IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-01738

BANCORPSOUTH BANK
APPELLANT

VS.

ALBERT JERMAINE DUCKETT
WALTER WILLIAMS, JR
APPELLEES

ON APPEAL FROM THE CHANCERY COURT OF
TISHOMINGO COUNTY, MISSISSIPPI

APPELLEES' BRIEF

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ORAL ARGUMENT IS REQUESTED

IN THE SUPREME COURT OF MISSISSIPPI

BANCORPSOUTH BANK — **APPELLANT**

VS. — **NO. 2006-CA-01738**

ALBERT JERMAINE DUCKETT AND WALTER WILLIAMS, JR. — **APPELLEES**

CERTIFICATE OF INTERESTED PARTIES

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

Albert Jermaine Duckett

Walter Williams, Jr.

Walter Williams, Sr.

BancorpSouth Bank, one and the same entity as Bank of Mississippi, having changed it's name on July 31, 1997, and one and the same entity as Iuka Guaranty Bank, which was merged into Bank of Mississippi on March 18, 1997.

BancorpSouth, Inc., a publicly-held corportation and the parent corporation of BancorpSouth Bank.

Saint Paul Insurance Company

This the 24th day of September, 2007.

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ORAL ARGUMENT REQUESTED

Appellees' request oral argument since this is a case of first impression and due to the extent of damages awarded. The award of punitive damages and the interest of the Mississippi Bankers Association suggest to this Court the important ramifications of it's decision. Oral argument would help the Court understand all of the issues presented at trial and the reasoning behind the trial court's decision.

Accordingly, Appellees' counsel requests oral argument.

IN THE SUPREME COURT OF MISSISSIPPI

BANCORPSOUTH BANK **APPELLANT**

VS. **NO. 2006-CA-01738**

ALBERT JERMAINE DUCKETT AND WALTER WILLIAMS, JR. **APPELLEES**

APPELLEES' BRIEF

I. STATEMENT OF THE CASE

Appellees believe a chronology will assist in fully understanding the depth of this case:

- April 3, 1993, Sharron A. Duckett, mother of Albert Jermaine Duckett and Walter William, Jr., was murdered by a trustee of the Tishomingo County Jail at her place of employment. (Trial Exhibit 30, R.E. 75)[1]
- June 7, 1993, Tishomingo County Chancery Court, appointed Walter Williams, father of the two minors, guardian of the funds from the estate of Sharron A. Duckett. (Trial Exhibit 30, C.R. 74)
- March 10, 1995, Decree is entered allowing settlement of claim minors had against all parties regarding their mother's death. (Trial Exhibit 30, R.E. 73)
- July 21, 1995, a check made payable to Iuka Guaranty Bank and Walter J. Williams, Guardian in the amount of $267,233.00, was deposited in Iuka Guaranty Bank into an account named "Albert Jermaine Duckett and Walter J. Williams, Jr., Minors, Walter J. Williams, Guardian". (Trial Exhibit 3, Ape. R.E.

[1]References to Trial Exhibits are denoted by exhibit number and either R.E. (Appellant's) or Ape. R.E. (Appellees') and page number. Excerpts and references from the trial transcript will be denoted "Tr." with the page number and lines following. Reference to documents in the official court file are denoted "C.R." followed by the page number designated by the court clerk.

1). An officer from Iuka Guaranty Bank executed a Waiver of Process and Entry of Appearance, as well as, a Receipt for Funds and Governing Order that same day (Trial Exhibits 1 and 2; R.E. 86 and 89).

- September 7, 1995, the court issued an order allowing the guardian to withdraw $100 per child each month for expenditures on behalf of the minors. (Trial Exhibit 15; R.E. 93)
- August 12, 1997, accounts with the guardianship funds equaled $289,562.08 (Trial Exhibit 37, Ape. R.E. 5).
- March, 1997, Iuka Guaranty Bank was purchased by Bank of Mississippi (now BancorpSouth) and a conversion of Iuka Guaranty Bank's accounts to Bank of Mississippi occurred in that same month. (Tr. 203:2-7; Ape. R.E. 29)
- July 12, 1999, all guardianship funds were depleted from accounts with BancorpSouth (Trial Exhibit 37, Ape. R.E. 7).
- August 23, 2000, Albert Jermaine Duckett reach the age of twenty-one (Tr. 181:25-182:5; Ape. R.E. 25-26).
- July 4, 2002, Walter Williams, Jr. reached the age of twenty-one (Tr. 174:9-14; Ape. R.E. 23).
- 2004, Walter Williams, Jr. met with bank officials and asked about the funds being held for him in Bancorp South. He was then informed that no funds existed. (Tr. 152:14 - 154:15; Ape. R.E. 20-22).
- June 23, 2004, Complaint for Accounting and Conversion of Guardianship Assets was filed by Walter Williams, Jr. (C.R. 67-103). Walter Williams, Sr., United States Fidelity and Guaranty Company, and Bancorp South were named as

defendants.

- September 22, 2004, agreed order allowing an amended complaint was entered and same was filed with the court naming Albert Jermaine Duckett as a plaintiff in the cause (C.R. 162-201).
- October 27, 2004, Plaintiffs made application to the Chancery Clerk for an Entry of Default against Walter Williams, Sr. for failure to respond to the complaint (C.R. 216).
- December 8, 2004, BancorpSouth took the depositions of Walter Williams, Jr. and Albert Jermaine Duckett.
- February 25, 2005, 30(b)(6) deposition of BancorpSouth was conducted with Kathy Milligan, Cathy Talbot, Gene Jourdan, and Tina Cox produced as representatives for BancorpSouth. (Trial Exhibits 31, 32, & 33).
- April 15, 2005, the court heard argument and made the following rulings: overruled BancorpSouth's Motion to Dismiss Plaintiffs' Amended Complaint; overruled BancorpSouth's Motion for Partial Summary Judgment Against Plaintiff, Albert Jermaine Duckett; and sustained Plaintiffs' Motion for Summary Judgment Against BancorpSouth Bank and a judgment was entered in favor of the Plaintiffs, Albert Jermaine Duckett and Walter Williams, Jr. (Tr. 86:27 - 99:9; R.E. 13 - 26).
- October 13, 2005, November 18, 2005, and May 15, 2006, Writ of Inquiry was conducted as to damages.
- June 16, 2006, court issued ruling on Writ of Inquiry (Tr. pp. 533-571, R.E. 28-66).

