with BARNES and should be required to uphold its obligation under the agreement by rendering payment to BARNES for the fees due.

C. Unilateral Acts of Estate's Beneficiaries. The reason for the increased fees is not unreasonableness, but the result of an atypical Estate administration caused by the actions of the beneficiaries. BARNES explained in the Memorandum of Conference and Letter Regarding Explanation to Clients of Fee Schedule that the fee was based on the expected cost of a normal Estate administration, which did not factor in any problems or complexities that may occur. The unilateral acts of the estate's beneficiaries represent a major factor in BARNES' fees exceeding the estimate that was provided to THE CAPPAERT ESTATE.

The unilateral acts included firing the first Executor, without telling anyone about it beforehand, which demanded that BARNES find a new Executor to replace the old Executor. The beneficiaries wanted Trustmark to serve as executor; and unilaterally fired BancorpSouth. However, after the firing of BancorpSouth, Trustmark declined to serve. Action then had to be taken to see if BancorpSouth would accept reinstatement (R.E. at 80, 82, 84). The Warren County Chancery Court had to be consulted about the reinstatement procedure. The unilateral acts of the Beneficiaries continued when the Petitioner had to prepare a Petition for Fees because the beneficiaries would not sign a waiver. This also caused several trips to see the Honorable Judge Barnes due to the situation. BARNES also had to deal with conflicting opinions on estate

property located in Florida from an attorney that the beneficiaries had consulted on the matter. The Beneficiaries decided to procure loans from the Family Limited Partnership that created an I.R.C. § 2036 problem, in spite of the instructions from BARNES not to do so. This issue was very serious as it could cause the loss of substantial valuation discounts obtained by the use of the Family Limited Partnership. In order to address this problem, BARNES had to prepare extensive documentation corroborating the loans, so that the Family Limited Partnership would still meet IRS requirements for valuation discounts if the estate was later audited. Most interestingly, THE CAPPAERT ESTATE required BARNES to get court approval before a car could be sold even though that was not a requirement of the will (R.E. at 62). All of the aforementioned acts were clearly outside the scope of a normal Estate representation and also outside of the fixed fees.

BARNES, in the proceedings in the lower court, testified that he never received any complaints about his fees, or the reasonableness of such fees, prior to being terminated by THE CAPPAERT ESTATE (R.E. at 627). BARNES also testified that he did not receive any complaints regarding the performance of BARNES in administering the estate, prior to being terminated by THE CAPPAERT ESTATE (R.E. at 626). This testimony is corroborated by the testimony of Mrs. Bonnie Wood and Mr. Bobby Quarles, employees of the executor. Mrs. Wood and Mr. Quarles both testified that there were no complaints made to BARNES regarding the reasonableness of his fees or the quality of his work (R.E. at 695-696, 747).

The facts clearly indicate that no objection was communicated to BARNES regarding the reasonableness of his fees or the quality of his work. Furthermore, the evidence clearly illustrates that the increased fees were the direct result of the unilateral actions taken by the beneficiaries of the estate. No fault should be contributed to BARNES for these acts, as they were conducted without notifying BARNES.

D. Factors Considered by BARNES in Establishing Fees. Rule 1.5 of the Mississippi Rules of Professional Conduct states that the factors to be considered in determining if a fee is reasonable are,

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent."

BARNES is a tax law specialist practicing in the areas of wills, trusts and estate planning, personal and corporate financial planning; asset protection, mergers, acquisitions and sales of businesses; and civil and criminal tax controversy, including trials. BARNES is a member of the Mississippi, Hinds County Bar Associations; Trustee and Past-President of the Mississippi Tax Institute, Inc.; Fellow of the Mississippi Bar Foundation; Member and Past-President of the Taxation Section of the Mississippi State Bar Association; Past Chairman of the Mississippi Bar Professionalism Committee; Past President of the Hinds County Bar Association; Member of the Mississippi Trial Lawyers, International Association of Financial Planners and Rotary International. BARNES received his B.A. Degree from Mississippi State University in 1968; his J.D. from the University of Mississippi School of Law in 1972, and received his LL.M. in Taxation from the University of Florida in 1980. BARNES is admitted to practice law before the

Mississippi U.S. District Courts, United States Tax Court, and the United States Supreme Court. BARNES is AV rated by Martindale-Hubbell.

