IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2018-CA-00023-COA

ANGELA VERMILLION **APPELLANT**

v.

ROBYN PERKETT AND DOUGLAS P. VERMILLION, II **APPELLEES**

DATE OF JUDGMENT:	12/06/2017
TRIAL JUDGE:	HON. JENNIFER T. SCHLOEGEL
COURT FROM WHICH APPEALED:	HARRISON COUNTY CHANCERY COURT, FIRST JUDICIAL DISTRICT
ATTORNEY FOR APPELLANT:	G. CHARLES BORDIS IV
ATTORNEYS FOR APPELLEES:	DEREK R. CUSICK KIMBER RENEE ROTEN
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
DISPOSITION:	AFFIRMED - 03/19/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE CARLTON AND J. WILSON, P.JJ., AND McDONALD, J.

CARLTON, P.J., FOR THE COURT:

¶1. Angela Vermillion filed a complaint seeking grandparent visitation with her granddaughter, Chella Rose Vermillion. Chella Rose's natural parents, Robyn Perkett Vermillion and Douglas Vermillion II, contested Angela's complaint. After a bench trial, the Harrison County Chancery Court granted Robyn and Douglas's motion for a directed verdict. The chancellor also awarded Robyn and Douglas attorney's fees.

¶2. Angela appeals and asserts the following assignments of error: (1) the trial court erred in granting a directed verdict; (2) the trial court applied the wrong legal standard with respect to grandparent visitation; (3) the trial court erred in awarding attorney's fees to Robyn and

Douglas; and (4) the trial court erred in dismissing Angela's complaint with prejudice. After our review, we find no error. We therefore affirm the chancellor's judgment.

FACTS

¶3. Angela is the natural mother of Douglas. In 2014, Chella Rose was born to Robyn and Douglas. The record reflects that when Chella Rose was born, Angela visited the hospital and was allowed to hold her. Angela next saw Chella Rose when the baby was forty-nine days old. Angela claims that at that time, Robyn informed Angela that she would never see Chella Rose again. Angela maintains that she has indeed been denied access to Chella Rose ever since.

¶4. On August 9, 2016, Angela filed a complaint for grandparent visitation. At the time Angela filed her complaint, Chella Rose was a little over two years old. In her complaint, Angela claimed that she was entitled to visitation with Chella Rose because it would be in Chella Rose's best interests and would "allow [her] to learn, discover[,] and become familiar with her paternal grandparents and their family."

¶5. Robyn and Douglas testified that they are opposed to Angela having any visitation with Chella Rose. Douglas stated that since he was in high school, he and his mother had a contentious relationship that alternated between civility and hostility. Robyn stated that during her dating relationship with Douglas, she and Angela also had a contentious relationship. Robyn expressed that the relationship remained contentious after she and Douglas were married. Robyn and Douglas also asserted that even before Chella Rose was born, Angela attempted to interfere in their parenting decisions. Robyn and Douglas further

expressed concerns about Chella Rose's safety while in Angela's presence.

¶6. On September 23, 2016, Robyn and Douglas filed a motion for attorney's fees.[1] The chancellor held a bench trial on May 22, 2017, and the trial was continued until October 31, 2017. After Angela's direct examination—but prior to her cross-examination—Robyn and Douglas moved for a directed verdict. The chancellor declined to rule on Robyn and Douglas's motion for a directed verdict at that time. Counsel for Robyn and Douglas cross-examined Angela, and then Angela rested her case. At that time, Robyn and Douglas renewed their motion for a directed verdict. The chancellor made her ruling from the bench and granted the motion for a directed verdict.

¶7. On November 9, 2017, the chancellor entered an order granting the motion for attorney's fees and awarding Robyn and Douglas attorney's fees in the amount of $7,384.47. On December 6, 2017, the chancellor entered her judgment for a directed verdict and dismissed the matter with prejudice. In the judgment, the chancellor stated that "after reviewing the testimony and evidence presented and having heard the arguments of the parties, [the court] finds that, applying the applicable standard of law to the facts evidenced at the hearing, [Angela] is not entitled to grandparent visitation." The chancellor made a handwritten notation on the judgment stating that she would incorporate into the order the ruling read into the record from the bench.

