2009-CA-01976T

IN THE CHANCERY COURT OF LAUDERDALE COUNTY
THE STATE OF MISSISSIPPI

IN THE MATTER OF THE GUARDIANSHIP
OF RUBY BUCKALEW — MOVANT

VS. — CIVIL ACTION NO. [redacted]

DIANE BUCCLUCH — RESPONDENT

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 disqualification or recusal.

1. Joe Clay Hamilton and The Hamilton Law Firm, P.L.L.C., Attorneys for Movant, James Buckalew, Guardian of Ruby Buckalew.

2. Diane Buccluch, Respondent;

3. Henry Palmer and Rhae Darsey, Attorneys for Respondent, Diane Buccluch;

4. Honorable Jerry Mason, Chancery Court Judge, Lauderdale County Chancery Court.

Respectfully submitted, this the 7th day of April, 2010.

JAMES BUCKALEW, GUARDIAN OF
RUBY BUCKALEW, MOVANT

BY: _____
JOE CLAY HAMILTON
ATTORNEY FOR MOVANT

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Leaf River Forest Prods. v. Deakly. 661 So.2d 188, 196 (Miss. 1995)

RULES CITED

Rule 11(b) Mississippi Rules of Civil Procedure

Miss. Code Ann. 1972 § 11-55-1.

IN THE SUPREME COURT OF MISSISSIPPI

IN THE MATTER OF THE GUARDIANSHIP
OF RUBY BUCKALEW

JAMES BUCKALEW — Appellant

VS. — NO. 06-268-M

DIANE BUCCLUCH — Apellee

I. STATEMENT OF THE ISSUES

A. Whether the Chancellor abused his discretion by finding that the counterclaim by defendant "had no hope of success upon the counterclaim and that the counterclaim was a frivolous pleading" Memorandum Opinion, page 16, October 26, 2009, and Amended Opinion dated December 11, 2009, and then awarded only a small fraction of the reasonable attorney fees and none of the expenses, and;

B. Whether the Answers and Defenses plead by appellee without any supporting evidence or legal theory, and admitted that appellee refused to vacate unlawfully were also frivolous, and for the purpose of delay of lawful eviction, and sanctionable as such.

II. STATEMENT OF THE CASE

Appellant is the court appointed guardian of Ruby Buckalew, having been appointed on April 12, 2006 after filing a complaint for appointment joined by the appellee. Memorandum Opinion, page 1, October 26, 2009. Appellee Diane Buccluch is the ward's daughter, and brother to appellant. id, page 2.

Agreement was reached between the parties that appellee would live with and give the necessary care to the ward. The guardian made the determination that the care given

by the appellee was inadequate, improper, and likely to cause great harm to the ward and therefore the guardian (appellant) had to remove the ward to his home to attend to her to see that she regained her health.

The evidence at the hearing was uncontroverted, that at the time the guardian removed her, she had lost 20 pounds in weight. She was unkempt. Her hygiene was not being taken care of and she was losing a portion of her consciousness, no longer feeding herself and simply mumbling instead of talking. R. 16-17. When she was with Appellee, she was non-responsive and physically inactive. R. 18. Appellee did not feed her properly, bathe her properly and did not do housework. She did not give her her medicine on a regular basis. R. 19.

Donna Riley was the third child of the ward. She testified that over the time period the appellee had the ward, she had lost 20 pounds. R. 16. Her appearance was unkept like her hygiene wasn't being taken care of and her mother was in a fog and would sit around and mumble. Her eyes were not clear and she couldn't talk. R. 16-17. When the ward was moved from the care of appellee to the care of appellant, the witness, Donna Riley, noticed she was clearer in her speech, in her appearance and there was a total change. She began gaining weight. R. 17. She regained over 20 pounds. R. 18. When she was in the appellee's care, she was unresponsive, physically inactive, and once she was removed, she gained her strength and energy back and was clearer in every way. R. 18. She further testified that prior to moving to Mississippi, that the said Dianne had been keeping her mother and that she saw the appellee taking medications and she would find her asleep on the floor. She would have to try to arouse her and get her up and this went on for a year. R. 20. Ms. Riley stated her mother now talks and moving around with someone by her side and feeding

