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 BRIEF

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CERTIFICATE OF INTERESTED PERSONS

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

BancorpSouth Bank, one and the same entity as Bank of Mississippi, having changed its 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 corporation and the parent corporation of BancorpSouth Bank

Albert Jermaine Duckett

Walter Williams, Jr.

Walter Williams, Sr.

Saint Paul Insurance Company

THIS, the 3rd day of July, 2007.

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APPELLANT'S BRIEF

I. STATEMENT OF ISSUES

A. Introduction

Albert Jermaine Duckett and Walter Williams, Jr. (referred to herein at times as the "Plaintiffs") were the wards of a guardianship in the Chancery Court of Tishomingo County. After reaching majority, they sued the guardian (their father) Walter Williams, Sr. (referred to herein at times as the "Guardian"); Saint Paul Insurance Company (his bonding company); and BancorpSouth (the depository for guardianship funds). The Plaintiffs' action sought to recover $267,233.00 of guardianship funds which the Guardian misappropriated. In addition to granting other relief to the Plaintiffs, the chancellor entered judgment against BancorpSouth in the amount of $1,777,306.06 for mistakenly allowing the Guardian to have access to the funds beyond the limited access which the court had authorized.

B. Issues on Appeal

BancorpSouth raises the following issues in this appeal:

(1) The chancellor excluded or otherwise ignored evidence which was essential to understanding the case.

(a) 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.

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

(2) The chancellor erred as a matter of law in treating BancorpSouth as a surety.

(a) The chancellor applied the wrong statute of limitations to BancorpSouth.

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

(c) 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.

(3) The chancellor erred in awarding punitive damages against BancorpSouth.

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

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

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

(4) The chancellor erred in the manner of awarding interest.

(a) The chancellor should have awarded interest at the savings account contract rate.

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

(5) The chancellor permitted the Guardian to testify at trial when the Guardian had invoked the Fifth Amendment and refused to testify during discovery.

(6) The chancellor erred in awarding attorney's fees against BancorpSouth.

(a) This was not a case for punitive damages, and no contract or statute otherwise authorized an award of attorney's fees.

(b) Even if an award of attorney's fees were appropriate, the Plaintiffs failed to offer sufficient evidence to establish the reasonableness of the fees.

II. STATEMENT OF THE CASE

A. Procedural Background

After reaching majority, the Plaintiffs sued the Guardian, Saint Paul Insurance Company and BancorpSouth for the loss of $267,233.00 which the Guardian withdrew from BancorpSouth in violation of a court order which restricted his access to the funds to only $200.00 per month. BancorpSouth cross claimed against the Guardian. Saint Paul cross claimed against the Guardian and BancorpSouth.

The Chancery Court of Tishomingo County granted summary judgment against BancorpSouth and against Saint Paul. The chancellor set a writ of inquiry for the amount of damages against BancorpSouth and entered judgment against Saint Paul in the amount of its bond, $50,000.00. Following the writ of inquiry, the chancellor awarded actual damages against BancorpSouth in the amount of $555,218.62 (being $207,833.00 in principal and $347,385.62 in interest)[1], plus attorney's fees in the amount of $222,087.44 and punitive damages in the amount of $1,000,000.00, for a total judgment of $1,777,306.06.

BancorpSouth settled Saint Paul's cross-claim, and the Guardian mounted only a nominal defense against the parties' various claims against him. As against the Guardian, the

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[1] The chancellor arrived at the principal amount by taking the amount of the original deposit, $267,233.00 and subtracting from it (*a*) $9,400.00, being $200.00 per month from September 1995, when the court authorized such monthly withdrawals, to July 1999 when the Guardian had exhausted the funds; and (*b*) the $50,000.00 recovered by the Plaintiffs from Saint Paul. The chancellor arrived at the interest amount by accruing eight percent interest on the amount of the original deposit, $267,233.00, compounded annually from the date of the original deposit, July 21, 1995 to May 15, 2006. (R. 635, R. E. 11.)

Plaintiffs received judgment in the amount of $777,306.06, plus the transfer of title from the Guardian to the Plaintiffs to two houses purchased by the Guardian with guardianship funds withdrawn from BancorpSouth. As against the Guardian, Saint Paul received judgment for its attorney's fees in the amount of some $25,000.00. As against the Guardian, BancorpSouth received a judgment essentially mirror-imaging the judgment against BancorpSouth in favor of the Plaintiffs. On September 8, 2006, the chancery court entered final judgment for all of the foregoing, from which BancorpSouth has taken this appeal.

B. Facts

Sharron Williams was shot and killed at the Tishomingo County Hospital by a county inmate on April 3, 1993. (R. 84.) She was an employee of the hospital. (R. 4-5.) She left two minor children, the Plaintiffs, Albert Jermaine Duckett and Walter Williams, Jr. (R. 84.) On June 7, 1993, the Guardian, Walter Williams, Sr., was appointed guardian of the Plaintiffs. The Guardian obtained a $50,000.00 bond from the United States Fidelity & Guaranty Company (later the Saint Paul Insurance Company). (R. 74-77.) The Honorable Howard Gunn represented the Plaintiffs and brought four workers compensation and wrongful death actions on their behalf against various defendants. (R. 5, 84-85.)

The Plaintiffs' workers compensation lawsuits were settled by order of the chancery court dated March 10, 1995 for $5,000.00. (R. 5.) The wrongful death actions were settled by decree of the chancery court also dated March 10, 1995, for a confidential amount. (R. 86-87.) The decree approving this settlement provided that the net proceeds were to be deposited in a federally-insured interest bearing account, "to be acknowledged by record of deposit" and not to be disbursed until an heirship proceeding was had to determine the heirs at law of Sharron Williams, and "which such persons, if any" are entitled to share in the proceeds and

in what percentages. The decree further provided that the Guardian would "remain accountable to and amenable to" the court for the proceeds pending adjudication of heirship and further order of the court. (Trial Exhibit 30, Ex. pp. 109-12, R. E. 78-81.)

On July 21, 1995, the Guardian deposited the amount of $267,233.00 with Iuka Guaranty Bank into a variable rate savings account styled "Albert Jermaine Duckett and Walter J. Williams, Jr., Minors, Walter J. Williams, Guardian." (Trial Exhibit 37, Ex. p. 545, ¶ IV.A.)[2] When the account was opened, an officer of Iuka Guaranty Bank signed two documents, (*a*) a Waiver of Process and Entry of Appearance of Depository and (*b*) a Receipt of Funds and Governing Court Order. Each of these documents was filed in the guardianship proceeding. (Trial Exhibits 1 and 2, Ex. pp. 8-13, R. E. 86-89.)

The Waiver of Process and Entry of Appearance of Depository provided that the deposit was made so that the Guardian could "qualify" under Miss. Code Ann. §§ 93-13-17 and 93-12-67, that no withdrawals could be made without an order of the court, and that the bank would provide the Guardian with a receipt for the deposit. (Trial Exhibit 1, Ex. pp. 8-10, R. E. 86-87.)

The Receipt of Funds and Governing Court Order (Trial Exhibit 2, Ex. p. 11, R. E. 89) provided in pertinent part:

> The undersigned DEPOSITORY, acting by and through its duly authorized and undersigned officer, hereby acknowledges receipt of the following:

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[2] In the record on appeal, the chancery clerk has numbered the pages of the Trial Exhibits sequentially from 1 to 662. The portion of the record containing the clerk's papers contains pages with the same numbers but with different content. Accordingly, for clarity, references in this brief to Trial Exhibits are by exhibit number and by page, denoted "Ex. p." References to the Appellant's Record Excerpts are denoted "R. E."

1. The sum of $267,233.00 deposited in account number 01-219967-10 styled Albert Jermaine Duckett and Walter J. Williams, Jr., Minors, Walter J. Williams, Guardian, which is fully insured up to $100,000.00 by FDIC Insurance.

2. 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 and any interest thereon, except as specifically set forth in said order, until a subsequent order specifically approves a disbursement or withdrawal.

Consistent with the method by which Iuka Guaranty Bank addressed court-restricted accounts, when the guardianship savings account was opened, a message was placed on the bank's computer system which caused the following text to appear on a teller's computer screen whenever a transaction was attempted on the account: "CAUTION - WITHERAWAL [sic] - COURT ORDER ONLY". (Trial Exhibit 32, Ex. p. 251.) This message feature of the computer system was referred to by Iuka Guaranty Bank employees as the "green worm" because of its eye-catching and attention-grabbing nature, with the text appearing as a reverse image in green, standing out from the rest of the text on the screen. (Trial Exhibit 31, Ex. pp. 230-31.)

Importantly, on September 7, 1995, a subsequent order was entered in the guardianship, relaxing the "no withdrawals" prior order, and allowing the Guardian to withdraw from Iuka Guaranty Bank the amount of $100.00 per month per Plaintiff (being a total of $200.00 per month). (R. 64.)

The original deposit of $267,233.00 was deposited into a savings account bearing interest at a variable rate. (Trial Exhibit 14, Ex. pp. 39-41, R. E. 90-92 (account agreement); Trial Exhibit 34, Ex. pp. 537-39, R. E. 95-97 (showing the various rates); Trial Exhibit 37, Ex. p. 545, ¶ IV.A.) The parties stipulated at trial that but for the Guardian's malfeasance, if the

original deposit had remained on deposit at such variable savings interest rate (which ranged over time from 0.75 percent to three percent), and allowing only for the authorized disbursements of $100.00 per month per Plaintiff, then on plaintiff Albert Jermaine Duckett's twenty-first birthday, August 23, 2000, his half of the deposit would have been, with accrued interest at the contract rate, $144,747.60, and on plaintiff Walter Williams, Jr.'s twenty-first birthday, July 4, 2002, his half of the deposit would have been, with accrued interest at the contract rate, $146,038.66. (Trial Exhibit 34, Ex. p. 539, R. E. 97; Trial Exhibit 37, Ex. pp. 546-47, ¶ VII.)

In 1997 Iuka Guaranty Bank was acquired by and merged into BancorpSouth. As a part of the merger process, BancorpSouth needed to transfer the account information on the Iuka Guaranty Bank computer system over to the BancorpSouth computer system. This "system conversion" was performed in March of 1997. With regard to banking operations, the merger process with Iuka Guaranty Bank and BancorpSouth was an intricate undertaking consisting of many steps and tasks and involving many people. (Tr. 227:5-228:15; Trial Exhibit 16, Ex. pp. 46-55.) The computer system conversion process consisted of transferring particular information from the location or "field" where that information was contained in the Iuka Guaranty Bank computer system to the location or "field" where the same information was to be contained in the BancorpSouth computer system. (Tr .229:28-230:12.)

The initial step of this undertaking involved a process called "mapping" the various fields in the Iuka Guaranty Bank computer system so that the information contained in those particular "fields" could be automatically electronically transferred to the corresponding field in the BancorpSouth computer system. In a transfer from one bank computer system to another, it is ordinary to encounter a number of fields of information which will not

automatically transfer and which must be transferred by some alternative method. (Tr. 230:15 -231:8, 235:5-238:21, 281:19-282:18.) In this instance, for technical reasons, the "green worm" message field in the Iuka Guaranty Bank computer system could not be made to automatically transfer to BancorpSouth's computer system.[3] (Tr. 379:21-380:9)

This was significant in this merger process because for accounts which had limitations on access, such as the court-restricted account at issue in this case, Iuka Guaranty Bank used the "green worm" message feature of its computer system to alert its employees. (Tr. 239:12-23.) BancorpSouth, on the other hand, used a "special instruction" combined with a "hold" for such accounts. (Tr. 239:24-240:8.) The "special instruction" feature of BancorpSouth's computer system was similar to the "green worm" in that it caused a message to appear on a teller's computer screen advising that the account had limited access. The additional "hold" feature of BancorpSouth's computer system took the safety measure a step further, creating a kind of electronic lock on the account which would not allow an employee to permit a transaction on the account. (Tr. 378:15-379:4.)

The fields that could not be automatically transferred from the Iuka Guaranty Bank system to the BancorpSouth system were listed on a report. The report included a plan for how the information in these fields would be transferred over to the BancorpSouth computer system. (Tr. 234:28-235:17; Trial Exhibit 18, Ex. pp. 56-58.)

In the case of the "green worm" message information, the only means by which the transfer could be accomplished was by printing out the text of the messages and then manually typing these messages into the BancorpSouth computer system. (Tr. 235:24-29; 379:21-

[3] There were several other fields in the Iuka Guaranty Bank computer system which likewise could not be made to automatically transfer to BancorpSouth's computer system.

380:9.) Regrettably, by human error oversight — an express finding of fact by the chancellor (Tr. 541:26, R. E.36) — the employee who typed the "green worm" message information into the BancorpSouth computer system did not type in the message information on this one account, the guardianship savings account which is at issue in this case. After the computer data transfer process was finished, the effect of this omission was that when access to the account was attempted via the BancorpSouth system, no "special instruction" alert message appeared on a teller's computer screen advising that the account had limited access and no "hold" or electronic lock was in place. Absent any such special instruction or hold, it would appear to any teller using the BancorpSouth system that the depositor having signature authority on the account — in this case, the Guardian — was authorized to access the account without restriction.[6] (Tr. 240:17-241:11, 380:10-382:17, 446:4-15.)

After the merger, BancorpSouth retained Iuka Guaranty Bank's physical file for this account. It contained the copy of the check in the amount of $267,233.00 which opened the account, the copy of the first page of the Decree Granting Authority to Compromise and Settle Doubtful Claim for Personal Injury and Death and a copy of the order allowing the Guardian to withdraw $100.00 per month per Plaintiff. (Tr. 447:9-448:9.) Retention of such papers is normal banking practice. (Trial Exhibit 31, Ex. pp. 256, 273, 334.)

With regard to any account, front line bank employees only know what is recorded in the bank's computer system. This use of modern technology in banking enables the bank's computer system to prompt a teller to stop or refuse to allow a transaction. Thereafter, if

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[6] It is common that bank accounts with the term "guardian" in the account name are not court-restricted guardian accounts. Most guardian accounts at BancorpSouth are not court-restricted guardian accounts. (Tr. 214:13-17, 446:4-15.)

prompted by the system to stop, the teller knows to not proceed and to alert a supervisor. It is therefore not normal banking practice for bank employees to consult the physical account file when transactions are attempted on an account having special instructions or a hold. (Tr. 377:17-379:4.)