¶8. On January 4, 2018, Angela filed her notice appealing the trial court's December 6, 2017 judgment for a directed verdict and the November 9, 2017 order granting attorney's

[1] On October 30, 2016, Robyn and Douglas filed a supplement to their motion for attorney's fees.

fees.

STANDARD OF REVIEW

¶9. "Findings of a chancellor will not be disturbed on review unless the chancellor was manifestly wrong, clearly erroneous, or applied the wrong legal standard." *Smith v. Martin*, 222 So. 3d 255, 259 (¶4) (Miss. 2017) (internal quotation marks omitted). We review questions of law under a de novo standard. *T.T.W. v. C.C.*, 839 So. 2d 501, 503 (¶6) (Miss. 2003).

DISCUSSION

I. Directed Verdict

¶10. Angela argues that the chancellor erred in granting Robyn and Douglas's motion for a directed verdict. Angela asserts that because the case was tried without a jury, Robyn and Douglas should have filed a motion for involuntary dismissal, rather than a motion for a directed verdict. Angela also argues that the chancellor applied an erroneous interpretation of Mississippi Code Annotated section 93-16-3(2)–(3) (Rev. 2013); specifically, whether Angela established a viable relationship with Chella Rose.

¶11. We first address Angela's procedural issue. Mississippi Rule of Civil Procedure 41(b), which governs involuntary dismissals, "applies in actions tried by the court without a jury, where the judge is also the fact-finder." *All Types Truck Sales Inc. v. Carter & Mullings Inc.*, 178 So. 3d 755, 758 (¶13) (Miss. Ct. App. 2012) (internal quotation marks omitted). "Mississippi Rule of Civil Procedure 50(a), which governs directed verdicts, applies to jury trials, where the judge is not the fact-finder." *Id.* at (¶12) (emphasis omitted).

We recognize that "the appropriate motion in a case tried without a jury is not a motion for directed verdict, but for involuntary dismissal . . . ." *Gulfport-Biloxi Reg'l Airport Auth. v. Montclair Travel Agency Inc*., 937 So. 2d 1000, 1004 (¶13) (Miss. Ct. App. 2006). In similar cases, rather than reversing a trial court's judgment granting a directed verdict due to a procedural error, this Court has considered such appeals under the standard of review for a motion for involuntary dismissal. *Id*. at 1006 (¶18); *Ladner v. Stone County*, 938 So. 2d 270, 273 (¶¶9-10) (Miss. Ct. App. 2006). We will therefore review the judgment at issue before us under the standard of review for Rule 41(b) involuntary dismissals.

¶12. In applying this standard, we recognize that "[a]ppellate courts . . . employ a more deferential standard of review when considering involuntary dismissals [at a bench trial] than when reviewing grants of directed verdicts" at a jury trial. *All Types Truck Sales*, 178 So. 3d at 758 (¶13). Rule 41(b) involuntary dismissals are reviewed under a "substantial-evidence/manifest-error standard," rather than the de novo standard applied when reviewing directed verdicts. *Id*. "A judge should grant a motion for involuntary dismissal if, after viewing the evidence *fairly*, rather than in the light most favorable to the plaintiff, the judge would find for the defendant." *Id*. (quoting *Gulfport-Biloxi Reg'l Airport Auth*., 937 So. 2d at 1004 (¶13)). "The court must deny a motion to dismiss only if the judge would be obliged to find for the plaintiff if the plaintiff's evidence were all the evidence offered in the case." *Id*.

