IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-TS-00612-COA

CENTRAL HEALTHCARE SERVICES P.A. and
WENDALL HARRELL — APPELLANTS

VERSUS

CITIZEN'S BANK OF PHILADELPHIA, MISSISSIPPI — APPELLEE

ON APPEAL FROM THE CHANCERY COURT
OF LEAKE COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE TO THE BRIEF OF APPELLEE/CROSS-APPELLANT

ORAL ARGUMENT REQUESTED

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REPLY BRIEF OF APPELLANT/CROSS-APPELLEE TO THE BRIEF OF APPELLEE/CROSS-APPELLANT

REPLY TO THE LAW AND ARGUMENT OF APPELLEE/CROSS-APPELLANT ON THE DIRECT APPEAL OF WENDELL HARRELL AND CENTRAL HEALTHCARE SERVICES, INC.

I. THE COURT GIVES GREAT DEFERENCE TO THE CHANCELLOR'S RULING.

While the above is a general statement of the rule and law in this state's jurisprudence, a Chancellor's rulings must give way when there is clear error. In arriving at the truth in any action, the first thing that must be examined is why was the case filed in the lower Court? Simply stated, the Appellee, Citizens Bank of Philadelphia, Mississippi, sometimes hereafter referred to as the "Bank," in this case filed an Amended Complaint against Central Healthcare Services, Inc., sometimes hereafter referred to as "CHS," and Wendell Harrell, sometimes hereafter referred to as "Harrell," setting forth therein that the

Bank wanted title to a parcel of real property, sometimes hereafter referred to as the "Crawford lot," it had passed to George L. Whitten, Joseph Kyle Welch, J. P. Culpepper and Gregg Thaggard, sometimes hereafter to collectively as the "Whitten Group," confirmed.

II. THE CHANCERY COURT OF LEAKE COUNTY, MISSISSIPPI, COMMITTED MANIFEST ERROR BY CONVEYING TITLE OF THE CRAWFORD LOT TO CITIZENS BANK OF PHILADELPHIA, AND THE CHANCELLOR DID NOT FOLLOW THE APPLICABLE PRINCIPLES GOVERNING CONSTRUCTION OF LEGAL INSTRUMENTS.

The record reflects that the Crawford lot was purchased by CHS on May 24, 1989, from Harrell. *Appellee's Record Excerpts Tab 2. Exhibit 5 to the Trial Proof.* This deed of conveyance to CHS was un-controvertibly prepared by Mr. Roy Wright and ***it did not contain the usual "acquisition" clause***, which Mr. Wright testified that he generally always puts in the deeds he prepares. *Record 179-182.* There is no "acquisition clause" in the deed conveying the Crawford lot to CHS in 1989. Mr. Wright relied heavily in his testimony to support the title of the Whitten Group on the "acquisition" clause in the deed he prepared for the Whitten Group from CHS. Appellee contends that CHS, by and through its owner and President, Blanche Gregory, conveyed the Crawford lot to Appellee's successor in title to the Whitten Group.

However, an examination of the "acquisition" clause in the quitclaim deed executed by CHS to the Whitten Group dated July 28, 2004 (*Appellee's Record Excerpts Tab 24. Exhibit 44 to the Trial Proof*), indicates that it is not an acquisition clause at all. Mr. Roy Wright testified that he includes acquisition clauses in deeds he prepares, so that lawyers

examining title to the property can trace the title back to its origin, or at least to a recorded deed. *Record 179-182.* The so called acquisition clause in controversy in this action states the following:

> Grantor intends to convey herein, the property acquired by deed from Mrs. Nonie Lee Hardage, dated November 7, 1994, recorded in Deed Book 212, Page 27, records of the Leake County Chancery Clerk's Office.

