

2013-CA-01170

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAY FOSTER, PLLC

APPELLANT

VS.

CASE NO.

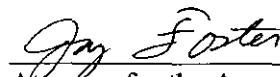
KATELYNN KOTSAKOS
BY AND THROUGH HER NATURAL FATHER,
PAUL KOTSAKOS

APPELLEES

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 Judges of this Court may evaluate possible disqualification or recusal.

1. Jay Foster, Attorney for the Appellant.
2. Billy Miller, Attorney for the Appellees.
3. Paul and Katelynn Kotsakos, Appellees.



Attorney for the Appellant

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review is:

- A. It Is Undisputed That The Mississippi Supreme Court Has Held That A Lawyer Must Be Paid For His/Her Bill
- B. The Mississippi Constitution Prohibits Changing the Contract Terms
- C. The Chancery Court Failed To Follow The Law In Determining Attorney's Fees
- D. It Is Undisputed That The McKee Factors Were Not Addressed
- E. It Is Undisputed That The Chancery Court Would Not Allow Further Argument For A Proffer
- F. The Attorney For Kotsakos Has A Conflict

STATEMENT OF THE CASE

A. Course of Proceedings And Disposition In the Court Below

References to the Record Excerpts submitted by Jay Foster, P.L.L.C. (hereinafter Foster) shall be by notation. (R. Ex.). References to the Clerk's papers will be by the designation (C.P., Vol., p.), meaning the Clerk's Papers, Volume, and page.

The Appellees, Paul Kostakos on behalf of Katelynn Kostakos (hereinafter the Kostakos), failed to pay their bill for legal services rendered. The chancery court found that Foster was entitled to only \$500.00 in attorney's fees and Foster's fees were in excess of \$9,000.00 but Foster requested only \$5,171.25.

B. Statement of the Facts

1. It is undisputed that the bill for legal services rendered has already been filed with the chancery court (C.P., Vol. I p. 41).
2. It is undisputed that the work was performed and the amount charged was customary. (C.P., Vol. I pp. 27, 62). It is undisputed lawyers with similar experience charge similar fees. (C.P., Vol. III pp. 63, Copies of John Jones Fees).
3. It is also undisputed that the legal work was performed. A copy of the legal work was not filed with the chancery court as it would reveal attorney client privileged information, but the work is contained in the file. It is also undisputed that there is a signed retainer agreement.
4. It is also undisputed that Kotsakos signed a retainer agreement with the Appellant, Jay Foster, P.L.L.C. (C.P., Vol. I, p. 67). In the event Kotsakos terminated the attorney-client relationship, the retainer agreement shows that the Kotsakos were to pay Jay Foster, P.L.L.C., \$280.00 per hour for legal services rendered. The Kotsakos did not pay Jay

Foster, P.L.L.C. anything. (C.P., Vol. I, p. 27). As a result, on or about April 18, 2013, Foster filed a Motion for Summary Judgment regarding attorney's fees and Kotsakos failed to file a response..

5. Subsequently, on May 30, 2013, a hearing on Foster's Motion for Summary Judgment was held and the chancery court reduced Foster's fees to \$500.00. (C.P., Vol. III pp. 351-353).

SUMMARY OF THE ARGUMENT

This case should be reversed since the chancery court failed to consider all the case law regarding attorney's fees and failed to apply the *McKee* factors.

STANDARD OF REVIEW

Regarding attorney's fees, it is an abuse of discretion except where a trial court applies an erroneous legal standard or fails to follow the law such as applying the *McKee* factors to a determination of attorney's fees. *Weeks v. Weeks*, 29 So. 3d 80, 93 (Miss. Ct. App. 2009).

ARGUMENT

It Is Undisputed That The Mississippi Supreme Court Has Held That A Lawyer Must Be Paid For His/Her Bill

1. It is further undisputed that this Court has repeatedly held that lawyers are entitled to be paid for legal services rendered. For example, in *Duggins v. Guardianship of Washington*, 632 So. 2d 420 (Miss 1993), this Court once again held that a lawyer is entitled to a fee for services rendered. In this case, Duggins was a lawyer. His law partner had stolen money from the guardianship.
2. Naturally, the guardianship sued Duggins himself and his law partner. This Court said this

about Duggins, “his lack of action and attention allowed the guardianship to be victimized.