¶13. Turning to address the merits[2] of Angela's issue, Angela asserts that the chancellor

[2] In her first assignment of error, Angela additionally argues that she complied with all of the requirements of Mississippi Code Annotated section 93-16-5 (Rev. 2013) and

improperly construed sections 93-16-3(2)–(3) and therefore erred in granting Robyn and Douglas's motion for a directed verdict. Angela explains that during the trial, Robyn and Douglas argued that under section 96-16-3(3), Angela was required to show "*frequent* overnight visits or at least six months of financial support prior to the date of filing" in order to prove that she had a viable relationship with Chella Rose. (Emphasis added). Angela argues that the statutory language actually requires "frequent visitation including *occasional* overnight visitation and partial financial support." Miss. Code Ann. § 96-16-3(3) (emphasis added). On appeal, Robyn and Douglas agree with Angela's assertion that the statute only requires occasional overnight visitation and financial support in whole or in part for not less than six months. However, Robyn and Douglas argue that Angela still failed to satisfy the minimum statutory burden, because Angela never exercised overnight visitation with Chella Rose and never provided any financial support, in whole or in part.

¶14. Grandparents' visitation rights are purely statutory. *Smith*, 222 So. 3d at 263 (¶14); *see also Aydelott v. Quartaro*, 124 So. 3d 97, 100 (¶9) (Miss. Ct. App. 2013) ("There is no common-law right to grandparent visitation.").[3] These rights are codified in Mississippi Code Annotated sections 93-16-1 to -7 (Rev. 2013). Section 93-16-3(2), the statutory

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offered testimony and proof with respect to each of the factors set forth in *Martin v. Coop*, 693 So. 2d 912, 916 (Miss. 1997), *abrogated in part on other grounds by Smith*, 222 So. 3d at 263 (¶15), as to why grandparent visitation would serve Chella Rose's best interest. We will address the requirements of section 93-16-5 and the *Martin* factors later in our opinion.

[3] In *Aydelott*, 124 So. 3d at 104 (¶23) (quoting *Stacy v. Ross*, 798 So. 2d 1275, 1280 (¶23) (Miss. 2001)), this Court also recognized that "[p]arents with custody have a paramount right to control the environment, physical, social, and emotional, to which their children are exposed."

provision applicable to the facts before us, permits grandparents to petition for visitation "when a grandparent shows (1) a 'viable relationship' with his or her grandchild has been established, (2) visitation with the grandchild has been unreasonably denied by the grandchild's parent, and (3) visitation is in the grandchild's best interest." *Eaves v. Gatlin*, 194 So. 3d 171, 173 (¶6) (Miss. Ct. App. 2015). The Mississippi Supreme Court has emphasized that "the best interest of the child must be the polestar consideration." *Smith*, 222 So. 3d at 263 (¶15). In determining the best interests of the child with regard to grandparent visitation, the supreme court has held that "making findings of fact under the *Martin* factors is an integral part of a determination of what is in the best interests of a child." *T.T.W.*, 839 So. 2d at 505 (¶12).

¶15. In *Aydelott*, 124 So. 3d at 100 (¶10) (internal quotation marks omitted), this Court held that in order for the grandparents in that case "to have the statutory right to petition for visitation, they first had to show they had established a viable relationship with each granddaughter." Section 93-16-3(3) defines "viable relationship" as

> a relationship in which the grandparents or either of them have voluntarily and in good faith supported the child financially in whole or in part for a period of not less than six (6) months before filing any petition for visitation rights with the child, the grandparents have had frequent visitation including occasional overnight visitation with said child for a period of not less than one (1) year, or the child has been cared for by the grandparents or either of them over a significant period of time during the time the parent has been in jail or on military duty that necessitates the absence of the parent from the home.

¶16. In reviewing whether Angela met her burden of proving that she had established a viable relationship with Chella Rose, we find the following exchange in the transcript helpful to our determination. During Angela's cross-examination, counsel for Robyn and Douglas

walked Angela through the requirements of section 93-16-3(2) and questioned her as to whether she met these requirements:

[COUNSEL]: Have you provided financial support of Chella Rose for six months prior to August 9th of 2016?