Mr. Paul Carruba was accepted by the chancellor as an expert witness on banking operations. (Tr. 369:12-15.) Mr. Carruba testified that the Iuka Guaranty Bank approach of using a message feature was a sound means for handling restricted accounts, such as court-restricted guardianship accounts. (Tr. 375:14-376:6.) Mr. Carruba also testified that the BancorpSouth approach using both a special instruction and a hold was not only a sound means for handling accounts such as court-restricted guardianship accounts but actually was a better approach than using the message feature alone. (Tr. 376:22-379:4.) Mr. Carruba opined that the procedures of a "green worm" type message conformed to industry practice, and that the BancorpSouth process of combining a special instruction with a hold was a "best practice" for the industry. (Tr. 373:4-7.) Mr. Carruba also testified that the BancorpSouth's merger process complied with best industry practices and was state-of-the-art. (Tr. 372:28-373:7.)

Beginning on August 12, 1997, after the computer system changeover from Iuka Guaranty Bank to BancorpSouth, the Guardian realized that he was no longer limited to withdrawing $100.00 per month per Plaintiff as authorized by the court. Instead, he discovered that he could withdraw any amount he wanted. This was because, due to BancorpSouth's human oversight computer error, no special instruction appeared on the teller's computer screen advising that the account had limited access, and no hold was in place, thus creating the appearance that the Guardian was able to access the account without restriction. (Tr. 543:4-17.) Taking advantage of this realization and violating not merely a court order, but his oath

and bond, during the period beginning August 12, 1997, and ending on July 12, 1999, the Guardian systematically withdrew from the guardianship account all of the guardianship funds of the Plaintiffs. (Trial Exhibit 37, Ex. p. 548, ¶ VIII.)

The Guardian filed a single annual accounting in this guardianship, in 1995, before the bank computer error occurred. (R. 23-24.) After the error occurred and the Guardian set out on his course of misappropriation of guardianship funds, he failed to file any further annual accountings or to otherwise account for his expenditures. (Tr. 350:29-351:9.)

During the entire time that the Iuka Guaranty Bank computer system disclosed the "green worm" account information, before it was inadvertently lost during the BancorpSouth computer system changeover process, not a single transaction was permitted on the account which was inconsistent with the court's orders. (Tr. 224:24-225:4.) The fact that after the computer system changeover the Guardian made transactions which were inconsistent with the court's orders was explained by the testimony of Paul Carruba that, on a day-to-day transactional basis, the only things that bank employees know about a particular account are those which are disclosed on the bank's computer system. (Tr. 424:18-425:6.) Ms. Cathy Talbot and Mr. Lee McAllister, each BancorpSouth employees, also testified that BancorpSouth regularly and frequently deals with court orders affecting deposit accounts and understands the need for appropriate attention and compliance, and that the accepted norm in banking is to accomplish such through utilization of technology such as special instructions and holds. (Tr. 255:4-256:14, 448:2-449:20.)

Thus, the act which left the key to open the door so that the Guardian could enter and cause the Plaintiffs' losses — the merger-related transfer of the account information from the Iuka Guaranty Bank computer system to the BancorpSouth computer system — was an isolated

incident and an accident. (Tr. 224:24-225:4.) Moreover, the Guardian got the Plaintiffs' funds; BancorpSouth did not. A computer system mistake such as occurred in this case has never before or since been experienced by BancorpSouth. (Tr. 408:4-13.) In the nine years since the Iuka Guaranty Bank computer system changeover was completed, BancorpSouth has received no reports or complaints of any data transfer errors other than the one at issue in this case. BancorpSouth is not aware of any court-ordered guardianship accounts housed with BancorpSouth which have been disbursed inconsistently with any court order, other than the account at issue in this case, and all such accounts have been addressed the same way, through the use of special instructions and holds. (Tr. 413:16-414:1.)

BancorpSouth has always had in place written policies concerning the use of special instructions and holds in the handling of court-restricted accounts such as restraining orders, garnishments, subpoenas and seizures, and including court-ordered guardianships. (Tr. 221:6-15, 223:3-224:12.) This is consistent with industry practice. (Tr. 224:13-23.) BancorpSouth also has a written policy specifically addressing court-ordered guardianship accounts which was adopted subsequent to the losses caused by the Guardian, although the policy was adopted before BancorpSouth became aware of this particular case. This specific policy is written in an "attention-grabbing" manner intended to cause bank employees to be particularly cautious in accepting court-restricted guardianship deposits. (Tr. 220:26-221:21.) Mr. Carruba testified that few financial institutions take the extra step of having written policies specifically addressing court-ordered guardianship accounts. He further testified that BancorpSouth's policies — both the general policies dealing with judicially restricted accounts and the specific policies dealing with court-ordered guardianship accounts — set forth sufficient safeguards to protect against unauthorized transactions on court-ordered guardianship accounts and meet

or exceed recognized industry practice. (Tr. 392:22-393:13, 423:8-17; Trial Exhibit 19, Ex. pp. 59-63.)

Mr. Carruba testified that many banks no longer accept court-ordered guardianship deposits because they require banks to bear expenses of administrative responsibility, as well as risk of claims such as are being litigated here, especially where, as in this case, funds are not totally restricted but the court allows the guardian limited but ongoing access to the otherwise restricted account — all for no more return than a bank would make on an ordinary checking account. He further testified that one way some banks avoid these expenses and lessen the risk is to administer court-ordered guardianship accounts through their trust departments, although at a substantial fee cost to the guardianship. (Tr. 384:10-387:1) A schedule of fees which BancorpSouth's trust department charges for such an account was put into evidence. (Trial Exhibit 55, Ex. p. 608.)

BancorpSouth has always trained, and continues to train, all of its tellers in the use of special instructions and account holds and has always trained, and continues to train, all of its customer service representatives regarding its longstanding policies concerning the handling of judicially-restricted accounts generally and court-ordered guardianship accounts specifically. (Tr. 223:3-225:19.) Prior to the writ of inquiry hearing, BancorpSouth performed a review of all court-ordered guardianship accounts at BancorpSouth in the First Chancery District and found that all such accounts, totaling 119, have in place the requisite special instructions and holds which are required by BancorpSouth's policy and the court orders pertaining to those accounts. (Tr. 449:28-454:25; Trial Exhibit 49, Ex. pp. 569-576.)

III. SUMMARY OF THE ARGUMENT

The many errors which occurred in the court below can be grouped into six broad categories:

The exclusion or disregard of relevant evidence. The first inquiries a court of equity should make when confronted with a question of guardianship funds spent contrary to a court order are (*a*) did any of the expenditures benefit the wards? and (*b*) how did it happen? In this case, the chancellor was not interested in either of these crucial points. If the chancellor had followed the money, he would have seen that a third of the misappropriated funds was spent on two houses which became the Plaintiffs' homes and on a vehicle and the establishment of a checking account for the elder of the Plaintiffs after he reached age eighteen, was about to be married and expecting a child. The chancellor excluded evidence of those expenditures, yet he awarded title to the houses to the Plaintiffs *and* allowed them to recover from BancorpSouth the amount spent by the Guardian in purchasing them. This abuse of discretion led to an inequitable result.

Neither did the chancellor have any interest in practices, policies, procedures and technology employed by BancorpSouth to safeguard monies in court-restricted accounts, all of which were state-of-the-art and constituted best industry practices, according to the uncontradicted testimony of a highly-credentialed expert on bank deposit operations. The chancellor had no interest in how a clerical error in connection with the bank's computer system resulted in the electronic "unlocking" of an account to which the Guardian was only supposed to have limited access. The chancellor ignored all of this highly material evidence and concluded without justification that because BancorpSouth inadvertently permitted account

transactions which were inconsistent with a court order, it was liable for punitive damages, period.

Treating BancorpSouth as a surety. The Guardian deposited the guardianship funds with Iuka Guaranty Bank (which later became BancorpSouth) without bond (other than the $50,000.00 Saint Paul bond) pursuant to Miss. Code Ann. § 93-17-13. The chancellor interpreted this statute as conferring upon BancorpSouth the status of surety, just as if BancorpSouth had issued a surety bond. This incorrect view of the statute further fueled the constant theme in the court below of strict liability for BancorpSouth. It also resulted in the application to BancorpSouth of the five-year statute of limitations which governs guardians and their sureties instead of the general three-year statute of limitations which governs depositories. This was highly significant because the three-year statute of limitations had already run against the elder of the Plaintiffs before suit was filed. The chancellor's construction of § 93-17-13, if affirmed, will have an important and far-reaching impact on the banks of this state.

Having placed BancorpSouth in the role of surety for purposes of the statute of limitations, the chancellor proceeded to ignore the legal effect of that role when it came to damages. Sureties are liable for the amounts of their bonds, and nothing more. Here, the only thing which could be remotely characterized as a bond was the bank's receipt of the original court order. The Receipt of Funds and Governing Court Order (Trial Exhibit 2, Ex. p. 11, R. E. 89) expressly provided that the deposit was insured to $100,000.00. But instead of capping BancorpSouth's liability at this fixed amount consistent with surety law which controlled the court's ruling on the statute of limitations, the chancellor proceeded to hold the bank liable for over $550,000.00 in actual damages, over $220,000.00 in attorney's fees and $1,000,000.00 in punitive damages. The chancellor applied the wrong law in making BancorpSouth a surety

for purposes of the statute of limitations, but once having done so, he was bound by the law of the case to treat the bank as a surety for purposes of damages as well.

Imposing punitive damages. The chancellor was very clear that the reason he imposed punitive damages against BancorpSouth was because the bank "violated" the court order which restricted the Guardian's access to the deposit. The remedy for noncompliance with a court order is consideration of contempt, not punitive damages. But contempt is only applicable where the contemnor wilfully and deliberately ignores an order of the court. Here, the only evidence was that BancorpSouth, during a process which was designed and intended to promote *compliance* with court orders, made a mistake which resulted in an unintentional violation of an order. Indeed, the chancellor himself found that what occurred on the bank's part was "human error oversight."

The strict requirements of Mississippi's punitive damages statute require proof by clear and convincing evidence that the defendant acted with gross negligence which evidences a willful, wanton or reckless disregard for the safety of others. The chancellor found that BancorpSouth's human error oversight committed during its computer data transfer process fits this definition. If the chancellor was right, then virtually any mistake opens the door for punitive damages. This is not the law, even when the mistake involves a court order.

Awarding interest. The chancellor awarded the Plaintiffs interest at the rate of eight percent, compounded annually, on the amount of the Guardian's original deposit from the date of deposit until the date of judgment. In so doing, the chancellor ignored the statute which requires that prejudgment interest be awarded at the contract rate. The Guardian deposited the funds into a variable rate interest-bearing savings account. That account would have earned interest at rates ranging from 0.75 percent to three percent per annum, compounded annually.

By ignoring the contract rate and the applicable law, the chancellor placed the Plaintiffs in a far better position than if the Guardian had performed his duties perfectly.

Even assuming that there were some authority which would permit the chancellor to ignore the contract rate and apply a substitute rate, there is no law which would allow him to ignore the contract rate *and* compound the interest at the substitute rate from the date of the original deposit. Here, compounded interest was a feature of the variable rate savings account. But if those variable rates do not apply, then the compounding feature of the account cannot apply either. Absent following the account terms, the compounding of interest can only be reached if BancorpSouth engaged in fraud or intentional misconduct. BancorpSouth did nothing of the sort. It made a clerical error — human error oversight — which allowed the Guardian to access the funds without restriction. Simple interest is awarded for simple negligence. Moreover, the statute governing prejudgment interest plainly prohibits such an award prior to the time suit is filed. In any event, the Plaintiffs are entitled no more than they would have realized had the Guardian never touched the funds. The chancellor misapplied the law and allowed them far more.

Allowing the Guardian to testify at trial. During discovery, BancorpSouth took the Guardian's deposition. In response to every question asked by the bank concerning the guardianship, the Guardian invoked his Fifth Amendment right against self-incrimination. This deposition testimony was entered into evidence by BancorpSouth at trial, and the bank asked the chancellor to draw adverse inferences from the Guardian's repeated invocations of the Fifth. At the punitive damages phase of the trial, the Plaintiffs called the Guardian as a witness, and the chancellor allowed the Guardian to testify about the matters for which he had invoked the Fifth in discovery. BancorpSouth strenuously objected to this and pointed the

chancellor to an opinion of this Court directly on point, holding that such testimony at trial after hiding behind the Fifth in discovery is impermissible. The chancellor overruled the bank's objection, and BancorpSouth heard for the first time at trial the story which it had asked for during discovery. More importantly, BancorpSouth was entitled as an evidentiary matter to have adverse inferences drawn against the Guardian, especially in view of the fact that the bank was attempting to defend itself against a claim for punitive damages.

Awarding attorney's fees. The chancellor awarded attorney's fees to the Plaintiffs in the amount of forty percent of the actual damages assessed against BancorpSouth. This was error because attorney's fees are awardable only where a contract or a statute provides for them or the case is one for punitive damages. None of those qualifiers apply here. Beyond this, the chancellor erred by failing to apply this Court's familiar *McKee* factors and by failing to make specific findings on those factors. Instead, the chancellor merely rubber-stamped the Plaintiffs' forty percent contingency fee contract with their lawyer without determining the reasonableness of a fee in that amount.

IV. ARGUMENT

A. Standard of Review

A chancellor's application and interpretation of the law is reviewed *de novo* on appeal. *Allred v. Fairchild*, 916 So. 2d 529, 531 (Miss. 2005). An appellate court always reviews a chancellor's findings of fact and will give deference to those findings except where they are unsupported by substantial evidence and it is reasonably certain to the appellate court that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard. *Biglane v. Under the Hill Corp.*, 949 So. 2d 9, 13-14 (Miss. 2007); *Cummings v. Benderman*, 681 So.2d 97, 100 (Miss. 1996).

