Case No. 2001-TS-01911

Supreme Court of Mississippi

WASHINGTON MUTUAL FINANCE GROUP, LLC,
Defendant and Appellant,

vs.

GRETA BLACKMON, LOUISE BLUE, et al.,
Plaintiffs and Appellees.

Brief of Mississippi Bankers Association As Amicus Curiae In Support Of Defendant-Appellant

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Appeal from a Judgment of the Circuit Court
of Holmes County, Mississippi (No. 98-0026)

The Honorable Jannie Lewis, Circuit Judge

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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

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SUMMARY OF ARGUMENT

This is a critically important case not just for the parties before this Court, but also for the State of Mississippi and the companies that conduct business within its boundaries. If permitted to stand, the judgment of the trial court will render the concepts of "fiduciary duty" and "reasonable reliance" merely empty vessels, stripped from the substantive moorings to which they have long been attached, and will obliterate the critical distinction between tort and contract.

Mississippi law has long recognized that, absent clear and convincing evidence of extraordinary factors (none of which is present here), the relationship between debtors and creditors is not a fiduciary one. The reason for this is simple: business simply cannot operate if in every transaction the creditor (or insurance seller) is responsible for the decisions of the borrower (or purchaser) and is charged with delving in detail into the unique circumstances of the person sitting across the table.

The Mississippi Bankers Association urges this Court to reverse the trial court's transformation of arms-length business transactions into ones that involve a fiduciary relationship. The costs of such a radical transformation of the law are tremendous. The ability of a business to fix its obligations (and set its liabilities) through contract is a fundamental prerequisite to the creation and maintenance of a vibrant business environment and a foundation of our market economy. Yet in the world created by the trial court's judgment, any business which enters into to a contract with a citizen of this State faces the open-ended imposition of tort duties and damages (including punitive damages), all but destroying its ability to conduct business in an economically rational and predictable manner. It is not an overstatement to predict that, should the judgment stand, companies already fearful of doing business in Mississippi will face yet another reason to reconsider their decision to do so.

The path proposed by the Plaintiffs is not only bad for business, it is bad for consumers, who will find it increasingly more difficult to obtain financing and insurance at attractive rates, *if at all.* No longer able to rely on the sanctity of written disclosures approved by Mississippi and federal regulatory authorities or on the bedrock concept that the borrower/lender relationship is not a fiduciary one, legitimate lenders operating in Mississippi will inevitably decide that the detriment from litigation uncertainty substantially outweighs any benefits from continuing to make consumer loans here. The credit needs of Mississippi's populace, however, will surely remain, leaving those needs either unfulfilled or to be serviced solely by pawnbrokers, payday lenders or illicit transactions.

The trial court compounded its error by ignoring the time-honored principle that a party may not justifiably rely on an oral representation that is inconsistent with the plain terms of a written contract. Longstanding Mississippi law imputes to a person knowledge of the contents of an agreement he has signed, even if the person has not read the document. Sound public policy requires people to read what they sign *before* they sign it. Yet failure to enforce written agreements on the basis of alleged inconsistent oral representations, (as done by the trial court), subjects every contracting party to the perilous risk of imperfect memories, a willingness to remember things only partially or selectively, and even fabricated assertions of fraud. The trial court's judgment is contrary to established Mississippi law and will, if left undisturbed, further undermine the tool that promotes efficient, convenient, and predictable business transactions -- the written contract.

Further, the damages awarded in this case are a prime example of how the law as applied (or ignored) by the trial court has and will continue to wreak havoc on business. Because the arms-length transactions in this case were transformed into tort claims, the "compensatory damages" awarded dwarfed the alleged economic loss. Additionally, the "compensatory damages" here bear no reasonable relationship to the vague expressions of emotional distress offered by Plaintiffs (or to the evidence of actual economic injury).

Finally, the vast majority of the Plaintiffs' claims reached the jury only because the trial court cast a blind eye to the statute of limitations. The trial court refused to apply the statute of limitations even though the Plaintiffs did not and could not satisfy the affirmative act or due diligence requirements for tolling the statute of limitations.

