

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CASE NO. 2008-CA-01700-SCT**

CHARLES TIMOTHY WEST, ET AL. APPELLANTS

V.

DEBORAH GAYLE THORNTON WEST APPELLEE

**Consolidated with
2002-IA-00158-SCT**

DEBORAH GAYLE THORNTON WEST APPELLANT

V.

CHARLES TIMOTHY WEST APPELLEE

**Consolidated with
2009-CA-01877-SCT**

DEBORAH GAYLE THORNTON WEST APPELLANT

V.

WEST QUALITY FOOD SERVICES, INC., ET AL. APPELLEES

**ON APPEAL FROM THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI**

BRIEF OF APPELLEES, WEST QUALITY FOOD SERVICES, INC., ET AL.

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record 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 this Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Deborah Gayle Thornton West – Appellant;

Patrick F. McAllister – Attorney for Appellant;

William B. Pemberton, II – Trial Attorney for Appellant;

West Quality Food Services, Inc. – Appellee;

Coastal Express, Inc. – Appellee;

West Leasing Company – Appellee;

West Brothers Leasing Company – Appellee;

West Family Leasing Company – Appellee;

West Investments, LLC – Appellee;

James Robert Sullivan, Jr. – Attorney for Appellees;

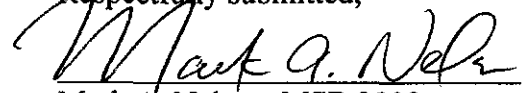
Mark A. Nelson – Attorney for Appellees;

Jared W. Eastlack – Attorney for Appellees;

Charles Timothy West – Defendant in underlying action, Cause No. 94-0191, Jones County, First Judicial District; and

Terry L. Caves – Attorney for Charles Timothy West.

Respectfully submitted,



Mark A. Nelson, MSB 3808

Jared W. Eastlack, MSB 102615

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STATEMENT OF THE ISSUES

- A. The Chancellor's determination that the West Entities were entitled to attorneys' fees from the time they complied with Debbie's subpoenas duces tecum is supported by evidence in the record and is not manifestly wrong.**
- B. The Chancellor considered the relevant factors in awarding attorneys' fees and his determination is not manifestly wrong.**

STATEMENT OF THE CASE

Because the relevant facts in this case are the details of proceedings before the Chancellor, the West Entities combine their Statement of the Case and their Statement of Facts.

This case initially began as a divorce proceeding between Tim and Debbie West in 1994 when the parties filed a Property Settlement Agreement ("PSA") and were divorced. Several years later, Debbie brought a contempt action against Tim. The Chancellor voided certain provisions of the PSA and Debbie sought an interlocutory appeal. In 2004, this Court reversed the Chancellor's decision and remanded the case for further proceedings. In its opinion, this Court stated:

We have held that a "[husband or] wife, in respect of [his or] her right to maintenance or alimony, [are] within the protection of statutes or the rule avoiding conveyances or transfers in fraud of creditors or other persons to whom the maker is under legal liability; and this is so irrespective of whether the conveyance or transfer was made before, and in anticipation of the [husband or] wife's suit for maintenance or alimony, or pending the suit, or after a decree has been made in the [husband or] wife's favor." Although in the past, this precedent has typically applied in cases where the conveyance of the property in question originates with one of the spouses, we find that the law is applicable in a situation where the offending spouse is on the receiving end of a conveyance of property to which the other spouse appears reasonably entitled under a maintenance or alimony agreement

West v. West, 891 So. 2d 203, 217 (Miss. 2004)(citations omitted).

On remand, the West Entities voluntarily complied with subpoenas duces tecum that Debbie had served on them before the appeal, producing over 17,000 pages of financial documents.¹ R. 2060. Debbie thereafter filed a motion for leave to file an amended complaint for fraudulent conveyance against the West Entities on September 15, 2005. R. 721. Debbie amended the motion to file an amended complaint in March 2006. R. 800. The Chancellor granted Debbie's motion to file an amended complaint and Debbie filed the amended complaint on April 21, 2006. R. 903-915. The West Entities answered the amended complaint on September 7, 2006. R. 969.

After Debbie filed her amended complaint, the parties entered an amended scheduling order, setting trial for December 2006. R. 925. The scheduling order was amended several other times, with trial ultimately set for February 13, 2007. *See* R. 1107, 1182. In anticipation of trial, the parties filed multiple motions, all of which required attention by the West Entities. Debbie filed other motions that, while not directly affecting the West Entities, required attention. *See, e.g.,* R. 1109 (motion to compel medical examination). In January 2007, Tim filed a motion for summary judgment. R. 1192. The West Entities moved to dismiss the amended complaint and also moved for attorneys' fees and costs. R. 1698, 1687.

At the February 2007 hearing on the pending motions, the Chancellor inquired as to the basis of Debbie's claim of fraudulent conveyance against the West Entities. R. 1718. Debbie's counsel responded that the West Entities "loaned the money. They gave the money." R. 1718. The Chancellor concluded that this basis was not sufficient as a matter of law and granted the West Entities' motion to dismiss. R. 1710, 1719.

