

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

RITA FAYE MILEY

APPELLANT

VERSES

CASE NO. 2008-TS-00677

WILLIAM M. MILEY, JR.

APPELLEE

BRIEF OF APPELLEE WILLIAM M. MILEY, JR.

APPEAL FROM THE CHANCERY COURT OF
OKTIBBEHA COUNTY, MISSISSIPPI
CAUSE NO. 2007-0138-B

(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

In accordance with Rule 28(a) of the Mississippi Supreme Court Rules, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

These representatives are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. Rita Faye Miley, Appellant
2. William M. Miley, Jr., Appellee
3. Hal H. H. McClanahan, III, Attorney for Appellant
4. Rodney P. Faver, Attorney for Appellee

Respectfully submitted,

WILLIAM M. MILEY, JR.

By: 

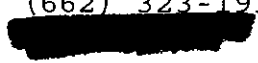
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STATEMENT OF THE ISSUES

Issue 1: Whether the trial Court manifestly abused it's discretion in awarding the Appellant, Rita Faye Miley, attorney fees in the amount of \$5,000.00 in it's opinion and judgment dated February 26, 2008.

Issue 2: Whether the trial Court manifestly abused it's discretion overruling the Motion to Reconsider dated March 20, 2008.

Respectfully submitted,

WILLIAM M. MILEY, JR.

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STATEMENT OF THE CASE

A. Nature of the case:

On March 23, 2007, the Plaintiff/Appellant, Rita Faye Miley (hereinafter "Rita"), filed her Complaint for Separate Maintenance (R.E.1-3). The Defendant/Appellee, William M. Miley, Jr. (hereinafter "Buzz") filed his Answer denying the Complaint and filing no Cross-Complaint (R.E.4-7).

The parties entered an Agreed Order of temporary maintenance to "Rita" in the amount of \$2,400.00 per month on August 10, 2007 (R.E.8-9).

The trial in this matter, was held on January 10, 2008 and lasted the majority of the day with the Court rendering a bench opinion at the end of the trial. In the Court proceeding, the Court heard the following:

- 1) the parties had an on-going relationship for many years and the Court heard testimony that the parties had been married and divorced. Subsequently, the parties were married again and within a year of the second marriage "Rita" moved out and moved into a mobile home which "Buzz" provided for her.

The Court heard testimony regarding "Rita's" assertion that she had been physically abused, but the Court reviewed and heard testimony regarding the medical records and did not find her testimony credible. The Court after hearing the pleadings of the parties, testimony and exhibits, found that "Rita" had not satisfied her burden regarding her right for separate maintenance. The Court was not satisfied that "Ms. Miley's conduct didn't in fact play a substantial role in the separation of the parties." Further, the Court was not convinced that if Mr. Miley made a "good faith" effort, and according to Mrs. Miley's testimony, she would ever take him back. Therefore, the Court found that Mrs. Miley "is not entitled to separate maintenance." (see R.E.17).

The only evidence that was offered regarding attorney fees was the professional service agreement, an itemized attorney sheet, and 2 affidavits from attorneys, which were presented at the beginning of the trial. The Court heard no testimony from the Appellant's attorney regarding these fees.

The Court in it's opinion, determined that a reasonable attorney fee for this case was \$5,000.00. (R.E.14,18) and further, the Court at the conclusion of the case in rendering it's decision stated that "the Court has examined the exhibit for attorney's fees. The Court finds that Mrs. Miley does not have the resources to pay attorney fees. The Court, almost every day, hears cases where lawyers present domestic relation cases. The Court has no doubt that Mr. McClanahan put the time in there and that his time is valued at what he says, but there is also a statute that says the Court can make a determination, even without proof, as to what

reasonable attorney fees are. The Court is going to direct that Mr. Miley pay Mrs. Miley for her attorney fees, within the next sixty days, the sum of \$5,000.00." The Court then stated, "any other relief requested by either party is denied. Alright, whether you agree with me or not, is there anything that you feel like the Court overlooked?" (R.E.14). The Court, as stated in the transcript, based his determination of the reasonableness of the amount of fees based on his trying domestic relations case. The amount as awarded by the Court, was done so without a contemporaneous objection by Appellant counsel nor any request for any factors that the Court used in determining the figure.

On or about March 6, 2008, "Rita" submitted her Motion to Reconsider the judgment without supporting memoranda (R.E.19-30).

On or about March 20, 2008, the trial Court overruled "Rita's" Motion to Reconsider from which the Appellant perfected this Appeal (R.E.31).

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SUMMARY OF THE ARGUMENT

There was no finding by the Court that the Appellant had met their burden of proof such as to sustain an award for separate maintenance. The Court did not manifestly abuse it's discretion in awarding reasonable attorney fees of \$5,000.00 based on the Court's review of the evidence presented and the Court's knowledge of domestic relation cases.

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ARGUMENT

I. STANDARD OF REVIEW

The Chancellor did not manifestly abuse his discretion in awarding \$5,000.00 in attorney fees. Further, the court conducted a analysis of the reasonableness of the fees awarded based on his experience in domestic relation cases (McKEE V. McKEE, 418 So.2d 764) .