In sum, *Amicus Curiae* Mississippi Bankers Association respectfully requests that this Court reverse the judgment of the trial court. Doing so will restore certainty and predictability to the Mississippi credit community, which not only will be good for business, but will correspondingly benefit the citizens of this State.

ARGUMENT

I. THE TRIAL COURT'S JUDGMENT MUST BE REVERSED BECAUSE IT WOULD TRANSFORM EVERY ARMS-LENGTH COMMERCIAL RELATIONSHIP INTO A FIDUCIRARY RELATIONSHIP

It has long been settled that business transactions typically do *not* involve fiduciary relationships. The relationship at issue here -- between debtors and creditors -- is not a fiduciary one. See General Motors Acceptance Corp. v. Baymon, 732 So. 2d 262, 270 (Miss. 1999); Merchants & Planters Bank of Raymond v. Williamson, 691 So. 2d 398, 404 (Miss. 1997). Dealings between lenders and borrowers typically amount to nothing more than an "arms-length business transaction." Williamson, 691 So. 2d at 404. Similarly, "there is no fiduciary relationship or duty between an insurance company and its insured in a first party insurance contract." Langston v. Bigelow, 820 So.2d 752, 756 (Miss. 2002). Much like the situation between lenders and borrowers, "the purchase of insurance is deemed to be an arms-length transaction." Id. (citation omitted).

A fiduciary relationship can arise in an otherwise arms-length transaction only under very limited *special circumstances*. As the Mississippi Supreme Court explained in Langston, fiduciary relationships may exist when one party has an "overmastering influence" over another, or when one party demonstrates "weakness, dependence, or trust, justifiably reposed." Id. (citing Lowery v. Guaranty Bank & Trust Co., 592 So.2d 79, 83 (Miss. 1991)). Further, a special "confidential relationship" akin to a fiduciary duty arises when "one party justifiably imposes special trust and confidence in another, so that the first party relaxes the care and vigilance that he would normally exercise in entering into a transaction with a stranger." Id. To show such a fiduciary relationship arose in the context of an ordinary commercial transaction, the plaintiff must prove by clear and convincing evidence that "(1) the parties have 'shared goals' in the other's commercial activity, (2) one party justifiably places trust or confidence in the integrity and fidelity of the other, *and* (3) the trusted party has effective control over the other party." Smith v. Franklin Custodian Funds, Inc., 726 So.2d 144, 151 (Miss. 1998) (quoting Peoples Bank & Trust Co. v. Cermack, 658 So.2d 1352, 1359 (Miss. 1995)) (emphasis added).

Although a number of factors have been considered by courts to determine whether a particular situation has given rise to a fiduciary relationship, see e.g., Hopewell Enterprises, Inc. v. Trustmark National Bank, 680 So.2d 812, 816-17 (Miss. 1996), courts should not lose sight of the forest for the tress -- lending and insurance transactions typically are not fiduciary in nature, and only under special, not commonplace, circumstances can they be deemed to expand into the fiduciary realm.

Here, Plaintiffs presented no evidence, much less evidence that is clear and convincing, to prove that anything was special about their ordinary, arms-length transaction with Defendant. Here, there is no absolutely no evidence whatsoever that Plaintiffs' changed their behavior in alleged "reliance" on the Defendant. Langston, 820 So.2d at 756. Accordingly, for Plaintiffs to prevail under their fiduciary duty theories, virtually every lending transaction would have to be governed by the kind of rules that apply to lawyer/client, guardian/ward and trustee/beneficiary relationships. But Mississippi law is not so cavalier about the creation of such duties. Rather, Plaintiffs and Defendant here simply engaged in typical, ordinary, arms-length transactions.

