IN THE SUPREME COURT OF MISSISSIPPI
DOCKET NO. 2007-CA-01406

EDWARD S. BALLARD

PLAINTIFF/APPELLANT

VERSUS
COMMERCIAL BANK OF DEKALB

DEFENDANT/APPELLEE

Civil Appeal from Chancery Court
of Chickasaw County, Mississippi;
Civil Action No. 2004-0058-2-B

APPELLANT'S REPLY BRIEF

Barfield & Associates
WES W. PETERS ([redacted]
121 Village Boulevard
Madison, Mississippi 39110
Telephone: (601) 856-6411
Facsimile: (601) 856-6441

Attorney for Edward S. Ballard, Appellant

ORAL ARGUMENT REQUESTED

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I. JUST AS IT DID IN THE TRIAL COURT, THE BANK RESTATES THE PLAINTIFF'S CLAIM IN ORDER TO AVOID ADDRESSING PLAINTIFF'S ACTUAL CLAIM

Appellee's Brief serves as a perfect illustration of how it was able to prevail in the Trial Court. Before the Bank presents any facts or argument, the Bank restates the Plaintiff's claim, so that all of its facts and arguments address a completely different claim. Specifically, the Bank proffers that the Plaintiff is claiming that both deeds of trust are complete nullities, as if neither had ever been signed or come into existence. (Appellee's Brief at p. 1) By restating the Plaintiff's claim in this manner, not only does the Bank create a situation for the misapplication of law and a skewed consideration of the evidence, but the Bank can actually make it sound like this case is nothing more than a provider of security becoming unhappy, when the underlying debt cannot be repaid by the debtor. There can be no doubt that this tactic of restating the Plaintiff's claim was successful in the Trial Court, because the Bank similarly begins its argument before this Court by citing the fact that the Trial Court explicitly adjudicated that Mr. Ballard was seeking to declare both deeds of trust complete nullities.[1] (Appellee's Brief at p.1)

However, that is, very simply, not the Plaintiff's claim. Plaintiff never attempted to disavow the terms of the deed of trust which was executed before the Bank made any of the loans in dispute to Mr. Moody. To the contrary, the Plaintiff relied on the June 29, 2001 deed of trust to evidence the fact that the farm was not intended to stand as security for any debt, unless the

[1] As will be addressed in Section IV of this Brief, this restatement of the Plaintiff's claim was not the only one that the Bank proffered and the Trial Court adopted to address something other than what the Plaintiff's claim actually was.

of trust to foreclose on the family farm for the debt of Mr. Moody. In sum, the Plaintiff's claim was that the deed of trust which was executed before the Bank loaned the first dime in dispute to Mr. Moody should control, not that it was a complete nullity, as suggested by the Bank and adopted by the Trial Court.

Nevertheless, by successfully convincing the Trial Court that Plaintiff was attempting to disavow both the before the fact deed of trust as well as the after the fact deed of trust, the Bank provided the Trial Court with an improper skew in its consideration of the evidence and convinced the Trial Court to apply rules of law in a manner which were the exact opposite of the way they would actually apply to Plaintiff's claim. Exactly how this improper statement of the Plaintiff's claim skewed the Trial Court's consideration of the evidence and caused it to misapply the rules of law will be discussed in the Sections II and III of this Brief.

II. HOW THE BANK'S RESTATEMENT OF THE PLAINTIFF'S CLAIM CAUSED THE TRIAL COURT TO IMPROPERLY APPLY THE RULES OF LAW

Prevalent throughout Appellee's Brief and its submissions to the Trial Court, as well as the Trial Court's Opinion, are an abundance of citations to the rule of law:

(1) that a person is charged with knowledge of a document he or she signs, whether he or she actually reads the document or not; and,

(2) that a party may not rely upon an oral representation which contradicts the terms of a written agreement; and,

(3) that two documents can be construed together, even if they are executed at different times.

Plaintiff does not dispute these rules of law. Since Plaintiff does not dispute these rules of law, and citations in support thereof are abundantly contained within the Briefs and the Trial Court's opinion, they will not be repeated herein again.