- August 17, 2006, court issued final ruling on all matters (Tr. pp. 612-617; R.E. 67-72).

II. SUMMARY OF THE ARGUMENT

BancorpSouth admittedly breached it's duty to protect the minors' money. However, BancorpSouth only admitted a duty after years of litigation. BancorpSouth's duty is ongoing in nature and continues even today. The trial court made specific findings that this breach of BancorpSouth's duty was proven to be grossly negligent by clear and convincing evidence. Therefore, the trial court properly awarded principle ($207,833.00), interest ($347,385.62), attorney's fees($222,087.44), and punitive damages ($1 million). (R.E. 11) The findings of fact made by the learned Chancellor are well-reasoned, supported by the evidence and certainly within the discretion afforded a judge sitting as trier of fact. Accordingly, this Court should affirm. Appellees' brief responds to the arguments made by Appellant in the order presented in Appellant's Brief.

III. ARGUMENT

A. Ignored Evidence

1. Exclusion of evidence of expenditures

In BancorpSouth's eyes, the following expenditures "were reasonable":

1. $16,903.45, for a new Pontiac Firebird spent by Guardian on Duckett;

2. $7,000.00, in cash; and

3. $86,000.00, for two houses on Pickwick Circle titled in Guardian's name individually, but with a Deed of Trust to BancorpSouth. (Appellant's Brief pp. 21-22).

Therefore, BancorpSouth should have been given "credit" for these expenditures. BancorpSouth

wants this Court to consider these expenditures now, in spite of the fact that no prior approval was obtained. Appellees' position is that no Chancellor would have approved these expenditures if presented with a petition for approval, much less given authority for them "after the fact."

The authority for any guardian expenditure comes from M.C.A. §93-13-38. That statute provides:

> . . . .
> It shall be the duty of the guardian of wards as defined by Section 1-3-58, Mississippi Code of 1972, to improve the estate committed to his charge, and to apply so much of the income, profit or body thereof as may be necessary for the comfortable maintenance and support of the ward and of his family, if he have any, ***after obtaining an order of the court fixing the amount.*** And such guardian may be authorized by the court or chancellor to purchase on behalf of and in the name of the ward with any funds of such ward's estate sufficient and appropriate property for a home for such ward or his family on five (5) days' notice to a member of said family, or the necessary funds may be borrowed and the property purchased given as security.
> . . . . (emphasis added).

The statute contemplates the guardian obtaining prior approval before expenditures being made. Specific facts have led Chancellors and appellate courts to allow post-expenditure approval for certain money spent on wards where the results otherwise would be inequitable. This is not such a case. BancorpSouth's reliance on *U.S.F.&G. v. Conservatorship of Melson,* 809 So.2d 647 (Miss 2002) and *Vinson v. Benson,*- - So2d- - , 2007 WL 1470509 (Miss.App.) in support of it's argument that expenditures noted above should have been ratified "after the fact" is completely misplaced. This Court reviewed the facts of *Melson* meticulously and clearly stated:

> It is undisputed that no court order was obtained for disbursements made by Tolliver from Melson's conservatorship. The case law and statutory language clearly require that prior court approval be obtained before expenditure of capital. This was not done in the case at hand. USF&G notes that the special chancellor did not make a distinction as to whether all the expenditures were capital or some from the conservatorship income.
>
> The facts are further undisputed that since at least February 17, 1989, Melson was

> mentally competent. Melson also had a Massachusetts conservator in addition to Tolliver in Mississippi. The record reflects that Melson participated significantly in the management of her assets and often communicated directly with Tolliver as to transactions in her account. She also came back to Mississippi on a regular basis, during which she would confer with Tolliver concerning her business affairs. Tolliver testified that of the $108,666.03 in challenged transactions, $64,961.71 were payments ***made directly to Melson at her express direction.*** There was no testimony that these funds were wasted in any way or that they, in fact, do not this day still remain on deposit in Melson's Massachusetts bank account.
>
> Another $36,686.26 of funds were spent on Melson's behalf, most paid to third parties at her express direction, $22,000 pursuant to the divorce decree, $15,000 to her former husband and $7,000 to her husband's divorce attorney.
> Id at 659, 660.
>
> . . . .
>
> Without extending this case beyond the facts at hand, in order to avoid creating an absurd and inequitable result in this specific case, we find that the special chancellor's award to Melson for $108,66.03 should be reduced by the $62,961.71 paid directly to Melson, and the $22,000 paid to Melson's former husband and his divorce attorneys pursuant to the divorce decree. This reduction is solely for the purpose of preventing an unfair result and in ***no way is intended to weaken the protections afforded a ward under a conservatorship or beyond the specific situation at bar.***
> Id. at 661. (emphasis added)

These facts are clearly distinguishable from the case at bar. There was no direction by the wards for the spending of the wards' money, never was their disability of minority removed, and in *Melson,* U.S.F.&G. had made no representations that it would not let the guardianship funds be disbursed as BancorpSouth did in Trial Exhibits 1 and 2 (R.E. 86, 89). BancorpSouth seeks to weaken the protections afforded to minors in order to reduce it's admitted liability. This action in and of itself would create an inequitable result against the very wards the statutes were created to protect. The trial court is not required to approve spending minor's money on items it would not have approved if properly presented with a petition. Certainly, guarding a minor's money from waste is one of the Chancellor's highest duties and not approving of the expenditures after the fact falls within the trial court's discretion.

2. *Ignored testimony of expert witness*

BancorpSouth alleges, "Mr. Carruba's testimony was uncontradicted." (Appellant's Brief p. 25). BancorpSouth views the record and facts underlying it's hired gun's testimony as "uncontradicted".[2] Other testimony already in the record disputed Carruba's testimony about "policy" and "awareness." Appellees took the 30(b)(6) deposition of BancorpSouth on February 25, 2005.

