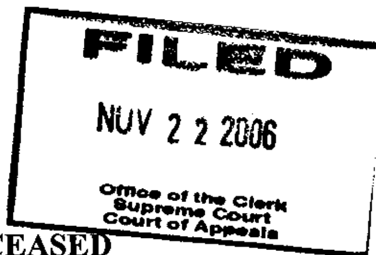
COPY

IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI

NO. 2006-CA-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

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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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
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4.	Ned G. McInnis, Jr. Mary Deane McInnis	Appellees
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5.	Ron Nelson	Appellee, *Pro Se*

6. Ronson Construction Systems, Inc.,
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BRIEF OF THE APPELLANT

COMES NOW, the Appellant, BancorpSouth Bank (hereinafter "BancorpSouth"), by and through undersigned counsel, and files this, its Brief of the Appellant, in support of its request for an entry of judgment against Ned and Mary Deane McInnis, Ronson Construction Systems, Inc., Ron Nelson, and the Estate of James C. P. Hartman, deceased, jointly and severally, as follows:

a) awarding BancorpSouth judgment against Mary Deane McInnis (maker of note to BancorpSouth), Ronson Construction Systems, Inc. (maker of note to Mary Deane McInnis and Ned McInnis which was assigned to BancorpSouth), Ron Nelson (guarantor of Ronson's note) and the Estate of James C. P. Hartman, deceased, (guarantor of Ronson's note) for:

   1) the principal sum of $266,949.27;

   2) trustee's fees;

   3) attorneys fees of $50,000.00 to $88,890.00;

   4) interest at the legal rate of 8% per annum from and after conclusion of trial on October 14, 2005;

   5) costs of court; and

b) overturning the lower court's finding that BancorpSouth owed and breached a fiduciary duty to Mary Deane McInnis and Ned McInnis.

I.

STATEMENT OF THE ISSUES

I. The trial court erred in finding that the Trustee's announcement that the foreclosure sales were subject to the liens of McInnis to BancorpSouth deeds of trust discouraged bidders and that the foreclosure sales did not serve as an adequate determination of fair market value so as to establish deficiency.

II. The trial court erred in finding that BancorpSouth owed and breached a fiduciary duty to McInnis which resulted in BancorpSouth not being allowed to recover from McInnis or from Ronson, Nelson and Hartman under the Wraparound Note assigned unto it by McInnis.

II.

STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises out of the denial of BancorpSouth's counter-claim for deficiency against Ned and Mary Deane McInnis[1] [hereinafter "McInnis"], and denial of its cross-claim for deficiency against Ron Nelson [Nelson], James C.P. Hartman [Hartman], and Ronson Construction Systems, Inc. [Ronson].

McInnis owed BancorpSouth for loans related to rental properties owned and managed by McInnis. In November 2003, McInnis decided to sell these rental properties and requested that BancorpSouth refrain from enforcing their "due on sale" provision if McInnis was able to reach an agreement to sell these rental properties to Hartman. At McInnis' request, BancorpSouth agreed not to make "due upon sale" demand. McInnis then sold the eighteen (18) parcels of property to Hartman for $970,000.00. Hartman conveyed four (4) parcels to other buyers, then simultaneously conveyed the remaining fourteen (14) rental parcels to Ronson. At the closing, Ronson gave McInnis a Wraparound Note, secured by two Deeds of Trust against the fourteen (14) parcels of rental property, in the amount of $664,683.90, which amount included McInnis' existing loan indebtedness to BancorpSouth. Also at closing, Hartman and Nelson personally guaranteed the Wraparound Note to McInnis. McInnis assigned to BancorpSouth the Wraparound Note, Guaranty and Deeds of Trust as security for McInnis' existing loans, to which the Wraparound Deed of Trust was expressly subordinate. Payments on the Wraparound Note were to be made directly to BancorpSouth, credited to McInnis' loans and any overage

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[1] Mary Deane inherited rental properties which she used as collateral for indebtedness she owed BancorpSouth under four separate notes. With the help of her husband, Ned, she managed these properties. Together they sold the properties to Hartman, entering into a purchase money financing agreement with Hartman. Both Ned and Mary Deane were payees on the purchase money note (Wraparound Note) and beneficiaries on the Deeds of Trust which secured said Wraparound Note.

remitted to McInnis' personal account.

On or about March 2004, Ronson defaulted on the Wraparound Note. Shortly thereafter, McInnis defaulted on the underlying notes in favor of BancorpSouth. Subsequent to McInnis' and Ronson's default, Nelson and Hartman refused to honor their personal guaranties. Thereafter, BancorpSouth obtained judicial authority to foreclose upon the Deeds of Trust securing the Wraparound Note. On May 3, 2005, BancorpSouth's Trustee conducted foreclosure sales on the fourteen (14) properties, eleven (11) parcels in Forrest County and three (3) parcels in Jones County. BancorpSouth acquired title to the fourteen (14) parcels at the foreclosure sales for the total bid price of $199,900.00.

