

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

APPELLANTS/CROSS-APPELLEES

VERSUS

NO. 2008-CA-01700

DEBORAH GAYLE THORNTON WEST

APPELLEE/CROSS-APPELLANT

**APPEAL FROM THE CHANCERY COURT OF
JONES COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT NO. 94-0191**

**BRIEF OF CROSS-APPELLEES AND
REPLY BRIEF OF APPELLANTS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	<u>-ii-</u>
CASES	<u>-ii-</u>
STATUTES	<u>-iii-</u>
 STATEMENT OF THE CASE	 <u>-2-</u>
ARGUMENT	<u>-4-</u>
1. The law of the case doctrine does not preclude the Chancellor from voiding provisions of the PSA as unenforceable.	<u>-4-</u>
A. Marital Assets.	<u>-5-</u>
B. Distributions.	<u>-6-</u>
C. Debbie's Interest (if any) in the West Entities.	<u>-8-</u>
2. The Chancellor erred in denying the West Entities' motion to void the PSA's provisions regarding Debbie's purported interest in the West Entities.	<u>-8-</u>
3. The Chancellor did not err in dismissing Debbie's claim against the West Entities	<u>-13-</u>
4. The Chancellor did not err in awarding attorneys' fees to the West Entities. .	<u>-17-</u>
 CERTIFICATE OF SERVICE	 <u>-18-</u>

TABLE OF AUTHORITIES

CASES

<i>A & L, Inc. v. Grantham</i> , 747 So. 2d 832 (Miss. 1999)	-14-
<i>Barbee v. Pigott</i> , 507 So.2d 77 (Miss. 1987)	-15-
<i>Blount v. Blount</i> , 231 Miss. 398, 95 So. 2d 545 (1957)	-14- , -15-
<i>Burns v. Burns</i> , 789 So.2d 94 (Miss. App. 2000)	-11- , -12-
<i>Catchings v. Manlove</i> , 39 Miss. 655 (1861)	-15-
<i>Cf. Ngo v. Centennial Ins. Co.</i> , 893 So. 2d 1076 (Miss. Ct. App. 2005)	-15-
<i>Fayard v. Fayard</i> , 293 So.2d 421 (Miss. 1974)	-11-
<i>Folmar & Associates LLP v. Holberg</i> , 776 So.2d 112 (Ala. 2000)	-15-
<i>In re Estate of Anderson</i> , 541 So. 2d 423 (Miss. 1989)	-9-
<i>Limbert v. Miss. Univ. for Women Alumnae Ass'n</i> , 998 So. 2d 993 (Miss. 2008)	-6-
<i>Mauk v. Columbus Hotel Co.</i> , 741 So.2d 259 (Miss. 1999)	-5-
<i>McGee v. McGee</i> , 726 So.2d 1220 (Miss. App. 1998)	-9- , -12-
<i>Murray v. Murray</i> , 358 So.2d 723 (Miss. 1978)	-14-
<i>TXG Intrastate Pipeline Co. v. Grossnickle</i> , 716 So.2d 991 (Miss. 1997)	-5-
<i>United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.</i> , 125 F.3d 899 (5th Cir. Tex. 1997)	-15-
<i>Weir v. Jones</i> , 84 Miss. 602, 36 So. 533 (1904)	-16-
<i>West v. West</i> , 891 So.2d 203 (Miss. 2004)	-2- , -5- , -7- , -8-
<i>Wiggins v. Perry</i> , 989 So. 2d 419 (Miss. Ct. App. 2008)	-3-
<i>Wooldridge v. Wooldridge</i> , 856 So. 2d 446 (Miss. Ct. App. 2003)	-5-

STATUTES

Miss. Code Ann. § 11-55-3	<u>-17-</u>
Miss. Code Ann. § 11-55-5	<u>-17-</u>
Miss. Code Ann. § 15-3-101 <i>et seq.</i>	<u>-15-</u>
Miss. Code Ann. § 79-4-6.27	<u>-11-</u>

RULES

Miss. R. Civ. P. 11	<u>-17-</u>
Miss. R. Civ. P. 12(b)(6)	<u>-15-</u>
Miss. R. Civ. P. 9	<u>-15-</u>
Miss. R.Civ.P. 54(b)	<u>-3-</u>

OTHER AUTHORITIES

Waller, Jr., William L., <i>The Mississippi Lawyer, Modifications or Avoidance of Child Support and Alimony Commitments based on Questionable Distributions after Equitable Division of Assets</i> , 26 (June 2005)	<u>-14-</u>
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Appellants/Cross-Appellees West Quality Food Services, Inc., Coastal Express, Inc., West Leasing Company, West Brothers Leasing Company, West Family Leasing Company and West Investments, LLC (collectively the “West Entities”) submit this brief in response to the brief of Debbie West (“Debbie”) as Cross-Appellant and in reply to the brief of Debbie as Appellee.