BancorpSouth employee, Kathy Milligan, gave the following testimony in the 30(b)(6) deposition which was admitted into evidence at trial:

> Q. Okay. All right. You talked about a little bit - - I'm still on the policy. Is there a written policy that BancorpSouth had after March 1st, 1997, about the handling of different types of accounts?
>
> A. I think that's the question that John asked me, too.
>
> Q. Yeah.
>
> A. If there was a written policy, I am not aware of it.
>
> Q. Okay was there an informal policy?
>
> A. I am not aware. I'm sorry.
>
> Q. Okay. John asked you a lot of questions about these documents and about restrictions on withdrawal. And I think your answer was

---

[2]Interestingly, Carruba had previously worked for the law firm of Watkins, Ludlam who filed the Amicus Curiae brief on behalf of the Mississippi Bankers Association (Tr. 387:26-28; Ape. R.E. 43). Carruba was paid $350 per hour for his testimony and previously had testified almost exclusively for the banking industry. (Tr. 364:23 - 365:26; 387:14-19; Ape. R.E. 41-43).

consistently that at any time after September of 1998 that Walter Williams, Sr., could have withdrawn funds from any of those accounts?

A. I think that his question, as he went through them, was there any terminology on the document itself restricting any withdrawal. And my response was there is none.

Q. And my question to you is why was there not any restrictions on withdrawal knowing that that was a guardianship account or guardianship accounts?

A. Documents, Certificates of Deposit - -

Q. Uh-huh (yes).

A. - - signature cards do not carry any restrictive information on the document. They use basically name, address, social security number, dollars, account number, those things. They don't carry restrictive information.

Q. Well, what checks and balances did BancorpSouth have at the time Mr. Williams was withdrawing these funds to assure that they were not improperly withdrawn?

Mr. Alvis: I object to the form of the question.
Mr. Cooke: You can still answer.

A. I don't know of any checks and balances. Those would have been handled somewhere outside the branch location.
(Trial Exhibit 31; Ape. R.E. 11-12)

Another BancorpSouth employee, Cathy Talbot, gave the following testimony during the same 30(b)(6) deposition:

Q. Okay. I wasn't going there yet, but are there policies, procedures in place at BancorpSouth, that you're aware of, between 1997

and 2000 that was - - that would restrict disbursement of guardianship funds with a court order?

A. I'm not aware of any written policy and I wasn't able to find any during researching this case.

Cathy Talbot (Trial Exhibit 32; Ape. R.E. 14)

In other words, there were no written policies or procedures on how to handle this situation known by the 30(b)(6) deponents representing BancorpSouth. All of this testimony occurred prior to the trial court's grant of summary judgment against BancorpSouth and while BancorpSouth was still maintaining it's position that it owed "no duty" to either the wards or the court. Further, BancorpSouth would have this Court believe, according to Carruba's testimony, that "They are very much aware of the incident that occurred" (Appellant's Brief p. 30) when the opposite is true.

Lee McAllister's trial testimony:

Q. All right. When did you first become aware of the situation that y'all did not follow the court order?

A. Y'all may need to help me. It was either late May or June. It was May. It was May because there was a scheduling of a June date. That was my first.

Q. And that's the first time you became aware that your bank had not followed the court order?

A. Yes, sir.

THE COURT: What year, sir?
MR. LEE MCALLISTER: This year.
(Tr. p. 200:17-26; Ape. R.E. 28)

In other words, the head of training and compliance for BancorpSouth had never heard that the bank had disbursed funds improperly and illegally more than a year after service of the lawsuit.

Clearly, the bank was not "very much aware of the incident that occurred". Lee McAllister further testified as follows:

Q. And you work for BancorpSouth?

A. Yes, sir.

Q. And in what capacity do you work for them?

A. In work in an area - - I have three areas of responsibility; bank coordination, central deposit services, and training responsibility.

Q. You are here as the corporate representative today?

A. Yes, sir.

Q. You understand that the policies and procedures of this bank that are contained in Exhibit 19 that you were on the committee on and helped write. Correct?

A. I was a part of that. Yes, sir.

Q. And each and every one of those three ladies that were produced in the 30(b)(6) deposition were trained and knew about that policy and procedure at the time they gave their deposition; did they not?

A. Yes, sir.

Q. And each and every one of them had been trained by the bank and had experience with the bank for over 20 years. Isn't that right?

A. Yes, sir.

Q. In that context of, you know, don't you, now that there were restrictions on this account at Iuka Guaranty Bank?

A. Yes, sir.

Q. Were there not?

A. Yes, sir.

Q. And those restrictions were destroyed when it was converted?

A. That special message was eliminated through human error. Yes, sir.

Q. Through human error?

A. Yes, sir.

Q. And by June of 2004, when I filed my complaint, at least by then the bank knew, did it not, that, hey, there is some restrictions - - there were restrictions on this account and you, basically, knew what had happened, didn't you?

A. Yes, sir. The bank would have known when you filed. Yes, sir.

Q. You got a copy of the complaint and you understood - - you probably had to reconstruct some files, but you understood, basically, what happened within a short period of time thereafter, a month, two, three months?

A. I'm assuming that.

Q. And, in fact, Exhibit 7 was recreated by your bank showing the history of these accounts by Cathy Talbot and others, Tina Cox?

A. You have the exhibit. Yes, sir.

Q. Yes, sir. So the bank pretty much knew by the time that was created sometime in July or August of last year what had happened to this money, didn't they, that the restrictions had been - -

A. Yes, sir.

Q. - - done away with and somebody had taken the money? Right?

A. Yes, sir.

Q. Okay. And so in that context, with Tina Cox, Cathy Talbot, and Kathy Milligan, on February the 25th of '05, they knew as representatives of the bank what had happened with that money, didn't they?

A. Yes, sir.

Q. And they knew that there was a order restricting the release of those funds, didn't they?

A. Yes, sir.

Q. And they knew that this bank, that at least Iuka Guaranty Bank who is now BancorpSouth, had represented to the court that it wouldn't let that money out without a court order, didn't they?

A. They had a copy of the court order. Yes, sir.

Q. Yes, sir. Even under that context, even with that knowledge, they still said they had no obligation either to these minors or this court. Isn't that right?

A. That's what's written in the deposition. And, again, I don't know what their thinking was. Was their thinking was, you know, that - - which the Court has decided - - does the Court decide when the guardian initiates this and doesn't follow the rules of the guardianship, are thinking in terms of that? You know, I just don't know from which they were thinking when they answered those questions. That's what I'm talking about the context of it.

