IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2006-CA-01658

IN THE MATTER OF THE ESTATE OF NATHAN McGEE, DECEASED

FRANCES CAROLYN HARRIS PHILIP, SUSAN CATHERINE HARRIS COUCH, SAMUEL KING HARRIS, DAVID WALTON LONGMORE, JAMES ALAN LONGMIRE, and ROBERT WILLIAM LONGMIRE **APPELLANTS**

v.

MARGARET McDANIEL HARVESTON, ADMINISTRATRIX, and RLI INSURANCE COMPANY, SURETY **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel of record certifies that the persons listed below have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Honorable George Ward, Adams County Chancellor

THE NATHAN McGEE HEIRS:
Frances Carolyn Harris Philip, Appellant
Susan Catherine Harris Couch, Appellant
Samuel King Harris, Appellant
David Walton Longmire, Appellant
James Alan Longmire, Appellant
Robert William Longmire, Appellant

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Margaret McDaniel Harveston, Administratrix, Appellee

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RLI Insurance Company, Surety for the Administratrix, Appellee

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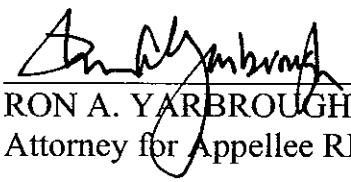

RON A. YARBROUGH (MSB 6630)
Attorney for Appellee RLI Insurance Company

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ORAL ARGUMENT

Appellee RLI Insurance Company does not believe that oral argument of the case will assist the Court in rendering its opinion.

STATEMENT OF THE FACTS

Nathan McGee died intestate on September 23, 1999, in Adams County, Mississippi. (R.E. 1). Prior to his death, he was seriously visually-impaired and lived a reclusive lifestyle. (Tr. 5-6; 70). In the latter years of his life, Mrs. Harveston had assisted Mr. McGee and, at his death, she contacted Thomas McNeely, a local attorney, to handle Mr. McGee's estate. (Tr. 83). So far as Margaret Harveston knew, he left no living family members. (Tr. 9-10).

On September 30, 1999, Mrs. Harveston was appointed Administratrix by the Chancery Court of Adams County. (R.E. 1). After her appointment, Mrs. Harveston filed an inventory on December 16, 1999, disclosing that the total value of Mr. McGee's property was $2,254,199.84, including $2,191,906.09 held in brokerage accounts in New Orleans and Baton Rouge. (R.E. 2).

By Order dated December 22, 1999, the Court approved Mrs. Harveston's petition to transfer to Edward Jones Investments in Vidalia, Louisiana, the securities that were held in Mr. McGee's account in New Orleans and Baton Rouge. (R.E. 4). Mrs. Harveston transferred the securities to Edward Jones Investments because the attorney for the estate told her that Edward Jones was a good company, she knew Mr. McDonough at the Edward Jones office and she felt the securities would be protected. (Tr. 20-21). On February 25, 2000, RLI Insurance Company ("RLI") executed and issued its Bond of Administrator, as surety for Mrs. Harveston, in the amount of $2,255,000.00. (R.E. 5).

Mrs. Harveston had no experience investing in the stock market and relied upon the advice of Mr. McDonough, an investment advisor, and on the estate's attorney and

accountant. (Tr. 49; 50-51; 55; 90-92). Between the date of the initial transfer of the securities to Edward Jones Investments and the October 27, 2000 report attached to the First Annual Accounting, (R.E. 7), the securities that Mr. McGee held in five separate companies at the time of his death increased in value, even after $438,000.00 worth of securities were sold with approval of the court to pay federal and state taxes. (Tr. 56).

On May 25, 2001, as shown on Exhibit C to the Petition for Approval of Second Annual Accounting (R.E. 9), these same securities had increased in value by about $250,000.00, even after another court-approved transfer of $90,000.00 to pay partial professional fees. (R.E. 6). Although no one in the investment industry or otherwise could have predicted the terrorists attacks in September 2001, those events rocked the stock market, and the value of these securities decreased almost $465,000.00 during September 2001. (R.E. 9). At the same time, professional money managers were telling their clients not to abandon the stock market but to stay in it. (Tr. 129). The securities remained invested in the same five companies.

