No. 2016-CP-00820

IN THE
SUPREME COURT OF MISSISSIPPI

ARLIN GEORGE HATFIELD, III,
Appellant,

v.

DEER HAVEN OWNERS ASSOCIATION, INC.,
Appellee.

Appeal from the
Chancery Court of Madison County

BRIEF FOR APPELLEE

Oral Argument Not Requested

M. Scott Jones (MSB 102239)
Timothy J. Anzenberger (MSB 103854)
ADAMS AND REESE LLP
1018 Highland Colony Parkway
Suite 800
Ridgeland, MS 39157
601.353.0794
scott.jones@arlaw.com
tim.anzenberger@arlaw.com

James L. Martin (MSB 1891)
TAGGART, RIMES & GRAHAM, PLLC
1022 Highland Colony Parkway
Suite 101
Ridgeland, MS 39157
601.898.8400
jim@trglawyers.com

March 8, 2017

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 or judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Arlin George Hatfield, III, appellant and defendant/counter-plaintiff below;

2. Deer Haven Owners Association, Inc., appellee and plaintiff/counter-defendant below;

3. Steven H. Smith and the law firm of Steven H. Smith, PLLC, counsel to appellant and defendant/counter-plaintiff below;

4. M. Scott Jones, Timothy J. Anzenberger, and the law firm of Adams and Reese LLP, counsel to appellee and plaintiff/counter-defendant below;

5. James L. Martin and the law firm of Taggart, Rimes & Graham, PLLC, counsel to appellee and plaintiff/counter-defendant below; and

6. The Hon. Robert George Clark, III, chancellor below.

Dated: March 8, 2017

By: s/Timothy J. Anzenberger

M. Scott Jones (MSB 102239)
Timothy J. Anzenberger (MSB 103854)
ADAMS AND REESE LLP
1018 Highland Colony Parkway
Suite 800
Ridgeland, MS 39157
601.353.0794
scott.jones@arlaw.com
tim.anzenberger@arlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

QUESTION PRESENTED

In *Journeay v. Berry*, the prevailing party in a subdivision-covenant dispute was entitled to a mandatory award of attorney's fees where the covenants provided that: "In any . . . proceeding for the enforcement . . . of these Protective Covenants . . . , the prevailing party or parties shall also be entitled to an award of reasonable attorneys' fees . . . ." 953 So. 2d 1145 (Miss. Ct. App. 2007). Here, the Deer Haven Owner's Association, Inc. prevailed in a suit to enforce its covenants against Dr. Arlin George Hatfield, III, and those covenants contained the exact same attorney's-fee provision as *Journeay*. After first denying the Association's request for attorney's fees, the chancellor granted the Association's motion for reconsideration and awarded the Association reasonable attorney's fees based on the testimony of the Association's president, attorney affidavits setting forth the *McKee* factors, all of the invoices billed, and other related testimony and evidence.

The question presented is whether the chancellor erred by granting the Association's motion for reconsideration and awarding the Association its reasonable attorney's fees and costs.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument will not aid in the decisional process because (1) the facts and legal arguments are adequately presented in the briefs and record, and (2) the dispositive issue in this case has been recently decided.

STATEMENT OF ASSIGNMENT

There is no need for the Supreme Court to retain this case under Rule 16(b) or (d) of the Mississippi Rules of Appellate Procedure, because this case does not involve the death penalty; utility rates; annexations; bond issues; election contests; a trial court's ruling a statute unconstitutional; a question of first impression; a fundamental and urgent issue of public importance; a substantial constitutional question; or an issue upon which there is an inconsistency in the decisions of the Court of Appeals or the Supreme Court.

STATEMENT OF THE CASE

1. Nature of the Case

The issue raised on this appeal is straightforward. The Deer Haven Owner's Association prevailed in a suit against Dr. Arlin George Hatfield, III, to require Dr. Hatfield to remove chicken coops, pens, wire fences, and chickens, guineas, ducks, geese and/or other wild fowl from his home in accordance with the Association's restrictive covenants and Madison County's residential-zoning ordinances. Despite prevailing, the chancellor originally denied the Association's request for an award of attorney's fees, despite the fact that the covenants expressly provided that:

> In any legal or equitable proceeding for the enforcement or to restrain the violation of this Declaration or any provisions hereof by reference or otherwise, the prevailing party or parties shall also be entitled to an award of reasonable attorney's fees, in such amount as may be fixed by the court in such proceeding.

So, the Association filed a motion for reconsideration under M.R.C.P. 59(e), contending that the failure to award attorney's fees under the covenants was a clear error of law. Indeed, the Mississippi Court of Appeals decision in *Journeay v. Berry* addressed this very issue and held that a covenant containing the exact language as the Association's covenants *required* that attorney's fees be awarded to the prevailing party. The chancellor agreed and entered an order granting the motion for reconsideration and awarding the Association an award of reasonable attorney's fees and costs. Dr. Hatfield appeals, arguing that—despite the clear holding in *Journeay*—an award of attorney's fees is not mandatory and that, regardless, the Association failed

to put forth sufficient evidence to support an award of attorney's fees. Both of these arguments are meritless: *Journeay* is directly on point and applies here, and the Association put on sufficient—indeed, *substantial*—evidence of the existence and reasonableness of its fees. Accordingly, Dr. Hatfield has failed to demonstrate that the chancellor abused his discretion in granting the Association's motion for rehearing.