(Tr. 214:25 - 217:12; Ape. R.E. 33-36)

Amazingly, with this "state of the art system" no one with any authority in BancorpSouth wanted to admit a mistake. Instead, intentional and/or grossly negligent misrepresentations were made to the wards, their attorney, and to the trial court in an effort to limit the bank's liability. Thereafter, once the court entered it's summary judgment, the bank and it's employees fell in line

with it's simple human error concept. Prior to that, bank policy (if it exists) trumped everything (including court orders). Representations by the bank stated in Trial Exhibits 1 and 2 and court orders were secondary to bank policy which was reiterated many times in the bank's 30(b)(6) depositions. The first time BancorpSouth admitted it did not follow the court order (a simple concept given the admitted facts) was Lee McAllister's testimony (Tr. 200:4-11; Ape. R.E. 28) on October 13, 2005.

BancorpSouth's attitude was bank policy overrides the court order and always has been. Lee McAllister gave the following testimony at trial:

> Q. And the question was: With regard to court orders and guardianship accounts, would the bank typically see a court order at the time the account was established? And the answer is?
>
> A. Yes.
>
> Q. And then the next question: And beyond the time of the establishment of the account, was the bank concerned about court orders or was that the guardian's responsibility? And the answer?
>
> A. The answer says that would be the guardian's responsibility.
>
> Q. Right. And it goes over into the next page. So when asked by her own lawyer, Kathy Milligan, speaking for the bank, she said she wasn't concerned about court orders after the establishment of the account, was she? Isn't that what she said?
>
> A. That's what's written there. Yes, sir.
>
> THE COURT: The objection will be overruled as stated here, to that question. Go ahead.
>
> BY MR. WHITE:
>
> Q. And this is the same individual who you say has

20 years' experience, is a operations coordinator for Iuka Guaranty Bank and knows your policies and procedures, doesn't she?

A. Should, yes, sir.

Q. And she's not concerned about court orders. Isn't that what she said?

A. That's what is written there. Yes, sir.

Q. Yes, sir. That's exactly what she said.

MR. WHITE: May I approach again, your Honor?
THE COURT: Yes, sir.

BY MR. WHITE:

Q. Again, sir, I'm going to have to look on with you. This is Tina - - I'm sorry, Cathy Talbot's deposition. Is that correct?

A. Yes, sir.

Q. Taken after Brenda Milligan's - -

A. Kathy Milligan.

Q. Kathy Milligan. I don't know why I said that. Kathy Milligan's deposition. And on Page 62, Mr. Cooke asked a question, and it says: Question, As we sit here, and I have listened to three people, I'm having a hard time understanding what, if any, obligation the bank thinks it had to the two minors who were the subject of this guardianship. And what's the answer?

A. We are only a depository. The guardian has that responsibility and he's been ordered by the Court to follow whatever rules there may be.

Q. Question: All right. Is it your testimony that you think the bank had no obligation to these two young men? What is the answer?

A. Yes, sir.

Q. Okay. And Cathy Talbot is somebody that has been trained in your policies and procedures as you have outlined on Exhibit 19. Isn't that correct?

A. Yes, sir, she knows it.

Q. Show [sic] knows what they are, doesn't she?

A. Yes, sir.
(Tr. 208:1- 210:1; Ape. R.E. 30-32)

The trial court further questioned Mr. McAllister with regard to the difference between bank policy and court orders, as follows:

THE COURT: Why did you need a policy if you had a court order to follow? What difference did it make; the court order takes precedence over a policy?

MR. LEE MCALLISTER: Well, maybe I should say procedure, sir.

THE COURT: The same difference.

MR. LEE MCALLISTER: That's what we have always - -

THE COURT: It's begging the question. Why do you take a procedure of a bank or a policy of a bank violating a court order which you have testified here you have? Can you explain that to this Court, please?

MR. LEE MCALLISTER: I didn't know - - I didn't realize that I had said that, sir.

THE COURT: Well, you just admitted it a while ago on direct examination that y'all made an error.

MR. LEE MCALLISTER: We made a mistake in

allowing that message, sir, that did not get converted.

THE COURT: That message had nothing to do with a court order that was in place before that human error took place. Is that not true?

MR. LEE MCALLISTER: Please repeat, sir.

THE COURT: That court order was in place before this alleged human error took place, wasn't it?

MR. LEE MCALLISTER: Yes, sir. Yes, sir.

THE COURT: Why wasn't it followed then?

MR. LEE MCALLISTER: It was followed up until the point we had that mistake and then the warning messages didn't go out to the personnel.

THE COURT: Was that the fault of these minors?

MR. LEE MCALLISTER: No, sir.
(Tr. 221:22 - 222:29; Ape. R.E. 37-38)

All of the 30(b)(6) depositions are in evidence and "speak for themselves". The underlying facts and very testimony of bank employees dispute Carruba's testimony. Bank employees under oath repeatedly stated, in spite of obvious facts to the contrary, they did not have any duty to follow through on the representations of the bank as set out in Trial Exhibits 1 and 2 nor did they have to follow the court order. Carruba's testimony does not obviate this essential fact.

Did the trial court have to believe every assertion made by the bank's expert? With the facts before the Court, the clear answer is no. After all, what Carruba expressed was an "opinion" based on facts. Clearly, the trial court is not required to abdicate it's authority to an expert. This Court in *American National Insurance Company v. Hogue,* 749 So.2d 1254

(Miss.2000), stated, in part:

> Court will not render a verdict contrary to jury's verdict short of a conclusion on a court's part that given the evidence as a whole, taken in light most favorable to jury's verdict, no reasonable, hypothetical juror could have found as the jury did, and such action on court's part removes case from the previous and any future jury.
>
> . . . .
>
> This is the only testimony concerning Mr. Hogue's damages, all given during direct examination. There was no cross-examination concerning his loss of consortium claim, nor was there redirect.
>
> . . . .
>
> Mr. Alldread would have this Court consider only the direct testimony of himself and his wife, and then accept his claim the evidence was uncontradicted. Mr. Alldread fails to consider however his and his wife's testimony on cross-examination. The jury had the opportunity to hear and weigh the elements of the consortium claim both by direct and cross-examination testimony, and soundly rejected damages allegedly proven by Mr. Alldread, as non-existent.

