IN THE SUPREME COURT OF MISSISSIPPI

BANCORPSOUTH BANK — APPELLANT

V. — NO. 2006-CA-01738

ALBERT JERMAINE DUCKETT AND WALTER WILLIAMS, JR. — APPELLEES

Appeal from the Chancery Court of Tishomingo County

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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APPELLANT'S REPLY BRIEF

I. INTRODUCTION

As the format for this reply brief, BancorpSouth lists each of the issues argued in its principal brief and, with regard to each issue, replies to the arguments made by the Plaintiffs in their brief. As is indicated below, the Plaintiffs have failed to respond at all to numerous issues raised by BancorpSouth in this appeal. As to those issues to which the Plaintiffs have responded, their arguments are marked by misstatements of the facts and by citation to law which is inapplicable.[1]

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[1] BancorpSouth has not undertaken in this brief to respond to the "Appellees' Reply to *Amicus Curiae* Brief of the Mississippi Bankers Association." As has been pointed out by the Mississippi Bankers Association in its pending motion to strike the *amicus* reply, the Rules of Appellate Procedure make no provision for response to an *amicus* brief, and the official comment to Rule 29 plainly provides that the "former practice of a separate brief in response to the *amicus* brief is abolished." Yet that is exactly what the Plaintiffs have done in this case, leaving BancorpSouth in the predicament of deciding whether to respond to a brief which is not permitted by the rules. There is much in the *amicus* reply which needs correction, most notably with regard to serious misstatements of fact. It also contains improper argument, such as its section on "special deposits," a theory which was not raised in the court below and which now stands waived by the Plaintiffs in this appeal. *See* discussion *infra* at 15 concerning procedural waiver of issues which are raised for the first time on appeal. BancorpSouth has assumed that Rule 29 and its official comment mean what they say and that this Court will grant the motion of the Mississippi Bankers Association to strike the *amicus* reply.

II. STATEMENT REGARDING ORAL ARGUMENT

BancorpSouth respectfully requests oral argument in this case. Such will be helpful to this Court in view of the potentially far-reaching impact the disposition of this appeal may have. First, it will affect all banks doing business in this state with fiduciaries such as guardians, conservators, executors and administrators. Second, it will fundamentally affect the law of punitive damages if, as the Plaintiffs urge, defendants in Mississippi can be liable for punitive damages for clerical errors. Third, it will displace a large body of case law on contempt if, as the Plaintiffs urge, a party may be punished for *unintentionally* violating a court order. Fourth, if the Plaintiffs' theory is successful, it will have the effect of broadening the heretofore limited application of the rules in bad faith refusal-to-pay insurance cases from insurance companies to any defendant. These, among numerous other important issues raised in this appeal, are particularly well-suited for the kind of further development which oral argument promotes.

III. ARGUMENT

A. Standard of Review

The Plaintiffs appear to agree with the standard of review set forth in BancorpSouth's principal brief.[2]

B. The chancellor excluded or otherwise ignored evidence which was essential to understanding the case.

Essential to the understanding of the issues in this appeal is the key point that the only thing that mattered to the chancellor was that the court's order restricting the Guardian's access

[2] *See* Appellant's Brief at 18.

to the guardianship funds was violated. The Plaintiffs argued, and the chancellor agreed, that *how* the violation occurred (through a clerical error by BancorpSouth in a computer data transfer process) and what happened *after* the violation occurred (the funds were used, for example, to purchase houses which the Plaintiffs own today and in which they presently reside) was totally irrelevant. The chancellor's view was that the failure to abide by the court's order was the beginning and the end of the inquiry. This view led to an inequitable result; the Plaintiffs offer nothing in their brief to dispel this conclusion.

1. The chancellor excluded evidence of the Guardian's expenditures which benefitted the Plaintiffs and failed to credit BancorpSouth accordingly, thus allowing the Plaintiffs a multiple recovery.

The Plaintiffs misunderstand the meaning of *United States Fid. & Guar. Co. v. Melson*, 809 So. 2d 647 (Miss. 2002), particularly with regard to the two houses which the Guardian purchased for some $86,000.00, title to which the chancellor vested in the Plaintiffs without any corresponding credit to BancorpSouth for their value.[3] The ultimate meaning of *Melson* is that in entertaining the possibility of retroactive approval of a guardian's expenditures, the court must look to the totality of the circumstances in order to prevent unfair results. *Id.*, 809 So. 2d at 661. Unfair results are precisely what the chancellor allowed in this case by permitting the Plaintiffs to recover from BancorpSouth the $86,000.00 spent on these houses *and* awarding them title to the houses.

The Plaintiffs likewise frame their argument on this point around what they suppose a chancellor would have done if requested to approve certain expenditures before they were

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[3] The Plaintiffs successfully contended at the actual damages phase of the trial that these houses were irrelevant (Tr. 163:2-165:15), but at the punitive damages phase, they thought better of it, with the result being the chancellor's awarding the houses to them. (Tr. 616:15-25.)

made. For example, they say, in the abstract, that no chancellor would have approved the Guardian's using $16,903.45 of the guardianship funds to purchase plaintiff Duckett an automobile or $7,000.00 to open a checking account for Duckett. They conveniently ignore the concrete circumstances surrounding Duckett at the time of these expenditures: Duckett had a family to support; he was over eighteen years old and he and his soon-to-be wife were expecting a child.[4]

The Plaintiffs are so bold as to argue that anything other than that kind of double recovery would be "inequitable."[5] *Melson* stands for the sound proposition that equity will not permit a double recovery and is consistent with longstanding Mississippi law which prevents unjust enrichment by precluding a recovery of the same damages multiple times.[6] The Plaintiffs recovered the same damages multiple times in the court below. And notwithstanding this multiple recovery, the Plaintiffs seek yet additional windfall in the form of punitive damages, excessive interest and attorney's fees under facts which will support none of these.

Further, *Melson* holds that transactions made by a guardian in violation of a court order can be ratified after the fact to prevent an inequitable result. If a *guardian* can be entitled to that kind of relief, surely a third party such as a depository bank ought to be all the more entitled to the same relief and assistance. If the role of the court is to aid a surety whose guardian has acted unscrupulously,[7] surely such a guardian's bank which is serving as his

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[4] *See* Appellant's Brief at 21-22.

[5] *See* Appellees' Brief at 6.

[6] *See* authorities cited in Appellant's Brief at 24-25.

[7] *See Reily v. Crymes*, 176 Miss. 133, 168 So. 267 (1936), holding that a surety of a guardian who has embezzled his ward's money is entitled to be aided by the court in

depository under Miss. Code Ann. § 93-13-17 should at a minimum be entitled to the same kind of aid from the court.

To the extent that any portion of the judgment below is affirmed by this Court, and particularly in view of the fact that BancorpSouth was not the Plaintiffs' guardian, equity requires that such judgment be reduced by the value of the two houses which the Plaintiffs now own.[8]

2. The chancellor ignored the uncontradicted testimony of an expert witness on bank mergers and deposit operations.

The Plaintiffs do not appear to dispute that the chancellor ignored the testimony of Mr. Paul Carruba, who was accepted as an expert witness on banking operations. Instead, the Plaintiffs argue that the chancellor was justified in ignoring this testimony because it was, they claim, "contradicted."