2. Facts and Course of Proceedings Below

A. Dr. Hatfield violates Deer Havens' restrictive covenants.

Dr. Arlin George Hatfield, III is a board-certified radiologist that purchased a home in the Deer Haven Subdivision in July of 2012. (C.P. 535.) Deer Haven is a gated, lakeside community in Madison, Mississippi, Like most gated communities, the lots in Deer Haven are governed by covenants set forth in the Declaration of Covenants, Conditions and Restrictions for Deer Haven (the "Covenants"). (C.P. 14-60.) The purpose of the Covenants is "to establish standards making Deer Haven a desirable place for property ownership," "to enhance the charm and beauty of Deer Haven and its surroundings," and to preserve homeowners' property values. (C.P. 15-16.) The Covenants are enforced by the Deer Haven Owners Association, Inc. (the "Association"). (C.P. 19.)

Less than a year after moving to Deer Haven, Dr. Hatfield constructed chicken coops and pens on his property, along with chicken-wire fences, and he began raising chickens, ducks, geese, and guinea fowl in his backyard. (C.P. 189-193, 205-208, 333.) At one time, Dr. Hatfield even kept a goat and rooster on his

property. (C.P. 189-193, 205-208, 333.) While the total number of animals at his home varied (C.P. 197), Dr. Hatfield occasionally had up to 60 birds living on his property at the same time (C.P. 199, 258.)

Dr. Hatfield's birds roamed the neighborhood streets and his neighbors' yards, and the clucking, squawking, and quacking of Dr. Hatfield's birds could be heard at least four lots down the street. (C.P. 190, 207-208.) Dr. Hatfield's next-door neighbors had to install specialized fans in their bedroom to drown out the noise, including from Dr. Hatfield's rooster, which crowed throughout the night. (C.P. 189-190.)

Dr. Hatfield's home is the first house residents and visitors see as they turn into the neighborhood on Deer Haven Drive, and Dr. Hatfield's unsightly coops, pens, and chicken-wire fencing are in plain view. (C.P. 190.)

Unsurprisingly, the Association alleged that Dr. Hatfield had violated numerous provisions of the Covenants. In letters dated March, April, July, and August of 2013, the Association (1) advised Dr. Hatfield that raising the birds on his property violated Sections 6.20 and 6.21 of the Covenants, (2) advised Dr. Hatfield that he had failed to obtain approval to construct the chicken coops and pens on his property in violation of Section 6.28 of the Covenants, (3) invited Dr. Hatfield to address these violations before the Association, and (4), eventually, requested that Dr. Hatfield remove the birds, chicken coops, and pens from his property. (C.P. 61, 63-63, 66, 181.) Dr. Hatfield refused.

The Madison County Planning and Zoning Department also inspected Dr. Hatfield's property and sent demand letters to Dr. Hatfield advising that keeping chickens, guineas, ducks and other wild fowl violated Article VI, Section 601 of the Zoning Ordinance of Madison County, Mississippi for Residential Estate Districts (the "Madison County Zoning Ordinance") (C.P. 110-111.) After Dr. Hatfield refused to remove the birds, the Madison County Board of Supervisors rendered a decision finding that Dr. Hatfield had violated the Ordinance and demanding that he bring his property into compliance. (C.P. 505-06.)[1]

B. The Association files suit against Dr. Hatfield and prevails.

After Dr. Hatfield refused to comply with the Association's requests, the Association filed a two-count complaint in the Chancery Court of Madison County, Mississippi in October of 2013, alleging that Dr. Hatfield had violated the Covenants by keeping the birds on his property and constructing the chicken coops and pens without obtaining prior approval of the Association under Section 2.28 of the Covenants. (C.P. 9-13.) The first count requested that the Chancellor enter a mandatory injunction against Dr. Hatfield, requiring him to remove the birds, chicken coops, and pens from his lot. (C.P. 12.) The second count requested an award for reasonable attorney's fees and costs under Section 10.03 of the Covenants, which expressly provided that:

> In any legal or equitable proceeding for the enforcement or to restrain the violation of this Declaration or any provisions hereof by reference or otherwise, the prevailing party or parties shall also be entitled to an

[1] The Circuit Court of Madison County affirmed (C.P. 767-769), and the case is now on appeal before this Court, styled as *Hatfield v. Madison County Board of Supervisors*, 2016-CP-0016-SCT.

> award of reasonable attorney's fees, in such amount as may be fixed by the court in such proceeding.

(C.P. 47.)

Dr. Hatfield hired counsel[2] and responded by filing a four-count counterclaim against the Association. (C.P. 68-76.) The first count requested a declaratory judgment decreeing that the Covenants did not expressly prohibit residents from keeping "domestic" animals. (C.P. 74.) The second count, in turn, requested a declaratory judgment that Dr. Hatfield's birds were "domestic" and therefore not prohibited by the Covenants. (C.P. 74.) The third count requested a declaratory judgment that the chicken coops and pens did not constitute "improvements" or "structures" under the terms of the Covenants and therefore Dr. Hatfield had not violated the Covenants by failing to obtain preapproval for constructing the coops and pens under Section 6.28. (C.P. 74-75.) Like the Association's complaint, Dr. Hatfield's final count requested attorney's fees and costs under Section 10.03 of the Covenants (C.P. 75.), but also under Mississippi's Litigation Accountability Act, alleging that the Association's claims were frivolous, negligent, improper, unlawful, and filed in bad faith. (C.P. 75, 230, 394.)

