IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI

NO. 2006-TS-00641

BANCORPSOUTH BANK — APPELLANT

VERSUS

NED G. MCINNIS, JR., MARY DEANE MCINNIS,
RON NELSON and JAMES C. P. HARTMAN, DECEASED
AND RONSON CONSTRUCTION SYSTEMS, INC. — APPELLEES

ON APPEAL FROM THE CHANCERY COURT OF
FORREST COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

BRYAN NELSON P.A.
Jack W. Land MBN [redacted]
Joe D. Stevens, MBN [redacted]
Tracy K. Bowles, MBN [redacted]
Post Office Box 18109
Hattiesburg, MS 39404
Telephone: (601) 261-4100
Fax: (601) 261-4106
ATTORNEYS FOR APPELLANT

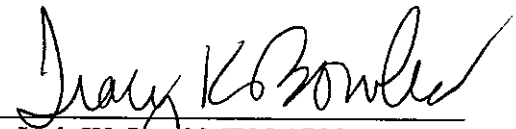
APPELLANT'S CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant, BancorpSouth Bank, certify that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1.	Honorable Sebe Dale, Jr. Chancery Court Judge P.O. Box 1248 Columbia, MS 39429-1248	Trial Court Judge
2.	Estate of James C.P. Hartman, Deceased	Appellant
	Robin L. Roberts, Esq. Attorney at Law P.O. Box 1953 Hattiesburg, Mississippi 39403-1953	Attorneys for Appellant, Estate of James C.P.Hartman
	W. Wayne Drinkwater, Jr., Esq. Clarence Webster, III, Esq. Bradley Arant Rose & White LLP Post Office Box 1789 Jackson, MS 39215-1789	
3.	BancorpSouth Bank P.O. Box 1231 Hattiesburg, MS 39403-1231	Appellant
	Jack W. Land, Esq Joe D. Stevens, Esq. Tracy K. Bowles, Esq. Bryan Nelson P.A. P.O. Box 18109 Hattiesburg, MS 39404-8109	Attorneys for Appellant, BancorpSouth Bank
4.	Ned G. McInnis, Jr. Mary Deane McInnis	Appellees
	Ray T. Price, Esq. Ray Price & Associates P.O. Box 1546 Hattiesburg, Mississippi 39403	Attorney for Appellees, Ned and Mary Deane McInnis
5.	Ron Nelson	Appellee, *Pro Se*

6. Ronson Construction Systems, Inc.,
c/o Ron Nelson
334 First Hopewell Road
Sumrall, Mississippi 39482

Appellee, *Pro Se*

By: 

Jack W. Land MBN 1798
Joe D. Stevens, MBN 9039
Tracy K. Bowles, MBN 101522
Attorneys for Appellant, BancorpSouth Bank

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

REPLY

I. The Wraparound financing[1] was requested by the parties to the transaction.

Hartman explained at trial that, in order to make the deal work, he was "trying to find someone or some way that the McInnises could transfer their properties to someone else and those mortgage payments could continue ... just the way they [were]." (Testimony of James Hartman, Tr. 144, lines 4-7). Hartman's trial testimony revealed that he presented the idea of the Wraparound to BancorpSouth, telling bank officer, Joe Anthony, that "we could make this fly and it could happen on a wrap-around mortgage." (Testimony of James Hartman, Tr. 142, lines 24-27). Hartman now claims that BancorpSouth required the Wraparound, which was "critical to [the] transaction." (Appellant's Brief, p. 7-8). Hartman further argues that the transaction benefitted BancorpSouth and McInnis, while Hartman took all the risk. (Appellant's Brief, p. 9). On the contrary, testimony and evidence presented at trial show that not only did Hartman, a savvy businessman, receive a hefty fee for "brokering" the deal, he even built in an "escape clause" to alleviate his potential risk, in the event that financing fell through. (Testimony of James Hartman, Tr. 139, lines 25-27). Even though Hartman says that he would not have agreed to the deal by himself, testimony at trial revealed that his main concern was management of the property. According to Ron Nelson's testimony at trial, Hartman stated that he did not "want to be going around trying to collect rent from people who are working at McDonald's ..." . (Testimony of Ron Nelson, Tr. 173, 34). However, Hartman clearly thought that the deal was good enough to