Mr. Carruba gave his opinions that *(a)* the Iuka Guaranty Bank approach using the "green worm" message feature was a sound means for handling accounts such as court-ordered guardianship accounts; *(b)* the BancorpSouth approach using both a "special instruction" and a "hold" was a sound means for handling accounts such as court-ordered guardianship accounts and actually was a better approach than using just the message feature alone; *(c)* BancorpSouth's merger transfer process complied with best industry practices and was state-of-the-art; and *(d)* BancorpSouth's policies set forth sufficient safeguards to protect against unauthorized transactions on court-ordered accounts, including BancorpSouth's specialized guardianship policies. In their brief, the Plaintiffs take issue only with the last of these

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recovering its bond money from the guardian.

[8] *See* Appellant's Brief at 25, n. 10.

opinions, and they quote at length from the testimony of BancorpSouth witnesses in an effort to show that the Guardian's malfeasance occurred because BancorpSouth had inadequate policies and procedures for the handling of court-ordered accounts.

The problem with this argument is that it is not based in fact. The absolutely uncontradicted fact is that before the computer data transfer process which changed the guardianship account from the Iuka Guaranty Bank system to the BancorpSouth system, the court's orders concerning disbursement of the guardianship funds were complied with perfectly. It was only *after* this data transfer process — when the "electronic lock" fell off the account due to an error — that the funds became vulnerable to the unscrupulous Guardian. The presence or absence of written policies or procedures on how to handle disbursements from court-ordered accounts had utterly nothing to do with what happened here.

Moreover, the Plaintiffs' contention that BancorpSouth had no such policies or procedures is false. BancorpSouth had no written procedures focusing specifically on the handling of *guardianship* accounts until around 1999.[9] (Tr. 196:15-25.) But Mr. Carruba testified that such guardianship-specific procedures are unusual and that BancorpSouth's specific procedures are actually *more* stringent than the practices of most banks. (Tr. 423:8-424:3.) To the contrary of what the Plaintiffs would have this Court believe, the evidence was clear that BancorpSouth has *always* had policies and procedures targeted to accounts with restrictions, which by definition includes guardianship accounts. (Tr. 221:6-20.)

Far from being contradicted, Mr. Carruba's opinion as to the sufficiency of these policies and procedures was corroborated by the fact that the bank perfectly complied with the

---

[9] This was after the Guardian stole the guardianship funds but before BancorpSouth had become aware of it.

restrictions on the guardianship deposit at issue in this case until a computer error made it appear to the bank's employees that the Guardian's access to the deposit was unrestricted and that its policies concerning restricted deposits did not apply to the account. His opinion was further corroborated by a study of court-ordered guardianship accounts at BancorpSouth undertaken by the bank which confirmed that all necessary holds and safeguards were functioning properly. (Tr. 449:28-454:6.) Nothing in the evidence contradicted Mr. Carruba's opinion concerning the sufficiency of BancorpSouth's policies and procedures.

The Plaintiffs argue that "BancorpSouth's attitude was bank policy overrides the court order and always has been."[10] This argument is premised upon two exchanges out of a Rule 30(b)(6) deposition transcript to which the Plaintiffs returned again and again — and *always* out of context — in an attempt to portray BancorpSouth as having callous disregard for court orders. The first of these exchanges, with 30(b)(6) bank witness Kathy Milligan, involved practices at Iuka Guaranty Bank. The Plaintiffs asked BancorpSouth officer Mr. Lee McAllister about this exchange 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

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[10] *See* Appellees' Brief at 13.

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.

(Tr. 208:1-17.)

This exchange is immaterial because it is not what happened in this case. It is absolutely undisputed that Iuka Guaranty Bank handled the Guardian's deposit to the letter of the court's orders. While there was in place the court's first order, prohibiting any disbursement at all, Iuka Guaranty Bank did not allow disbursement of a single dime from the guardianship account. Obviously, the bank read the order, it put into place a method for compliance in the form of the "green worm" message, and it complied with the order perfectly. Afterward, when the first order was replaced by the court's second order, allowing the Guardian to withdraw $200.00 per month, the bank never allowed more than $200.00 per month to be withdrawn. Again, the bank obviously read the order, kept in place the "green worm" message, and complied perfectly. Thus, despite the Plaintiffs' wishes that this Court see the bank as unconcerned about court orders, the plain evidence is that *in fact* the bank scrupulously followed the court's orders as is exemplified by its perfect compliance with them at all times up to the changeover from the Iuka Guaranty Bank computer system to the BancorpSouth computer system, when the "green worm" protection was mistakenly lost.[11]

The second deposition exchange which the Plaintiffs attempt to use as evidence of a contemptuous bank which is uninterested in court orders was with 30(b)(6) bank witness Cathy

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[11] Even though it does not describe the facts in this case, it is at least worth noting that Ms. Milligan's testimony is a fairly accurate description of the provisions of Miss. Code Ann. § 81-5-34. *See* Appellant's Brief at 38-39; *Amicus Curiae* Brief of the Mississippi Bankers Association at 4-6.

Talbot, who testified about matters *after* the data transfer to the BancorpSouth computer system. At trial, this exchange was recounted and explained by Ms. Talbot:

> Q. I want to ask you about an exchange in your own testimony in your own 30(b)(6) deposition that, likewise, has been read into the record previously by Mr. White. And for the Court's convenience and for counsel opposite, this is the 30(b)(6) deposition of Cathy Talbot, page 62, beginning at line 15, and continuing to page 63, line 1.
>
> Question: As we sit here and I have listened to three people and 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.
>
> Answer: 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.
>
> Question: All right. Is it your testimony that you think that the bank had no obligation to these two young men?
>
> Answer: Yes, sir.
>
> Now, with regard to that testimony, you were — I take it, you were testifying as a witness for BancorpSouth; is that correct?
>
> A. Yes, sir.
>
> Q. You were not testifying as a witness for Iuka Guaranty Bank?
>
> A. No, sir. I was not involved with Iuka Guaranty.
>
> Q. Have you ever worked for Iuka Guaranty Bank?
>
> A. No, sir.
>
> Q. I take it then, in light of the fact that you didn't work for Iuka Guaranty Bank and you were testifying for BancorpSouth, your answer was in the context of conditions that existed at BancorpSouth?
>
> A. Yes, sir. What we were aware of *at that time.*
>
> Q. Can you explain — can you explain to the Court what the circumstances were with regard to this guardianship account as it existed after the time the deposit converted from Iuka Guaranty Bank to BancorpSouth?
>
> A. It appeared as a normal guardian-type situation where Mr. Williams, Sr. was an authorized signer of the account and had access to the funds. There were no special instructions or no monetary holds on the bank system to indicate otherwise.

Q. Now, should there have been special instructions on that deposit?

A. Yes, sir.

Q. But there weren't and, therefore, Mr. Williams, Sr. could access the account without restrictions. Is that the way it worked?

A. Yes, sir, as he did, he took advantage of it, in my opinion.

* * * * *

Q. If the account appeared on the BancorpSouth system to have no special instructions or no court-ordered restrictions on it, then is it accurate that the account could be accessed freely?

A. Yes, sir.

Q. By whom could it be accessed?

A. By Mr. Williams, Sr. who was noted as the guardian and as a signature on the account.

(Tr. 443:24-445:13; 446:4-11, emphasis added.)

