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

RITA FAYE MILEY — APPELLANT

VERSUS — CASE NO. 2008-TS-00677

WILLIAM M. MILEY, JR. — APPELLEE

REPLY BRIEF OF APPELLANT RITA FAYE MILEY

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

(ORAL ARGUMENT REQUESTED)

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

The Appellant has previously made her Statement of the Case in her original Brief herein. Appellant, however, definitely takes issue with the Appellee's Statement of the Case in the following regards:

I

The Appellee claims that the trial court was shown no testimony from the Appellant's attorney regarding his fees. Admittedly, counsel for the Appellant did not orally testify before the trial court subject to cross-examination. Counsel for the Appellant, however, did include his Affidavit under Rule 1.5, which was included in the Record of Excerpts in Exhibit 21 as shown as [R.E. 77 - 98 (80 - 96)]. The testimony in the sworn Affidavit was clear as to the attorney's qualifications and to his itemization of fees. Exhibits 18 and 21 were both introduced in the evidence without objection by agreement as shown by the trial transcript in R.E. 51 - 55, 56 and 57. Exhibit 18 [R.E. 58 - 77] contained the Professional Service Agreement and itemized bill. Exhibit 21 [R.E. 77 - 98] contained the supporting affidavits of the other two (2) counsel plus Appellant's counsel's Affidavit under Rule 1.5 together with the itemized statement.

Appellant's Affidavit was actually sandwiched in Exhibit 21 at R.E. pages 88 - 96 between the affidavits of Gary Geeslin and Jack Brown, the other two attorneys. Inexplicibly, a fax cover sheet transmitting the undersigned's affidavit to Jack Brown was made part of Exhibit 21. Nonetheless, the Exhibit was entered of record without objection by the Appellee. There was no cross-examination or counter-affidavit tendered by the Appellee as to the reasonableness of the fees or to the qualifications of the attorney or the amount charged. The trial court, moreover, definitely reviewed the Affidavit [T.T. 199; R.E. 133]. In short, there is no proof to the contrary in the record as to the reasonableness of the Appellant's attorney fees.

The affidavit by counsel in support of his request for attorney fees was also submitted to the trial court as part of Exhibit "C" in his Memorandum in Support of Plaintiff's Motion to Alter or Amend and set forth in R.E. 155 - 158, pages 141 - 143. Appellee submitted nothing to the trial court in opposition to this post trial exhibit just as he did not in the trial.

II

Secondly, Appellee claims that counsel submitted a Motion to Alter or Amend Judgment without supporting memoranda. This statement is patently wrong in that it clearly overlooks the Motion to Alter or Amend Judgment together with the attached Memorandum in Support of Motion to Alter or Amend Judgment from the records of the Chancery Court of Oktibbeha County as clearly set forth in T.T., pages 97 - 145; R.E. 115 - 163, all of which is plainly stated on page 10 of the Appellant's Brief.

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SUMMARY OF THE ARGUMENT

The Appellant was entitled to an award of attorney fees based on the equities of the case with the trial court continuing to award support herein. The trial court did manifestly abuse its discretion in awarding only $5,000.00 attorney fees based on the evidence before it.

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ARGUMENT

I. STANDARD OF REVIEW

Appellant disagrees with the statement that the trial court based on its experience in domestic relations cases conducted an analysis of the reasonableness of the attorney fees sought in conjunction with the *McKee* case at 418 So.2d 764. *McKee* definitely states the factors to be considered by the Chancellor in making a determination of reasonableness as to the award. What is objectionable is that there are no absolutely no findings of fact by the trial court with reference to the factors set forth in *McKee* when it had counsel's unobjected-to Affidavits in two (2) instances as to the *McKee* factors and the itemized statement. All that the record states is "The Court has examined the exhibits for attorney fees. The Court finds that Ms. Miley does not have the resources to pay her attorney fees. The Court, almost every day, hears cases where lawyers present domestic relations cases. The Court has no doubt that McClanahan had 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 Ms. Miley for her attorney fees within the next sixty (60) days in the sum of

$5,000.00." [T.T. 195 - 199; R.E. 45 - 50] What the trial court did not do from the record was make any analysis of the uncontradicted evidence before it as to the reasonableness of the attorney fees, when the trial court admitted that counsel had put in the time stated and that his time was valued as he claimed as substantiated by the affidavits of the other two practicing attorneys in the Fourteenth Chancery District.

Admittedly, the trial court did not award separate maintenance. The trial court did find, however that there was no way the parties would ever live together again; and that Ms. Miley still required support from her husband [R.E. 45 - 50, page 47]. With this finding, an award for attorney fees under *Haney v. Haney*, 907 So.2d 948, is merited where the equities and facts show that the one party should assist the other when the other party is unable to pay. The proof was uncontradicted that Ms. Miley was wholly and totally dependent on the monthly support that she had received from the Temporary Order as evidenced by her 8.05 [R.E. 100 - 110]. As stated in *Makamson v. Makamson*, 928 So.2d 218, the basis for an attorney fee award is a necessity as opposed to an entitlement. Finally, as shown in *White v. White*, 913 So.2d 323, an award for attorney fees in a domestic proceeding where the wife is in poor health and there is a disproportion in the incomes of the parties is merited to the less fortunate person. Consequently, there is ample authority for the Chancellor to have made the requested award of attorney fees.

