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

ALAINA HILL ROGERS **APPELLANT**

V. **CAUSE NO. 2018-CA-00800**

CASEY AND CO., LLC **APPELLEE**

BRIEF OF APPELLANT

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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. Alaina Hill Rogers, Appellant
2. Casey and Co., LLC, Appellee
3. Rex Sanderson, counsel for Appellee
4. R. Shane McLaughlin, counsel for Appellant
5. Hon. John Gregory, Trial Court Judge

/s/ R. Shane McLaughlin
Attorney of record for Appellant

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STATEMENT OF THE ISSUES

1. Whether the Court erred by finding an enforceable contract existed where both parties admitted there was no agreement as to price, and price was an essential term of the agreement.
2. Whether the Court erred by any awarding attorneys' fees against Alaina Hill where there was no statutory basis or contractual agreement for an award of attorney's fees.
3. Whether the Court erred in arbitrarily awarding attorney's fees of fifty percent (50%) of the principal, without evidence of any of the *McKee* factors and without any consideration of the factors.

STATEMENT OF ASSIGNMENT

This case involves the application of established Mississippi law. There are no novel issues presented in this appeal.

This case should be deflected to the Court of Appeals.

STATEMENT OF THE CASE

Plaintiff Casey & Co., LLC filed a Complaint against Alaina Hill Rogers. (C.P. p. 2).[1] Alaina Hill Rogers filed an Answer. (C.P. p. 16). Among her defenses to the Complaint, Rogers specifically pled that she already paid what was owed to Plaintiff, and that there was no agreement with sufficient terms to amount to a valid contract in any event. (C.P. p. 16).

The Parties consented to a bench trial and the case was tried on March 22, 2018. (C.P. p. 33). At the close of Plaintiff's case-in-chief Rogers made a Rule 41(b) Motion to Dismiss based on lack of an agreement to an essential term of the contract. (T. p. 31). The Trial Court denied the Motion. (T. p. 33).

The Parties submitted briefs to the Trial Court after the conclusion of trial. (C.P. p. 37-41). The Trial Court entered a judgment against Rogers for a principal amount of $5,073.44, attorney's fees of an additional fifty percent (50%) of $2,536.72, costs of $219.30, for a total of $8,387.49. (C.P. p. 43).

Rogers timely perfected this appeal. (C.P. p. 45).

[1] Clerk's Papers are cited as "C.P." and the trial transcript is cited as "T."

STATEMENT OF FACTS

There is no dispute as to the salient facts of this simple dispute. Casey Moss operated a florist business under the name Casey & Co., LLC. (T. p. 4-5). Alaina Hill Rogers ("Alaina") contacted Casey & Co., LLC to provide flowers for Rogers' wedding. (T. p. 5).

Alaina and her family operated a retail furniture business. (T. p. 34-35). Prior to the wedding, Casey Moss visited the furniture store and inquired whether she might exchange her florist services for Alaina's wedding for furniture from the store. (T. p. 11-12). Casey and Alaina eventually agreed to exchange a sectional sofa, with a pre-tax retail value of $3,799, for Casey's florist services at the wedding. (T. p. 12; T. p. 35-36).

Both Casey and Alaina testified at trial that there was no other agreement between them other than an exchange of a sectional for florist services at the wedding. (T. p. 16; T. p. 36). It is undisputed in this case that there was never an agreement as to any price Casey & Co., LLC would charge for the flowers or florist services at the wedding. (*See, e.g.*, 11, 16, 21, 35). For instance, Casey testified:

> Q. Do you claim that Alaina Hill agreed to do anything other than [exchanging the sectional]?
>
> A. We had not met at that time. When we talked about the sectional, it was in December. We did not meet about her wedding until January. I would never put a cost on a wedding that I had not even met about.
>
> Q. What Alaina Hill said she would do, give you a sectional at no cost, she did? She did what she said she would do; is that true?
>
> A. Yes.
>
> Q. You did what you said you would do? You provided flowers, right?
>
> A. Yes.
>
> Q. Here's my question: Are you here to tell Judge Gregory there's some other agreement? We had an agreement about how much money she'd pay. Did you?

A. No.

Q. Did y'all ever have an agreement as to price?

A. No.

(T. p. 16).