After crediting the amount of the foreclosure bid to the underlying notes, McInnis, as maker, still owes BancorpSouth $266,949.27, as of October 14, 2005. BancorpSouth is entitled to judgment for this sum, plus interest and attorneys' fees. Because McInnis had previously assigned the Wraparound Note, personal guaranties and deeds of trust to BancorpSouth as collateral for McInnis' four (4) notes, BancorpSouth is also entitled to a joint and several Judgment against Ronson, as maker of the Wraparound Note, and Nelson and Hartman, as guarantors, for the $266,949.27 principal sum that McInnis continues to owe BancorpSouth.

B. Course of Proceedings and Disposition in Court Below

On April 28, 2004, McInnis initiated litigation against Ronson, Nelson and Hartman. BancorpSouth was initially named in the Complaint as an interested party, but subsequently it was added as a party defendant. The suit culminated in a three (3) day trial in October 2005, before Honorable Sebe Dale, Jr., in the Chancery Court of Forrest County, Mississippi.

The Chancellor issued his Memorandum Opinion on January 6, 2006. The Court found that BancorpSouth was equitably precluded from obtaining a deficiency judgment against McInnis. Instead,

the Chancellor entered a Final Judgment on February 2, 2006, which awarded to McInnis a deficiency judgment against Hartman, Nelson and Ronson under the Wraparound Note of $582,218.49, together with interest on the amount of $562,709.49 from December 31, 2005 until paid, at the rate of 6.5% per annum. BancorpSouth's claim for Judgment against Hartman, Nelson and Ronson was also denied, based upon the Court's finding that BancorpSouth was barred from collecting from McInnis. The effect of the Chancellor's judgment was to allow McInnis to collect from Ronson, Nelson and Hartman the $266,949.27 which McInnis owes BancorpSouth without any requirement that McInnis pay BancorpSouth. On April 17, 2006, BancorpSouth filed its Notice of Appeal and Cross-Appeal.

C. Statement of the Facts

McInnis' were customers of BancorpSouth. At the time of the transaction with Hartman, McInnis owed BancorpSouth on four (4) promissory notes (B-R.E. 7; B-R.E. 8; B-R.E. 9; B-R.E. 10) that were secured by Deeds of Trust on eighteen (18) parcels of land that were primarily residential rental units. McInnis owed BancorpSouth on six (6) additional promissory notes secured by Deeds of Trust on their home and property adjacent to their home.

These six (6) additional notes are related to the issue before the Court by virtue of McInnis' deal with Hartman. McInnis sold Hartman the eighteen (18) parcels that secured the four (4) notes and financed the sale upon a Wraparound Note with the monthly payments thereon to be paid at BancorpSouth and applied to the monthly installments due on McInnis' ten (10) notes. (Testimony of Joe Anthony, B-R.E. 17, lines 12-20). The Wraparound Note payments were expected to cover the monthly payments on McInnis' ten (10) notes and to produce an additional amount to be deposited in

McInnis' personal bank account. (Testimony of Ned McInnis, B-R.E. 19; Tr. 228, lines 2-11). [2]

The Sale Agreement (B-R.E. 5) between Hartman and McInnis, provided Hartman with an "escape provision" which gave him a right to a refund of his deposit and the right not to proceed with the purchase if he could not get financing. However, that was not needed because by the closing date, Hartman had conceived a plan for: (Testimony of James Hartman, B-R.E 18; Tr. 62, lines 4-22):

- Hartman to take title as a "straw man";
- Hartman to convey two (2) of the eighteen (18) parcels to a totally independent party for cash with Hartman making a profit;
- Hartman to convey to himself and a new partner two (2) of the remaining sixteen (16) parcels (an undeveloped subdivision in Petal, Mississippi, from which timber sales brought cash to the new partnership, and an eight (8) unit apartment complex, known as "Maynard," which had been generating approximately $4,000.00 per month income for McInnis); (Testimony of Ned McInnis, B-R.E 20; Tr. 268).
- Hartman to convey fourteen (14) rental parcels to Ronson Construction Systems, Inc.;
- Ronson to execute a Wraparound Note for $664,683.90 to McInnis; (B-R.E. 6).
- Ronson to execute two (2) Deeds of Trust to McInnis to secure the Wraparound Note;
- Hartman and Nelson to personally guarantee the Wraparound Note; (Testimony of Ned McInnis, B-R.E 20; Tr. 261, line 27, 262, line 10).
- McInnis to assign the Wraparound Note, Deeds of Trust on the fourteen (14) parcels securing the Wraparound Note, and personal guaranties from Hartman and Nelson to BancorpSouth;(B-R.E. 11; B-R.E. 12).
- Ronson to authorize Hartman to be the controller of the money and to pay the $8,500.00 monthly Wraparound Note installments to BancorpSouth.