However, inasmuch as the Bank was obviously able to persuade the Trial Court that the Plaintiff was seeking to disavow both of the deeds of trust, when that was not Plaintiff's claim, Plaintiff respectfully submits that the Bank was able to get the Trial Court to misapply these rules of law.

Specifically, if a person is chargeable with knowledge of a document it prepares or signs, whether it reads the document or not, this would mean that both the Bank and Mr. Ballard were charged with knowledge that the June 29, 2001 deed of trust provided that the farm would not stand as security for a loan, unless Mr. Ballard was advised and consented in writing to a particular loan being placed against the deed of trust, precisely as Plaintiff claimed. (P-1) (R.E. p. 27) In other words, if both Mr. Ballard and the Bank would have read the only deed of trust which existed during the time the Bank was making loans to Mr. Moody, both the Bank and Mr. Ballard would have known that the farm would not stand as security for any of these loans, unless Mr. Ballard was advised and specifically consented in writing to the loan. Conversely, this also means that Mr. Ballard would have no reason to believe that the Bank would be trying to place loans against his property without his knowledge or consent

However, after citing the rule of law that a person is charged with knowledge of a document he signs, the Trial Court actually adjudicated that the Bank had no knowledge of the terms of the document it drafted, and specifically adjudicated that "Ballard had no reasonable

expectation that he would be contacted for prior approval". (R. Vol.4 p.459 at paragraph 24, p. 461 at paragraph 31) (R.E. p. 16 at paragraph 24 and p.18 at paragraph 31)

It is inexplicable how the Trial Court could cite the referenced rule of law, then explicitly adjudicate that it should not apply to the Bank with respect to the very deed of trust it drafted before it ever made a single one of the disputed loans to Mr. Moody. As it respects the Plaintiff, however, since the Trial Court viewed the Plaintiff as attempting to disavow both of the deeds of trust, the Trial Court obviously thought that it did not matter that the two deeds of trust contained materially different language as it respects the central issue before the Court. Instead, since it viewed the Plaintiff as disavowing both deeds of trust, the Trial Court specifically adjudicated that it was simply going to interpret the two deeds of trust as one, such that, anything that was missing or different from the deed of trust that was drafted before the Bank ever made a single one of the disputed loans to Mr. Moody could be supplied or changed by the deed of trust it drafted after it learned that Mr. Moody had no money to pay a dime in interest, principal or refinancing fees on any of the loans, and that Mr. Moody was bouncing every check in his checking account.[2] (R. Vol. 4 p. 460) (R.E. . 17)

However, to correctly apply this rule of law to the claim the Plaintiff was actually making would necessarily mean that the Bank must be charged with knowledge that the farm could not be used as security unless Mr. Ballard was advised and consented to the loan and that Mr. Ballard had every right to rely on this term. That is precisely why the Bank determined that it was necessary to convince the Trial Court, and now this Court, that the Plaintiff was simply trying to

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[2] The Trial Court's adjudication that it could use the later deed of trust to change the terms of the first is discussed *infra.*

disavow both of the deeds of trust, so that any distinction between the two does not matter.

Further, as referenced above, also prevalent throughout the Appellee's Brief, its submissions to the Trial Court and the Trial Court's opinion are citations to the rule of law that a person may not rely upon claimed oral promises or representations which contradict the terms of a written document. However, it was the Bank that was relying on a claimed oral representation to contradict the terms of the written document, not the Plaintiff. The only deed of trust which existed before or while the Bank was making all of these loans to Mr. Moody was the June 29, 2001 deed of trust which provided that the farm would not stand as security for a loan unless Mr. Ballard was apprised and agreed in writing to the loan. It was the Bank that claimed that, despite the terms of the written document, the actual oral discussions between the parties were that Mr. Ballard did not care anything about the loans and that the Bank could put whatever loans it wanted to of Mr. Moody against the farm, without ever telling the Plaintiff anything about the loans.

Obviously, however, since the Trial Court viewed Mr. Ballard as disavowing both of the deeds of trust, the Trial Court determined that these claimed oral discussions should control to contradict the terms of the June 29, 2001 deed of trust.