¹ This case has been consolidated with cases numbered 2008-CA-01700-SCT and 2002-IA-01158-SCT. The West Entities refer to the record filed in this case (2009-CA-01877) on February 11, 2010, as "Supp. R. ____." The West Entities refer to the record filed in case 2008-CA-01700-SCT on March 10, 2009, as "R. ____."

In April 2008, the Chancellor granted the West Entities' motion for attorneys' fees. R. 2059-61. According to the Chancellor, the West Entities provided over 17,000 pages of financial documents to Debbie. R. 2059-60. The Chancellor found that "Debbie and her counsel should have been able to determine from these financial documents that there was no possibility of success if she filed a claim against the West Entities." R. 2060. Put another way, the West Entities "should never have been sued because the documents [they produced in response to the subpoena duces tecum] made it clear that there was no fraudulent conveyance." R. 2062. Pursuant to the request of Debbie's counsel, the Chancellor granted Debbie thirty days to initiate discovery on the issue of the quantum of the fees." R. 2062. The Chancellor entered a final judgment on May 9, 2008, incorporating its findings of fact and conclusions of law that were entered on April 10, 2008. R. 2070.

The Chancellor received testimony and evidence and heard argument to determine the amount of fees in November 2008. Supp. R. 36-47. Counsel for the West Entities prepared an abstract of his billings to the West Entities relative to Debbie's amended complaint. Supp. R. 37-47. He testified that he billed the West Entities for other work that he performed for them. Supp. R. 56. He further testified that he used his discretion as managing partner of the firm to determine rates and to determine how to place time value on his services. Supp. R. 57. The Chancellor entered an order awarding attorneys' fees and costs in the amount of \$41,063.71. Supp. R. 28.

Debbie filed a motion to alter or amend the award of attorneys' fees. Supp. R. 29. In her motion, Debbie argued, among other points, that the West Entities' counsel had withdrawn the request for fees incurred after the West Entities were dismissed, and the award should be reduced by that amount, \$3,182.00. Supp. R. 29-30. The West Entities did not oppose that portion of

Debbie's motion and the Chancellor entered an amended order, awarding fees and expenses in the amount of \$33,366.71. Supp. R. 61.

SUMMARY OF THE ARGUMENT

The Chancellor's decision is reviewed for abuse of discretion and should not be set aside unless it is "manifestly wrong." Debbie's arguments do not reach this high standard. First, the Chancellor properly determined that the West Entities were entitled to attorneys' fees after the time that Debbie should have realized she had no claim for fraudulent conveyance against the West Entities. Debbie does not dispute that the West Entities complied with subpoenas duces tecum on August 5, 2005, the date determined by the Chancellor to trigger the award of fees. Second, the Chancellor is not required to expressly reference the *McKee* factors and the record shows that he properly considered relevant facts in determining the amount of fees.

ARGUMENT

This Court reviews a trial court's award of attorneys' fees for abuse of discretion. *Mauck v. Columbus Hotel Co.*, 741 So.2d 259, 269 (Miss. 1999). An award of attorneys' fees will not be disturbed unless it is "manifestly wrong." *Tupelo Redevelopment Agency v. Gray Corp.*, 972 So.2d 495, 520-23 (Miss. 2007). In this context, "manifest" means "unmistakable, clear, plain, or indisputable." *Id.* In considering an award of attorneys' fees, this Court considers the trial court's experience with the proceedings and other "substantial credible evidence in the record." *Mabus v. Mabus*, 910 So.2d 486, 489 (Miss. 2005). Further, the trial court is not required to detail its reasoning or application of the factors set out in *McKee v. McKee*, 418 So.2d 764 (Miss. 1982). See *Upchurch Plumbing, Inc. v. Greenwood Utilities Commission*, 964 So.2d 1100, 1115-16 (Miss. 2007); *Stigler v. Stigler*, 2009 Miss. App. LEXIS 704 (Miss. App. Oct. 13, 2009).

A. The Chancellor's Determination that the West Entities were Entitled to Attorneys' Fees from the Time They Complied with Debbie's Subpoenas Duces Tecum is Supported by Evidence in the Record and is not Manifestly Wrong.

Debbie first objects to the time period for which the Chancellor awarded attorneys' fees and costs. According to Debbie, the Chancellor erred in awarding the West Entities fees incurred from August 3, 2005 (the date on which the West Entities complied with Debbie's subpoenas duces tecum) to April 21, 2006 (the date on which she made the West Entities parties to this divorce action). Appellant Brief, p. 5.

The Chancellor correctly held that the West Entities were entitled to fees from the time that they complied with Debbie's subpoenas duces tecum. R. 2059-61. At that time, according to the Chancellor, Debbie had all the information necessary to know that a claim against the West Entities was without merit. R. 2060. Debbie nonetheless filed a motion to amend her complaint to add the West Entities as parties. R. 721. Debbie argues that the West Entities are not entitled to any fees incurred before she actually filed or served the amended complaint.