herself whereas she did none of that under the care of the appellee. R. 21. Vickie Buckalew, wife of appellant, who is a registered nurse, R. 25 visited the ward about once a week and stated that while the appellee had her there was a continuous decline in physical, cognitive, mental in all of Ms. Buckalew's abilities. She deteriorated in her physical appearance and her hygiene. She was never clean. Her hair wasn't fixed. She wasn't properly dressed. She would be in pajamas and sometimes in the same clothes two days in a row. Donna would go over there and find at mealtime there would be no evidence that meals had been prepared or were being prepared. R. 26-27. When appellant and his wife took Ms. Buckalew at a time when appellee was gone for two weeks on one occasion, the medication box that was given her was in shambles, none of the days contained the same types medications and there were medications in there that did not belong to the ward. R. 28. In short, all of the evidence showed that the appellee's care of Ms. Buckalew was more than deficient, but extremely detrimental to her well-being.

Appellant then asked appellee to vacate the ward's home so the ward could move back in with a new care giver. Complaint to Order Diane Buccluch to Vacate Property Owned by Ward.

The appellee refused to move out of the house so the appellant filed a complaint in the guardianship to have her removed from the house on August 29, 2008, so he could place the ward back in her home with a new caretaker. id.

The appellee responded by engaging an attorney and filing a counterclaim to remove appellant as the guardian of the ward. Her answer and counter complaint were filed on the 18th day of September, 2008. Answer to Complaint, Defenses, and Counterclaim of Diane Buccluch. Attached to the Answer to Complaint, Defenses, and Counterclaim of Diane

Buccluch was a letter from family who lived out of state and had no personal knowledge, a single-spaced, two-page document obviously prepared by the appellee with some signatures of persons unknown and filled with unsubstantiated allegations. id. A motion to strike the document was pending when the Counterclaim was dismissed.

In addition to making a motion to strike the hearsay exhibit from the record, appellant filed a motion for Sanctions against appellee for the frivolous pleadings and discovery and other services related to the defense of the counterclaim, and the Answer along with the expense of the appellant and rental expense for the time appellee squatted in the home of the ward which amount is $3,900.00 R. 32, and also for the cost of repairs and waste committed by the appellee discovered on her moving out of the home in the amount of $2,295.09 as shown on a list which was offered for identification but refused admission by the Court. Appellant argues that the list should have been admitted to establish the expenses. R. 45, 46, 47. Although the Chancellor found the Counterclaim to be without hope of success, and frivolous, he only awarded a small fraction of the attorneys fee, and no expenses. The Chancellor did not find the Answer and Defenses frivolous, even though there was never any evidence presented. The Chancellor awarded $800.00 in attorney fees. Memorandum Opinion, page 16, October 26, 2009, but later, on December 7, 2009, after the Notice of Appeals are filed, the Chancellor issued and amended and supplemental memorandum and opinion and order clarifying that he arrived at the $800.00 by allowing $200.00 an hour and found that the specific services rendered relevant to the defense of the counterclaim, were rendered on October 24, 2008, consisting of .7 hours, and on January 16, 2009, .80 hours and awarded 2.5 hours on the preparation and trial on the Rule 11 Motion. Appellant suggested this is totally contrary to the evidence

offered. The hearing on the Rule 11 alone lasted some five hours and the evidence submitted showed 12 hours and 10 minutes devoted to the preparation for the hearing and the affidavit and actually following the hearing the preparation of the memorandum briefs added an additional $600.00 which was submitted with the Motion to Reconsider. This is not the only error in calculation from appellant's viewpoint but from appellant's viewpoint, the entire bill is related to frivolous pleadings and the fruits accruing to the appellee from all of the frivolous pleadings from the time the complaint to order Diane Buccluch to vacate was filed on August 28, 2008. At the very least, once the answer and cross complaint were filed, everything is related to the frivolous actions and pleadings of the defendant. The Rule 11 Motion was noticed on October 7, 2008, although filed later. It seems unquestionable that everything from that day forward was caused by the frivolous pleadings of the appellee. With due respect, the filing of the Amended Opinion by the Chancellor reinforces the position of appellant, that the court erred.