Finally, prevalent throughout Appellee's Brief, its submissions to the Trial Court and the Trial Court's opinion are citations to the rule of law that two documents can be construed together as part of the same transaction, even if the documents are signed at different times. Admittedly, this is a rule of law and a good rule of law, as anybody who purchases, finances and insures a home, car, piece of equipment or most anything are called upon to sign multiple documents which form a part of the same transaction and which should obviously be construed

together for any misunderstanding about the complete terms of the deal. Here, however, we are talking about the parties preparing and executing a deed of trust before the first disputed loan is ever made to Mr. Moody; as compared to a completely different deed of trust which the Bank drafted after it learned that Mr. Moody could not pay a dime in interest, principal or financing fees on any of the loans which had already been renewed several times over, was bouncing every check in his checking account and did not have a dime to his name.[3] The cases cited by the Bank and adopted by the Trial Court simply do not support construing two such documents together.

Specifically, the Bank and the Trial Court rely upon the case of *Phillips Petroleum v. Stack*, 231 So. 2d 475 (Miss. 1970) as supportive of using an after the fact deed of trust to change the terms of the deed of trust which was drafted before the first disputed loan was made. However, in *Phillips Petroleum v. Stack*, the two documents at issue were a farm out agreement dated December 10, 1959, relating to the proposed assignment of certain oil and gas leases for exploration and possible production and the actual assignment of those leases **dated the following day**, December 11, 1959. In the transmittal letters for execution of each of these documents, both of the documents were always referenced, and it was specifically directed that

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[3] The Bank does not dispute the fact that it knew that several of these notes were several years old and had never been repaid in accordance with the parties' original agreement, that the notes had already been renewed several times over, that it knew that Mr. Moody did not have any money to pay a single dime of interest, principal of even refinancing fees, that is had asked for but received nothing to show that Mr. Moody had any income or any timber left on any of the tracts of land and that Mr. Moody was bouncing every check out of his checking account. The only thing the Bank disputes is that any of these facts should cause it to believe that Mr. Moody may not be able to repay the loans. In other words, simply because a dog is not moving, not breathing and has no brain or heart function should not give anyone cause to believe that the dog may be dead.

the assignment should not be delivered to the assignee until the farm out agreement was executed.

The farm out agreement stated that the consideration for the impending assignment was the assignee's agreement to drill two exploration wells. However, the actual assignment, dated the following day, simply recited that the consideration for the assignment was the typical $10.00 cash in hand paid, the receipt and sufficiency of which was acknowledged. Obviously, however, since the two documents formed part of a single transaction, the parties always referenced both as forming a part of the same transaction when executing the documents as well as the very simple fact that no entity could have possibly drilled two exploratory wells between December 10, 1959 and December 11, 1959, the documents had to be considered together as part of the same transaction, even though they were dated one day apart.

After the exploratory wells had been drilled and it was apparently determined that they were not as productive as possibly hoped, the assignee wrote the assignor attempting to get the assignor to reduce its royalty interest as provided in the agreements. In return, the assignee advised that it would seek renewal of the underlying leases from the lessors. However, the assignor pointed out that the terms of the farm out agreement explicitly provided that the assignor was entitled to the same royalty interest on any renewals or extensions of the underlying leases, whether they were procured by the assignor or the assignee. In response, the assignee, while admitting that the parties had fully performed their respective obligations as set forth in both the farm out agreement as well as the assignment, proffered that this one term of the farm out agreement was merged into and overridden by its omission in the actual assignment of the following day. Obviously, this Court rejected that argument and held that the farm out

agreement and the assignment formed one transaction, despite the fact that they were dated on subsequent days.

Similarly, in *Rocks v. Brosius*, 241 Md. 612, 217 A. 2d 531 (Md. 1966), cited by Appellee, the Trial Court, and this Court as supportive of its opinion in *Phillips Petroleum v. Stack, supra,* the two documents at issue were a lease between a landowner and a developer, dated August 4, 1962, which specifically referenced the parties' contemplation of a sublease between the developer and a builder and incorporated the terms of any such sublease into the underlying lease, and the actual sublease between the developer and the builder of the development dated later that same month, August 23, 1962.[4]