As indicated above, BARNES brought considerable experience, reputation and ability to performing the services to THE CAPPAERT ESTATE, which was the reason THE CAPPAERT ESTATE contacted BARNES for the representation. BARNES had not represented THE CAPPAERT ESTATE before the current representation. However, BARNES had worked with the creator of the Estate, Marilyn I. Cappaert, Deceased and Michael Cappaert, a beneficiary. In both instances, the attorney-client relationship was effective and amicable.

Numerous time constrictions precluded BARNES from pursuing other work due to the character of the representation of THE CAPPAERT ESTATE. Federal and State Tax deadlines continuously drive an Estate administration, and it was convoluted additionally by the nonexistence of an Executor during a time when an Executor was needed to carry out various responsibilities, such as writing checks to the Internal Revenue Service. The final result of closing the estate was not accomplished by BARNES since the representation was ended early. However, in every endeavor that BARNES undertook, the result was at all times favorable and BARNES was never criticized from any of the involved persons about the quality of the work done. It should be noted that the estate did not owe any additional estate taxes and was closed without any IRS review.

The cost estimated by BARNES is reasonable in consideration of the fees customarily charged in the locality for similar legal services. BARNES would support this based on the amount of accountant's fees for the Estate that had accumulated during the same time period. The reported accounting fees that had accumulated during the administration were approximately sixteen thousand four hundred and thirty-two ($16,432.00) dollars, and the reported attorney's fees that had accumulated during that same time period were eighteen thousand one hundred and

11/100 ($18,100.11) dollars. This is a difference of only one thousand six hundred and sixty-eight and 11/100 ($1,668.11) dollars. These facts are evidenced by the Amended Petition for Approval for Partial Executor's Fees, for Partial Attorney's Fees, and for Partial Accountant's Fees (R.E. at 86-128 and 764-806).

It is with these and other factors that BARNES has fulfilled his obligation under the Mississippi Rules of Professional Conduct Rule 1.5 to charge a reasonable fee.

E. Use of Paraprofessionals in the Practice of Law. In its arguments presented before the court below, THE CAPPAERT ESTATE placed a great deal of focus on BARNES' use of paraprofessionals in the practice of law. In particular, THE CAPPAERT ESTATE questioned the services performed by BARNES' secretarial staff including the hourly billings for such time. BARNES, however, testified that his secretary performed a combination of tasks, some of which would be deemed secretarial and others which would be considered paraprofessional.

Rule 5.5(b) of the Mississippi Rules of Professional Conduct states, "A lawyer shall not: (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." However, the commentary to Rule 5.5(b) of the Mississippi Rules of Professional Conduct states, "Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work."

Not only do the Mississippi Rules of Professional Conduct allow lawyers to employ the services of paraprofessionals, but the rules do not set forth any prohibitions against billing for the time of such paraprofessionals (subject to the criteria set forth in Rule 1.5 – Fees). As no licensing criteria for paraprofessionals has been established in Mississippi, the paraprofessional's education, training, and work experience necessary to perform substantive legal work is therefore greatly subject to the discretion of the supervising attorney (complying

with Mississippi Rules of Professional Conduct, Rule 5.3 – Responsibilities Regarding Non-Lawyer Assistants).

In consideration of the Rules of Professional Conduct, BARNES not only complied with the rules in utilizing the services of paraprofessionals; but also assisted THE CAPPAERT ESTATE in reducing its fees by utilizing such paraprofessional staff for the performance of ministerial, but necessary, tasks at a greatly reduced hourly billing rate. In fact, the initial quote given to THE CAPPAERT ESTATE was based on having paraprofessionals assist with some of the work at a lower rate than BARNES' two hundred and twenty-five ($225) dollar per hour rate. THE CAPPAERT ESTATE's assertion that BARNES' secretary (who has worked in the legal field for over 35 years) does not possess the education, training, and work experience necessary to perform substantive legal work as a paraprofessional (subject to Rule 5.3 and 5.5), represents a gross misunderstanding of the facts in this matter, as well as an obvious deficiency in its familiarity with the Mississippi Rules of Professional Conduct.

F. Expert Witness Testimony. THE CAPPAERT ESTATE introduced testimony before this Court from Kenneth B. Rector, Esq (R.E. at 700). The general substance of Mr. Rector's testimony was that BARNES' fees were "unreasonable" in the administration of THE CAPPAERT ESTATE (R.E. at 723). However, on cross-examination it became apparent that Mr. Rector did not practice tax law, nor does he engage in any type of estate work. In fact, Mr. Rector admitted that he focused his practice on commercial/business law and referred estate type work to another member of his firm (R.E. at 724).