Eventually, both the Association and Dr. Hatfield filed motions for summary judgment as to their original pleadings. (C.P. 82-95, 106-108, 209-228.)

Thereafter, the Association amended its complaint[3] to specifically identify

---

[2] While acting *pro se* on appeal, Dr. Hatfield was represented by counsel in the lower court.
[3] The chancellor granted the Association leave to file an amended complaint (C.P. 736.) In his brief, Dr. Hatfield accuses the Association's counsel of "threaten[ing]" the chancellor to allow the Association to amend its complaint. (Appellant Br. 11.) This accusation is an

"that a violation of any state, municipal or local law, ordinance or regulation pertaining to the use of any property within Deer Haven [was] a violation of [Section 10.05 of] the Covenants," (C.P. 334) and that Dr. Hatfield's violation of the Madison County Zoning Ordinance, in turn, constituted a violation of Section 10.05 (C.P. 335), thereby further warranting removal of the birds from his property. Dr. Hatfield responded by filing an amended answer and counterclaim, virtually the same as his first. (C.P. 385-400.)

The parties then filed second motions for summary judgment as to the claims in their amended pleadings. (C.P. 401-525, 582-600.)

In December of 2015, the chancellor entered two separate orders—the first order disposed of the original motions for summary judgment (C.P. 735) and the second order disposed of the second motions for summary judgment. (C.P. 738.)

In the second order, the chancellor found that (1) "Section 10.05 of the Covenants states that a violation of any state, municipal or local law, or ordinance pertaining to the use of any property within Deer Haven is also a violation of the Covenants." (C.P. 739.) The chancellor further found that "[t]he raising and keeping of chickens, ducks, turkeys, geese or other fowl is not a permitted use of property zoned R-1 in according with Article VI Section 601 of" the Madison County Zoning Ordinance, and that Dr. Hatfield was "raising and keeping an undetermined number of birds/fowl on his lot" in violation of that ordinance. (C.P. 730-31.) Accordingly, the chancellor granted summary judgment in the Association's favor on

---

utter fabrication. Moreover, the appellate record is devoid of any objection to the Association filing an amended complaint.

the first count in the Association's amended complaint for a mandatory injunction, thereby requiring Dr. Hatfield to remove the birds from his property. (C.P. 731). As a result, the chancellor further found that the Association was entitled to recover reasonable attorney's fees and costs under Section 10.03 of the Covenants. (C.P. 731.)

The chancellor did grant summary judgment on two of Dr. Hatfield's claims—but neither was contested or relevant to the resolution of this dispute. In the first order, the chancellor granted summary judgment in Dr. Hatfield's favor that the Covenants did not prohibit "domestic" animals. (C.P. 735.) Of course, the Association never contested this claim—the Covenants certainly allowed "domestic" animals, such as household pets. Instead, the real dispute was Dr. Hatfield's second count: whether his birds were considered "domestic" animals, to which the chancellor correctly *denied* summary judgment. (C.P. 735-36, 740.) The chancellor also granted summary judgment in Dr. Hatfield's favor that the Covenants did not expressly define the terms "pens" or "coops." (C.P. 740.) But this claim was also not disputed—the Covenants did not contain a list of definitions. Instead, the actual dispute was whether the "pens" or "coops" constituted an "improvement" or "structure" for purposes of whether Dr. Hatfield was required to obtain pre-approval to build the pens and coops, to which the chancellor also correctly denied summary judgment. (C.P. 740.)

Given that the chancellor had granted summary judgment in the Association's favor as to the first count of its amended complaint, thereby requiring

Dr. Hatfield to remove the birds from his property, Dr. Hatfield no longer had a need to keep the chicken coops, pens, and chicken-wire fences on his property and he agreed to remove them under the terms of an agreed partial final judgment. (C.P. 743.) After entry of the agreed partial final judgment, the only issue remaining was the Association's award of reasonable attorney's fees and costs under Section 10.03 of the Covenants, which the chancellor set for hearing.

C. After prevailing in its suit against Dr. Hatfield, the Association was awarded its reasonable attorney's fees under Section 10.03 of the Covenants.

At the hearing on the issue of attorney's fees, the Association put on sufficient evidence of the existence, amount, and reasonableness of its attorney's fees and costs. (T.T. 48-100.) To do so, the Association put on the testimony of James L. Pettis, III, the president of the Association and a practicing attorney. (T.T. 49-50.) Pettis testified that the suit was filed to obtain a mandatory injunction requiring Dr. Hatfield to remove the birds, chicken coops, pens, and chicken-wire fences from his property, and that the Association had prevailed in that effort. (C.P. 53, 62-63.) Pettis further testified to the efforts undertaken by counsel in the suit, the amount of attorney's fees and costs incurred, and the reasonableness of the fees incurred and the hourly rates charged. (C.P. 55-57.) The Association also introduced into evidence affidavit's from both of the Association's attorneys—James L. Martin and M. Scott Jones—detailing each of the factors set forth in *McKee v. McKee* and setting for the fees and expenses billed to the Association. 418 So. 2d 764, 767 (Miss. 1982). (C.P. Exs. P2 and P5). The Association also introduced the attorneys'

invoices, invoices of the court reporter, and an itemization of the Association's out of pocket expenses. (Exs. P2 through P5.)

Pettis also testified to the many difficulties the Association's attorneys faced with Dr. Hatfield in the suit and the obvious costs incurred thereby. For example, Pettis testified to Dr. Hatfield's initial refusal to sit for a deposition, Dr. Hatfield's failure to appear for a duly noticed deposition, the sanctions the lower court imposed on Dr. Hatfield for this failure, and the Association's efforts to obtain an order compelling Dr. Hatfield to sit for a deposition. (T.T. 71-72, 86-88.)