The Appellant, in her Brief has attempted to cloud the issue with references to the amount of money involved in this divorce. The size of the estate, however, has nothing to do with the issue at hand. The question to be resolved is whether or not the Court manifestly abused his discretion in awarding attorney fees in the amount of \$5,000.00.

It should be noted, that the Court found that "Rita" did not sustain her burden regarding separate maintenance. The only reason that she received any money, including attorney fees, was based on the Court finding that equity required it.

The Supreme Court has recently reaffirmed the standard necessary to overturn a Chancellor's decision on attorney fees. The Court in MABUS V. MABUS 910 So.2d 486 (Miss. 2005), reaffirmed that, "unless the Chancellor is manifestly wrong, his decision

regarding attorney fees will not be disturbed on appeal." Further, the Court in MABUS, stated that to find "as related to whether a Chancellor exercised manifest abuse of discretion, means unmistakable, clear, plain or indisputable." The Court in MABUS also said that "the Appellate Court will affirm the Chancellor's Decree if the record shows any ground upon which the decision may be justified." and further found "the Court will not arbitrarily substitute it's judgment for that of the Chancellor who is in the best position to evaluate all factors".

The case at bar, involved a relatively simple case, wherein the Appellant was requesting separate maintenance. The sole issue was, that the Court needed to make a determination as to whether or not the living conditions were such that it was unreasonable for "Rita" to continue living there. There was no dispute, that "Rita" had moved out of the marital abode and that she did not intend to move back to the marital abode no matter what Mr. Miley did (see opinion of the Court R.E.17). The Court looked at the hours that the Appellant's attorney put in his statement, and contrasted that with his experience in dealing with domestic relations cases (see R.E.14). The Court looked at the evidence presented, the nature of the case and his experience in these types of cases and made a determination as to what a reasonable attorney fee should be.

In the case of HOLLOWAY V. HOLLOWAY 856 So.2d 382 (Miss. Ct. App. 2003), the Court found that it was not an abuse of discretion to award attorney fees significantly less than what was requested by the Appellant.

In that case, the only issue on appeal was whether or not the

Chancellor abused her discretion in awarding attorney fees of \$1,500.00. That case, involved a Motion for Contempt, wherein the Appellee was not found to be in contempt. However, as in our case the Chancellor awarded the Appellant some of her attorney fees in pursuing the Contempt Motion. The attorney in that case had requested attorney fees in the amount of \$9,948.12 and the Court awarded \$1,500.00 without any explanation as to the reason or basis for the amount of the award. Significantly, the dissent in that case noted that the attorney for the Appellee offered no evidence to rebut the Appellant's attorney regarding the amount of fees, except for a question regarding seven entries. In the HOLLOWAY case, it was apparent that the Court placed great significance on the fact that the Court found that the Appellee purged himself of contempt by paying the half a million dollar installment prior to the contempt hearing, but significantly did not find the Appellee to be in contempt. As in this case, there was no award for separate maintenance, but equitable relief was granted to the Appellant, based on her illness and the factors as enumerated in the Court's Order. Therefore, the Court made an equitable decision based on the fact that the Appellant was not successful in sustaining her burden on separate maintenance and received the same amount of money that the Appellee had agreed to pay her in the Agreed Temporary Order.

The Appellant, decided to go for more money than what she was already receiving and presented the Court with document upon document about the Appellee's finances. The attempt to influence the Court, was not successful and the Court followed the law

regarding separate maintenance and denied her request.

The Appellant has argued that the Court did not follow the BROWDER V. WILLIAMS case (Miss. Ct. App. 2000) in the actions he took in making his decision. The Appellant has stated that the Court in this case, "made a factual determination and that he somehow pulled it out of thin air." However, it is clear by the Court's decision, that he reviewed all of the testimony and used his experience in domestic relation cases to determine what was a reasonable fee based on the case before him (see R.E.14).

The Appellant has also put forth the proposition, that the Judge needed to make some specific finding of fact regarding the McKEE factors in our case. However, that is not the case. In the case of MITCHELL V. MITCHELL 823 So.2d 568 (Miss. Ct. App. 2002), the Appellate Court upheld the award of attorney fees without specifically mentioning the McKEE factors. The Court also affirmed that failure to address the McKEE factors is not necessarily a cause to reverse the award. WELLS V. WELLS, 800 So.2d 1239 (Miss. Ct. App. 2001). The Court in MITCHELL, cited the WELLS case by stating that "even though the Chancellor did not state anything more than that the party was unable to pay, that when the Court reviewed the evidence and the financial status of each party, the award of attorney fees was not an abuse of discretion." Further, the dissent in the HOLLOWAY case stated "I am mindful that there are a number of cases that tend to relax the necessity of strict adherence to the McKEE factors". Additionally, in the MABUS case the Court made a finding of attorney fees with nothing more than the statement put forth by the attorneys and the testimony of the

attorneys, without any finding specifically of the McKEE factors. Therefore, the Chancellor's finding regarding the reasonableness of the amount of attorney fees awarded in light of all the circumstances in this case, should be upheld without specifically enumerating the McKEE factors.