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

At every stage of the proceedings in the court below, BancorpSouth urged the chancellor to consider *how* the Guardian accessed the Plaintiffs' money — by exploiting the unintentional clerical error made by BancorpSouth during the computer system changeover — and that much of the money was used for the Plaintiffs' benefit. The Plaintiffs answered the bank's defenses and arguments for mitigation that in the end all that mattered was that BancorpSouth failed to follow a court order which restricted the Guardian's access to the funds to $200.00 per month. The chancellor's attitude toward the case was the same. (*See, e.g.*, Tr. 11:14-12:29; 16:18-22; 96:16-97:16.) Indeed, this narrow assessment of the issues is best summarized in the following excerpt from the transcript of the very first hearing, with BancorpSouth arguing that the court should consider what the Guardian did with the funds he improperly withdrew:

> THE COURT: Let me ask you this: What difference does it make what he did with it if the bank issued it in violation of this court order?

(Tr. 80:23-26.)

Without question, one who fails to follow a court order should be answerable to the court. Yet the opportunity to purge oneself of that failure, and certainly to offer the explanation for that failure, should be allowed. Strict liability for failure to follow a court order without regard to the underlying circumstances or the reason therefor is not and should not be the law of this state. Regrettably, that is the view of the law against which BancorpSouth had to contend in the lower court and which is urged as error in this appeal.

The chancellor viewed failure to comply with a court order in a vacuum; the *reason* the failure occurred was of no consequence to the chancellor; what occurred *after* the failure was

irrelevant to him. For example, during the testimony of Mr. Lee McAllister, the BancorpSouth employee who supervised the overall process of transferring the Iuka Guaranty Bank computer system information over to the BancorpSouth system, counsel for BancorpSouth asked him about the thoroughness of the bank merger process in which the data transfer error occurred, upon which there followed this exchange:

> MR. WHITE: Your Honor, I'm sorry. I just don't know the relevance, to be honest with you.
>
> THE COURT: I don't either. Court is going to sustain the objection. I don't care what they merged with First National of Chicago, if there is such a bank. *My question is simply whether or not they paid out these accounts in violation of a court order.* I'm here to determine those damages. Okay. Go ahead.

(Tr. 226:7-15, emphasis added.) Shortly before this exchange, the chancellor questioned Mr. McAllister extensively as he testified about BancorpSouth's policies and procedures for handling court-restricted accounts:

> 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, emphasis added.)

This exceedingly narrow view, urged by the Plaintiffs, continued throughout the litigation until the chancellor made his ultimate finding, "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.)

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.

A prime example of the inequitable effect of this narrow view is the chancellor's refusal to consider the fact that a substantial portion of the Guardian's expenditures actually benefitted the Plaintiffs. For example, the Guardian used $16,903.45 of the guardianship funds to purchase plaintiff Duckett an automobile and another $7,000.00 to open a checking account for Duckett at another bank after he was over eighteen years old and when he and his soon-to-

be wife were expecting a child. (Tr. 189:13-18; Trial Exhibit 24, Ex. p. 79, R. E. 94.) Such expenditures were reasonable because Duckett had a family to support.

Additionally, the Guardian used some $86,000.00 of funds withdrawn from BancorpSouth to purchase two houses in Iuka, Mississippi, titled in the Guardian's individual capacity, one of which at the time of trial was occupied by Duckett, his wife and four children as their home, and the other of which at the time of trial was occupied by plaintiff Williams, Jr. and his father, the Guardian. (Tr. 166:16-269:20.) Sustaining the objection of the Plaintiffs as to relevancy during the actual damages phase of the writ of inquiry, the chancellor refused to allow any evidence of any of these otherwise legitimate expenditures on the grounds that the lack of prior court approval made them irrelevant. (Tr. 162:3-25; 165:9-15.) BancorpSouth had to therefore submit evidence of these expenditures under an offer of proof. (Tr.165:16-173:10; Trial Exhibits 23-28, Ex. pp. 79-100.)

The law in Mississippi has long been that expenditures made by a guardian for the ward's benefit from the income of a ward without prior court approval may nevertheless be ratified by the court later. *United States Fid. & Guar. Co. v. Melson*, 809 So. 2d 647, 658 (Miss. 2002); *Vinson v. Benson*, 2007 Miss. App. LEXIS 349, No. 2006-CA-00342 COA, ¶ 28 (Miss. App. May 22, 2007). Here, the income of the Plaintiffs (if one accepts their version of damages) equals a decade's worth of interest compounded at eight percent, which more than doubled their original $267,233.00 principal. This income was more than sufficient to pay for the expenditures to acquire the two houses and Duckett's automobile and checking account.

Melson goes further still and allows even an unapproved expenditure of a ward's *principal* to be ratified if disapproval would yield an inequitable and fundamentally unfair result. *Melson* involved a conservatorship of an adult who was rendered by an accident

incapable of managing her affairs. Two conservatorships were opened for her, one in Mississippi and the other in Massachusetts. She later recovered to the point of competency, even though the conservatorships continued. After her recovery of competency, but while the conservatorships were still in place, the Mississippi conservator disbursed some $109,000.00 without court authorization. The Massachusetts conservator sued the Mississippi conservator's surety to recover these disbursements made without court approval, and the chancery court entered judgment against the surety for repayment of the full amount. On appeal, this Court noted that some $63,000.00 of the funds at issue were paid to the ward at her request. Because the ward received the benefit of these funds during her competency, and because there was no evidence that the funds were wasted, this Court held that the chancellor erred by not crediting the surety with the $63,000.00 actually received by the ward and reversed the judgment "for the purpose of preventing an unfair result." *Id.*, 809 So. 2d at 661.

The facts in *Melson* are very similar to those of the case at bar. Here, the Plaintiffs each enjoyed the use of a separate house, and that use has continued into their majority and through trial. Thus, at the actual damages writ of inquiry stage, BancorpSouth argued for an equitable remedy of imposition of a constructive trust which would *(a)* benefit the Plaintiffs by allowing them to keep their homes, *(b)* penalize the Guardian by divesting him of title to the houses and vesting it in the Plaintiffs; and *(c)* aid BancorpSouth by crediting it with the value of the houses the Plaintiffs would receive.[7] (Tr. 160:6-161:23.) *See, e.g., Union Nat'l Life Ins. Co. v.*

[7] As is more fully addressed later in this brief (*see infra*, pp. 31-43), the chancellor treated BancorpSouth as a surety. Aiding BancorpSouth by crediting it with the value of these houses and Duckett's automobile and checking account is consistent with *Reily v. Crymes*, 176 Miss. 133, 168 So. 267 (1936), which holds that a surety of a guardian who has embezzled his ward's money is entitled to be aided by the court in recovering its bond money from the guardian.

Crosby, 870 So. 2d 1175 (Miss. 2004), holding that a constructive trust is a fiction of equity created for the prevention of unjust enrichment by one who holds legal title to property which, under principles of justice and fairness, rightfully belong to another.[8]

All of the foregoing, on the objection of the Plaintiffs, was ruled *not relevant* at the writ of inquiry stage. (Tr. 163:2-165:15.) Amazingly, though, at the final hearing, these houses suddenly became relevant to the Plaintiffs, and the chancellor acted on BancorpSouth's earlier idea by imposing a constructive trust, divesting title from the Guardian, and vesting title in the Plaintiffs. However, the chancellor refused to allow BancorpSouth any credit whatsoever for this substantial recovery. Thus, the chancellor allowed the Plaintiffs to recover from BancorpSouth the $86,000.00 spent on these houses *and* he awarded title to the houses to them.[9]

The purpose of compensatory damages is to make an injured party whole. *Brandon HMA v. Bradshaw*, 809 So. 2d 611, 618 (Miss. 2001). Allowing the Plaintiffs a money judgment for the value of the houses purchased by the Guardian and vesting title to those houses in them compensates the Plaintiffs twice for the same injury. Stated differently, the chancellor's judgment unjustly enriches the Plaintiffs. Double recovery is a tort doctrine that prevents unjust enrichment by precluding a recovery of the same damages multiple times. *R.*

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[8] BancorpSouth even went so far as to preserve the possibility of this remedy for all concerned by advancing the grossly delinquent real estate taxes owed on the houses on the eve of the expiration of the tax sale redemption period. The chancellor likewise viewed this as irrelevant. (Tr. 166:26-169:3; 610:17-28; Trial Exhibit 40, Ex. p. 552.)

[9] Not only is this result inequitable, it is also inconsistent with the chancellor's allowance of a credit in favor of BancorpSouth for the $50,000.00 which the Plaintiffs recovered from Saint Paul on the surety bond. (*See* bench ruling on writ of inquiry as to BancorpSouth, Tr. 566:20-25, R. E. 61.) The chancellor was correct in allowing that adjustment in order to prevent a multiple recovery.

K. v. J. K., 946 So. 2d 764, 777 (Miss. 2007). The provision of credits against damages awards to prevent double recovery is a long-standing principle of Mississippi law. *Brown v. N. Jackson Nissan, Inc.*, 856 So. 2d 692, 698 (Miss. Ct. App. 2003). The result permitted by the chancellor, especially in view of how it was accomplished procedurally, violates that principle, is inequitable and fundamentally unfair and constitutes an abuse of discretion. To the extent that any portion of the judgment below is affirmed by this Court, equity requires that such judgment be reduced by the value of the two houses which the Plaintiffs now own.[10]

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

Mr. Paul Carruba was accepted by the chancellor as an expert witness on banking operations. Mr. Carruba testified that *(a)* the Iuka Guaranty Bank approach using the "green worm" message feature (*see* pp. 6-11, *supra*) 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. Mr. Carruba's testimony was uncontradicted. It was also highly probative of issues pertinent to punitive damages, which the chancellor later imposed

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[10] The house which was awarded by the chancellor to plaintiff Duckett was purchased by the Guardian for $39,043.00, and the house which was awarded by the chancellor to plaintiff Williams, Jr. was purchased by the Guardian for $47,000.00. (Trial Exhibit 24; Ex. p. 79, R. E. 94.)

against BancorpSouth: it established that BancorpSouth's error in leaving the guardianship account unprotected was not gross negligence, but at worst simple negligence; it established that BancorpSouth's action which led to the error was not reckless, but meticulous, detailed and careful, and not in disregard of the safety of others, but motivated to provide for the safety of others; and it established that BancorpSouth did not need to be deterred from committing the same error again.

Under Mississippi law,

> [u]ncontradicted or undisputed evidence should ordinarily be taken as true by the triers of facts. More precisely, evidence which is not contradicted by positive testimony or circumstances, and is not inherently improbable, incredible or unreasonable cannot be arbitrarily or capriciously discredited, disregarded, or rejected even though the witness is a party interested; and unless shown to be untrustworthy, is to be taken as conclusive, and binding on the triers of fact.

American Nat'l Ins. Co. v. Hogue, 749 So. 2d 1254, 1263 (Miss. Ct. App. 2000) (*quoting Lucedale Veneer Co. v. Rogers*, 211 Miss. 613, 635, 53 So. 2d 69, 75 (1951)). Stated differently, a chancellor does not have an arbitrary right to disregard testimony which is undisputed and uncontradicted, and which is not inherently improbable, incredible, or unreasonable. *McLeod v. State Board of Health*, 393 So. 2d 479, 480 (Miss. 1981). This has always been the law in Mississippi.[11]

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[11] *See Dunn v. Dunn*, 911 So. 2d 591 (Miss. Ct. App. 2005); *State Farm Auto Ins. Cos. v. Davis*, 887 So. 2d 192 (Miss. 2004); *A & F Properties, LLC v. Lake Caroline, Inc.*, 775 So. 2d 1276 (Miss. 2000); *James v. Mabus*, 574 So. 2d 596 (Miss. 1990); *Reeves Royalty Co., Ltd. v. ANB Pump Truck Service*, 513 So. 2d 595 (Miss. 1987); *Edwards v. Mid-State Paving Co.*, 300 So. 2d 794 (Miss. 1974); *Hearin-Miller Transporters, Inc. v. Currie*, 248 So. 2d 451 (Miss. 1971); *Shivers v. Biloxi-Gulfport Daily Herald*, 236 Miss. 303, 110 So. 2d 359 (1959); *Hulitt v. Jones*, 220 Miss. 827, 72 So. 2d 204 (1954); *Lucedale Veneer Co. v. Rogers*, 211 Miss. 613, 53 So. 2d 69 (1951); *Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311 (1949); *Stevens v. Stanley*, 154 Miss. 627, 122 So. 755 (1929); *Crichton v. Halliburton & Moore*, 154 Miss. 265, 122 So. 200 (1929).

With reference to BancorpSouth's bank merger process plan, which included the operation whereby account information was transferred from Iuka Guaranty Bank to BancorpSouth, and during which the data input error was made, Mr. Carruba was of the opinion

> [t]hat every consolidation process or conversion process has a conversion plan. And this plan is a very comprehensive plan. I, also, in determining the effectiveness of this plan, look at the history that the bank has had over a number of years and the number of consolidations. I know that Mr. McAllister mentioned that he had been involved in 45 such consolidations using this plan. Those plans have been very successful.

(Tr. 371:17-24.)

With regard to the necessity of the use of computer systems in banking operations in general and the quality of BancorpSouth's systems in particular, Mr. Carrubba testified:

> Q. I guess from the standpoint of the old-timey cashier and doing little counter checks and little handwritten receipts, what role does technology, computers, operations type thing play in banking today?
>
> A. It's absolutely essential. We would not have banking today if it were not for technology.
>
> Q. From the standpoint of BancorpSouth technology savvy or whatever we want to call it, how would you — what is your opinion before this Court as far as what you have observed and have knowledge of related to BancorpSouth systems?
>
> A. Based on the systems that I have reviewed and the technology that was discussed in Mr. McAllister's testimony, I would say that they have state-of-the-art technology within that organization.

(Tr. 372:22-373:7.)

With regard to a bank's use of a computer system, as opposed to referring to a paper file of court orders, as the way to keep track of account restrictions, Mr. Carrubba testified:

> It is the only effective way to do it. To place a special instruction in the file in a back office or to place a special instruction on a signature card would serve

no purpose and, certainly, you couldn't have notes in each branch telling each teller to be aware of this account because it has special instructions. Through automation, it's done through the on-line system.

Q. That is industry practice?

A. Yes, sir, it is.

Q. What is your opinion as far as having reviewed the BancorpSouth system of at the teller line with the screens and the methods or whatever of special instructions and holds?