In this case, however, we do not have anything which is even remotely similar to a farm out agreement which is explicitly drafted in contemplation of an assignment, a lease which is explicitly drafted in contemplation of a sublease, or a home or car which is purchased in contemplation of insurance and financing. To the contrary, in this case, we have a deed of trust which is drafted before the Bank made a single one of the disputed loans to Mr. Moody, with no

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[4] Notably, the Trial Court also cited *Security Mut. Finance Company v. Willis*, 439 So.2d 1278 (Miss. 1983), as standing for the proposition that a supplemental contract may be entered to explain or supplement an existing contract; and *Wilson Industries, Inc. v. Newton Bank*, 245 So.2d 27 (Miss. 1971) as standing for the proposition that a construction must be placed on each of the documents entered as part of an overall transaction which will be consistent with the dominant purpose of the parties. (R. Vol. 4 p. 460)(R.E. p. 17) These cases were cited in precisely the same manner as standing for precisely the same propositions in the Bank's proposed findings of fact and conclusions of law. However, if one actually reads these cases, it is realized that in *Willis*, what this Court actually held was that one party **could not** use a prior course of dealing for one business dealing to supplement a contract entered into for another business dealing, even if it was between the same parties. Similarly, in *Wilson Industries*, this Court was not even addressing two documents executed at different times. To the contrary, all of the documents at issue were signed at one time as part of a single comprehensive closing of a deal.

explanation as to why a second deed of trust, would, should or did even come into existence at all.

Further, we are not talking about one day between the execution of a farm out agreement and the assignment it contemplates, or a lease which is executed 19 days before the sublease is executed or multiple documents which are executed at a single comprehensive closing of a deal. To the contrary, we are talking about a deed of trust, for which-according to the Bank, there was never any need for a second deed of trust; but which nonetheless is drafted 2 1/2 years and $600,000 after the fact, at a time when the Bank knew that Mr. Moody could not pay a dime of principal, interest or refinancing fees, was bouncing every check in his checking account and did not have a dime to his name.

Finally, we are not talking about a second document which explains the terms of the first, but one which completely changes it from one in which no trustee could foreclose for the disputed loans to one which the Bank would then seek to use for that very purpose.

However, since the Trial Court adopted the Bank's restatement of the Plaintiff's Claim, and saw the Plaintiff as attempting to disavow both of the deeds of trust, the Trial Court obviously determined that a second deed of trust which existed for no known purpose and which came about 2 years and $600,000 after the fact, at a time when the Bank knew that Mr. Moody did not have a dime to his name, could be interpreted as one.

However, Plaintiff respectfully submits that the proper application of each of the above referenced rules of law means: (1) that the Bank is chargeable with the knowledge that it could not use the June 29, 2001 deed of trust to foreclose for the debts of Mr. Moody, when it never advised the Plaintiff of a single one of those loans, (2) that the June 29, 2001 deed of trust

entitled the Plaintiff to be advised and consent to a loan for Mr. Moody before the farm could be used as security therefore, (3) that the Bank is not entitled to rely on alleged oral discussions that the Plaintiff did not care about any of the loans and provided the Bank *carte blanche* to put whatever of Mr. Moody's loans against the farm it wanted to without ever advising the Plaintiff of anything, and (4) that a second document which was never contemplated at the time of the first, which came into existence for no known purpose, with no discussions of any sort between the parties to the document, and which came into existence totally and completely after the fact should not be interpreted as one document with the first.

III. HOW THE BANK'S RESTATEMENT OF THE PLAINTIFF'S CLAIM CAUSED THE TRIAL COURT TO IMPROPERLY CONSIDER THE EVIDENCE

Not only did the Bank's Restatement of the Plaintiff's claim cause the Trial Court to incorrectly apply the rules of law, but it also caused the Trial Court to improperly consider the evidence. Specifically, by believing that the Plaintiff was attempting to disavow both of the deeds of trust, the Trial Court obviously believed that Mr. Ballard was claiming that he never had any discussion with the Bank concerning the financing of loans for Mr. Moody business. Accordingly, the Trial Court viewed anything that associated the two as impeaching of Mr. Ballard's claim and supportive of the Bank's claim.