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[1] The term Wraparound denotes the type of financing utilized in this transaction. As explained more thoroughly in Appellant BancorpSouth's intial brief, incorporated herein by reference, a wraparound mortgage is a special type of junior lien or second mortgage. Bill B. Caraway, *Unwrapping the Wraparound Mortgage Foreclosure Process*, 47 WASH. & LEE L. REV. 1025 (1990). A wraparound is subordinate to an existing first mortgage or other prior lien that remains unsatisfied. *Id.* The wraparound differs from a conventional second mortgage in that the principal or face amount of the wraparound "wraps around" and includes the underlying indebtedness of the first mortgage and the amount of the additional funds or credit that the lender extends under the wraparound. *Id.*

personally guarantee the whole thing.

Wraparound financing was utilized because the parties did not request a new loan. (Testimony of Joe Anthony, Tr. 26, line 22-29). The final Agreement was structured as requested by the parties, so that no new loan was made by BancorpSouth. Hartman's and McInnis' suggestion that BancorpSouth "forced" them to enter an extremely complex, highly unusual transaction is baseless. BancorpSouth merely structured the financing to accommodate the demands of the parties to the transaction. Hartman established the terms of the Agreement with McInnis' and convinced Ron Nelson to purchase the bulk of the rental property. The BancorpSouth officer, Joe Anthony, testified at trial that a Wraparound Note "[i]s a pretty standard thing. It's not an unusual transaction at all." (Testimony of Joe Anthony, Tr. 27, lines 19-22). Hartman lined up Ron Nelson and his company, Ronson, as the subsequent purchaser of (14 of the 18 parcels) the McInnis property, all of which was initially purchased by Hartman at the "simultaneous closing." Nelson freely admitted at trial that he would have been unable to qualify for a new loan. In fact, Nelson testified at trial that "[i]t was understood that I didn't have any money." (Testimony of Ron Nelson, Tr. 172, line 11). Despite their attempts to argue otherwise, the record is clear that McInnis wanted to sell all parcels, Hartman wanted to buy and sell all parcels, and Ronson wanted to buy some parcels. Hartman by his own admission received a sizable fee for "brokering" the entire deal. Confident in the deal, Hartman personally guaranteed the whole thing.

McInnis implies that the Wraparound financing in the final Agreement came as a total surprise and that prior sales contracts called for a cash sale until the final version of the Agreement. (Appellee's Brief, p. 2; Ex. 35). See, however, Trial Exhibit No. 18, a November 2, 3003 Agreement, which also describes wraparound financing, was prepared entirely by Hartman's attorney and was executed by Mcinnis and Hartman. McInnis would have this Court believe that BancorpSouth, in league with

Hartman, somehow orchestrated a "bait and switch" in which McInnis was expecting a cash sale, yet ended up with Wraparound financing, forcing McInnis to give up valuable rights under the Wraparound Note. (Appellee's Brief, p. 3). This implication is clearly unsupported by the record and by McInnis's own brief.

McInnis admits that the final terms of the Agreement make it "abundantly clear that the overriding purpose of the Assignment was to benefit McInnis by allowing them to sell their property, extinguish their debt to BancorpSouth, allow BancorpSouth to collect all sums due under the Note and Deed of Trust, apply the proceeds to the McInnis debts and credit McInnis with the approximately $800.00 monthly excess." (Appellee's Brief, p. 17). McInnis admits signing the Agreement and admits assigning the Wraparound Note and Deed of Trust to BancorpSouth. As the record clearly shows, McInnis and Hartman brought this deal to BancorpSouth. (Testimony of James Hartman, Tr. 142, lines 24-27). As an accommodation to McInnis, BancorpSouth allowed the Wraparound by not accelerating the due date of McInnis' existing debts to BancorpSouth. In doing so, BancorpSouth acquired additional security through the Assignment and personal guaranties of Hartman and Nelson.

