

CA  
NO. 2009-01976

---

IN THE SUPREME COURT  
OF THE STATE OF MISSISSIPPI

---

JAMES BUCKALEW  
*Plaintiff - Appellant*

v.

DIANE BUCCLUCH  
*Defendant - Appellee*

---

On Direct Appeal from the Chancery Court of  
Lauderdale County, the State of Mississippi

---

BRIEF OF APPELLEE  
DIANE BUCCLUCH

---

ATTORNEY FOR APPELLEE,  
DIANE BUCCLUCH:

RHAE R. DARSEY (MS Bar No. [REDACTED])  
HENRY PALMER (MS Bar No. [REDACTED])  
LAWYERS, PLLC  
1803 24<sup>TH</sup> AVENUE  
P.O. BOX 1205  
MERIDIAN, MS 39302-1205  
601-693-8204 (telephone)  
601-485-3339 (facsimile)

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IN THE MATTER OF THE GUARDIANSHIP  
OF RUBY BUCKALEW

JAMES BUCKALEW

APPELLANT

VS.

NO. 2009-TS-01976

DIANE BUCCLUCH

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Joe Clay Hamilton and The Hamilton Law Firm, P.L.L.C.,  
Attorneys for Appellant, James Buckalew, Guardian of Ruby Buckalew;
2. James Buckalew, Appellant, Guardian of Ruby Buckalew;
3. Ruby Buckalew, Ward;
4. Diane Buccluch, Appellee;
5. Henry Palmer, Rhae R. Darsey and Lawyers, P.L.L.C.,  
Attorneys for Appellee, Diane Buccluch;
6. Honorable Jerry Mason, Chancery Court Judge, Chancery  
Court of Lauderdale County, Mississippi.

Respectfully submitted, this the 29th day of June, 2010

Diane Buccluch, Appellee

By: Rhae R. Darsey  
RHAЕ R. DARSEY (MS Bar No. 102884)  
HENRY PALMER (MS Bar No. 3990)  
LAWYERS, PLLC  
1803 24<sup>TH</sup> AVENUE  
P.O. BOX 1205  
MERIDIAN, MS 39302-1205  
601-693-8204 (telephone)  
601-485-3339 (facsimile)

HER ATTORNEYS

## TABLE OF CONTENTS

I.	CERTIFICATE OF INTERESTED PARTIES.....	1
II.	TABLE OF CONTENTS.....	3
III.	INDEX OF AUTHORITIES.....	5
IV.	STATEMENT OF THE ISSUES.....	6
V.	STATEMENT OF THE CASE.....	7
IV.	STANDARD OF REVIEW AND APPLICABLE LAW	
A.	Standard of Review.....	10
B.	Applicable Law.....	10
V.	SUMMARY OF THE ARGUMENT.....	11
VI.	ARGUMENT	
A.	The Chancellor abused his discretion by finding that the appellee, Diane Buccluch, had no hope of success upon the counterclaim and that the counterclaim was a frivolous pleading, which warranted the imposition of sanctions.....	12
1.	Diane Buccluch had some hope of success upon her counterclaim.....	12
a.	Diane offered a letter written by family members to support her claim.....	13
b.	Diane provided evidence that, though she had an agreement with James, which they agreed would serve the best interests of their mother, he refused to comply with the terms of that agreement.....	13
c.	Diane produced evidence of James's misappropriation of Ruby's funds and breach of fiduciary duty.....	16
2.	The Chancellor abused his discretion by finding that the counterclaim was a frivolous pleading, which warranted the imposition of sanctions.....	16
a.	The purpose of filing Diane's counterclaim was to have James removed as guardian, not to harass or cause delay..	16

b.	James failed to present the proof necessary to justify a fee award.....	18
B.	The Chancellor did not abuse his discretion by determining that the appellee, Diane Buccluch, did have some hope of success in defense of the Complaint to Order Diane Buccluch to Vacate Property Owned by Ward.....	20
VII.	CONCLUSION.....	22
VIII.	CERTIFICATE OF MAILING.....	23
IX.	CERTIFICATE OF SERVICE.....	24

## INDEX OF AUTHORITIES

### CASES CITED

*Jowers v. BOC Group, Inc.*, 609 F.Supp.2d 724 (S.D.Miss. 2009).