By October 2002, other factors, including the collapse of Worldcom and Enron, etc., pulled the stock market down further. On the recommendation of the estate's investment advisor, Mrs. Harveston petitioned the court for and received approval to sell these securities to achieve broader diversification. (R.E. 10). (Tr. 60-61). After these securities were sold, the proceeds were invested in mutual funds and bonds recommended by the estate's financial advisor. (R.E. 11). (Tr. 67).

Between October 2002, when the original securities were liquidated and reinvested for diversification, and entry of an Order on November 3, 2003, liquidating the

investments to make a partial distribution to the heirs, (R.E. 13), the value of the estate assets increased almost $450,000.00. (Tr. 132).

Mrs. Harveston had no substantive knowledge of the stock market and relied upon the estate's financial advisor, attorney and accountant for advice. (Tr. 49; 50-51; 55; 90-92). In every instance when Mrs. Harveston sold or otherwise transferred any of the estate securities, she did so only with approval of the court. (R.E. 4; 6; 8; 10; 13; 14).

By August 23, 2003, an adjudication of heirship had concluded with a number of distant relatives having been determined to be Mr. McGee's heirs at law. On November 18, 2004, these same heirs filed a Complaint in the Chancery Court of Adams County against Mrs. Harveston and her surety, RLI, alleging breach of Mrs. Harveston's fiduciary duty, breach of duty by removing property out of state and gross negligence.

At the trial on August 1, 2006, only two witnesses were called, Mrs. Harveston and Stacy Wall, a professional money manager who testified on behalf of the plaintiffs. Mrs. Harveston testified, *inter alia*, to the petitions filed and orders entered by the court during her administration of the estate, of her lack of knowledge regarding the stock market and her reliance upon the advice of the estate's financial advisor, attorney and accountant in pursuing the estate's investment objectives.

Mr. Wall acknowledged considerable debate and disagreement in the investment industry as to what is the best investment strategy "under prevailing circumstances". (Tr. 126). After hearing Mrs. Harveston testify that she had no investment experience, Mr. Wall opined that she should have sought advice from a broker and/or attorney and that, in his opinion, if she followed their advice, she received "bad advice". (Tr. 126 – 127).

At the conclusion of the plaintiff's case, the Court dismissed the case on motion of RLI, finding that Mrs. Harveston did not violate her fiduciary duty, committed no waste of estate assets and should "be commended" for acting diligently in handling the business of the estate. (Tr. 144 – 150).

SUMMARY OF THE ARGUMENT

After Nathan McGee died intestate, Margaret Harveston was appointed administratrix of his estate. At the time of his death, the bulk of his estate consisted of stock certificates valued at $2,191,906 and invested in five different companies. The securities were held in brokerage accounts in New Orleans and Baton Rouge, and they were transferred by Order of the Chancery Court to the Edward Jones Investments office in Vidalia, Louisiana, across the Mississippi River from Adams County, where the estate was administered.

Mrs. Harveston had no experience investing in the stock market. She trusted Mr. McDonough, the investment representative at Edward Jones, to protect the investments, and she relied on Mr. McDonough, along with the estate's attorney and accountant, for investment advice. During the first 18 months of administration the securities continued to appreciate in value. As of May 2001, the securities were worth more than when they were transferred to Edward Jones Investments even after disposing of $528,000 to pay taxes and partial payment for professional fees.

As a protracted adjudication of heirship proceeded, the stock market began to decline, affected by the September 11 terrorists attacks, the collapse of Enron and Worldcom and other events. In October 2002, on the advice of the estate's investment advisor, the court authorized liquidation of the securities and re-investment in mutual funds and bonds to achieve diversification. During the following thirteen months the value of the assets increased by approximately $450,000.00 when they were liquidated for distribution to the heirs.

Although the estate assets ultimately decreased in value by about $146,000 over a four year period, Mrs. Harveston did not breach any duty imposed by Miss. Code Ann. § 91-13-3 respecting investment of estate assets, or otherwise. The chancellor correctly found that she committed no waste of any estate assets, acted diligently and acted upon the advice of the estate financial advisor, attorney and accountant. Mrs. Harveston sought and obtained court approval for every sale or transfer of estate assets.

The plaintiffs are engaging in second-guessing based upon hindsight. If these same investments had increased over time, the Complaint would never have been filed by the heirs. The chancellor was correct in dismissing the plaintiffs' case against Mrs. Harveston and her surety, RLI Insurance Company, and the chancellor's Judgment should be affirmed.