[ANGELA]: No.

[COUNSEL]: Have you had frequent visitation with Chella Rose, or was it the three times that you were in the room with her, and once you've held her?

[ANGELA]: I've not been allowed.

[COUNSEL]: Have you ever had an overnight visit with Chella Rose?

[ANGELA]: Not been allowed.

[COUNSEL]: Has Douglas ever had any military service or jail time during which time he asked you to care for his daughter? Has Douglas ever served in the military and asked you to take care of his daughter during that time?

[ANGELA]: No.

[COUNSEL]: Has he ever served any jail time and asked for you to take care of his daughter during that time?

[ANGELA]: I've only talked to him three times in three years. I don't know.

[COUNSEL]: How about Robyn? Did she serve any time in the military and ask for your help in taking care of their child?

[ANGELA]: I don't—she's not been in the military.

[COUNSEL]: How about jail time? Did Robyn ask you during some period of confinement whether you could care for Chella Rose in her absence?

[ANGELA]: I don't know. I've not seen her in three years. She could have been in jail. I mean, I don't know. That's my answer. I don't know. I know . . . neither one of them have been in the military.

¶17. The record reflects that after Angela's direct examination, but prior to her cross-examination, Robyn and Douglas moved for a directed verdict. At that time, counsel for Robyn and Douglas argued that Angela failed to meet the requirements set forth in section 93-16-3(1)–(2); specifically, that Angela failed to show that she had established a viable relationship with Chella Rose. The chancellor declined to rule on Robyn and Douglas's motion for a directed verdict at that time.

¶18. At the close of Angela's case-in-chief, Robyn and Douglas renewed their motion for a directed verdict. During arguments on the motion, the chancellor reminded counsel for Angela that regardless of whether the court ultimately found that Robyn and Douglas's denial of visitation to Angela was unreasonable, "you [also] have to establish a viable relationship." Counsel for Angela admitted that they could not establish a viable relationship "because a viable relationship is defined as six months. And if the visitation is stopped and you find unreasonable visitation at [forty-nine] days, it's impossible to comply. So we acknowledge that coming in." The chancellor ultimately ruled that "for the reasons set forth in [Robyn and Douglas's] motion, I will grant the motion for directed verdict."

¶19. The record clearly shows that Angela failed to meet her burden under section 93-16-3(2) of showing that she had established a viable relationship with Chella Rose. After our review, we find no manifest error in the chancellor's decision. We therefore affirm the chancellor's judgment granting a directed verdict in favor of Robyn and Douglas.

II. Legal Standard

¶20. Angela next argues that the chancellor applied the wrong legal standard with respect to grandparent visitation; specifically, by refusing to consider section 93-16-5, which addresses the best interest of the child. Angela asserts that she began her relationship and bonding with her grandchild before Chella Rose's birth and that the chancellor erred by failing to consider "Angela's effort prior to the live birth." Angela maintains that "[t]he proof has shown that through the second and third trimester of pregnancy, everyone was happy." Angela asserts that the chancellor is required to consider section 93-16-5 prior to sustaining a motion for a directed verdict and dismissing Angela's claim with prejudice.

¶21. Our careful review of relevant precedent shows that grandparents seeking visitation rights must first satisfy the requirements of section 93-16-3 before the chancellor is required to address the best interests of the child. In *Aydelott*, 124 So. 3d at 100 (¶10) (internal quotation marks omitted), this Court outlined the factors that the grandparents in that case had to prove in order "to have the statutory right to petition for visitation . . . ." This Court explained that the grandparents "first had to show they had established a viable relationship with each granddaughter." *Id*. The grandparents "next had to show that 'the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child.'" *Id*. at 101 (¶10) (quoting Miss. Code Ann. § 93-16-3(2)(a)). This Court then expressed that "[o]nly by the [grandparents'] establishment of a viable relationship and unreasonable denial of visitation could [they] reach the polestar consideration for statutory grandparent visitation—whether visitation rights of the grandparent with the child would be in the best

interests of the child." *Id*. at (¶11) (internal quotation marks omitted) (citing Miss. Code Ann. § 93-16-3(2)(b)). This Court explained that "[g]randparent visitation is different than child custody, as there are other evidentiary considerations besides the child's best interest that must be considered—namely, whether the grandparent has produced sufficient evidence to show he or she is authorized under the statute to be awarded visitation." *Id*. at 103 (¶19).