In their repeated use of the deposition exchange quoted at the beginning of the foregoing excerpt, and in their argument to this Court, the Plaintiffs have been very careful to omit Ms. Talbot's explanatory testimony which placed this exchange in proper context. The Guardian was allowed access to the guardianship account not because BancorpSouth disregarded the court's order. Instead, the Guardian was allowed to access the account because the "green worm" protective measure which had been placed on the account by Iuka Guaranty Bank was inadvertently lost in the process of converting data from the Iuka Guaranty computer system to the BancorpSouth computer system, making the account at all times thereafter appear to bank employees as if there were no restrictions upon it and as if the Guardian was allowed to transact on it freely.

There is not a scintilla of evidence in the record that, as the Plaintiffs urge, BancorpSouth has no regard for court orders. The contention is preposterous, as is evident from *how* the Guardian became able to access the guardianship account in this case and from the testimony of the bank's witnesses at trial. BancorpSouth witness Mr. Lee McAllister testified as follows:

> Q. Did BancorpSouth knowingly violate the court order in this particular case?
>
> A. At Iuka?
>
> Q. Yes.
>
> A. Not knowingly, no, sir.
>
> Q. Was it done intentionally?
>
> A. No, sir.
>
> Q. You described how, as a human error that morning somehow?
>
> A. Yes, sir.
>
> Q. What about generally, does BancorpSouth respect court orders?
>
> A. Yes, sir.
>
> Q. To your knowledge, would BancorpSouth ever intentionally violate any court orders of any court of this land?
>
> A. No, sir.
>
> Q. Anywhere where it does business or otherwise?
>
> A. No, sir.

(Tr. 255:25-256:14.) Similarly, bank security officer Ms. Cathy Talbot testified as follows:

> Q. Did BancorpSouth, in this case, ever intentionally violate any court order?

A. No, sir. I don't know that we ever have.

Q. Did BancorpSouth, in this case, ever willfully violate any court order?

A. No, sir.

Q. Or knowingly violate it?

A. No, sir.

Q. How many years did you say you have been dealing with the security issues of the bank and court orders?

A. I have been in the audit division the entire 26 years, and that includes the security department.

Q. In your 26 years, are you aware of a situation where the bank has knowingly or willfully or intentionally disregarded the order of any court?

A. No, sir, not at all.

Q. If such had occurred, would you know about it?

A. I feel like I would have, because I would be the person to do all the research and gather up all the documents.

Q. What is the bank's regard for court orders?

A. We treat them to the highest. I mean, I receive different court documents every single day. We deal with them immediately. And if there is any hesitation or question, I contact legal counsel.

(Tr. 448:25-449:20.)

This critical point of understanding the *context* in which events happened was made repeatedly at trial.[12] The Plaintiffs ignored it then and ignore it now because it is unhelpful to their case. Instead, they attempt to "spin" out of context the bank's explanation as to what

[12] The trial testimony of bank witnesses Mr. Lee McAllister and Ms. Cathy Talbot and the expert testimony of Mr. Paul Carruba, each spoke to this, and it was argued by counsel throughout.

occurred, while attempting to claim multiple recovery as a benefit. The chancellor ignored the bank's explanation because he was interested only in the abstract: *that* a court order was violated; he showed no interest whatever in the concrete: *how* it was violated. While a court must look at evidence on both sides, evidence has significance only in a concrete context, not in the abstract. *See Central Electric Power Ass'n. v. Hicks*, 236 Miss. 378, 390, 110 So. 2d 351, 357 (1959).

How the Guardian was able to access the funds should matter. Therein lies the error in the chancellor's ignoring Mr. Carruba's expert testimony. His conclusions were completely harmonious with the evidence at trial and were drawn within the proper context of the concrete circumstances of the case.

C. The chancellor erred as a matter of law in treating BancorpSouth as a surety.

Noting that nowhere did the chancellor call BancorpSouth a surety,[13] the Plaintiffs now all but concede that the chancellor erred in applying the surety statute of limitations to BancorpSouth. Notwithstanding this, the Plaintiffs do cling to an argument which tries to paint the Waiver of Process and Entry of Appearance of Depository (Trial Exhibit 1, Ex. pp. 8-10, R. E. 86-87) and the Receipt of Funds and Governing Court Order (Trial Exhibit 2, Ex. p. 11, R. E. 89) as some kind of bond. The Plaintiffs tell this Court that somehow "BancorpSouth was *more* than a surety."[14] It is clear from their brief that the Plaintiffs in essence urge this Court to hold that BancorpSouth was their co-guardian. As is more fully shown in the next two sections of this brief, these arguments, and particularly those concerning the applicable

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[13] *See* Appellees' Brief at 24.

[14] *See* Appellees' Brief at 23 (emphasis added).

statute of limitations, miss the mark.

1. The chancellor applied the wrong statute of limitations to BancorpSouth.

The Plaintiffs argue that the statute of limitations does not begin to run until the approval of the Guardian's final accounting — an event that has never occurred. As authority for this position, they cite *Pattison v. Clinghan*, 93 Miss. 310, 47 So. 503 (1908), which held that what is now Miss. Code Ann. § 15-1-27 (providing for a five-year statute of limitations on actions against guardians and their sureties) does not begin to run until approval of the guardian's final accounting. What is never explained by the Plaintiffs — and what the chancellor never explained in his reliance on *Pattison v. Clinghan*[15] — is how BancorpSouth qualifies as a guardian or a surety. Under the plain facts of this case, it is obviously neither, such that neither § 15-1-27 nor *Pattison v. Clinghan* can have any application to it. The other cases[16] cited by the Plaintiffs likewise each involve actions against guardians or their sureties or both, but not against third parties such as is BancorpSouth in this case.

In view of the plain inapplicability of this line of cases to BancorpSouth, the Plaintiffs make much of the language of the Waiver of Process and Entry of Appearance of Depository and Receipt of Funds and Governing Court Order which are binding on the bank "*until a subsequent order specifically approves a disbursement or withdrawal.*" (Trial Exhibit 2, Ex. p. 11, R. E. 89, emphasis added.) The Plaintiffs ask, "How can a statute of limitations begin

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[15] *See* Tr. 91:17-92:4; R. E. 18-19.

[16] *Nunnery v. Day*, 64 Miss. 457, 1 So. 636 (1886); *Bell v. Randolph*, 70 Miss. 234, 12 So. 153 (1892); and *United States Fid. & Guar. Co. v. Melson*, 809 So. 2d 647 (Miss. 2002).

to run if there is no 'subsequent order'?"[17] The simple answer, of course, is that there *was* a subsequent order.

The order referred to in the Receipt of Funds and Governing Court Order is a decree dated March 10, 1995 (R. E. 73-85) which does prohibit disbursement, but only until further order of the court, or, in the words of the Receipt, "until a subsequent order specifically approves a disbursement or withdrawal." (R. E. 89.) That subsequent order was entered on September 7, 1995, and allowed the Guardian to have access to the guardianship funds in order to withdraw the amount of $100.00 per month per Plaintiff. (R. E. 93.) Inasmuch as the bank was bound by the Governing Court Order *until* a subsequent order specifically approved a disbursement or withdrawal, it follows that the bank was no longer bound by the Governing Court Order after September 7, 1995.