STATEMENT OF THE CASE

The West Entities submit this amended Statement of the Case to clarify the unique procedural posture of their appeal and cross-appeal in this case.

This action began in 1994 when Debbie West (“Debbie”) and Charles Timothy West (“Tim”) divorced. The judgment of divorce included a Property Settlement Agreement (“PSA”) that was signed by Debbie and Tim. The West Entities were not parties to the PSA.¹ C.A.R.E. 1-21.

In 2000, Debbie filed a motion for contempt against Tim. The Chancellor voided the PSA on the ground that it was unreasonably ambiguous and vague. On interlocutory appeal, this Court reversed and remanded. *See, West v. West*, 891 So.2d 203 (Miss. 2004)(“*West I*”). The West Entities were not parties in *West I*.

On remand, Debbie amended her complaint to add a claim against the West Entities for fraudulent conveyance. C.P. 912. The West Entities filed a motion to void the PSA on the ground that any attempted transfer of an interest in the West Entities was prohibited by the West Entities’ internal corporate documents. C.P. 1363. The Chancellor denied the motion because the West Entities were not parties to the PSA. C.P. 1719. Hence, according to the Chancellor, there was nothing to void.

¹ The West Entities refer to the transcript of testimony prepared by the court reporter in this case as “T2 ____”; exhibits admitted at the trial as “Ex. ____”, the record excerpts of Cross-Appellant Debbie West as “C.A.R.E. ____”, the Clerk’s papers as “C.P. ____”, and the brief of Cross-Appellant Debbie West as “C. App. ____”.

The West Entities then moved to dismiss Debbie's claims against them. C.P. 1698. At a hearing on the motion, the Chancellor asked Debbie's counsel what he alleged the West Entities did that was a "fraudulent conveyance." T2 190. Debbie's attorney responded that "[t]hey loaned the money. They gave the money." T2 190. The Chancellor ruled that allegations that the West Entities made a loan were not sufficient. T2 190. The Chancellor then dismissed the claims against the West Entities. C.P. 1710.

Debbie's claims against Tim and Tim's claims against Debbie proceeded to trial. The West Entities had been dismissed and they did not participate in the trial as parties. After trial, the Chancellor entered detailed findings of fact and conclusions of law, as well as a final judgment certified under Rule 54(b). C.P. 2011. Because the Chancellor's ruling affected the West Entities, they filed a motion to alter or amend the judgment. C.P. 2149. In particular, the West Entities challenged the Chancellor's reliance on "law of the case" and the Chancellor's determination that Debbie had a "contingent" interest in Tim's ownership in the West Entities. C.P. 2149.

After the parties filed their notices of appeal, the West Entities filed a motion to stay this appeal pending resolution of other issues that are pending before the Chancellor. This Court denied that motion.

The West Entities renew their motion to stay these proceedings. The Chancellor certified the May 8, 2008 judgment as "final" under Rule 54(b), but reserved ruling on the amount of attorneys' fees due the West Entities from Debbie. C.P. 2072 Rule 54(b) provides that the Chancellor may direct entry of final judgment as to "one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment." *See* Miss. R.Civ.P. 54(b). *See also, Wiggins*

v. Perry, 989 So. 2d 419, 432 (Miss. Ct. App. 2008)(by “reserving ruling” on issue, order was not final under Rule 54(b) even if parties and Chancellor treated it as final).

ARGUMENT

This case began when Debbie and Tim signed the PSA and divorced in 1994. The West Entities, however, have been brought into this dispute even though they are not parties to the PSA at issue. The West Entities request that the Court affirm the Chancellor’s dismissal of them from this litigation and direct the Chancellor to void the PSA to the extent it gives Debbie any right to control or monitor the West Entities so that the West Entities can concentrate on their business operations without interference.

1.The law of the case doctrine does not preclude the Chancellor from voiding provisions of the PSA as unenforceable.