In total, the Association requested an award of attorney's fees and costs of $65,891.12. (Ex. P 5.) Dr. Hatfield never objected to the reasonableness of these fees and costs—nor could he. Dr. Hatfield himself testified that he had incurred and paid $65,044.99 in attorney's fees. (T.T. 96.)

The chancellor initially denied the Association's request for attorney's fees and costs (C.P. 755), so the Association filed a motion for reconsideration under M.R.C.P. 59(e), arguing that, under *Journeay v. Berry*, it was an abuse of discretion to deny attorney's fees and costs in light of Section 10.03 of the Covenants. 953 So. 2d 1145 (Miss. Ct. App. 2007) (C.P. 756-762). The chancellor agreed, and entered his order granting the Association's motion for reconsideration and awarding the Association reasonable attorney's fees and costs in the total amount of $50,250—approximately $15,000 less than the Association requested. (C.P. 780.)

Dr. Hatfield has now appealed from the chancellor's order granting the Association's motion for reconsideration (*See* C.P. 784-85) and seeks reversal on two

grounds: (1) an award of attorney's fees was not mandatory under Section 10.03 of the Covenants; and (2) the Association failed to put on sufficient evidence justifying an award.

SUMMARY OF THE ARGUMENT

After Dr. Hatfield refused to remove his birds, chicken coops, pens, and chicken-wire fences from his backyard in the Deer Haven subdivision, the Association filed suit for a mandatory injunction requiring Dr. Hatfield to do so, alleging that he was in violation of the neighborhood's restrictive Covenants.

Eventually, the chancellor below granted summary judgment in the Association's favor, finding that Dr. Hatfield was in violation of a Madison County residential-zoning ordinance that prohibited residents from keeping chickens and other wild birds on his property, which was—in turn—a violation of the Covenants. Accordingly, the chancellor ordered Dr. Hatfield to remove the birds. This ruling prompted Dr. Hatfield to immediately agree to the terms of an agreed partial final judgment, which further required Dr. Hatfield to remove the coops, pens, and chicken-wire fences.

The chancellor then held an evidentiary hearing on the Association's request for attorney's fees under Section 10.03 of the Covenants, which provided that:

> In any legal or equitable proceeding for the enforcement or to restrain the violation of this Declaration or any provisions hereof by reference or otherwise, the prevailing party or parties shall also be entitled to an award of reasonable attorney's fees, in such amount as may be fixed by the court in such proceeding.

But after the chancellor denied the Association's request, the Association filed a motion for reconsideration under M.R.C.P. 59(e), contending that the failure to award attorney's fees under Section 10.03 of the Covenants was a clear error of law. Indeed, the Mississippi Court of Appeals decision in *Journeay v. Berry* addressed this very issue and held that a covenant containing the exact language as Section 10.03 *required* the trial court to award attorney's fees to the prevailing party in a dispute over neighborhood covenants. The chancellor agreed and entered an order granting the motion for reconsideration and awarding the Association reasonable attorney's fees and costs.

On appeal, Dr. Hatfield makes two arguments, neither of which have merit. First, Dr. Hatfield argues that an award of attorney's fees under the language of Section 10.03 is not mandatory. But Dr. Hatfield is attempting to relitigate an issue already decided by the Mississippi Court of Appeals in *Journeay*. Second, Dr. Hatfield argues that the Association failed to provide sufficient evidence to support an award of reasonable attorney's fees and costs. But as the trial transcript and record reveals, the Association put on sufficient (indeed, *substantial*) evidence of the existence, amount, and reasonableness of its attorney's fees and costs, including through the testimony of James L. Pettis, III, and the affidavits of the Association's counsel. Although certain of the Association's attorney's fees were paid by an insurance carrier, state and federal courts have consistently held that the

prevailing party to a lawsuit may still recover attorney's fees—assuming there is a contractual or statutory basis to do so—regardless of whether a third-party paid those fees. *E.g. Worsham v. Greenfield*, 78 A.3d 358 (Md. 2013); *Ed A. Wilson, Inc. v. Gen. Servs. Admin*, 126 F.3d 1406 (Fed. Cir. 1997); *Pelletier v. Zweifel*, 987 F.2d 716 (11th Cir. 1993).

Accordingly, Dr. Hatfield has failed to demonstrate that the chancellor abused his discretion, and this Court should affirm the decision below.

ARGUMENT

Dr. Hatfield has failed to demonstrate that the chancellor abused his discretion in granting the Association's motion for reconsideration and awarding the Association its reasonable attorney's fees and costs. Instead, the chancellor correctly ruled, consistent with *Journeay v. Berry,* that an award of attorney's fees and costs was mandatory under Section 10.03 of the Covenants. 953 So. 2d 1145 (Miss. Ct. App. 2007). And, as the record reveals, the chancellor's award of attorney's fees and costs was based on sufficient evidence.