A. It's a very effective way of preventing funds from leaving the account. Not only does the teller see the fact that there is a special instruction to hold the entire balance, they can then inquire to find out what the special instruction is. And if they try to still make a withdrawal from the account, if they try to make an entry to that account, the system won't let them. It will not. It will block the transaction completely, so the teller has no authority to override that transaction. The screen just goes completely blank so the teller has no access to it. I think it's a very effective way of preventing the withdrawal without following the special instruction.

Q. Is that a better system than just special instructions, in your opinion?

A. Yes, sir, it is.

(Tr. 378:5-379:4.)

With regard to the specific error which occurred in connection with the Guardian's account, Mr. Carrubba testified:

Q. Take us back then to conversion. And you mentioned Mr. Lee McAllister's testimony. Have you learned exactly in the conversion process what happened here as far as this special instruction being transferred over to the BancorpSouth system?

A. Yes, sir, I have.

Q. All right. Contrast that with the BancorpSouth conversion team and process and then the event which occurred.

A. Yes, sir. Again, as I mentioned, it appears to me, based on the success that BancorpSouth has had in its conversions and mergers, that it has been a very effective process. It involves a lot of people, a lot of departments, a lot of

instructions were printed out on a report and then there was some number of employees, both from Iuka and BancorpSouth, that went down the list and manually entered the special information on the system. It appears that — I can envision someone going down a list with a ruler and they just skipped over one and missed it and didn't put it on the system.

THE COURT: Okay. Go ahead.

Q. Notwithstanding that human error related to that process, is — what is your opinion concerning once you reach the fact that humans and manualists is inevitable in conversions, what is your opinion concerning the BancorpSouth systems to, in fact, endeavor to address these issues, as far as industry prospective?

A. Are you speaking specifically to the actions that BancorpSouth has taken subsequent to this?

Q. Yes.

A. They are very much aware of the incident that occurred. It's my understanding there have been no other incidents. So, apparently, whatever procedures they have in place are certainly working to prevent this from occurring again in the future.

(Tr. 381:9-382:17.)

Q. . . . based on your understanding of technology that's there or systems of holds, conversions or whatever, is could either BancorpSouth or other banks you know do any more than what you have seen in this circumstance to address such to send a message from a technology standpoint than is being done already?

A. No, sir. Within the bank, I don't see what more a bank could possibly do to insure that funds are not withdrawn without that court order.

(Tr. 386:21-387:1.)

Again, there was an underlying current revealed early in the case in an exchange with the Plaintiffs' counsel which was a precursor of the chancellor's attitude toward the subject matter of Mr. Carruba's later testimony:

THE COURT: You have about as much for computers as this Court does, don't you?

MR. WHITE: Not much, your Honor.

THE COURT: I don't trust them period. Go ahead.

(Tr. 26:24-28.)

Nevertheless, the chancellor himself remarked of Mr. Carruba, "This is an extremely qualified individual.... He will be accepted as an expert witness in the field of banking operations, conversion mergers, these areas that he's testified about here." (Tr. 366:13-14, 369:12-15.) Yet, having accepted Mr. Carruba as an expert and having heard his testimony that BancorpSouth employed sound means for the safeguarding of court-restricted accounts and state-of-the-art operations systems — none of which testimony was in any way improbable, incredible, or unreasonable and all of which was undisputed and uncontradicted — the chancellor arbitrarily ignored it, especially with its relevance to issues critical to the question of punitive damages. In so doing, the chancellor likewise ignored well-established Mississippi law.

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

The Plaintiffs argued from the very outset of this case that because the guardianship funds were deposited with BancorpSouth pursuant to Miss. Code Ann. § 93-13-17, the statute which waives the necessity of a guardian's bond to the extent the assets are invested in "fully insured" bank deposits, the legal status of BancorpSouth was thereby elevated from a mere depository to a "defacto bonding company." (Tr. 28:6-27.) The chancellor bought this argument, and it led to a series of errors which this Court must correct.

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

Plaintiff Albert Jermaine Duckett was born on August 23, 1979. (Tr. 181:26.) Duckett's twenty-first birthday was August 23, 2000. The Guardian had depleted the guardianship funds by July 12, 1999. (Tr. 543:21-25.) Duckett was thus a minor at the time the funds were depleted. However, Duckett was aware on his twenty-first birthday that guardianship funds had been set aside for him and that the Guardian had spent at least some of those funds. (Tr. 186:13-187:2.) The general three-year statute of limitations, Miss. Code Ann. § 15-1-49, therefore began to run on Duckett's twenty-first birthday, August 23, 2000, and the deadline for Duckett's claim against BancorpSouth expired on August 23, 2003. The original complaint against BancorpSouth in this action, to which Duckett was not a party, was filed on June 13, 2004. (R. 67-103.) The amended complaint against BancorpSouth, which joined Duckett as a plaintiff, was filed on September 22, 2004. (R. 163-201.)

In view of this chronology, BancorpSouth moved for summary judgment against Duckett on the grounds that his claim was time-barred. The chancellor overruled this motion and held it was not the general three-year statute of limitations of § 15-1-49 which controlled, but instead § 15-1-27 which provides that "[a]ll 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." (Emphasis added.)

Section 15-1-27 by its terms applies only to actions against guardians and the bonds of their sureties. In this case, BancorpSouth was neither the guardian nor did it issue any bond to sue upon. Section 15-1-27 therefore has no application to BancorpSouth.

In making his ruling on the statute of limitations issue, the chancellor referred to Miss. Code Ann. § 15-1-67 and stated that in view of the fact "that there was some kind of fraudulent activity here," Duckett could not be called upon to exercise due diligence regarding the discovery of any claim concerning loss of the funds. (Tr. 92:16-93:12, R. E. 19-20.) Section 15-1-67 of the Mississippi Code provides as follows:

> If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

At the hearing on BancorpSouth's motion for summary judgment, the chancellor alluded to § 15-1-67 and appeared to assume that tolling under the statute would be appropriate as to Duckett. However, when Duckett later testified at trial, his own testimony negated any applicability of the tolling provisions of § 15-1-67:

> Q. You might not have been aware of the exact amount of money that was on deposit at Iuka Guaranty which became BancorpSouth; but you, in fact, knew that there was a sizable sum of money from your mother's lawsuit death claim set aside for you and your brother?
>
> A. Yes, sir.
>
> Q. All right. And, in fact, you told us in your deposition, you were asked at what time did you become aware that there was a settlement of money that had been put back for you in a guardianship, and you told us in 1995, when it happened?
>
> A. Yes, sir.

(Tr. 185:23-186:5.)

> Q. I want to ask you, as far as you heard your brother indicate that at age 18 he thought that was the age when he might have had access to this money, did you have a like belief at age 18?
>
> A. Yes, sir.

Q. Okay. So whether you were mistaken or not, you can go to war, you can go vote, so you thought at age 18 you might have access to the money?

A. Yes, sir.

Q. What, at age 18, when you reached 18, what did you do, what inquiry did you make concerning the funds?

A. What do you mean?

Q. Well, did you go check on it, did you ask anybody, or did you do anything?

A. No, sir.

Q. When you became age 21, did you do anything, check on the money, or take any action at all, either at the bank or even through your father?

A. No, sir.

Q. Has anyone at BancorpSouth or at Iuka Guaranty ever refused to give you any information concerning the funds?

A. No, sir.

Q. Since you learned about the amount of money, this Exhibit 1, 2 and 3, did anyone at the bank attempt to cover up or keep you from finding out about your money?

A. No, sir.

(Tr. 186:13-187:10.)

There are two critical components which must be present in order to toll the running of a statute of limitations in the face of fraud under § 15-1-67. First, the defendant who raises limitations as a defense must have fraudulently concealed the cause of action from the plaintiff. This means a subsequent act or conduct of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action. *Robinson v. Cobb*, 763 So. 2d 883 (Miss.

2000); *Lady v. Jefferson Pilot Life Ins. Co.*, 241 F. Supp 2d 655 (S.D. Miss. 2001). Duckett's own testimony refutes the existence of this component.

Second, the plaintiff must be diligent in discovering the cause of action. In order for § 15-1-49 to begin to run against a claim, it is not necessary that a plaintiff become absolutely certain that he has a cause of action. Instead, in order for the statute to begin to run, the plaintiff need only be on notice that he should carefully investigate circumstances that suggest that a cause of action potentially exists. *First Trust Nat'l Assn. v. First Nat'l Bank of Commerce*, 220 F. 3d 331 (5th Cir. 2000). With ample knowledge on August 23, 2000, Duckett sat idly by and did nothing for over four years. He further testified at trial:

> Q. But you never made any inquiries, even at age 18 or even at age 21, to inquire about it?
>
> A. No, sir.
>
> Q. Is that because you thought you had gotten your money, either through houses, cars, or whatever?
>
> A. Well, yes, sir.

(Tr. 188:20-25.) In sharp contrast, Duckett's younger brother, Williams, Jr., was very diligent in discovering his claim. As early as age eighteen, he went to the bank and began asking questions and soon discovered what had happened. (Tr. 173:15-174:7.)

Regardless of whether it is appropriate to give credit to BancorpSouth for the value of the house, automobile and checking account provided to Duckett with funds withdrawn from BancorpSouth (*see* pp. 21-25, *supra*), it is clear from the testimony of Duckett that he was not merely sleeping on his rights but was consciously refraining from pursuing a claim against the Guardian because Duckett considered himself as having already received his share of the

guardianship funds. He deemed himself already made whole, whether the distributions he received from the Guardian had been authorized by the court or not.

The chancellor was therefore manifestly wrong not only in holding that § 15-1-27 was the controlling statute of limitations but also in effectively conferring on Duckett the tolling benefits of § 15-1-67. Where, as here, the chancellor misinterprets the law, the Supreme Court must reverse. *Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.*, 910 So. 2d 1093, 1098 (Miss. 2005). Accordingly, Duckett's claim, should be found time-barred as a matter of law, and all aspects of the Final Judgment in his favor should be reversed and rendered.

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

Miss. Code Ann. § 93-13-17, the statute which the Plaintiffs successfully argued as making BancorpSouth into a "defacto bonding company," dispenses with the necessity of a guardian's bond to the extent that the guardianship funds are invested in "fully insured" bank deposits. The waiver of bond posting by a guardian under these circumstances has to do with the integrity of the investment, not with the risk of the guardian's malfeasance. A guardian might invest the ward's funds in anything — land, stocks, a business venture. Those investments involve risk of loss of value, but bank deposits do not carry the risk of loss of value to the extent that they are fully insured by the Federal Deposit Insurance Corporation. In fact, the Receipt of Funds and Governing Court Order (Trial Exhibit 2, Ex. p. 11, R. E. 89) expressly states to all, not just to the Guardian and the court, this understanding of the meaning of the statute:

> The sum of $267,233.00 deposited in account number 01-219967-10 styled Albert Jermaine Duckett and Walter J. Williams, Jr., Minors, Walter J.

> Williams, Guardian, *which is fully insured up to $100,000.00 by FDIC Insurance.*

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

The chancellor did not interpret the "fully insured" provision of § 93-13-17 as referring to FDIC insurance:

> THE COURT: What do you do with 93-13-17 that says those funds, once they are put on deposit, that they shall be, quote, fully insured? It doesn't say anything about an FDIC bond. That's the statute. What do we say to that?

(Tr. 274:6-11.) The chancellor apparently read § 93-13-17 as requiring banks to purchase some form of general liability or errors and omissions insurance whenever a guardian who is not otherwise bonded makes a deposit, regardless of the amount of the deposit. Such a reading of § 93-13-17 is out of step with the virtually identical statutes of other jurisdictions which expressly provide that the "fully insured" provision refers to FDIC insurance. *See, e.g.*, Ark. Stat. Ann. § 28-65-215(e); N.J. Stat. § 3B:15-16; N.Y. Surr. Ct. Proc. Act § 1708. It is also out of step with the very terms of the court's original deposit order, entered by a previous chancellor, which expressly provided that the guardianship funds were to be deposited into a "*federally insured* interest bearing account." (*See* Trial Exhibit 30, Ex. p. 111, R. E. 80, emphasis added.) And if "fully insured" in § 93-13-17 refers to FDIC insurance, then the coverage afforded can have no applicability here, since FDIC insurance only covers claims of depositors in the "case of the liquidation of, or other closing or winding up of the affairs of, any insured depository institution." 12 U.S.C. § 1821(f). *See Crockett v. Citizens & Southern Financial Corp.*, 349 F. Supp. 1104, 1105 (N.D. Ga. 1972) (holding that no claim for payment under FDIC insurance may be made unless the bank in question has been closed for insolvency).

Beyond this, it is also worth noting that in this case the Guardian's deposit was expressly *not* fully insured. Even the bank's receipt in the amount of $267,233.00 plainly stating that the deposit was insured by the FDIC up to $100,000.00 did not negate the Guardian's requirement to post bond.[12] Saint Paul's $50,000.00 bond remained in place. But the Saint Paul bond, coupled with the $100,000.00 limit of FDIC insurance, still left $117,233.00 of the deposit "unbonded." There were various ways to address this shortcoming. One, of course, would have been to increase the amount of Saint Paul's bond. Another would have been to apportion the funds among three different banks, depositing $100,000.00 each in two banks and the remaining $67,233.00 in a third in order to procure three deposits which were each fully insured within the meaning of § 93-13-17.[13] For whatever reason, through no fault of or attribution to BancorpSouth, the Guardian's attorney did not see to this and the chancery court did not require it.

Even where a guardian places guardianship funds in a prudent investment such as a bank account fully insured by the FDIC, there nevertheless remains the risk that the guardian will liquidate the investment, be it FDIC-insured or not, and misappropriate the proceeds. Banks are not insurers against that. This point is clearly made by 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 administrator, executor, guardian, trustee or other fiduciary in trust for a named beneficiary or beneficiaries. Any such fiduciary shall have the power to make

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[12] At all material times, the limit of FDIC insurance for a guardianship account in the name of two wards was a total of $100,000.00. 12 C. F. R. §§ 330.6, 330.7 (1997).

[13] This need to apportion among several banks in view of the $100,000.00 FDIC limit was recognized by the legislature and was the reason § 93-13-17 was amended in 1987 to provide for deposit in "one or more" banks. 1987 Miss. Laws, Ch. 368.

> 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.