In her response, Debbie argues that the law of the case doctrine bars consideration of the enforceability of the PSA because this Court resolved those issues in *West I*. Review of *West I*, however, shows that the Court did not decide those issues and, in any event, the law of the case doctrine is not applicable.

The statements in *West I* regarding marital property and the inclusion of distributions in the calculation of alimony are dicta, and not rulings of law.² It is well established that the law of the case doctrine “does not apply to statements made by the court in passing, or stated as possible

² The Chancellor also held that consideration of Tim’s obligation to provide financial information to Debbie was barred by the law of the case doctrine. See C.P. 2072 (Judgment, ¶ 2). Although the *West I* Court stated that the obligation to provide financial information was unambiguous, it did not quote that provision in the opinion. Also, the *West I* Court did not address the express limitation to Tim’s obligation to provide financial information: “However, [Tim] shall not be obligated to provide information which would breach any fiduciary duty of [Tim] to such corporations or partnerships which are imposed by state law or other rule of law.” C.A.R.E. p. 13. Therefore, *West I* does not bar consideration of that provision.

alternatives.”¹ 18-134 Moore's Federal Practice - Civil § 134.20. Further, the law of the case doctrine relates solely to questions of law, not questions of fact, and is applicable only “so long as there is a similarity of facts.” *Mauk v. Columbus Hotel Co.*, 741 So.2d 259, 267 (Miss. 1999).

The West Entities were not parties to the proceedings that led to *West I* and submit that none of the rulings in that opinion are binding on them. *See, TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So.2d 991 (Miss. 1997)(law of case applicable “between the same parties and the same case”).

A. Marital Assets. Debbie argues that the scope of “marital assets” applicable to the PSA was decided in *West I*. Review of the *West I* opinion, however, shows that any reference to the parties’ definition of “marital assets” was simply an observation dependent upon factual findings. In *West I*, the Court stated that, “[a]s to marital property, the agreement states that Debbie is entitled to one-half of all existing marital assets, including, but not limited to, stocks, limited partnerships, and business assets.” 891 So.2d at 211. The *West I* Court apparently read the clause at the end of the sentence to define “marital assets.” The sentence, however, is more accurately read to mean that the agreement applied to “marital assets,” and those assets *could* include such things as stocks, limited partnerships, and business assets. In fact, the proof at trial showed that Tim’s interests in West Quality and West Leasing were not “marital assets” because he received them by gift, primarily before the marriage. (T2 1055-56) Tim’s interest in Coastal, West Brothers Leasing and West

³ The law of the case doctrine is also inapplicable when it leads to “unjust results or manifest injustice.” *Wooldridge v. Wooldridge*, 856 So. 2d 446, 449 (Miss. Ct. App. 2003). Debbie argues that application of the doctrine is not “manifestly unjust” because the Chancellor rejected the claim that the PSA was unconscionable. *See* C. App. p. 14. That misses the point and confuses two separate concepts. The Chancellor rejected the unconscionability argument based on the law of the case doctrine. On appeal, Tim and the West Entities argue that the Chancellor’s reliance on law of the case is “manifestly unjust.” *See Wooldridge*, 856 So.2d at 449 (law of the case not applicable “if the former decision in its judgment after mature consideration is erroneous and wrongful and would lead to unjust results.”).

Family Leasing Company are arguably “marital assets” because he acquired them during the marriage.⁴ (T2 1055-56).

In any event, nothing in the PSA suggests that the parties defined “marital assets” to mean everything that Tim owned. So the *West I* Court’s statement as to the assets that were included as “marital assets” is necessarily dependent on facts relating to his ownership interest. The *West I* Court did not consider the facts of Tim’s ownership in each of the West Entities and, hence, did not hold, as a matter of law, that the PSA defined “marital assets” to include all of Tim’s interests in the West Entities. For that reason, the law of the case doctrine does not preclude the Chancellor’s consideration of the parties’ definition of “marital assets.”

B. Distributions. Debbie argues that *West I* held, as a matter of law, that the PSA entitles her to a share of all distributions paid to Tim by the West Entities. The language on which Debbie relies in *West I* refutes that argument. Debbie points out that *West I* stated that the “general purpose” of the PSA was for Tim to “provide one-half of his various forms of income” and that Tim “agreed to give Debbie fifty percent of his diverse forms of income.” C. App. 12-13. This language is obvious dicta because it is inconsistent with the PSA and with established rules of contract construction.

