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

GARY E. WHITE ATTORNEY, P.A.;
GARY E. WHITE, INDIVIDUALLY AND AS
AGENT FOR BLACKWELL AND WHITE,
A PARTNERSHIP, APPELLANT

V.

LEONARD BLACKWELL, II,;
LEONARD A. BLACKWELL, ATTORNEY, P.A.;
LATRICIA S. TISDALE AND
LATRICIA S. TISDALE, P.A., APPELLEES

NO. 2009-CA-01465-COA

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REPLY BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

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ARGUMENT IN REPLY

1. **Blackwell's assertion that his putative withdrawal from the partnership was not in response to White's protestations of fee splitting with non-lawyers is contrary to the evidence.**

Mr. Blackwell, in a footnote, states at page 7 of his brief that:

> White's attempt to portray the withdrawal as some sort of response to alleged misconduct on Blackwell's part is complete fabrication. The proof is uncontroverted that the withdrawal had nothing to do with John Felsher, a trust account error, or anything other than Blackwell's continuing dissatisfaction with White's office demeanor and conduct.

Neither Blackwell's brief, however, nor the trial court's opinion address in any kind of meaningful fashion:

a. that on March 3, 2006, the day the Beverin fee was collected, White learned for the first time that Felsher had been paid $125,550.00, and complained about the fee to Blackwell, pointing out that Felsher did no substantive work on the case. The reply brief does not direct us to any evidence that Felsher did anything except respond to one telephone call from Blackwell;

b. on Thursday, April 27, 2006, White learned that several weeks earlier Blackwell had transferred $150,000.00 from the trust account to his personal account. White asked Blackwell to return the money, which he did on the next day;

c. or that on Friday, April 28, 2006, the same day Blackwell returned the $150,000.00 to the firm account, White told Blackwell that he

didn't want to take part in further payments to Felsher or Burton as "consultants" from fees due to the firm;

d. and that the next business day, after Blackwell had to repay the $150,000.00 to the trust account and the day after White told Blackwell he wouldn't take part in payments to Felsher and Burton, was the day Blackwell delivered the withdrawal letter.

If Blackwell were so dissatisfied that he wanted to terminate the partnership based upon White's allegedly unpleasant office demeanor, why wouldn't he have mentioned it to White at some point in time previously to invoking it now during this litigation? And what is the explanation for Blackwell permitting, no, *requesting* White to go down to the car dealership on the Saturday April 29, 2006, after White told him he wouldn't take part in any more fee arrangements with Felsher and Burton, and sign contracts personally obligating White on new vehicles for the firm and Blackwell's wife? White's manner hadn't changed over the nearly quarter of a century of their business relationship. What changed were the big real estate deals, the concealed partnership with Felsher, and the payments out of the attorney fees to which White objected.

Moreover, the sequence of events, both in terms of their factual content and proximity in time immediately preceding the Monday morning delivery of the withdrawal letter, make the inference virtually mandatory that Blackwell's action was connected to White's objections to Felsher/Burton, hardly a manufactured fabrication concocted for ulterior motives by White as Blackwell claims in his brief.

The circumstantial evidence as to the cause of the breakup - - White's refusal to cooperate with payments to Felsher and Burton - - is overwhelming.

Our law defines circumstantial evidence as a chain of circumstances that indirectly prove a fact. ***Sherrell v. State***, 622 So.2d 1233 (Miss. 1993); ***Guilbeau v. State***, 502 So.2d 639 (Miss. 1987). The law makes no distinction between the weight to be given either direct or circumstantial evidence, leaving it to the trier of facts, here the Chancellor, to decide the weight to be given the evidence. Id.

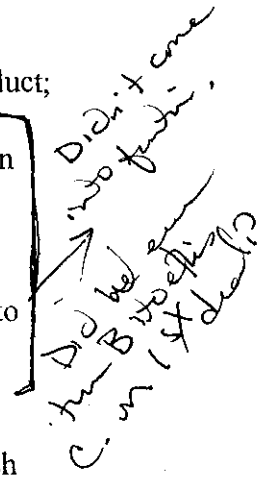
Given the totality of the circumstances here, the Chancellor was manifestly in error in failing to give proper weight to the chain of events (outlined above and in the principal brief) preceding the delivery of the dissolution letter, and certainly he was manifestly in error in not addressing the Burton evidence, which makes it virtually conclusive that Blackwell was intent on sharing fees with nonlawyers in material breach of the partnership agreement.