The Plaintiffs conclude their argument on the statute of limitations by raising a new theory for the first time on appeal. Confronted with the obvious — that BancorpSouth is neither a surety nor a guardian — they now argue that Miss. Code Ann. § 15-1-43 is the most readily applicable statute of limitations.[18] This was nowhere argued in the court below. It is a long-established principle of appellate practice that an appellate court will not consider issues which are raised for the first time on appeal. *See, e.g., Jones v. Fluor Daniel Servs. Corp.*, 959 So. 2d 1044, 1048 (Miss. 2007); *Canadian Nat'l/Ill. Cent. R.R. v. Hall*, 953 So. 2d 1084, 1098 (Miss. 2007); *Dedeaux Util. Co. v. City of Gulfport*, 938 So. 2d 838, 846 (Miss. 2006); *State Indus. v. Hodges*, 919 So. 2d 943, 947 (Miss. 2006).

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[17] *See* Appellees' Brief at 20.

[18] *Id.*

Even if this argument were not procedurally barred, it has no merit. The Mississippi Court of Appeals has correctly construed Miss. Code Ann. § 15-1-43 as applicable to judgment creditors and their efforts to execute on their judgments. *Haycraft v. Mid-State Constr. Co.*, 915 So. 2d 1117, 1121 (Miss. Ct. App. 2005). Nothing in either the Governing Court Order of March 10, 1995 or in the subsequent order of September 7, 1995 makes the Plaintiffs judgment creditors of BancorpSouth or gives them any right to execute against BancorpSouth. Accordingly, § 15-1-43 is inapplicable. The chancellor should have applied the general three-year statute of limitations, Miss. Code Ann. § 15-1-49.

2. The chancellor misconstrued Miss. Code Ann. § 93-13-17 as making BancorpSouth a de facto *bonding company.*

The Plaintiffs' position at trial was that Miss. Code Ann. § 93-13-17, the statute which dispenses with the necessity of a guardian's bond to the extent that the guardianship funds are invested in "fully insured" bank deposits, had the effect of making BancorpSouth into a *de facto* bonding company. BancorpSouth responded that if such were the effect of the statute (and it is not), then the extent of its "bond" was necessarily $100,000.00, which was the extent to which the Guardian's deposit was insured by the Federal Deposit Insurance Corporation.[19] The Plaintiffs' only counter to this necessary conclusion is that it is "nonsensical."[20] How this conclusion is nonsensical is not explained by the Plaintiffs. Of course, this conclusion is not only sound, but it is consistent with both the law of the case[21] and the express provisions of the Receipt of Funds and Governing Court Order which state in the plainest terms possible that the

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[19] *See* Appellant's Brief at 36-40.

[20] *See* Appellees' Brief at 22.

[21] *See* discussion *infra* at 20.

Guardian's original deposit of $267,233.00 *"is fully insured up to $100,000.00 by FDIC Insurance."*[22]

Turning quickly from the problem of the clause in § 93-13-17 waiving bond "so long as such deposits are fully insured" and the plain language of the Receipt confirming that the Guardian's deposit was *not* fully insured, the Plaintiffs argue another new theory for the first time on appeal: BancorpSouth should be elevated to the status of a trustee.[23]

The Plaintiffs argue that by accepting the Guardian's deposit, BancorpSouth became a trustee under Miss. Code Ann. § 81-5-33. Section 81-5-33 authorizes banks to act as trustee of trusts arising under trust agreements or court orders establishing trusts, and it likewise authorizes banks to serve as guardian of minors and as administrator or executor of decedents' estates. The statute requires that any bank which receives funds in any such capacity shall segregate the funds and "shall keep a separate set of books and records showing in proper detail all transactions engaged in under the authority of this section." There is no question but that § 81-5-33, entitled "Powers in regard to trusts", pertains to express fiduciary undertakings administered through a bank's trust department, such as formal trusts or guardianships where the bank is appointed as the guardian, or decedent's estates where the bank is appointed as the administrator or executor. In fact, the statute twice refers to the bank's "trust department."

This is in sharp contrast to the very next section in the code, Miss. Code Ann. § 81-5-34, which provides in pertinent part:

Any bank, including a national bank, may accept accounts in the name of any

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[22] Trial Exhibit 2, Ex. p. 11, R. E. 89 (emphasis added.).

[23] *See* discussion *supra* at 15 concerning procedural waiver of issues which are raised for the first time on appeal.

> administrator, executor, guardian, trustee or other fiduciary in trust for a named beneficiary or beneficiaries. *Any such fiduciary shall have the power to make payments upon and to withdraw any such account, in whole or in part.* The withdrawal value of any such account or other rights relating thereto may be paid or delivered, in whole or in part, to such fiduciary, *without regard to any notice to the contrary*, as long as the fiduciary is living. The payment or delivery to any such fiduciary or a receipt of acquittance signed by any such fiduciary to whom any such payment or any such delivery of rights is made shall be valid and sufficient *release and discharge of any bank* for the payment or delivery so made.

(Emphasis added.) Sections 81-5-33 and 81-5-34 deal with two entirely separate circumstances. The distinction is obvious: the former deals with situations where the bank itself is the fiduciary; the latter deals with situations where the bank is the depository for a third party who is the fiduciary. It is beyond dispute that in this case, BancorpSouth was the latter.

That trust department scenarios have no application to this case was underscored by BancorpSouth at trial when, in the punitive damages phase, it introduced evidence showing that without statutory protections such as those provided by § 81-5-34, guardians would have no choice but to seek out banks with trust departments and incur the substantial fees which can be associated with trust department administration of funds, thus leaving many guardians of smaller estates with nowhere to turn for depository services.[24] Such would be the inevitable effect of an award of punitive damages in this case: it would not so much deter "similar misconduct in the future"[25] as it would discourage the provision of general banking services to fiduciaries such as guardians, conservators, executors and administrators.

In order for § 81-5-33 to apply, BancorpSouth would have to be the guardian of the Plaintiffs. Not even in the most creative rendering of the facts is such the case here. The

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[24] *See* Tr. 383:19-384:9.

[25] *See* Miss. Code Ann. § 11-1-65(1)(e).

Plaintiffs' father was their court-appointed guardian who, as their fiduciary, having taken the oath prescribed by law, deposited the guardianship funds with BancorpSouth pursuant to § 81-5-34. When he withdrew the funds, BancorpSouth was entitled to the benefit of that statute which is plainly intended to protect banks from the wrongdoing of fiduciaries such as guardians who exceed their authority or who violate their oaths.

3. Assuming, **arguendo,** *that BancorpSouth was a surety, the chancellor departed from the law of the case and imposed against BancorpSouth a greater quantum of damages than may be imposed against a surety.*

The Plaintiffs make no response to this section of BancorpSouth's brief (Appellant's Brief at 40-44). It is a familiar rule of appellate practice that an appellee's failure to file a brief is tantamount to confession of error and will be accepted as such unless the appellate court can say with confidence, after considering the record and the brief of the appellant, that there was no error. *See, e.g., City of Jackson v. Lakeland Lounge*, 688 So. 2d 742, 746 (Miss. 1996). This Court has held that this rule applies not only to an appellee's failure to file any brief at all, but also to an appellee's failure to respond to a part of the appellant's brief. *Turner v. State*, 383 So. 2d 489, 491 (Miss. 1980) *citing Stampley v. State*, 284 So. 2d 305 (Miss. 1973); *Lawler v. Moran*, 245 Miss. 301, 148 So. 2d 198 (1963); *Gulf, M. & O. R. Co. v. Webster County*, 194 Miss. 660, 13 So. 2d 644 (1943).