First, in construing a contract, courts look to the four corners of the document and its express language, not surmised “general purpose.” See, *Limbert v. Miss. Univ. for Women Alumnae Ass’n*, 998 So. 2d 993, 999 (Miss. 2008) (in interpreting contract, concern is “not nearly so much with what the parties may have intended, but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy”). Therefore,

⁴ Debbie has not disputed these facts.

West I's statement of the "general purpose" of the PSA does not constitute a ruling of law, but rather merely an observation made in passing, a summary for purposes of considering other issues.

Second, the PSA does not refer to fifty percent of "diverse income" or "various forms of income." Instead the PSA uses specific language and even an example to describe Debbie's bi-weekly payments. In particular, the PSA states that:

Tim is to pay Debbie one-half of [his] income, which at present is \$1,458.54 (\$4500 gross, less deductions of \$1,582.92 = \$2,917.08 [divided by] 2, beginning May 1, 1994, and one-half of net monthly Director's fee which is \$500.00,

The PSA subsequently clarified that:

the bi-weekly payments would be equal to one-half (1/2) of [Tim's] monthly salary from WEST QUALITY FOOD SERVICE, INC. or a substituted business/employer.

Further clarifying, the PSA states:

For purposes of this agreement, [Tim's] 'monthly salary' shall be defined as the gross taxable salary or wages paid to [Tim] from WEST QUALITY FOOD SERVICES, INC., or substituted business/employer

Nothing in the PSA could be construed to mean that the parties intended division of anything other than Tim's salary and director's fees from West Quality Food Services, Inc. So the PSA does not include any reference to "distributions" in describing Tim's income, and also expressly excludes reference to distributions by its clear and express definition of "salary."⁵ Further, nothing in the PSA suggests that Debbie is entitled to any income that Tim receives from any entity other than West Quality, except as a "substituted business/employer."

⁵ The *West I* Court was also influenced by the fact that the parties evidently abided by the terms of the PSA without conflict for several years. See 891 So.2d at 211. As explained in Tim's briefs before this Court, for those several years, Tim did include cash distributions in the alimony that he paid Debbie. Tim never included distributions that he did not receive in cash. When Tim learned that he had incorrectly included cash distributions in the alimony, he believed he had overpaid. That dispute lead to Debbie's initial filing.

Therefore, the *West I* Court's reference to "diverse income" or "various forms of income" was necessarily simply a shorthand way of referring to the PSA, and does not constitute a ruling of law interpreting the language of the PSA. *West I*'s characterization of the source of income is nothing but dicta and not a ruling of law that triggers the law of the case doctrine.

C. Debbie's Interest (if any) in the West Entities.

In *West I*, the Court stated that the PSA entitled Debbie "to equally share" the "marital assets." 891So.2d at 211. The Court, however, never explained what "equally share" meant. As evidenced by the arguments in Debbie's brief, it is clear that neither the Chancellor nor the parties understand that term. The *West I* Court relied on the parties' prior performance of the PSA as evidence that it was unambiguous. 892 So.2d at 211. Before Debbie initiated this action, however, Tim and Debbie did not "equally share" Tim's interests in the West Entities. In any event, the *West I* Court did not address or determine all of the issues relating to Debbie's claimed interest in the West Entities. For that reason, law of the case does not preclude this Court's consideration of those issues.

2.The Chancellor erred in denying the West Entities' motion to void the PSA's provisions regarding Debbie's purported interest in the West Entities.

Debbie argues that the Chancellor properly denied the West Entities' motion to void the PSA, but improperly characterized her interest as "contingent" based on the restrictions on transfer of Tim's interest.

First, the PSA does not give Debbie any present interest in the West Entities. The PSA states that Tim "agrees and hereby acknowledges, and it is the intention of both parties, to make a present transfer to [Debbie] of a one-half (1/2) vested equitable ownership interest in said properties as a division of marital assets, while married, and this Agreement constitutes an existing equitable lien to [Debbie] of one-half (1/2) of said properties." C.A.R.E. 15.

Debbie's argument is error because it disregards this Court's opinions on "equitable interests" and "equitable liens" *in domestic cases*:

Characteristic of equitable liens is that they are not estates or property in the thing itself, nor are they rights which may be the basis of a possessory action. They are merely a charge on property for the purpose of security, and are ancillary to and separate from the debt. They are neither debts nor rights or property, but merely remedies for a debt. Of extreme importance is the fact that *such liens do not divest the debtor of title or possession*.