¶22. Similarly, in *Hillman v. Vance*, 910 So. 2d 43, 47 (¶11) (Miss. Ct. App. 2005), this Court held that because the chancellor found that the grandparent seeking visitation failed to meet one of the requirements of section 93-16-3(2), the chancellor could have disposed of the visitation request without conducting a best-interest analysis under *Martin*.[4] *See also Smith*, 222 So. 3d at 258 (¶2) (affirming the chancellor's judgment granting visitation rights to the grandparents when the chancellor considered the *Martin* factors only "[a]fter determining that the [grandparents] were entitled to visitation under both section 93-16-3(1) and section 93-16-3(2) . . .").

¶23. Since the record reflects that Angela failed to meet her burden of proving that she had established a viable relationship with Chella Rose, we find that the chancellor was not required to consider section 93-16-5 before granting the motion for directed verdict. This issue lacks merit.

III. Attorney's Fees

¶24. Angela argues that the chancellor erred in awarding attorney's fees to Robyn and Douglas. Angela acknowledges that section 93-16-3(4) allows a trial court to award

[4] The chancellor found that the parents' denial of visitation to the grandparent was reasonable. *Id*. at 47 (¶11).

attorney's fees to the parents in a grandparent-visitation case, but she asserts that the statute also allows for an exception to such award where the chancellor finds that no financial hardship will be imposed on the parents. Angela claims that the record shows that Robyn and Douglas are both employed and that payment of the attorney's fees that they incurred would cause them no financial hardship.

¶25. Angela also argues that because Robyn and Douglas's counsel failed to produce Robyn and Douglas's contract for legal services, Angela was deprived of her right to review and question Robyn and Douglas regarding the contents of the contract. Angela further maintains that, after the trial, Robyn and Douglas's counsel presented a letter to the chancellor that summarized the attorney's fees assessed to Robyn and Douglas. Angela argues that she was not provided with the opportunity to review the letter or cross-examine Robyn and Douglas regarding the contents.

¶26. In grandparent-visitation cases, section 93-16-3(4) allows for the parents to seek attorney's fees from the grandparents as follows:

> The court shall on motion of the parent or parents direct the grandparents to pay reasonable attorney's fees to the parent or parents in advance and prior to any hearing, except in cases in which the court finds that no financial hardship will be imposed upon the parents. The court may also direct the grandparents to pay reasonable attorney's fees to the parent or parents of the child and court costs regardless of the outcome of the petition.

We recognize that the question of whether Robyn and Douglas "were entitled to attorney's fees or the no-financial-hardship exception applied is one entrusted to the sound discretion of the chancellor." *Aydelott*, 124 So. 3d at 104 (¶26) (internal quotation mark omitted) (quoting *Zeman v. Stanford*, 789 So. 2d 798, 806 (¶30) (Miss. 2001)).

¶27. The testimony at trial reflected that Robyn was employed as a real estate agent and Douglas was employed as an offshore welder. Douglas testified that he earned approximately $80,000 in 2016. When asked by counsel whether she earned "at least $2,000 a month," Robyn responded: "Probably not." Robyn testified that although she and Douglas earned enough income to make ends meet, they were financially stressed due to the grandparent-visitation action and resulting attorney's fees. Robyn explained that Douglas's income "pays for the majority of our bills," but her income was sometimes necessary to compensate for the remaining bills. However, Robyn testified that after commencement of the grandparent-visitation action, "everything [she has] made this year . . . goes to [her] attorney." Robyn also stated that Douglas would have to miss a week of work because of the court proceedings, and she would "have to compensate" for the missed income.