In this case, the record plainly reveals that the chancellor treated BancorpSouth as a surety for purposes of the statute of limitations and applied the surety statute, Miss. Code Ann. § 15-1-27, to BancorpSouth at the urging of the Plaintiffs. (Tr. 91:1-93:12.) The record is equally plain that, having obtained this favorable ruling, the Plaintiffs then proceeded to successfully urge the chancellor to treat BancorpSouth as a depository for purposes of

damages, ignoring the familiar rules of surety liability which shield sureties from liability for attorney's fees and punitive damages. By successfully urging the chancellor to apply the surety statute of limitations to BancorpSouth, the bank should have been made a surety for all purposes, consistent with the doctrine of the law of the case as explained by this Court in *Mauck v. Columbus Hotel Co.*, 741 So. 2d 259 (Miss. 1999) and the cases discussed in BancorpSouth's principal brief.[26] This issue is fully developed in BancorpSouth's principal brief. The Plaintiffs' failure to respond to this issue is tantamount to confession of error, and this Court should accept it as such.

D. The chancellor erred in awarding punitive damages against BancorpSouth.

The chancellor's express grounds for awarding punitive damages against BancorpSouth were stated simply in his bench ruling:

> *This Court finds that the plaintiffs are entitled to punitive damages in this case because of that violation of that court order.*

(Tr. 563:16-22, R. E. 58, emphasis added.) No doubt sensing it unlikely that this Court will set as precedent strict liability for punitive damages when a court order is violated — especially without regard to *why* or *how* the order was violated — the Plaintiffs instead turn to an alternative ground which appears nowhere in the chancellor's findings. They argue that BancorpSouth should be punished for not paying restitution to the Plaintiffs as soon as their complaint was filed. Their argument fails in several respects, as is more fully developed below. With regard to other aspects of this appeal concerning the propriety of punitive damages, the Plaintiffs' brief is simply silent.

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[26] *See* Appellant's Brief at 40-44.

1. The chancellor applied the wrong remedy for violation of a court order; the remedy is contempt, not imposition of punitive damages.

The Plaintiffs advance no argument in response to this section of BancorpSouth's brief. For the reasons stated *supra* at 19, the Plaintiffs' failure to respond is tantamount to confession that in awarding punitive damages the chancellor applied the wrong remedy. *Turner v. State*, 383 So. 2d 489, 491 (Miss. 1980) *citing Stampley v. State*, 284 So. 2d 305 (Miss. 1973); *Lawler v. Moran*, 245 Miss. 301, 148 So. 2d 198 (1963); *Gulf, M. & O. R. Co. v. Webster County*, 194 Miss. 660, 13 So. 2d 644 (1943). Consistent with these authorities, and in view of the full development of this issue in BancorpSouth's brief,[27] this Court should accept the Plaintiffs' failure to respond as confession of this issue on appeal.

2. The chancellor's award of punitive damages is contrary to Miss. Code Ann. § 11-1-65 and Mississippi law.

The Plaintiffs argue that the law of punitive damages applicable to bad faith refusal-to-pay insurance cases ought to be applied in cases such as this one. They argue, essentially, for imposition of punitive damages for a defendant's failure to make full restitution after discovery of the defendant's liability. As support for this novel idea, the Plaintiffs seek to apply to *banks* a line of cases which has always been applied only to *insurance companies*.

The Plaintiffs cite *Gregory v. Continental Insurance Company*, 575 So. 2d 534 (Miss. 1990) for the proposition that a defendant's failure to pay an obligation to a plaintiff subsequent to the filing of the lawsuit can provide grounds for consideration of punitive damages. The issue of BancorpSouth's failure to pay was never in evidence in the trial below.

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[27] *See* Appellant's Brief at 44-49.

The Plaintiffs attempted to go there with the following question put to bank witness Mr. Lee McAllister:

> Q. Do you know what efforts your bank made at any time to pay to the minors the funds that were deposited in your account or in your bank for them?

(Tr. 200:28-201:1.) BancorpSouth immediately objected to this inquiry. The argument on the objection concluded as follows:

> MR. CALDWELL: Your Honor, he asked why we haven't paid these plaintiffs money. I think that's far afield.
>
> THE COURT: All right. The objection will be sustained at this point. Go ahead.

(Tr. 202:14-18.)

The question of whether BancorpSouth made any effort to pay anything to the Plaintiffs having been excluded by the chancellor, the Plaintiffs made no proffer of evidence on the point, nor did they take any cross appeal from the chancellor's ruling. The Plaintiffs' failure to cross appeal this issue results in their waiving it, and they are barred from raising it now. *See L.W. v. C.W.B.*, 762 So. 2d 323, 329 (Miss. 2000); *Hickman v. Hickman*, 190 So. 2d 853, 854 (Miss. 1966).

Notwithstanding that the Plaintiffs are procedurally barred from raising this issue, the very authority which they cite, *Gregory v. Continental Insurance Company*, *supra*, does not support their position. *Gregory* is a bad faith refusal-to-pay insurance case which predates the enactment of the current version of § 11-1-65. *Gregory* involved an insurer which refused to pay a claim because the insured had not submitted a proof of loss. When the insured filed suit, the insurer did not raise as an affirmative defense the insured's failure to submit a proof of loss. The trial court found the insurer liable for the claim, but not for punitive damages. This Court

reversed the trial court as to the punitive damages question, since the insurer, having failed to raise what was otherwise a dispositive affirmative defense, offered no reason why it refused to pay the claim. This Court did not award punitive damages, but remanded the case to the trial court so that the insurer could explain any legitimate or arguable reason for the delay in making payment.

This Court's approach in *Gregory* is harmonious with a consistent line of Mississippi bad faith insurance cases, uniformly applied only to insurance company defendants, holding that where there is an arguable basis for the delay or denial of payment under a contract of insurance, there is no valid claim for punitive damages. *See, e. g.*, *Windmon v. Marshall and Miss. Farm Bureau Ins. Co.*, 926 So. 2d 867, 872 (Miss. 2006) (*citing Murphree v. Federal Ins. Co.*, 707 So. 2d 523, 529 (Miss. 1997); *Miss. Power & Light Co. v. Cook*, 832 So. 2d 474, 485 (Miss. 2002) (a workers' compensation case).