*Leaf River Forest Prod., Inc. v. Deakle*, 661 So.2d 188 (Miss.1995).

*Matter of Will of Fankboner*, 638 So.2d 493 (Miss.1994).

*Nichols v. Munn*, 565 So.2d 1132 (Miss.1990).

*Scruggs v. Saterfiel*, 693 So.2d 924 (Miss.1997).

*Smith v. Malouf*, 597 So.2d 1299 (Miss.1992).

*Stevens v. Lake*, 615 So.2d 1177 (Miss.1993).

*Tricon Metals & Services, Inc. v. Topp*, 537 So.2d 1331 (Miss.1989).

*Warren v. Derivaux*, 996 So.2d 729 (Miss. 2008).

### RULES CITED

Rule 11(b), Mississippi Rules of Civil Procedure.

Section 93-13-38, *Mississippi Code Annotated*, 1972, as amended.

## STATEMENT OF THE ISSUES

1. Whether the Chancellor abused his discretion by finding that the appellee, Diane Buccluch had no hope of success upon the counterclaim and that the counterclaim was a frivolous pleading, which warranted the imposition of sanctions.
2. Whether the Chancellor abused his discretion by determining that the appellee, Diane Buccluch did have some hope of success in defense of the *Complaint to Order Diane Buccluch to Vacate Property Owned by Ward*.

## STATEMENT OF THE CASE

James Buckalew (hereinafter "James") was appointed as guardian of Ruby Buckalew (hereinafter "Ruby") on April 12, 2006. [R. at 10.] James Buckalew is the son of Ruby Buckalew. Diane Buccluch (hereinafter "Diane") is the daughter of Ruby Buckalew and the sister of James Buckalew. [R. at 211.]

Following a stroke and a diagnosis of Alzheimer's disease in 2004, Ruby Buckalew was in need of someone to provide care for her. [R. at 214.] Ruby moved to Colorado to live with Diane, as she is an educated nurse with experience in caring for the elderly and was ready and willing to provide the care that her mother needed. [R. at 214.] Diane and Ruby were living in Colorado when Ruby made it known to her children that she wanted to move back home to Mississippi. [R.E. at 9.4-9.5.] Diane and James agreed that it would be in their mother's best interests if she moved with their mother back to her home in Lauderdale County, Mississippi, so that she could provide full-time care for her. *Id.* Diane and James agreed that if she would care for their mother on a full-time basis, Diane would receive certain funds that their mother received from Veterans Assistance for her care. *Id.* She was to pay for her mother's expenses from those funds and she would keep the remainder as compensation for her time and effort. *Id.*

In accordance with her agreement between James and herself, Diane moved from Colorado to Meridian, Mississippi and incurred significant expense in the process. [R.E. at 9.5.]

On June 26, 2008, James removed Ruby from her home while Diane was visiting family in Las Vegas. [R. at 215.] James reasoned that Diane was not providing necessary and appropriate care for Ruby and that her condition had declined. [R. at 214-215.]



Diane insists that she did provide necessary and appropriate care for her mother and that James removed Ruby from her care out of greed and distaste for her. [R. at 215.] Thereafter, James refused to allow Diane to spend adequate time with her mother and requested that Diane vacate their mother's home. In reliance on her agreement with James, Diane vacated her home in Colorado to move to Mississippi. She also incurred more than \$2,500.00 in expenses as a result of the move. [R.E. at 9.5.] Diane did not have an alternative place to live and she did not have the financial ability to rent an apartment when James asked her to leave her mother's home. [R.E. at 13.3.]