McInnis correctly points out that Hartman's attorney prepared the two initial sale contracts and, after the terms of the transaction had been "hashed out" by the parties, BancorpSouth's attorney prepared the final Agreement. (Appellee's Brief, p. 2). Any discussions or details of the initial sale contracts that preceded the final Agreement are not relevant or admissible in that parol evidence is not to be considered. There is no need to go beyond the four corners of the contract. *See Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 2003 WL 22411200 (Miss. 2003)(Appellate court should seek the legal purpose and intent of parties from objective reading of the contract to the exclusion of parol or extrinsic evidence). However, reference is made to said contracts to disprove the assertion that is now being

advanced that BancorpSouth dreamed up and demanded the use of Wraparound financing.

The record is clear that the final Agreement, which was ultimately prepared by BancorpSouth's attorney at the request of the parties, resulted from additions to an existing written Agreement, dated November 6, 2003. (Testimony of Joe Anthony, Tr. 24, line 17; Ex. 18, prior Agreement; Ex. 19, Final Agreement). BancorpSouth's additions were in keeping with standard banking practice, such as requiring payment of insurance, bringing taxes current and bringing all of McInnis' loans current. (Ex. 19, Final Agreement). As BancorpSouth officer, Joe Anthony, testified at trial, "[w]e didn't look at it like we were actually lending them money. They were getting on a note that we already had. We were just trying to add security to what we already had." (Testimony of Joe Anthony, Tr. 36, lines 6-8). Had BancorpSouth not agreed to the Wraparound, McInnis was at risk of losing the property entirely, as their loans were then in default. Hartman and McInnis brought the deal to BancorpSouth, not the other way around. (Testimony of Joe Anthony, Tr. 30; lines 8, 11).

II. BancorpSouth properly conducted the foreclosure sales and established a deficiency.

Hartman argues that BancorpSouth performed a "creative foreclosure". (Appellant's Brief, p. 9). Evidence presented at trial shows that the Trustee properly conducted the foreclosure sale. As set forth in Appellant BancorpSouth's initial Brief, trial testimony established that the letter of the law was met, and the Trustee conducted commercially reasonable foreclosure sales. (Testimony of Joe Anthony, Tr. 309, line 24 - 310, line 15).

Hartman further argues that BancorpSouth erred by foreclosing on the Wraparound Note, rather than the senior mortgage and by announcing at the foreclosure sales that the purchase would be subject to the senior indebtedness, thus making it "virtually impossible for a third party to make a competitive bid". (Appellant's Brief, p. 13). McInnis claims that potential buyers appeared at the foreclosure sale

in Forrest County and wanted to bid, but were discouraged from bidding by BancorpSouth's announcement. (Appellee's Brief, p. 23). These arguments are unsupported by the record.

Testimony at trial clearly established that BancorpSouth was the successful bidder at both foreclosure sales, although other people were present at the Forrest County foreclosure. (Testimony of Joe Anthony, Tr. 310, lines 16-21; Testimony of Carol Daniel, Tr. 390, line 29-391, line 3; *See also* Amended Substituted Trustee's Report, Pleading Index, Vol. II., No. 47). BancorpSouth officer, Zeke Powell, testified at trial that "I recall in Forrest County there were two or three other people that were there at the foreclosure, but didn't bid on anything." (Testimony of Zeke Powell, Tr. 346, lines 24-26). Trial testimony also established that both Hartman and the McInnis' attorney attended the foreclosure sales in both Jones and Forrest County and lodged no complaints. (Testimony of Zeke Powell, Tr. 346, lines 23-4; Tr. 353, lines 21-27).

To understand why the announcement of the existence of the Wraparound Note was proper, it is necessary to take into consideration the nature of the Wraparound. As set forth in BancorpSouth's initial brief, property at a Wraparound foreclosure is sold subject to prior liens; therefore, the trustee must announce the terms of the sale to inform potential bidders, just as the BancorpSouth trustee properly did at the foreclosure sales in the instant matter. *See Summers v. Consolidated Capital Special Trust*, 783 S.W.2d 580 (TEX. 1989).

