

IN THE COURT OF APPEALS 05/07/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01021 COA

**PAUL MOON, JAMES BAUGH, WILLIAM WELLS, JAMES T. JOHNSON AND ROBERT
D. JOHNSON**

APPELLANTS

v.

**CEDAR HILLS HUNTING CLUB, RODNEY D. HUDGINS, CHARLES RAY NIX, MACK
THAMES AND TOMMY D. THAMES**

APPELLEES

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

TRIAL JUDGE: HON. W. O. DILLARD

COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS:

JAMES G. MCINTYRE

ATTORNEY FOR APPELLEES: BILLY W. KEYES, JANET DOUGLAS COX

NATURE OF THE CASE: DIRECTORS' MISAPPROPRIATION

TRIAL COURT DISPOSITION: ORDERED PROXY VOTE FOR OFFICERS

BEFORE BRIDGES, P.J., COLEMAN, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

This is an appeal from a judgment that was entered in the Chancery Court of Hinds County. The

judgment was signed by the chancellor before it was circulated to Appellant's counsel. Appellant, Paul Moon, et. al. ("Moon") asserts that this was in violation of Chancery Court Rule 5.04. Furthermore, Moon asserts the lower court erred in awarding the Appellees, Cedar Hills Hunting Club ("Cedar Hills"), trial costs and attorneys' fees. We find that the lower court did not have authority to award attorneys' fees absent statutory or contractual authority. Therefore, we reverse and render that portion of the judgment awarding attorneys' fees.

FACTS

The following is a chronology of pertinent events that transpired which have led to this appeal:

December 28, 1992- Moon filed a complaint against Cedar Hills alleging conversion, misappropriation...etc. Moon sought a temporary restraining order as well as appointment of a receiver for the club.

January 19, 1993- Order issued. Chancellor reserved ruling on motion to appoint receiver until a trial was held on the merits. The club's bank account was frozen, and the current utility bills of the club were ordered to be paid.

February 26, 1993- Cedar Hills filed a motion for contempt because the utility bills for the club had not been paid pursuant to the order of the court.

April 23, 1993- Order issued clarifying the previous January 19th order. Officers were ordered to pay bills from the club's bank account, which was otherwise frozen.

May 12, 1993, Cedar Hills filed a motion for default judgment because Moon had not answered the cross-complaint.

May 24, 1993- Moon answered the cross-complaint. A hearing was held. Court issued order authorizing a special election of officers held by secret ballot to be opened by the court.

June 4, 1993- Ballots were counted by the court. Counsel for Moon was not present due to a previous engagement. Despite eight contested votes, the remaining undisputed votes of the members duly elected Mack Thames, Tommy Thames and Rodney Hudgins as officers of the club.

June 7, 1993- Judgment entered naming the duly elected officers. Trial costs and attorneys' fees were awarded in the amount of \$3,500.00.

July 20, 1993- Cedar Hills files motion for contempt.

July 29, 1993- Moon files motion to vacate and set aside judgment.

August 9, 1993- The court enters judgment for contempt, enforcing the June 7, 1993 judgment and awarding \$350.00 in attorneys' fees against Moon for the contempt proceedings.

October 29, 1993- Court enters order overruling motion to set aside and vacate judgment. The court allowed an interlocutory appeal to the Mississippi Supreme Court, and stayed all proceedings in reference to the June 7, 1993 judgment.

June 13, 1994- In finding that no petition for interlocutory appeal had been entered, Mississippi Supreme Court enters order remanding the matter to the chancery court for trial proceedings to proceed in due course.

September 30, 1994- Chancery court enters order stating in part that all proceedings pending collection and to appeal of the judgment previously entered shall proceed in due course.

The only issue before this Court is the validity of the judgment entered on June 7, 1993.

DISCUSSION

CHANCERY COURT RULE 5.04

Moon argues that the chancellor erred in signing the order drafted by the Appellees' attorney before the order had been circulated to counsel opposite for criticism. Moon contends that this was in violation of Uniform Chancery Court Rule 5.04.

Rule 5.04 states:

In all litigated actions, the attorney who shall be directed to draw the Judgment shall submit the same to opposing counsel for criticism as to form only, and shall present the same to the Chancellor within ten (10) calendar days after being directed to draw the judgment *unless otherwise permitted*.

Unif. Ch. Ct. R. 5.04 (emphasis added). Upon reviewing the language of the rule, we find no error.

The language of the rule plainly states that the judgment shall be circulated for criticism unless otherwise permitted. The final clause obviously infers that this is not a mandatory requirement, and leaves the chancellor with great latitude. Turning to the record, we find that the chancellor had the following colloquy with the attorney for Cedar Hills:

Mr. Rutland: Your Honor, can Mr. McIntyre and I get with you Monday about an order?

The Court: Well, Mrs. Johnson will have the records there, and the order will show who was duly qualified and is empowered to elect--

Mr. Rutland: But the thing about it is, Your Honor, we have a problem with the bank and the hunting club account.

The Court: As soon as she transcribes that or as soon as y'all prepare a judgment showing that the Court declares them to be the duly elected and qualified officers, and whatever decision they make will be up to the club.

Clearly, there were still unresolved issues between the parties that were not before the court. Therefore, it was in the best interest of justice for the judgment declaring the duly elected officers to be filed as soon as possible. Since the judgment was to merely reflect the results of the proxy vote, we do not think that the chancellor was manifestly wrong in signing the judgment before it was circulated to Moon's counsel.

ATTORNEYS' FEES

In the original judgment of June 7, 1993, a provision awards Cedar Hills trial costs and attorneys' fees in the amount of three thousand five hundred dollars (\$3,500.00). Moon contends that the chancellor overstepped his authority when he awarded attorneys' fees in this instance. We agree.

In regard to attorneys' fees, this Court has never approved awarding trial expenses and attorney's fees to the successful litigant in the absence of contractual or statutory authority, or unless punitive damages are also proper. *Denson v. George*, 642 So. 2d 909, 916 (Miss. 1994) (citations omitted). The Mississippi Supreme Court has consistently held that such expenses are not allowable as part of the costs. *Grisham v. Hinton*, 490 So. 2d 1201, 1205 (Miss. 1986). In the present case, there is no evidence of a contractual provision entered into by the parties which provided for the payment of Cedar Hills' attorneys' fees. Also, there was no award of punitive damages, and the chancellor made no findings of conduct that would warrant assessment of punitive damages. The remaining basis for authority to award attorneys' fees would be statutory, which does not exist in this particular case.

Thus, this portion of the judgment must be reversed.

CONCLUSION

We do not find any basis in the record for assessing the payment of attorneys' fees. Therefore, we reverse that portion of the judgment of awarding trial costs and attorneys' fees. We find that the chancellor was not manifestly wrong by entering the judgment before circulating it to Moon in this instance. Thus, the remainder of the judgment is affirmed.

THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT IS AFFIRMED IN PART AND REVERSED AND RENDERED AS TO THE ATTORNEY'S FEES AND COURT COSTS ONLY. COSTS OF THIS APPEAL ARE TAXED EQUALLY TO THE PARTIES.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.