1. An award of reasonable attorney's fees and costs was mandatory under Section 10.03 of the Covenants.

To prevail on a motion for reconsideration under M.R.C.P. 59(e), the moving party must demonstrate the need to correct a clear error of law. *Freeman v. CLC of Biloxi, LLC*, 119 So. 3d 1164, 1167 (Miss. Ct. App. 2013) (citing *Harrison v. Miss. Transp. Comm'n*, 57 So. 3d 648, 651 (Miss. Ct. App. 2010)). And a trial court's decision to grant a motion under M.R.C.P. 59(e) may only be reversed on appeal where the trial court has abused its discretion. *Freeman*, 119 So. 3d at 1167 (citing

Harrison, 57 So. 3d at 2013). Indeed, the Mississippi Supreme Court gives "substantial weight, deference, and respect" to a trial court's decision to grant or deny a motion under M.R.C.P. 59. *Coho Res., Inc. v. Chapman*, 913 So. 2d 899, 908 (Miss. 2005) (citing *Maxwell v. Ill. Cent. Gulf R.R.*, 513 So. 2d 901, 908 (Miss. 1987)).

Here, the chancellor's original order denying the Association's request for attorney's fees and costs constituted a clear error of law, and the chancellor therefore correctly granted the Association's motion to reconsider and correctly awarded the Association its fees and costs.

In *Journeay v. Berry*, the Mississippi Court of Appeals addressed an attorney's-fee provision in a neighborhood covenant containing *identical* language to Section 10.03 here and held that the provision *unambiguously mandated* an award of fees and costs to the prevailing party. 953 So. 2d 1145, (Miss. Ct. App. 2007).

Section 10.03 of Deer Haven's Covenants	**Attorney's Fee Provision in *Journeay***
In any legal or equitable proceeding for the enforcement or to restrain the violation of this Declaration or any provisions hereof by reference or otherwise, the prevailing party or parties shall also be entitled to an award of reasonable attorney's fees, in such amount as may be fixed by the court in such proceeding.	In any legal or equitable proceeding for the enforcement or to restrain the violation of these Protective Covenants or any provisions hereof by reference to otherwise [sic], the prevailing party or parties shall also be entitled to an award of reasonable attorney's fees and costs, in such an amount as may be fixed by the Court in such proceeding from the non-prevailing party or parties, including the costs of any expert witness.

Because the covenant in *Journeay* was valid, ran with the land, and bound each successor in interest, the Court of Appeals held that the lower court abused its discretion in *failing* to award attorney's fees to the prevailing party below. *Id*. at 1162-63.

Under *Journey*, the chancellor below was required to award attorney's fees to the prevailing party under Section 10.03 of the Covenants, as the Association was clearly the prevailing party. Under Mississippi law, "[a] party prevails 'when actual relief on the merits of [its] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" Jeffrey Jackson *et al.*, Encyc. Miss. Law § 8.28 (West 2016) (citing *Cruse v. Nunley*, 699 So. 2d 941 (Miss. 1997); *Farrar v. Hobby*, 506 U.S. 103 (1992)). In both its original and amended complaint, the Association alleged that Dr. Hatfield was in violation of the Covenants and sought a mandatory injunction against Dr. Hatfield requiring him to remove his birds, chicken coops, pens, and chicken-wire fencing from his property. (C.P. 12, 335-36.) The chancellor granted summary judgment in the Association's favor, finding that Dr. Hatfield had violated the Madison County Zoning Ordinance by keeping the birds on his property, which—in turn—constituted a violation of the Covenants. (C.P. 739, 743.) In light of this ruling in the Association's favor, Dr. Hatfield agreed to the terms of an agreed partial final judgment, requiring Dr. Hatfield to remove the coops, pens, and wire fencing from his property. (C.P. 742-44.) Accordingly, the Association obtained all of the relief that it sought when it filed this suit in 2013, and the chancellor did not

abuse his discretion in granting the Association's motion to reconsider and awarding the Association its fees and costs under *Journeay*.

On appeal, Dr. Hatfield does not allege that Section 10.03 of the Covenants is invalid or unenforceable. In fact, Dr. Hatfield *himself* requested attorney's fees and costs under Section 10.03 (C.P. , 394) and acknowledged in the agreed partial final judgment that the Covenants were enforceable and governed "[a]ll lots" in Deer Haven (C.P. 742). Instead, Dr. Hatfield argues that Section 10.03 of the Covenants is discretionary—not mandatory—and that the language in Section 10.03 is "completely different and distinguishable" from the covenant in *Journeay*. (Appellant Br. 15.) In support, Dr. Hatfield cites the final clause of Section 10.03, which provides that "the prevailing party or parties shall also be entitled to an award of reasonable attorney's fees, **in such amount as may be fixed by the court in such proceeding**." (Appellant Br. 16) (emphasis in original.) Dr. Hatfield then wrongly concludes that this language renders Section 10.03 permissive. But the language of the covenant in *Journeay*—quoted in full above—contained the *exact same phrase*. Dr. Hatfield ignores the operative, mandatory language of both Section 10.03 and the covenant in *Journeay*, which provides that "the prevailing party or parties *shall* also be entitled to an award of reasonable attorney's fees . . . ." Accordingly, Dr. Hatfield's argument is meritless, and Dr. Hatfield has failed to meet his burden of showing that the chancellor abused his discretion in granting the Association's motion for reconsideration.

