

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

RILEY McCOY, ET AL.

v.

THE HERSHEWE LAW FIRM, P.C.

RESPONDENTS,

APPELLANT.

DOCKET NUMBER WD72728
**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: April 10, 2012

Appeal From:

Jackson County Circuit Court
The Honorable Ann Mesle, Judge

Appellate Judges:

Division Three: Karen King Mitchell, P.J., James M. Smart, Jr., and Gary D. Witt, JJ.

Attorneys:

James Patrick Frickleton and Edward Deroy Robertson, III, Leawood, KS, for **respondents**.

Susan Ford Robertson and J. Zachary Bickel, Kansas City, MO and Bryan Ormsby Wade and Christopher Francis Weiss, Springfield, MO, for **appellant**.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
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v.

THE HERSHEWE LAW FIRM, P.C.,

APPELLANT.

No. WD72728

Jackson County

Before Division Three: Karen King Mitchell, P.J., James M. Smart, Jr., and Gary D. Witt, JJ.

Ronald and Stacey McCoy gave birth to Riley McCoy, who was born with very significant permanent brain damage, allegedly caused by the negligence of the medical personnel attending the birth. The McCoy's met with Aaron Smith, an associate at Hershewe Law Firm (HLF), and agreed to have HLF represent them in the matter.

While the case was in its early stages, Smith resigned from HLF. The McCoy's chose to have their case transferred to Smith at his new firm. After the McCoy's decision to transfer their case from HLF, HLF filed a notice of attorneys' lien in the Jasper County case and withdrew from further representation. The McCoy's eventually signed a new fee agreement with Smith that permitted him to associate with other counsel. Smith then arranged with James Frickleton, of Bartimus, Frickleton, Robertson & Gorny, P.C. (BFRG), to assist him with the McCoy case.

The McCoy's settled their case about eight months later. Before the settlement was approved, the McCoy's dismissed the case in Jasper County without prejudice and refiled it in Jackson County with the intent of obtaining approval of the minor's settlement in that venue. BFRG notified HLF of the proposed settlement.

HLF filed a motion to intervene in the McCoy's suit. The motion to intervene was granted. The trial court denied HLF's motion for change of venue, finding that as an intervenor HLF did not have standing to challenge the agreed upon venue of the defendants and plaintiffs.

The court approved the minor's settlement in the McCoy case. The court approved the reimbursement of litigation expenses to HLF, Smith, and BFRG, and approved the sum of \$1,900,000 in total attorneys' fees.

At trial on the quantum meruit claim, HLF once again moved for a change of venue, arguing that the court was required to transfer venue because the medical defendants had been dismissed and the trial court was required under section 508.012 to redetermine and transfer venue. The trial court denied the motion, conducted a trial to decide HLF's petition for declaratory and quantum meruit relief, and entered its judgment.

HLF appeals the attorneys' fee award, claiming substantial evidence does not support the trial court's judgment and the trial court misapplied the law. HLF further claims the trial court abused its discretion in refusing to transfer venue because, as an intervenor, it became a "defendant" within the meaning of section 508.012, and thus a redetermination of venue was required by the court both when HLF became an intervenor and once the medical defendants were dismissed.

AFFIRMED.

Division Three holds: The trial court did not err in (1) denying HLF's motion for change of venue or (2) in its award of attorneys' fees.

(1) The legislature *did not* provide for *intervenors* in the statutory reforms in 2005. The court found that the omission of "intervenors" in section 508.012, in light of the legislature's specific inclusion of third parties, was an intentional act by the legislature to exclude intervenors from falling under section 508.012. Such exclusion is reasonably inferred from a consideration of the context of the statute as well. While HLF would like to treat intervenors as normal plaintiffs, defendants, or third-party plaintiffs or defendants upon intervention for purposes of redetermination of venue, throughout the Missouri statutes and rules of civil procedure, intervenors are treated as separate and distinct parties with their own governing rules. Thus, HLF, as an intervenor, was not entitled to stand on the same footing as a party plaintiff or defendant or third party plaintiff or defendant within the application of section 508.012.

HLF was also not "forced to intervene to protect its interests." An attorney has a right under sections 484.130 and .140 to bring a motion in the original case for attorneys' fees *or* to bring a separate cause of action for attorneys' fees after a verdict, decision, or judgment has been rendered in a client's favor. HLF's attorneys' lien attached to the McCoy's cause of action in Jasper County, and subsequently attached to the *res* of the proceeds of the settlement after it was approved by the trial court in Jackson County. HLF had the option of ignoring the Jackson County proceeding and filing its own separate cause of action. It did not. The trial court did not err in regarding HLF as an intervenor, not a defendant. HLF, therefore, did in fact lack standing as an intervenor to challenge the venue of the proceeding in Jackson County.

(2) The trial court did not abuse its discretion in determining attorneys' fees. The trial court applied the relevant and necessary factors from *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 60 n.7 (Mo. banc 1982), in determining the award amount for HLF. The trial court is vested with the discretion to evaluate these factors according to the particular circumstances of each case. The trial court's decision was not arbitrary or unreasonable, and did not result from a misapplication of law, therefore the court found no basis for upsetting the trial court's determination here.

Opinion by James M. Smart, Jr., Judge

April 10, 2012

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