The Trial Court received considerable evidence indicating that both Parties believed Casey would in fact owe a balance to the furniture store for the sectional after providing flowers for the wedding. (T. p. 18). Indeed, Casey offered to send a blank check for the furniture store to hold until "after we settle up" for the wedding. (T. p. 18). Casey's husband picked up the furniture from the store, but "forgot" to bring the blank check. (T. p. 19). Casey offered to send a debit card for the store to hold instead. (T. p. 19).

On the day of Alaina's wedding, Casey submitted her invoice claiming that the cost of the flowers and various "service charges" amounted to $8,292. (Trial Exhibit 2). Casey gave credit for the price of the furniture she received (without sales tax) of $3,799, and claimed Alaina owed an additional $5,073.44 for the florist services. *Id.* Alania never agreed to pay, nor expected to pay, such exorbitant charges and contended the charges were grossly inflated. (S*ee, e.g.*, T. p. 40-41). Alaina introduced evidence showing that Casey's charges for flowers dwarfed all of the other vendors at her wedding. (*See, e.g.*, T. p. 38-40; Trial Exhibit 6). Alaina paid every vendor everything she owed for her wedding services. *Id.* Alaina did not pay Casey more than the sectional they agreed on because she did not believe she owed Casey & Co. more money. (T. p. 40-42).

Casey & Co.'s invoice added various charges to the bill such as a $500 "labor charge" along with time and travel of eight and one-half hours at $50 per hour. (*See* T. p. 26). Casey

generally admitted at trial that Alaina never agreed to pay these sorts of charges. (*See* T. p. 24, 27).

Although Casey & Co., LLC admitted that there was no agreement as to price for the flowers and services, Casey testified that she was not seeking recovery in *quantum meruit* at trial. (T. p. 30). Casey testified she was asking for the price she billed, not an amount deemed fair or equitable by the Trial Court. (T. p. 30). Casey & Co.'s attorney made it equally clear that Plaintiff was not seeking *quantum meruit* recovery at trial. (T. p. 33). Casey & Co.'s attorney, in responding to the Rule 41(b) Motion explained:

> Your Honor, the testimony the Court has here are the services were supplied as agreed upon and they were satisfactory to the defendant and the amount is what was charged. It was a flexible charge. It was growing everyday. It came to rest on the day of the wedding. This is what this lady charges for her services and for the goods that were delivered. ***This is not a quantum meruit circumstance here, Judge.*** We have a clear cut job done that is done everyday in many, many professions in our community. She supplied the goods and she hasn't been paid for it.

(T. p. 33). Casey & Co. presented no evidence touching on *quantum meruit* recovery.

Although both Parties testified there was no agreement as to price, and despite that Plaintiff and its counsel repeatedly disavowed a *quantum meruit* theory of recovery, the Trial Court enforced the unenforceable contract and awarded a judgment to Plaintiff. (C.P. p. 43). The Trial Court also awarded attorneys' fees against Alania. (C.P. p. 43). As discussed below, neither result cannot stand under established Mississippi law.

SUMMARY OF THE ARGUMENTS

Price is an essential term of a contract under Mississippi law. A contract is unenforceable where there is no agreement as to price. Where a contract fails because there was no agreement as to price, the only possible recovery is under the theory of *quantum meruit.*

Plaintiff admitted at trial that there was no agreement as to the price for her services. Plaintiff, and her counsel, admitted they were not seeking recovery in *quantum meruit*. Plaintiff did not plead *quantum meriut*, did not present any evidence from which a recovery in *quantum meruit* could be fashioned, and expressly disclaimed recovery under *quantum meruit*. The Trial Court did not give a recovery under *quantum meruit*, but rather enforced the contract although it was undisputed the Parties never agreed on price.

This is clear-cut legal error. Principles of contract law apply to large disputes and small disputes. Although the economic value of this case is small the law must nevertheless be followed. The Court should reverse and render the Trial Court's judgment.

Aside from clear error in enforcing an unenforceable contract, the Trial Court also erred by awarding attorneys' fees to Plaintiff. There was no legal basis for an award of attorney's fees. The services were not rendered on an open account and there was no contractual agreement for an award of attorneys' fees. Further, the Court's award of attorney's fees of fifty percent (50%) of the principal, with no *McKee* analysis, flies in the face of Mississippi law.