This statute is designed to protect banks from precisely the kind of liability which was imposed upon BancorpSouth in this case. It makes plain that the deposit relationship on a fiduciary account is a relationship that exists between the bank and the fiduciary and no one else, such that the bank may act on the orders of the fiduciary without question and, in the words of the statute, "*without regard to any notice to the contrary*, as long as the fiduciary is living." The statute is plain, and its legislative intent is to exculpate banks from the wrongdoing of fiduciaries such as guardians who exceed their authority or who violate their oaths, even going so far as to provide that payment of guardianship funds over to the guardian who requests them works as a *release* of the bank.

Section 93-13-17, read with § 81-5-34, can only mean that what is "fully insured" is the loss of the deposit through the liquidation or closing of the bank, not loss through the malfeasance of the fiduciary. Otherwise, § 81-5-34 is meaningless. The correctness of this construction of the statutes is all the more apparent in view of the fact that the bond waiver provision of § 93-13-17 was adopted in 1972;[14] § 81-5-34, with its provision for release of the bank without regard to any notice to the contrary, was adopted in 1984[15] and is the legislature's most recent enactment on the subject of the relationship between banks and guardians.

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[14] 1972 Miss. Laws, Ch. 408, § 7.

[15] 1984 Miss. Laws, Ch. 325.

The chancellor misinterpreted § 93-13-17 and erred by holding that the bond waiver provisions of that statute elevate BancorpSouth's liability from that as a depository under § 81-5-34 to that of a surety, to same extent as if the bank had issued a surety bond. Accordingly, the chancellor erred as a matter of law.

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.*

In opposing BancorpSouth's motion for partial summary judgment on the statute of limitations issue, the Plaintiffs did not dispute the factual premise of BancorpSouth's motion, but instead, as their sole ground for opposing the motion argued that Miss. Code Ann. § 15-1-27 was the applicable statute of limitations. The chancellor agreed with the Plaintiffs. Because § 15-1-27 applies only to guardians and their sureties, the effect of the Plaintiffs' successful argument of this point at trial was to make, for all purposes in this case, BancorpSouth a surety of its depositor, the Guardian.[16]

If, as the Plaintiffs successfully argued to the chancellor, BancorpSouth is a *de facto* surety, then the Receipt of Funds and Governing Court Order (Trial Exhibit 2, Ex. p. 11, R. E. 89) is the *de facto* "bond." Indeed, the chancellor characterized the Waiver of Process and Entry of Appearance of Depository and Receipt of Funds and Governing Court Order as a contract between the Guardian and BancorpSouth. (Tr. 56:24-57:24.) Having done so, the

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[16] This does not make for inconsistent argument by BancorpSouth. Instead, it merely highlights that the Plaintiffs cannot "have their cake and eat it too," and that rulings made in motion practice have significant consequences and effects at trial. This Court should not give any precedential effect to the chancellor's ruling that banks are sureties under § 93-13-17 . Instead, for the promotion of consistent application of law within this case only, this Court should treat BancorpSouth as a surety for purposes of damages if it is a surety for purposes of the statute of limitations.

chancellor should have determined BancorpSouth's obligation, as surety, by its contract, the Waiver of Process and Entry of Appearance of Depository and Receipt of Funds and Governing Court Order. *Cahn v. Wright*, 119 Miss. 107, 80 So. 494 (1919). Instead, the chancellor then proceeded to erroneously determine the extent of BancorpSouth's liability on this "bond."

The bond waiver statute, Miss. Code Ann. § 93-13-17, served as the source of chancellor's characterization of BancorpSouth as a *de facto* surety. This should have solely meant that the court may dispense with the necessity of a guardian's bond to the extent that guardianship funds are deposited into a fully FDIC-insured bank account. Yet, if § 93-13-17 shifts bonding from a conventional surety to a depository, it can only do so to the extent that the deposit is insured. The clear language of the statute is that to the extent the deposit is *not* fully insured, bonding by a conventional surety will still be required for the difference. Here, as is plainly indicated by the Receipt of Funds and Governing Court Order (Trial Exhibit 2, Ex. p. 11, R. E. 89), the Guardian deposited $267,233.00 into a single account, and that account was insured for $100,000.00. Thus, if, as the Plaintiffs successfully argued, the Waiver of Process and Entry of Appearance of Depository and Receipt of Funds and Governing Court Order constitute a *de facto* "bond," then the effect and intent of § 93-13-17 are clear: BancorpSouth's obligation as a surety was $100,000.00.[17] *See, e.g., Estate of Treadwell v. Wright*, 61 P. 3d 1214 (Wash. App. 2003), observing that such statutory provisions are substitutes for bonds.

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[17] For this reason, BancorpSouth, after the granting of summary judgment in favor of the Plaintiffs and during the writ of inquiry, urged the chancellor to revisit the issue of the statute of limitations. Either § 15-1-49 applied and Duckett's claim was time-barred, or § 15-1-27 applied and BancorpSouth's liability was capped at $100,000.00.

A surety's liability is limited to the express terms of its bond or contract and cannot be broadened. *See National Fire Insurance Co. v. Currie*, 180 Miss. 711, 718, 178 So. 104, 105 (1938) and the many authorities cited there. Accordingly, unless the bond or some statute expressly provides for it, a surety is not liable for the creditor's attorney's fees. *Alexander v. Fidelity & Guaranty Co.*, 232 Miss. 629, 100 So. 2d. 347 (1958); *Nat'l Surety Co. of New York v. Runnelstown Consolidated School*, 146 Miss. 277, 111 So. 445 (1927). Nor is a surety liable for punitive damages, even if punitive damages might lie against the principal. *U. S. Fidelity & Guaranty Co. v. State for Use and Benefit of Stringfellow*, 186 Miss. 116, 182 So. 2d 919 (1966); *Cooper v. U. S. Fidelity & Guaranty Co.*, 186 Miss. 116, 188 So. 6 (1939).[18]

Notwithstanding all of this, the Plaintiffs changed their earlier argument, and later argued for, and both Plaintiffs received against BancorpSouth, not only actual damages in the amount of $555,218.62 (which included compound interest), but attorney's fees in the amount of $222,087.44 *plus* punitive damages in the amount of $1,000,000.00. Thus, the chancellor held that for purposes of the statute of limitations, BancorpSouth was a surety, but for purposes of actual damages, attorney's fees and punitive damages, BancorpSouth was a depository.

More to the point, in reaching these irreconcilable results, the chancellor ignored the law of the case. In *Mauck v. Columbus Hotel Co.*, 741 So. 2d 259 (Miss. 1999), this Court defined the law of the case as follows:

> The doctrine of the law of the case is similar to that of former adjudication, relates entirely to questions of law, and is confined in its operation to subsequent proceedings in the case. Whatever is once established as the

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[18] Here, BancorpSouth was assessed punitive damages as a surety when punitive damages *did not* lie against its "principal," the Guardian. The chancellor declined to award any punitive damages against the Guardian, even though he, not the bank, was clearly the malefactor.

> controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, so long as there is similarity of facts. This principle expresses the practice of courts generally to refuse to reopen what has previously been decided. It is founded on public policy and the interests of orderly and consistent judicial procedure.

Id. at 266-67 and cases cited there. Since by the law of the case established at the summary judgment stage at the urging of the Plaintiffs, BancorpSouth was a surety, its Waiver of Process and Entry of Appearance of Depository and Receipt of Funds and Governing Court Order made up the contractual terms of its "bond." The plain limit of that "bond" on its face was $100,000.00, just as the plain limit of Saint Paul's bond on its face was $50,000.00. If for statute of limitations purposes BancorpSouth was a surety, then for damages purposes BancorpSouth must be a surety, as well. And, just as Saint Paul, as surety, was not liable for interest, attorney's fees or punitive damages, neither could BancorpSouth, as Saint Paul's co-surety, be liable for interest, attorney's fees or punitive damages. As Saint Paul's liability was capped at the face amount of its bond, $50,000.00, so must BancorpSouth's liability have been capped at the face amount of its "bond," $100,000.00.

The chancellor impermissibly allowed the Plaintiffs to distance themselves from the effect of their prior position that because BancorpSouth is a *de facto* surety, the surety statute of limitations controlled. Having asserted that position and benefitted from it, the Plaintiffs were estopped when it became more convenient or profitable for calculating damages, from retreating from that position later in the litigation. *Dockins v. Allred*, 849 So. 2d 151, 155 (Miss. 2003).

The chancellor was manifestly wrong in placing BancorpSouth in the legal position of a surety for purpose of the statute of limitations and then in the legal position of depository for purposes of damages. If BancorpSouth was a surety (and it was not), then damages against it

must be capped at the amount of its *de facto* "bond," $100,000.00. But if BancorpSouth was a depository of court-restricted guardianship funds (and it was), then the statute of limitations had expired against Duckett before the suit was commenced. The chancellor erred as a matter of law in letting the Plaintiffs have it both ways.

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

Evaluation of the chancellor's imposition of punitive damages against BancorpSouth must begin with the reason for which the chancellor ruled as he did. He was very clear as to why punitive damages were awarded, and his words from his bench opinion bear repeating:

> *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.)

The chancellor erred fundamentally by imposing punitive damages where the remedy for such is consideration of contempt, administered according to familiar standards which have long been the law in Mississippi. To the extent that punitive damages were imposed outside of a framework of contempt, the chancellor was bound to follow the clear dictates of Miss. Code Ann. § 11-1-65, which he failed to do in a number of respects. And regardless of how punitive damages were imposed, they could only be imposed in a manner which does not offend due process; the chancellor went well beyond those constitutional boundaries as well.

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

A party who wilfully violates an order of a court is answerable to that court for contempt. *R.K. v. J.K.*, 946 So. 2d 764, 778 (Miss. 2007); *Pittman v. Lakeover Homeowners' Ass'n*, 909 So. 2d 1227, 1229 (Miss. Ct. App. 2005); *Westerburg v. Westerburg*, 853 So. 2d

826, 828 (Miss. Ct. App. 2003); *In re Hoppock*, 849 So. 2d 1275, 1279 (Miss. 2003); *McCracking v. Champaigne*, 805 So. 2d 586, 589 (Miss. Ct. App. 2001); *Weston v. Mounts*, 789 So. 2d 822, 826 (Miss. Ct. App. 2001); *Brame v. State*, 755 So. 2d 1090, 1094 (Miss. 2000); *Bredemeier v. Jackson*, 689 So. 2d 770, 777 (Miss. 1997); *Cooper v. Keyes*, 510 So. 2d 518, 519 (Miss. 1987).

Yet all of the foregoing authorities hold that a citation for contempt is proper only when the contemner has *wilfully and deliberately* ignored an order of the court. *See also Broome v. Broome*, 832 So. 2d 1247, 1251 (Miss. App. 2002) and cases cited there. Moreover, clear and convincing proof is required for finding of contempt by a chancellor. *Broome v. Broome, supra*, and cases cited there.

The uncontradicted evidence at trial was that because BancorpSouth utilized the accepted means of tracking restricted accounts via computer records, and because of the clerical error which occurred during the changeover from Iuka Guaranty Bank to BancorpSouth, the tellers with whom the Guardian dealt had no independent knowledge of the court order restricting the Guardian's authority apart from what was shown on the bank's computer system in the form of special instructions and holds. (Tr. 203:13-21, 373:4-7, 424:18-425:6, 543:11-17.) The uncontradicted testimony of Paul Carruba, the bank operations expert, was that such computer-dependent notification is the industry norm. The evidence was also uncontradicted that the Guardian did not withdraw the funds until the "green worm" message was inadvertently lost at the time of the transfer of account information from the Iuka Guaranty Bank system to the BancorpSouth system. Such does not constitute willful and deliberate ignoring of a court's order. Far from it, at worst it was an accidental and inadvertent event — a clerical error at that — which allowed the *Guardian* to violate the court's order.

Because it is a guardian under circumstances such as this who is the ultimate cause of violating a court order (there would be no need for a special instruction or hold on the deposit of the guardian who was faithfully performing his office), statutory contempt remedies in cases like this are directed at *guardians*, not their depositories. *See* Miss Code Ann. § 91-7-285.

And consideration of contempt is not to be confused with punitive damages. Indeed, this Court has made clear that violation of a court order does not justify the imposition of punitive damages. In *Moulds v. Bradley*, 791 So. 2d 220 (Miss. 2001), a mother sought punitive damages against the father of her child who, despite having a lucrative income, failed to pay a modest monthly child support previously ordered by the court. This Court, holding that the chancellor was justified in refusing to impose punitive damages for violating the court order, said

> There is no precedent in this State's jurisprudence for the award of punitive damages as a sanction for failing to pay child support. Moreover, [the mother] does not cite any authority from other jurisdictions in support of this practice. After a diligent search, we could find only one court awarding punitive damages for criminal contempt, which was deemed a fine, payable to the court, not the opposing party.

Id., 791 So. 2d at 226-227.

Here, the chancellor made no bones about it: he imposed punitive damages against BancorpSouth for failing to abide by a court order. The reason the failure occurred was of no consequence to the chancellor. In the face of the evidence that BancorpSouth failed to follow a court order, the chancellor, in disregard of the fact that the failure was due to a mistake, awarded punitive damages. In the words of *Moulds*, there is no precedent for such in Mississippi law, nor in the law of any other jurisdiction.

Neither does the chancellor's finding of gross negligence on the part of BancorpSouth provide a premise upon which a contempt holding may be based. In *Brame v. State*, 755 So. 2d 1090 (Miss. 2000), this Court held that even "gross negligence does not rise to the level of willful conduct which is required to support a finding of criminal contempt." *Id.*, 755 So. 2d at 1094.

Finally, it is a basic principle of contempt that the contemnor can always purge himself from any penalty imposed by the court by complying with the order which was violated. *See In re Williamson*, 838 So. 2d 226 (Miss. 2002). This basic principle has special relevance to this case because BancorpSouth attempted to no avail to rectify the effects of any noncompliance with the court's order by offering that the Plaintiffs take judgment against it pursuant to Rule 68, Miss. R. Civ. P. The trier of fact is not supposed to know of the existence of an offer of judgment by any defendant.[19] Nevertheless, the Plaintiffs informed the chancellor that BancorpSouth made offers of judgment by filing two pleadings each titled "Response to Offer of Judgment." (R. 474-75; 587-88.) Improper as these filings were, the Plaintiffs opened the door to consideration of the full details of the offers of judgment, as they are pertinent to the issues of punitive damages, contempt and BancorpSouth's efforts to purge itself of any contempt.