Here, the trial court, sitting as trier of fact, heard all the testimony; saw all the witnesses; viewed direct and cross-examination; and ruled on evidentiary questions throughout the trial. It is for the trial court to determine which witness' testimony should be given credibility, not the appellate court. In this case, the Chancellor had many reasons to question the validity and relevance of experts and positions put forth by BancorpSouth.

B. Treatment of BancorpSouth as a Surety

1. Statute of limitations

Admittedly, Albert Jermaine Duckett turned twenty-one on August 23, 2000. (Tr. 181:25-182:5; Ape. R.E. 25-26) The original complaint filed against BancorpSouth Bank and the Guardian was filed on June 13, 2004, (C.R. 67-103) and the amended complaint, which joined Duckett as a plaintiff, was filed on September 22, 2004 (C.R. 163-201).

BancorpSouth argues that the three year statute of limitations M.C.A §15-1-49 applies and ran before the filing of the complaint. The Judge ruled M.C.A. §15-1-27 applied and denied

BancorpSouth's motion for summary judgment against Duckett. (R.E. 17-20). M.C.A. §15-1-27 states, "All actions against a guardian and the sureties on his bond, or either of them, by the ward, shall be commenced within five years next after the ward shall have arrived at the age of twenty-one years, and not after."

Apparently, unnoticed by BancorpSouth, the Judge also stated:

> The interesting part about it is, as I see it, under that particular case, the particular section of the code, you are going to find an old case styled *Pattison v. Clingan* cited 93 Mississippi 310, 47 So. 503, decided by the Mississippi Supreme Court November 9th, 1908. And you say that's an antiquated ruling. Well, it's good law up to 1:15 p.m. today. And that particular decision, basically, points out to us something that's interesting and I think very applicable here. That this code section that I have just quoted to you, 15-1-27, which used to be your old code section in the 1942 Code of Section 726 does not begin to run against suits on guardians bonds until – and this is the critical point – final settlement of his trust. That's the guts of the holding in that case. (Tr. 91:17- 92:4; R.E. 18-19).

In other words, which ever statute applies, the claim is not time-barred because the statute never began running. Until a final accounting is made pursuant to M.C.A §93-13-77 the statute does not run. *Pattison v. Clingan,* 93 Miss 310, 47 So.2d 503 (1908). *Bell v. Rudolph*, 70 Miss 234, 12 So.2d 153 (1892), an even older case is even more strict on those who hold guardianship funds. *Nunnery v. Day,* 64 Miss 457, 1 So.2d 636 (1887) states, "The guardian in this case might have been compelled to account, after it became his duty to do so, at the instance of the sureties on his bond, as well as by the ward, and the failure to compel the accounting was as much the negligence of the sureties as of the ward."

These cases, while old, continue to be the law. *U.S.F.&G. v. Conservatorship of Melson,* 809 So.2d 647 (Miss 2002) affirmed these rulings and reiterated the fact that no statute of limitations begins to run until the final accounting is filed. Id at 654. In it's argument about statute of limitations, BancorpSouth ignores, once again, the most important documents in this case (Trial Exhibits 1 and 2). (R.E. 86-89).

Trial Exhibit 1 in the record in part states:

> Depository understands that the Court has entered or is expected to enter an order authorizing and directing the guardian herein to deposit funds of the Walter James Williams, Jr. and Albert Jermaine Duckett so as to qualify under M.C.A. §93-13-17 and/or §93-12-67, and requiring such funds not be withdrawn except as specifically provided except upon further order of this court. Depository understands that the guardian is required to obtain and file a receipt of Depository for said order and funds.
>
> Having been requested to serve as a depository in this matter, Depository acknowledges and ***accepts the duties and responsibilities mandated by the laws of Mississippi*** as to funds held in guardianship accounts.
>
> Depository hereby waives service of process herein and enters its appearance in this cause for ***all purposes relating to any assets of this estate which may be received by Depository***, specifically submitting to this Court's jurisdiction.
>
> Depository has provided or upon accepting funds of the ward will provide to the guardian a properly executed Receipt for Funds and Governing Court Order substantially in accordance with Exhibit "A" hereto.
>
> Depository acknowledges and agrees that *any assets* of the guardianship and interest thereon coming into its possession ***shall be disbursed only in accordance with an order of this Court.*** (Trial Exhibit 1, R.E. Page 86-87,¶5-9) (emphasis added).

This "waiver" was signed by a "duly" authorized officer of the bank. This waiver and the receipt (Trial Exhibit 2, R.E. 89) represented to the Court that the bank would "follow the law" and not disburse funds without a court order. Trial Exhibit 2 states in part:

> "A certified true copy of the Order of the Chancery Court of Tishomingo County in this matter dated the 10th day of March, 1995, which has the effect of authorizing such a deposit and restricting disbursement and withdrawal of said funds any interest thereon, except as set forth specifically in said order, until a ***subsequent order specifically approves a disbursement*** or withdrawal." (Trial Exhibit 2; R.E. 89, ¶ 2) (emphasis added)

How can a statute of limitations begin to run if there is no "subsequent order"? The Receipt and Acknowledgment contemplates and requires that a disbursal order is forthcoming. Without this disbursement order, no statute of limitations begins to run. The court ruling that not statute of limitations had begun to run was manifestly correct.

Assuming *arguendo* that the trial court applied the wrong statute of limitations it appears that the statute of limitations that is most applicable in this case would be M.C.A. §15-1-43, which states:

> All actions founded on any judgment or decree rendered by any court of record in this state, shall be brought within seven years next after the rendition of such judgment or decree, and not after, and an execution shall not issue on any judgment or decree after seven years from the date of the judgment or decree.

This action is founded on the decree rendered by Tishomingo County Chancery Court on March 10, 1995 (Trial Exhibit 30; R.E. p. 73-85). That is the order which restricted disbursement of the funds. Albert Jermaine Duckett reached the age of twenty-one on August 23, 2000. Accordingly, the statute of limitations had no run on his claim. (R.E. 17-20). This case is not dissimilar to other cases involving child support orders; *Guthrie v. Guthrie,* 537 So.2d 886 (Miss 1989); public official's bonds, *Melson, supra*; or property settlement agreements. *Nichols v. Nichols,* 841 So.2d 1208 (Miss 2003). The court asked Mr. Caldwell the following on the record:

> Q. Do statute of limitations run on a court order, Mr. Caldwell?