The only problem was that after Hartman's disposal of the four (4) choice parcels, at great personal financial gain, insufficient rental revenue was left in the fourteen (14) parcels conveyed to

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[2] Abbreviations: BancorpSouth Record Excerpts (B-R. E.); Record.(R.)); Trial Transcript (Tr.).

Ronson, and Ronson was unable to meet its obligation on the Wraparound Note. (Testimony of Ned McInnis, B-R.E. 20; Tr. 265, lines 5-14). Although Hartman was shrewd, he was not shrewd enough - he had personally guaranteed the entire plan! (Testimony of James Hartman, B-R.E. 18; Tr. 62, lines 18-22; B-R.E 6 R 100010).

Ronson's last monthly payment to BancorpSouth on the Wraparound Note was in February 2004; therefore, the Wraparound Note and McInnis' four (4) notes were not past due until March 2004. In April 2004, McInnis filed suit against Hartman, Nelson and Ronson, and named BancorpSouth as an "interested party", but did not make any allegations of wrongdoing against BancorpSouth. Hartman continued to manage the fourteen (14) parcels. After suit was filed, BancorpSouth received only a small amount of funds from tenants and Section 8 and that could be applied on McInnis' four (4) notes.

McInnis' attorney wrote BancorpSouth and asked that McInnis be allowed to take over collection of rents on these fourteen (14) properties. (Testimony of Ned McInnis, B-R.E. 21; Tr. 271, lines 21-28). BancorpSouth considered the request, evaluated the potential liability associated with McInnis serving as debt collectors,[3] assessed potential adverse effects of interfering with Hartman's management of the properties and ultimately decided not to grant the request. McInnis filed suit approximately eight days after making the request. The entire matter was then before the Chancery Court. (Testimony of Ned McInnis, B-R.E 20; Tr. 265, lines 24-29; 266, lines 1-4; Testimony of Carol Daniel, B-R.E 31, Tr. 400, line 27 - 401, line 2). McInnis neither petitioned the Court for the right to collect rents nor asked the Chancellor to appoint a receiver to collect rent. Later, McInnis amended their suit to assert a damage claim against BancorpSouth, but they still did not request appointment of a receiver.

[3] Collection of debts for another is governed by the Fair Debt Collection Practices Act which, if violated, can impose liability upon a creditor such as BancorpSouth.

In November 2004, the parties entered into an Agreed Order which granted BancorpSouth authority to conduct foreclosure sales. On May 3, 2005, BancorpSouth's Trustee conducted the court-authorized foreclosure sales on the fourteen (14) rental parcels which secured the Wraparound Note, eleven (11) rental parcels in Forrest County and three (3) rental parcels in Jones County. BancorpSouth was the high bidder at the foreclosure sales and acquired title to the fourteen (14) parcels. In the five month period between foreclosure and trial, BancorpSouth was able to obtain buyers for two (2) of the parcels. Sales of the remaining twelve (12) parcels occurred over a period of several months after the trial was concluded. Based upon the sales of the individual parcels and the amounts received in these "willing-buyer, willing-seller" transactions, BancorpSouth's pre-trial bid price at foreclosure was proven to be commercially reasonable, just as BancorpSouth anticipated when it formulated its bid. (Testimony of Carol Daniel, B-R.E 30; Tr. 390, lines 11-25).

III.

SUMMARY OF THE ARGUMENT

This a case about payment of a secured debt. McInnis owes money to BancorpSouth on four (4) notes that preceded, and are senior to, the Wraparound Note. McInnis' assignment of the Wraparound Note and personal guaranties mandates payment to BancorpSouth by Ronson, Nelson and the Estate of Hartman of McInnis' debt under the four (4) notes. McInnis made a commitment, and the law says it must be honored. McInnis loaned money to Ronson, and the Chancellor properly found that the Wraparound Note should be paid in full. However, payment of a portion of the Wraparound Note, $266, 949.27, should be made to BancorpSouth as current holder of said note. Prior thereto and by the same token, BancorpSouth loaned money to McInnis and now it should be paid in full. BancorpSouth secured its interest, not once, but twice; yet, payment has been denied by the chancery court's erroneous

ruling.