2. The Association presented sufficient evidence to support an award of reasonable attorney's fees and costs.

Under Miss. Code Ann. § 9-1-41, "[i]n any action in which a court is authorized to award reasonable attorney's fees, the court *shall not* require the party seeking such fees to put on proof as to the reasonableness of the amount sought . . . ." (emphasis added). Instead, the court "shall make the award based on the information already before it and the court's own opinion based on experience and observation." *Id.* A party may, however, "in its discretion, place before the court other evidence as to the reasonableness of the amount of the award . . . ." *Id.* Fixing an award of "reasonable attorney's fees is a matter ordinarily within the sound discretion of the trial court," and the Mississippi Supreme Court "will not reverse the trial court on the question of attorney's fees unless there is a manifest abuse of discretion in making the allowance . . . ." *Mauck v. Columbus Hotel Co.*, 741 So. 2d 259 (Miss. 1999) (citing *Gilchrist Tractor Co. v. Stribling*, 192 So. 2d 409, 418 (Miss. 1966)).

On appeal, Dr. Hatfield argues that the Association failed to put on "sufficient evidence . . . from which an appropriate fee award could be determined." (Appellant Br. 18.) As an initial matter, the Association did put on sufficient—indeed, *substantial*—evidence of the existence, amount, and reasonableness of its attorney's fees and costs. (*See generally* T.T. 49-84; Exhs. P2-P5.) For example, counsel to the Association introduced affidavits to the chancellor detailing each of the factors in *McKee v. McKee*, as well as their invoices. (Exs. P2-P4.) James L. Pettis, the president of the Association, further testified to the relevant *McKee*

factors, including the Association's ability to pay, the fact that the Association achieved its goals in bringing the suit, the reasonableness of the hourly rates and total amounts charged, and the difficulties Dr. Hatfield caused the Association's counsel in prosecuting this action, including Dr. Hatfield's refusal to sit for a deposition and later failing to appear for a duly noticed deposition. (T.T. 49-84.) And, in the trial court below, Dr. Hatfield never challenged the existence or reasonableness of the fees and costs awarded—nor could he, as Dr. Hatfield himself incurred and paid $65,044.99 in attorney's fees (approximately $15,000 more than the chancellor eventually awarded to the Association) (T.T. 94-95.) Thus, any argument regarding the sufficiency of the evidence presented below, the existence of the attorney's fees and costs incurred, and the reasonableness of the fees and costs awarded is meritless, if not waived.

Nevertheless, Dr. Hatfield makes two points to support his "sufficiency of the evidence" argument. First, Dr. Hatfield argues that the Association is only entitled to fees it incurred prosecuting the claims upon which the Association prevailed. Second, Dr. Hatfield argues that the Association is not entitled to the fees and costs incurred by Adams and Reese LLP, because some of those fees were paid by an insurance carrier. Neither argument has merit.

As to Dr. Hatfield's first argument, the Association was the prevailing party in this matter and was therefore entitled to its attorney's fees and costs under Section 10.03 of the Covenants and *Journeay*, 953 So. 2d 1145. Since the inception of this suit, the Association sought (in *both* its original and amended complaint) one

result—an order requiring Dr. Hatfield to remove the birds, chicken coops, pens, and chicken-wire fences from his property, based on the grounds that Dr. Hatfield's activities violated Deer Haven's Covenants. At the end of this matter, that result is exactly what the Association achieved.

That is not all. The Association also prevailed as to each of Dr. Hatfield's disputed counterclaims against the Association, which sought a declaration that Dr. Hatfield's birds were "domestic" animals and therefore permissible under the Covenants, and that Dr. Hatfield's coops, pens, and wire fences did not constitute "structures" under the Covenants, thereby requiring pre-approval from the Association. (*E.g.* C.P. 68, 331.) Dr. Hatfield also sought attorney's fees under Mississippi's Litigation Accountability Act, alleging that the Association's claims were frivolous, negligent, improper, unlawful, and filed in bad faith. (C.P. 75, 230, 394.) But when the Association obtained summary judgment in its favor, it rendered Dr. Hatfield's counterclaims moot.[4]

Given that the Association prevailed on these claims, the Association was entitled to an award of reasonable attorney's fees and costs under the express

[4] As noted above, the chancellor did grant summary judgment in Dr. Hatfield's favor on two narrow grounds—neither of which were contested and neither of which were relevant to the ultimate resolution of the dispute. First, the chancellor granted summary judgment in Dr. Hatfield's favor that the Covenants did not prohibit "domestic" animals. (C.P. 735.) But the Association never contested this claim—of course the Covenants allowed "domestic" animals, such as household pets. Instead, the real dispute was Dr. Hatfield's second count that his birds were considered "domestic" animals under the Covenants, to which the chancellor correctly denied summary judgment. (C.P. 735-36, 740.) The chancellor also granted summary judgment in Dr. Hatfield's favor that the Covenants did not expressly define the terms "pens" or "coops" in the Covenants. (C.P. 740.) But this claim was also not in dispute—the Covenants did not contain a list of definitions. Instead, the actual dispute was whether "pens" or "coops" constituted an "improvement" for purposes of whether Dr. Hatfield was required to obtain approval to build the pens and coops under Section 6.28 of the Covenants, to which the chancellor also correctly denied summary judgment. (C.P. 740.)

language of Section 10.03. Dr. Hatfield counters this argument by citing three cases for the proposition that the Association was only entitled to the attorney's fees incurred prosecuting the claim upon which it prevailed. (Appellant Br. 19) (citing *Indus. and Mech. Contractors of Memphis, Inc. v. Tim Mote Plumbing, LLC*, 962 So. 2d 632 (Miss. Ct. App. 2007); *Romney v. Barbetta*, 881 So. 2d 958 (Miss. Ct. App. 2004); *A&F Props., LLC v. Lake Caroline, Inc.*, 775 So. 2d 1276 (Miss. Ct. App. 2000)). Dr. Hatfield then argues that the Association only prevailed on a single narrow issue: that Dr. Hatfield had violated the Madison County Zoning Ordinance. So, according to Dr. Hatfield, the Association was required to demonstrate the amount of fees incurred prosecuting that narrow ground, which—according Dr. Hatfield—the Association did not do.