Even if one is to consider the McKEE factors, there was no evidence presented regarding 1) anything unusual about the issues or that they were novel or difficult: 2) no evidence presented regarding the degree of responsibility involved in the management of the case; 3) nothing offered suggesting that the representation of "Rita" in the case precluded other employment by the attorney. Basically, there was no basis for the award of attorney fees, because the Appellant was not successful in her complaint for separate maintenance. If not for the Court's generosity by allowing attorney fees, Appellant would be paying them on her own.

The Appellant in this case has tried to make this as some type of decision that is sending a message to the bar regarding destitute women. However, the Appellant made a decision in this case not to continue to accept the temporary award that was agreed to by the Appellee and try to get a larger payday, with full knowledge that the Court would award attorney fees to her, because of the fact that the Appellee had been taking care of her throughout the course of their separation.

The only message that is being sent here, is that the Chancellor in this case, looked at all of the factors and made an equitable decision for both parties and did not punish one because he is in a better financial situation than the other.

There is absolutely no reason for the Court to reverse and render, as requested by the Appellant in this matter. The Chancellor in this case has demonstrated his ability to be equitable in this case and if this Court determines that he needs to make a detailed finding, there is no doubt that he will be able to do so.

As the Supreme Court stated in the MABUS case, "the Appellate Court will not arbitrarily substitute it's judgment for that of the Chancellor who is in the best position to evaluate all factors and it is clear that the Appellant in this case has not shown that the Chancellor manifestly abused his discretion, that his decision met the definition of manifest which is unmistakable, clear, plain or indisputable.


II. CONCLUSION

The Court found that "Rita" did not sustain her burden for the award of separate maintenance. The Appellant took a chance in going to Court to try to get a higher award than what the Appellee had agreed to pay her in the Temporary Order. The Law is well settled that this Court would not arbitrarily substitute it's judgment for that of the Chancellor, who is in the best position to evaluate all factors, when reviewing a Chancellor's decision regarding attorney fees. Further, in this case even though the Appellant did not meet all of the factors in the McKEE case, and did not win her case, the Chancellor equitably ordered \$5,000.00 worth of attorney fees, based on his hearing of the case and his experience and knowledge in domestic relations cases. The Appellant wanted to take one more chance and try to get a larger award and she wants the Appellee to pay for that chance also. However, equity should not extend that far, by allowing additional attorney fees both for the Lower Court case and the appeal. The Court should defer to the Chancellor who is in the best position to evaluate all the factors in this case.

Respectfully submitted,

WILLIAM M. MILEY, JR.

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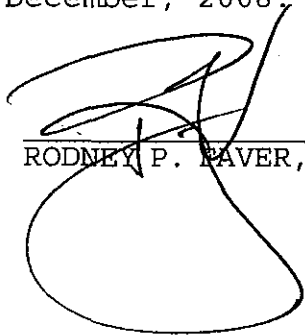
CERTIFICATE OF SERVICE


I, RODNEY P. FAVER, Attorney for Appellee, William M. Miley, Jr., do hereby certify that I have this day caused to be delivered via U.S. Mail postage prepaid, a true and correct copy of the above and foregoing **APPELLEE'S BRIEF** to:

HAL H.H. McCLANAHAN, III
P.O. BOX 1091
COLUMBUS, MS 39703-1091

HONORABLE KENNETH M. BURNS
CHANCERY COURT JUDGE, DISTRICT FOURTEEN
P.O. DRAWER 110
OKOLONA MS 38860-0110

SO CERTIFIED this the 1 day of December, 2008.



RODNEY P. FAVER, 

CERTIFICATE OF MAILING

I, RODNEY P. FAVER, Attorney for Appellee, do hereby certify that I have this day caused to be delivered via U.S. Mail postage prepaid, the original and three copies of the above and foregoing **APPELLEE'S BRIEF** to:

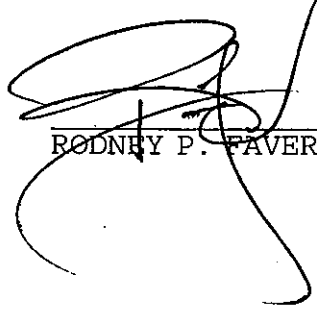
MS. BETTY W. SEPHTON, CLERK
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and further certify that this day a true and correct copy of the above and foregoing APPELLEE'S BRIEF was mailed, via U.S. Mail postage prepaid, to:

HAL H.H. McCLANAHAN, III
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COLUMBUS, MS 39703-1091

HONORABLE KENNETH M. BURNS
CHANCERY COURT JUDGE, DISTRICT FOURTEEN
P.O. DRAWER 110
OKOLONA MS 38860-0110

SO CERTIFIED on this the 1 day of December, 2008.



RODNEY P. FAVER, 