ARGUMENT

A. STANDARDS OF REVIEW

Regardless of whether RLI's motion, made at the conclusion of the plaintiffs' case, is treated as a motion under Rule 50, Miss. R. Civ. P., or one under Rule 41(b), RLI agrees that the standard of review is the "substantial evidence/manifest error standard" urged by the plaintiffs. Judged against that standard, the Chancellor's dismissal of the plaintiffs' case was overwhelmingly correct, and the Chancellor's Bench Opinion amply justifies a ruling "that upon the facts and the law the plaintiff[s] [have] shown no right to relief". Rule 41(b), Miss. R. Civ. P. Moreover, whether Mrs. Harveston exercised the requisite standard of care in managing the estate's funds is a question of fact, *McNeil v. Hester*, 753 So.2d 1057, 1073 (Miss. 2000), and, because substantial credible evidence supports the Chancellor's decision, it should be affirmed. *In Re Estate of Carter*, 912 So.2d 138, 143 (Miss. 2005).

B. THE STANDARD OF CARE

RLI agrees with the plaintiffs that the standard of care applicable to Mrs. Harveston's duties as administratrix is set forth in Miss. Code Ann. § 91-13-3, which provides, in relevant part, as follows:

> **Authority to prudently invest in all property.**
>
> In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property held in fiduciary capacity, **the fiduciary shall exercise the judgment and care under the circumstances then prevailing which men of prudence, discretion, and intelligence exercise in the management of their own affairs**, not in regard to speculation, but in regard to the permanent disposition of their

> funds, considering the probable income as well as the probable safety of their capital.
> (Emphasis added).

Mrs. Harveston, therefore, was obligated to "exercise the judgment and care under the circumstances then prevailing which [people] of prudence, discretion, and intelligence exercise in the management of their own affairs". She did just that, and the Chancellor so found. That the estate value decreased over time does not mean that Mrs. Harveston's actions lacked "prudence, discretion and intelligence", and the Chancellor found no evidence to support the plaintiffs' allegation.

1. THERE WAS NO FAILURE TO MARSHAL THE ASSETS.

Without developing their argument - - as there is nothing in the record to support it - - the plaintiffs assert that Mrs. Harveston "began her term as administratrix by violating her duty to marshal the assets within the state of Mississippi", as required by Miss. Code Ann. § 91-7-257. (Brief at p. 18). That statute provides, in pertinent part, as follows:

> **Property not to be removed from state.**
>
> An executor or administrator shall not remove any of the property of the estate out of this state. * * *

The plaintiffs do not assert that the value of these securities decreased by their alleged removal out of state, and one is left to wonder why they would mention it even in passing. The undisputed facts are that securities valued at $1,998,586.00 were held in Nathan McGee's account at Merrill Lynch's Baton Rouge, Louisiana, office and securities valued at $193,320.09 were held at Prudential Securities' New Orleans,

Louisiana, office. (R.E. 2). Accordingly, **all** estate securities were already held outside of Mississippi.

By Order dated December 22, 1999, the Chancellor authorized the transfer of these securities from New Orleans and Baton Rouge to the Edward Jones Investments office in Vidalia, Louisiana, across the river from Adams County, where Nathan McGee's estate was administered. (R.E. 4). These securities were not "removed" from Mississippi. They were out of this state to begin with, and they were simply transferred to a more convenient investment office.

As the Chancellor's Bench Opinion correctly found:

> The estate simply - - there was a transfer, initial transfer of the account from Merrill Lynch and Prudential, I believe it was, Securities over to Edward Jones; that was of no consequence; it was a matter of course. It had no consequence or merit or effect on the account other than to place it into one account with one broker, which was Edward Jones, which was with Mr. McDonough, who was a person that the administrator felt she could trust.
> (Tr. 147).

The securities were never removed from this state to Louisiana and the transfer of the securities from New Orleans and Baton Rouge to Vidalia, Louisiana, was done with approval of the Court.

2. THE CHANCELLOR'S DISTINCTION BETWEEN A TRUSTEE AND AN ADMINISTRATRIX IS A DISTINCTION WITHOUT A DIFFERENCE.

The plaintiffs complain that the Chancellor was manifestly wrong in distinguishing between the standard of care applicable to a trustee and that applicable to an administrator. (Brief at p. 21).

In his Bench Opinion, the Chancellor said:

> In fact, Mrs. Harveston is not a trustee; she is an administrator of an estate; and she is only acting by authority that was granted to her by this Court. Therefore, she was amenable to the court and subject to the authority of the court before she could do anything.
> (Tr. 146).