McGee v. McGee, 726 So.2d 1220, 1222 (Miss. App. 1998)(emphasis original).

Therefore, contrary to Debbie's argument, the PSA does not give Debbie a present interest or any other rights in or to Tim's interests in the West Entities.

Further, the PSA refutes Debbie's argument that she has some "vested" (rather than "contingent") interest in the West Entities. (As discussed herein, the West Entities deny that Debbie has any interest in the West Entities.) Under established Mississippi law, interests are contingent if an event must occur before the interest vests. In contrast, an interest can be "vested" if it can be cut short if an event happens. *In re Estate of Anderson*, 541 So. 2d 423, 429 (Miss. 1989). Here, the PSA provides that Tim "agrees to promptly transfer one-half (1/2) of those assets as and when they become unrestricted; or if they are sold, conveyed, transferred, surrendered, exchanged, or otherwise disposed of by [Tim], then [Tim] will immediately pay one-half (1/2) of the proceeds, remunerations or other considerations to [Debbie]." C.A.R.E. 15. In other words, Tim has no obligation to transfer an interest in the assets to Debbie *unless an event happens*, the release of the restrictions on the stock. Similarly, Tim has no obligation to pay Debbie any proceeds of sale of the assets *unless he sells the assets*. Therefore, the Chancellor correctly characterized Debbie's interest (if she has any at all) as "contingent."

Next, regardless how Debbie's "interest" in the West Entities is characterized, the PSA is void to the extent that it interferes with the West Entities' right to operate their business without interference. For the Court's consideration of this argument, the West Entities set out a summary of the applicable restrictions:

- West Leasing Company, LP: Any partner may transfer his or her interest by gift or sale to a "member or members of the transferor's Immediate Family or to a trust for the primary benefit of some or all of the Immediate Family." A partner may sell his or her partnership interest to a member of the Immediate Family of the selling partner (but not the spouse of such person) or a trust for the primary benefit of a person who could purchase the interest. A partner may sell his or her interest to any other prospective purchaser only after the selling partner gives notice and an opportunity to purchase the interest to the other partners. "Any sale or transfer, or purported sale or transfer, of any Partnership interest, except as otherwise provided in this ARTICLE 11, shall be null and void unless made strictly in accordance with the provisions of this ARTICLE 11." Ex. 67; R.E. 184.
- West Quality Food Service, Inc.: A stockholder may not dispose of a share of stock by sale, assignment, gift or otherwise, or pledge, subject to a security interest, or otherwise encumber in any manner whatsoever a share of stock in the corporation without the prior written consent of the other stockholders. "It is the intention of the parties to this Agreement to protect the subchapter S election of the Corporation by restricting the transfer or registration of transfer of shares of corporate stock on the Stock Ledger of the Corporation until such time as the transferors and/or transferee comply with the terms and condition of this Agreement." The restrictions apply to voluntary and involuntary transfers. If a stockholder desires to transfer his stock and the other shareholders do not consent, the selling stockholder shall give the other shareholders and the corporation the opportunity to purchase the stock on the same terms. "No attempt to transfer or dispose of any stock of the Corporation owned by any Stockholder executing this Agreement by any voluntary or involuntary manner whatsoever, except by death, but including any sale under judicial order, legal process, execution, attachment, enforcement of a pledge, trust, or encumbrance, shall be a valid transfer . . ." Ex. 66; R.E. 163.
- Coastal Express, Inc.⁶: Transfer of stock is subject to the restrictions and conditions of a Development Agreement of Rally's, Inc. All sales or transfers of stock are subject to the prior approval of the board of directors of Coastal Express, Inc. Ex. 70; R.E. 225. *See, e.g.*, T2 280. Ex. 132; R.E. 294.

⁶ Some of the West family members (along with an operations manager) created Coastal Express, Inc. in 1987 as a condition to developing eighteen Rally's restaurants under a development agreement with Rally's, Inc. T2 280.

