

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

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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RITA FAYE MILEY

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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 Faver, Attorney for Appellant

Respectfully submitted,

RITA FAYE MILEY

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RITA FAYE MILEY

APPELLANT

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CASE NO. 2008-TS-00677

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STATEMENT OF THE ISSUES

Appellant appeals the decision of the Trial Court on the following basis:


I

The Chancellor abused his discretion by awarding an insufficient amount of attorney fees in the Opinion and Judgment dated February 26, 2008, and the Order Overruling the Motion to Reconsider dated March 20, 2008.

Respectfully submitted,

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VERSUS

CASE NO. 2008-TS-00677

WILLIAM M. MILEY, JR.

APPELLEE

STATEMENT OF THE CASE

On or about March 23, 2007, the Plaintiff/Appellant Rita Faye Miley (hereinafter "Rita") filed her Complaint for Separate Maintenance (T.T. Pleadings 3 - 5; R.E. 3 - 5). The Defendant/Appellee William M. Miley, Jr., (hereinafter "Buzz") filed his Answer denying the Complaint but no Cross-Complaint (T.T. Pleadings 16 - 19; R.E. 6 - 9).

On or about August 10, 2007, the trial court entered its Order awarding temporary maintenance to Rita in the amount of \$2,400.00 per month with Rita being liable for payment of mobile home payment in the amount of \$440.00 per month (T.T. Pleadings 63 - 64; R.E. 10 - 11).

The trial was held on or about January 10, 2008, and lasted an entire day with the Chancellor rendering a bench opinion at the end of the trial without taking same under advisement. The following facts were developed during the course of testimony:

1. This was a true "May/December" marriage. Buzz is a retired military officer, who was eighty-five (85) years of age. Rita was forty-nine (49) years of age and totally disabled with multiple sclerosis, not having worked since 2005. Despite the separation in ages, Buzz was still sexually active demanding sex approximately three (3) times a week. Rita participated depending upon her

they had a combined gross income of \$114,196.00 or ninety-seven percent (97%) of their gross earnings. Rita earned \$3,748.00 or three percent (3%) of their gross earnings (T.T. 7; R.E. 13). In 2002 Buzz made \$81,142.00 with Rita having a loss of \$4,644.00 or Buzz earning one hundred percent (100%) of the money that year (T.T. 8; R.E. 14). In 2003 Buzz grossed \$94,982.00 or ninety-five percent (95%) of the income with Rita making only \$4,829.00 or five percent (5%) of the income (T.T. 9 - 10; R.E. 15 - 16). In 2004 Buzz earned \$93,568.00 or ninety-seven percent (97%) of the income with Rita earning \$3,369.00 or three percent (3%) (T.T. 11 - 12; R.E. 17 - 18). In 2005 Rita added \$3,369.00 to Buzz's \$93,568.00 for a total of \$96,937.00. Rita's share of the 2005 earnings was again three percent (3%) with Buzz earning ninety-seven percent (97%) of which \$3,750.00 was from gambling (T.T. 11 - 12; R.E. 17 - 18). In 2006 Buzz earned \$149,429.00 with the Appellant losing \$396.00. In short, Buzz earned one hundred percent (100%) of the income for year 2006 (T.T. 12; R.E. 18). According to Buzz's 2006 tax return, he had \$71,732.00 from his military retirements, which have a two and a half percent (2 1/2%) Cost of Living Adjustment (COLA) per year, together with \$10,787.00 in Social Security benefits, which also has COLA. In short, he had assured earnings in government retirements of \$82,519.00 per year (T.T. 13; R.E. 19). Buzz also has an interest in a development in Starkville, Mississippi, known as "Pearson Place", which was originally a fourteen (14) acre tract. Several lots have been sold from which he has already received \$75,000.00 with ten (10) acres remaining to be sold. All of

nothing.