Further, we sadly note that his efforts to date have been almost totally to protect himself

financially with little attention to restoring or protecting the guardianship.” *Id.* at 432.

3. Despite this Court’s obvious dislike of Duggins, they still held, “the chancellor should consider an appropriate attorney’s fee with which to compensate Duggins for his services.”

They further held, “a possible method for determining the appropriate amount of attorney’s fees to which Duggins is entitled would be to compensate him on a quantum meruit basis.”

Id. at 431.

4. Thus, we have a lawyer that this Court obviously dislikes and thinks did a very poor job in his representation of the guardianship but they still held that he is entitled to a fee for services rendered.

5. The same is true here. Even if, for some inexplicable reason, this Court was to find that Jay Foster, P.L.L.C., did a poor job, which is simply wrong, the firm is still entitled to the entire fee for services rendered. No such finding was made by the chancery court (in fact, the *McKee* factors, discussed below, were never considered).

The Mississippi Constitution Prohibits Changing the Contract Terms

6. Article 3, Section 16 of the Mississippi Constitution prohibits the changing of the contract terms. This section provides that ex post facto laws or “laws impairing the obligation of contracts shall not be passed.” Here, that is exactly what the Appellees are trying to do. The Appellees are attempting to have the chancery court change the terms of the contract so that the Appellees does not have to follow the Appellees’s legally obligated duty.

7. This Court has held this section of the constitution prohibits changing the terms of a contract.

Whitaker v. T & M Foods, Ltd., 7 So. 3d 893, 901 (Miss. 2009); *See Also In Re Guardianship*

of Savell, 876 So. 2d 308, 315 (Miss. 2004).

The Chancery Court Failed To Follow The Law In Determining Attorney's Fees

8. With regard to minors' matters in Mississippi, principles of equity govern. In *Sunnyland Contracting Co. v. Davis*, 221 Miss. 744, 756, 75 So. 2d 638, 639 (1954), this Court held:
“Where minors are involved, the courts must [necessarily] determine the fees; and any contract for fees does not bind the minors.” In accordance with *Sunnyland*, this Court does not have to recognize the existing contingency-fee contract”. Thus, only equitable principles control the division of attorney's fees in this case. *Guardianship Estate of Baker v. Harang*, 31 So. 3d 1285, 1288 (Miss. App. 2010) (citing *In Sunnyland Contracting Co. v. Davis*, 221 Miss. 744, 756, 75 So. 2d 638, 639 (1954)) .
9. In *Baker*, the Mississippi Court of Appeals held, “When looking to determine the equitable division of attorney's fees, this Court looks to Rule 1.5(a) of the Mississippi Rules of Professional Conduct, which provides that “a lawyer's fee shall be reasonable.” The Court explained that Rule 1.5(a) sets out several factors to be considered in determining reasonableness. *Id.*

It Is Undisputed That The McKee Factors Were Not Addressed

10. Assuming for the moment that the Appellees somehow gets past all of the above, the Appellees still cannot get past the *McKee* Factors. All the factors favor an award of the attorney's fees requested. In *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982), the Mississippi Supreme Court outlined several factors that must be considered by a trial court regarding attorney's fees. It is undisputed that the chancery court did not consider any of these factors. (R. Ex. 18). In fact, the Court said “And I don't know how to really deal with this issue except to - - I'm going to allow Mr. Miller a 33 and a third percent of the net

recovery and allow you \$500.” Therefore, no *McKee* factors were considered as required by law.