In Re Estate of Carter, 912 So.2d 138, 144-145 (Miss. 2005), holds "that the same standard of care applicable to a general trustee applies to an executor or administrator." The standard of care expressed in that case for trustees, executors and administrators is the same standard set out in § 91-13-3, the standard generally referred to as "the prudent investor rule." And, that is the standard by which Mrs. Harveston's performance is judged.

On this same point, the plaintiffs claim the Chancellor was manifestly wrong in holding that Mrs. Harveston was "subject to the authority of the Court before she could do anything" and that "the only way that she could make any such decision in assignment or sale or transfer [of the securities] would be by authority from this Court". (Brief at p. 21). From there, the plaintiffs argue for reversal, saying " The Chancellor was wrong and committed manifest error in his findings of facts and conclusions of law that Margaret Harveston could not have sold investment in the stock market without court approval". (Brief at p. 22). In sum, the plaintiffs argue that "[T]he Chancellor confused investing in the stock market with transferring stock certificates." *Id.*

It is the plaintiffs who are "confused". Their argument, based as it is upon Miss. Code Ann. § 91-7-255, is wholly misplaced. That statute provides, in relevant part, as follows:

Fiduciary not to transfer negotiable papers.

> **No** executor, **administrator**, guardian, receiver or other fiduciary appointed by or acting pursuant to the authority of any chancery court **may sell**, assign **or transfer any** note, bill of exchange, **bond, stock certificate**, or other negotiable paper **belonging to the estate** committed or entrusted to him by such court, **unless** he should be **authorized so to do by an order of the court or chancellor**, or by the last will and testament of the decedent . . . (Emphasis added)
> Miss. Code Ann. § 91-7-255.

There was no last will and testament of Nathan McGee. Therefore, the statute prohibited Mrs. Harveston from selling or transferring "any . . . stock certificate . . . belonging to the estate" without authority to do so evidenced by the chancellor's order. She faithfully complied, as the Chancellor found.

The plaintiffs, however, read "negotiable papers" as used in the heading of § 91-7-255 to mean "negotiable instruments" as defined in § 75-3-104. The rules of statutory construction are familiar. A court's primary goal in interpreting a statute is to discern and give effect to the Legislature's intent. *City of Natchez v. Sullivan*, 612 So.2d 1087, 1089 (Miss. 1993). The proper way to discern this intent is to study the words of the statute in their proper context. *Kerr-McGee Chemical Corp. v. Buelow*, 670 So.2d 12, 17 (Miss. 1996). Although the phrase "negotiable papers" appears in the title, when the Legislature wrote that "no . . . administrator . . . may sell . . . or transfer any . . . bond or stock certificate" without authority of the court, that prohibition is clear. Similarly, when the Chancellor held that "[T]he only way that [Mrs. Harveston] could make any such decision in assignment or sale or transfer would be by authority from this court" (Tr. 147), he correctly stated the applicable law.

In every instance when Mrs. Harveston sold estate securities, she applied for and received an order from the court allowing her to do so. These transactions are supported by Orders dated June 14, 2000, authorizing the sale of Ford Motor Company stock for payment of federal and state taxes (R.E. 6); December 14, 2000, authorizing transfer for partial payment of professional fees (R.E. 8); October 9, 2002, authorizing diversification by making transfers into fixed bonds or mutual funds (R. E. 10); and November 3, 2003, for liquidation of the assets held at Edward Jones Investments, pending a partial distribution to the heirs the following month. (R.E. 13).

Even if the Chancellor was wrong in making a distinction between a trustee and an administratrix he was absolutely correct in holding that Mrs. Harveston could sell estate securities only with court approval. As this Court held in *Tucker v. Tucker*, 453 So.2d 1294, 1296 (Miss. 1984) (quoting *Yates v. Yates*, 284 So.2d 46, 47 (Miss. 1973)):

> We, as an appellate court, will affirm the decree if the record shows **any ground** upon which the decision may be justified . . . We will not arbitrarily substitute our judgment for that of the chancellor who is in the best position to evaluate all factors . . . (Emphasis added).

3. "DILIGENCE" IS A FUNDAMENTAL REQUIREMENT OF A FIDUCIARY.