- West Investments, LLC: A Member may only sell or encumber the Member's interest after offering the interest to the other Members on the same terms, the offer to remain open for forty-five days. If no Member elects to purchase the interest on those terms, the Member may complete the transaction within ninety days. But a Member may transfer an interest by bequest or devise or by inter vivos transfer to a spouse or direct lineal descendent of a Member. A person may become a New Member only with consent of all Members. Admission of a new member is only effective after the New Member has executed and delivered to the other Members and Managers a consent to be bound by the Operating Agreement. Ex. 14; R.E. 240.

Mississippi recognizes that corporations may impose restrictions on transfer of stock. *See, e.g., Burns v. Burns*, 789 So.2d 94, 98-99 (Miss. App. 2000). *See also* Miss. Code Ann. § 79-4-6.27 (restrictions on transfer are authorized to maintain corporation's status when it is dependent on number or identity of shareholders or for any other reasonable purpose). In *Fayard v. Fayard*, 293 So.2d 421 (Miss. 1974), the Court identified some factors to consider in determining whether a restriction on transfer is reasonable:

(1) The size of the corporation, (2) the degree of restraint on the power to alienate, (3) the time the restriction is to remain in effect, (4) the method used in determining the transfer price of shares, (5) the likelihood of the restrictions contributing to the attainment of corporate objectives, (6) the possibility that a hostile shareholder would injure the corporation and (7) the likelihood of the restriction promoting the best interest of the enterprise as a whole.

293 So. 2d at 424.

Debbie does not discuss those factors except in the context of the restrictions established by the by-laws of Coastal Express, Inc. *See* C. App. p. 18. Therefore, she has waived this argument as to the other West Entities.

The *Fayard* factors, however, support the validity and reasonableness of the restrictions. All of the West Entities are small, each having no more than ten owners. *See* T2 1056-57. The restrictions do not prohibit all transfers or transfers to any particular person. *See supra* p. 10-11. The restrictions remain in effect until changed by the shareholders or partners. When an owner

wants to transfer an interest, the transfer price is determined, initially, by the price offered by the third-party prospective transferor. The restrictions are necessary to maintain the legal status of some of the entities. *See, e.g., supra* p. 10 (restrictions necessary to maintain Subchapter S status of West Quality). Because of the limited number of shareholders or partners, a single shareholder can hinder effective corporate management. The restrictions promote the best interest of the West Entities by providing an established procedure for transfer of the limited number of shares. In the end, the restrictions balance the interest of a shareholder in being able to transfer his shares with the interest of the entity in maintaining the businesses as closely-held and productive. Therefore, the restrictions are valid under Mississippi law.

Debbie nonetheless argues that the restrictions are irrelevant because Tim is not disposing of “legal title” to his interest in the West Entities. Debbie’s cases, however, address the effect of prohibited transfers as between the parties, not the effect of those transfers on the business entity. *See, Burns*, 789 So.2d at 98-99 (person entitled to corporate stock may assign right and “the assignment is good between the parties”). The West Entities are not parties to any agreement with Debbie. Additionally, as noted above, Debbie disregards Mississippi law that “equitable liens” “do not divest the debtor of title or possession.” *McGee*, 726 So.2d at 1222.

Further, Debbie’s argument elevates form over substance. In other words, she seeks to deprive the West Entities of the benefit of their legitimate, lawful, and reasonable decisions to govern their business. According to her argument, she can circumvent the restrictions on transfer with subterfuge, when the result is the same – interference with the West Entities’ business through no fault of their own.

Therefore, the West Entities submit this Court should reverse the Chancellor's denial of the West Entities' motion and hold that the PSA is invalid to the extent it purports to give Debbie any interest in Tim's interest in the West Entities.

3. The Chancellor did not err in dismissing Debbie's claim against the West Entities.

Debbie's argument that the Chancellor erred in dismissing her claim against the West Entities is based solely on a suggestion by this Court in *West I*. Debbie has never, however, presented any facts that supports her claim as set out in her complaint.

In her amended complaint, Debbie made the bare legal conclusion that loans and advances that the West Entities made to Tim were "fraudulent conveyances intended solely for the purpose of depriving Debbie . . . [and] in order to avoid paying Debbie . . ." C.P. 912. Debbie's amended complaint included no factual allegations supporting the conclusory statements as to the West Entities' intent or purpose. *See* C.P. 903-13.