11. Despite the fact that Jay Foster, P.L.L.C., currently has over \$9,000.00 in fees in this matter, only \$5,171.25 in requested in fees. These fees have been reduced significantly as reflected in the bill. In addition, some of the fees would not have been required had counsel opposite simply agreed to a resolution regarding attorney’s fees prior to conducting a hearing on this matter which is customary throughout Mississippi.
12. The hours worked in the case clearly exceeded the amount requested so the time in it is extensive. As to the skills to perform the service, Foster has tried and settled literally thousands of car wreck cases during his career. It is one of only four areas of the law that Foster’s practices. The likelihood that Foster would not accept other employment actually happened. When Foster accepted Kotsakos’ case, Foster did not take any more cases until another case resolved. (C.P., Vol. I p. 62, Jay Foster Affidavit).
13. There are many lawyers charging \$280-\$300 an hour and bills were submitted to the chancery court showing this rate. The amount involved was only \$5,171.25 despite the fact that the bill is actually over \$9,000.00, and the results obtained were we made sure the Appellees obtained a treating physician, obtained the Appellees’s medical records, advised the Appellees of the procedures regarding car wreck cases such as treating with a doctor, filing a lawsuit potentially if settlement was not possible, the value of the case, the evaluation of the value of a case, etc., and it is likely that Foster would have already settled this matter long ago had it not been for Kotsakos firing Foster. Korakoa hired Foster on February 2, 2012, and fired Foster on or about July 17, 2012.
14. The experience, reputation, and ability regarding Foster’s expertise as a car wreck lawyer is

well-known. Foster is the only lawyer in this State that has written a book for consumers regarding car wreck cases. Foster has handled these cases for most of my legal career and was admitted to the Bar back in 1994. Foster clerked for a Circuit Court Judge, a Mississippi Court of Appeals Judge, and a Supreme Court Justice. Foster frequently has other lawyers refer car wreck cases to him. And all of his experience, education, and training and specialization make him an expert in car wreck cases. A letter from Bobby Atkinson (a car wreck insurance defense lawyer) regarding my reputation and ability as a lawyer was submitted to the chancery court. (C.P., Vol. I p. 68). In fact, as of today, Foster has yet to lose a jury trial on a car wreck case. Finally, the fee is \$280.00 per hour in the event services are terminated prior to settlement.

15. Moreover, this Court has repeatedly held and stressed the importance of Rule 1.5(a) analysis in determining the reasonableness of an attorney's fee award, "[t]he reasonableness of an attorney's fee award is determined by reference to the factors set forth in Rule 1.5 of the Rules of Professional Conduct." *Mauck v. Columbus Hotel Co.*, 741 So. 2d 259, 269 (Miss. 1999). Not only must Rule 1.5(a) be applied, the application must be documented. In *Mauck*, this Court stressed the importance of a chancery court providing a complete Rule 1.5(a) analysis based on each of the eight enumerated factors and cited United States Supreme Court precedent in support of this conclusion. *Id.* at 271.
16. An objective review of the transcript demonstrates that no such analysis was done by the chancery court in this case and this is why the case must be reversed.
17. In *Miss. Power & Light Co. v. Cook*, 832 So. 2d 474, 487 (Miss. 2002), this Court again referenced the importance of a complete Rule 1.5(a) analysis and explained what it means to by way of credible evidence and held, "[c]learly, the trial judge abused her discretion in

awarding this extreme amount of attorneys' fees." "The *McKee* factors should have been applied by the trial judge in determining the amount of attorneys' fees to be awarded, and any award should be supported with factual determinations." *Id.* at 487 (citing *Browder v. Williams*, 765 So.2d 1281, 1288 (Miss. 2000)).

18. In deciding *Miss. Power & Light Co.*, this Court vacated the attorneys' fee award and remanded the matter back to the trial court stating, "[t]he trial judge should reconsider this issue in light of the *McKee* factors and support a new award, if any, based on findings of fact and conclusions of law." *Id.*

19. In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), the United States Supreme Court provided guidance in making an objective and reasonable calculation of attorney fees:

The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." *S.Rep. No. 94-1011*, p. 6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. *It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.*" *Copeland v. Marshall*, 205 U.S.App. D.C. 390, 401, 641 F.2d 880, 891 (1980)(en banc) (emphasis in original).

Id. 461 U.S. at 434, 103 S.Ct. at 1939-40 (emphasis added).

20. In addressing the application of this objective standard, the U.S. Supreme Court specifically held, "[i]t remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award." *Id.* at 437, 103 S.Ct. 1933.