BancorpSouth's Trustee properly conducted the foreclosure sales. The announcement that the foreclosure sales were subject to the liens of McInnis to BancorpSouth deeds of trust was accurate and did not discourage bidders. The foreclosure sales served as a determination of fair market value, and the amount of the judgment has been determined with certainty. Foreclosure on the Wraparound Note did not cause BancorpSouth's interests to merge. No fiduciary relationship existed between BancorpSouth and McInnis. BancorpSouth is entitled to a judgment against Mary Deane McInnis on the four (4) McInnis notes. By virtue of the assignment of the Wraparound Note and Nelson and Hartman's personal guaranties, BancorpSouth is also entitled to a judgment against Ronson, Nelson and the Estate of Hartman for the same amount that McInnis owes BancorpSouth. Thus, BancorpSouth is entitled to a judgment against Mary Deane McInnis, Ronson, Nelson and the Estate of Hartman, jointly and severally, for $266,949.27, plus trustee's fees, reasonable attorneys' fees, interest and court costs after October 14, 2005.

IV.

ARGUMENT AND AUTHORITIES

A. Standard of Review on Appeal

As to the issues raised in BancorpSouth's appeal, the standard of review is abuse of discretion. "When reviewing fact-based findings, we will only examine whether the trial court abused its discretion and whether there was substantial evidence supporting the determination." *Holmes v. Coast Transit Auth.*, 815 So.2d 1183, 1185 (MISS. 2002). As to matters of law, however, review is de novo, and this Court must reverse if the chancellor applied an incorrect legal standard. *Morreale v. Morreale*, 646 So.2d 1264, 1267 (MISS. 1994). If there is substantial evidence to support the chancellor's findings, the

Supreme Court will not disturb his conclusions, but the Court will not hesitate to reverse if the chancellor's decision is manifestly wrong, or applied erroneous legal standard. *Mississippi Dept. of Environmental Quality v. Weems*, 653 So.2d 266 (Miss.1995).

B. The trial court erred in finding that the Trustee's announcement that the foreclosure sales were subject to the liens of McInnis to BancorpSouth deeds of trust discouraged bidders and that the foreclosure sales did not serve as an adequate determination of fair market value so as to establish deficiency.

1. BancorpSouth's Trustee Properly Conducted the Foreclosure Sale

Wansley v. The First National Bank of Vicksburg established that "every aspect of the [foreclosure] sale, including the method, advertising, time, place and terms must be commercially reasonable." *Wansley v. The First National Bank of Vicksburg*, 566 So.2d 1218, 1225 (Miss.1990). In *Wansley*, a dispute arose over a deficiency after foreclosure. *Wansley,* 566 So.2d at 1218. The Chancery Court upheld the foreclosure. 566 So.2d at 1218. On appeal by the former owner, the Mississippi Supreme Court initially set aside the deficiency, then, on petition for reconsideration, affirmed the chancellor's decision, based on a finding that every aspect of the foreclosure sale was commercially reasonable. *Id.*

The evidence presented at trial shows that the Trustee properly conducted the foreclosure sale. In keeping with the touchstone of commercial reasonableness established in *Wansley*, testimony presented at trial in the instant matter established that the sale was conducted in a commercially reasonable manner. Proper notice of the Foreclosure Sale was provided to all parties as well as to the public in accordance with the terms of the Deed of Trust and the statutes of the State of Mississippi. (B-R.E. 13, B-R.E 14). McInnis, Ronson, Hartman and Nelson were informed by the Trustee of the default, the impending foreclosure, and the time, date and place of the foreclosure sale. Trial testimony also established that both Hartman and the attorney for McInnis attended the foreclosure sale and lodged no

complaints. (Testimony of Zeke Powell, B-R.E. 26; Tr. 346, lines 23-4;B-R.E. 27, Tr. 353, lines 21-27). The letter of the law was met, and the Trustee conducted a commercially reasonable foreclosure sales. (Testimony of Joe Anthony, B-R.E. 22; Tr. 309, line 24 - 310, line 15).

a. The announcement that the foreclosure sale was subject to the liens of McInnis to BancorpSouth deeds of trust did not discourage bidders, and the foreclosure sale served as a determination of fair market value.

The Chancellor erred in finding as fact "that the announcement by the trustee that the sale would be subject to the liens of the McInnis to BCS deeds of trust resulted in discouraging others than BCS from bidding on the properties, thereby foreclosing opportunity for any sale serving as a determinant of fair market value of the properties sold." (Memorandum Opinion, B-R.E. 2, p. 4, ¶ 10; R. 567-577). The Chancellor further erred in concluding that the "bid price by BancorpSouth was without any prior proper determination of fair market value by appraisal or otherwise and no determination of fair market value has been determined by willing-seller willing-buyer sales." (Memorandum Opinion, B-R.E. p. 5, ¶ 12; R. 567-577).