The above language is clearly a part of the granting clause that limits the conveyance of the larger tract described to the specific property that is described in Deed Book 212, Page 27, of the records of the Leake County Chancery Clerk's Office. Blanche Gregory is not a lawyer or abstractor, but she did specify that she intended only to convey to the Whitten Group the property she purchased from Nonie Hardage. When Mr. Roy Wright requested that CHS sign a new deed correcting title to the property, CHS and Blanche Gregory, owner and president of CHS, did not know what was wrong with the first deed she signed to her father conveying the Hardage lot to him. Blanche Gregory agreed to sign the newly prepared deed but she made it known that the Hardage lot was the only lot she was conveying to cure title by the quitclaim deed to the Whitten Group. CHS had already conveyed the Hardage lot to Harrell by deed dated September 1, 2000. *See Exhibit 12 to the trial.* ***Exhibits 1, 5, 7 and 12*** are all relevant deeds to this litigation and were prepared by Mr. Roy Wright. A reading of the acquisition clauses in those deeds testify to the language that Mr. Wright used in his typical "acquisition clauses":

> And being in all respects the same land and property heretofore conveyed by Carleton Oil Company, Inc. by warranty deed dated May 6, 1983, of record in Book 159 at Page 597 thereof, records of Chancery Clerk's Office, Leake Count, Mississippi. *See Exhibit 1 to the trial*

Exhibits 5, 7 and 12 to the trial contain the same "acquisition" clause language as is found in Exhibit 1. There is a deep and profound contrast in the grant "limiting clause" in the deed from CHS to the Whitten Group and the "acquisition clause" contained in Exhibits 1, 5, 7 and 12. CHS did not convey the Crawford lot to the Whitten Group by the quitclaim deed, and never intended to do so. The Crawford lot belonged to CHS and it is still the property of CHS, except for the manifest error of the Chancellor in the lower court.

Had it been the intent of CHS and Blanche Gregory to convey the Crawford lot to the Whitten Group by the quitclaim deed, as Citizens Bank contends, why did Citizens Bank feel it necessary to sue CHS to confirm the title in the Whitten Group? If the quitclaim deed was an "arms length" transaction and was intended by CHS and Blanche Gregory to convey the Crawford lot to the Whitten Group, Citizens Bank would have no reason or cause to seek confirmation of title to the Crawford lot. If the deed was valid, why did Citizens Bank file a lawsuit to confirm the deed? CHS/Blanche Gregory had no reason to suspect "trickery and fraud" on the part of Mr. Roy Wright and Citizens Bank. If CHS/Blanche Gregory had perceived that Citizens Bank and Mr. Roy Wright intended that the quitclaim deed pass title of the Crawford lot to the Whitten Group, CHS/Blanche Gregory would never have executed the quitclaim deed. Bear in mind, Citizens Bank never talked to CHS/Blanche Gregory about the matter of the Crawford lot. The first time that CHS/Blanche Gregory knew of any

contest over the title to the Crawford lot was when CHS/Blanche Gregory was served with a summons as a defendant by Citizens Bank to confirm title to the lot. This occurred at a time when Citizens Bank claims there was perfection of the title it passed to the Whitten Group to the Crawford lot through the quitclaim deed from CHS/Blanche Gregory to the Whitten Group. There was no need for Citizens Bank to file this lawsuit if the quitclaim deed from CHS to the Whitten Group passed good and valid title to the Whitten Group. If Citizens Bank knew that CHS/Blanche Gregory would contest title to the Crawford lot, why did it seek and obtain a quitclaim deed with an "unclear description." The truth is that Citizens Bank had never even talked to CHS/Blanche Gregory about the quitclaim deed, because Citizens Bank knew it was not a deed of conveyance to the Crawford lot and it needed validation of a deed to the Whitten Group to make its title good. Mr. Roy Wright needed validation of such a deed to cover his negligence. Citizens Bank knew that if anyone started working on the Crawford lot, that its owner, CHS/Blanche Gregory , would protest. So, Citizens Bank had to do something. The natural course was for Citizens Bank to file a lawsuit of some type. It is not known when the plan to rely on the quitclaim deed executed by CHS/Blanche Gregory to the Whitten Group was first perceived to wrest title from CHS/Blanche Gregory to the Crawford lot. But, it is a certainty from the point of view of the Appellants and the proof at trial, that the suit was contrived and is not based in fact on the intention of CHS/Blanche Gregory in executing the quitclaim deed relied upon by Citizens Bank. The clear unambiguous language of the quitclaim deed limits the conveyance

to the Hardage lot, and excludes the Crawford lot, with CHS/Blanche Gregory retaining ownership of the Crawford lot.

