

IN THE COURT OF APPEALS 12/12/95
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-00038 COA

EMERSON ELECTRIC COMPANY

APPELLANT

v.

WILLIAM A. BRYANT

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. DON GRIST

COURT FROM WHICH APPEALED: LAFAYETTE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

RONALD HENRY PIERCE

ATTORNEY FOR APPELLEE:

ANDRE K. HOWORTH

NATURE OF THE CASE: TEMPORARY RESTRAINING ORDER

TRIAL COURT DISPOSITION: ATTORNEY FEES WERE AWARDED

EN BANC

BARBER, J., FOR THE COURT:

In this action for the dissolution of a temporary restraining order, the chancery court awarded

\$250.00 to William Bryant for attorney fees. Claiming that the chancery court was manifestly in error, Emerson Electric appeals. We conclude that the chancellor's decision was not manifestly in error.

FACTS

On December 7, 1994, the attorney for Emerson Electric filed a complaint in which it sought a temporary restraining order to prevent William Bryant from (1) entering the Emerson plant, (2) contacting employees of Emerson (other than by mail), (3) attempting to contact Joe Corrigan or any members of his family, or (4) otherwise attempting to threaten, intimidate and/or harass or contact Emerson's employees. In support of the complaint, Emerson stated that Bryant, a former employee, entered the Emerson plant at or about 4:00 p.m. on December 6, 1994, and began shouting profanities as he searched for his former manager, Joe Corrigan. Upon locating Corrigan in his office, Bryant began screaming and calling Corrigan names. Bryant refused to leave the premises when asked to do so by Leonard Farrow, another Emerson employee. Thereafter, Bryant entered Hazel McLaughlin's office and confronted McLaughlin and Jim Turner, shouting and using profanity in almost every sentence. Emerson charged that Bryant then proceeded to the conference room where a meeting was being held, used profanity, and disrupted the meeting.

Emerson complained that it and/or its employees would suffer immediate and irreparable injury, loss and damage if the restraining order was not granted. Emerson concluded that such injury, loss and damage would include, but not necessarily be limited to, possible violent confrontations and other damaging disruptions of Emerson's operations. Ronald Henry Pierce, Emerson's attorney, certified that he had made reasonable efforts to give notice of the request for the temporary restraining order to Bryant by attempting to reach Bryant by telephone.

On December 7, 1994, the chancellor granted the temporary restraining order. A hearing on the merits was scheduled for December 12, 1994. On December 12, 1994, Emerson informed the court that Bryant had complied with the temporary restraining order and that it did not wish to pursue a permanent injunction.

During the hearing held on December 12, 1994, in which Bryant was the only person to testify, Bryant admitted that on December 6, 1994, he went to Emerson and had a heated conversation with one of Emerson's employees, Corrigan. In explaining his purpose in going to Emerson to see Corrigan, Bryant stated the following:

I had recently tendered my resignation from Emerson, and the day after I did that, they chose to go ahead and dismiss me with pay, which was no problem; you know, they had me leave [sic] the plant immediately, and I did. And Mr. Corrigan's son is in my wife's class at school, her 4th grade class. His son is an absolutely perfect student, extremely bright, extremely well-mannered, my wife's favorite student as it were. And as my wife and I were talking, I was glad to be through with Emerson. I was tired of being with them, didn't want to be reminded of Emerson anymore. And she happened to have two paperweights on her desk that said "Emerson Electric" on them, and she totally, innocently, without my knowing it gave the two paperweights to Matt Corrigan, Joe Corrigan's son. And he was very thrilled to get them. The kid -- the other kids in the class were jealous she told me because they all wanted these sparkley [sic] little paperweights.

She gave the paperweights to him because his daddy worked for Emerson, and she knew he was proud of his daddy and would like to have something from Emerson. For some reason, Mr. Corrigan took an extreme a front [sic] to that and thought evidently that she was trying to create trouble --

Bryant explained that the child's father, Corrigan, went to the school where his wife worked, met with the school principal, and told him about his wife giving the paperweights to his son. After that meeting, the principal met with his wife. According to Bryant, when his wife arrived home from school, she was crying and very upset.

She was offended and very hurt because someone had accused her of making trouble for a child, something she absolutely would never do. This attack, as it were, on my wife is what infuriated me and made me quite angry. I proceeded to go directly to Mr. Corrigan's office, and I told him how low-down I thought he was. And, basically, that's it. I also told two other people as I was leaving the plant because I know the way Emerson likes to keep things secret that nobody [sic] would ever know anything except I came out there and raised my voice, and I wanted them to know why I was out there. And, so, I confronted two people only to tell them and inform them why I was out there.