James filed a Complaint to Order Diane Buccluch to Vacate Property Owned by Ward on August 29, 2008. [R. at 107,108.] Diane filed her Answer to Complaint, Defenses, and Counterclaim on September 18, 2008. [R. at 109-117.] In her counterclaim, Diane requested that James Buckalew be removed as guardian because he "has created a conflict of interest between himself and his ward and has failed or refused to act in a matter to protect the person and estate of the ward and in the ward's best interest." [R. at 112-113.] Attached as Exhibit "A" to the counterclaim was a letter in support of her claim that was written by Ruby Buckalew's sister, Hazel King, and was signed by six relatives of Ruby Buckalew. The signatures on this letter belong to the following: Hazel King, Ruby's sister; Kenneth K. King, Hazel King's husband and Ruby's brother-in-law; Elaine Kappen, Ruby's sister; Ted Kappen, Elaine Kappen's husband and Ruby's brother-in-law; Howard Jenkins, Ruby's brother; Fontella Jenkins, Howard Jenkins' wife and Ruby's sister-in-law. [R. at 115-117.]

James filed a Motion to Strike said exhibit, but the Motion was not heard. [R. at 121-123.] After months of conflict with her brother and being alienated from her

mother, Diane decided to dismiss her counterclaim and move to Las Vegas, where friends offered her a temporary home. The Order of Dismissal Without Prejudice was entered on April 13, 2009. [R. at 131.]

On October 3, 2008, the attorney for James drafter a Rule 11 Motion, claiming that the entire action filed by Diane was frivolous and unwarranted and was done for the purpose of harassing much rather than in the interest of the Ward. He requested that sanctions be granted to the ward to include all expenses and attorney's fees in the defense of the action. [R. at 224.] A copy of said Motion was delivered to the attorney for Diane thereafter, but the original Motion was not filed with the trial court. [R. at 212.]

After a hearing on the Motion, the trial court determined that "Diane Buccluch had no hope of success upon the counterclaim and that the counterclaim was a frivolous pleading." [R. at 222.] The trial court imposed sanctions upon Diane Buccluch in the amount of \$800.00. [R. at 223.]

## STANDARD OF REVIEW AND APPLICABLE LAW

### A. Standard of Review

When reviewing a court's award of sanctions pursuant to Rule 11, this Court must apply the abuse of discretion standard. This Court should reverse if it finds that the trial court abused its discretion in imposing sanctions or employed an incorrect legal standard. *Leaf River Forest Prod., Inc. v. Deakle*, 661 So.2d 188, 196-197.

### B. Applicable Law

The Defendant would show unto the Court that sanctions under Rule 11 of the *Mississippi Rules of Civil Procedure*, "are warranted when the pleading or motion is 1) frivolous or 2) is filed for the purpose of harassment or delay." *Matter of Will of Fankboner*, 638 So.2d 493, 498 (Miss.1994), citing M.R.C.P. 11.

In *Scruggs v. Saterfiel*, 693 So.2d 924, 927 (Miss.1997), the Supreme Court discussed what constituted a frivolous claim. "To determine whether a claim is frivolous pursuant to the statute, this Court looks to the definition of 'frivolous' found in M.R.C.P. 11. *Leaf River Forest Products, Inc. v. Deakle*, 661 So.2d 188, 197 (Miss.1995). For purposes of Rule 11, a claim is frivolous "only when, objectively speaking, the pleader or movant has no hope of success." *Stevens v. Lake*, 615 So.2d 1177, 1184 (Miss.1993), quoting *Tricon Metals & Services, Inc. v. Topp*, 537 So.2d 1331, 1335 (Miss.1989); *Smith v. Malouf*, 597 So.2d 1299, 1303 (Miss.1992) (applying Rule 11 definition to Litigation Accountability Act context). "Though a case may be weak or 'light-headed,' that is not sufficient to label it frivolous." *Deakle*, 661 So.2d at 195; *Nichols v. Munn*, 565 So.2d 1132, 1137 (Miss.1990)."