Appellee argues that the clause in the quitclaim deed is merely a recital clause that was intended to help abstractors and lawyers determine the deed origin of the property being conveyed. If that were true, then there would have been an "acquisition clause" referring to the deed wherein Harrell took title from Robert Lee Crawford (*See exhibit 1 to the trial*) or the deed wherein CHS/Blanche Gregory took title to the Crawford lot from Harrell (*See exhibit 5 to the trial*). There was no "acquisition" or recital clause in the quitclaim deed. The reference to the Hardage lot in the deed was a part of the description of the property conveyed by the deed limiting the conveyance to the Hardage lot and excluding the Crawford lot from the conveyance. Particular words and phrases should not control interpretation of an instrument. Rather, the entire instrument should be examined to determine the intent of the parties. *Pursue Entergy Corp. v. Perkins*, 558 So.2d at 352 (Miss. 1990). The question is----why was the quitclaim deed constructed in that manner? And, the clear answer is that Mr. Roy Wright was trying to avoid liability and was willing to conform to a position and theory to satisfy Citizens Bank.

In general, although the granting clause in a deed may be explained, modified, or limited by subsequent clauses, it cannot be defeated by subsequent clauses when it is expressed in clear and unambiguous language. *Hinman v. Barnes*, 146 Ohio St. 497, 32 Ohio Op. 564, 66 N.E.2d 911 (1946) The granting clause will control any other clause of the deed inconsistent therewith, *Goodson v. Capehart*, 232 Va. 232, 349 S.E.2d 130 (1986), where

it is impossible to ascertain **the grantor's intention** (emphases added) from a consideration of the entire instrument. *Burk v. Ann W. Jones Co., Inc.*, 687 S.W.2d 582 (Mo. Ct. App. W.D. 1985). However, where the intention of the parties as to the kind of estate conveyed is clearly expressed in a clause other than the granting clause, such intention will be given effect, regardless of any technical rule that the granting clause will prevail over other portions of the deed. *Barber v. Flynn, 1980 OK 175*, 628 P.2d 1151 (Okla. 1980). Hence, a clear and specific limitation provision in a deed, following the granting clause and designating an estate different than that conveyed in the granting clause, will prevail over the granting clause as to the estate conveyed. *Pike v. Menz*, 358 Mo. 1035, 218 S.W.2d 575 (1949). Also, the expressed intention of the grantor will control the granting clause, the habendum clause, or the warranty clause, although they are apparently repugnant thereto. *Id*. In this case, the clause limiting the conveyance to the Hardage lot in the quitclaim in controversy must prevail and become a part of the "granting clause". It is not impossible to ascertain **the grantor's intention** (emphases added) from a consideration of the entire quitclaim deed in this action. *Burk*, 687 S.W.2d 582. In this case the intention of CHS/Blanche Gregory is clearly expressed in a clause other than the granting clause, and her intention should be given effect, regardless of any technical rule that the granting clause will prevail over other portions of the deed. *Barber* 628 P.2d 1151. In this case there is a clear and specific limitation provision in the quitclaim deed, following the granting clause and designating an estate different than that conveyed in the granting clause, and it should prevail over the granting clause as to the estate conveyed. *Pike* ,18 S.W.2d 575. The

expressed intention of CHS/Blanche Gregory should control the granting clause in this case. *Id.* In this case the clause in the quitclaim in controversy must prevail and become a part of the "granting clause" limiting the conveyance to the Hardage lot. This writer finds no clear case in Mississippi absolutely in conformity with the above cited foreign cases. However, this Court should adopt the rationale in these cases and Blanche Gregory's lot should not be allowed to be taken from her by a lawyer covering his negligence and a rich bank attempting to take land without paying for the lot.

