

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-01158-SCT

DEBORAH GAYLE THORNTON WEST

APPELLANT

v.

CHARLES TIMOTHY WEST

APPELLEE

Consolidated with:
2009-CA-01877-SCT

DEBORAH GAYLE THORNTON WEST

APPELLANT

V.

CASE NO. 2009-CA-01877

WEST QUALITY FOOD SERVICES, INC. ET AL

APPELLEES

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

REPLY BRIEF OF APPELLANT

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III. LEGAL ARGUMENT

The West Entities failed to prove that the attorneys' fees and expenses requested were reasonable.

A. *The lower court awarded attorneys' fees for services incurred prior to the filing of claim.*

In her principal brief, Debbie argued the chancellor erred in awarding attorneys fees to the West Entities¹ for legal services provided before Debbie filed her amended complaint joining the West Entities as party defendants.² On April 21, 2006, Debbie filed an Amended Complaint joining the West Entities as defendants and asserting that transfers from the West Entities to Tim as "loans" or "account receivables" payments were constructive distributions and fraudulent conveyances. (2008-R.E.114-126).³ While the West Entities did not answer the Amended Complaint until September 7, 2006, (R.E. 9), the chancellor awarded fees to the West Entities from May 11, 2005. (R.E. 32-36, T3. at 3-7). Thus, the West Entities were awarded fees for legal services that were rendered before the pleading that the chancellor determined was frivolous was even filed.

The West Entities argue that the filing of Debbie's motion to amend, rather than the filing of the amended complaint, triggered her liability for sanctions. They claim the filing of the motion to amend "unnecessarily expanded the proceeding" and therefore, sanctions from the date the motion

¹ West Quality Food Services, Inc., Coastal Express, Inc., West Leasing Company, West Brothers Leasing Company, West Family Leasing Company, and West Investments, LLC are collectively referred to as "the West Entities."

² Debbie has appealed the chancellor's dismissal of the West Entities and the chancellor's determination that the West Entities were entitled to attorneys' fees in Case No. 2008-CA-01700, which is currently pending before the Court and has been consolidated with this appeal. In the event the Court finds the West Entities should not have been dismissed, or determines that the West Entities were entitled to a dismissal, but that Debbie had substantial justification for filing the fraudulent conveyance claim, the issue regarding the quantum of the fees awarded will be moot.

³ Appellee has used the following abbreviations in referring to the record on appeal: CP - clerk's papers on this appeal; 2008-CP - clerk's papers filed in Case No. 2008-CA-01700-SCT; R.E. - record excerpts filed by Debbie on this appeal; 2008-R.E. - record excerpts filed by Tim West in Case No. 2008-CA-01700-SCT; 2008-A.R.E. - record excerpts filed by Debbie in Case No. 2008-CA-01700-SCT; T2. - transcript of proceedings in Case No. 2008-CA-01700; T3. - transcript of November 25, 2008 motion hearing; and, T3.Ex. - trial exhibits offered into at the November 25, 2008 hearing.

to amend was filed was proper under the Litigation Accountability Act ("LLA"), Miss. Code Ann. §11-55-5, *et seq.* (2002).

However, the West Entities fail to cite anything in the record wherein the chancellor determined the filing of the motion to amend unnecessarily expanded the proceedings. In his April 10, 2010 opinion, the chancellor simply found that "because the West Entities complied with Debbie's prior subpoenas duces tecum before the suit was filed they should never have been sued because the documents made it clear that there was no fraudulent conveyance. Any attorney's fees incurred because of the suit filed against [the West Entities] should be paid to them by Debbie." (2008-R.E. 86).⁴

In relevant part, Miss. Code Ann. §11-55-5 provides that attorneys fees may be awarded if "an attorney or party brought an action, or asserted any claim . . . , that is without substantial justification ." Under M.R.Civ.P. 3(a) "A civil action is commenced by the filing of a complaint with the court." Debbie's action against the West Entities was asserted and commenced with filing of her Amended Complaint on April 21, 2006. Debbie submits the chancellor clearly abused his discretion in awarding attorneys fees for time incurred by counsel for the West Entities before the West Entities were joined as party defendants.

Debbie respectfully submits the chancellor erred in awarding the West Entities for fees incurred from August 3, 2005 to April 21, 2006 in the amount of \$7,742.75, since the Amended Complaint, the pleading which the chancellor determined to be filed without substantial justification, was not filed until April 21, 2006.

⁴ The West Entities note that the chancellor made reference to 17,000 pages of documents allegedly produced by the West Entities. (West Entities Brief at 2). There is nothing in the record indicating that 17,000 pages of documents were produced. The chancellor's statement was apparently based on a similar statement from counsel for the West Entities. (T2.1681). Debbie does not dispute that the West Entities produced several hundred pages of documents, some of which were produced in the middle of trial. (T2. 323-25). More importantly, the documents produced should not have been relevant to the chancellor's consideration of the West Entities motion since a motion to dismiss only tests the legal sufficiency of the complaint. *Children's Med. Group, P. A. v. Phillips*, 940 So.2d 931, ¶7 (Miss. 2006).

- B. *The chancellor did not consider the McKee factors in awarding fees, the fee application lacked adequate documentation and the West Entities offered no proof regarding the McKee factors.*

The West Entities make three arguments in response to Debbie's assertion that chancellor's failure to consider the *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982) factors was an abuse of discretion. First, they contend the chancellor was not required to discuss the *McKee* factors so long as he relied on substantial evidence in record supporting the fee award. In support of this argument, the West Entities cite *Upchurch Plumbing, Inc. v. Greenwood Utilities Comm.*, 964 So.2d 1100, 1115-16 (Miss. 2007) and *Dickerson v. Dickerson*, 2010 Miss. App. LEXIS 202 (Miss. App. April 20, 2010). Second, they argue Debbie's claim regarding the inadequacy of the time records submitted is "conclusory and vague" and, thus, insufficient to establish that the chancellor abused his discretion. Finally, they argue that Debbie "mischaracterized the proceedings." The West Entities cited no law for their second and third arguments.