Bryant testified that Leonard Farrow had neither intervened nor told him to leave the premises as alleged in the complaint. Instead Farrow, an old friend of Bryant, had patted him on the back saying "Calm down, calm down, calm down." Bryant also explained that he did not go to the conference room and interrupt a meeting by shouting profanity nor was he otherwise disruptive. Bryant stated that he never threatened physical violence on anybody nor was he requested to leave. Rather, he left on his own accord. Moreover, when he told Farrow, "Well, you can throw me out now," Farrow told him, "No, No. No, I'm not going to throw you out."

At the conclusion of the hearing, the chancellor granted Emerson's request to dissolve the restraining order, and Bryant's motion for attorney fees.

ANALYSIS

Emerson contends that the chancellor erred when he ordered Emerson to pay \$250.00 in attorney fees to Bryant's attorney. Emerson argues that since the chancellor made no specific findings that Bryant was "wrongfully enjoined or restrained," under Rule 65(e) of the Mississippi Rules of Civil Procedure, it must be "assumed" that the chancellor found that Bryant was wrongfully enjoined or restrained in order to award attorneys fees to Bryant's counsel. Emerson argues, however, that there is nothing in the record to support such a "presumed finding." Emerson explains that the facts of the Verified Complaint clearly justified Emerson's apprehension that Bryant would make good on his threat to return to the plant and it seems equally indisputable that Emerson was faced with the threat of irreparable injury, including but not limited to, possible violence and other damaging disruptions of Emerson's workplace.

In response, Bryant argues that the restraining order filed by Emerson was designed to harass him, and that the chancellor's award of attorney fees was justified under the circumstances of this case.

"The chancellor as the trier of fact, evaluates the sufficiency of the proof based on the credibility of witnesses and the weight of their testimony." *Denson v. George*, 642 So. 2d 909, 914 (Miss. 1994) (citations omitted). "And the chancellor, being the only one to hear the testimony of witnesses and observe demeanor, is to judge their credibility." *Id.* (citations omitted). The chancellor's findings "will not be disturbed unless the chancellor abused his discretion, was manifestly wrong or clearly erroneous, or an erroneous legal standard was applied." *Shipman v. North Panola Consol. Sch. Dist.*, 641 So. 2d 1106, 1115 (Miss. 1994) (citations omitted).

In the instant case, the chancellor made the following finding of facts and ruling:

The facts of this case are that the Plaintiff showed up before this Court in Tippah County on Thursday approximately 1:30 p.m. This Court signed a Temporary Restraining Order and set this matter for hearing on the 12th day of December, 1994, at 9:30 a.m. at the courthouse in Holly Springs, Marshall County, Mississippi.

It is the further finding of this Court that the Plaintiff has showed up today asking that this Restraining Order be dissolved. The Defendant is here denying that there was ever any need for a Restraining Order, that he did go to the Plaintiff's place of employment and apparently, for the lack of better term, may have generally given Mr. Corrigan a general cursing where profanities were used and possibly a threat that if they thought he was mad and/or pissed at that time, basically, wait to see what he was like if he had to come back.

Subsequent to that, he was told by and patted on the back or during that time by another employee of authority with Emerson and told to settle down after the completion of the cursing. He informed a Mr. Farrow that he was finished and he could throw him out. He was told by Mr. Farrow that they did not intend to do that.

Also, it was represented to this Court before the Temporary Restraining Order was issued that there was an attempt made to get in touch with the Defendant; however, through checking the phone book, the Plaintiff obtained the wrong phone number from the phone book for the Defendant.

Now, again, the Plaintiff is here this morning asking himself through his counsel to dissolve this Temporary Restraining Order. The Defendant is not asking for it to be dissolved, neither is his attorney. They just showed up because this Court ordered them to show up here.

It is the finding of this Court that Mr. Bryant is entitled to attorney's fees in the amount of two hundred and fifty dollars. And that would be the Order of this Court, that two hundred and fifty dollars be paid to Mr. Bryant for the benefit of his counsel, that the balance of the bond be returned to -- excuse me, a surety bond was signed, that the Temporary Restraining Order would be dissolved.

After a review of the record, we cannot say that the chancellor's findings were manifestly in error.

Additionally, Emerson complains that because there is nothing in the record to indicate how the chancellor determined that \$250.00 was the appropriate amount of attorney fees, the award of such fees was error. Indeed, our courts have held that although "the award and quantum of attorneys' fees is a matter committed to the sound discretion of the trial judge," *Young v. Huron Smith Oil Co.*, 564 So. 2d 36, 40 (Miss. 1990), "[t]he court may not judicially note what is a reasonable fee and it certainly may not merely pull a figure out of thin air." *Key Constr. Inc. v. H & M Gas Co.*, 537 So. 2d 1318, 1324 (Miss. 1989). "Rather, the party entitled to recover a reasonable fee must furnish an evidentiary predicate therefor." *Id.*; *Young v. Huron Smith Oil Co.*, 564 So. 2d 36, 40 (Miss. 1990); *Smith v. Smith*, 545 So. 2d 725, 729 (Miss. 1989). This issue, however, is untimely raised.