21. In *Walker v. United States Dep't of Hous. & Urban Dev.*, 99 F.3d 761 (5th Cir. 1996), the Fifth Circuit echoed the idea of "billing judgment" and mandated, "[p]laintiffs submitting fee

requests are required to exercise billing judgment.” *Id.* at 769. “The Appellees are charged with the burden of showing the reasonableness of the hours they bill and, accordingly, are charged with proving that they exercised billing judgment.” *Id.* at 770.

22. The idea of billing judgment as expressed by the U.S. Supreme Court and implemented by the Fifth Circuit clearing correlates with *McKee v. McKee*, 418 So. 2d 764 (Miss. 1982). In *McKee*, this Court applied Rule 1.5(a)-type factors to the reasonableness analysis of an assessment of attorneys’ fees, and in so doing, the Court held, “[i]n determining an appropriate amount of attorneys fees, a sum sufficient to secure one competent attorney is the criterion by which we are directed.” *Id.* at 767 (citing *Rees v. Rees*, 188 Miss. 256, 194 So. 750 (1940)).
23. At the time, the “competent attorney” was expressed in the then-applicable Disciplinary Rule 2-106(B) of the Mississippi Code of Professional Responsibility which stated in pertinent part that “[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.”
24. In applying reasonableness standards, a trial judge must indeed properly utilize discretionary authority. In *Mauck*, this Court referred to statutory authority and logically addressed the need for a trial judge to apply the judge’s own experience in determining objective reasonableness. “The Legislature gives additional guidance to courts in determining the reasonableness of attorney’s fees by instructing the court to ‘make the award based on the information already before it and the court’s own opinion based on experience and observation....’ ” Miss.Code. Ann. § 9-1-41 (1991). *Mauck v. Columbus Hotel Co.*, 741 So. 2d 259, 270 (Miss. 1999).

25. While a trial judge has discretion in determining whether an attorney's fee submission is reasonable, the judge's discretion is not unfettered. Moreover, the eight enumerated factors specifically outlined by Rule 1.5(a) of the Mississippi Rules of Professional Conduct, along with objective standards of billing judgment and of a competent attorney of ordinary prudence serve as appropriate guidelines when making an on-the-record determination of a fee's reasonableness.
26. Here, the standards described above were not applied at all. (C.P., Vol. I p. 72, Order and May 30, 2013, Hearing Transcript). Accordingly, the chancellor's judgment finding the attorneys' fee submission of \$5,171.25 to be unreasonable not only failed to make findings of fact, it was not supported by credible evidence. In so ruling, the chancellor failed to apply even one factor enumerated in Rule 1.5(a) of the Mississippi Rules of Professional Conduct, failed to consider what constitutes a reasonable fee in this type of litigation, failed to apply any notion of billing judgment to either attorneys' proposed bill and, ultimately, failed to issue even one finding of fact to support his final reasonableness determination.
27. In addition, the chancellor failed to make a single finding in regards to either of the attorney's bills or the affidavit filed by Foster in his final Order holding only that the fees should be reduced.
28. As a result, this case must be reversed.

Failure To Allow A Proffer

29. The chancery court refused to all Foster to make a proffer regarding additional issues that he wished to raise before it. In particular, at the hearing on this matter, the Court's bailiff apparently knew the Appellees personally. This may or may not present a conflict in this matter but it is certainly something the chancery court should address when this matter is

reversed. This Court has repeatedly held, “When testimony is not allowed at trial, a record of the proffered testimony must be made in order to preserve the point for appeal.” *Metcalf v. State*, 629 So. 2d 558, 567 (Miss. 1993) (citing *Johnson v. State*, 416 So. 2d 679, 681 (Miss.1982); *Gates v. State*, 484 So. 2d 1002, 1008 (Miss. 1986)).

30. In addition, counsel wanted to explain to the Court further the *McKee* factors. It was at page 19 of the record excerpt where Foster asked to make a statement “just for the record” and the chancery court denied it. (R. Ex. 19).