Any apparent inconsistency between the granting clause and other portions of the deed should be reconciled, if possible, *Holmes v. Countiss*, 195 Ark. 1014, 115 S. W. 2d 553 (1938) and *Stambaugh v. Stambaugh*, 288 Ky. 491, 156 S. W. 2d 827 (1941), and the rule that the granting clause prevails over inconsistent clauses should not be resorted to until all efforts to reconcile conflicting parts have failed. *Straford v. Lattimer*, 255 Ala. 201, 50 So. 2d 420 (1951). An estate conveyed in one portion of a deed by clear, explicit, and unambiguous words cannot be diminished or destroyed by words in another part of the instrument, unless they are equally clear, decisive, and explicit. *Stambaugh*, 156 S.W.2d 827 and *Pike*, 218 S. W. 2d. 575.

Mr. Roy Wright may have been hired to prepare the certificate of title to Citizens Bank at the beginning of the matter which developed into this controversy. But, Mr. Roy Wright admitted in his testimony that he did not represent, nor had he ever represented, CHS or Blanche Gregory. When Mr. Roy Wright drew the quitclaim deed he was representing himself and the interest of Citizens Bank, and CHS/Blanche Gregory did not have a lawyer

acting in their behalf. The quitclaim deed must be construed most strongly against the drafter----Mr. Roy Wright and Citizens Bank, the entity whose interests Mr. Roy Wright was protecting, together with his own.

III. THE CHANCERY COURT IMPROPERLY DISMISSED THE COUNTERCLAIMS OF HARRELL AND CENTRAL HEALTHCARE SERVICE, INC.

Appellant will rely and stand on the fact assertions, trial proof in the record, and cited law in its original Brief in answer to the assertion by Appellee that the Chancery Court correctly dismissed the Counterclaims of Harrell and CHS. However, the undersigned writer will point out that if Citizens Bank had good title to the Crawford lot through the quitclaim deed, as it asserts, and despite this fact filed its action to confirm title in contradiction to its "good title" claim, then it is a frivolous lawsuit and the denial of the Counterclaims of Harrell and CHS were not justified and therefore should not have been dismissed.

REPLY TO LAW AND ARGUMENT ON CITIZENS BANK'S CROSS-APPEAL

THE CHANCERY COURT DID NOT ERR IN DENYING CITIZENS BANK'S CLAIMS FOR DEFICIENCY, ATTORNEY'S FEES AND PREMIUM

I. CITIZENS BANK IS NOT ENTITLED TO AN AWARD OF ATTORNEY' FEES AGAINST HARRELL

The Appellee did not pray for attorney's fees in its Amended Complaint against the Defendants and it did not in its case in chief put on any evidence of nor a request for attorney's fees. It was only after Harrell and CHS requested attorney's fees in its case that Appellee requested attorney's fees for Citizens Bank. The Chancellor, over the objection of Harrell and CHS allowed the request. However, the failure to plead for attorney's fees and

failure to put on proof of attorneys fees at the proper time, precludes Citizens Bank from an award of attorney's fees.

Notwithstanding the above, the determination of an amount constituting a reasonable attorney's fee is within the sound discretion of the trial court. *Mauck v. Columbus Hotel Co.*, 741 So.2d 259, 269(¶ 32) (Miss.1999). "This Court will not reverse the trial court on the question of attorney's fees unless there is a manifest abuse of discretion in making the allowance." *Id.* (quoting *Deer Creek Const. Co., Inc. v. Peterson*, 412 So.2d 1169, 1173 (Miss.1982))."[t]he reasonableness of an attorney's fee award is determined by reference to the factors set forth in Rule 1.5 of the Mississippi Rules of Professional Conduct" and in *McKee v. McKee*, 418 So.2d 764, 767 (Miss.1982). *BellSouth Pers. Commc'n, LLC v. Bd. of Supervisors of Hinds County*, 912 So.2d 436, 447(¶ 37) (Miss.2005) (quoting *Browder v. Williams*, 765 So.2d 1281, 1288 (Miss.2000)). Rule 1.5(a) provides that:

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following: (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.

The determination of a reasonable fee also should take into consideration the "relative financial ability of the parties." *McKee*, 418 So.2d at 767.