Appellant would agree that while *Mabus v. Mabus*, 910 So.2d 486 (Miss. 2005), is a recent statement of the standard by the Chancellor's decision would not

be overturned, he ignores the final pronouncement of the Court in *Mabus* where it is stated "In order for this Court to say that the Chancellor has abused his discretion, there must be insufficient evidence to support his conclusion." That is exactly the case at bar. In *Mabus* the Chancellor had the itemization of reasonable attorney fees of two (2) attorneys, who had worked on different aspects of the case. The trial court conducted its own review of the attorney fees to its own satisfaction. The critical situation in the *Mabus* case was that the wife never presented any evidence contradicting the actual hours and hourly rate submitted by the attorneys in question. There was absolutely no contesting the amount of the award. That is the identical case that you have at bar where the Appellant's attorney's itemized records were admitted into evidence or brought to the trial court's attention without opposition on two (2) different occasions and where the amount of time billed and the value of the billing were found to be correct by the trial court in its own Opinion. The Defendant made absolutely no objection either during the trial or in opposition to the Motion to Alter or Amend to the contract for employment, the itemization of attorney fees, the sworn Affidavit from counsel for the Appellant or the supporting affidavits for the application for attorney fees.

In short, the trial court had absolutely no credible evidence before it to support its decision to award only $5,000.00 for attorney fees. The only rational given was "The Court almost every day has cases where lawyers present domestic relations 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..." There was absolutely no credible evidence before the trial court disputing or disproving the application for attorney fees. The Court manifestly abused the standards as set forth in *McKee v. McKee* as previously cited in the Appellant's Brief in its decision and now in *Mabus*.

On its face Appellee's statement that this is a relatively simple case requesting separate maintenance is correct. Proving the case, however, was anything but simple, relative or otherwise. The time records indicate work over a ten (10) month span over four (4) counties in multiple depositions and two (2) different court appearances together with applications of law in the various fields cited in the Appellant's Brief. Even the trial court acknowledged that the time spent was accurate. The Chancellor's assertion, however, that he can make his finding without any proof is not exactly accurate. He has to have sufficient evidence for his conclusions. He cannot "pluck it out of thin air."

The case of *Holloway v. Holloway*, 865 So.2d 382, gives authority for the Court to award significantly less than what was requested by the Appellant. The problem with Appellee's reliance on *Holloway*, however, is that the defendant cured the contempt before the motion hearing with the trial court making its award based on the fact that no contempt had been awarded. That is not the situation that we have at bar, and *Holloway* should not be controlling authority in this case.

Appellant's reliance on *Browder v. Williams*, 765 So.2nd 1281, is well based. The trial court in *Browder*, has before it an application for $4,430.00 in

attorney fees with an itemized application with the Chancellor only awarding $2,000.00 without specifying its reasons. This Court was very clear that the trial court should have reviewed the eight (8) factors as set forth in *McKee* and Rule 1.5 in supporting the facts of its determination. In case at bar the trial court had the uncontested evidence before it on two (2) occasions in the form of the undersigned's Affidavit supported by the affidavits of two (2) other attorneys also practicing in the Fourteenth Chancery District and, for whatever reasons, chose to ignore it.

Appellee's reliance on *Mitchell v. Mitchell*, 823 So.2d 568, is not well taken because of the lack of similarity in facts with the case at bar. In *Mitchell* the wife sought only $750.00 and was awarded $500.00. In the case at bar the wife was seeking $26,036.31 and was awarded only $5,000.00, which barely covered the expenses of counsel as set forth in the Appellant's Brief. Furthermore, *Mitchell* cites the *Wells* case where this Court reviewed the evidence of the financial status of each party and found in view of the facts there was no an abuse in discretion. In the instant case, however, the award is a manifest abuse of discretion. Ms. Miley was totally dependent on her husband for all support. Her husband had liquid assets at that point in excess of $750,000.00, all of which is previously set forth in the Appellant's Brief. Under this set of facts, *Mitchell* is definitely inapplicable as well as the *Wells* case. Furthermore, in *Wells* the woman had only asked to be awarded one-third (1/3) of her attorney fees, not the entire amount.

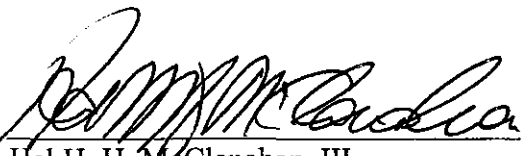
Finally, *Pool v. Pool*, 989 So.2d 920, is the most recent case on this issue. In *Pool* the Chancellor did not cite the *McKee* factors in rendering the award of attorney fees. This Court ruled, however, that the Chancellor's failure to cite the controlling authority in rendering an attorney fees awards is not grounds for a reversal unless the failure to make sufficient findings of facts and conclusions of law constituted manifest error. *A & L, Inc. v. Grantham*, 747 So.2d 832, 845(¶ 61) (Miss.1999)." This is exactly the case at bar. The trial court manifestly abused its discretion by failing to cite sufficient findings of facts and conclusions of law in reaching its decision or having any credible evidence before it to support its decision other than the fact that domestic cases where tried before the court while Appellant's counsel's figures and values were admitted to be accurate by the trial court.

II. CONCLUSION

For all the above stated reasons, Appellant respectfully requests that the Court award the amount of attorney fees sought in the amount of $26,036.31 or whatever amount it deems appropriate and render judgment accordingly. And Appellant prays for any such other relief to which she may be entitled.

Respectfully submitted,

RITA FAYE MILEY, Appellant

By: 

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have on this day mailed, postage prepaid, a true and correct copy of the foregoing Rebuttal Brief of Appellant Rita Faye Miley to the Honorable Rodney Favor, Attorney for Appellee, at 121 N. Jackson Street, Starkville, Mississippi 39703-0648; the Honorable Kenneth Burns, Chancery Court Judge, P. O. Drawer 110, Okolona, Mississippi 38860-0110; and Ms. Betty W. Sephton, Clerk, Mississippi Supreme Court, P. O. Box 249, Jackson, MS 39205-0249.

SO CERTIFIED on this the 6th day of February, 2009.

Hal H. H. McClanahan, III
Attorney-at-Law