McInnis claims that potential bidders were discouraged by this announcement. At trial, however, McInnis, did not present any documentation that during or after the public sale identified any "discouraged bidder." Moreover, at trial, McInnis presented no documentation that any "discouraged bidder" expressed an interest in purchasing any parcel from BancorpSouth after BancorpSouth became the successful bidder. Notwithstanding McInnis' claim, several persons testified at trial that

BancorpSouth was the successful bidder at both the Forrest County and the Jones County foreclosure sales. Hartman argues that BancorpSouth failed to prove the existence of a deficiency by failing to prove the fair market value of the property purchased at foreclosure. (Appellant's Brief, p. 14). Hartman further asserts that BancorpSouth's failure to determine the fair market value of the Ronson property defeats the pursuit of a deficiency from McInnis or Hartman, and that the Court properly found that BancorpSouth's bid price was without determination of fair market value by appraisal or otherwise. (Appellant's Brief, p. 24).

On the contrary, BancorpSouth clearly established in the record that its bid amounts reasonably reflected the valuation of the property sold at the foreclosure sales. (Testimony of Zeke Powell, Tr. 341, line 24 - 342, line 12; 342, lines 26-343, line 19). BancorpSouth officers, one of whom was a licensed contractor, realtor and real estate appraiser (Tr. 340, lines 1-17) inspected the property and established values and bid amounts for the foreclosure sales. These qualified officers reviewed and updated the existing appraisals in the file, personally inspected the properties the day prior to the foreclosure sale and calculated appropriate bids for the properties. (Testimony of Zeke Powell, Tr. 341, line 24 - 342, line 12; 342, line 26-343, line 19). BancorpSouth officer, Zeke Powell, testified, "I was bidding on the value of the property as given the date of the foreclosure. And I was bidding on that dollar amount. I didn't ... enter into what was owed or what wasn't owed on any notes or anything like that. I wasn't privy to that. I could care less." (Testimony of Zeke Powell, Tr. 368, lines 18-23).

Evidence was presented at trial showing that all aspects of the foreclosure sale were commercially reasonable and that the bid price was sufficient, not only for purposes of establishing the adequacy of the bid price, but also for proving BancorpSouth's entitlement to the judgments sought. Based upon the condition of the properties at issue and the thorough evaluations conducted by the

BancorpSouth officers to establish its bid amount (Testimony of Zeke Powell, Tr. 341, line 24 - 342, line 2), BancorpSouth clearly put on sufficient proof that the bid prices at the foreclosure sales were not only adequate but also commercially reasonable (Testimony of Carol Daniel, Tr. 390, lines 6-25), and that the bid amounts were duly and properly applied to the Notes at issue (Testimony of Joe Anthony, Tr. 324, lines 20-22).

The problem with the Chancellor's finding is that it allows McInnis to receive a double recovery. The Chancellor awarded judgment to McInnis under the Wraparound for both the amount of the underlying debt which McInnis owed to BancorpSouth and the additional amount which Ronson, Hartman and Nelson owed to McInnis. In effect, the Chancellor awarded to McInnis not only that which was owed to McInnis, but also that which was owed to BancorpSouth. The Chancellor's decision did not restore McInnis to the same position they were in before the breach; the Chancellor placed McInnis in a much better position than they would have been if Ronson, Nelson and Hartman had not breached the Agreement, resulting in serious inequity to BancorpSouth.

III. BancorpSouth's interests did not merge; McInnises' debt was not extinguished.

Hartman also argues that the debt of McInnis was extinguished by operation of law. (Appellant's Brief, p. 14). Hartman asserts that the foreclosure merged the McInnis Deed of Trust into the Wraparound Note, extinguishing any deficiency. (Appellant's Brief, p. 21).