The plaintiffs are aggrieved that the Chancellor found that Mrs. Harveston "acted diligently". (Tr. 148). They assert: "Nowhere in the fiduciary duty of a prudent investor is the word 'diligently' used . . ." (Brief at p. 23). The plaintiffs' own authorities belie that argument, as they spend three-fourths of a page quoting extensively from *In Re Estate of Carter, supra*, for the proposition that a trustee and administrator

are held to the same fiduciary standard and what that standard is. There, in black and white, in the middle of page 19 of their Brief, they quote the *Carter* Court:

> Ordinary care, skill and prudence are normally required of trustees in the performance of all their duties, unless the trust instrument provides otherwise. The rule is that 'trustees are bound by the management of all of the matters of the trust to act in good faith and employ such vigilance, sagacity, **diligence** and prudence as in general prudent [persons] of discretion and intelligence in like matters employ in their own affairs . . ." (Emphasis added).
> 912 So.2d at 144.

And the plaintiffs don't stop there. In further explaining the duty applicable to administrators they rely, at page 20 of their Brief, upon *In Re Adams Guardianship*, 152 So. 836, 837 (Miss. 1934), for the proposition that:

> [W]hether they be receivers, guardians, executors, or administrators, or trustees of any description, so long as they keep themselves strictly within the line of duty, and exercise reasonable care and **diligence**, they cannot be made responsible for any loss or depreciation in the funds entrusted to them . . .".
> (Emphasis added).

The cases, including the authorities upon which the plaintiffs rely, recognize that "diligence" is required of an administrator. The Chancellor, after hearing all of the evidence, correctly found that Mrs. Harveston acted "diligently".[1] (Tr. 148).

C. THE CHANCELLOR CORRECTLY FOUND THAT MRS. HARVESTON DID NOT BREACH HER FIDUCIARY DUTY.

In his Bench Opinion, the Chancellor found:

> So the Court can't find from the evidence that she has breached any fiduciary duty that has arisen by statute or otherwise by other rule. She does have the duty or did have

[1] It is worth noting that Mrs. Harveston's diligence resulted in the plaintiffs-heirs being located and that initial distributions of $200,000 to $150,000 were made to them. (R.E. 14).

> the duty as the administrator not to commit waste . . . but there has been no proof before the court that she in any way committed any waste to any asset of the estate.
>
> * * * *
>
> There's no question that Ms. Harveston had any knowledge of the stock market, not even herself having ever invested in the stock market, and she would have had to totally rely on the advice that she would have received from her attorney and her broker or the estate's broker, and that's all the standard that she is held to is to act diligently and to rely on the advice of those who are hired by the estate. That's exactly what the evidence has shown that she has done in this case.
> (Tr. 147-148).

As to these findings by the Chancellor, the plaintiffs urge that the trial court manifestly erred by allowing Mrs. Harveston "to use the advice of counsel, accountants and brokers as a shield to protect her". (Brief at p. 23). The plaintiffs' entire premise is built upon the fact that Mrs. Harveston had no investment experience and that a loss of approximately $145,000 in principal over nearly four years proves she violated the standard of care in Miss. Code Ann. § 91-13-3.

The plaintiffs would impose upon every administrator a duty to become an investment professional. Their argument ignores the fact that most administrators, like Mrs. Harveston, have little or no investment experience. Many find themselves appointed to their office through a confluence of circumstances, not unlike those involving Nathan Magee, a recluse with no known family and few acquaintances. Equally important, the plaintiffs' argument ignores the repeated testimony that Mrs. Harveston, recognizing her limitations, sought and acted upon the advice of the estate's attorney, its investment advisor and its accountant. (Tr. 49; 50-51; 55; 67; 90 - 92).

A return to § 91-13-3 is instructive. The standard of care required Mrs. Harveston to "exercise the judgment and care under the circumstances then prevailing which men of prudence, discretion, and intelligence exercise in the management of their own affairs . . . ". Mrs. Harveston exercised "prudence, discretion, and intelligence" by seeking out and acting on the advice of the estate attorney, its financial advisor and its accountant. That is what people of prudence, discretion and intelligence do; they seek advice from professionals they trust. That is what the standard requires of an administrator with no knowledge of the stock market.