Yet even if BancorpSouth were an insurance company (which it is not), and even if the *Gregory* approach applied to banks (which it does not), in this case BancorpSouth had an arguable basis for not immediately reimbursing the Plaintiffs for the money which was stolen by the Guardian. The facts surrounding plaintiff Duckett created an arguable basis for not reimbursing him, first, on the issue of his claim being time barred, and second, on the issue of the house, vehicle and cash given to him by the Guardian after he was eighteen and supporting a family and benefits he received from them.[28] Likewise, the facts surrounding plaintiff Williams, Jr. created an arguable basis for not reimbursing him, first, in view of the separate

[28] Duckett asserted no claim until after his brother had sued the bank. His reason for delay was fairly obvious: he felt that through these distributions he had already gotten his money. (Tr. 188:23-25.)

house purchased for him by the Guardian, and second, in view of the fact that at all times throughout the litigation he resided with and enjoyed a close relationship with the person he otherwise characterized as a thief.[29] In addition to these bases, there were and are the unresolved issues of the amount of interest payable, the time frame over which it should be paid, and the amount of principal payable in view the Plaintiffs' position at trial that BancorpSouth was a surety on a "bond" (R. E. 89) which on its face was limited to $100,000.00. And overarching all of these bases is the plain language of Miss. Code Ann. § 81-5-34 which permits banks to pay guardianship deposits over to the guardian "without regard to any notice to the contrary."[30]

Notwithstanding all of these arguable bases, and contrary to what the Plaintiffs would lead this Court to believe, BancorpSouth has in fact offered to make restitution to the Plaintiffs, but they rejected it. As more fully explained in BancorpSouth's principal brief,[31] during the course of the litigation BancorpSouth made three separate offers of judgment to the Plaintiffs pursuant to Rule 68, Miss. R. Civ. P. The first, in the amount of $101,000.00 (R.622-24), was based on the Plaintiffs' "*de facto* bonding company" theory and the law of the case which they themselves established. The second, in the amount of $182,500.00 (R. 625-27), was based upon the assumption that plaintiff Duckett's claim was time barred; the offer would have provided plaintiff Williams, Jr. with more than he would have received had the Guardian

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[29] *See* Appellant's Brief at 70, n. 25.

[30] The Plaintiffs actually support the existence of an arguable basis for not making immediate reimbursement, acknowledging that "this is a case of first impression." *See* Appellees' Brief at v. Moreover, their view that the facts involved here present a case of first impression in and of itself should negate grounds for punitive damages.

[31] *See* Appellant's Brief at 47-49.

perfectly performed his duties. The third, in the amount of $325,001.00 (R. 628-30), assumed that Duckett's claim was not time-barred, included interest liberally calculated, and would have resulted in payment to each the Plaintiffs of far more than they would have received had the Guardian never touched the original deposit.[32] To the Plaintiffs, none of this was enough. They scoffed at these offers by filing two pleadings in violation of Rule 68, each titled "Response to Offer of Judgment" (R. 474-75; 587-88.), and now they tell this Court that BancorpSouth has withheld, delayed or denied payment to them.

The making of an offer of judgment under Rule 68 carries the same significance as payment to the plaintiff or tender of funds into the registry of the court. *See Rainbow Rental & Fishing Tools, Inc. v. Delta Underground Storage, Inc.*, 542 So. 2d 258, 263 (Miss. 1989). Thus, even if BancorpSouth were an insurer (which it is not), and even if the approach in *Gregory v. Continental Insurance Company, supra*, applied to banks (which it does not), in this case BancorpSouth on three separate occasions was willing to set aside its arguable basis defenses and instead offer restitution via Rule 68 for its "human error oversight" which allowed the Guardian to spend the guardianship funds. The last of these offers would have made each of the Plaintiffs more than whole.[33]

Finally, the Plaintiffs conveniently ignore in their brief the inescapable conclusion that

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[32] It is worth noting none of these offers of judgment sought any credit for the $50,000.00 which the Plaintiffs had already recovered from the Guardian's surety, unlike any judgment which could they could have obtained equitably on the merits.

[33] Because the third offer of judgment, like the first two, would have allowed the Plaintiffs to retain the $50,000.00 recovered from the surety without any corresponding adjustment to amounts recoverable from BancorpSouth, the third offer would have actually resulted in total compensation to the Plaintiffs in the amount of $375,001.00. That total amount would have compensated the Plaintiffs with the exact amount they would have received had the Guardian perfectly performed his duties, plus an additional $84,000.00.

the proof in this case cannot possibly constitute clear and convincing evidence of willful, wanton or reckless disregard for the safety of others by BancorpSouth. Such a finding is absolutely required by § 11-1-65(1)(a) if punitive damages are to be considered in this case. This Court must not lose sight of the fact that what occurred in this case was a clerical error made by BancorpSouth during the attempted manual transfer of account information from the computer system of Iuka Guaranty Bank to the computer system of BancorpSouth, the unintended result of which was to leave the guardianship account vulnerable to misappropriation by the unscrupulous Guardian. Particularly relevant for purposes of § 11-1-65(1)(a) and its requirement of clear and convincing evidence of willful, wanton or reckless disregard for the safety of others, is the fact this error occurred in the context of an information transfer process which was designed and intended to protect the interests of its depositors and to ensure the safety of depositors' accounts, including those which required special handling, such as those restricted by court order. That this detailed, carefully-designed, well-intentioned process was unsuccessful with regard to a single account does not translate into willful, wanton or reckless disregard for the safety of others.

Because the Plaintiffs' brief does not address the essential requirement of § 11-1-65(1)(a) that there be clear and convincing evidence of willful, wanton or reckless disregard for the safety of others, BancorpSouth will not restate its argument here. Instead, BancorpSouth draws this Court's attention to this vitally important point and respectfully requests careful consideration of the fuller treatment of it set forth in BancorpSouth's principal brief.[34]

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[34] *See* Appellant's Brief at 50-56.

3. The chancellor's award of punitive damages is contrary to the due process protections of the federal constitution.

Miss. Code Ann. § 11-1-65(4) expressly provides that the trial court and the appellate courts each have a duty to ensure that punitive damage awards comply with constitutional requirements. These constitutional requirements have been established by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) and its progeny. In its principal brief, BancorpSouth discusses in detail the applicability of constitutional requirements to the chancellor's award of punitive damages in this case and shows that the award, viewed against the content of the record, fails to comply with those constitutional requirements.[35]

The Plaintiffs ignore this key issue and do not address it at all in their brief, nor do they respond to BancorpSouth's arguments. Again, for the reasons stated *supra* at 19, the Plaintiffs' failure to respond is tantamount to confession that the chancellor's award of punitive damages in this case fails to comply with constitutional requirements. In view of the full development of this issue in BancorpSouth's brief, this Court should accept the Plaintiffs' failure to respond as confession of this issue on appeal. *Turner v. State*, 383 So. 2d 489, 491 (Miss. 1980) *citing Stampley v. State*, 284 So. 2d 305 (Miss. 1973); *Lawler v. Moran*, 245 Miss. 301, 148 So. 2d 198 (1963); *Gulf, M. & O. R. Co. v. Webster County*, 194 Miss. 660, 13 So. 2d 644 (1943).

E. The chancellor erred in the manner of awarding interest.

The responses of the Plaintiffs to BancorpSouth's argument concerning interest completely ignore the authorities raised by BancorpSouth and instead focus on law which is plainly inapplicable to this appeal.

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[35] *See* Appellant's Brief at 56-59.