The standard of review for admission or exclusion of testimony is abuse of discretion. The admission of expert testimony is left to the sound discretion of the trial judge unless this Court concludes that the discretion was arbitrary and clearly erroneous, amounting to an abuse of

discretion. *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So.2d 703, 708 (Miss. 2005) (citing *Crane Co. v. Kitzinger,* 860 So.2d 1196, 1201 (Miss. 2003)).

The decision of the trial court to allow the testimony of Mr. Rector was clearly erroneous. Although the firm in which Mr. Rector belongs may perform some estate work, Mr. Rector was noticeably unqualified to render a meaningful opinion as to the reasonableness of fees involving an estate administration, especially a taxable estate. In fact, Mr. Rector testified that he referred tax questions to a certified public accountant (R.E. at 734). Aside from the fact that Mr. Rector does not practice in this area, and is therefore unfamiliar with the nuances of such practice, Mr. Rector admitted that he applied no standard in evaluating the reasonableness of BARNES' fees. (R.E. at 736). In his testimony, Mr. Rector further asserted that he did not apply any generally accepted auditing techniques in attesting to the reasonableness of BARNES' fees; nor, did he apply any other attestation principles by which a professional opinion may be rendered. Mr. Rector also testified that he did not conduct reviews or audits of law firms on a regular basis; that he was not a certified public accountant; nor, had he received any type of training in such areas.

It is obvious that Mr. Rector's opinion as to the reasonableness of BARNES' fees should be disregarded in consideration of this matter. Mr. Rector lacks the working knowledge, training, and experience needed to accurately make such an assessment. Furthermore, Mr. Rector failed to apply a basic measuring standard by which the reasonableness of fees should be ascertained. Finally, Mr. Rector didn't even apply basic auditing techniques in conducting an attestation engagement regarding BARNES' fees. These shortcomings clearly demonstrate that Mr. Rector is not the expert that THE CAPPAERT ESTATE proclaims him to be. As such, his testimony should be excluded from this Court's evaluation of BARNES' fees.

III. FULL SETTLEMENT OF THIS BREACH OF CONTRACT DOES INCLUDE THE COLLECTION OF REASONABLE ATTORNEY'S FEES

A. Open Account Miss. Code Ann. § 11-53-81 (1972) states that if there is an open account then, "that person shall be liable for reasonable attorney's fees to be set by the judge for the prosecution and collection of such claim when judgment on the claim is rendered in favor of the Plaintiff." An open account is a type of credit extended through an advance agreement which permits one party to make charges without a note of security and is based on an evaluation of the buyer's credit. *Black's Law Dictionary* (8th ed); see also *Stanton & Associates, Inc. v.* Bryant Constr. Co., 464 So.2d 499 (Miss. 1985). This Court has said that an account based on continuing transactions between the parties which have not been closed or settled but are kept open in anticipation of further transactions meets the definition of an open account. *Westinghouse Credit Corp. v. Moore, McCalib, Inc.*, 361 So.2d 990, 992 (Miss. 1978).

BARNES continued to perform legal services for THE CAPPAERT ESTATE and charged his fees to their account for billing. Under the standards set by this Court, the arrangement between BARNES and THE CAPPAERT ESTATE clearly meet the requirements of an open account.

THE CAPPAERT ESTATE has also asserted that BARNES did not provide adequate notice in order to collect on an "open account."

Miss. Code Ann. § 11-53-81 (1972) states that,

> When any person fails to pay an open account within thirty (30) days after receipt of written demand therefore correctly setting forth the amount owed and an itemized statement of the account in support thereof, that person shall be liable for reasonable attorney's fees to be set by the judge for the

prosecution and collection of such claim when judgment on the claim is rendered in favor of plaintiff.