## SUMMARY OF THE ARGUMENT

The Chancellor abused his discretion by finding that Diane had no hope of success upon the counterclaim and that said counterclaim was a frivolous pleading, which warranted the imposition of sanctions. It is Dian's position that she did have some hope for success upon her counterclaim and that she produced evidence in support of her position. She offered a letter written by family members to support her claim, which remains part of the record. She provided evidence that, though she had an agreement with James, which they agreed would serve the best interests of their mother, he refused to comply with the terms of that agreement. She also produced evidence of James's misappropriation of Ruby's funds and breach of fiduciary duty, which warrants his removal as guardian of their mother.

The Chancellor abused his discretion by finding that the counterclaim was a frivolous pleading, which warranted the imposition of sanctions. Diane's purpose in filing her counterclaim was to have James removed as guardian of her mother, because she believes that he is not acting in her best interests. Her purpose was never to harass or cause delay.

Further, it is well established that the burden of proof lies with the movant and that the pleadings themselves are not evidence. James failed to present the proof necessary to justify a fee award.

## ARGUMENT

- A. The Chancellor abused his discretion by finding that the appellee, Diane Buccluch, had no hope of success upon the counterclaim and that the counterclaim was a frivolous pleading, which warranted the imposition of sanctions.

For purposes of Rule 11, a claim is frivolous "only when, objectively speaking, the pleader or movant has no hope of success." *Stevens v. Lake*, 615 So.2d 1177, 1184 (Miss.1993), quoting *Tricon Metals & Services, Inc. v. Topp*, 537 So.2d 1331, 1335 (Miss.1989); *Smith v. Malouf*, 597 So.2d 1299, 1303 (Miss.1992)(applying Rule 11 definition to Litigation Accountability Act context). "Though a case may be weak or 'light-headed,' that is not sufficient to label it frivolous." *Deakle*, 661 So.2d at 195; *Nichols v. Munn*, 565 So.2d 1132, 1137 (Miss.1990)."

1. **Diane Buccluch had some hope of success upon her counterclaim.**

In the *Answer to Complaint, Defenses, and Counterclaim of Diane Buccluch*, she contends that:

[s]ufficient cause exists for this court to remove James Buckalew as Guardian and to appoint herself as guardian and/or some other willing and appropriate individual that is statutorily approved. He has created a conflict of interest between himself and his ward and has failed or refused to act in a manner to protect the person and estate of the Ward and in the Ward's best interest. [R. at 113.]

The Chancery Court found that "Diane Buccluch, as counterclaimant, has failed to submit any evidence to support her counterclaim allegation, 'that sufficient cause exists for this Court to remove James Buckalew as guardian.'" [R. at 222.] Based on that finding, the court imposed sanctions upon Diane Buccluch for the filing of a frivolous counterclaim and granted unto the petitioner, a reasonable attorney's fees. [R. at 222-223.]

- a. Diane offered a letter written by family members to support her claim.

Contrary to the Court's finding, Diane did submit evidence to support her counterclaim allegation. Diane offered support of her claim in the form of a letter, which was attached to her counterclaim as Exhibit "A". [R. at 115-117.] The letter was written by Ruby Buckalew's sister, Hazel King, and was signed by six relatives of Ruby Buckalew. The signatures on this letter belong to the following: Hazel King, Ruby's sister; Kenneth K. King, Hazel King's husband and Ruby's brother-in-law; Elaine Kappen, Ruby's sister; Ted Kappen, Elaine Kappen's husband and Ruby's brother-in-law; Howard Jenkins, Ruby's brother; Fontella Jenkins, Howard Jenkins' wife and Ruby's sister-in-law. *Id.*

In this letter, Ruby's closest family members attested to Diane's level of care for her mother and expressed their concerns about Mr. Buckalew's level of care for her and for her home. They spoke of Mr. Buckalew's failure to cure a termite problem in Ruby's home, his constant criticism of Diane's care for her, his refusal to provide Diane with money for Ruby's hair treatments, his failure to allow Ruby to have visitors once she moved into the trailer, his lack of respect for his mother, her belief that Mr. Buckalew is using Ruby's money inappropriately, Mr. Buckalew's failure to provide appropriate care to Ruby after she had a stroke, etc. [R. at 115-117.] His treatment is even referred to in the letter as "Parental abuse!" [R. at 116.]