3. The living styles of the parties are as different as they could be. Buzz lives in a house in downtown Starkville on ten (10) acres in which he has a life estate. The property by the Oktibbeha County Tax Assessment Rolls was appraised in 2007 at \$201,520.00. This property, however, is owned by his daughter and will pass upon his death directly to her. Rita has no claim against this property for her retirement years (T.T. 15 - 16; R.E. 21 - 22) (T.T. P-19; R.E. 23).
4. Buzz also has two (2) Merrill Lynch accounts of \$250,000.00 and \$475,000.00, respectively. Both of these accounts will pass outside his estate by beneficiary designations directly to his daughters. When Buzz passes, Rita has no interest in the accounts (T.T. 20 - 24; R.E. 24 - 28).
5. Buzz also had a USAA investment account at the time of the trial totaling \$52,726.27. Once again, however, his daughters by previous marriages are the designated beneficiaries at his death with his current wife Rita receiving nothing in the event of his demise (T.T. 27 - 28; R.E. 29 - 30).
6. Buzz was also positive that he left Rita absolutely nothing in his Last Will and Testament despite this being their second marriage to each other, which at this particular point in time was in its sixth year (T.T. 28 - 29; R.E. 30 - 31).
7. In addition, Buzz had a savings account at AmSouth Bank, N.A. with a balance of \$101,360.31 as of August 31, 2007. By the time of the trial in January, 2008, however, the balance in the account had been reduced by \$25,000.00, which was

according to the terms of his Will in which Rita receives

should also be noted that Buzz could spend the entire amount at any time he so desires by virtue of being the sole owner of the account (T.T. 28 - 29; R.E. 30 - 31) (T.T. Exhibit P-16, pages 450 - 451; R.E. 32 - 33).

8. Finally, at the time of the filing of his 8.05, Buzz had approximately \$90,000.00 in his checking account; but it had dwindled to \$70,000.00 by the time of the trial (T.T. 35; T.T. Exhibit P-13, pages 454 - 458; R.E. 34 - 38). This checking account also goes through Buzz's estate, assuming that there is anything remaining in it by that time, with Rita not being provided for at all in Buzz's Last Will and Testament.
9. By virtue of Buzz's military service, Rita is entitled to receive military medical privileges at no cost. She was, moreover, totally dependent on the military medical treatment for her multiple sclerosis at the time of the trial. Rita is entitled to the medical benefits so long as she remains the wife of the Appellee but loses all privileges in the event they are divorced (T.T. 44; R.E. 38A). Buzz does, however, have Rita designated as his surviving military wife, which means that she is entitled to an allotment of approximately \$3,200.00 to \$3,600.00 when he dies (T.T. 45 - 46; R.E. 39 - 40).
10. Rita has had multiple sclerosis since 2004 and has not worked at all since 2005 (T.T. 63, 84; R.E. 41 - 42).
11. Rita lives in a double-wide mobile home, which was originally bought for \$264,844 and has monthly payments of \$444.00 (T.T. 105; R.E. 43; Exhibit 19,

currently paying off the note in order to have a place to stay.

At the end of the trial on January 10, 2008, the Chancellor rendered his bench opinion in which he found on the conflicting evidence before him that Rita had failed to sustain the burden of proof for separate maintenance. He also found, however, that the parties would never reside together as husband and wife; and that under the powers of equity, Rita was entitled to support and maintenance in the previously ordered amount of \$2,400.00 per month from which she still had to pay the monthly mobile home payment of \$444.00 (T.T. 195 - 200; R.E. 45 - 50).

At the beginning of the trial the parties entered into evidence without objection twenty-three (23) exhibits (T.T. Exhibits 1 - 2, i - 3; R.E. 51 - 57). Of these, P-18 was a combined exhibit consisting of (1) a Professional Service Agreement by which Rita had retained the services of counsel herein for an initial retainer fee of \$3,500.00 to be billed against at the rate of \$250.00 per hour and (2) an itemized Attorney Time Sheet totaling \$26,036.31 (T.T. Exhibits 477 - 494, Exhibit P-18; R.E. 58 - 76). Also submitted into evidence in support of Plaintiff/Appellant's attorney fees request were Affidavits in Support of Request for Attorney Fees by two (2) other practicing attorneys in the Fourteenth Chancery District (T.T. Exhibits 519 - 540, Exhibit 21; R.E. 77 - 98). The testimony of Rita (T.T. 119 - 120; R.E. 99 - 100), which was admitted without objection either as to reasonableness of the hourly rate or the amount of time spent, was that she did not have sufficient funds from which to pay her attorney as shown on her 8.05 (T.T. Exhibit, pages 459 - 486, Exhibit P-14; R.E. 100 - 109). Rita's 8.05 also reflected that