As set forth in *Allied Steel*, the legal determination of the adequacy of the purchase price at a foreclosure sale is based upon the establishment of the fair market value for the property. *Allied Steel Corp. v. Cooper*, 607 So.2d 113, 118 (MISS. 1992). In *Allied Steel*, the Circuit Court found that the co-owner of commercial property was not personally liable for debts owed to lienholders and entered an order ratifying the foreclosure sale. *Allied Steel*, 607 So.2d at 113. The Supreme Court held that the co-owners acted as partners and that the bid price at the foreclosure sale was not unconscionable. 607 So.2d at 113. Factors which the *Allied Steel* Court considered in determination of fair market value included testimony by party representatives, testimony by real estate appraisers, and valuations of the property which were made a part of the record. *Id.* at 119. "Evidence of recent sales of the same

property is likewise relevant to determination of the fair market value of the property." *Id.* at 120 (citations omitted).

At the foreclosure sale in the instant matter, BancorpSouth was the only bidder. (Testimony of Joe Anthony, B-R.E. 22; Tr. 310, lines 16-21; Testimony of Carol Daniel, B-R.E 30; Tr. 390, line 29-391, line 3). BancorpSouth clearly established that its bid amounts reasonably reflected the valuation which BancorpSouth established for each of the fourteen (14) parcels on the day before the foreclosure sales. (Testimony of Zeke Powell, B-R.E. 25; Tr. 341, line 24 - 342, line 12; 342, line 26-343, line 19). BancorpSouth officers with significant experience in inspecting property and establishing values and bid amounts for foreclosure sales reviewed and updated the existing appraisals in the file, personally inspected the properties the day prior to the foreclosure sale and calculated an appropriate bid for the properties.[4] (Testimony of Zeke Powell, B-R.E. 25; Tr. 341, line 24 - 342, line 12; 342, line 26-343, line 19). The amounts bid by BancorpSouth were commercially reasonable. (Testimony of Carol Daniel, B-R.E.30; Tr. 390, lines 6-25). The bid amounts they calculated were the successful bids at the foreclosure sales; no other potential bidders announced a bid. (Testimony of Joe Anthony, B-R.E. 22; Tr. 310, lines 16-21; B-R.E. 15; Testimony of Carol Daniel, B-R.E. 30; Tr. 390, line 29- 391, line 3). The Trustee offered the parcels for sale both separately and collectively, which assured a maximum recovery for the fourteen (14) parcels.(Testimony of Carol Daniel, B-R.E. 30; Tr. 390, lines 26-28).

BancorpSouth officer, Zeke Powell, testified that of the fourteen (14) parcels purchased by BancorpSouth at foreclosure, buyers for only two (2) parcels were found in the five month period between foreclosure and trial. (B-R.E. 28; Tr. 373, lines 11-17). Further testimony also proved that

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[4] BancorpSouth sent two of its officers to perform these duties, both of whom were qualified. In fact one of the BancorpSouth officers was licensed as a contractor, a realtor and a real estate appraiser. (Tr. 340, lines 1-17).

BancorpSouth's bid price closely reflected the sale price it was able to obtain. (Testimony of Zeke Powell, B-R.E. 29; Tr. 384, line 29 - 385, line 1). "Willing buyer-willing seller" sales that occurred in the five- month period between foreclosure and trial serve as demonstrative evidence of the commercial reasonableness of BancorpSouth's bid.[5] (Affidavit of BancorpSouth officer, Carol Daniel B-R.E. 32).

b. Foreclosure on the Wraparound Note did not cause BancorpSouth's interests to merge.

The Chancellor further erred in finding as a matter of law "that the statement of the trustee was an incorrect statement on the basis that BCS [BancorpSouth], in electing to foreclose on the RCSI Deed of Trust [Wraparound Note], merged its interests under the McInnis Deeds of Trust, having accepted the RCSI Deed of Trust as a 'Wraparound' which encompassed the former." (Memorandum Opinion, B-R.E. 2, p. 4 ¶ 10; R. 567-577).

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.*

At the foreclosure sale of a defaulted wraparound, the property is typically sold "subject to" prior liens, meaning in addition to the payment of the bid amount, the purchaser will take "subject to" the

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[5] The total actual sale prices for the two (2) parcels sold between foreclosure and trial, 105 Mamie and 129 Saucier, were $28,000.00 and $29,000.00, respectively; the 2003 and 2004 taxes for those parcels were $3,572.00 and $2,307.00, respectively. (Testimony of Zeke Powell, B-R.E. 29; Tr. 387, lines 16-26). To compare sale prices to the bid prices at foreclosure, the ad valorem taxes which had to be paid must be deducted. The 2004 ad valorem taxes were past due and four months of the 2005 taxes had elapsed and were pro ratable to BancorpSouth.

outstanding balance and lien of the prior mortgages. 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). Although the trial court indicated that the method of foreclosure in the instant matter was improper, there is no statute or rule of procedure which addresses the proper manner of foreclosing a 'wraparound' mortgage. *Id.* (*citing Bayshore Garden Apartments, Ltd. v. Real Estate Apartments, Ltd.*, 541 So.2d 158, 159 (FLA. DIST. CT. APP. 1989)). 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. *Id.* at 223.