Although James Buckalew filed a *Motion to Strike* this letter from the pleadings, said motion was never resolved and the letter remains a part of the record.

- b. Diane provided evidence that, though she had an agreement with James, which they agreed would serve the best interests of their mother, he refused to comply with the terms of that agreement.

Diane provided evidence that, though she had an agreement with James, which they agreed would serve the best interests of their mother, he refused to comply with the terms of said agreement and removed Ruby from Diane's care. A copy of the *Defendant/ Counter-plaintiff's Answers to the Plaintiff/ Counter-defendant's First Set of Interrogatories and Request for Production of Documents* was entered as Exhibit 2 in the trial on this matter. [R. at 213.] A copy of *Defendant/ Counter-plaintiff's Answers to the Plaintiff/ Counter-defendant's Second Set of Interrogatories and Request for Production of Documents* was entered as Exhibit 3. *Id.*

In her answer to Interrogatories Number 20 and 21, Diane states that she and James entered into an agreement whereby she would live in her mother's home with her and provide her with full-time care. [R.E. at 9.5.] Diane is an educated nurse with experience in caring for the elderly. *Id.* In exchange, James would pay to Diane the full amount that Ruby received each and every month from Veteran's Assistance and Diane would be entitled to complete privacy in Ruby's home. *Id.* Diane was to use the money for everyday maintenance on the house, food and utilities (power, gas, telephone, satellite television) and if there was any money left over, it would be compensation for Diane's time. *Id.* James also agreed to reimburse Diane for her move from Colorado to Meridian, which totaled more than \$2,500.00 in expenses. *Id.* However, James entered Ruby's home on several occasions, while Ruby was under Diane's care and without Diane's permission. He freely searched through Diane's private things, which caused her to feel harassed. *Id.* Contrary to the agreement, James never reimbursed Diane for the move from Colorado to Meridian. *Id.*

Further, James unilaterally decided, after numerous petty and personal arguments with Diane, that her care for Ruby was inadequate. He removed Ruby from her home and from Diane's care while she was visiting family in Las Vegas. [R. at 215.] Diane never wavered in her insistence that she did provide necessary and appropriate care for her mother and that James terminated the agreement out of greed and distaste for her. *Id.* In answer to interrogatory number 8 (Exhibit 2), Diane listed the many things she did for her mother on a day-to-day basis:

I looked after my mother 24 hours a day, 7 days a week. I assisted her with activities of daily living, while encouraging her to do as much as possible for herself. I kept her company throughout the day by: looking at old family pictures with her and putting special photos in frames, reminding her of stories from the past about friends and family, reading old letters to her, keeping her informed as to family news, watching her favorite westerns on television, etc. I took care of her grooming. I applied lotion to her skin; cleaned her fingernails; bathed her; washed, rolled, and colored her hair; and applied her make-up. I took her for walks outside in the yard as often as possible. I took her with me everywhere I went, i.e. shopping and to visit friends in town. Sometimes she would become confused while trying to make it to the bathroom and I would assist her. She slept with me for the last few months because I worried that she may fall if she were to get up. I cooked for her, washed clothes, and tended to the housekeeping. We had coffee together everyday. [R.E. at 9.2-9.3.]

On cross examination, James admitted that he could not testify to what Diane did for Ruby on a daily basis, because he was not present all the time. [R.E. at 13.5.] He made his decision to remove Ruby based on what, in his opinion, was not being done for her. He asserted that Ruby's weight loss of 24 pounds evidenced Diane's failure to feed her. *Id.* However, Ruby was only 5 feet, 3 inches tall and she weighed 113 pounds at the time of James's complaint. There was no evidence produced to support his claim that this was an unhealthy weight for an elderly woman like Ruby. James's decision to remove Ruby from Diane's care was inappropriate.



- c. Diane produced evidence of James's misappropriation of Ruby's funds and breach of fiduciary duty.