2. Blackwell misstates White's position on the effects of Blackwell's ethical and fiduciary lapses.

Blackwell misstates White's position regarding Blackwell's ethical violations over the fee splitting. Blackwell correctly observes that "the law is clear that the Rules of Professional Conduct are designed to protect clients, and ... violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached..."Appellee's brief at page 23, citing Rule 8.3, Mississippi Rules of Professional Conduct.

Mr. White does not attempt to assert the ethical violations as a distinct cause of action. Rather, the partnership contract between the parties, RE-6, exhibit "1", incorporates the ethical rules into the contract when it cites as a ground for expulsion under Section 17 alternately

discipline by the Bar so long as the remaining partner wasn't complicit in the wrongful conduct; and breach of partnership ethics, to wit: "if any partner persists in professional misconduct in violation of the standards set forth in local or state regulations or statutes, or in the Rules of Conduct established within the profession, after being requested by the remaining partners to desist."



At trial, Blackwell objected to questions posed to White about the fee splitting, which was overruled, and Mr. White testified that the Blackwell and White partnership agreement "required (them) to abide by the ethics." R-463.

The partnership agreement between these two lawyers made it a breach of the agreement for one of the partners to engage in ethical misconduct. The Chancellor in his opinion did not come to grips with the problem, and Mr. Blackwell in his brief does not address it, choosing instead to disingenuously mischaracterize the argument.

3. The Court misapplies the ethical opinion which it used to find that Blackwell's $125,550.00 payment was proper, and Blackwell does not address the problem in his brief.

In his brief, Blackwell does not address the problem of the trial court's misconstruction of Ethics Opinion No. 91, Appendix 1 to the principal brief of the Appellant. Ethics Opinion No. 91 does not provide authority for a non-testifying expert to be paid on a contingency fee if, as here, that "expert" happens to be the business partner of the lawyer, and if his fee is to be paid, not out of the client portion of the recovery but, by the lawyer himself out of the contingent attorney fee.

Moreover, the putative consulting agreement was put together literally on the day that Felsher got his money on March 3, 2006, not on the December 5, 2005 date which appears on the

document, a suspicious circumstance which in and of itself calls into question the legitimacy of the "agreement." A reading of Mr. Felsher's testimony, exhibit "56", pages 57 and following, discloses that as between Blackwell and him, Felsher thought he was going to receive $100,000.00 for his "consulting fee" on the Beverin case. As to the back dating, not addressed by Blackwell in his brief, witness:

Q: (to Felsher)... and so if I understand what you are saying, though, then, you didn't sign the agreement until on or about March 3, 2006, when you got your check; would that be right?

Felsher: That's correct.

Exhibit "56", page 65.

A further irregularity not addressed was the changing amount of the payment. Mr. Felsher received $125,550.00 from the Blackwell and White attorney fee on the Beverin case. If there was any question about the agreement not existing until the money was taken in and then to be paid from the attorney fee to the non-lawyer, it is removed by Felsher's own testimony.

Q: ...if I read this correctly, you got this check for $125,550.00 on or about the date that's on the check, March 3, 2006?

Felsher: Yes sir.

Q: Would that be right? And, of course, at that point, the transaction had closed, was over?

Felsher: I would assume such yes, sir.

Q: and prior to receiving the check, your understanding was that you were going to get $100,000.00; right?

Felsher: My - my understanding was that I was going to $100,550.00.

Q: What was the $550.00 for?

Felsher: The $550.00 was for a pair of moccasin loafers that Mr. Blackwell told me he would owe me if the firm actually facilitated the transaction based on that...

Exhibit "56", page 62.

Q: ...the point is that you didn't know about the extra twenty-five grand until you actually got it in your hand, and that was on March 3, 2006?

Felsher: That is correct.

Q: That being the case, would you agree with me that this date on December 20, 2005, really doesn't represent the date that the agreement was prepared because it makes reference in exhibit "B" back here to $125,550.00?