This analysis is borne out by a number of federal district courts in Mississippi, which have rejected identical or similar fiduciary duty claims against defendants in the same lending context. See Conner v. First Family Fin. Services, Inc., No. 4:01cv242PB, 2002 WL 31056778 at *7 (N.D. Miss. Aug. 28, 2002) ("Banks, finance, and insurance companies are not eleemosynary institutions. The plaintiffs should have been aware of as much at the outset, before blindly signing documents and failing to read them."); Strong v. First Family Fin. Services, Inc., 202 F. Supp. 2d 536, 542 (S.D. Miss. 2002) ("that plaintiffs trusted their lender (and by inference, its employees) because it was their lender ... is plainly insufficient under [Mississippi law] to support finding that a fiduciary relationship existed."); Harrison v. Commercial Credit Corp., 2002 WL 548281 at *5 (S.D. Miss. March 29, 2002) (statements that the plaintiffs "trusted" the CitiFinancial employee with whom they dealt was not enough to establish the existence of a fiduciary relationship between them).

Common sense further confirms that no fiduciary relationships existed here. Plaintiffs' argument boils down to the bald notion that a customer's subjective perception or belief, standing alone, transforms an otherwise arms-length transaction between strangers into a fiduciary relationship. Such a rule would radically alter the business landscape in Mississippi as the same argument could be used in other contexts to impose heavy fiduciary duties on many other ordinary business relationships. See Strong, 202 F. Supp. 2d at 542 n.5 (discussing Merchants & Planters Bank v. Williamson, 691 So.2d 398, 404 (Miss. 1997), and explaining that a decision to hold, as a matter of law, that a lender/borrower relationship is a fiduciary one "would serve to impose fiduciary concepts upon what is, in many cases, a standard contractual relationship between parties with fundamentally different interests"). If a plaintiff, like those in this case, cannot identify particular acts of the putative fiduciary that create "special circumstances" and result in significantly "changed behavior" of the plaintiff, there can be no fiduciary relationship.

If every arms-length commercial relationship is susceptible to being converted into a fiduciary relationship on "evidence" as flimsy as that presented here, then it takes no stretch of the imagination to realize the consequences on this State's business environment. Literally every company in the banking or insurance sectors will see the cost of doing in business in this State go through the roof, not just from the open-ended tort liability for past transactions, but also from the costs of continuing to do business as they attempt to fulfill the heavy obligations of a fiduciary in each of the tens of thousands of business transactions that occur every day. The end result will be either that companies will stop doing business in this State altogether, or will be forced to pass along to consumers the substantial costs imposed by such an unwise legal regime. Either way, it is a lose - lose proposition for businesses and consumers.

II. THE STATUTE OF LIMITATIONS BARS MOST OF PLAINTIFFS' CLAIMS

A. Affirmative Acts Are Required To Toll the Statute of Limitations.

It is undisputed that Plaintiffs' claims are governed by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49(1). Plaintiffs attempted to escape an obvious time bar of most of their claims through tolling or alleged lack of discovery. Plaintiffs' reliance on fraudulent concealment principles to escape the limitations bar is unavailing as they cannot -- and did not -- satisfy the requirements for tolling the limitations period.

In Mississippi, fraudulent concealment is governed by statute, which states:

> If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled

> thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

Miss. Code Ann. § 15-1-67. To qualify for the statute's benefits, the burden is on the plaintiff to prove two elements -- that the Defendant "[c]oncealed the conduct complained of and that the plaintiff[s] failed to discover the facts forming the basis of [their] claim, despite the exercise of due diligence." Cunningham v. Massachusetts Mut. Life Ins. Co., 972 F. Supp. 1053, 1054 (N.D. Miss. 1997) (citation omitted) (emphasis added).

This Court clearly has determined that the first element of fraudulent concealment requires proof that Defendant "engaged in affirmative acts of concealment." Robinson v. Cobb, 763 So. 2d 883, 887 (Miss. 2000) (quotation and citation omitted). The trial court's refusal to find most of Plaintiffs' claims time-barred reflects a lack of appreciation of the purpose of the statute and the affirmative act requirement.