It is worth recalling that Nathan McGee, prior to his death, built a small fortune investing in the very same securities that ultimately suffered losses due to unexpected forces, e.g., the 9/11 terrorist attacks, the collapse of Enron and World Com, etc., events that no one could predict, including the plaintiffs' own expert witness. (Tr. 129). Again, § 91-13-3 requires exercise of judgment and care "under the circumstances then prevailing". As the Chancellor found, "Mrs. Harveston was not in stock to begin with; Mr. McGee was in stock . . ." (Tr. 145).

The story is more fully told by a review of Mrs. Harveston's petitions and annual accountings and through the testimony of Mrs. Harveston. In the early months of her administration and based "upon the recommendation of Edward Jones Investments", Mrs. Harveston sought and received authority to sell part of the Ford Motor Company stock to pay federal and state taxes because that stock "was found to be the most likely for a 'sell' ". (R.E. 6). As shown on page 4 of the First Annual Accounting, the value of the securities transferred to Edward Jones Investments from Merrill Lynch

($1,871,406.90) and from Prudential Securities ($188,781.34) totals slightly more than $2,060,000.00. (R.E. 7). As shown on page 6 of the First Annual Accounting, *Id.*, the value of the securities at Edward Jones Investments as of October 31, 2000, was more than $2,122,000.00, and this is **after** $438,000.00 in securities had been sold by court order for payment of taxes. (Tr. 55-56). Under "the circumstances then prevailing" in the stock market, the value of the securities increased nearly $500,000 between the date they were transferred to Edward Jones Investments and the date shown in the First Annual Accounting, adjusted for the $438,000 transfer to pay taxes.

The plaintiffs blame Mrs. Harveston for failing to follow the institutional investment bar graphs appearing on the monthly statements from Edward Jones Investments. (Brief at p. 9). While the precise advice that Mrs. Harveston received from the Edward Jones broker, individually - - as opposed to the institutional bar graph recommendations - - is not known, what is clear is she sought and relied on his advice. And that advice, "under the circumstances then prevailing", more often than not proved beneficial to the estate. As the plaintiffs' own expert testified:

> Q. There is a lot of debate and disagreement in the investment industry as to what is the best investment strategy under prevailing circumstances, correct?
>
> A. Yes.
>
> (Tr. 126).

Exhibit "C" to the Petition of Approval of Second Annual Accounting (R.E. 9), shows the Edward Jones account at May 25, 2001, in excess of $2,250,000.00 – - a gain of more than $128,000 during that period and **after** $90,000.00 had been transferred to

pay partial professional fees approved by court Order. (*Id.*). (Tr. 59-60). Unfortunately, as shown on subsequent Edward Jones' statements attached to the Petition for Approval of Second Annual Accounting, between September 1 and September 28, 2001, the value of the account declined from more than $1,800,000.00 to approximately $1,346,000.00, the month of the terrorist attacks in the United States. (R.E. 9). Even then, as the plaintiffs' expert acknowledged, he and other investment professionals were telling their clients, "Don't sell out now; hold the course". (Tr. 129). Those were "the circumstances then prevailing" that Mrs. Harveston faced.

In early October, 2002, Mrs. Harveston filed her Petition for Authority to Transfer Assets, advising the Court as follows:

> After consultation with William A. McDonough, investment representative of Edward Jones Investments, Vidalia, Louisiana and reviewing recent monthly reports concerning the asset portfolio in this estate, the administratrix considers it necessary to transfer and diversify certain listed investments consisting of five assets which represent 80% of the estate portfolio.
>
> * * * *
>
> Since September 11, 2001 and the recent Enron and World Com (sic), the history of the above stocks show that it is necessary to make some changes. These stocks need to be diversified.
> (R.E. 10).

The investment climate had changed. "Under the circumstances then prevailing", as contemplated by § 91-13-3, and in reliance upon the recommendations of the estate's financial advisor, Mrs. Harveston petitioned the court for authority to transfer these securities in order to achieve more diversification. (Tr. 61-62). Thereafter, with court

approval, the stocks were liquidated beginning in October 2002 (R.E. 11), and the proceeds were re-invested on the recommendation of Mr. McDonough, the estate's financial advisor. (Tr. 67).

With the adjudication of heirship concluded, the heirs petitioned to have the assets liquidated and placed in a separate money market account for subsequent distribution. An Order allowing the liquidation was entered on November 3, 2003. (R.E. 13). The following month, the Court authorized a partial distribution to the heirs, which Order recites that the assets of the estate consist of cash in the amount of $1,405,984.00 and a bond in the amount of $50,000.00, for a total of $1,455,984.00. (R.E. 14). As the plaintiffs' own expert acknowledged, between the October 2002 liquidation and the December 2003 decree authorizing a partial distribution, the value of the estate assets had increased almost $450,000.00! (Tr. 32).