At the hearing on the West Entities' motion to dismiss this claim, the Chancellor gave Debbie's attorney the opportunity to address the nature of Debbie's claim. The Chancellor asked counsel "what specific things do you contend . . . that the West Entities have done or failed to do – specifically what they've done or failed to do – which causes them to be a party to a fraudulent conveyance." T2 190. Debbie's attorney responded that "[t]hey loaned the money. They gave the money." *Id.* The Chancellor asked, "is that it?" to confirm. *Id.* Counsel responded "That's it. That's exactly it." *Id.* The Chancellor held that loaning the money was not enough. *Id.*

The fact that a corporation loaned money to a stockholder is and of itself would be insufficient for the Court to determine that they've participated in a fraudulent conveyance. I don't see where there would be any set of facts or circumstances that you could present to the Court, based on what you're saying, that would lead the

Court to a finding that the West Entities were participants in a fraudulent conveyance. It would be just like every time a bank loaned somebody some money, could they be placing themselves in a position of being involved in a fraudulent conveyance? I don't think so.

Id.

Debbie cannot point to any Mississippi authority that a transfer *from* a third party *to* the debtor can be a fraudulent conveyance. All the Mississippi cases involve a transfer *by* the debtor, not some third party. In *Blount v. Blount*, 231 Miss. 398, 414, 95 So. 2d 545 (1957), the Court described fraudulent transfers as “transfers made in anticipation of, or pending a suit *against the transferor*.” *Id.* (emphasis added). Hence, under *Blount*, the transferor in a fraudulent conveyance is the debtor.⁷ The cases on which Debbie relies does not say anything different. In *Murray v. Murray*, 358 So.2d 723 (Miss. 1978), the Court held that, in a fraudulent conveyance action, the grantee is a necessary party and the grantor is not, although the grantor is a proper party. In *Murray*, the wife argued that her husband fraudulently conveyed assets to third parties to avoid his obligations in their divorce. In other words, the husband was the grantor and the third parties were the grantees. *See also, A & L, Inc. v. Grantham*, 747 So. 2d 832, 843 (Miss. 1999)(chancellor may set aside, as fraudulent, conveyance made by *one of the spouses*, where conveyance was made with exclusive intent of cheating other spouse out of their share of marital assets).

In contrast, in this case, the West Entities – third-parties who are not parties to any agreement with Debbie – are the transferors. And Tim – the person with whom Debbie has an agreement – is

⁷ In an article in *The Mississippi Lawyer*, published before the Chancellor heard this case on remand, the author, Justice Waller, indicated that Mississippi law only recognized fraudulent conveyances by an obligor or debtor: “When addressing whether an *obligor's transfer* of a business interest to another party constitutes an effort to defraud a former spouse of marital assets or support, . . .” Waller, Jr., William L., *The Mississippi Lawyer*, *Modifications or Avoidance of Child Support and Alimony Commitments based on Questionable Distributions after Equitable Division of Assets*, 26 (June 2005)(emphasis added).

the transferee. Under Mississippi law, third party transferors are not liable for “fraudulent conveyances.” Miss. Code Ann. § 15-3-101 *et seq.* applies only to conveyances made by a “debtor,” that being the person who is “liable on the claim.” Here, the West Entities are not “debtors” with respect to Debbie.¹ See, *Folmar & Associates LLP v. Holberg*, 776 So.2d 112 (Ala. 2000)(applying similar statutory language).

Further, even if *West I* can be construed to change Mississippi law, Debbie’s allegations are still insufficient, as a matter of law, to state a claim for fraudulent conveyance. Rule 9(b) re-states established Mississippi law that “specific facts which constitute fraud must be definitely averred.” Miss. R. Civ. P. 9 (comment). Cf. *Ngo v. Centennial Ins. Co.*, 893 So. 2d 1076, 1082 (Miss. Ct. App. 2005)(under Rule 12(b)(6), court “does not have to accept legal conclusions or allegations as to the legal effect of events which may be included in a complaint.”). Also, contrary to Debbie’s assertion, a plaintiff must support a claim of fraudulent conveyance with *facts*.⁹ In *Catchings v. Manlove*, 39 Miss. 655, 658 (1861), on which Debbie relies, the plaintiff made specific allegations that the debtor was insolvent and transferred property to family members as a gift. The Court held that, while an allegation of fraudulent intent was not necessary, factual allegations were: “for it is a rule of pleading, that a party is only required to state the facts necessary to make out his claim or to sustain his action, and the law will draw the legal conclusion from those facts.”¹⁰ 39 Miss. at

¹ The Mississippi statute was enacted in 2006, after some of the conveyances of which Debbie complains. Before the statute, Mississippi had not held that a third party transferor could be liable for a “fraudulent conveyance.”