The tolling of a statute of limitations period under Miss. Code Ann. § 15-1-67 aids a plaintiff who, *by reason of the defendant's conduct*, was unaware of his claim against that defendant. Parties to an arms-length transaction, like those here, have no such duty to disclose information to each other.[1] Thus, the affirmative act ensures that, for parties who have no duty to disclose, a plaintiff must show a separate basis for attributing to the defendant his lack of knowledge of his claim against that defendant.

Here, Plaintiffs have not shown affirmative acts by defendant designed to conceal the alleged fraud. Additionally, as explained above, the Plaintiffs and the Defendant were not in

[1] Although there is no need for the plaintiff to show an affirmative act of concealment where a preexisting duty to disclose information exists, see Van Zandt v. Van Zandt, 86 So.2d 466, 470 (Miss. 1956) (applying the earlier, identical version of the statute of limitations at issue here and concluding that the affirmative act requirement has no application in a fiduciary relationship because a fiduciary already is "under a duty to reveal the facts"), as described above, there was no such duty in this case.

fiduciary relationships with each other. Accordingly, Plaintiffs have not satisfied the first component of fraudulent concealment.

The trial court's judgment effectively deletes the defense of the statute of limitations from the Mississippi code. The trial court erred in substituting its own view for the Legislature's judgment that stale claims such as those present here "ought not to proceed." Reich v. Jesco, Inc., 526 So. 2d 550, 551 (Miss. 1988). If a plaintiff can evade the statute of limitations without showing any affirmative acts of concealment by the defendant, then there is no statute of limitations defense at all. If that decision is to be made, then it should be done by the Legislature, not by the courts.

B. Plaintiffs' Failure To Exercise Due Diligence To Discover Their Claims Further Precludes Tolling of the Statute of Limitations.

Even if an affirmative act were not a necessary predicate for tolling the statute of limitations, Plaintiffs' failure to use due diligence to discover their claims renders them time-barred. When a plaintiff, by his failure to exercise reasonable diligence, fails to discover the existence of a claim, the statute of limitations will not be tolled. Miss. Code Ann. § 15-1-49(2); 15-1-67; Cunningham, 972 F. Supp. at 1054.

In a recent case, this Court reaffirmed the rule that a party is placed on notice that a claim exists *when the party receives written documents disclosing the alleged wrongful act.* American Bankers Ins. Co. v. Wells, 819 So.2d 1196 (Miss. 2001). In Wells, two plaintiffs complained that their lender acted wrongfully in force-placing insurance by (a) backdating the insurance and (b) using an unfair accounting method in establishing the amount of insurance. More than three years prior to the filing of their lawsuit, one of the plaintiffs received written notice of the force-placed insurance, disclosing that the insurance was backdated. This Court held that the backdating claims of this plaintiff should be dismissed as being barred by the applicable three-year statute of limitations because the plaintiff should have discovered that the insurance was backdated when he first received the notice. Wells, 819 So.2d at 1202.

Wells precludes tolling of the limitations period as to most of Plaintiffs claims here because they signed and received, more than three years before the filing of the complaint, the loan documents and related disclosures that informed Plaintiffs of the existence of their claims. The result compelled by Wells squares harmoniously with and reinforces other Mississippi law that requires parties, such as Plaintiffs, to read documents before signing them.

III. A PARTY MAY NOT JUSTIFIABLY RELY ON AN ORAL REPRESENTATION INCONSISTENT WITH THE TERMS OF A WRITTEN CONTRACT

A. Parties Are Presumed To Have Read Agreements that They Have Signed, and Knowledge of the Contents of the Agreements Is Imputed to the Parties.

Mississippi follows the nearly universal rule that a person is charged with knowledge of the documents she signs, whether she reads them or not. See, e.g., Cherry v. Anthony, Gibbs, Sage, 501 So. 2d 416, 419 (Miss. 1987). As this Court has observed:

> Had [the defendant] "slipped in" additional language as [plaintiff] claims, [plaintiff] cannot assert that he did not have notice of what was in the agreement or that he was surprised by the different language when he signed the agreement, not once, but twice. The trial court was correct in finding that "[plaintiff] demonstrated a course of conduct whereby he accepted the terms of the . . . contract as binding upon him and entered into a definite and unequivocal course of conduct disclosing that he acceded and assented to the contract and his conduct constituted an acceptance and ratification of the contract which precludes a claim of fraud."