In every instance, Mrs. Harveston sought and obtained prior Court approval for her handling of the estate's assets. The general rule, as stated in 34 CJS "Executors and Administrators" § 224 is as follows:

> The [administratrix] is entitled to apply to the court for advice and directions with respect to investments, and the sanction of the court for any investment, procured before the investment is made, will, in the absence of fraud in procuring such sanctions, protect the representative.

The plaintiffs make no allegation that Mrs. Harveston engaged in fraud in procuring court approval for her actions; the record is silent as to any such claim.

Similarly, in 31 Am.Jur.2d "Executors and Administrators" §519, the commentator observes:

> In dealing with the stock market, a fiduciary is not omniscient, but must act as an ordinarily prudent person would under the circumstances.
>
> * * * *
>
> The rule is clear that prudence is tested at the time of the investment decision, not from the vantage point of hindsight. Hindsight is always better than foresight and often is the basis of a lawsuit.
>
> * * * *
>
> An executor is not normally responsible for failure to anticipate fluctuations in the price of a publicly traded stock arising from general market conditions as distinct from conditions peculiar to the company in which stock is held.

Significantly, too, the plaintiffs offered no evidence that the fluctuation in the value of these assets involved anything other than "general market conditions".

Mississippi law is in accord with the general statements of law set out above. While a fiduciary has been held liable for investment losses sustained without a court order allowing the transaction, *Walton v. Walton's Estate*, 109 So. 707, 709 (Miss. 1926), "[a]nnual accounts approved by the Chancellor are *prima facie* correct" absent "substantial evidence in the record rebutting this *prima facie* case". *Neville v. Guardianship of Kelso,* 247 So. 2d 828, 835 (Miss. 1971) (citing *Neville v. Kelso*, 211 So.2d 825, 826 (Miss. 1968)).

Finally, as the Court held in *New York Indem. Co. v. Myers*, 138 So. 334, 336 (Miss. 1931):

> Executors and administrators, in the administration of the estate, are not required to use the highest degree of skill, but only ordinary care and diligence. They are not required to exercise any higher skill and prudence than that which is

> imposed upon any other agent or trustee; they are not insurers or guarantors. The measure of their care in the management and closing of the estate is that which an ordinarily prudent man would exercise under like circumstances in the management of his own affairs. And the liability of the surety on the bond of an executor or administrator is coextensive with that of the principal, and does not extend further.

Because the Chancellor found that Mrs. Harveston was not liable for any breach of her fiduciary duties, her surety, RLI, is similarly not liable. *Mohundro v. Alcorn County*, 675 So.2d 848, 854 (Miss. 1996) (no liability may be imputed to surety beyond that of its principal.)

CONCLUSION

This case represents the rankest form of second-guessing, an attempt to judge Mrs. Harveston's prudence from the prohibited "vantage point of hindsight". As *In Re Adams Guardianship, supra*, teaches:

> [S]o long as [administrators] keep themselves strictly within the line of duty, and exercise reasonable care and diligence, they cannot be made responsible for any loss or depreciation in the funds entrusted to them.
> 152. So. At 837.

The learned Chancellor correctly summed it up:

> [Mrs. Harveston] certainly acted diligent and without any negligence in relying on the advice of counsel and her broker, and I certainly think this she's to be commended for that.
> (Tr. 149).

The Chancellor's findings of fact and conclusions of law should be affirmed.

Respectfully submitted,

RLI INSURANCE COMPANY

By: _____
Ron A. Yarbrough (MSB #[redacted])
Its Attorney

OF COUNSEL:

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CERTIFICATE OF SERVICE

I, Ron A. Yarbrough, hereby certify that I have this day caused to be delivered, via United States mail, first class postage prepaid, a true and correct copy of the foregoing document to the following:

Mr. John W. Christopher
Christopher & Nester, PLLC
P.O. Box 982
Ridgeland, MS 39158

Mr. Claude Pintard, Jr.
Pintard & Pintard
P.O. Box 1065
Natchez, MS 39121-1065

Hon. George M. Ward
Adams County Chancellor
Post Office Box 1144
Natchez, MS 39121

This the 13th day of March, 2007.

Ron A. Yarbrough