To illustrate, as Appellee references in its Brief, the Trial Court held that "Mr. Ballard judicially admitted the purpose of the first deed of trust was to provide a 20% equity cushion as additional security for the financing of Kiley's timber business"; and just as the Appellee does in its Brief, the Trial Court cited every little item the Bank proffered about a relationship between

the two, from loaning Mr. Moody $5,000 to loaning him gas money. The Trial Court held that each and everyone of these facts impeached the Plaintiff's claim and supported the Bank's claim. (R. Vol. 4 p. 453-462)(R.E. p. 10-26)

However, Mr. Ballard never suggested that there was no relation between the two. To the contrary, the Plaintiff merely claimed that the farm was not to stand as security for Mr. Moody's loans, unless Mr. Ballard was advised of and consented to the loan. In this regard, the undisputed proof was that Mr. Moody had been able to obtain several loans for his business from the Bank, including six figure loans, before the Bank ever met Mr. Ballard. (R. Vol. 5 p . 111-112)) Accordingly, Mr. Moody was obviously able to supply that requisite 20% equity on these loans without any assistance or additional collateral from Mr. Ballard. It was also undisputed that, with respect to one loan in May of 2001, Mr. Moody could not come up with the requisite 20% equity. In this regard, there is also no dispute that Mr. Ballard was specifically consulted about that loan, advised that it was a loan for which Mr. Moody was ready to harvest the timber, that the loan would be repaid in full within a period of 30-60 days; and there is no dispute that Mr. and Mrs. Ballard agreed to pledge some stock as collateral for that loan, that the loan was repaid within 30 days, and the Ballard's retrieved their stock after the loan had been repaid in full.[5] (R.

[5] It is acknowledged that the Bank tried to explain that the pledging of this stock for this loan was simply some sort of interim deal until the Bank could take some unidentified action to take the farm as collateral; and it is acknowledged that the Trial Court adopted the Bank's explanation, without requiring any proof or even an explanation as to what it was the Bank was supposedly waiting on to take the farm as collateral. However, this proffered explanation by the Bank is totally and completely unsupported by any evidence in the record and makes no sense whatsoever. Specifically, if Mr. Ballard was going to travel from Alabama to Dekalb with his stock for the purpose of pledging it as some sort of interim deal to use the farm as collateral, why would he not also come with a copy of the deed to the farm or whatever else the Bank needed to take the farm as collateral. Moreover, the Bank admitted that, at no time prior to November of 2003-when it drafted the completely different deed of trust, did the Bank ever seek or obtain any

Vol. 5 p. 112) (P. 24 at 6-11)

What is most shocking about the Trial Court's conclusion that this evidence amounted to a "judicial admission" which supported the Bank's claim and required it to reject Mr. Ballard's restated claim, however, is that the Trial Court never required the Bank to prove that a single one of the loans at issue required the use of the farm as some sort of necessary 20% equity injection. To the contrary, it was clear beyond peradventure that the Bank was not trying to use the deed of trust to supply some missing 20% equity injection. Rather, the Bank had renewed each of the loans several times over, which is precisely what allowed Mr. Moody to harvest and sell the timber out of trust and leave the Bank with none of the collateral which had been pledged for each of these loans; and the Bank was now seeking to use the farm as 100% of the collateral for each of these loans.[6]

In sum, since the Trial Court adopted the Bank's statement of the Plaintiff's claim, as opposed to what the Plaintiff's claim actually was, the Trial Court viewed absolutely anything that established any remote financial connection between Mr. Ballard and Mr. Moody as

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kind of title certificate, appraisal or anything on the farm so that it could take it as collateral. In sum, the Trial Court simply adopted the Bank's explanation that it was waiting on some unidentified something to take the farm as collateral, when it never did or sought to do whatever that unidentified something was until after it drafted the new and completely different deed of trust, at which time they did it immediately.

[6] As a matter of fact, when it was discovered that Mr. Moody's checking account showed payments on loans which were not credited by the Bank, the Plaintiff asked for a complete accounting of each loan, when payments were credited to each of these loans as well as an accounting to show where these payments recorded in Mr. Moody's checking account were applied, the Trial Court rejected Plaintiff's request to have the Bank account for these matters. (R. Vol. 7 p.322, 351-354). However, the Bank was never made to account for these loans and the payments applied thereto, so as to completely negate the Plaintiff's rights as provided by Miss. Code Ann. 89-1-59.

impeaching of the Plaintiff's claim and supportive of the Bank's claim, to the extent that it even characterized the evidence of the 20% equity injection as a "judicial admission", even if it was not going to require the Bank to prove that any such injection was ever needed with respect to a single one of these loans and it was going to allow the Bank to use the farm as its only collateral for these loans.