As set forth in BancorpSouth's initial brief, a Wraparound does not operate like a typical junior mortgage. Property at a wraparound foreclosure sale is sold "subject to" prior liens, and if the wraparound foreclosure bid is less than the amount of the underlying debt in the wrap note, a deficiency exists. Frank A. St. Claire, *Wraparound Mortgage Problems in Nonjudicial Foreclosures*, 20 REAL EST. L.J. 221 (1992). *See also*, C. Jacobus, REAL ESTATE LAW [215] Reston, VA, Reston Pub. Co. (1985);

Summers v. Consolidated Capital Special Trust, 783 S.W.2d 580 (TEX. 1989). Contrary to Hartman's argument, BancorpSouth's interests did not merge. As in *Summers*, *supra*, the Trustee in the instant matter foreclosed on the Wraparound deeds of trust and properly announced that the foreclosure sales were subject to the pre-existing notes in favor of the bank.

IV. No Fiduciary Duty Existed.

McInnis argues that the three-part test[2] for fiduciary duty has been met, establishing that BancorpSouth had a fiduciary duty to McInnis and BancorpSouth breached that duty. (Appellee's Brief, p. 24). This argument is not supported by the law or by the record.

"[A] mortgagee-mortgagor relationship is not a fiduciary one as a matter of law." *Hopewell Enter. Inc. v. Trustmark*, 680 So. 2d 812, 816 (Miss. 1996); *see also Burgess v. Bankplus*, 830 So. 2d 1223, 1227-28 (Miss. 2002)(no fiduciary relationship existed although mortgagor had 20 year relationship with bank and branch president stated he would work with mortgagor to pay off debt); *see also* Appellant BancorpSouth's initial Brief. In order to create a fiduciary relationship there must be something more, some type of "special dealings" between the bank and the borrower. *Lowery v. Guar. Bank & Trust Co.*, 592 So. 2d 79, 83 (Miss. 1991)(fiduciary relationship may arise where one side has overmastering influence or the other side is weak and dependent).

In the instant matter, McInnis has pointed to no facts showing that the transaction with BancorpSouth was anything more than a typical arm's length mortgage transaction. McInnis claims that "both the McInnises and the Bank had a shared goal in entering the agreement that the loans of the McInnises to Bancorp would be paid." (Appellee's Brief, 24). If Appellee's claim actually created a

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[2] "[W]hether (1) the parties have shared goals in each other's commercial activities, (2) one of the parties places justifiable confidence or trust in the other party's fidelity, and (3) the trusted party exercises effective control over the other party. " *Amsouth Bank v. Gupta*, 838 So. 2d 205, 216 (Miss. 2002).

fiduciary relationship, all commercial transactions would give rise to a fiduciary relationship. As this Court noted in *AmSouth v. Gupta*, the fact that both parties hope to profit "is a feature common to every free-market transaction." *AmSouth v. Gupta*, 838 So.2d 205, 216 (Miss. 2002). Additionally, this Court "has repeatedly held that the power to foreclose on a security interest does not, without more, create a fiduciary relationship." *Burgess*, 830 So.2d at 1228 (Miss. 2002).

Appellee erroneously argues that the record indicates that BancorpSouth had effective control over McInnis. The record simply does not support this contention. Both Ned and Mary Deane McInnis are sophisticated businesspeople. By their own admission, they have been involved in property management of "sixty-seven apartment units in Hattiesburg and Laurel for over twenty years." (Appellee's Brief, p. 1). The mere fact that BancorpSouth's attorney prepared the final Agreement does not mean that BancorpSouth exercised effective control over McInnis. Similarly, without something more than can be found in this record, it cannot be shown that BancorpSouth had an "overmastering influence" over McInnis or that McInnis was "weak and dependent." *See Lowery*, 592 So.2d at 85. There is no evidence that BancorpSouth forced McInnis into this deal. Nor did BancorpSouth, as argued by Appellee, force McInnis to assign all of their rights to BancorpSouth. McInnis' argument seems to suggest that it was unreasonable for BancorpSouth to request an Assignment and that McInnis unwillingly granted the assignment to BancorpSouth.