The trial court in passing on the case at the end of the day-long trial denied Rita separate maintenance based on the conflicting evidence before the Court. The trial court also found, however, that the parties would never reside together again as husband and wife and that Rita was totally dependent upon Buzz for support. Accordingly, the Court ordered Buzz to continue paying Rita the monthly award of \$2,400.00 by the powers of equity and also ordered Buzz to pay \$5,000.00 for Rita's attorney fees. The trial court in its findings specifically stated that Rita did not have the resources to pay an attorney and had no doubt that counsel had put in the time stated and that the counsel's time was valued as he stated. The trial court rendered an attorney fee award of only \$5,000.00 to Rita with absolutely no explanation or reasoning in the record of how this sum was derived (T.T. 195 - 199; R.E. 45 - 50). The Opinion and Judgment of the trial court was later transcribed to judgment on or about February 26, 2008 (T.T. Pleadings 94 - 96; R.E. 112 - 114).

On or about March 6, 2008, Rita submitted her Motion to Reconsider the judgment with supporting memoranda (T.T. Pleadings 97 - 149; R.E. 115 - 168).

On or about March 20, 2008, the trial court, once again without any explanation, overruled Rita's Motion to Reconsider from which the appeal herein was perfected (T.T. Pleadings 150; R.E. 169).

RITA FAYE MILEY

APPELLANT

VERSUS

CASE NO. 2008-TS-00677

WILLIAM M. MILEY, JR.

APPELLEE

SUMMARY OF THE ARGUMENT

THE CHANCELLOR ERRED IN AWARDING ONLY \$5,000.00 ATTORNEY FEES HEREIN INSTEAD OF \$26,036.31; AND THE AMOUNT OF THE ATTORNEY FEES NEEDS TO BE ALTERED OR AMENDED TO \$26,036.31 OR WHATEVER THE COURT DEEMS REASONABLE IN LIGHT OF THE EVIDENCE IN THIS CASE, RULE 1.5 OF THE RULES OF PROFESSIONAL CONDUCT AND *McKEE V. McKEE*, 418 So 2d 764.

VERSUS

CASE NO. 2008-TS-00677

WILLIAM M. MILEY, JR.

APPELLEE

ARGUMENT

I. STANDARD OF REVIEW

THE CHANCELLOR ERRED IN AWARDING ONLY \$5,000.00 ATTORNEY FEES HEREIN INSTEAD OF \$26,036.31; AND THE AMOUNT OF THE ATTORNEY FEES NEEDS TO BE ALTERED OR AMENDED TO \$26,036.31 OR WHATEVER THE COURT DEEMS REASONABLE IN LIGHT OF THE EVIDENCE IN THIS CASE, RULE 1.5 OF THE RULES OF PROFESSIONAL CONDUCT AND *McKEE V. McKEE*, 418 So 2d 764.

Rita's counsel introduced pursuant to Rule 1.5(a) of Mississippi Rules of Professional Conduct an Affidavit and itemization of his attorney fees requested in the amount of \$26,036.31 as contained in Exhibit P-21 together with his retainer contract at \$250.00 an hour and an itemized bill of \$26,036.31 in Exhibit P-18. The Affidavit of Rita's counsel, which somehow got included with a faxed mailing to Jack Brown, was supported by (a) an Affidavit, which stated that the \$250.00 an hour charge sought by Rita's counsel was reasonable based on the experience and qualifications of Rita's counsel, from the Honorable Gary L. Geeslin, who has been a practicing attorney in the Fourteenth Chancery District since 1968; and (b) an Affidavit from Jack Brown, which stated that he was personally familiar with Rita's counsel and stated the \$250.00 hourly fee as sought

Rita's counsel also submitted with his Affidavit

March 21, 2007, and extending through January 10, 2008.

billed for post-trial briefing and preparation and with proper credit being given for fees advanced where a loan was given by relatives to Rita. The five (5) hours post-trial has been more than utilized already. In Exhibit 21 Rita's counsel also included his own Affidavit pursuant to Rule 1.5 of the Mississippi Rules of Professional Conduct (T.T. Exhibit 519 - 540; R.E. 77 - 98).

It is crucial to note that Buzz did not make any objection as to either the reasonableness of either the hourly rate of \$250.00 or the amount of time spent of 96.20 hours. As previously stated, the Attorney Time Sheet, Professional Service Agreement and both supporting Affidavits were admitted by agreement with no objection. While the failure of Buzz to object to the reasonableness of Rita's requested attorney fees does not relieve the Court of its duty to make its own ruling pursuant to *Jackson v. Galan*, 1990 WL 15258, Rita strongly believes that the failure to object is persuasive evidence of the reasonableness of the fee request. Rita's counsel, moreover, had the burden of proof herein and a much heavier workload than counsel for Buzz.