There are no Mississippi cases directly on point; however, in *Summers v. Consolidated Capital Special Trust*, the Texas Supreme Court considered the issue of how to calculate a deficiency following foreclosure of a Wraparound note. *Summers v. Consolidated Capital Special Trust*, 783 S.W.2d 580 (TEX. 1989). In *Summers*, a wraparound note assignee brought an action to recover the amount of proceeds from the foreclosure sale which exceeded the balance due on the underlying indebtedness, and the beneficiary and trustee counter-claimed for deficiency. *Summers*, 783 S.W.2d at 580. The District Court found that the sale price must be credited against the outstanding balance of the wraparound note. 783 S.W.2d at 580. The Texas Supreme Court affirmed the District Court and held that when a deed of trust lien securing a wraparound note is foreclosed, the amount bid for the property at the sale is to be credited to the entire outstanding balance, including the wrapped or preexisting indebtedness. *Id.* at 583. In *Summers*, the notice of trustee's sale stated that the foreclosure sale would be made "subject to" the prior notes and liens. *Id.* at 581. The entire foreclosure in *Summers* was made subject to four prior liens. *Id. Summers* also specifically determined that a third party purchaser would have to satisfy the

underlying indebtedness to obtain clear title to the property following a successful bid at the foreclosure sale. *Summers* at 583.

In the instant case, there was no merger of interests in BancorpSouth electing to foreclose the Wraparound deeds of trust, it was merely the appropriate course of action. Had BancorpSouth elected to foreclose the superior McInnis deeds of trust, that would have resulted in the Wraparound deeds of trust being wiped out to the detriment of McInnis. As in *Summers*, 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 BancorpSouth. Any prospective bidder who attended the sale was aware of the fact that the sale would be subject to BancorpSouth's lien and that the four (4) McInnis Deeds of Trust would have to be satisfied before clear title could be obtained.

C. The trial court erred in finding that BancorpSouth owed and breached a fiduciary duty to McInnis which resulted in BancorpSouth not being allowed to recover from Ronson, Nelson and Hartman under the Wraparound Note assigned unto it by McInnis.

1. BancorpSouth is Entitled to a Judgment.

a. The amount of the Judgment has been determined with certainty.

The chancellor erred in "finding and concluding as a matter of fact and law that no deficiency which may be asserted with certainly has been determined." (Memorandum Opinion, B-R.E. 2, p. 5, ¶ 12; R. 567-577). The Chancellor further erred in finding "[a]s a matter of equity BCS should be precluded by the Court from ... obtaining judgment against McInnis for a deficiency not determined with certainty and for attorneys fees and costs." (Memorandum Opinion, B-R.E 2, p. 6, ¶ 12; R. 567-577). Deficiency judgment is defined as "[a] judgment against a debtor for the unpaid balance of the debt if a foreclosure sale or a sale of repossessed personal property fails to yield the full amount of the debt. BLACK'S LAW DICTIONARY 679 (7th ed. 2000). The Mississippi Supreme Court has long recognized

that the terms of foreclosure must be commercially reasonable and that, where the foreclosing bank is the successful bidder at foreclosure, the bank must give the debtor fair credit for the commercially reasonable value of the collateral. *See Wansley*, 566 So.2d at 1221-22, 1224-25.

The mortgagee has the burden of proving its entitlement under principles of equity. *Lake Hillsdale Estates, Inc. v. Galloway*, 473 So.2d 461, 466 (MISS. 1985). In *Lake Hillsdale*, a mortgagor sued a mortgagee and trustee over the value of realty sold at a foreclosure sale, and the mortgagee cross-claimed for a deficiency judgment. *Lake Hillsdale,* 473 So.2d at 461. The Chancellor granted the deficiency to the mortgagee. 473 So.2d at 461. The Supreme Court held, in part, that there was no evidence of bad faith or unfairness on the part of the trustee even though the property sold at foreclosure for far less than the amount due on the note. *Id.* The mortgagee in *Lake Hillsdale* was the sole bidder at the foreclosure sale, and the sale price left the mortgagee entitled to a deficiency judgment of over one hundred thousand dollars ($100,000.00); however, the Court found that the price was not so inadequate as to set aside the sale. *Id.* at 466.