James also withheld the Veteran's Assistance money from Diane to pay for the installation of an air conditioning unit in Ruby's house. In James's own words, said air conditioning unit "was necessary for the health of the ward and the house was not air conditioned but had simply one room cooler and did not have central heat." [R. at 41.] However, he refused to authorize the expense of this unit to be paid from Ruby's funds. Pursuant to Section 93-13-38, *Mississippi Code Annotated*, 1972, as amended, the guardian should have allowed the air conditioning unit to be purchased and installed with the ward's funds. Instead, James required Diane to forego the money that was earmarked for Ruby's support and for her compensation and forced her to spend personal savings to maintain and care for the ward. All the while, James was collecting income on behalf of Ruby on top of the Veteran's Assistance funds, by way of Social Security as well as Royalty payments. [R. at 41-44.]

James well knows that, upon Ruby's death, Diane will receive her home. [R.E. at 8.1-8.2.] He taxed this improvement that he deemed necessary for the comfort of Ruby to Diane because he was sure that she would eventually receive the benefit of said improvement. The remaining income that Ruby received was reserved so that James had some chance to inherit. This action evidences a misappropriation of Ruby's funds and a breach of fiduciary duty by James.

- 2. **The Chancellor abused his discretion by finding that the counterclaim was a frivolous pleading, which warranted the imposition of sanctions.**
  - a. The purpose of filing Diane's counterclaim was to have James removed as guardian, not to harass or cause delay.

The purpose of Rule 11 sanctions are to thwart frivolous litigation and check abuses in the signing of pleadings. Henry Palmer (hereinafter “Mr. Palmer”) testified that, as Diane’s attorney, he drafted her counterclaim and signed it after she expressed serious concerns over the Guardian’s treatment of their mother and about a potential conflict of interest between the Guardian and the Ward. [R.E. at 14.1-14.5.] Diane had also provided to Mr. Palmer, certain material used in preparing the pleadings and the opportunity to speak with witnesses who supported her version of the facts. *Id.* at 4.1,4.2.

Mr. Palmer testified that Diane’s concerns caused him to question the appropriateness of Mr. Buckalew as the guardian or fiduciary of his mother. *Id.* at 14.2. When Ruby became ill and required special care, certain portions of her estate were divided between her children. Mr. Buckalew and Diane’s other sister were deeded individual parcels of real property that were owned by Ruby, while Diane received Ruby’s home place subject to Ruby’s life estate. *Id.* When Diane and James agreed that she would return to Mississippi to provide the full-time care for her mother, she moved into Ruby’s house that was set to become hers upon Ruby’s death. James would pay Diane from certain monies Ruby received from the government. *Id.* at 14.3. However, Diane was of the opinion that James failed to perform the necessary maintenance to the house. *Id.*

Diane and a witness, Ms. Cooper, reported to Mr. Palmer that James bruised and pinched Ruby in order to make her eat. *Id.* After James took Ruby from Diane’s care, Diane was concerned because he allowed her “very limited opportunity to see her mother, and only under supervision from [James].” *Id.* at 14.4. Mr. Palmer’s research into the law provided him with assurance that the described behavior, along with the other evidence

presented to him, was sufficient cause for this Court to remove James Buckalew as guardian. *Id.* at 14.3, 14.4.

Mr. Palmer also testified that the purpose of filing Diane's counterclaim was to attempt to have James removed as guardian and to replace him with a neutral third party or with the Defendant herself. Diane did not intend to harass her brother in any way and her counterclaim was not for the purpose of delay. This action was not frivolous. *Id.* at 14.4. Mr. Palmer's testimony provided proof enough that his filing of Diane's counterclaim met the objective standard of reasonableness under the circumstances and, therefore, should have been adequate to defeat any request for sanctions.

**b. James failed to present the proof necessary to justify a fee award.**

It is well established that the burden of proof lies with the movant and that the pleadings themselves are not evidence. The proof necessary to justify a fee award was not met by James. In *Jowers v. BOC Group, Inc.*, the district court stated that "it appears the rule in Mississippi is that the proof necessary to justify a fee award is tantamount to and coextensive with the proof necessary to obtain punitive damages." 609 F.Supp.2d 724, 780 (S.D.Miss. 2009). It is well-settled law that "[p]unitive damages are only appropriate in the most egregious cases so as to discourage similar conduct and should only be awarded in cases where the actions are extreme." *Warren v. Derivaux*, 996 So.2d 729, 738 (Miss. 2008).