This is a separate maintenance case. Because of separate maintenance's difference from the relief sought in a divorce, it is less frequently used and is only the second separate maintenance action brought by Rita's counsel in thirty-seven (37) years.

There was nothing simple about this case. As shown by the itemized billing for services herein in Exhibit 18 (R.E. 58 - 76), it involved travel to

Mississippi, to review medical records of Rita, when the company wanted approximately \$1,000.00 just to copy the voluminous records extending back four (4) years with multiple visits. There were three (3) separate trips to Maben, Mississippi, for record checks, depositions and re-scheduled depositions at Dr. Sue Simmons' office. This case involved preparation for and attendance at a temporary hearing in West Point, Mississippi, in June, 2007, in which Plaintiff had to obtain five (5) years of Rita's tax returns to impeach the "inartfully drawn" 8.05 of the Defendant, and a second trip to West Point to catch a medical records clerk when the undersigned was unable to meet in Maben, Mississippi. This case was further complicated with the examinations of the land records of Oktibbeha County, Mississippi, to establish the land ownership of the Defendant and the issuance of a Subpoena Duces Tecum on Merrill Lynch in Jackson, which involved travel to Starkville, Mississippi, to secure the issuance of same.

The trial took one (1) day. The appeal is not any easier. It cost \$2,381.00 to appeal the case (T.T. Pleadings 162 - 164; R.E. 170 - 172). The record consists of two (2) volumes of transcript testimony, two (2) volumes of pleadings and five (5) volumes of exhibits. The paperwork in this appeal speaks for itself.

After having conducted depositions of the parties in Starkville, it was ascertained that Buzz had liquid assets in excess of \$500,000.00 of which his daughters are the named beneficiaries on all accounts. This designation means all funds with the exceptions of a savings and checking account will pass

ten (10) acres in Starkville, Mississippi, which he previously used.

daughters subject to the reservation of a life estate to himself. This means that when the eighty-five (85) year old plus Buzz dies, Rita has absolutely no homestead interest to the property and only the mortgaged double-wide mobile home in which she resides to live.

The Chancellor, after having reviewed all the conflicting facts, adjudicated that Rita was not entitled to separate maintenance but found that under the situation the parties would never live together again and ordered the continuing support of Rita in the amount of \$2,400.00 a month under the general powers of equity. Consequently, Rita still has financial support from Buzz and is living in a double-wide mobile home upon which she is making payments. In short, Rita's counsel lost the battle but won the war in the long haul, especially since she still has all of her military medical privileges.

While the undersigned means absolutely no disrespect to the trial court, it abused its discretion by awarding only \$5,000.00 attorney fees based on the uncontradicted record before it.

After deducting the uncontradicted costs of \$1,986.31, Appellant's counsel was effectively awarded only \$3,013.69 in attorney fees. Approximately two-fifths (2/5) of the trial court's award paid only counsel's expenses. With the balance of \$3,013.69, Appellant's counsel with then thirty-seven (37) years trial experience was awarded only \$31.33 per hour.

judged on an abuse of discretion standard as cited in *Gray*.

Oriental Foods, Inc., 2007 WD 4111418 (Miss. App.) of November, 2007. In *Gray v. Gray*, 909 So. 2nd 108, while acknowledging that the award for attorney fees is discretionary with the Chancellor, the Mississippi Supreme Court also pointed out that the Chancellor has the duty to weigh all facts and assess the circumstances needed to determine the award of attorney fees. Similarly, in *Browder v. Williams*, 765 So. 2nd 1281, the Court pointed out that in making an award of attorney fees the Chancellor has to support the award with a factual determination and that the award is not to be pulled out of thin air.

In the instant case the trial court actually made the finding in its bench judgment of January 10, 2008, that "*The Court has no doubt that Mr. McClanahan put the time in and that his time is valued at what he says...*" In short, the trial court admits that the work has been performed as charged and that the fees charged are reasonable in conjunction with the skill of the attorney involved and the results obtained. The trial court, however, also stated that "*There is a statute that says the Court can make a determination, even without proof, as to what reasonable attorney fees are.*" The trial court then went on to order only \$5,000.00 attorney fees with no other rationale stated in the record for the basis of the award. In short, the trial court "pulled the figure out of thin air" by giving absolutely no factual basis in its award of what it considers to be reasonable attorney fees while at the same time admitting that the work charged

uncontested by the Defendant.