Felsher: I cannot agree on that date. I can only tell you that the agreement was placed before me and I signed it. Mr. Blackwell, in particular, and the law firm as a whole had never given me any reason to second guess them, so he put the - - he had a check in one hand and the agreement, and I signed.

Q: Alright. So you didn't sign the agreement until you got your check? Would that be right?

Felsher: That's right.

Exhibit "56", pages 63-64.

Blackwell admitted at trial that the putative agreement with Felsher wasn't signed until the date of the Beverin closing in March and was backdated to reflect on its face a December 5,

2005, execution date. (R-164 ff); and that Felsher's fee wasn't paid by the Beverins but was paid by Blackwell and White only after the firm's $700,000.00 fee was collected. All parties agree that the client didn't pay any of Felsher's fee.

Thus, it may be seen that the trial court erroneously applied an ethics opinion to permit a nontestifying "consultant" to be paid on a contingency fee basis from the attorney fee received by the lawyer. Mr. Felsher was not a "nontestifying expert." He was Mr. Blackwell's business and investment partner in Blackwell and Felsher. He did essentially nothing on the Beverin matter, and the agreement which was relied upon as a basis to disburse to him $125,550.00 wasn't prepared until after the deal was closed and the checks were in hand. Even at that, Blackwell threw in an extra $25,550.00 for him, as Felsher testified that he thought he was to receive $100,000.00 from the attorney fee.

Mr. Blackwell split fees with a non-attorney. The ethics opinion relied upon by the Court and Blackwell do not avail them here, as the scenario outlined in ethics opinion 91 is not the scenario before the Court. The situation here is more like those found in Counts five, six and seven of the Complaint filed by the Bar against Gerald Emil in ***Emil v. The Mississippi Bar***, 690 So.2d 301 (Miss. 1997). There was much more money involved in the Blackwell and Felsher/Burton agreements, and Felsher didn't refer a client to Blackwell (but Burton did). White doesn't maintain that Felsher and Burton were runners like the highway patrolman and the investigator in the ***Emil*** case, but the practice of paying non-lawyers out of attorney fees, particularly when no substantive work was performed, is sufficiently similar in kind so as to bring Blackwell and Felsher/Burton within the sweep of the vice of splitting fees with non-

lawyer such as is condemned by the rules, by the case law, and indirectly by the Blackwell and White Partnership Agreement itself.

CONCLUSION

Mr. White would respectfully assert to the Court that the Trial Judge was manifestly in error in rendering many of the factual findings as outlined in White's principal brief, some of which are reemphasized here and many more of which are covered in the principal brief. The Court ignored the abundant evidence that Blackwell's partnership with Felsher was concealed from White, to White's detriment and to the detriment of the Blackwell and White partnership. Occluded machinations within the trust account sought to conceal Blackwell's interest in a Blackwell and Felsher real estate deal, acts which were anathema to the fiduciary relationship between Blackwell and White at the time.

The Trial Court erred in applying section 15 (i) to the breakup in the face of abundant evidence, most of which surfaced only after the litigation commenced, which supported Blackwell's expulsion and a division of the proceeds under Section 17. Indeed, Mr. White would respectfully assert that the Trial Court erred in failing to revisit its interlocutory opinion, which was based only upon a construction of the four corners of the agreement, after the trial produced abundant evidence which should have altered the Court's earlier analysis.

Mr. White would respectfully ask this Court to vacate both Judgments of the Trial Court and remand the matter with instructions to make findings consistent with Blackwell's wrongful conduct in his concealed partnerships with Felsher and Burton, and to apply section 17 in the division of partnership assets as set out in Whites principal brief and at trial.

Respectfully submitted on this the 15th day of April, 2011.

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CERTIFICATE OF SERVICE

I, CHESTER D. NICHOLSON, do hereby certify that I have mailed, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of the Appellant to Honorable E. C. Prisock, at his mailing address of 201 S. Jones Avenue, Louisville, Mississippi 39339; Judy Guice, Esquire, at her mailing address of P. O. Box 1919, Biloxi, Mississippi 39533, Wynn E. Clark, Esquire, at his mailing address of 2510 16th Street, Gulfport, Mississippi 39501; and Gary White, Esquire at his mailing address of P. O. Box 700, Gulfport, Mississippi 39502.

This the 15th day of April, 2011.

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CHESTER D. NICHOLSON