Before this Court is evidence 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, B-R.E. 25; Tr. 341, line 24 - 342, line 2), BancorpSouth clearly put on sufficient proof that the bid prices paid at the foreclosure sale were not only adequate but also commercially reasonable (Testimony of Carol Daniel, B-R.E. 30; Tr. 390, lines 6-25), and that the bid amounts were duly and properly applied to the Notes at issue (Testimony of Joe Anthony, B-R.E. 24; Tr. 324, lines 20-22). As set forth by Carol Daniel,

BancorpSouth also established through willing seller-willing buyer sales post-trial, that the successful bid price was demonstrative of fair market value. (B-R.E. 32; R. 594). As such, BancorpSouth is equitably entitled to Judgment against McInnis, Ronson, Nelson and the Estate of Hartman.

Because the foreclosure sale served as a determination of fair market value, as discussed *supra* herein, and because the amount of the judgment has been determined with certainty. BancorpSouth is entitled to a judgment of $266,949,27, plus trustee's fees, attorneys' fees, interest and court costs. (Testimony of Joe Anthony, B-R.E. 23; Tr. 317). *See Baxter v. Shaw Associates, Inc.*, 797 So.2d 396 (MISS. 2000). BancorpSouth has now also incurred the additional expense of the appeal, the cost of which should be included in the attorney's fees.

The Chancellor established a reasonable interest rate on the judgment awarded to McInnis; he just failed to award BancorpSouth its portion of the principal indebtedness, fees and interest after October 14, 2005.

b. No fiduciary relationship existed between BancorpSouth and McInnis.

The Chancellor erred in finding that "as a matter of law there was created between BCS and McInnis as to the excess portion of that note a fiduciary relationship which at least imposed upon BCS an obligation not to do anything affirmatively that would jeopardize the position of McInnis vis-a-vis their relationship with the maker and guarantors of the Wraparound note." (Memorandum Opinion, B-R.E. 2, p. 5, ¶ 12; R. 567-577). The Chancellor further erred in finding that BancorpSouth's refusal to consent to McInnis' request to allow McInnis to undertake rental collections was in derogation of BancorpSouth's fiduciary obligation to McInnis. (Memorandum Opinion, B-R.E. 2, p. 6, ¶ 12; R. 567-577).

As set forth in *Union Planters National Bank, NA v. Jetton*, a fiduciary relationship does not

automatically exist in a commercial loan transaction. *Union Planters National Bank, NA v. Jetton*, 856 So.2d 674, 677(MISS. Ct. App. 2003)(citations omitted). In *Union Planters*, a certificate of deposit buyer brought suit against the bank after the bank set-off the debt of a joint owner of the certificate of deposit. *Union Planters*, 856 So.2d at 674.. The Chancellor entered judgment for the buyer, and the bank appealed. 856 So.2d at 674. The Court of Appeals held that no fiduciary relationship existed between the bank and the buyer, and the bank was entitled to set-off. *Id.* "The party asserting the existence of a fiduciary relationship bears the burden of proving its existence by clear and convincing evidence." *Id.* at 677 (citations omitted).

The Mississippi Supreme Court has refused to recognize the existence of a fiduciary relationship in cases where the relationship between the two parties was no more than "an arms-length business transaction involving a normal debtor–creditor relationship." *Merchants & Planters Bank of Raymond v. Williamson*, 691 So.2d 398, 404 (MISS. 1997). In *Merchants*, a borrower brought suit against the bank alleging numerous causes of action, including breach of fiduciary duty. *Merchants*, 691 So.2d at 398. The Chancellor found for the borrower, and the bank appealed. 691 So.2d at 398. The Supreme Court held, in pertinent part, that a mortgagor/mortgagee relationship between a bank and borrower was not a fiduciary relationship, as a matter of law. *Id.* The Court pointed out that "[t]he existence of a fiduciary duty must be established before a breach of that duty can arise. *Id.* at 403 (*citing Lowery v. Guaranty Bank and Trust Co.*, 592 So.2d 79,83 (MISS. 1991)).

BancorpSouth has not breached any duty owed to McInnis. BancorpSouth did not owe a fiduciary duty to McInnis, and there is absolutely no proof of the existence of a fiduciary relationship nor the breach of any such duty that could, for purposes of argument, be thought to exist. McInnis bore the burden to prove at trial, by clear and convincing evidence, that a fiduciary duty existed; however,

McInnis failed entirely to establish the existence of such a duty. 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, B-R.E. 16; Tr. 36, lines 6-8; 39, lines 7-8; 37, lines 15-16). This was "an arms-length business transaction" between experienced businesspeople, McInnis (debtor), and BancorpSouth (creditor).