The attorney's fees award should also be reversed and rendered.

STANDARD OF REVIEW

A Trial Court's ruling on a question of law is subject to *de novo* review by this Court. *Warren v. Derivaux*, 996 So. 2d 729, 735 (Miss. 2008). Questions of the enforceability of contracts are questions of law subject to *de novo* review. *See, e.g., Busching v. Griffin*, 542 So. 2d 860, 863 (Miss. 1989); *Leach v. Tingle*, 586 So. 2d 799, 801 (Miss. 1991).

All of the issues presented in this appeal involve issues of law. Accordingly, each of Alaina's assignments of error should be reviewed *de novo*.

ARGUMENT I.

THE TRIAL COURT ERRED BY ENFORCING A CONTRACT WHERE BOTH PARTIES TO THE CONTRACT ADMITTED THERE WAS NO AGREEMENT AS TO PRICE.

An agreement as to price is an essential element for the formation of a contract. *Leach v. Tingle*, 586 So. 2d 799, 803 (Miss. 1991). The Supreme Court has held that where any agreement, including an oral agreement, fails to include an agreement upon price the contract fails as a matter of law. *Leach*, 586 So. 2d at 803. The Court in *Leach* explained:

> On the other hand, price is an essential term. It must be stated with specificity. Where it is not provided, the contract fails. *Duke v. Whatley, supra; Busching v. Griffin*, 542 So.2d at 864. This does not mean that the price must be set out simply. Where, from the terms of the contract, one familiar with elementary principles of mathematical reasoning may deduce with certainty the sales price, the contract will not fail. *Gordon v. Fechtel*, 220 Miss. 722, 729-30, 71 So.2d 769, 771 (1954). On the other hand, where the language employed necessarily requires a substantial measure of speculation and conjecture in ascertaining price, the contract fails. *Gordon v. Fechtel*, 220 Miss. at 729-30 71 So.2d at 771.

Leach, 586 So. 2d at 803.

Where services are provided, and there was no agreement as to price, the service provider may recover only based on a *quantum meruit* theory. *Ladner v. Manue*, 744 So. 2d 390, 392 (Miss. Ct. App. 1999). That is, the service provider may recover based on the reasonable value of the materials and services. *Estate of Johnson v. Adkins*, 513 So. 2d 922, 926 (Miss. 1987). The *Adkins* Court explained:

> Quantum meruit recovery is a contract remedy which may be premised either on express or "implied" contract, and a prerequisite to establishing grounds for quantum meruit recovery is claimant's reasonable expectation of compensation. *Wiltz v. Huff*, 264 So. 2d 808 (Miss. 1972*); Est. of Van Ryan v. McMurtray*, 505 So. 2d 1015 (Miss. 1987). The measure of recovery in quantum meruit is the reasonable value of the materials or services rendered. *Kalavros v. Deposit Guaranty Bank & Trust Co*., 248 Miss. 107, 158 So. 2d 740 (1963).

Estate of Johnson v. Adkins, 513 So. 2d at 926.

This Court need go no further than Casey's testimony to reverse and render in this case. Casey and Alaina both testified there was no agreement as to price for Casey & Co.'s florist services. The issue of an enforceable contract is settled with that testimony. There can be no enforceable contract without an agreement as to price. The Trial Court's finding of an enforceable contract must be reversed and rendered based on this.

Although the Trial Court did not address *quantum meruit* recovery, the Record makes clear that Casey & Co. could not recover in *quantum meruit* for several reasons. First, Plaintiff did not plead *quantum meruit* in her Complaint. *See* Miss. R. Civ. P. 8 (requiring a short and plain statement of the claim and relief sought). Second, Plaintiff testified she was seeking the "contract price" and not *quantum meruit* recovery. Third, Plaintiff's attorney specifically disclaimed a *quantum meruit* theory at trial. Plaintiff's attorney explicitly stated Plaintiff was not seeking a *quantum meruit* recovery. Finally, in any event, Plaintiff produced no evidence from which a *quantum meruit* recovery could be fashioned.