Not only did the James fail to meet this burden of proof, he actually provided evidence to support the allegation in the Diane's counterclaim, "that sufficient cause exists for this Court to remove James Buckalew as guardian." According to Section 93-13-

38, Mississippi Code Annotated, 1972, as amended, "It shall be the duty of the guardian of wards . . . to improve the estate committed to his charge, and to apply so much of the income, profit or body thereof as may be necessary for the comfortable maintenance and support of the ward and of [her] family." Therefore, it is the responsibility of the guardian to ensure that all home repairs necessary for the comfortable maintenance and support of the Ward are carried out and to apply funds from the Ward's estate toward those necessary repairs.

On cross-examination, James acknowledged that when an air conditioner unit had to be purchased for Ruby's home, he ultimately paid for said unit from funds that were promised to Diane, rather than from Ruby's estate. [R.E. at 13.3-13.5.] James testified that during the time Diane was living with and caring for Ruby, it became necessary to install an air conditioning unit in Ruby's house. *Id.* at 13.2. He presented the receipt and a cancelled check to show that the unit had been replaced, those documents were entered into evidence as Exhibit 5. However, he testified that the expense of this unit was deducted from Diane's earned income. *Id.* at 13.3-13.5. He did not dispute the fact that, although he wrote the check for the air conditioning unit, Diane actually paid for it with funds that were supposed to be applied for Ruby's everyday expenses. By James's own admission, Diane proved that he failed to apply Ruby's funds for the implementation of this necessary air conditioning unit and forced Diane to go without the Veterans Assistance funds for a number of months. Since Diane was not receiving those funds, she was forced to tap into her personal savings to pay for Ruby's expenses so that Ruby was able to live comfortably. This failure to appropriate funds for the necessary living expenses of Ruby evidences cause for his removal as guardian.

James's reluctance to apply the Ruby's funds to accomplish repairs on her home can be explained by examining his testimony as to the possible conflict of interest he has placed himself in as guardian of his mother. On cross examination, James admitted that he is the son of the Ward, Ruby, and that he does stand to inherit from her upon her death. [R.E. at 13.6-13.7]. Each of the Ruby's three children had been deeded certain real property by her. [R.E. at 14.3] His portion of real property and that of his sister, Donna Riley is now in their possession, without encumbrance. However, the real property deeded to Diane, the house located at 4496 Highway 19 South, is subject to Ruby's life estate. [R.E. at 8.1-8.2.]. James acknowledged that any of the Ruby's funds that are used for the improvement of her home will be unavailable for distribution to him upon her death. [R.E. at 13.7.] James's potential benefit from neglecting certain duties he owes to Ruby, as Guardian, creates a conflict of interest and provides Diane with a chance of success when asking that he be removed.

**B. The Chancellor did not abuse his discretion by determining that the appellee, Diane Buccluch, did have some hope of success in defense of the Complaint to Order Diane Buccluch to Vacate Property Owned by Ward.**

James, in his *Appellant Brief*, argues that Diane offered no evidence or legal theory why she had legal claim to the house. *Brief of Appellant*, page 9. On the contrary, paragraph 4 of James's *Complaint to Order Diane Buccluch to Vacate Property Owned by Ward* states in part, "That the said Diane Buccluch occupied the home as part of the arrangement with her to care for the Ward." [R. at 107.] Diane describes the agreement between James and herself in detail in her Answers to Interrogatories Number 20 and 21. [R.E. at 9.4-9.6, 11.1-11.2.] Further, James acknowledges that the parties did, in fact, have an agreement wherein Diane would reside in the house so that she could provide

full-time care for her mother in his testimony at trial. [R.E. at 13.1-13.2.] Diane, in reliance on James's promise, moved from Colorado to Meridian and incurred significant expense.