"Under Mississippi law, an appellant is not entitled to raise a new issue on appeal, since to do so prevents the trial court from having an opportunity to address the alleged error." *Crowe v. Smith*, 603 So. 2d 301 (Miss. 1992) citing *Cooper v. Lawson*, 264 So. 2d 890, 891 (Miss. 1972). *Crowe* is an opinion written by Presiding Justice Prather of the Mississippi Supreme Court.

To paraphrase *Crowe, supra*, if Emerson believed that the chancellor's award of attorney's fees in the amount of \$250.00 was not supported by the record or the findings of the chancellor, the issue should have been raised with supporting evidence in the trial court. Emerson had ample opportunity to raise such an objection immediately following the chancellor's findings that the temporary restraining order should be dissolved and, consequently, the award of attorney's fees to Bryant for his counsel. This view is supported by the following record excerpts:

MR. HOWORTH: In brief rebuttal, Your Honor, we are here as we were on notice that there was going to be a Permanent Injunction Hearing today. There's not going to be one because they're not requesting it. Mr. Pierce's efforts, reasonable efforts, to provide notice are -- as the Court has seen have proven not reasonable, and we think we're entitled to attorney's fees.

THE COURT: Anything else, Mr. Howorth?

MR. HOWORTH: No, sir, Your Honor.

THE COURT: Mr. Pierce?

MR. PIERCE: No, sir, Your Honor.

The second opportunity to object occurred when the court found as follows:

THE COURT: It is the finding of this Court that Mr. Bryant is entitled to attorney's fees in the amount of two hundred and fifty dollars. And that would be the Order of this Court, that two hundred and fifty dollars be paid to Mr. Bryant for the benefit of his counsel, that the balance of the bond be returned to -- excuse me, a surety bond was signed, that the

Temporary Restraining Order would be dissolved. Is there anything further this Court needs to address, Mr. Howorth?

MR. HOWORTH: No, Your Honor.

THE COURT: Mr. Pierce?

MR. PIERCE: No, Your Honor.

MR. HOWORTH: I would ask that Mr. Pierce prepare the Order for my approval.

THE COURT: Mr. Pierce, if you would, prepare the Order for the Court. Send a copy of it to Mr. Howorth, and you can mail a copy of it to the Court or I will be back here tomorrow.

Another excellent opportunity was given Emerson when its counsel was given the task of preparing the judgment. Significantly, the form of the judgment prepared by Emerson's counsel and approved by him contained both the dissolution of the temporary restraining order and the order to pay \$250.00 to defendant for benefit of his counsel as attorney's fees. The form of the judgment approved by Emerson's counsel was also approved by counsel for Bryant and duly entered by the chancellor without any opposition whatsoever.

To summarize, counsel for Emerson had ample opportunity to object to (1) the court's findings and (2) the court's judgment which he prepared. Having failed to do so, Emerson has no standing in this Court to pursue an appeal of findings and a judgment when the chancellor was given no opportunity to defend his findings and judgment. A lower court cannot be held in error on an issue which was not presented to it for a decision. *Chase v. State*, 645 So. 2d 829 (Miss. 1994). Therefore, this issue is not suitable for consideration on appeal. In order for the appellant to preserve his right to raise an issue on appeal, it is necessary that he contemporaneously object at trial. Where

no objection is made, the appellant is deemed to have waived this right. *Roberson v. State*, 595 So. 2d 1310 (Miss. 1992).

THE JUDGMENT OF THE LAFAYETTE COUNTY CHANCERY COURT IS AFFIRMED. COSTS ARE TAXED TO THE APPELLANT.

BRIDGES, P.J., COLEMAN AND PAYNE, JJ., CONCUR. FRAISER, C.J., CONCURS IN RESULTS ONLY. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DIAZ, J. MCMILLIN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY THOMAS, P.J., AND SOUTHWICK, J.

IN THE COURT OF APPEALS 12/12/95
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-00038 COA

EMERSON ELECTRIC COMPANY

APPELLANT

v.

WILLIAM A. BRYANT

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

KING, J., DISSENTING:

I respectfully dissent, and would reverse this matter for an on-the-record determination of attorney fees.

The majority suggests that the failure of Emerson to interpose an objection when the trial court announced the award of \$250.00 attorney fees, precludes this matter being now considered on appeal. I disagree. The verdict of any court, whether determined by a jury, or a judge, must be supported by the record. *See Yarbrough v. Camphor*, 645 So. 2d 867, 872, 873 (Miss. 1994) (Banks, J., dissenting). Where such a verdict, both as to entitlement and amount, is not supported by the record, this Court has an obligation to act. *Id.*

In the present case, the record clearly reflects an entitlement by Bryant to attorney fees. However, the record does not present a basis for determining the amount to which Bryant was entitled. The award of attorney fees under these circumstances is plain error and should be noted by this Court.

KING, J., DISSENTING WITH SEPARATE WRITTEN OPINION JOINED BY

DIAZ, J.