Dockins v. Allred, 755 So. 2d 389, 394 (Miss. 1999) (citation omitted) (emphasis added).

Mississippi law presumes that a party has read and is aware of the contents of a document signed by that party. See Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., 584 So. 2d 1254 (Miss. 1991); American States Ins. Co. v. Natchez Steam Laundry, 131 F.3d 551, 555 (5th Cir. 1998). Consistent with this law, the Federal Trade

Commission long ago announced in the context of federally-required loan disclosures that borrowers must read rather than ignore the disclosure statements:

> A written disclosure statement given to the consumer as required by the Truth-in-Lending Act, before consummation of the transaction, is protection against oral misrepresentations that induce a loan. *Consumers must learn to inspect disclosure statements before signing a contract,* otherwise the purpose of the Act and Regulation Z will be frustrated.

FTC informal Staff Opinion of Dec. 9, 1969 (1969-1974 Transfer Binder), CCH CONS.CRED.GUIDE P 30,309 (emphasis added).

B. A Party Cannot Justifiably Rely On Oral Representations Contradicted by the Terms of the Signed Agreement.

Sound public policy compels this rule and result. Freedom of contract is one of the hallmarks of a democratic society and a bedrock principle of our market economy. Individuals, businesses and even the regulatory authorities alike have a keen interest in predictable, efficient, and convenient business transactions, and written contracts greatly facilitate those transactions. To ensure that written contracts have meaning, courts must enforce agreements that are in writing and signed by the parties, and require or presume the parties to read what they sign. Failure to enforce signed contracts subjects every contracting party to the unfair and highly risky perils of imperfect memories, a willingness to remember things only partially or selectively, and, of course, fabricated assertions of fraud.

Parties to a contract, therefore, cannot justifiably rely on oral representations that are inconsistent with the written agreement. Indeed, for reliance to be "justified," a party must take at least those steps reasonably within his or her means to ensure the accuracy of the representations. See e.g., Cozzi Iron & Metal, Inc. v. U.S. office Equipment, Inc., 250 F.3d 570, 574 (7th Cir. 2001) (applying Illinois law) ("a party may not enter into a transaction with its eyes closed to available information and then charge that it has been deceived by another.")

Citing the Godfrey and Cherry opinions of this Court, the lower federal courts have found that Mississippi law ascribes to a person knowledge of the contents of a signed, written contract. See Strong v. First Family Fin. Services, Inc., 202 F. Supp. 2d 536, 543-44 (S.D. Miss. 2002) (plaintiffs could not reasonably claim reliance on oral statements that they had to purchase insurance because both the loan note and a separate disclosure form expressly stated that credit insurance was not required to obtain the loan); Harrison v. Commercial Credit Corp., 2002 WL 548281 at *3 (S.D. Miss. March 29, 2002) (finding that a statement in the plaintiffs' loan documents that credit insurance was not required to obtain credit was sufficient to preclude reasonable reliance on a contrary oral statement); see also Conner v. First Family Financial Services, Inc., 2002 WL 31056778 at *8 (N.D. Miss. Aug. 28, 2002); Cooley v. Washington Mutual Finance Group, 2002 WL 1768897 (S.D. Miss. July 29, 2002); Carter v. Union Sec. Life Ins. Co., 148 F. Supp. 2d 734, 737 (S.D. Miss. 2001) (even though there was no direct evidence that the plaintiff had actually read the capitalized statement immediately above his signature, the content of this statement was imputed to the plaintiff *as a matter of law*).