Debbie submits that the West Entities' reliance on *Upchurch* and *Dickerson* is misplaced. *Upchurch* involved a bench trial after years of discovery. *Upchurch* at ¶2, 9. Further, attorneys' fees were awarded pursuant to a contract, rather than under the LLA or Rule 11. *Upchurch* at ¶35. Finally, the trial court made a specific finding that it had "reviewed the attorney fees sought and finds that they meet the reasonableness requirements of the rules," and noted the complexity of the subject matter and duration of the litigation. *Id.* at ¶36. Nothing in *Upchurch* suggests, as claimed by the West Entities, that "a trial court is not required to detail its analysis of the *McKee* factors." (West Entities Brief at 6).

None of the relevant factors at issue in *Upchurch* are present here. The West Entities were dismissed on a motion to dismiss after several months. There was no trial on the merits and no consideration of any evidence, since the chancellor concluded the claim was legally insufficient. The

fees were not awarded under a contract, but rather as a matter of sanctions. Finally, and perhaps most importantly, the record is devoid of any statement from the chancellor that he determined the fees requested to be reasonable under the *McKee* factors or M.R. Prof. Conduct 1.5. Debbie respectfully submits the chancellor's failure to consider the *McKee* factors or Rule 1.5, or to make any factual determination as to the reasonableness of the fee requested, is an arbitrary decision warranting reversal. *Patterson v. Holleman*, 917 So. 2d 125, ¶36 (Miss. App. 2005).⁵

The West Entities reliance on *Dickerson* is equally misplaced. There, the parties stipulated that legal bills were legitimate and reasonable. As a result of the stipulation, the appellant was procedurally barred from contesting the reasonableness of the fees on appeal. *Dickerson* at ¶41-42. Debbie did not stipulate to the reasonableness of the legal fees incurred by counsel for the West Entities and is not procedurally barred from appealing that issue. *Dickerson* simply has no relevance to the issue before the Court on this appeal.

Tim argument, without citation of any authority, regarding the adequacy of the time records submitted also misses the mark. As discussed in her principal brief, Debbie's objection as to the adequacy of the time records is based on the complete failure to document the work performed and is not limited to objections regarding administrative time billed as legal fees for things like 1.5 hours for "Brad organize file," and billing for non-work such as .5 hours for "Theresa West depo - cancelled" (R.E. 70, 72).

⁵ As the Court noted in *Patterson*, the chancellor "did not expressly apply the Rule 1.5 or *McKee* factors in determining a reasonable attorney's fee. His award was not substantiated by any factual determinations. Therefore, the award was arbitrary. We have no alternative but to reverse and remand for the chancellor to determine a reasonable attorney's fee award considering the factors stated in Rule 1.5 and *McKee*, and to make supporting findings of fact and conclusions of law concerning those factors." Citing *Miss. Power & Light Co. v. Cook*, 832 So.2d 474, 487 (P42) (Miss. 2002).

In order to determine if fees are reasonable they must be adequately documented. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Where, as here, there is nothing in the records to indicate the subject matter of a meeting, telephone call or email, and nothing to indicate what work was actually performed, it is impossible for a court to verify the reasonableness of the fee requested and the fee request should be denied or reduced. *In re Meese*, 907 F.2d 1192, 1204 (D.C. Cir. 1990).

The West Entities also take issue with Debbie's argument that \$33,366.71 in legal fees incurred in a claim dismissed on a motion to dismiss without an evidentiary hearing is unreasonable. In arguing that Debbie mischaracterized the proceedings, they claim their counsel had to respond to discovery, filed motions and defended motions filed by Debbie. The problem with their argument is that it is simply not supported by the time records submitted. While the time records do contain some entries reflecting time spent in preparing or responding to discovery or motions, the vast majority of the time records are simply notations of telephone calls or emails without any indication what work was actually performed or how it even related to this case. Further, of the approximately 183.75 hours for which fees were awarded, approximately 5.50 hours actually refer to the motion to dismiss. (Time entries on 11/21, 22 and 26/2006, R.E. 71). Debbie respectfully submits that the failure to submit proof regarding the *McKee* factors, beyond the bare billing statement, coupled with the excessive hours billed and a complete lack of documentation; warrants a finding that the fee award was arbitrary.

IV. CONCLUSION

Debbie contends the chancellor erred in granting the West Entities' motion to dismiss, and in finding that the filing of a fraudulent conveyance claim against the West Entities was without

substantial justification.⁶ However, if this Court determines that the West Entities were properly awarded fees by the chancellor, Debbie submits that the fees awarded were excessive and that the chancellor erred in simply accepting the fee application as submitted without considering the lack of documentation in the fee application and the remaining *McKee* factors.

Debbie respectfully submits that the attorney fees awarded should be vacated and remanded for a determination of the reasonableness of the fees requested in light of the *McKee* factors. On remand, this Court should instruct the chancellor to require counsel for the West Entities to submit adequate documentation to support the requested fees.

Respectfully submitted,

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⁶ As noted above those issues are before the Court in Case No. 2008-CA-01700. If the Court reverses the chancellor on either of those issues, the issue regarding the quantum of the fees awarded will be moot.

V. CERTIFICATE OF SERVICE

I, Patrick F. McAllister, do hereby certify that I have this day served a true and correct copy of the above and foregoing Brief by U.S. mail, postage prepaid, upon:

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