However, if this evidence is considered in the context of what Plaintiff's claim actually is, there was never any dispute that the Bank and Mr. Ballard did, in fact, have a discussion about loans being made for Mr. Moody's business; and this discussion resulted in the drafting of the only deed of trust which ever existed while all of these loans were being made. Further, as opposed to some "judicial admission" in favor of the Bank and against the claim of Mr. Ballard, it clearly shows that the Bank made numerous loans which never required a 20% injection from Mr. Ballard; when a 20% equity injection was needed from Mr. Ballard, he was specifically consulted and specifically agreed to the loan in which it was needed, and not a single one of the loans in dispute contains a single reference to the Chickasaw County property being pledged to supply any deficiency in the collateral which was otherwise being taken at the time the loans were made. (R. Vol. 5 p. 82-83) In sum, this "judicial admission" was totally and completely consistent with the Plaintiff's actual claim and completely contrary to the manner in which the Bank was now seeking to use the deed of trust.

IV. THE BANK'S STATEMENT OF THE ISSUE IS NOT THE ONLY RESTATEMENT OF PLAINTIFF'S CLAIM WHICH WAS OFFERED BY THE BANK AND ADOPTED BY THE TRIAL COURT

As shown, the Bank does not feel comfortable presenting any facts and arguments, unless it first restates the Plaintiff's claim into something other than what it is. However, the restatement of Plaintiff's claim which appears at the beginning of the Bank's Brief before this Court is not the only one it offered which was adopted by the Trial Court. Specifically, as can be seen throughout the Bank's Brief, the Bank proffers the alternative argument that what the Plaintiff seeks to do is exclude any extrinsic evidence surrounding the execution of the first deed of trust, but offer extrinsic evidence surrounding the second deed of trust. The Trial Court also adopted this alternative statement of the Plaintiff's claim as well.

> He contends the first deed of trust should be construed without reference to extrinsic evidence, while the second should be construed with reference to extrinsic evidence. That Mr, Ballard may be satisfied with the first as written but dissatisfied with the second as written does not justify his illogic. The law does not permit him to have it both ways. To the extent that he relies upon extrinsic evidence to invalidate the second, he ignores the rules of construction upon which he relies to invalidate the first.

(R. Vol.4 p.460-461) (R.E. p.17-18)

However, this Court can review the entire record in the Trial Court; and not once will it find a single Motion *in Limine* or objection in which the Plaintiff sought to exclude any extrinsic evidence related to the deeds of trust. To the contrary, the only place anything can be found in the record about Plaintiff seeking to exclude extrinsic evidence related to the deed of trust is in the Bank's arguments and proposed findings of fact and conclusions of law; and again, the Trial Court simply adopted what the Bank said the Plaintiff was claiming as opposed to what the Plaintiff was actually claiming

As a matter of fact, the Trial Court makes no reference as to what the extrinsic evidence is that the Plaintiff was supposedly trying to exclude. However, the record will clearly show that

both Mr. and Mrs Ballard offered their testimony as to what was said when the June 29, 2001 deed of trust was signed. (R. Vol.6 p. 179)(P-24) Conversely, when the Bank tried to offer extrinsic evidence relating to the first deed of trust, it could not even be consistent. Initially, the Bank attempted to proffer that the June 29, 2001 deed of trust was supposed to secure each and every loan of Mr. Moody; and the only reason no specific notes were listed on the deed of trust was because none existed at the time the deed of trust was executed. However, when it was discovered that two of the notes which it listed on the second deed of trust did exist at the time the first deed of trust was executed, it changed its extrinsic proffer to say that it was supposed to secure any and all debts of Mr. Moody except the two that existed at the time the first deed of trust was executed. Again, however, proof of this extrinsic inconsistency was proffered by the Plaintiff in support of its claim, not sought to be excluded by the Plaintiff. (P-16)