Appellant appeals that decision due to the very small amount of legal fees and the lack of any expenses awarded.

III. SUMMARY OF THE ARGUMENT

The Chancellor erred in computing the time spent defending the frivolous pleadings. By awarding $800.00, four hours of legal work, and no expenses, he ignored the evidence of the voluminous amount of work performed by appellant. The time sheet, "Exhibit 7" in the index of exhibits, shows 30.85 hours and Mr. Hamilton testified that he would need to add an additional 4 hours R. 68 for the hearing up to the time that he was testifying, making it a total of 34.85 hours which would be $6,970.00. In addition, there has been some 10 hours spent on the appeal process.

Rule 11 also permits the award of expenses, and the Chancellor ignored the expense the appellant incurred by having the ward occupy his rental property next to his house, rather than rent it for income. The frivolous pleadings that allowed the appellee to remain in the house unlawfully, were the direct and proximate cause of these expenses.

And the actions of the appellee, taken as a whole, were clearly designed to unnecessarily delay her eviction from the house of the ward, to which occupancy she had no right whatsoever. Though she freely admitted in her answer that she was refusing to vacate the home, on her claimed basis of some agreement, there was never any evidence offered of any agreement which would justify her in staying in the home. For nearly a year, she lived rent free as the appellant poured time, money and energy into mounting a legal battle against her frivolous and delaying pleadings.

In the testimony of Henry Palmer, he quoted there were "concerns in facts" that called into play the appropriateness of Mr. Buckalew to be the guardian and that there was "some agreement between Diane and her brother about Diane taking care of her mother in the home." R. 73-74. He further testified that the issue on Ms. Buckalew's care for his mother and her eating habits and it was reported that she would be bruised and pinched by Mr. Buckalew to make her eat. R. 74.

Basically, Mr. Palmer said that she decided it would be in her mother's best interest if she were guardian and so she authorized him to file a complaint. R. 75. He did say he had reviewed some medical records of appellee showing where she had been given prescription drugs for pain killer. He didn't remember what was in our first interrogatories regarding her physical and mental condition. But he would imagine that he saw this. R. 76. He admitted that he had seen the medical records that stated that Appellee had suffered from

depression, amnesia and other mental conditions. R. 76-77. He denied seeing the list of the psychiatrist that she had been seeing. R. 77. Basically, the crux of his testimony was that Diane felt that her mother was too thin and Diane felt like her brother was too fat. He didn't remember, basically, who he talked to. R. 78. He said it would have been her sister, Donna, but he didn't remember and he doesn't remember the name. R. 78. Donna was the witness who described the poor quality of treatment her mother was receiving under the appellee and the good quality she was receiving under the appellant. When asked if, basically, everything he had put in the complaint was what Diane told him, he answered, no, he wouldn't agree with that. R. 79. He said the stuff he put in the complaint was "from my own research." R. 79. He claimed he talked to a man, his name he can't remember, and a Cooper lady and her sister and to her, but he doesn't know if anybody's gotten a subpoena for the Cooper woman. R. 80. He said he did not where Diane Buccluch is. R. 81. When asked if he had tried to find any of the witnesses for the hearing this day that he relied upon in preparing the complaint, he said no. R. 81.

IV. ARGUMENT

Appellee Buccluch's Answer, Defenses and Counterclaim had no hope of success, was frivolous, and was intended to delay her lawful eviction from the house she was inhabiting. The award of sanctions by the Chancellor bore no relationship to the actual time and expense incurred in the defense of the frivolous pleadings, and this Court should award reasonable attorneys fees in the amount of $6,970.00 plus the additional hours as set out herein, being $800.00 as testified to at the hearing. Appellant further requests that if the court rules in the favor of appellant the court will either set or allow appellant to submit an additional bill for the appeal to be approved in such manner as the court shall prescribe.