Dr. Hatfield's argument fails for at least two reasons. First, even if Dr. Hatfield were correct, the Association prevailed by achieving the exact result it sought when it filed this suit. Under Mississippi law, a party "prevails" by obtaining relief that "modifi[es] the defendant's behavior in a way that directly benefits the plaintiff," which is exactly what the Association achieved here. Jeffrey Jackson et al., Encyc. Miss. Law § 8.28 (West 2016) (citing *Cruse v. Nunley*, 699 So. 2d 941 (Miss. 1997); *Farrar v. Hobby*, 506 U.S. 103 (1992)). Second, the cases Dr. Hatfield cites are distinguishable from this case. *Romney* did not involve a contractual provision or covenant providing for an award for attorney's fees—instead, *Romney* involved an award of fees under Mississippi's Litigation Accountability Act. 881 So. 2d at 962. *Lake Caroline* and *Industrial* did involve contractual attorney's-fees

provisions, but the provisions in each of those cases limited an award of attorney's fees solely to a party that prevailed in enforcing a specific contractual provision. *Industrial*, 962 So. 2d at 635; *Lake Caroline*, 775 So. 2d at 1283. Section 10.03 of the Covenants here, however, is broader and contemplates that a party will be entitled to an award of attorney's fees if it prevails in a dispute over the Covenants, regardless of whether that party was the entity seeking to enforce the Covenants or was simply defending an action. Thus, the language of Section 10.03 is much broader than in *Industrial* and *Lake Caroline*.

As to Dr. Hatfield's second argument, Dr. Hatfield cited no authority below or on appeal to support his argument that the Association was not entitled to an award of attorney's fees and costs incurred by Adams and Reese LLP, who was retained by the Association's insurer to represent the Association after Dr. Hatfield filed his counterclaim. (T.T. 58-59.) Instead, numerous appellate courts have held that "attorney's fees may be awarded where a party incurs no legal expense because its fees were paid by another," specifically including where the attorney was paid by an insurance carrier. Robert L. Rossi, 1 Attorneys' Fees § 6:14 (3d ed.) (June 2016) (citing *Ed A. Wilson, Inc. v. Gen. Servs. Admin*, 126 F.3d 1406 (Fed. Cir. 1997) (insurer paid fees); *Devlin v. Delray Cmty. Hosp.*, 575 So. 2d 757 (Fla. Dist. Ct. App. 1991); *Couch v. Drew*, 554 So. 2d 1185 (Fla. Dist. Ct. App. 1989); *Futrell v. Martin*, 600 P.2d 777 (Idaho 1979); *Scott v. Irmeger*, 859 N.E.2d 1086 (Ind. Ct. App. 2003); *Worsham v. Greenfield*, 978 A.2d 839 (Md. Ct. App. 2009), *aff'd*, 78 A.3d 358 (Md. 2013); *Quest Sys., Inc.*, *v. Zepp*, 552 N.E.2d 593 (1990); *Macomb County Taxpayers*

Ass'n v. L'Anse Creuse Pub. Sch., 564 N.W.2d 457 (1997); *Morrison v. C.I.R.*, 565 F.3d 658 (9th Cir. 2009)). *See also Weichert Co. of Maryland, Inc. v. Faust*, 19 A.3d 393 (Md. 2011); *Poulard v. Lauth*, 793 N.E.2d 1120 (Ind. Ct. App. 2003). This is so for multiple reasons.

In *Worsham v. Greenfield*, the Maryland Court of Special Appeals affirmed a trial court's decision awarding attorney's fees to the prevailing party, despite the fact that the prevailing party's attorney was paid by an insurance carrier during the litigation. 978 A.2d 839 (Md. App. 2009). In doing so, the court first noted that, "[i]n today's world, one in which liability insurance, which frequently includes the cost of defense, is extremely widespread and even mandated in certain situations, a contrary conclusion would result in [fee-shifting provisions] never applying to persons maintaining a proceeding against a party who is insured but always applying to parties defending a proceeding." *Id*. at 848. Importantly, the court noted that insurers typically "have a contractual right, by way of subrogation or assignment, to pursue the insured's rights or compel an insured to pursue such rights on its behalf." *Id*. And even where there is no contractual right of subrogation, the common law right of equitable subrogation exists in most jurisdictions. *Id*.

On a petition for a *writ of certiorari*, the Maryland Court of Appeals affirmed, holding that (consistent with cases across the country) a prevailing party was entitled to attorney's fees even where those fees were paid by an insurance company on that party's behalf. 78 A.3d 358 (Md. 2013). This was true where a party sought

attorney's fees under a contractual provision where the prevailing party's employer paid the fees, in situations where legal services were rendered *pro bono*, and others like situations. *Id.* (citing *Weichert Co. of Md., Inc. v. Faust*, 19 A.3d 393 (2011); *Henriquez v. Henriquez*, 992 A.2d 446 (Md. Ct. App. 2010)). The court also noted that the "argument that [a prevailing party] cannot recover what he may have to pay over to the insurance company in satisfaction of its subrogation rights is patently frivolous." *Worsham*, 78 A.3d at 363 (quoting *Pelletier v. Zweifel*, 987 F.2d 716, 717 (11th Cir. 1993)).