Diane denied that her care of her mother was inadequate and she submitted answers to interrogatories in furtherance of that denial. In answer to interrogatory number 8 (Exhibit 2), Diane lists the many things she does for her mother on a day-to-day basis. [R.E. at 9.2-9.3.] She also provided evidence that she had contributed money to improve the house. [R.E. at 11.2-11.3.] Specifically, she was forced to give up money that was promised to her by James in order to have air conditioning installed in the house. The total expense of that air conditioning unit alone was \$7,189.00. [R.E. at 10.1.] She will not enjoy the benefit of that sacrifice because she was forced to leave Ruby's home.

Diane did admit that, even though she was no longer sitting with Ruby, she continued to reside in her home and refused to vacate. [R. at 111.] However, her refusal to vacate was based on the agreement she had with James. She denied that the care given by her was inadequate and stated that she relied to her detriment on said agreement by leaving her home in Colorado to move back to Mississippi in order to care for her mother. [R. at 110, 111.] It was her position that she should not have to leave the home and that James should fulfill his end of the agreement.

Diane's voluntary dismissal of her counterclaim on April 13, 2009 is no indication of her lack of hope for success. Months into the litigation against her brother, Diane finally became too emotionally and financially drained to continue. Her entire purpose for moving to Meridian was to be with her mother in the last years of her life and James had even barred her from that purpose. The continued harassment by James was Diane's

reason for dismissing her counterclaim, she had no lack of hope for success and James failed to present any evidence to the contrary.

The emotional and financial hardship that this case presented to Diane was also her reason for returning to Las Vegas and for not appearing at the trial. Diane simply did not have the funds to travel back to Meridian after she incurred even more expenses moving out of Ruby's house, just as James insisted.

Finally, if the chancery court was proper in granting any sanctions, the amount of \$800.00 was reasonable and proper.

### CONCLUSION

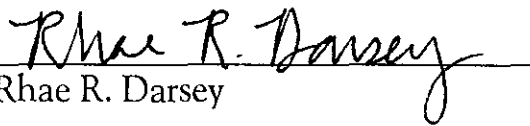
For the reasons stated above, Diane prays that this Honorable Court find that she did have some hope of success upon her claim that "sufficient cause exist[ed] for the court to remove James Buckalew as Guardian . . . [as] he has created a conflict of interest between himself and his ward and has failed or refused to act in a manner to protect the person and estate of the Ward and in the Ward's best interest." [R. at 113.] She prays that this Honorable Court find that because she did have some hope of success, that her counterclaim was not a frivolous pleading and that it was an abuse of discretion for the chancery court to impose sanctions.

Diane further urges this Court to affirm the Chancellor's decision when he determined that she did have some hope of success in defense of the *Complaint to Order Diane Buccluch to Vacate Property Owned by Ward*.

If the chancery court was proper in granting any sanctions, Diane would submit that the amount of \$800.00 was reasonable and proper. See, [R. at 257-260.]

### CERTIFICATE OF MAILING

Pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure, I hereby certify that I have personally caused to be mailed one original and three copies of the Appellee's Brief via first-class U.S. Mail, postage prepaid, addressed to the Clerk of the Supreme Court of the State of Mississippi on this the 29th day of June, 2010.

  
Rhae R. Darsey

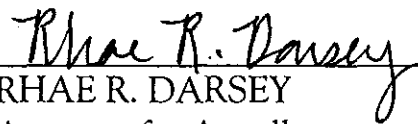


## CERTIFICATE OF SERVICE

I, Rhae R. Darsey, attorney for appellee, Diane Buccluch, certify that I have this day served a copy of this Brief of this Brief of Appellee, Diane Buccluch, by United States mail with postage prepaid on the following persons:

Honorable Joe Clay Hamilton  
The Hamilton Law Firm, PLLC  
P.O. Box 1511  
Meridian, MS 39302-1511

THIS the 29th day of June, 2010.

  
\_\_\_\_\_  
RHAЕ R. DARSEY  
Attorney for Appellee