The trial court must support an award of attorney's fees with factual determinations as to the reasonableness of the fee award. *BellSouth*, 912 So.2d at 447(¶ 37). The award should be supported by the evidence and should not be "plucked out of the air." *Browder*, 765 So.2d at 1287-88(¶ 34) (quoting *Dynasteel Corp. v. Aztec. Indus., Inc.*, 611 So.2d 977, 986 (Miss.1992)). The absence of any factual determinations as to the reasonableness of the fee award "would obligate this Court to make an original reasonableness determination and, in so doing, deprive us of our proper judicial function as a reviewing appellate body." *BellSouth*, 912 So.2d at 448(¶ 37). Accordingly, this Court previously has reversed and remanded for the trial court to make factual determinations pursuant to Rule 1.5 concerning an award of attorney's fees made pursuant to subsection 95-5-10(3). *Smith*, 888 So.2d at 1207(¶ 33). Accordingly, the Chancellor did not err in not awarding attorney's fees to Appellee.

II. CITIZENS BANK IS NOT ENTITLED TO A JUDGMENT AGAINST HARRELL FOR THE ALLEGED DEFICIENCY/INDEMNIFICATION AMOUNTS

The Chancellor correctly found in this case that there was more equity in the land to satisfy the debt Harrell owed on the Land than was bid by Citizens Bank at the foreclosure sale. *See page 16 of the Final Judgment.* The Chancellor correctly interpreted and applied the principals found in *Mississippi Valley Title Insurance Company v. Home Construction Company, Inc.*, 372 So.2d 1270, 1272 (Miss. 1979) and *Lake Hillsdale Estates v. Galloway*,

473 So.2d 461 (Miss. 1985) to this case and denied Citizens Bank's request for a deficiency balance.

The Chancellor found that in connection with its claim against Harrell for the premium of $34,000.00, that same was a request for indemnification. Applying the law to the facts of this case, Citizens Bank's request for indemnification and payment of the claimed $34,000.00, the Court correctly reasoned that Citizens Bank 1) did not prove that it was legally liable to the Whitten Group for said sum, 2) did not prove that Citizens Bank paid the sum to the Whitten Group under compulsion and 3) did not prove the amount paid was reasonable. *Hartford Casualty Insurance Company v. Halliburton Company*, 826 So.2d 1206 (Miss. 2001). Consequently, Citizens Bank is not entitled to indemnification from Harrell.

CONCLUSION

The Ruling of the Chancery Court of Leake County, Mississippi, on the direct appeal of CHS and Harrell should be reversed by this Honorable Court based on the relevant facts and Mississippi Law evidencing that the 2004 Quitclaim Deed did not convey title to the Crawford Lot and should declare CHS/ Blanche Gregory the fee simple owner of the Crawford Lot; that this Court should find in favor of the Counterclaims of both CHS and Harrell based on the evidence and testimony presented at trial and hold the Bank liable to both CHS and Harrell for reasonable attorney's fees and all costs and other damages incurred by CHS and as a result of this litigation, including, but not limited to, compensation for defamation incurred in connection with CHS' and Harrell's involvement in this action

and damages for defamation, abuse of process, malicious prosecution, and awards that may be due CHS under the Litigation Accountability Act. This Court should further find that CHS and Harrell are each individually entitled to punitive damages from the Bank in the amount of $3,000,000.00.

On the Cross-Appeal, this Court should 1) declare CHS/ Blanche Gregory the fee simple owner of the Crawford lot, 2) affirm the Chancellor's denial of an award of attorneys' fees to Citizens Bank, 3) affirm the Chancellor's denial of the deficiency judgment claims of Citizens Bank in the sum of $81,611.03 against Harrell and 4) affirm the Chancellor's denial of the premium paid on the purchase of the Crawford lot in the sum of $34,000.00 claimed by Citizens Bank against Harrell.

DATED this the 23rd day of October 2008

RESPECTFULLY SUBMITTED,

CENTRAL HEALTHCARE SERVICES P.A.
AND WENDALL HARRELL

BY: _____
J. EDWARD RAINER

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he has this the 23rd day of October 2008 caused to be mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Reply Brief to:

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