A. Sir?

Q. Do the statute of limitations
run on a court order?

A. Your Honor, I would submit
that it would, from the standpoint of - - if
that's the case, that court order then, that
started clicking at the conversion in 1997. We
learned about it later. So I would respectfully
submit - - and we're not here to say there's not
some consequence that needs to be in tune for
BancorpSouth - -

Q. I misunderstood you. I thought
you felt like these boys owed y'all.
[Tr. 271:27 - 272:12; Ape. R.E. 39-40]

The problem with BancorpSouth's argument on statute of limitations is their misinterpretation of their duty. Once BancorpSouth represented to the Court in the waiver (Trial Exhibit 1; R.E. 86-88) and receipt (Trial Exhibit 2; R.E.89) it would not disburse the money without a court order, and the court so ordered, an ongoing duty to not disburse the funds was created. This has always been the law.

No final accounting was ever filed. This was a direct Court finding. (Tr. 92:5-9; R.E. 19). Without a final accounting or a "subsequent order", no statute of limitations ran on any claim against BancorpSouth. Accordingly, BancorpSouth's argument regarding statute of limitations is not well-taken.

2. M.C.A. §93-13-17

M.C.A. §93-13-17 states:

> Every guardian, before he shall have authority to act, shall, unless security be dispensed with by will or writing or as hereinafter provided, enter into bond payable to the state, in such penalty and with such sureties as the court may require; and the bond shall be recorded and may be put in suit for any breach of

the condition, whether the appointment be legal or not; and the condition shall be as follows:

> "The condition of the above obligation is that if the above bound _____, as guardian of _____, of _____ County, shall faithfully discharge all the duties required of him by law, then the above obligation shall cease."

And the guardian shall also take and subscribe an oath faithfully to discharge the duties of guardian of the ward according to law.

A guardian need not enter into bond, however, as to such part of the assets of the ward's estate as may, pursuant to an order of the court in its discretion, be deposited in any one or more banking corporations, building and loan associations or savings and loan associations in this state so long as such deposits are fully insured, such deposits there to remain until the further order of the court, and a certified copy of the order for deposit having been furnished the depository or depositories and its receipt acknowledged.
(emphasis added)

BancorpSouth argues that it is only liable up to the F.D.I.C. insured amount ($100,000) and the Guardian's attorney and the Court made the mistake. This is their "they-gave-us-too much-money" defense. BancorpSouth's argument about F.D.I.C. insurance and §81-5-34 is nonsensical. Why? They never mention the order, (Trial Exhibit 15, R.E. 93), the waiver (Trial Exhibit 1, R.E.86-88) nor paragraph two of the receipt (Trial Exhibit 2, R.E. 89).

M.C.A. §81-5-34 is a much needed section that does protect banks from liability for fiduciary accounts much like an attorney's trust account. *See Holifield v. BancorpSouth, Inc.*, 891 So.2d 241 (Miss.App.2004). However, much more cogent to the case at bar is M.C.A. §81-5-33 which states, in part:

> ***Banks may accept*** and execute all such trusts ***and perform such duties*** of every description ***as may be committed to them*** by any person or corporation or that may be committed or transferred to them by ***order of any court of record*** . . . . They may accept trust funds or other property upon specifically agreed terms and pay or deliver the same to the owners, beneficiaries or others, as the case may be, when and as the same should be paid or delivered according to the terms of the trust agreement under which it is held. . . . .
>
> . . . .

> In any case in which the laws of this state require that one acting as trustee, executor, administrator or in any fiduciary capacity, shall take an oath or make an affidavit, the president, vice-president, cashier or trust officer of a bank may take the necessary oath or execute the necessary affidavit. [emphasis added]

Banks actually have to perform "duties committed to them by order of any court of record"? Not according to BancorpSouth. Every banker, lawyer, court clerk, and sensible person knows that when a court orders any person or business to do something; it is done or appealed.

BancorpSouth took an "oath" through it's bank officer that "any assets of the guardianship and interest thereon coming into its possession shall be disbursed only in accordance with an order of this Court." (Trial Exhibit 1, R.E. 87, ¶9). This oath or "duty" was separate and distinct from any duty the Guardian owed. The Court relied on this oath and today, in spite of court orders to the contrary, BancorpSouth ignores it's responsibility.

Once again BancorpSouth misconstrues it's duty (ongoing in nature) and the Court's ruling. In this case, BancorpSouth was more than a surety because of the representations it made to the court. A surety is "one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor" *Blacks Law Dictionary* 1005 (6th ed. 1991). By representing to the Court in Trial Exhibits 1 and 2 that no disbursements of the minor's funds would be made, BancorpSouth placed itself in a relationship not only with the guardian and the wards but with the court.

A fiduciary relationship is "one founded on trust or confidence reposed by one person in the integrity and fidelity of another" *Blacks, supra* at 432. One man trusts or relies upon another. The truth is, in this state, the courts, the legislature, guardians, wards, and people of all walks of life "trust" BancorpSouth and other banks to follow court orders restricting access to

funds deposited by Chancery Courts all over this state. This trust is especially enhanced when formal legal documents (Trial Exhibits 1 and 2) are executed representing such to the Court.

Nowhere in the Court's ruling on the motion to dismiss or motion for summary judgment does the Court call BancorpSouth a surety (R.E. 13-26). Unlike Saint Paul, BancorpSouth made representations about what it would do and how it would act, independent of the Guardian. In doing so, BancorpSouth did not limit it's duty to $100,000, nor did it limit the money it could make on the "float" or profit.