¶28. Robyn testified that she and Douglas each had separate savings accounts. Robyn stated that she had approximately $2,000 in her savings account. Robyn explained that she set aside the money in her savings account for the purpose of paying her legal fees.

¶29. Counsel for Robyn and Douglas admitted that they did not have the contract for legal services, and therefore it was not admitted into evidence. However, counsel for Robyn and Douglas cross-examined them regarding the invoices for attorney's fees. The record also reflects that counsel for Robyn and Douglas received a $1,500 payment from Angela toward their attorney's fees.

¶30. On November 9, 2017, the chancellor entered an order granting Robyn and Douglas's motion for attorney's fees. In the order, the chancellor found that after considering the

motion for attorney's fees, the parties' testimony, and the invoices and statement of account received into evidence, Robyn and Douglas were entitled to attorney's fees in the amount of $7,384.47. The chancellor also noted a credit to Angela in the amount of $1,500 from a prior payment toward the fee award.

¶31. After our review, we find no abuse of discretion by the chancellor in awarding attorney's fees to Robyn and Douglas under section 93-16-3(4). This issue lacks merit.

IV. Dismissal of Complaint

¶32. Angela argues that the chancellor erred in dismissing her complaint for grandparent visitation "with prejudice as to refiling of [the] same." Angela asserts that the chancellor's ruling fails to consider the fact that the relationship between Angela, Robyn, and Douglas could improve with the passage of time, or that Robyn and Douglas could divorce, or that one of them could die, creating a situation which would otherwise allow Angela to seek grandparent visitation rights under section 93-16-3(1).

¶33. As stated above, we are reviewing the chancellor's judgment of directed verdict under the standard set forth for Rule 41(b) involuntary dismissals. "[I]n reviewing a trial court's grant or denial of a Rule 41(b) motion for involuntary dismissal, we apply the substantial evidence/manifest error standards." *Amos ex rel. Amos v. Jackson Pub. Sch. Dist*., 139 So. 3d 120, 123 (¶7) (Miss. Ct. App. 2014) (quoting *Gulfport-Biloxi Reg'l Airport Auth. v. Montclair Travel Agency Inc*., 937 So. 2d 1000, 1005 (¶13) (Miss. Ct. App. 2006)). We recognize that Rule 41(b) "give[s] the judge trying a case without a jury, when considering a 41(b) motion, the discretion to rule on the facts as well as the law and to enter a final

judgment on the merits." *Mitchell v. Rawls*, 493 So. 2d 361, 364-65 (Miss. 1986). "A dismissal with prejudice indicates a dismissal on the merits." *Jackson v. Bell*, 123 So. 3d 436, 439 (¶17) (Miss. 2013).

¶34. In the present case, Robyn and Douglas assert that Angela failed to object to the wording of the proposed judgment of directed verdict at the time it was submitted to the chancellor; therefore, she cannot raise this issue for the first time on appeal. However, the record reflects on the judgment of directed verdict, counsel for Angela signed the judgment as "approved as to form only" and then handwrote the words "and not content." Angela argues that her counsel's notation that the judgment was approved as to form only, and not content, is "concrete proof" that Angela took issue with the content of the judgment.

¶35. After our review, we find no error by the chancellor in dismissing Angela's complaint with prejudice. However, we find that the dismissal with prejudice applies only to the instant claim and complaint filed by Angela; it does not bar Angela from filing a future claim stemming from a new set of facts and circumstances establishing a viable relationship with Chella Rose.

¶36. **AFFIRMED.**

BARNES, C.J., J. WILSON, P.J., GREENLEE, WESTBROOKS, McDONALD, McCARTY AND C. WILSON, JJ., CONCUR. TINDELL AND LAWRENCE, JJ., NOT PARTICIPATING.