A. Standard of Review

The standard of review for a Chancellor's decision is abuse if discretion. Creely v. Hosemann 910 So. 2d 512, 516 (Miss. 2005). The appellate court should reverse a chancellor when his decision is erroneous, or manifestly wrong. Cummings v. Benderman, 681 So. 2d 97, 100 (Miss. 1996). Questions of law are reviewed de novo. Corporate Mgmt. v. Greene County, 23 So. 3d 454, 459 (Miss. 2009)

B. When pleadings are used to harass or delay, or are frivolous, the imposition of sanctions is justified

The triggering factor for Rule 11 sanctions is the filing of a frivolous claim which causes injury. Nationwide Mut. Ins. Co. V. Evans, 553 So. 2d 1117, 1119-1120 (Miss. 1989). Such a filing is used to "determine or isolate the point in time upon which our Rule 11 focus must be placed." *id.*

When the court finds that a filing is frivolous, or intended to harass or delay, the imposition of sanctions is authorized by Rule 11. Tricon Metals & Services, Inc. V. Topp, 537 So. 2d 1331, 1335 (Miss. 1989). The purpose of the rule is to deter attorneys from filing such pleadings. Canton Farm Equipment, Inc. v. Richardson, 501 So. 2d 1098, 1108 (Miss. 1987).

The standard for determining when a claim is frivolous is that it has "no viable claim." Leaf River Forest Prods. v. Deakly. 661 So.2d 188, 196 (Miss. 1995). When a pleading has no hope of success, and is filed without good ground, the plaintiff and her attorney may be subject to monetary sanctions. Tricon Metals & Services, Inc. V. Topp, 537 So. 2d 1331, 1335 (Miss. 1989)

C. Appellee offered no evidence or legal theory why she had legal claim to the house

On September 18, 2008, appellee filed her answer and counterclaim. Memorandum Opinion, page 2, October 26, 2009. Among her defenses were the denial that her care was inadequate, that she had an agreement with the ward to occupy the house until the ward's death, that she had contributed money to improve the house, that the guardian was not giving proper care to the ward, and the counterclaim to remove appellant as guardian. Answer to Complaint, page 1.

Despite the numerous allegations made by appellee, neither she nor her attorney offered any evidence to support any of her claims. Attorney Palmer who drafted the answer and counterclaim, could not remember exact details as to who he had talked to or when. Henry Palmer-Direct Examination by Darsey, page 72. He was confused as to when , and who he had talked to witnesses, and had made no further effort to produce the phantom witnesses for the hearing to establish the non-frivolity of the pleadings. Henry Palmer, Cross Examination by Hamilton, page 80. Attorney Palmer had no admissible evidence to support the pleadings that he drafted and signed. Henry Palmer-Direct Examination by Darsey, page 72.

As further evidence that her pleadings were frivolous, appellee dropped her counterclaim on April 13, 2009. id. at page 6, further the Chancellor found that the counterclaim filed by appellee had no hope of success. Memorandum Opinion, page 16, October 26, 2009. But more important is that in spite of the lack of evidence and the cavalier way in which allegations were made, appellee did not even bother to show up for

the final hearing despite having been served a summons.[1]

D. Appellee's Answer to the Complaint included the admission that she had been asked to leave, and refused

On page three of appellee's Answer to Complaint, Defenses, and Counterclaim of Diane Buccluch she admits that she has refused to vacate the home. She offers no legal theory by which she should lay claim to the house, and was anything other than a squatter. Instead she quickly moved on to a frivolous counterclaim that had no hope of success.

But her Answer had no hope of success either. Because the appellee admitted that she had refused to vacate, the only issue before the court was whether she had a claim to the house as the remainder man. She did not. Nor was she required to answer the complaint. By doing so, and doing so in a frivolous manner with the design to delay her lawful eviction, the Chancellor should have awarded appellant more, if not all, of his attorneys fees and expenses.