The problem with this argument is that the record clearly indicates that Hartman and McInnis brought this deal to BancorpSouth, not the other way around. McInnis was indebted to BancorpSouth on four (4) Promissory Notes and also assigned to BancorpSouth the Wraparound Note, the Deeds of Trust on the fourteen (14) parcels which secured the Wraparound, and the personal guaranties of Nelson and Hartman. But this alone does not create a fiduciary duty. The assignments were made for the

purpose of providing additional collateral for McInnis' existing indebtedness to BancorpSouth. (Testimony of Joe Anthony, Tr. 36, lines 6-8; 39, lines 7-8; 37, lines 15-16). Because the buyer, Ron Nelson, could not qualify for a new loan, Hartman suggested the Wraparound financing, to which BancorpSouth agreed. The parties did not ask for a new loan; therefore, BancorpSouth viewed the deal as if additional parties were being added to the existing note. In exchange for not accelerating the debt on McInnis' loans which were in default, BancorpSouth reasonably requested additional security for the debt, in the form of an assignment.

McInnis failed to establish the existence of a fiduciary duty at trial; therefore, McInnis also failed to establish that BancorpSouth breached any duty to McInnis. The facts simply do not support the Appellee's argument or the Chancellor's finding. There is no indication that the dealings in the case *sub-judice* moved beyond "an arms-length business transaction" between experienced businesspeople, McInnis (debtor), and BancorpSouth (creditor); therefore, theirs was not a fiduciary relationship as a matter of law.

V. BancorpSouth breached no duty in refusing to allow the McInnises to collect rent.

McInnis argues that BancorpSouth's refusal to allow McInnis to collect rent and failure to attempt rent collection resulted in "the rent going uncollected for months and diminishing the rental income. " (Appellee's Brief, p. 5-6). McInnis also alleges that BancorpSouth allowed the property to depreciate and failed to perform repairs or take other actions to mitigate losses. (Appellee's Brief, p. 2). According to McInnis, because BancorpSouth did not allow McInnis to collect rent, we will never know to what extent rent was collectible. (Appellee's Brief, p. 22). Also according to McInnis, if BancorpSouth had allowed McInnis to collect rents, damages could have been largely mitigated. (Appellee's Brief, p. 23). McInnis and Hartman also complain that BancorpSouth delayed foreclosure.

(Appellee's Brief, p. 23; Appellant's Brief, p. 9).

In reality, McInnis put this matter before the court at a time when BancorpSouth was in the process of determining the extent of its rights. At trial, the BancorpSouth officer candidly admitted that he did not know exactly what rights BancorpSouth held prior to the foreclosure, which the attorneys for BancorpSouth asked the chancery court to authorize. (Testimony of Joe Anthony, Tr. 30, line 28). When specifically asked whether McInnis' rights had been turned over to BancorpSouth, bank officer Joe Anthony testified, "I didn't know what rights they had. I knew that the bank had whatever rights the deed of trust offered. I didn't know legally what rights they would retain." (Testimony of Joe Anthony, Tr. 32, lines 9-11).

The record also shows that Hartman "hired a manager to go and basically step into Ron Nelson's shoes and collect the rents and do the maintenance on the properties starting shortly after Ron Nelson said he could not do that any longer." (Testimony of James Hartman, Tr. 134, lines 9-12). As long as Hartman was managing the property and collecting the rents, BancorpSouth saw no reason to interfere with the actions of the two guarantors, nor could BancorpSouth grant to McInnis rights that were being exercised by Hartman. As Hartman testified at trial, his property manager continued to collect rents until the foreclosure sale and the rent money collected was paid on the note. (Testimony of James Hartman, Tr. 151, lines 21-23). BancorpSouth officer, Joe Anthony, testified at trial that "[p]rior to the foreclosure ... BancorpSouth didn't own the property. And we generally would not put money into something like that before it's foreclosed." (Testimony of Joe Anthony, Tr. 38, lines 7-10).