IV. THE COMPENSATORY DAMAGES ARE DISGUISED PUNITIVE DAMAGES

Plaintiffs were awarded between $40,000 and $250,000 in "compensatory" damages for Plaintiffs' economic losses ranging from $89.49 to $2,625.38.[2] These awards of "compensatory" damages are punitive on their face and must be overturned.

If Plaintiffs had shown a breach of their contracts, they would have been entitled to compensatory damages to provide them with the benefit of their bargain. Frierson v. Delta Outdoor, Inc., 794 So.2d 220, 225 (Miss. 2001). The verdict in this case, however, because it concluded (wrongly, as discussed above) that Defendant had committed torts, purports to include another kind of compensatory damages available only in tort -- "pain and suffering." Such

[2] Excluding the six plaintiffs who accepted remittitur.

damages are meant to provide reasonable compensation to an injured person for the "pain and suffering" caused by the Defendant. *See* Restatement of Torts (Second), § 903 (1965) (compensatory damages). In contrast, punitive damages are designed to punish the wrongdoer and deter others from perpetrating similar misdeeds. See Hurst v. Southwest Miss. Legal Services Corp., 708 So.2d 1347, 1350 (Miss. 1998).

Here, the compensatory damages awarded by the jury for emotional distress are demonstrably punitive. First, it simply is not reasonable that a plaintiff would suffer $250,000 in distress over the loss of less than $2,700 (or $85,000 in distress over the loss of less than $700, etc.). Further, that Plaintiffs did not complain of distress at the time of the transactions makes it even less reasonable to have suffered enormous "distress damages."

Finally, the compensatory damages awarded here are punitive because they bear no reasonable relationship to the emotional distress facts adduced during trial. For example, Plaintiff Louise Blue testified that she feels bad now knowing that that she paid money she did not have to pay (see 19 R.T. 1091:22-26, 1092:4-10), but she was awarded $80,000 in "compensatory" damages. Similarly, Plaintiff Percy Mason testified that he felt bad, thought City was unfair to him, that his blood pressure would go up, that he would get an upset stomach, and that he is nervous. (See 17 R.T. 857:5 - 859:7.) Incredibly, he was awarded $100,000. Similar evidence could be cited for the other Plaintiffs. There is no basis in law or in fact to support "compensation" of this magnitude. See Worsham v. City of Pasadena, 881 F.2d 1336, 1338 (5th Cir. 1989) (affirming decision to reject jury's award of compensatory damages because the evidence did not support such an award and because it was largely punitive in nature).

This Court should be vigilant against this recent trend of packing punishment-based damages into compensatory awards. The problem of inflated compensatory damages is of growing concern around the country. See "Pain-and-Suffering Awards Let Juries Avoid New Limits," New York Times, Oct. 28, 2002. Punitive damages cannot and should not be split up, with some being designated as punitive damages and the rest being packed into compensatory damages under the rubric of "pain and suffering." Such efforts are contrary to the vital distinction between punitive and compensatory damages. They further distort the determination of a valid amount of punitive damages, as the improper funneling of punitive damages into compensatory damages can dramatically alter the ratio between the two and enable parties argue that the punitive damages come within an acceptable multiple of the compensatory damages.

At bottom, the jury in this case has awarded damages far in excess of any actual injury suffered by Plaintiffs, whether measured by demonstrable economic losses or the weak and amorphous "pain and suffering" evidence offered by Plaintiffs. The compensatory damage awards here are punitive on their face -- not compensatory. Because the "compensatory" damages awarded in this case are punitive in nature, no portion of them can be upheld.

CONCLUSION

For the reasons set forth herein, the Mississippi Bankers Association, *Amicus Curiae,* respectfully requests that this Court overturn the verdict of the trial court and enter a verdict in favor of Defendant on all counts.

Respectfully submitted, this the 20th day of November, 2002.

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CERTIFICATE OF SERVICE

I, W. Scott Welch III, attorney for *Amicus Curiae* Mississippi Bankers Association, do hereby certify that I have this day caused a true and correct copy of the foregoing instrument to be delivered to the following, via United States mail, postage prepaid:

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