1. The chancellor should have awarded interest at the savings account contract rate.

The Guardian deposited the guardianship funds into a variable rate savings account with Iuka Guaranty Bank on July 21, 1995, where, over time, it earned interest at a rate which varied from a high of three percent to a low of 0.75 percent per annum. The Plaintiffs never complained of this investment; their position was that the Guardian should have never touched the money except to disburse the court-approved $100.00 per month per Plaintiff. The parties stipulated that had the funds remained in this variable rate savings account, earning interest at the variable rate, and if the Guardian had not touched the money except to make the small monthly disbursements, on the twenty-first birthday of plaintiff Duckett his share with interest at the contract rate would have been $144,747.60, and on the twenty-first birthday of plaintiff Williams, Jr. his share would have been $146,038.66.[36] Notwithstanding all of this, the chancellor awarded the Plaintiffs prejudgment interest at the "legal" rate of eight percent, compounded annually, not from the time of the Guardian's wrongful withdrawal, but instead from the time of the original deposit in 1995 to the date of judgment, resulting in a total of $555,218.62 for the Plaintiffs.

In defense of the eight percent rate utilized by the chancellor, the Plaintiffs cite Miss. Code Ann. § 93-13-57 which, by its own terms, applies only to *guardians*. The Plaintiffs argue that, apparently by analogy, this statute ought to apply to BancorpSouth. Section 93-13-57 is a penal statute,[37] and as such must be strictly and narrowly construed. *MidSouth Rail Corp.*

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[36] *See* Appellant's Brief at 60, n. 23.

[37] *See, e. g., Southern Package Corp. v. Walton*, 196 Miss. 786, 801, 18 So. 2d 458, 461 (1944) ("[A] statute is penal in character where its controlling purpose is to impose a punishment for the violation of its provisions").

v. Citizens Bank & Trust Co., 697 So. 2d 451, 458 (Miss. 1997) (reversing a chancellor who applied a penal environmental cleanup statute to a bank by analogy). Strictly and narrowly construed, § 93-13-57 cannot apply to a party who is not a guardian.

Similarly, the Plaintiffs defend the eight percent rate utilized by the chancellor with *Fidelity & Deposit Co. v. Deposit Guaranty Bank & Trust Co.*, 164 Miss. 286, 144 So. 700 (1932). In that case, the predecessor to § 93-13-57 was applied to a bank, and the bank was made liable for eight percent interest. However, the critical distinction between that case and this is that the bank in *Fidelity & Deposit* was in fact the guardian. Of course, the statute applied. *Fidelity & Deposit* adds nothing to the discussion of the instant case, as BancorpSouth is not the guardian, and the penal statute on which *Fidelity & Deposit* is decided applies only to guardians.

The most notable aspect of this portion of the Plaintiffs' brief, however, is its total silence concerning Miss. Code Ann. § 75-17-7, which clearly and unambiguously requires in this case the application of either (*a*) the variable savings account contract rate or (*b*) a rate determined by the judge to be fair "from a date determined by such judge to be fair *but in no event prior to the filing of the complaint.*" The Plaintiffs offer no explanation as to how to reconcile the provisions of § 75-17-7 with the chancellor's award of eight percent interest from the date of the original deposit in 1995. This omission is not surprising because there is no defensible explanation.

2. If the contract rate is ignored, there is no basis upon which to award compound interest.

The Plaintiffs do not address in their brief at all the issue of the chancellor's awarding *compound* interest, nor do they respond to BancorpSouth's arguments as to why it was error

for him to do so. They have nothing to say in their brief to defend the chancellor's erroneous reliance upon *In re Guardianship of Timothy Wayne Helton*, the unreported 1984 decision of Chancery Court of Tishomingo County, affirmed *per curiam* at 460 So. 2d 1165 (Miss. 1985), which the chancellor treated as precedent for compounding interest.[38] Nor do they do not defend the chancellor's mistaken application of *Jones v. Parker*, 216 Miss. 64, 61 So. 2d 681 (1952), which holds that compound interest cannot be charged in cases of simple neglect of duty where there is no fraud or intentional misconduct — the very circumstances which apply to BancorpSouth here.[39]

Once again, for the reasons stated *supra* at 19, the Plaintiffs' failure to respond to BancorpSouth's arguments concerning these issues is tantamount to confession that the chancellor's award of compound interest was reversible error. In view of the full development of these issues in BancorpSouth's brief, this Court should accept the Plaintiffs' failure to respond as confession of these issues on appeal. *Turner v. State*, 383 So. 2d 489, 491 (Miss. 1980) *citing Stampley v. State*, 284 So. 2d 305 (Miss. 1973); *Lawler v. Moran*, 245 Miss. 301, 148 So. 2d 198 (1963); *Gulf, M. & O. R. Co. v. Webster County*, 194 Miss. 660, 13 So. 2d 644 (1943).

F. The chancellor permitted the Guardian to testify at trial after the Guardian had invoked the Fifth Amendment and refused to testify during discovery.

Yet again, the Plaintiffs make no response whatsoever to this section of BancorpSouth's brief (Appellant's Brief at 68-71). The chancellor permitted the Guardian to

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[38] *See* Appellant's Brief at 65-66.

[39] *See* Appellant's Brief at 66-68.

testify at trial on behalf of the Plaintiffs as to matters for which he invoked the Fifth Amendment when BancorpSouth asked during discovery. The chancellor's permitting the Guardian's testimony under these circumstances was fundamentally unfair and unduly prejudicial and is precisely why this Court held in *In re Knapp*, 536 So. 2d 1330 (Miss.1988), that a witness cannot invoke the Fifth Amendment during discovery and then waive it for the first time at trial. BancorpSouth cited *Knapp* to the chancellor when it made its contemporaneous objection to the Guardian's testimony at trial, yet the chancellor overruled it, even though the case was directly on point. The result was, with regard to that witness, trial by ambush.

This is highly significant because, unlike the new theories for punitive damages advanced by the Plaintiffs on appeal, the Guardian's testimony was adopted by the Plaintiffs as the foundation of their argument for punitive damages at trial:

> Some time in March of 1997, BancorpSouth, after having bought Iuka Guaranty Bank, converted all of their funds over into BancorpSouth. Thereafter, on August of '97, unauthorized withdrawals began. There is only one way that Walter Williams, Sr. could have known that authorized withdrawals, or unauthorized withdrawals could have been made unless somebody at the bank told him. *He testified to that.* He also testified that the same individual that he dealt with at Iuka Guaranty Bank worked there at BancorpSouth and he dealt with them again.

(Closing argument of Plaintiffs' counsel, Tr. 491:17-29, emphasis added.)[40] This error was all

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[40] Moreover, this testimony upon which the Plaintiffs' punitive damages theory was founded came from the dishonest Guardian who took the money. Key to understanding the issue of propriety of punitive damages against BancorpSouth is that the bank was merely passively negligent by committing the clerical error which left the guardianship account vulnerable to exploitation by the Guardian. BancorpSouth did not take the money. The *Guardian* did, and it was he, not BancorpSouth, who was the active tortfeasor and the proximate cause of the Plaintiffs' losses. Had the Guardian faithfully performed his duties, the guardianship funds would still be in the bank, notwithstanding BancorpSouth's mistake in letting the "electronic lock" fall off the account. *See Titus v. Williams*, 844 So. 2d 459, 466

the more egregious in that it occurred during the punitive damages phase of the trial.