In effect, while Hartman was still collecting rents and making some payment on the note, McInnis initiated legal action, which took matters out of BancorpSouth's hands and placed the entire matter before the Chancellor. McInnis appears to have a crystal ball which shows that this matter would

have been resolved if only BancorpSouth had allowed McInnis to take over rent collections on property they no longer owned. If McInnis was so confident of this outcome, why did they not petition the Chancellor, as a matter of equity, to push aside the guarantors in favor of McInnis? McInnis seems very sure of exactly what rights they did not have, but wanted; exactly what rights that BancorpSouth had, but failed to exercise; and exactly what would have happened had those rights been granted and exercised as McInnis saw fit. In contrast, BancorpSouth was in the process of determining the proper course of action when McInnis placed the entire matter before the chancery court. At that time, nothing prevented McInnis from petitioning the Chancellor, as an equitable matter, to grant any rights that McInnis wanted. The facts in the record; however, show that McInnis never asked the Chancellor for those rights; yet, now McInnis wants to predict what would have happened had those rights been granted. This is pure speculation, totally unsupported by the record in this matter.

Once default was evident, McInnis initiated litigation against Hartman, Ronson and Nelson. Although BancorpSouth was named in the original complaint as an interested party, no monetary demands were made against BancorpSouth. Ultimately, an amended complaint was filed which did make monetary demands against BancorpSouth. BancorpSouth answered the amended complaint and petitioned the chancery court to authorize judicial foreclosure, which was eventually granted, but with a court imposed time delay to allow for settlement negotiations. When settlement negotiations between McInnis and Hartman fell through, the foreclosure sales were properly conducted. At no time following the filing of the initial complaint, or the subsequent amended complaint, did McInnis made any motion or otherwise petition the chancery court to allow them to collect rent or take other similar actions. Under the totality of the circumstances, the facts establish that BancorpSouth's decision was reasonable and did not breach any duty owed to McInnis, if in fact any such duty existed.

VI. CONCLUSION

Hartman presently is cast in judgment for the entire deficiency, but only because the judgment is in favor of McInnis; McInnis therefore has windfall by virtue of the McInnis debt to BancorpSouth not being collectible by BancorpSouth. Judicial foreclosure was allowed in equity and, in equity, BancorpSouth is entitled to be paid its debt from McInnis.

For the reasons set forth herein, BancorpSouth is entitled to judgment against Mary Deane McInnis, Ronson Construction Systems, Inc., Ron Nelson and the Estate of James C. P. Hartman, deceased, jointly and severally in the sum of $266,949.27, trustee's fees, attorneys' fees, interest from October 14, 2005 at 8% per annum, court costs and the right of first collection over any right of McInnis on the judgment awarded to them against Ronson, Nelson and the Estate of Hartman.

BANCORPSOUTH BANK/ APPELLANT

By: _____

Jack W. Land MBN 1798
Joe D. Stevens, MBN 9039
Tracy K. Bowles, MBN 101522
Attorneys for BancorpSouth Bank, Appellant

BRYAN NELSON P. A.
P. O. Drawer 18109
Hattiesburg, MS 39404
ATTORNEYS FOR APPELLANT,
BANCORPSOUTH BANK

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date mail, postage prepaid, U. S. Mail, a true and correct copy of Appellant's Reply Brief upon:

Honorable Sebe Dale Jr.
Chancery Court Judge
P.O. Box 1248
Columbia, MS 39429-1248

Ray T. Price, Esq.
P.O. Box 1546
Hattiesburg, MS 39403

Robin L. Roberts, Esq.
Attorney at Law
P.O. Box 1953
Hattiesburg, Mississippi 39403-1953

W. Wayne Drinkwater, Jr.
Clarence Webster, III
Bradley Arant Rose & White LLP
Post Office Box 1789
Jackson, MS 39215-1789

Ronson Construction, Inc.
334 First Hopewell Road
Sumrall, Mississippi 39482

Ron Nelson
334 First Hopewell Road
Sumrall, Mississippi 39482

This 26th day of February, 2007.

Jack W. Land MBN [redacted]
Joe D. Stevens, MBN [redacted]
Tracy K. Bowles, MBN [redacted]
Attorneys for BancorpSouth Bank, Appellant

Bryan Nelson P.A.
Post Office Drawer 18109
Hattiesburg, MS 39404-8109
Telephone: (601) 261-4100
Facsimile: (601) 261-4106
ATTORNEYS FOR APPELLANT,
BANCORPSOUTH BANK