The Attorney For Kotsakos Has A Conflict

31. Finally, the attorney for Kotsakos has a conflict. In Foster’s legal experience, attorney’s fees for minor settlements are never “added” on top of a subsequent attorney’s fee. In other words, prior to any hearing in this matter, Foster offered to reduce his fees and recommended to Kotsakos’ new attorney that they each agree to do this with the total fee not exceeding the contingency amount. In other words, the lawyers would split the attorney’s fees. This is routinely done in this situation.

32. Instead, Kotsakos’s attorney wants his entire contingency fee amount deducted from the settlement and then Kotsakos’ lawyer wants the chancery court to add Foster’s attorney’s fees on top of this. This was stated on the record at the May 30, 2013, hearing. (R. Ex. 10-11).

33. This does not seem appropriate for minor settlement cases and the refusal to do what is normally done in this cases by Kotsakos’ attorney presents an irreconcilable conflict for which he should be required to withdraw. This conflict would appear to violate Rules of Professional Conduct. In particular, Rule 1.5 and Rule 1.7(b) as this is definitely a situation in which a client is being “materially limited” by the “lawyer’s own interests.”

34. Before embarking on an analysis of the issues, a review of the law pertaining to an attorney's duties to his clients is in order. An attorney must deal with the client in a manner of "utmost honesty, good faith, fairness, integrity, and fidelity...." 7A C.J.S. *Attorney & Client* § 234 (1980). One treatise states:

The breach of fiduciary obligations, sometimes characterized as "constructive" fraud, has been appropriately recognized as an action in tort, not contract. The tort constitutes a wrong which is distinct and independent from professional negligence but still [comprises] legal malpractice. Some courts have suggested the standard of care encompasses the fiduciary obligations. More correctly, other courts have referred to fiduciary obligations as setting a standard of "conduct," as distinguished from the standard of "care" which pertains to the requisite skills and knowledge.

Mallen & Smith, Legal Malpractice § 11.1 (3d ed. 1989) (citations omitted).

35. Of course, this Court recognized this distinction between the duty of care and the duty of loyalty. *Singleton v. Stegall*, 580 So. 2d 1242 (Miss. 1991).

36. This Court has held that the duty of loyalty is fiduciary in nature. In the present context its breach may take one of two forms. The first involves situations in which the attorney obtains an unfair personal advantage, such as acquiring property from a client; the second involves situations in which the attorney or other clients have interests adverse to the client in question. We have recently defined the lawyer's duty of loyalty to include a duty to:

"safeguard the client's confidences and property, avoid conflicting interests that might impair the representation, and not employ adversely to the client powers conferred by the client-lawyer relationship." *Singleton v. Stegall*, 580 So. 2d 1242, 1245 (Miss. 1991).

Breach of the duty may be actionable.

37. Lawyers also have a fiduciary obligation to inform their clients of their adverse interests.

American Law Institute, Restatement (Third) of the Law Governing Lawyers § 31 (T.D. No. 5

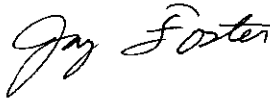
(1992)); *See Also Tyson v. Moore*, 613 So. 2d 817, 827 (Miss. 1992). Here, Kotsakos' lawyer wants to put less money in his own client's pocket.

38. This Court has repeatedly held that conflicts adverse to the client's best interest are improper. *Forbes v. St. Martin*, 2013 WL 791847. Clearly, this is adverse to the client.

CONCLUSION

39. The chancery court failed to consider any of the *McKee* factors as required by this Court. As a result, this matter should be reversed. In addition, the Mississippi Constitution prohibits changing the contract terms would not allow a proffer regarding this matter. Finally, it is clear that the attorney for Kotsakos has a conflict as he wants to get all his money to his client's detriment.

Respectfully submitted, November 8, 2013.

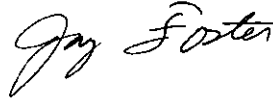


Jay Foster, Bar No. [REDACTED]

Certificate of Service

I certify that I have faxed a true and correct copy of the above and foregoing to all counsel of record and to Honorable Jim Persons, Chancery Court Judge.

So certified, November 8, 2013.



Jay Foster

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