BancorpSouth's first offer of judgment was in the amount of $101,000.00. (R.622-24.) This offer was made shortly after the chancellor overruled BancorpSouth's motion for partial summary judgment, holding that the surety statute of limitations applied to the bank. The first

[19] The plain language of Rule 68 provides that nothing pertaining to an offer of judgment is to be filed unless and until the offer is accepted; rejections of offers of judgment are automatic if not expressly accepted.

offer of judgment was consistent with the Plaintiffs' theory that the bank was a co-surety and with BancorpSouth's position that its "bond" was equal to the $100,000.00 FDIC insurance referenced in the Receipt of Funds and Governing Court Order.

BancorpSouth's second offer of judgment was in the amount of $182,500.00. (R. 625-27.) This offer was based on the possibility that the bank was not a co-surety after all, thus putting the statute of limitations back into play, and was in the amount of half of the original guardianship deposit plus interest liberally calculated.

BancorpSouth's third offer of judgment was in the amount of $325,001.00. (R. 628-30.) This offer was for well more than the original guardianship deposit plus all accrued interest at the savings account contract rate. (*See* Trial Exhibit 34, Ex. pp. 537-39, R. E. 95-97.) The Plaintiffs likewise rejected this offer, even though it would have resulted in BancorpSouth's conceding the statute of limitations issue as to Duckett *and* would have allowed the Plaintiffs to retain the $50,000.00 recovered from Saint Paul without any corresponding adjustment to amounts recoverable from BancorpSouth, resulting 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 point of all of this is that if BancorpSouth's negligence made it amenable to contempt for failure to comply with a court order, the parties which claim injury by the noncompliance, the Plaintiffs, rejected the efforts of BancorpSouth to purge itself of contempt via means afforded by the Mississippi Rules of Civil Procedure. As to the possibility of BancorpSouth's simply restoring some amount of money to the Plaintiffs, there was the obvious question of what amount to restore. Should BancorpSouth have ignored the statute

of limitations issue as to Duckett and restored to both Plaintiffs the full amount of the original deposit with interest accrued at the contract rate? Should BancorpSouth have restored only the $100,000.00 limit of its "bond"? Whatever the amount, should BancorpSouth have deducted the value of the two houses or the amount of Saint Paul's bond? Should BancorpSouth have assumed that § 81-5-34 meant something other than what it plainly says and had no application to this case? The presence of complicating factors such as this are in sharp contrast to cut-and-dried situations such as in *Wise v. Valley Bank*, 861 So. 2d 1029 (Miss. 2003), where a bank's *employee* stole money from a depositor's account, and the bank, having not even an arguable defense, restored the money to the depositor after the depositor sued the bank.

Here, if BancorpSouth is to be punished for failing to follow a court order, the remedy is not punitive damages but consideration of contempt, with an opportunity to purge as BancorpSouth attempted to do through its offers of judgment. And if contempt is the remedy, a showing of willful and deliberate violation of the order, proven by clear and convincing evidence, is required. The evidence in this record shows neither. The chancellor applied the wrong legal standard and committed reversible error in doing so.

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

Awards of punitive damages are governed by Miss. Code Ann. § 11-1-65. Subsection (1)(a) of that statute provides

> Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

Miss. Code Ann. § 11-1-65(1)(a). Thus, the burden upon the plaintiff is high at the outset: entitlement to punitive damages must be proven by clear and convincing evidence. There are three circumstances where punitive damages will lie:

(1) where the defendant acted with actual malice;

(2) where the defendant acted with gross negligence which evidences a willful, wanton or reckless disregard for the safety of others; or

(3) where the defendant committed actual fraud.

Here, the chancellor found that "there was, on the part of BancorpSouth, a reckless disregard and/or gross negligence in the disbursement of funds in violation of a court order." (Tr. 563:16-22, R. E. 58.) Indeed, there is no evidence to even suggest, and the Plaintiffs do not argue, that BancorpSouth acted with actual malice or committed actual fraud, so their entitlement to punitive damages in this case must rest entirely upon a showing by clear and convincing evidence of *(a)* gross negligence on the part of BancorpSouth which *(b)* evidences a willful, wanton or reckless disregard for the safety of others.

In applying § 11-1-65(a)(1), this Court has observed that the gross negligence prong addresses "such gross and reckless negligence as is, in the eyes of the law, equivalent to willful wrong." *Choctaw Maid Farms v. Hailey*, 822 So. 2d 911, 923 (Miss. 2002) and cases cited there. This Court has not defined "reckless disregard for the safety of others" in the context of § 11-1-65(a)(1), but it has defined substantially identical language in the context of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(c)(1). That section imposes liability on government employees who act "in reckless disregard of the safety and well-being of any person not engaged in criminal activity." In construing the meaning of that phrase, this Court has said that reckless disregard is a higher standard than gross negligence and "embraces

willful or wanton conduct which requires *knowingly and intentionally* doing a thing or wrongful act." *Collins v. Tallahatchie County*, 876 So. 2d 284, 287 (Miss. 2004) quoting *Turner v. City of Ruleville*, 735 So. 2d 226, 230 (Miss. 1999) (emphasis added). *Accord, City of Greenville v. Jones*, 925 So. 2d 106, 110 (Miss. 2006); *City of Jackson v. Powell*, 917 So. 2d 59, 71 (Miss. 2005). Although this definition arises in the context of the Tort Claims Act, there is no reason why the same definition ought not to apply to the identical phrase in § 11-1-65(a)(1).

The evidence at trial was uncontradicted that the Guardian's unauthorized withdrawals were permitted due to a single mistake 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 when, for technical reasons, the transfer could not be accomplished by automated means. This clerical error left the funds vulnerable to misappropriation by the unscrupulous Guardian. The error occurred in the context of a process which was not only intended to ensure the safety of depositors in the transfer of information from the Iuka Guaranty Bank computer system to the BancorpSouth computer system but also to address accounts which required special handling, such as those restricted by court order.

It cannot be overemphasized that what occurred on the part of BancorpSouth was a single event, a single mistake in the computer changeover process which left the account unrestricted. The chancellor incorrectly stated in his bench ruling that BancorpSouth "let this carry on for years and they did nothing about it until the funds were dissipated, until they were gone." (Tr. 564:28-565:2, R. E. 59-60.) Similarly, in weighing the provision of § 11-1-65(e) which prompts the court to consider the duration of the defendant's conduct and whether the defendant attempted to conceal it, the chancellor said:

> I don't think there was any concealing of it; there was just an ignoring of it. But there was a duration of it for years in allowing the guardian to withdraw these funds in violation of a court order.

(Tr. 568:21-25, R. E. 63.) Instead, the uncontradicted evidence was that the bank was unaware that the Guardian was violating the court's order until the Plaintiffs brought it to the bank's attention after the money was gone. (Tr. 414:15-23.) This is highly material because § 11-1-65(e) also prompts the court to consider "the defendant's awareness of the amount of harm being caused."

The evidence was likewise uncontradicted that the information transfer process was itself the exertion of a substantial effort by BancorpSouth to protect the interests of its depositors. Lee McAllister testified extensively and without contradiction regarding the careful design of this intricate process. (Tr. 227:9-238:24.) Paul Carruba testified without contradiction that banks are heavily regulated and that BancorpSouth had been examined by the Federal Reserve for its mergers and acquisitions processes and had received favorable ratings. (Tr. 385:16-28.) The evidence was further uncontradicted that the process used in BancorpSouth's merger integration conformed to industry standards and was state-of-the-art. (Tr. 371:5-379:4; 382:4-17; 400:25-401:1.) In view of all of this uncontradicted evidence, the chancellor found as a fact, and correctly so, that the act which left the guardianship account vulnerable to the unscrupulous Guardian was the result of "human error oversight" by BancorpSouth. (Tr. 541:26, R. E. 36.)

Unless the law is ignored, it is impossible to reconcile all of this evidence and the chancellor's finding of human error oversight with his finding that BancorpSouth acted with gross negligence. Even further into the realm of impossibility on the strength of this evidence is the chancellor's conclusion of law that BancorpSouth's "gross negligence" evidenced a

willful, wanton or reckless disregard for the safety of others. It is worth noting that on this point the chancellor found merely that BancorpSouth acted with "reckless disregard and/or gross negligence." There was no express finding of gross negligence *which evidences a willful, wanton or reckless disregard for the safety of others* as is required by § 11-1-65.

The acts and omissions of BancorpSouth were at worst *simple negligence*; they did not constitute gross negligence, and they could not possibly constitute a "wilful, wanton, or reckless disregard for the safety of others." As this Court has made clear, simple negligence will not support the imposition of punitive damages. *Irby v. Travis*, 935 So. 2d 884, 943 (Miss. 2006). As this Court has also made clear, clerical errors such as occurred here will not give rise to punitive damages. In *Long's Transfer & Storage v. Busby*, 358 So. 2d 393 (Miss. 1978), the plaintiff stored some goods with a warehouseman. When the plaintiff failed to pay the monthly storage fees, the warehouseman published notice of intent to sell the goods pursuant to the warehouseman lien law. The published notice set the sale date as October 23, 1974. However, the warehouseman conducted the sale on October 12, 1974. When the plaintiff tried to pay his storage fees on October 15, it was too late: the goods had already been sold. The plaintiff sued the warehouseman for failure to comply with the lien law notice provisions, seeking the value of the goods plus punitive damages. At trial, the warehouseman's employees testified that at all times the *intended* sale date was October 12 and that publication of the sale date as October 23 was a *clerical error* "and there was no intent deliberately to set out an erroneous sale date." *Id.* at 395. At trial, the plaintiff recovered the value of the goods plus punitive damages. In reversing the award of punitive damages because the harm was not intentionally or deliberately caused by the warehouseman, this Court stated

> "Wilful" is a word denoting an act done *consciously and intentionally, or knowingly and purposely*, without justification or excuse. The word as ordinarily used in courts of law denotes some element of *design, intention or deliberation* and intention to do or refrain from doing some act, and *not mere inadvertence. Dorroh v. State*, 229 Miss. 315, 90 So.2d 653 (1956), *citing* 94 *C.J.S.* Willful at 620, 624 (1956).

Long's Transfer & Storage v. Busby, 358 So. 2d 393, 396 (Miss. 1978) *(quoting Mississippi Insurance Commission v. Savery*, 204 So.2d 278 (Miss. 1967) (emphasis added).

Even after a plaintiff has established by clear and convincing evidence the existence of one of the three circumstances under which punitive damages will lie under § 11-1-65(1)(a), which the Plaintiffs failed to do in this case, the statute then turns its focus to numerous factors to be considered by the trier of fact and the court, which are designed primarily to afford due process safeguards before a punitive award is legally justified. Miss. Code Ann. § 11-1-65(1)(a).[20]

One of the purposes of punitive damages is to deter similar misconduct in the future by the defendant and others. Miss. Code Ann. § 11-1-65(e). In addition to the lack of any evidence at trial that BancorpSouth has repeated a data transfer error such as occurred in this case or has ever allowed unauthorized transactions on guardianship accounts, the evidence at trial was uncontradicted that BancorpSouth has always had in place written policies concerning the use of holds and special instructions in the handling of judicially-restricted accounts such as court-ordered guardianships, restraining orders, garnishments, subpoenas, seizures and the like, as well as having a "plain language" written policy specifically addressing court-ordered guardianship accounts, all of which set forth sufficient safeguards to protect against

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[20] Issues concerning the constitutionality of punitive damages in this case are discussed in the next section of this brief.

unauthorized transactions on court-ordered guardianship accounts. (Tr. 221:6-15, 223:3-224:12.)

The evidence was likewise uncontradicted that BancorpSouth trains all of its tellers in the use of special instructions and account holds and trains all of its customer service representatives regarding its court-ordered guardianship account policy. *See* testimony of Lee McAllister. (Tr. 223:3-225:19; Trial Exhibit 19, Ex. pp. 59-63.) Additionally, BancorpSouth performed a review of all court-ordered guardianship accounts at BancorpSouth in the First Chancery District and found that all 119 such accounts have in place the requisite special instructions and holds as required by BancorpSouth's policy and the court orders pertaining to those accounts. (Tr. 449:28-454:6; Trial Exhibit 49, Ex. pp. 569-76.) Further, BancorpSouth is fully aware of the importance of complying with court orders and explained that its simple negligence mistake in this case occurred not through intentional disregard of a court order, but through inadvertent loss of account information from the bank's computer system, which, consistent with industry standard, is the method by which banks implement the requirements of court orders. (Tr. 203:13-21, 224:13-23, 447:26-449:20.)

Finally, Paul Carruba testified that an award of punitive damages in this case would have a chilling effect on banks' willingness to accept guardianship deposits and might result in guardians having to employ the services of trust departments at considerable expense, if such deposits would be accepted at all.[21] (Tr. 386:5-387:1.) The evidence is thus

[21] Admitted into evidence during the punitive damages phase of the trial was the schedule of fees charged by BancorpSouth's trust department for management of conservatorships, guardianships and full service trusts. (Trial Exhibit 55, Ex. p. 608.)

overwhelming that, even if punitive damages had been appropriate in this case (and they were not), the deterrent purposes of § 11-1-65(e) are already being served.

If the chancellor's award of punitive damages under the facts of this case is upheld on appeal, the effect will be to construe § 11-1-65 in such as a way as to place simple negligence and clerical errors within its scope. Such would be utterly at odds with the consistent pronouncements of this Court that punitive damages are not favored but are reserved only for the most egregious cases where the conduct of the defendant is extreme. *Community Bank v. Courtney*, 884 So. 2d 767, 777 (Miss. 2004); *Wise v. Valley Bank*, 861 So. 2d 1029, 1034 (Miss. 2003); *Langston v. Bigelow*, 820 So. 2d 752, 757 (Miss. App. 2002). This is not such a case, and the evidence does not establish clearly and convincingly that BancorpSouth has engaged in any such conduct. The chancellor incorrectly applied § 11-1-65 and erred by awarding punitive damages against BancorpSouth.