E. The Chancellor erred in finding the Answer and Defenses had a hope of success, and needs no motion from Plaintiff to impose sanctions

The Chancellor is not bound by the motions of the plaintiff to impose sanctions, and can do so on his own. Tricon Metals & Services, Inc. V. Topp, 537 So. 2d 1331, 1335 (Miss. 1989). Further, under Miss. Code Ann. §§ 11-55-1, the Chancellor should award attorneys fees for any "meritless action, claim or defense, unwarranted delay, or unnecessary proceedings." §11-55-1 goes on to say:

"shall award, as part of its judgment and in addition to any other costs

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1 Appellant mistakenly sent a summons to appellee, rather than a subpoena to appear as a witness. The ramifications not withstanding, the summons still shows that appellee had actual notice of the hearing and chose not to appear, her whereabouts apparently unknown even to her attorneys.

otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure." Miss. Code Ann. 1972 § 11-55-1.

The entirety of the Answer to Complaint, Defenses, and Counterclaim of Diane Buccluch is frivolous, as it is filled with allegations that were unsubstantiated at any point in the case, as well as the admission that she was unlawfully refusing to vacate the house. There was, in fact, no dispute involved given her admission she was squatting, yet appellee managed to elongate the proceedings into a protracted legal battle.

But, in the alternative, if the sanctions are limited to the defense of the counterclaim, how did the Chancellor arrive at the amount of $800.00, or four hours of work? The hearing on Rule 11 sanctions alone took four hours, in addition to discovery, and filing answers and investigating the allegations of the counterclaim.

What should have been a simple eviction proceeding requiring a few hours work, turned into a miasma of legal wrangling that lasted for over a year. By the end, the appellee had abandoned her counterclaim, and abandoned the city, leaving for whereabouts unknown. Appellee offered no evidence to support any of her claims, and no legal theory under which she had a claim to possess the house.

Appellant was forced to defend this evidentiary void despite it's frivolity, and amassed a legal bill that totals $6,970.00 when all that was required was one simple eviction hearing.

Unfortunately, our administrative system for administering justice is sometimes used to prevent the administration of justice. That is what gives rise to the necessity of the system putting safety nets in place. Appellant feels that this case is a prime example for gaming the system to one's unfair advantage.

V. CONCLUSION

The Chancellor correctly decided that the counterclaim was frivolous and that there was no hope of success. The Chancellor seemed to be saying there was hope of success on the eviction, with which appellant strongly disagrees. No evidence was ever offered of any kind that showed that she had any hope of success on the eviction as she offered no evidence whatsoever on any type of agreement or anything else that would give her any hope. The only was to determine that a pleading is frivolous is to look at the evidence offered on the claims and there was no said evidence.

A litigant should not be allowed to simply use their pleadings to delay matters and then simply dismiss them when they have achieved the delay they wished. That is true of both the answer to the eviction and the counterclaim. In order to establish that the pleadings were frivolous and there was no hope of success, it was necessary for the appellant to conduct the hearing which was done. The hearing was solely on the Rule 11 Motion and the finding of the Chancellor regarding the time spent is totally contrary to the evidence presented and totally unsubstantiated by any other evidence.

Respectfully submitted, this the 7th day of April, 2010.

JAMES BUCKALEW, APPELLANT

BY: _____
JOE CLAY HAMILTON
ATTORNEY FOR APPELLANT

CERTIFICATE OF MAILING

Pursuant to Rule 25 (a) of the Mississippi Rules of Appellate Procedure, I hereby certify that I have personally placed one original and three copies of the Appellant's Brief via first-class U. S. Mail, postage prepaid, addressed to the Clerk of the Supreme Court on this, the 7th day of April, 2010.

Rhonda M Mottel

CERTIFICATE OF SERVICE

I, Joe Clay Hamilton, attorney for appellant, James Buckalew, certify that I have this day served a copy of this BRIEF OF APPELLANT JAMES BUCKALEW by United States mail with postage prepaid on the following persons at these addresses:

Hon. Henry Palmer
Hon. Rhae Randell Darsey
1803 - 24th Ave.
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Ms. Cindy James
Court Reporter
12th Circuit Chancery Court
P. O. Box 5165
Meridian, MS 39305-5165

THIS, the 7th day of April, 2010.

_____
JOE CLAY HAMILTON
ATTORNEY FOR APPELLANT