For the reasons stated *supra* at 19, the Plaintiffs' failure to respond to BancorpSouth's arguments concerning this issue is tantamount to confession that the chancellor's allowing the Guardian to testify at trial concerning matters for which he invoke the Fifth Amendment during discovery was reversible error. In view of the full development of this issue in BancorpSouth's brief, this Court should accept the Plaintiffs' failure to respond as confession of this issue on appeal. *Turner v. State*, 383 So. 2d 489, 491 (Miss. 1980) *citing Stampley v. State*, 284 So. 2d 305 (Miss. 1973); *Lawler v. Moran*, 245 Miss. 301, 148 So. 2d 198 (1963); *Gulf, M. & O. R. Co. v. Webster County*, 194 Miss. 660, 13 So. 2d 644 (1943).

G. The chancellor erred in awarding attorney's fees against BancorpSouth.

The Plaintiffs appear to concede that if this case is not appropriate for punitive damages, then it is likewise not appropriate for an award of attorney's fees. *Hamilton v. Hopkins*, 834 So. 2d 695, 700 (Miss. 2003). Instead they argue that the propriety of the attorney's fee award is consistent with the familiar *McKee* factors[41] and with Miss. Code Ann. § 9-1-41. The trouble with the Plaintiffs' argument is that it is supported by neither the record nor the law.

This Court has made clear that where a plaintiff who is entitled to recover attorney's fees has agreed with his attorney for a contingency fee, the amount of fees which is assessable against the defendant is not the contingency amount but instead what is reasonable. *Mauck v. Columbus Hotel Co.*, 741 So. 2d 259 (Miss. 1999). This Court has further made clear that

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(Miss. 2003) and accompanying discussion in Appellant's Brief at 58-59.

[41] *See McKee v. McKee*, 418 So. 2d 764 (Miss. 1982).

determination of what is reasonable requires consideration of and factual determinations regarding the *McKee* factors. *BellSouth Personal Communications, LLC v. Board of Supervisors*, 912 So. 2d 436, 445 (Miss. 2005); *Browder v. Williams*, 765 So. 2d 1281, 1288 (Miss. 2000). Finally, this Court has made clear that determination of what is reasonable *begins* with consideration of the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate. *BellSouth Personal Communications, supra*, at 446-47.

There is nothing in the record from which the chancellor could have made a factual determination in this regard, and there is nothing in the record against which this Court can weigh whether the chancellor's award of an attorney's fee of $222,087.44 was reasonable in view of the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate.[42] The Plaintiffs fault BancorpSouth for ignoring the testimony of their fee expert.[43] Here is what their fee expert had to say about the number of hours expended by Plaintiffs' counsel:

> Q. Do you know the number of hours that Mr. White [Plaintiffs' counsel] expended in this particular case?
>
> A. That would be *irrelevant* to me.
>
> Q. Do you know?
>
> A. I have no idea.

(Tr. 141:11-15, emphasis added.) The reason the expert did not know is because the Plaintiffs' counsel himself did not know. The Plaintiffs' counsel admitted that he did not keep any record

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[42] The amount of $222,087.44 was exactly forty percent of the actual damages awarded against BancorpSouth. The chancellor's awarding this amount was in fact a "rubber stamp" of the forty percent contingency fee contracts which each of the Plaintiffs with their attorney.

[43] *See* Appellees' Brief at 29, n. 4.

of his hours in this case. (Tr. 482:23-483:3.) The chancellor just as plainly stated in his bench opinion awarding attorney's fees that he did not consider the number of hours required. (Tr. 557:3-8.) Moreover, the Plaintiffs' fee expert, on whose testimony they so heavily rely in their brief, *disagreed* with the many opinions of this Court on the subject: his own opinion was that the number of house spent by counsel was irrelevant to the determination of the reasonableness of a fee.

Thus, while the chancellor recited the *McKee* factors, he did not apply them. Instead, as his ultimate authority for awarding attorney's fees against BancorpSouth in the exact amount called for by the Plaintiffs' contingency fee contracts, the chancellor relied upon Miss. Code Ann. § 9-1-41, which allows a trial court to award reasonable attorney's fees based upon the information before it and the trial court's own opinion based on experience and observation. However, this Court has made clear that § 9-1-41 is *not* a substitute for careful application of the *McKee* factors and factual determinations. *Miss. Power & Light Co. v. Cook*, 832 So. 2d 474, 487 (Miss. 2002).

This is not a case for the award of any attorney's fees because it is not a case for punitive damages. However, even if an award of attorney's fees were appropriate, the record is insufficiently developed for meaningful determination of reasonableness. The Plaintiffs have offered nothing in their brief to overcome that insufficiency.

IV. CONCLUSION

For all of the foregoing reasons and for those argued in BancorpSouth's principal brief, the Final Judgment of the lower court must be reversed. Remand is not necessary, however, as this Court has before it an ample record upon which it may render judgment.

As to punitive damages and attorney's fees, this Court should reverse the Final Judgment of the lower court and render judgment in favor of BancorpSouth.

As to actual damages:

(1) if BancorpSouth is entitled to the protection of Miss. Code Ann. § 81-5-34, then this Court should reverse the Final Judgment of the lower court and render judgment in favor of BancorpSouth; or

(2) if the statute of limitations which is applicable to BancorpSouth is Miss. Code Ann. § 15-1-49, then,

(*a*) as to the elder Plaintiff, Albert Jermaine Duckett, who failed to bring suit within the time permitted by § 15-1-49, this Court should reverse the Final Judgment of the lower court and render judgment in favor of BancorpSouth, and

(*b*) as to the younger Plaintiff, Walter Williams, Jr., whose suit was timely under § 15-1-49, this Court should reverse the Final Judgment of the lower court and render judgment in favor of plaintiff Walter Williams, Jr. and BancorpSouth in the amount of $74,038.66, calculated as follows:

(*i*) $146,038.66, being the stipulated balance of Williams, Jr.'s half of the original deposit with interest at the savings account variable rate from the date of deposit to his twenty-first birthday, all per Trial Exhibit 34 (Ex. pp. 537-39, R. E. 95-97) as stipulated by the parties in Trial Exhibit 37 (Ex. pp. 547-48);

(*ii*) *less* $47,000.00, being the sale price of the house purchased by the Guardian with guardianship funds, the title to which the chancellor vested in Williams, Jr.; and

(*iii*) *less* $25,000.00, being one half of the bond amount recovered by the

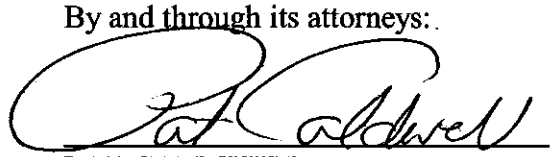
Plaintiffs from Saint Paul Insurance Company as the Guardian's surety.

(3) Alternatively as to actual damages, if the statute of limitations which is applicable to BancorpSouth is Miss. Code Ann. § 15-1-27, then, by law of the case established in this action, but not as precedent, this Court should reverse the Final Judgment of the lower court and render judgment in favor of the Plaintiffs and against BancorpSouth in the total amount of its "bond," $100,000.00.

Respectfully submitted,

BANCORPSOUTH BANK

By and through its attorneys:



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CERTIFICATE OF SERVICE

I, Pat Caldwell, hereby certify that I have this day served the within and foregoing APPELLANT'S REPLY BRIEF upon the following by first class mail, postage prepaid:

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THIS, the 12th day of November, 2007.

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