C. Award of Punitive Damages

The Chancellor awarded punitive damages of $1 million against BancorpSouth (Tr. 563:16-23, R.E. 58) stating specifically:

> . . . This Court finds that
> the plaintiffs have shown by clear and
> convincing evidence that that gross negligence
> occurred.
> [Tr. 567:27 - 568:1; R.E. 62-63]

Once again, BancorpSouth misstates it's responsibility regarding the court order in place. BancorpSouth would have this Court believe this is a one-time incident with no other consequences. In the bank's eyes, this duty is not on-going and ministerial in nature. In fact, Appellees believe BancorpSouth's duty is on-going in nature and once representations were made as outlined in Trial Exhibits 1 and 2, the breach of those representations was/is negligence to a degree which warrants punitive damages. In fact, this is what the Chancellor found. The trial court reviewed the factors for punitive damages contained in MCA §11-1-65 (Tr. 568-569; R.E. 63-64). The court further reviewed and cited cases in it's opinion, including: *Hartford Underwriters Insurance Company v. Williams,* 936 So.2d. 888, 2006 WL 1029156; *Wise v. Valley Bank,* 861 So.2d 1029 (Miss.2003); *Gamble v. Dollar General Corporation,* 852 So.2d 5

(Miss.2003); *Valley Forge Insurance Company/CNA Insurance v. Strickland* 620 So.2d 535 (Miss.1993); and *Tideway Oil Programs, Inc. v. Serio,* 431 So.2d 454, 58 A.L.R.4th 819 (Miss.1983) and applied that law to the facts of the case at bar. In looking at the "totality of the circumstances" (Tr. 561:26; R.E. 56) the court found the punitive damages were appropriate and proven by "clear and convincing evidence." (Tr. 567:28-29; R.E. 62)

The case for punitive damages is even greater today than it was when the Chancellor made his ruling. Why? The obligations and duties which the bank assume in it's affidavit (Trial Exhibit 1) continue even today. The bank, in it's brief, admits it owes Walter Williams, Jr., one of the minors, $74,038.66 (Appellants Brief P. 75) yet to-date has paid not one cent to him. The progress of this case, as shown in Appellees' statement of facts, clearly demonstrates BancorpSouth's attitude and unwillingness to accept it's responsibilities to protect the money of these minors without even an arguable reason to support it's position. This Court in *Gregory v. Continental Insurance Company,* 575 So.2d 534 (Miss.1990), recognized an insurance company's ongoing duty to promptly pay a legitimate claim even after a lawsuit was filed, stating:

> The circuit judge never considered Continental's conduct following filing of the complaint, and there we find he erred. An insurance carrier's duty to promptly pay a legitimate claim does not end because a lawsuit has been filed against it for nonpayment. ***Put more bluntly, if you owe a debt the duty to pay does not end when you are sued for nonpayment of it.*** (emphasis added).

Does a bank holding minors' money under a restrictive court order owe any less duty than an insurance company to it's insured? The representations made by the bank in Trial Exhibits 1 and 2 are plain and simple. BancorpSouth has had no legitimate arguable reason to withhold payment of the funds to the minors which now even it admits it owes as of July 3, 2007, when BancorpSouth filed it's Appellant's Brief. Finally, the bank admits it's liability, but it still has

done nothing to rectify it's breach of duty. The trial court considered all the facts before it, case law, and M.C.A. §11-1-65 and specifically found, as a result of BancorpSouth's breach of duty, that punitive damages were warranted. This Court should uphold that decision based upon the "totality of the circumstances" as stated by the Chancellor in his opinion (Tr.561:26; R.E. 56)

One million dollars represents .009% of BancorpSouth's total assets ($10,831,291,000 as of June 30, 2005) and falls well below the $15 million legislated by M.C.A. §11-1-65 considering the bank's net worth of $936,167,000.00. (Trial Exhibit 11, Ape. R.E.2). Clearly, an award of $1 million in punitive damages is not excessive nor arbitrary based on the amount of punitive damages and it's relationship with compensatory damages or the financial well-being of BancorpSouth.

D. Award of Interest

Trial Exhibit 1, paragraph nine states, "Depository acknowledges and agrees that any assets of the guardianship and ***interest*** thereon coming into its possession shall be disbursed only in accordance with an order of this court." (R.E. 87, emphasis added). Trial Exhibit 2, paragraph two states:

> A certified true copy of the Order of the Chancery Court of Tishomingo County in this matter dated the 10th day of March, 1995, which has the effect of authorizing such a deposit and restricting disbursement and withdrawal of said funds any ***interest*** thereon, except as set forth specifically in said order, until a subsequent order specifically approves a disbursement or withdrawal.
> (R.E. 89, emphasis added).

BancorpSouth's position is that it can only be liable for interest at the savings account rate.[3] To do otherwise would be "inequitable". In other words, BancorpSouth, after violating a

[3]BancorpSouth does not mention what it made on the money deposited. Although, Exhibit 54 at trial was introduced showing $59,539 was the float or profit on said money if it had remained on deposit. (Ape. R.E. 9).

court order and ignoring it's representations to the court, should only be found liable for what it would have paid (after all, it sets the savings rate) on the minors' savings account.

M.C.A. §97-13-57 states:

> Whenever the guardian shall have money of his ward not needed for current expenditures, or directed to be invested for the ward, he shall apply to the court, or chancellor in vacation, for direction as to the disposition he shall make of it. The court or chancellor shall determine whether he shall lend it at interest, and upon what security, or how he shall dispose of it. If the court or chancellor designate the person to whom the loan shall be made, or the security on which it shall be made, and the loan to be so made, responsibility shall not attach thereafter to the guardian; but if the court or chancellor shall entrust him with discretion in the matter, he shall be bound for the exercise of sound judgment. The court or chancellor in its or his discretion may direct an investment in the bonds of the state or of any county, or municipality thereof, or of a levee board, or of the United States, or in shares of a building and loan association or a savings and loan association or in collateral trust notes registered and authenticated by trust departments of any approved state or national bank or in a common trust established by a bank or trust company, pursuant to the uniform Common Trust Fund Law of Mississippi. ***Any guardian who fails to report to the court the fact that he has money of his ward not needed or allowed to be used for current expenditures, and to ask the order of the court as to the disposition of such money, may be chargeable with interest on the same at the rate of eight per centum (8%) per annum during the time of failure.***
> (emphasis added)

A guardian can be charged with 8% per annum for doing nothing. Here the bank made representations that were plain and forthright. Was their duty to follow through on those representations any less than the guardian's? Was their duty to follow the court order any less than the guardian's?

This is not a case where the bank just misplaced funds. This is a case where the bank **violated a court order**. Then the bank denied it had to follow the court order. When BancorpSouth finally admitted "human error", the bank then employed the "you-gave-us-too-much-money" defense saying it only owed $100,000 (F.D.I.C. insured amount). The case for interest at a rate not set by BancorpSouth is clear.