BARNES has met such requirements as mentioned in Miss. Code Ann. § 11-53-81. THE CAPPAERT ESTATE claims that no thirty (30) day notice was given. On November 19, 2004, BARNES sent to David M. Sessums, Esq. (attorney for THE CAPPAERT ESTATE), Mr. Bobby Quarles (senior vice president for BancorpSouth) and Bonnie Wood, as Executors for the Estate, a letter informing them that if the outstanding balance was not paid within ten days of the receipt of the letter, "pursuant to Section 11-53-81 of the Mississippi Code of 1972, Annotated (As Amended)" BARNES would take such action as necessary to receive the outstanding amounts due (R.E. at 216). This letter was sent with the intent of being the notice as required by the statute, and referred to as such. The letter gave 10 days for payment and the statute states "fails to pay within 30 days." The evidence shows that more than thirty (30) days was allowed for payment. The letter was sent by certified mail with return receipt. It is therefore undeniable that notice was given to THE CAPPAERT ESTATE that they owed eighteen thousand one hundred and 11/100 ($18,100.11) dollars, the amount owed at the time the November 19, 2004 letter was sent. This amount is the same amount that the Executor, in a sworn petition, filed with the Chancery Court of Warren County.

B. Reasonable Attorneys Fees Miss. Code Ann. § 9-1-41 (1972), states that, "In any action in which a court is authorized to award reasonable attorneys fees, the court shall not require the party seeking such fees to put on proof as to the reasonableness of the amount sought, but shall make the award based on the information already before it and the court's own opinion based on experience and observation." The Code goes on to state that the party may, "in its discretion, place before the court other evidence as to the reasonableness of the amount of the

award, and the court may consider such evidence in making the award." Miss. Code Ann. § 9-1-41.

It is not the burden of BARNES to support its fees; it is the burden of THE CAPPAERT ESTATE to prove why those fees are unreasonable (R.E. at 423-436). "The movant and non-movant bear the burdens of production corresponding to the burdens of proof they would bear at trial." *Collier v. Trustmark National Bank*, 678 So.2d 693 (Miss. 1996) (citing *Skelton v. Twin County Rural Elec.*, 611 So.2d 931, 935 (Miss. 1992)).

It is undeniable that an open account existed between BARNES and THE CAPPAERT ESTATE; that THE CAPPAERT ESTATE was properly given notice of their balance due; and, that the court below found that THE CAPPAERT ESTATE did in fact owe a reasonable amount to BARNES on their account ($15,000.00 an amount less than the true contracted fee amount). As such, the lower court's decision not to also hold THE CAPPAERT ESTATE liable for reasonable attorney's fees must be found in error.

CONCLUSION

Based on the above reasoning of fact and law we request that this Court reverse the ruling of the court below and find:

Based upon the requirements set forth by this Court in *Lanier v. State,* 635 So.2d 813, 826 (Miss. 1994), a binding contract was created and that THE CAPPAERT ESTATE breached the said contract. As such, THE CAPPAERT ESTATE therefore owes damages in the amount of the total fees owed on the "open account," an amount equal to twenty one thousand, two hundred forty three and 69/100 ($21,243.69) dollars.

The evidence warrants a finding by this Court that an open account existed between BARNES and THE CAPPAERT ESTATE; that THE CAPPAERT ESTATE was properly given notice of their balance due; and, that THE CAPPAERT ESTATE did in fact owe a reasonable amount to BARNES on their account. Based on this proof, THE CAPPAERT ESTATE is liable for reasonable attorney fees in the amount of thirty eight thousand, seven hundred sixty two and 93/100 ($38,762.93).

Respectfully submitted this the 7th day of November, 2007.

Attorney for the Appellant
James G. McGee, Jr. [redacted]
BARNES, BROOM, and MCLEOD, P.A.
5 River Bend Place, Suite A
Flowood, MS 39232-7618
(601) 981-6336

CERTIFICATE OF SERVICE

I, James G. McGee, Jr., of the firm of BARNES, BROOM, and McLEOD, P.A., Attorneys at Law, do hereby certify that I have this day served a true and correct copy of the above and foregoing APPELLANT'S BRIEF, by U.S. Mail to:

Honorable Vicki R. Barnes
Warren County Chancery Court Judge
P.O. Box 351
Vicksburg, Mississippi 38181
Phone: (601) 636-8327

David M. Sessums (MS Bar No. 6714)
VARNER, PARKER, & SESSUMS, P.A.
1110 Jackson Street
P.O. Box 1237
Vicksburg, Mississippi 39180
Phone: (601) 638-8741

Dated, this the 7th day of November, 2007.

Attorney for the Appellant
James G. McGee, Jr. [redacted]
BARNES, BROOM, and MCLEOD, P.A.
5 River Bend Place, Suite A
Flowood, MS 39232-7618
(601) 981-6336