The Chancellor further erred in finding that BancorpSouth "acted in contravention" of a fiduciary obligation to McInnis by refusing McInnis' request to collect rents. (Memorandum Opinion, B-R.E. 2 p.6 , ¶ 12; R. 567-577). As set forth at trial, McInnis' attorney wrote BancorpSouth and asked that McInnis be allowed to take over collection of rents on the fourteen rental (14) properties. (Testimony of Ned McInnis, B-R.E. 21; Tr. 271, lines 21-28). BancorpSouth considered the request, evaluated potential liability associated with McInnis serving as debt collectors,[6] and assessed potential adverse effects of interfering with Hartman's management of the properties, and chose not to interfere with the current management of the rental properties.

McInnis then filed suit, at which time, the entire matter was before the Chancery Court. (Testimony of Ned McInnis, B-R.E. 20; Tr. 265, lines 24-29; 266, lines 1-4; Testimony of Carol Daniel, B-R.E. 31; Tr. 400, line 27 - 401, line 2). McInnis did not petition the Court for the right to collect rents or ask the Chancellor to appoint a receiver to collect rent. When McInnis amended their suit to assert

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[6] Collection of debts for another is governed by the Fair Debt Collection Practices Act which, if violated, can impose liability upon a creditor such as BancorpSouth.

a damage claim against BancorpSouth, they still did not request appointment of a receiver. Even if a fiduciary duty existed, which BancorpSouth denies, McInnis put the entire matter in the hands of the Court and failed to raise the matter of rental collections.

c. BancorpSouth is entitled to recover from Ronson, Nelson and Hartman to the same extent as McInnis until McInnis' underlying debt to BancorpSouth is satisfied.

The Chancellor properly found that "RCSI, Nelson and Hartman [are] indebted to BCS by virtue of this transaction ... to the extent McInnis were indebted to BCS under their notes covering loans on the 18 properties conveyed to Hartman." (Memorandum Opinion, B-R.E. 2, p. 8, ¶ 15; R. 567-577). The Chancellor was also correct in his finding that "the only indebtedness remaining as an obligation on the part of Hartman and Nelson to BCS by virtue of the guaranty was the balance due under the McInnis notes to BCS covering loans on the 14 properties ultimately vesting in RCSI. It is as to those properties and the claimed deficiency remaining after foreclosure that BCS seeks judgment from RCSI, Hartman and Nelson." (Memorandum Opinion, B-R.E. 2, p. 8, ¶ 15; R. 567-577). The Chancellor erred; however, in finding as a matter of law and equity, that BancorpSouth is barred from collecting from the maker and the guarantors, as the Wraparound Note and guaranty had been properly and fully assigned by McInnis to BancorpSouth.

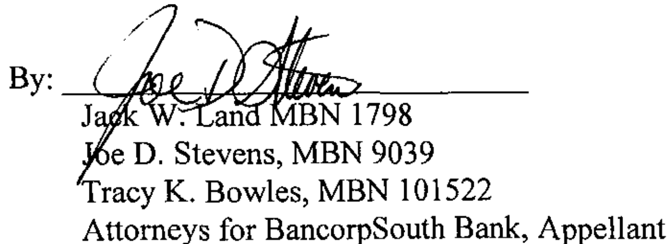
"As a general rule, the measure of liability of a guarantor of a mortgage debt, after the foreclosure of the mortgage and the bidding in of the property by the mortgagee, is the amount of the deficiency on the foreclosure, including appropriate allowances for taxes, insurance, commissions, attorneys' fees, and costs...." AM. JUR.2d Mortgages § 763 (1996). It is well-settled that a "guarantor's liability becomes indistinguishable from that of a co-maker." *West Point Corp. v. New North Mississippi Savings & Loan Assoc.*, 506 So2d 241, 246 (MISS. 1986); *Comfort Engineering Co., v. Kinsey*, 523 So.2d 1019 (MISS. 1988)(the liability of a guarantor is the same as a co-maker); Comment, UCC § 3-416.

The Wraparound Note contains a personal guaranty provision which was executed by Nelson and Hartman, whereby each, jointly and severally, agreed to satisfy the indebtedness of Ronson to McInnis in the event of default. According to MISS. CODE ANN. § 75-3-116, Nelson and Hartman are statutorily liable under their Guaranty. By virtue of assignment to BancorpSouth of their personal guaranties, Hartman and Nelson are liable to BancorpSouth to the same extent as McInnis. As set forth, *supra*, herein, as a matter of law and equity, BancorpSouth is entitled to a Judgment against McInnis for the amount of the outstanding indebtedness on the underlying notes. By the same token, BancorpSouth is, as a matter of law and equity, entitled to a Judgment against Ronson, Nelson and the Estate of Hartman, under the Wraparound Note and guaranty until the underlying debt of McInnis is satisfied.

V. CONCLUSION

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: 
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