In *Fidelity & Deposit Co. of Maryland v. DGNB,* 164 Miss. 286, 144 So.2d 700 (1932), an insolvent bank, serving as guardian, treated the guardianship funds as an "ordinary deposit". There, the Court held the bank was liable for interest at the rate of 8% from the time they were received until it suspended business. Here, BancorpSouth, while not guardian, represented to the court it would protect the principal and "interest" of the wards. This is the representation it failed to abide by and continues to do so today. BancorpSouth filed no declaratory judgment action pursuant to M.R.C.P. Rule 57 nor interpleader action pursuant to M.R.C.P. Rule 22. Nothing has released the bank from it's duty to the court or the plaintiffs to protect both the principal and interest of the guardianship funds.

The court made as a finding of fact that:

> The Court notes that there is a question here, possibly, as to whether or not there is a claim that is liquidated. This Court finds that the claim that is before this Court is, in fact, a liquidated amount, and that liquidated amount is $267,233, the amount of the initial deposit in this case.
> (Tr. 545:14-20; R.E. 40)

When the court gave it's ruling, it relied upon *Preferred Risk Mutual Insurance Company v. Johnson,* 730 So.2d 574 (Miss.1999), stating:

> The court stated in *Preferred Risk* this:
> We are of the opinion that where as in this case there is a justifiable dispute as to the amount of the loss, the insured is not entitled to interest until the amount of the claim has been made certain or liquidated. The Court has already ruled as to that here. And this is the important part here of this case, which I think is applicable to the case before it. However, the court said in *Preferred Risk,* we can envision cases where, in the discretion of the trial court interest should be allowed although

> the amount of the loss is in dispute and for this reason we do not foreclosed the allowance of interest in every case where the claim is unliquidated, close quote.
> (Tr. 547:11-26; R.E. 42)

The trial court in it's discretion found that the amount was liquidated and the rate to be applied for the prejudgment interest was 8%. After all, money today is not the same as money in 1997. Interest on minor's funds should be applied to protect the minors and the time value of their money. Such was the court's ruling and it was absolutely correct.

E. Award of Attorney's Fees

When the trial court made it's ruling on attorney's fees, it cited numerous cases, reiterated Mississippi law, referred to the testimony of Attorney John Ferrell[4], and M.C.A. §9-1-41. (Tr. 547-561; R.E. 49-56). In the end, under the facts of this case, the court awarded attorney's fees for the prosecution of this case considering the very factors which BancorpSouth espouses in it's brief. The court did not "rubberstamp" attorney's fees. John Ferrell testified to the reasonableness of attorney's fees, stating:

> Q. And the figures that are contained in Exhibit 12, thirty-three and a third percent prior to filing a lawsuit, 40 percent if a complaint is filed, and 50 percent in the event it becomes necessary to go to trial, would you consider that to be reasonable attorney's fees?
>
> A. Absolutely. That's typically the same percentages that I utilize in my contracts.
>
> Q. Would you turn to Exhibit 13, please?

---

[4]The testimony of John Ferrell, an expert qualified to testify about attorney's fees, was totally ignored in Appellant's Brief.

A. Yes, sir.

Q. Can you tell the Court what that is?

A. It appears to be an employment contract for legal services between Albert Jermaine Duckett, employing you as his attorney. And it's, likewise, specifically stated that it's on a contingency-fee basis. The percentages appear to be exactly the same as in Exhibit 12.

Q. And those percentages, again, would be reasonable?

A. Absolutely.

Q. You, in making this determination, I assume you are aware of the law in the State of Mississippi and the Rules of Professional Conduct?

A. Yes, sir.

Q. And the contracts that are marked as Exhibit 12 and 13 comply with those; do they not?

A. Absolutely.

Q. And you consider those contracts to be reasonable in this case?

A. Yes, sir.
(Tr. 137:26 - 138:26; Ape. R.E. 15-16)

Under cross-examination by Mr. Caldwell, Mr. Ferrell testified about the "novelty" of the case, as follows:

Q. Okay. Do you know the novelty and difficulty of questions involved in this case?

A. I know a little bit about the facts, obviously, because of when I was asked to testify about the nature of the litigation. As far as the novelty, I would hope it's

a novel question but I'm not sure that it is.

Q. So you would hope it's a novel question?

A. I would hope it would be because I assume banks, typically, don't disregard directions by court to not disburse funds.

Q. What's novel about that or difficult about that?

A. Well, we don't see a lot of it, I would hope.
(Tr. 141:16-28; Ape. R.E. 17)

Clearly, from the court ruling, the court considered all the proper factors (Tr. 556:3 - 557:19; R.E. 51-52) and awarded attorney's fees within it's discretion. The trial court made specific factual determinations necessary to grant attorney fees following the proper law. This Court should affirm that decision.

CONCLUSION

BancorpSouth does not want the Court to remand this case back to trial court where That Judge actually expects it to do what it says it will do. Instead, the Court should render a judgment against BancorpSouth for only $74,038.66 to Walter Williams, Jr. To do otherwise, would "damage" the banking industry.

What about the minors? Their mother was killed, lives destroyed, money stolen, hopes and dreams of a better life shattered.[5] But for the gross negligence of BancorpSouth, their lives would have, could have, should have been different. The bank says ignore what we say (Trial Exhibits 1 and 2), ignore what we did; ignore our duty; don't hold us accountable. The trial court

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[5]Albert Jermaine Duckett makes about $420 per week working at Heil of Tishomingo with four children and a stay-at-home wife. (Tr. 180:7-24; Ape. R.E. 24). Walter Williams, Jr. draws $478 per month Social Security Disability due to the genetic illness, sickle cell anemia. (Tr. 151:5 - 152:6; Ape. R.E. 19-20).

was able to view the witnesses expressions as well as their tenor when testifying, sift through reams of documents, and render a reasonable verdict under the circumstances. BancorpSouth was not forthright nor did it have even an arguable reason to deny it's duty or the breach thereof.

As this Court said in *Gregory, supra,* when does BancorpSouth's duty to pay end? When does BancorpSouth become accountable? The trial court's decision was meticulous, well-reasoned, grounded in fact, and applied the proper law. It most assuredly was well within the Chancellor's discretion to find BancorpSouth liable for the damages assessed. Accordingly, it should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that I, John R. White, attorney for Appellees, have this date delivered a true and correct copy of the above and foregoing Appellees' Brief by placing true and correct copies thereof in the United States Mail, postage prepaid, to the following:

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THIS, the 24th day of September, 2007.

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