COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CASE NO. 2010-CA-01993-COA

KATHERINE THOMPSON — PLAINTIFF/APPELLANT

VERSUS

ECHOSTAR COMMUNICATIONS CORP. — DEFENDANT/APPELLEE

REPLY BRIEF OF APPELLANT

APPEALED FROM THE CIRCUIT COURT
OF CARROLL COUNTY, MISSISSIPPI
CIVIL ACTION 200-0027CV1-L

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Preliminary Statement

In Reply to Appellee's brief on the issue of excluding expert Rosenhan and the trial court's granting of Appellee's motion for summary judgment, Appellant relies on the statement of facts and arguments set forth in her original brief. The statements and arguments contained therein sufficiently set forth the bases upon which the trial court erred. The arguments made by Appellee in its brief go to the weight of the evidence, and the issues should be decided by a jury as fact finder rather than the trial court. Re-arguing those facts would not serve the purpose of a reply brief.

With regard to the trial court's assessment of costs and expenses, and the trial court's order awarding attorney fees to the Appellee should it prevail, Appellant would Reply as follows:

I. Costs and Expenses

In Appellant's brief she asserted that M.R.C.P. 41(b) does not provide for sanctions in the Rule itself, and Appellee agrees. Appellee asserts, rather, that such authority is recognized by the case law, citing Cox v. Cox, 976 So.2d 869 (Miss. 2008). The Cox case did not involve the assessment of costs and expenses, though it does state there are numerous lesser sanctions that a trial court may invoke. Appellant noted in her brief that she could not locate any cases for which costs and expenses were assessed as sanctions in a case in which no court order had been violated. Based on its brief, Appellee was unable to locate any such authority as well. The majority of Mississippi cases on the subject all seem to cite Rogers v. Kroger Co., 669 F.2d 317 (5th Cir. 1982) as authority when discussing alternative sanctions. However, Rogers involved a case where one of the lawyers appeared before the court, was not prepared for trial, and requested a continuance. The district court dismissed the case pursuant to the federal equivalent of our M.R.C.P. 41. The Appellate Court in Rogers reversed the trial court and discussed sanctions in great detail. The Rogers case at page 322,

in discussing lesser sanctions, fines and costs, cites to Woodham v. American Cystoscope Co., 335 F.2d 551 (5th Cir. 1964). Woodham cites to Gamble v. Pope & Talbot, Inc., 307 F.2d 729 (3rd Cir. 1962) which held a district court does not have the power to fine counsel for a party engaged in private litigation for not complying with standing orders of the court. Id. At 730, 731. The Court of Appeals in Gamble notes that there is nothing in the Federal Rules which authorizes sanctions in the form of penalties to be imposed upon an attorney in civil litigation. Id. The bottom line is that the applicable Rule does not provide for the sanctions levied against Appellant and her counsel. There is case law which references such as a possibility, however there are no cases in which sanctions of costs and expenses were awarded in the absence of a violation of some court order. As such, the award of costs and expenses should be reversed.

However, even if there is authority to award costs and expenses, that authority cannot be unbridled. The Rogers case on remand stated the district court may impose such sanctions as, "necessary 'to achieve the orderly and expeditious disposition of cases' on its docket." Id. At 323, citation omitted. Appellee's position seems to be, "Plaintiff is unable to cite to any authority which sets forth a formula or rule for calculating sanctions." And therefore, apparently, no sanction may ever be measured. The fallacy of such an argument is that it ignores the lack of authority for awarding costs and expenses in a situation where no court order was violated, yet at the same time acknowledges and uses the lack of authority to circumvent the argument that such an order, if authorized, must be reasonable. If Appellee's argument were true, then the trial court need not have authority to award costs and expenses and such an award need not be reasonable. As noted in Appellant's original brief, the costs and expenses were not related to any delay and were therefore unreasonable and an abuse of discretion.

II. Attorney Fees

Since the Motion by Appellee for Attorney Fees was filed after this appeal with the trial court, Appellant's first argument would be that such a motion was untimely and the trial court has no jurisdiction once the appeal was filed to order an award of attorney fees.

Nonetheless, it was error to enter an order conditioning an award of attorney fees based upon the success of a litigant. As note above, no one argues or suggest that a court order or rule of procedure was ever violated. No request for deposition nor any interrogatories nor request for production were delayed at any time. Appellee never denies that its entire basis for the motion for summary judgment came from documents and the testimony of witnesses who were all timely disclosed and who were promptly, upon request by Appellee, made available without delay. It was not even contested that had Appellee previously pursued the depositions upon which its motion for summary judgement was based, and presuming the trial court would have had the same view, nothing Appellant did ever prevented or delayed the Appellee from pursuing its defense which is now the basis of a motion for over $70,000.00 in fees.

Appellee cites M.R.C.P. 11(b) as authority for the trial court's order of attorney fees though this Rule applies to Pleadings and Motions. At no time in any order or motion has it ever been previously suggested that the undersigned counsel for Appellant ever filed a motion or pleading that was frivolous of for the purpose of delay or harassment. To cite M.R.C.P. 11(b) as authority to support an award of attorney fees contingent on one party prevailing is incorrect.

Appellee also cites as authority M.R.C.P. 37, "Failure to Make or Cooperate in Discovery: Sanctions." This rule is a lengthy list of conduct which is prohibited and sanctionable pursuant to this rule. Such conduct includes: the failure of a deponent to answer a question; the failure of a party

to answer an interrogatory; failing to respond to a request for inspection; failure to comply with a court order compelling discovery; failing to admit a matter that should have been admitted; and failing to attend a deposition. Appellant never engaged in any of the conduct identified in M.R.C.P 37, and therefore to offer said rule as a basis for an award of attorney fees contingent on one party prevailing is incorrect.

The amount of attorney fees, over $70,000.00, is a significant amount and the Appellee seeks to essentially assess a $70,000.00 judgment in one fell swoop without so much as a single piece of discovery and in the absence of the violation of a single court order against not only a party but her counsel as well, all based on the success at the trial court level of the motion for summary judgment. There has not even been a hearing on this amount or a single bill provided itemizing the time and rate being charged. Not surprisingly counsel for Appellee takes the position that an oral argument would not be beneficial and at most Appellant and her counsel should be allowed to have the court review a bill in camera. Prohibiting the party and counsel being assessed a fine or judgment in excess of $70,000.00 from reviewing the basis of the award is not only unfair but would be a violation of due process. The trial court's order awarding attorney fees to the prevailing party should be reversed outright.

If, against Appellant's argument, this Court were to find the trial court had authority to award attorney fee's based on the outcome of the underlying case, at a minimum the case should be remanded for discovery and the opportunity to be heard on the matter.

Conclusion

For the reasons set forth above, and those set forth in Appellant's original brief, Appellant requests this Court reverse the judgment of the trial court and remand this case for a trial on the merits, and Appellant further requests this Court reverse the trial court's award of sanctions and attorney fees, together with such other relief as this court deems just and proper.

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VERSUS

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CERTIFICATE OF SERVICE

I, Daniel M. Czamanske, Jr., do hereby certify that I have this day sent by Federal Express the original and three copies of the Reply Brief of Appellant to the Clerk of the Court of Appeals and mailed, postage prepaid a true and correct copy of the same to the following:

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Hon. Joseph H. Loper, Jr.
Circuit Court Judge
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This, the 11th day of October, 2011.

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