There was no agreement as to price in this case, and thus no enforceable contract. Plaintiff did not seek, and did not prove, a claim for *quantum meruit* recovery. The Court enforced an alleged contract which indisputably lacked an essential element for the formation of a contract. Mississippi law compels that this case be reversed and rendered.

ARGUMENT II.

THE TRIAL COURT ERRED BY AWARDING ATTORNEY'S FEES SINCE THERE WAS NO STATUTORY BASIS NOR AGREEMENT TO SUPPORT SUCH AN AWARD.

A Court may award attorneys' fees when attorneys' fees are provided for by a written contract or a statute or when an award of punitive damages is proper. *Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495, 517 (Miss. 2007) ("unless provided by statute or contract, or unless punitive damages are awarded, attorneys' fees may not be recovered).

The Court in this case awarded attorney's fees as follows:

> The Plaintiff should recover a judgment for the amount of $5,073.44, together with interest ($558.03) and an attorney fee ($2,536.72, 1/2 of balance sued for) and deposition expenses ($219.30) for a total amount of $8,387.49.

(C.P. p. 43).

There was no legal basis for an award of attorney's fees in this case. This case does not involve an open account under Miss. Code Ann. § 11-53-81. An open account requires a series of continuing transactions between the parties which are kept open in anticipation of future purchases. *See Mauldin Co. v. Lee Tractor Co.*, 920 So. 2d 513, 516 (Miss. Ct. App. 2006). A single transaction, such as the one in this case, does not constitute an open account. *Mauldin*, 920 So. 2d at 516. Further, this Court has explained that "an account is not considered an open account absent a final and certain agreement on price." *Id.* citing *McLain v. West Side Bone and Joint Center*, 656 So.2d 119, 123 (Miss. 1995).

Because there was no statutory basis for an award of attorney's fees, and no contractual agreement to support an award of attorney's fees, the award must be reversed and rendered.

ARGUMENT III.

THE TRIAL COURT ERRED BY AWARDING ATTORNEY'S FEES IN THE ABSENCE OF EVIDENCE OF THE *MCKEE* FACTORS AND WITH NO *MCKEE* ANALYSIS.

Even if there had been some legal basis for an award of attorney's fees (which there was not), the Trial Court nevertheless erred by awarding a fifty-percent contingency attorney's fee with no consideration of the *McKee* factors an no *McKee* factor proof.

An award of attorney's fees must be based on a consideration of the factors in Miss. R. Prof. Conduct 1.5 and the factors enumerated in *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1982). *Patterson v. Holleman*, 917 So. 2d 125, 135 (Miss. Ct. App. 2005). The party seeking attorney's fees must present evidence for the Trial Court to consider the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

MISS. R. PROF. CONDUCT 1.5; *Patterson*, 917 So. 2d at 135.

The amount of attorney's fees must be reasonable based on a consideration of these factors, and the award may not be "plucked out of the air." *Browder v. Williams*, 765 So. 2d 1281, 1288 (Miss. 2000). Where the Court fashions an arbitrary amount of attorney's fees, without consideration of the *McKee* factors, this Court must reverse the award. *Patterson*, 917 So. 2d at 135.

Casey & Co. failed to present any evidence of the factors for determination of attorney's fees in this case. No proof to consider the *McKee* and Rule 1.5 factors is in the Record. The Trial Court did not consider any of the factors. The Trial Court's award of attorney's fees was "plucked out of the air" and set at fifty-percent of the principal balance.

This award of attorney's fees is inconsistent with established law. Even if there were some basis for the award, which there was not, the award of fees would nevertheless have to be reversed.

CONCLUSION

There was no valid contract formed in this case as the Parties both agree there was no agreement as to an essential term of such a contract. Accordingly, the Trial Court's judgment should be reversed and rendered.

RESPECTFULLY SUBMITTED, this the 7th day of January, 2019.

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day filed the **Brief of Appellant** via the Court's MEC e-filing system which supplied notice to all counsel of record. I have mailed a copy to the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid.

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Hon. John Gregory
Circuit Court Judge
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This the 7th day of January, 2019.

/s/ R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellant** via the Court's MEC e-filing system.

This, the 7th day of January, 2019.

/s/ R. Shane McLaughlin