⁹ Even the opinion on which Debbie relies for a “who, what, when, where” test warned that claims of fraud cannot be based on “speculation and conclusory allegations.” *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. Tex. 1997).

¹⁰ In *Blount v. Blount*, 95 So.2d 545 (Miss. 1957), this Court held that a fraudulent conveyance “with the sole purpose of cheating creditors was void as to such creditors.” 95 So.2d at 551-52. This Court has also identified “badges of fraud” to determine the purpose of a particular conveyance. See *Barbee v. Pigott*,

658. *See also, Weir v. Jones*, 84 Miss. 602, 36 So. 533 (1904)(challenging transfer as fraudulent, vague and indefinite statement that certain course of conduct was in pursuance of fraudulent scheme is insufficient).

In contrast to the plaintiff in *Catchings* who alleged facts but no legal conclusion, Debbie includes only the legal conclusion of intent, with no facts to support that conclusion. As noted above, Debbie's amended complaint included only the bare legal conclusions that the West Entities made certain transfers with an improper "intent" or "purpose." The amended complaint includes no facts that support these conclusions. *See generally* C.P. 903-13. Even now, Debbie offers nothing but her conclusion that the West Entities made "transfers intended to deprive Debbie of her interest." C. App. p. 69.

Despite the insufficiency of Debbie's complaint, the Chancellor gave her attorney an opportunity to specify facts that would support the claim.¹¹ According to counsel, the sole basis for Debbie's claim against the West Entities was that they made a loan. T2 190. As the Chancellor noted, Debbie's argument could render any bank subject to liability for fraudulent conveyance. *Id.* For this reason, the West Entities submit that the Chancellor did not err in dismissing Debbie's claims against the West Entities and his decision should be affirmed.

507 So.2d 77 (Miss. 1987). So Mississippi law is clear that a conveyance is not a "fraudulent conveyance" in the absence of some proof of intent to cheat creditors. But Debbie's amended complaint includes nothing but a bare allegation of intent, with no allegation that the conveyance was accompanied by any "badges of fraud."

¹¹ Debbie complains that she should have been given an opportunity to amend her complaint. Her attorney, however, confirmed at the hearing that Debbie could make no allegations, other than the fact of the loans, in support of the claim. Debbie did not request leave to amend in her response to the West Entities' motion to dismiss. C.P. 1704-07.

4. The Chancellor did not err in awarding attorneys' fees to the West Entities.

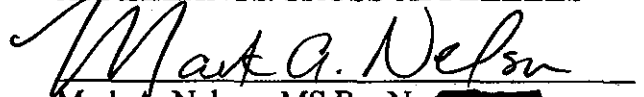
The Chancellor properly awarded attorneys' fees to the West Entities, but that decision is not yet final. In the Final Judgment entered May 8, 2008, the Chancellor expressly stated that the "issue of the quantum of the attorneys fees to be awarded to the West Entities will not be final until a separate final judgment is entered by the Court regarding the quantum of attorneys fees and expenses to be awarded." C.P. 2072. The Chancellor entered an order setting the amount of attorneys' fees on July 9, 2009. Debbie filed a motion to reconsider that order and her motion will be heard by the Chancellor in October 2009.

In any event, Debbie cannot show the Chancellor abused his discretion in awarding fees to the West Entities. Miss. Code Ann. § 11-55-5 authorizes fees for claims that are "without substantial justification," which includes claims that are "groundless in fact." *See* Miss. Code Ann. § 11-55-3. The same is true under Rule 11. Miss. R. Civ. P. 11. Here, Debbie's amended complaint did not include any facts to support her claim that the West Entities engaged in a "fraudulent conveyance."

This the 28th day of September, 2009.

Respectfully submitted,

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

I, undersigned attorney of record for the above-named Appellants/Cross-Appellees, West Quality Food, Coastal Express, Inc., West Leasing Company, West Brothers Leasing Company, West Leasing Company and West Investments, LLC, do hereby certify that I have this day served via U.S. Mail, a true and correct copy of the foregoing pleading to:

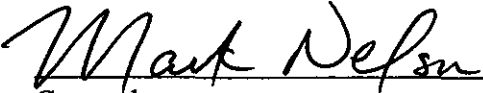
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