While the undersigned realizes that his submission of the requested attorney fees is purely advisory to the Court, which is not bound by the request, the present ruling does not square with the Supreme Court's decision in *Browder v. Williams*, supra. In the case at bar counsel tracked the requirements of Rule 1.5 of the Mississippi Rules of Professional Conduct. The requested hourly rate of \$250.00 by the undersigned is supported by the Affidavits of two (2) other attorneys of similar standing and experience within the same legal community of the Fourteenth Chancery District, is acknowledged by the trial court to be reasonable and is unopposed by the Defendant.

The undersigned's client was seeking reasonable support in a separate maintenance action commensurate with her station and lifestyle to which she was accustomed while being totally disabled with multiple sclerosis and attempting to qualify for Social Security benefits. Meanwhile, her husband had an annual income in excess of \$140,000.00 in 2006 and well in excess of \$500,000.00 in liquid assets as proved in trial.

The amounts involved and the results obtained speak for themselves. Counsel was not able to win that portion of the lawsuit by having the Court adjudicate a separate maintenance award, but he was successful in getting the Court to continue the support award of \$2,400.00 a month and keep the military medical benefits. Defeat was snatched from the jaws of victory. Good help is hard to find.

with the increased difficulty of having to transport me

hearings in Starkville and West Point because of her inoperable automobile.

This case involved knowledge of descent and distribution under the laws of the State of Mississippi, title searches, banking regulations, Social Security law, divorce and separate maintenance law, thirty-seven (37) years of trial experience as well as travel over a four-county area during an eight (8) month span with gas at over \$3.00 a gallon.

The standing of the attorney involved is testified to in of his Affidavit included a part of P-21 (R.E. 77 - 98). This is a fixed fee arrangement. In short, counsel has complied with the Rules of Professional Conduct as well as the authority in *McKee v. McKee*, 418 So. 2d 764, for the award of attorney fees.

Under the circumstances counsel has amply demonstrated that Rita is entitled to an award of reasonable attorney fees in line with the qualifications and services of her attorney, the results obtained herein and the bill submitted of \$26,036.31.

If this Court's award of attorney fees is not set at \$26,036.31 or substantially upgraded to what the Court feels reasonable under the circumstances, it will have the chilling effect of depriving women, and for that matter impoverished men, of competent representation by experienced and qualified trial counsel. If attorneys cannot have faith that their efforts will be reasonably compensated by the Court based upon their experience, efforts and the

event they leave any stone unturned, will have no choice but to

cash payment for attorney fees before attempting to represent destitute women or men, which will have the effect of depriving them of competent, experienced trial counsel. This economic fact of life becomes even more pressing where there are substantial discovery expenses that have to be met pending trial. See also *"Removing 'Money Illusion' from Fee and Damage Awards"* by Luther T. Munford, The Mississippi Lawyer (Volume LIII, June-August-September, 2007) for the effects of inflation on what would have been reasonable attorney fees ten (10) years ago against today's prices, which was part of Rita's Motion to Reconsider (R.E. 164 - 167).


Consequently, if this Court elects not to reverse and render with an award of reasonable attorney fees or, alternatively, reverse and remand the issue to the trial court for a decision on attorney fees based on the facts stated in the record, it will be sending a message throughout the State Bar and to the citizens of the State of Mississippi that destitute women and impoverished men are second-class citizens and cannot obtain their rights in this Court system with competent counsel, who cannot get adequately paid by the Court. While having all the respect in the world for the judgment of the trial court despite our current differences, counsel would prefer that this Court reverse and render on the basis of the loss of the time value of money not received occasioned by the appeal herein and the possible remand.

For all of the above-stated reasons, the trial court erred in ...

Appellant sufficient reasonable attorney fees to which she is entitled together with an award for attorney fees for having to appear before the Mississippi Supreme Court and appeal the lower court's ruling. And Rita prays for any such other relief to which she may be entitled.


Respectfully submitted,
RITA FAYE MILEY

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THIS IS TO CERTIFY that I have on this day mailed, postage paid, a correct copy of the foregoing 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 3rd day of November, 2008.

A handwritten signature in black ink, appearing to read "Hal H. H. McClanahan, III". The signature is fluid and cursive, with the first name "Hal" being particularly prominent.

Hal H. H. McClanahan, III

Attorney-at-Law