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

A defendant may not be made liable for punitive damages where such would transgress the federal constitution. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), the Supreme Court held that the constitutionality of punitive damages in a particular case must be viewed against "the degree of reprehensibility of the defendant's conduct." *Id.* at 1599. The degree of reprehensibility is further determined by consideration of the following factors:

(1) was the harm physical or economic?

(2) did the defendant's conduct show an indifference to or reckless disregard of the health or safety of others?

(3) was the target of the defendant's conduct financially vulnerable?

(4) did the defendant's conduct involve repeated actions or was it an isolated incident?

(5) did the defendant engage in intentional malice, trickery or deceit, or did the harm result from a mere accident?

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419, 123 S. Ct. 1513, 1521, 155 L. Ed. 2d 585, 602 (2003). Applying these considerations to the facts of the case at bar, it is clear that this is not a case for punitive damages.

First, the Plaintiffs' damages were economic; it is undisputed that they were not physically harmed.

Second, BancorpSouth's conduct was not indifferent to or in reckless disregard of the Plaintiffs' interests. The evidence was totally to the contrary. The very essence of BancorpSouth's entire computer information transfer process was to protect and preserve its customers' interests.

Third, BancorpSouth has not repeated the same action which occurred with respect to the Plaintiffs. Instead, what occurred here was a one-time "human error oversight" — a clerical error — during the computer information transfer process. The evidence at trial was undisputed that such a mistake has, to BancorpSouth's knowledge, never happened before or since.

Fourth, there was *zero* evidence of intentional malice, trickery or deceit on the part of BancorpSouth. To the contrary, the *only* evidence is that what occurred during the computer system changeover process was a mere accident resulting from human error oversight.

The only one of the Supreme Court's *Campbell* factors which has any arguable application to this case at all is whether the Plaintiffs were financially vulnerable. But it was not BancorpSouth but the *Guardian* who exploited any such vulnerability, and who acted with

indifference to his oath to the court, and who acted with malice, trickery and deceit. The only evidence at trial was that BancorpSouth's mistake created the opportunity for the Guardian to act as he did.

Although BancorpSouth made a computer data transfer mistake in allowing the access restriction to drop off the guardianship account, that is not ultimately why the guardianship funds were withdrawn from the bank. The real reason the guardianship funds were withdrawn from the bank was because the Guardian failed to faithfully execute his office; had he performed faithfully and honored his oath as guardian, the funds would still be in the bank even with the access restriction having dropped off BancorpSouth's computer system. Yet the chancellor, in punishing BancorpSouth, failed to consider the participation of the Guardian and others[22] in the Plaintiffs' losses.

Intertwined in the issue of punitive damages is the very substantial question as to whether BancorpSouth's negligence was even the proximate cause of the Plaintiffs' losses. *See Titus v. Williams*, 844 So. 2d 459, 466 (Miss. 2003). "Negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof." *Id.*, *citing Newell v. Southern Jitney Jungle Co.*, 830 So. 2d 621, 623 (Miss. 2002) and *Miss. City Lines v. Bullock*, 194 Miss. 630, 639, 13 So. 2d 34, 36 (1943). Thus, where two defendants

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[22] For example, Rule 6.02 of the Uniform Chancery Court Rules requires attorneys for guardians to be diligent in the filing of accountings and requires the attorney, under penalty of contempt, to notify the court if the guardian is not fulfilling his duties. Likewise, Miss. Code Ann. § 91-7-283 requires the chancery clerk to annually compile a list of all guardians who have failed to make their annual accounts so that the court can in turn investigate the circumstances. Neither the attorney for the guardian nor the chancery clerk fulfilled these duties.

have been negligent, one passively and the other actively, and where the Supreme Court's *Campbell* factors apply exclusively to the active defendant and not at all to the passive defendant, it is error for the trial court to even consider, much less to award, punitive damages against the passive defendant.

The chancellor abused his discretion in entertaining punitive damages against BancorpSouth under these facts, and he was manifestly wrong and applied wrong legal standards in awarding them. This Court should reverse and vacate the award of punitive damages against BancorpSouth.

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

The Guardian deposited the guardianship funds into a variable rate savings account with Iuka Guaranty Bank on July 21, 1995. Less than two months later, the chancery court authorized the Guardian to make withdrawals from the account in the amount of $200.00 per month. The Guardian began to make withdrawals from the savings account in excess of the authorized amount in August of 1997, after the changeover of the computer system from Iuka Guaranty Bank to BancorpSouth. The Guardian exhausted the guardianship funds by July 1999. Notwithstanding this chronology, and notwithstanding that the savings account referenced in the bank's Receipt of Funds and Governing Court Order (Trial Exhibit 2, Ex. p. 11, R. E. 89) originally filed with court earned a variable rate of interest ranging from 0.75 percent to three percent from the date of the deposit to the Plaintiffs' respective twenty-first birthdays, the chancellor awarded the Plaintiffs prejudgment interest at the "legal" rate of eight percent, compounded annually (as opposed to simple interest), from the time of the original deposit to the date of judgment. The chancellor imposed this interest against BancorpSouth even though plaintiff Duckett turned 21 in August 2000 and plaintiff Williams, Jr. turned 21

in July 2002, at which times their respective guardianships terminated. The effect of this erroneous application of interest by the chancellor was to convert the deposit originally made by the Guardian from one which, with variable savings account interest, would have resulted in $144,747.60 for Duckett at age 21 and $146,038.66 for Williams, Jr. at age 21, to an investment yielding the kind of returns day-traders covet, resulting in a total of $555,218.62 for the Plaintiffs.[23] This result placed the Plaintiffs in a far better position than they would have had if the original deposit had never been touched until their respective twenty-first birthdays. This result also offended the fundamental purpose of compensatory damages, which is to make the injured party whole and be put in as good a position as if the other party had fully performed. *Brandon HMA v. Bradshaw*, 809 So. 2d 611, 618 (Miss. 2001); Miss. Code Ann. § 75-1-106(1). It is a highly inequitable result that cries out to be reversed.

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

Interest in this case is governed by Miss. Code Ann. § 75-17-7, which provides as follows:

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[23] The parties stipulated at trial what the Plaintiffs would have received from the original deposit had the Guardian perfectly performed his duties. *See* Trial Exhibit 34 (Ex. pp. 537-39, R. E. 95-97) and Trial Exhibit 37 (Ex. pp. 547-48.) Because the Plaintiffs reached majority at different times, Exhibit 34 divided the initial deposit of $267,233.00 equally between the Plaintiffs, $133,616.50 each, and accrued interest on those respective amounts at the varying savings account contract rate from the date of deposit until their respective twenty-first birthdays. Exhibit 34 also reasonably allowed for withdrawals of $100.00 per month as to each during that period based upon the September 1999 subsequent order of the court. Using this approach, by the parties' stipulation at trial (Trial Exhibit 34, Ex. pp. 537-39 R. E. 95-97; Trial Exhibit 37, Ex. pp. 546-47, ¶ VI. A., B.), 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.

> All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.

This case is within the first sentence of this statute if BancorpSouth is held to the terms of the variable rate savings account into which the guardianship funds were originally deposited. The Guardian deposited all of the $267,233.00 in a regular savings account to earn a variable rate of interest, and the Plaintiffs have never complained of that investment. In fact, it is the Plaintiffs' position that once the money was placed in that savings account, it should not have been touched without court order.

If BancorpSouth is to be held responsible for any interest at all, it should be calculated according to what would have been earned on the savings account as the first sentence of § 75-17-7 provides. There is a separate statute, Miss. Code Ann. § 93-13-57, which applies to guardianship funds, but that statute makes the guardian — *not* the depository, *not* the surety — liable for eight percent interest on all guardianship funds which are not needed by the guardian for current expenditures and for which the guardian does not obtain directions from the court as to how such funds should be invested. The purpose of this statute is to permit the court to supervise the guardian's investment of his ward's money; compliance with it by the guardian is mandatory. *Brewer v. Herron*, 171 Miss. 435, 157 So. 522 (1934).

There was in fact an order which authorized the guardian to deposit the guardianship funds in a "federally insured interest bearing account," not to be disbursed except upon further order of the court. (*See* Trial Exhibit 30, Ex. p. 111, R. E. 80.) That order says nothing about the rate of interest. If the lack of specification of a rate of interest in the deposit order (Trial Exhibit 30) is viewed as placing the case within the second sentence of § 75-17-7, then perhaps

it was for the chancellor to determine a rate of interest which was fair, but the statute absolutely prohibits the award of any interest prior to the filing of the suit, which in this case was June 23, 2004.

Instead, as authority for awarding prejudgment interest on the full amount of the Guardian's total original deposit of $267,233.00 at the "legal" rate of eight percent, the chancellor relied upon *Moeller v. Am. Guar. & Liab. Ins. Co.*, 812 So. 2d 953 (Miss. 2002). (Tr. 547:27-550:4, R. E. 42-45.) This was clear error and a misreading of the case law and applicable statutes.

Moeller makes it very clear that Miss. Code Ann. § 75-17-7 governs the awarding of prejudgment interest, both as to rate and the time from which such interest begins to run. 812 So. 2d at 958. The chancellor held that the rate of prejudgment interest to which the Plaintiffs were entitled was the "legal" rate of eight percent set forth in Miss. Code Ann. § 75-17-1(1) and that it would run at that rate from the date of the original deposit, July 21, 1995. (Tr. 554:6-10, R. E. 49.)

Section 75-17-1(1) governs the *maximum* amount of interest which may charged on contracts; it is Mississippi's usury law. As was made plain by this Court in *Moeller*, § 75-17-7 governs the rate of interest which may recovered in litigation, and that rate is one of two things: the contract rate if there is one or, if not, a rate determined by the court to be fair. But where a contract between the parties specifies a rate of interest, § 75-17-7 clearly and unambiguously requires the application of the contract rate. *Tower Loan of Mississippi, Inc. v. Jones*, 749 So. 2d 189, 191 (Miss. App. 1999) (reversing the trial court's award of eight percent interest and rendering judgment for the appellant at the parties' contract rate, 34.71 percent.) The second sentence of the statute also governs the time period for which prejudgment interest may be

awarded, plainly providing that it may be awarded "from a date determined by such judge to be fair *but in no event prior to the filing of the complaint.*" The chancellor ignored both the law and the evidence in awarding the Plaintiffs interest at eight percent from the date of the original deposit, something even the Plaintiffs did not request.

At trial the parties stipulated to calculations based upon the original deposit as made by the Guardian, then accruing interest at a variable savings rate. These stipulated calculations show how much interest would have accrued on the original deposit at this variable contract rate had the Guardian perfectly fulfilled his duties and BancorpSouth not committed the merger process oversight resulting in the dropped special instructions. *See* Trial Exhibit 34 (Ex. pp. 537-39, R. E. 95-97), Trial Exhibit 37 (Ex. pp. 547-48) and note 23, p. 60, *supra*. These facts in evidence and the existence of the variable contract rate and the propriety of its application were argued extensively and repeatedly to the chancellor by BancorpSouth (*see, e.g.,* Tr. 127:23-129:14; 270:12-271:3; 289:16-29), yet in his bench ruling the chancellor inexplicably stated,

> I realize that the respondents or defendants have contended that the variable interest rate should be applied on this from the time that it was deposited at the rate of .75 percent up to 3 percent. I don't find any document in this case that shows that, other than the fact that they are saying this is deposited at a variable interest rate.

(Tr. 553:23-554:1, R. E. 48-49.) Not only were these rates and calculations based on exhibits admitted into evidence which disclosed the variable interest rates in effect at all pertinent times (Trial Exhibit 34, Ex. pp. 537-39, R. E. 95-97), the parties *stipulated* to these factual calculations at trial. *See* Trial Exhibit 37, Ex. pp. 547-548, ¶ VII. A., B., which itself refers to an exhibit containing an alternative calculation (Trial Exhibit 29, Ex. pp. 101-03) likewise disclosing all of the variable interest rates. As such, the stipulation is not just binding on the

parties, but establishes boundaries beyond which the court cannot stray. *Wilbourn v. Hobson*, 608 So. 2d 1187, 1189 (Miss. 1992) (citing *Johnston v. Stinson*, 434 So. 2d 715 (Miss. 1983); *Vance v. Vance*, 216 Miss. 816, 63 So. 2d 214 (1953); *Stone v. Reichman-Crosby Co.*, 204 Miss. 122, 37 So. 2d 22 (1948)). The court may not make findings inconsistent with the parties' stipulation nor enter a judgment which is inconsistent with it. *Id.*

Further, to saddle BancorpSouth with liability for eight percent compounded interest *after* the Plaintiffs' respective twenty-first birthdays has the effect of shifting to BancorpSouth the liability of the Guardian for his failure to timely seek the court's authorization to distribute the assets to the Plaintiffs at majority. BancorpSouth certainly did not undertake that liability via the Waiver of Process and Entry of Appearance of Depository, the court orders, or otherwise. Here, had the Guardian faithfully performed his duties, regardless of whether BancorpSouth had made a mistake during the process of transferring computer data, the guardianship funds would have remained on deposit, earning interest at the savings account variable rate, until the Plaintiffs reached their respective twenty-first birthdays, at which time their shares, with interest, would have been disbursed to them according to the calculations stipulated by the parties in Trial Exhibit 34 (Ex. pp. 537-39, R. E. 95-97).

Section 75-17-7 unambiguously requires the application of a contract rate of interest in the event of an award of prejudgment interest. In ignoring that statute and the stipulation and exhibit establishing the existence of a contract rate on the deposit at issue and the calculation of that rate on the principal amount as originally deposited, the chancellor erred as a matter of law in awarding prejudgment interest in a vastly different amount over a vastly inappropriate time. He likewise ignored the fundamental that the purpose of an award of

damages is, so far as possible, to put a plaintiff where he would have been had the loss not occurred. *Miss. Chemical Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 370 (5th Cir. 2002).