These are the relevant dates. The West Entities provided Debbie with the documents she requested by subpoenas duces tecum on August 3, 2005.² See R. 2060; Supp. R. 31. On September 15, 2005, Debbie filed a motion to amend the complaint to add the West Entities as defendants. R. 721. Following objections to that motion, as well as an amended motion, Debbie's motion was granted and she filed the amended complaint on April 21, 2006, serving it on counsel for the West Entities on June 5, 2006. R. 903-915.

Debbie's argument is not supported by the Litigation Accountability Act or Rule 11 of the Mississippi Rules of Civil Procedure. Under the Litigation Accountability Act, attorneys'

² Debbie does not challenge the Chancellor's finding that the West Entities completely responded to the subpoenas by August 3, 2005. The Chancellor found that "Debbie and her counsel have never denied that they received the documents first, and then chose to sue the West Entities." R. 2060.

fees may be ordered when an attorney or party brought an action or asserted a claim or defense that is without substantial justification or asserted a claim or defense for delay or harassment or “unnecessarily expanded the proceedings” by improper conduct. Miss. Code Ann. § 11-55-5. Similarly, a court may award attorneys’ fees against a party or attorney who “files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay.” Miss. R. Civ. P. 11.

Here, the Chancellor found that, based on more than 17,000 pages of financial documents that the West Entities produced, Debbie should have known that she did not have a claim for fraudulent conveyance. R. 2060. Notably, Debbie has never identified any document that supports her claim against the West Entities other than the bare assertion that they “loaned the money.” See R. 1718. Nonetheless, after she received the documents, Debbie filed a motion to amend the complaint to add the West Entities and assert a claim of fraudulent conveyance against them. R. 721-736. Therefore, it was the filing of the motion to amend, not the filing of the amended complaint, that triggered the liability for attorneys’ fees. The Chancellor’s finding to that effect is not manifestly wrong and should be affirmed.

B. The Chancellor Considered the Relevant Factors in Awarding \$33,366.71 in Attorneys’ Fees and His Decision is Not Manifestly Wrong.

Debbie next challenges the Chancellor’s award of attorneys’ fees for failure to consider the factors set out by this Court in *McKee v. McKee*, 418 So.2d 764 (Miss. 1982). According to Debbie, the fee request is not sufficiently detailed and includes some entries that are “simply inappropriate.” She also argues that the fees are excessive because there was no trial on the merits, only a motion to dismiss. Debbie’s arguments fail.

First, the trial court is not required to detail its analysis of the *McKee* factors. A trial court’s award of attorneys’ fees will be affirmed when the judge “relies on substantial credible

evidence in the record regarding attorney's fees." *Upchurch Plumbing, Inc. v. Greenwood Utilities Comm.*, 964 So.2d 1100, 1115-16 (Miss. 2007)(citations omitted). *See also Dickerson v. Dickerson*, 2010 Miss. App. LEXIS 202 (Miss. App. Apr. 20, 2010)(affirming award of attorneys' fees that did not specifically address *McKee* factors when award was supported by substantial evidence). Here, the Chancellor has presided over these proceedings at least since 2002, and is very familiar with the issues. *See* R. 290. While the West Entities were defendants, the Chancellor considered multiple motions among the parties. Before determining the amount of attorneys' fees, the Chancellor had conducted a trial on the merits and heard testimony specifically regarding the West Entities' motion for fees. *See* R. 2059-62; Supp. R. 52-58. The record demonstrates that the Chancellor's award of attorneys' fees was not manifestly wrong.

Second, Debbie objects to some of the entries on counsel's billing records but her objections are not supported by the record. The objections simply list three time entries, which she – without explanation – characterizes as "inappropriate." Debbie had the opportunity to conduct discovery on the West Entities' fees and to cross-examine the West Entities' counsel at the hearing before the Chancellor. Supp. R. 48-58. At the hearing, counsel testified that the proffered time related to Debbie's amended complaint. Debbie did not challenge counsel's testimony at the hearing. *See* Supp. R. 52-58. Without more, Debbie's conclusory and vague reference to some time entries as "inappropriate" is not sufficient to establish that the Chancellor abused his discretion.

Finally, Debbie mischaracterizes the proceedings in this case. According to Debbie, the amount of fees awarded to the West Entities was inconsistent with the reasonable cost to defend a case that was dismissed on motion and without a trial. The Chancellor did grant the West Entities' motion to dismiss, but much more was involved. While the West Entities were defendants, they responded to discovery, filed motions, and defended motions filed by Debbie.

See, e.g., R. 1698. Further, as parties, the West Entities were required to monitor proceedings between Debbie and Tim, even if the proceedings did not directly affect the West Entities. The Chancellor had knowledge of the proceedings in this case and his award of attorneys' fees was reasonable under the circumstances.


CONCLUSION

The record in this case demonstrates that the Chancellor did not abuse his discretion in awarding attorneys' fees to the West Entities in the amount of \$33,366.71, and his decision should be affirmed.

This the 10th day of June, 2010.

Respectfully submitted,

**WEST QUALITY FOOD SERVICES,
INC., COASTAL EXPRESS, INC.,
WEST LEASING COMPANY, WEST
BROTHERS LEASING COMPANY,
WEST LEASING COMPANY, WEST
FAMILY LEASING COMPANY, AND
WEST INVESTMENTS, LLC,
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