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89-R-99001

Clerk of Appellate Courts
Post Office Box 249
Jackson, Mississippi 39205

RE: Proposed Change to Rule 54

Dear Madam or Sir:

I have no comment on the proposed change to Rule 54 to add a new paragraph (c) concerning judgments summarily dismissing motions for post-conviction collateral relief. I do think we should add a sub-paragraph to the costs paragraph (current paragraph (d) and proposed new paragraph (e)) to explicitly address the procedure for applying for attorney's fees. This change will align our state rule with the federal rule.

Proposed new paragraph (e) read:

> (e) Costs. Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Mississippi is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security. Costs may be taxed by the clerk on one day's notice. On motions served within five days of the receipt of notice of such taxation, the action of the clerk may be reviewed by the court.

I propose that new paragraph (e) read:

> (e) Costs; Attorney's Fees.
>
> (1) Costs. Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Mississippi is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs,

> execution may be ordered to issue against such security. Costs may be taxed by the clerk on one day's notice. On motions served within five days of the receipt of notice of such taxation, the action of the clerk may be reviewed by the court.
>
> (2) Attorney's Fees.
>
> (A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.
>
> (B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:
>
> (i) be filed no later than 14 days after the entry of judgment;
>
> (ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;
>
> (iii) state the amount sought or provide a fair estimate of it; and
>
> (iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

The rationale for my suggestion is that we need a uniform standard stated in the rules regarding how a prevailing party applies for attorney's fees with the attorney's fee issue being addressed by the court, not the jury, in cases where there is no requirement by the substantive law to prove attorney's fees as an element of damages. I suspect that almost all prevailing party attorney's fees situations in state court are based on a contractual attorney's fees clause or when the attorney's fee issue is triggered by a verdict awarding punitive damages. Since damages in a contract action are not part of the elements of the claim that the plaintiff must prove as part of his or her case-in-chief, it stands to reason that recovery under a contractual attorney's fees provision is not something for the jury to decide. *See* Business Communications, Inc. v. Banks, 90 So. 3d 1221, 1222-23 (Miss. 2012) ("Regarding the elements of a breach-of-contract claim, we hold that monetary damages are a ***remedy for*** breach of contract, ***not an element of*** the claim."; emphasis in original). Importantly, the trial judge decides the appropriateness of any request for attorney's fees and proof concerning the reasonableness of the fees requested is merely advisory. *See* Ford Motor Co. v. Tennin, 960 So. 2d 379, 396. ¶60 (Miss. 2007)("[A]ny testimony by attorneys with respect to [reasonable attorney's fees] is

purely advisory and not binding on the trial court."), *citing* Mauck v. Columbus Hotel Co., 741 So. 2d 259, 269 (Miss. 1999). *See also* MISS. CODE ANN. § 9-1-41 (Supp. 2017)("In any action in which the court is authorized to award reasonable attorneys' fees, the court shall not require the party seeking such fees to put on proof as to the reasonableness of the amount sought, but shall make the award based on the information already before it and the court's own opinion based on experience and observation[.]"). Moreover, as explained by the supreme court in Cruse v. Nunley, 699 So. 2d 941 (Miss. 1997), an inquiry into attorney's fees cannot be conducted until a party has prevailed. Cruse v. Nunley, 699 So. 2d at 946, ¶19, *citing* White v. New Hampshire Dept. Of Empl. Sec., 455 U.S. 445, 451-52 (1978).

I submit that the above case law and statutory law suggest that the issue of attorney's fees is for the court to decide and by necessary implication the application for fees must be made post verdict since it is not until the trial on the merits is concluded is there a prevailing party. I think spelling out in Rule 54 how attorney's fees applications are handled will ensure a uniform standard is applied in county, circuit, and chancery courts.

Sincerely,

JOHN B. GILLIS