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

The chancellor erred not only by awarding interest against BancorpSouth in excess of the contract rate, but also by compounding it at anything other than the variable rate. As authority for compounding interest at eight percent per annum, the chancellor relied upon *In re Guardianship of Timothy Wayne Helton*, an unreported 1984 decision of Chancery Court of Tishomingo County, affirmed *per curiam* at 460 So. 2d 1165 (Miss. 1985). The chancellor, at the urging of the Plaintiffs, placed considerable weight on *Helto*n and treated the result reached there as precedent. (*See, e.g.*, Tr. 97:19-98:1, R. E. 24-25.)[24]

Helton involved an action by four wards against their guardian and the depository of the guardianship funds, Tri-State Savings and Loan Association. The interest earned on the guardianship deposits was paid to the guardian without court approval. Tri-State made a loan to the guardian in his individual capacity, and when the loan matured, Tri-State took the guardianship deposits to pay the loan, also without court approval, even though Tri-State was on notice that the deposits were held by the guardian in trust for his wards. (R. 824-825.) On these facts, and without citation to legal authority, the chancery court required Tri-State to repay the deposit with compound interest at the contract rate but declined to award punitive damages or attorney's fees against Tri-State.

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[24] The court file in *Helton* was reviewed by the chancellor in this case. In ruling on the Plaintiffs' motion for summary judgment, the unpublished opinion in *Helton* was "made a part" of the chancellor's ruling and he "adopted" the opinion in support of his ruling in favor of the Plaintiffs. (Tr. 97:17-98:1, R. E. 24-25.) For this reason, the court file in *Helton* has been included in the record in this appeal. (R. 679-984.)

This Court has made clear that trial courts are not free to decide issues according to authority found in unpublished circuit court opinions. *Federated Mut. Ins. Co. v. McNeal*, 943 So. 2d 658, 661-662 (Miss. 2006). The same rule, of course, applies to unpublished chancery court opinions. Indeed, the Rules of Appellate Procedure define the precedential effect of the decisions of Mississippi's appellate courts and plainly provide that

> [o]pinions in cases decided prior to the effective date of this rule [July 25, 1996] which have not been designated for publication *shall not be cited, quoted or referred to by any court* or in any argument, brief or other materials presented to any court except in continuing or related litigation upon an issue such as res judicata, collateral estoppel or law of the case.

Rule 35-A(b), Miss. R. App. P. (emphasis added). The same rule also makes clear that *per curiam* affirmances have no precedential value. *See* Rule 35-A(c), Miss. R. App. P. This only makes sense, as there is no way for bench or bar to derive any precedential value from an appellate's court single word, "Affirmed", in connection with an unpublished trial court opinion. Thus, here it was incumbent upon the chancellor to apply the law of compound interest as established by the published opinions of this Court, not by referring to local chancery court files.

The variable rate savings account into which the Guardian made the original deposit provided for compound interest, but at the variable rates which ranged over time from 0.75 percent to three percent. Because the chancellor ignored the contract rate of interest, to be consistent he was bound to likewise ignore the compounding feature of the deposit unless other law justified the compounding of interest. The other law relied upon by chancellor as authority for his award of compounded interest (in addition to *Helton*) was *Jones v. Parker*, 216 Miss. 64, 61 So. 2d 681 (1952). In *Jones v. Parker*, a case involving a guardian's conversion of guardianship funds, this Court held that "[c]ompound interest ordinarily is chargeable in cases

of interest, if any, only at the contract rates set forth in the stipulated calculations set forth in Trial Exhibit 34 (R. 537-39, R. E. 95-97).

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

Prior to trial, BancorpSouth took the Guardian's deposition. The deposition was read into the record at trial. (Tr. 306:4-321:28.) In the deposition, the Guardian invoked his Fifth Amendment privilege against self-incrimination over and over, some 34 times, in response to questions concerning the guardianship. Later in the punitive damages phase of the trial, the Plaintiffs called the Guardian as a witness. When the Plaintiffs' counsel began to question the Guardian concerning the guardianship, BancorpSouth strenuously objected on the ground that the Guardian, having invoked the Fifth Amendment during discovery, could not waive the privilege at trial. (Tr. 328:11-330:13.) As grounds for the objection, BancorpSouth cited to the chancellor this Court's decision in *In re Knapp*, 536 So. 2d 1330 (Miss.1988). (Tr. 329:3-10.) Although the case was directly on point, the chancellor overruled the objection and allowed the Guardian to testify at trial concerning the very matters about which he had invoked the Fifth Amendment during discovery. (Tr. 330:13.)

In re Knapp involved an alienation of affection suit against Knapp. During his deposition, Knapp invoked his Fifth Amendment privilege against self-incrimination. The plaintiff argued that Knapp had waived this privilege by answering the complaint. This Court held that merely answering the complaint was not a waiver of the Fifth Amendment privilege. However, this Court made clear that

> [t]his does not mean that Knapp may sit silently until the time of trial and then take the witness stand and waive the privilege by testifying in support of the claims and denials of his answer. If he intends to waive his privilege, he must

> do so reasonably in advance of trial and afford [the adverse party] reasonable opportunity for discovery.

536 So. 2d at 1336, n. 12. The chancellor ignored this, despite having been cited directly to the case, and permitted the Guardian to testify at trial for the Plaintiffs as to matters which he refused to testify when BancorpSouth asked during discovery.

The Guardian, who remained silent concerning guardianship matters when BancorpSouth took his deposition, suddenly at trial began to testify in detail concerning his withdrawal of the guardianship funds: that he dealt with a female bank employee originally; that he did not know her name; that he thought she left the bank at some point; that afterward he dealt with a second female bank employee every time he made a transaction; that he did not know her name, either; that one day this second employee told the Guardian that he could withdraw what he wanted, even though he had previously been limited to $200.00 per month. (Tr. 330:13-332:1; 339:12-342:28.)

All of this testimony caught BancorpSouth by surprise and left the bank with no way to rebut the testimony through these unidentified bank employees, neither of whom had been previously disclosed to BancorpSouth, even though BancorpSouth had attempted to get the Guardian's story through discovery. The chancellor's permitting the Guardian's testimony under these circumstances was fundamentally unfair and unduly prejudicial and is why this Court held as it did in *Knapp*.

A fair question is why the Plaintiffs felt the need to offer the Guardian's live testimony at all. When BancorpSouth introduced his deposition at the actual damages phase of the trial, filled with invocations of the Fifth Amendment, the Plaintiffs *objected* on the grounds of relevancy. (Tr. 304:26-29.) However, in the later punitive damages phase, needing some way

to convert what was obviously simple negligence on the part of BancorpSouth into something that might fit under § 11-1-65, the Plaintiffs put the Guardian on live to testify to such preposterous claims as he abided by the court's orders and therefore assumed that BancorpSouth was in possession of a court order which allowed him to withdraw as much money as he wanted. (Tr. 347:22-348:2.) During discovery, BancorpSouth asked the Guardian about his banking transactions and was met repeatedly with the privilege against self-incrimination. During the punitive damages phase of the trial, the Plaintiffs asked the Guardian about his banking practices, and he sang like a bird.[25]

While the general rule is that uncontradicted and unimpeached testimony ought to be taken as true, an exception to that general rule is where the testimony is so improbable that it lacks credibility. *Denson v. George*, 642 So. 2d 909, 914 (Miss. 1994). The Guardian's testimony at trial was utterly without credibility. Moreover, it was contradicted and impeached by his own invocation of the Fifth during discovery, from which the chancellor should have drawn an adverse inference. Beyond this, the chancellor's allowing the Guardian to testify and apparently considering it in the punitive damages phase of the trial, is not mere harmless error. This Court has stated in a long line of cases that trial by ambush will not be condoned. In *Coltharp v. Carnesale*, 733 So. 2d 780 (Miss. 1999), this Court held that where a party has

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[25] This was congruent with the friendly relationship between the Plaintiffs and the Guardian — the perpetrator of the fraud for which the chancellor was so diligently searching — who was ultimately a mere nominal defendant. Only after BancorpSouth pointed out to the chancellor that the Plaintiffs were making no serious pursuit of the active tortfeasor (Tr. 109:17-110:19) did they perfunctorily apply for entry of default against him. (R. 216-218.) The Guardian's refusing to answer BancorpSouth's discovery questions and his helping the Plaintiffs advance their case by testifying for them exemplified the alliance between the Plaintiffs and the Guardian. At the end of each day's hearing, the Guardian went home to the house which he shared with plaintiff Williams, Jr., and which had been purchased with funds taken by the Guardian from the account at BancorpSouth. (*See, e.g.*, Tr. 175:5-13.)

sought information in discovery, it is reversible error to allow an adverse party to withhold it and then spring it upon the party for the first time at trial. In view of the fact that it was the Guardian, not BancorpSouth, who took the money, this Court should do what the chancellor failed to do — draw adverse inferences from the Guardian's hiding behind the Fifth Amendment when BancorpSouth zeroed in on the truth in discovery. *See, e.g., Morgan v. United States Fidelity & Guaranty Co.*, 222 So. 2d 820, 828 (Miss. 1969).

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

In addition to awarding to the Plaintiffs judgment against BancorpSouth for actual damages in the amount of $555,218.62, plus $1,000,000.00 in punitive damages, the chancellor also awarded to the Plaintiffs judgment against BancorpSouth for attorney's fees in the amount of $222,087.44. This was clear error and an abuse of discretion.

1. This was not a case for punitive damages, and no contract or statute otherwise authorized an award of attorney's fees.

The law in Mississippi has always been that attorney's fees may not be awarded unless a contract between the parties provides for it, a statute authorizes it, or an award of punitive damages is appropriate. *Hamilton v. Hopkins*, 834 So. 2d 695, 700 (Miss. 2003) and the many cases cited there.

As has already been shown, punitive damages against BancorpSouth were not proper in this case, whether under Miss. Code Ann. § 11-1-65 or otherwise. There is no contract applicable to this case which provides for recovery of attorney's fees, nor is there any statute so providing. It follows, then, simply, that the chancellor erred as a matter of law in awarding attorney's fees against BancorpSouth.

2. Even if an award of attorney's fees were appropriate, the Plaintiffs failed to offer sufficient evidence to establish the reasonableness of the fees.

The chancellor awarded the Plaintiffs attorney's fees against BancorpSouth in the amount of forty percent of the actual damages awarded. The forty percent figure was drawn from employment contracts signed by each of the Plaintiffs with their attorney. (Trial Exhibits 12 and 13; Ex. pp. 37-38.)

Even if an award of attorney's fees were appropriate here, which BancorpSouth strongly urges is not the case, it does not follow that the amount of attorney's fees which was agreed between the Plaintiffs and their attorney is what should automatically be assessable against a defendant such as BancorpSouth. 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). To determine what is reasonable, the trial court must consider the factors set forth in Rule 1.5 of the Mississippi Rules of Professional Conduct. Those factors, sometimes called the *McKee* factors,[26] are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;

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

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Ford Motor Co. v. Tennin, 2007 Miss. LEXIS 201 (Miss. April 5, 2007); *Miss. Power & Light Co. v. Cook*, 832 So. 2d 474, 486 (Miss. 2002). Awards of attorney's fees must be based on these factors. *BellSouth Personal Communications, LLC v. Board of Supervisors*, 912 So. 2d 436, 445 (Miss. 2005). Moreover, a chancellor's award of attorney's fees must be supported by factual determinations. *Browder v. Williams*, 765 So. 2d 1281, 1288 (Miss. 2000).

Evaluation of these factors begins with the first:

> [T]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services . . . .

BellSouth Personal Communications, supra, at 446-47, *quoting In re Estate of Gillies*, 830 So. 2d 640, 645 (Miss. 2002) (*citing Mauck*, 741 So. 2d at 271) (*quoting Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). The record in this case is devoid of any evidence of the number of hours spent by the Plaintiffs' counsel. In fact, the Plaintiffs' counsel candidly admitted that he did not keep any record of his hours in this case. (Tr. 482:23-483:3.) In two reported cases in which a chancellor rejected a contingency fee arrangement in favor of an alternative fee based upon the number of hours reasonably expended, the attorney had kept track of his time and was able to provide that information to the court. *Mauck*, 741 So. 2d at 270; *In re Estate of Gillies*, 830 So. 2d at 646.

The chancellor was not troubled by the lack of time records, however, and instead employed Miss. Code Ann. § 9-1-41 as a substitute for the *McKee* factors. (Tr. 560:17-561:5, R. E. 55-56.) Section 9-1-41 provides

> [i]n any action in which a court is authorized to award reasonable attorneys' fees, the court shall not require the party seeking such fees to put on proof as to the reasonableness of the amount sought, but shall make the award based on the information already before it and the court's own opinion based on experience and observation . . .

To the contrary, 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, supra*, 832 So. 2d at 487.

In this case, the chancellor basically "rubber stamped" the forty percent contingency provision of the Plaintiffs' contract with their attorney without application of the *McKee* factors and without factual determinations based upon those factors. In doing so, the chancellor abused his discretion and committed reversible error.[27]

V. CONCLUSION

For all of the foregoing reasons argued, 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, if the statute of limitations which is applicable to BancorpSouth is Miss. Code Ann. § 15-1-49, then, (*a*) as to plaintiff Albert Jermaine Duckett, this Court should reverse the Final Judgment of the lower court and render judgment in favor of BancorpSouth, and (*b*) as to plaintiff Walter Williams, Jr., this Court should reverse the Final

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[27] He also acted inconsistently with the law of the case as established through his reliance on *In re Guardianship of Timothy Wayne Helton*, the unreported decision of Chancery Court of Tishomingo County which the chancellor followed in some regards and not in others. The court in *Helton* declined to award attorney's fees to the plaintiffs in that case. *See* discussion *supra* at pp. 65-67.

Judgment of the lower court and render judgment in favor of plaintiff Walter Williams, Jr. and BancorpSouth in the amount of $74,038.66, being

(*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

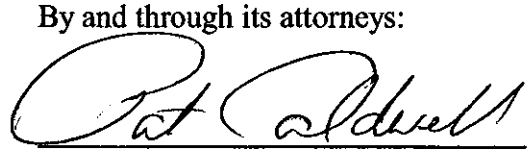
(*iii*) *less* $25,000.00, being one half of the bond amount recovered by the Plaintiffs from Saint Paul Insurance Company as the Guardian's surety.

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 amount of its "bond," $100,000.00.

Respectfully submitted,

BANCORPSOUTH BANK

By and through its attorneys:



PAT CALDWELL
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CERTIFICATE OF SERVICE

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

John R. White, Esq.
Post Office Box 557
Fulton, Mississippi 38852

Honorable Talmadge D. Littlejohn
Chancellor
Post Office Box 869
New Albany, Mississippi 38652

THIS, the 3rd day of July, 2007.

PAT CALDWELL
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