Similarly, in *Ed A. Wilson, Inc. v. Gen. Serv. Admin*, the United States Court of Appeals for the Federal Circuit elaborated that the cost of defense and legal representation is a benefit that an insured pays for *in advance* through the payment of premiums. 126 F.3d 1406, 1408-1410 (Fed. Cir. 1997). So, the insured "can be viewed as having incurred legal fees insofar as they have paid for legal services in advance as a component of the . . . insurance premiums." *Id.* at 1410. Thus, there is no reason why a prevailing party is not entitled to an award of attorney's fees and costs, even where an insurance carrier has paid those fees and costs.

Under these cases, the Association was certainly entitled to an award of reasonable attorney's billed by Adams and Reese LLP, despite the fact that some of those fees were paid by an insurer. Here, James Pettis testified that

- As noted in *Wilson*, the Association had been paying its premiums, which constituted the advance payment of legal fees (T.T. 81);

- As noted in *Worsham*, the Association's policy provided for the right of contractual subrogation (T.T. 60);[5] and

- The Association had, in fact, paid Adams and Reese LLP a deductible of $2,500 (T.T. 59-60).

Dr. Hatfield last argues that the Association is not entitled to an award for the fees and costs billed by Adams and Reese LLP because the invoices submitted by the firm were redacted. (Appellant Br. 21.) But at the hearing below, Dr. Hatfield never objected to the redactions, and this argument is therefore waived. But even if it were not waived, the invoices still listed the dates, number of hours, hourly rates, and were accompanied by an affidavit setting forth and establishing the reasonableness of the fees under *McKee v. McKee*, even assuming such evidence was required in the first instance. *See* Miss. Code Ann. § 9-1-41 ("[i]n any action in which a court is authorized to award reasonable attorney's fees, the court shall not require the party seeking such fees to put on proof as to the reasonableness of the amount sought").

Accordingly, Dr. Hatfield has failed to demonstrate that the chancellor committed a "manifest abuse of discretion" in awarding the Association its attorney's fees and costs. *Mauck v. Columbus Hotel Co.*, 741 So. 2d 259 (Miss. 1999) (citing *Gilchrist Tractor Co. v. Stribling*, 192 So. 2d 409, 418 (Miss. 1966)).

3. Dr. Hatfield's remaining arguments are not properly before this Court.

Dr. Hatfield devotes the first half of his brief to accusing the chancellor of "**EXTREME PREJUDICE AND BIAS**" (*E.g.* Appellant Br. 12) (emphasis in

[5] Mississippi also recognizes the common law right of equitable subrogation. *E.g. First Nat'l Bank of Jackson v. Huff*, 441 So. 2d 1317 (Miss. 1983).

original) and accusing the undersigned counsel of "unethical and criminal behavior" and of "threatening" the chancellor. (Appellant Br. 8.) To support this utterly baseless argument, Dr. Hatfield attached to his record excerpts frivolous complaints that he filed against the chancellor and the undersigned with the Mississippi Bar—which complaints are *not* a part of the appellate record, thereby rendering Dr. Hatfield's record excerpts in violation of the Mississippi Rules of Appellate Procedure. In the span of seven pages, Dr. Hatfield lambastes the chancellor for "delay," "prejudice," and "bias." Not only are these arguments wholly unfounded and not properly before this Court on appeal, but Dr. Hatfield's language and "arguments" demonstrate the "disrespect or contempt for the trial court" sufficient to strike Dr. Hatfield's brief and record excerpts from the court file under M.R.A.P. 28(l).

Dr. Hatfield also begins his brief by discussing the merits of his motion for a mistrial, which was filed after this appeal was perfected. Not only is that motion not a part of the appellate record, but the chancellor entered an order denying that motion and sanctioning Dr. Hatfield on February 13, 2017. *Deer Haven Owners Association, Inc. v. Hatfield*, Civ. Action No. 2013-1076(C), Chancery Court of Madison County, Mississippi, Docket No. 135.

CONCLUSION

For these reasons, Dr. Hatfield has failed to show that the chancellor abused his discretion in granting the Association's motion for reconsideration and in

awarding the Association its reasonable attorney's fees and costs. This Court should therefore affirm the decision below.

Respectfully submitted,

By: s/Timothy J. Anzenberger
M. Scott Jones (MSB 102239)
Timothy J. Anzenberger (MSB 103854)
ADAMS AND REESE LLP
1018 Highland Colony Parkway
Suite 800
Ridgeland, MS 39157
601.353.0794
scott.jones@arlaw.com
tim.anzenberger@arlaw.com

By: s/James L. Martin
James L. Martin (MSB 1891)
TAGGART, RIMES & GRAHAM, PLLC
1022 Highland Colony Parkway
Suite 101
Ridgeland, MS 39157
601.898.8400
jim@trglawyers.com

March 8, 2017

CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that this day I have filed the foregoing document with the Clerk of the Court using the MEC system, which has sent notification of such filing to all those registered to receive such notification. Further, I do hereby certify that on March 8, 2017, I have caused to be served via U.S. Mail, postage prepaid, the forgoing document to the following non-MEC participants:

The Hon. Robert G. Clark, III
Chancellor
11th Chancery Court District
P.O. Box 404
Canton, MS 39046

Arlin George Hatfield, III
100 Deer Haven Drive
Madison, MS 39110

March 8, 2017.

s/Timothy J. Anzenberger
Of Counsel