Further, it was the Plaintiff that proffered evidence that, except for one instance in May, 2001, Mr. Moody had obtained multiple loans, including six figure loans, without the need for further equity to be supplied by a third party. (R. Vol. 5 p. 111-112) Further, it was the Plaintiff that offered evidence that, with respect to that one situation, the loan was to be repaid in short form, it was repaid in short form and the Plaintiff immediately retook his security. Further, it was the Plaintiff that put on proof that, if the first deed had been intended to secure all of Mr. Moody's loans, there were two loans outstanding at the time the first deed of trust was executed that could have been specifically referenced on the deed of trust, but were not. (R. Vol. 5 p. 61-67) Further, it was the Plaintiff that put on proof that the Bank never obtained a title opinion or appraisal of the subject property when the first deed of trust was executed, and it was the Plaintiff who put on proof of each and everyone of the disputed notes in issue which could be produced by

the Bank; and it was the Plaintiff that put on proof that not a single one of those notes referenced the Chickasaw County property standing as security therefore. (R. Vol. 5 p. 82-83 (P-3-P11)

In sum, like its initial statement of the issue, Appellee proffered that Plaintiff sought to exclude extrinsic evidence related to the first deed of trust; and the Trial Court adopted this conclusion. However, there is not a single Motion *in Limine* or objection in the record seeking to exclude any such evidence; and in fact, the Plaintiff put on an abundance of extrinsic proof surrounding the execution of the June 29, 2001 deed of trust.

V. THE BANK EVEN CLAIMS THAT IT WAS THE PLAINTIFF THAT SHOULD HAVE BEEN HELD TO THE BURDEN OF REFORMING THE DEED OF TRUST

The reason it is so paramount that the Bank restate the Plaintiff's claim and direct the entirety of its facts and arguments to that restatement of the claim, is because the Bank well knows that its own claim is based on the fact that it made a mistake in drafting the June 29, 2001 deed of trust; and it knows that there is no way that it can prove that it is entitled to reform that deed of trust after the fact. Again, there can be no reasonable dispute that there is not a trustee in this state who could have used the June 29, 2001 deed of trust to foreclose on the farm for debts of Mr. Moody of which the Plaintiff was never apprised.

In its initial Brief before this Court, Plaintiff went into great detail about how the Bank's claim compelled it to prove that it was entitled to reform the deed of trust which it claims it mistakenly drafted; and how it could not meet that burden of proof. In response, the Bank merely offers the summary conclusion, without explanation, that it was the Plaintiff that bore the burden

of proof to reform the deed of trust. That makes no sense. It was the Bank that claimed that the deed of trust it drafted before it ever made a single one of the disputed loans to Mr. Moody contained a mistake. As drafted, the June 29, 2001 deed of trust compelled the Bank to advise the Plaintiff when it was making a loan for which the farm would be used as collateral and have the Plaintiff consent to the property being placed against the loan. It is not the Plaintiff that claims that the document should have said that Mr. Ballard did not care about the loans and for the Bank to simply place whatever loans against the property it wanted to.

Clearly, it is the party that claims that it made a mistake in the deed of trust it drafted before anything occurred and claims that it should have said that the Bank had *carte blanche* to put whatever loans against the property it wanted to that bears the burden of reforming a document that provides that the grantor must have knowledge and consent to the loans being placed against it. The Banks knows that it cannot meet this burden. Therefore, it offers nothing more than "nuh unh", it was your burden to make our document say what we wanted it to say. That argument simply makes no sense, and the Bank has offered nothing to support it.

VI. THE BANK REFUSES TO EVEN DISCUSS THE EQUITIES BETWEEN THE PARTIES

Plaintiff strongly believes that a proper application of the referenced rules of law to the facts compels a finding that the Bank was charged with knowledge that the deed of trust it drafted before it made a single loan to Mr. Moody could not be used to secure undisclosed and unconsented debts of Mr. Moody, and that the Bank cannot claim that the deed of trust it drafted was wrong and should have provided it *carte blanche* authority to put any loans against the

property that it wanted to; and at the same time, fail and refuse to meet its burden to reform the document to say what it wanted it to say. However, there should also be some consideration of where the equities lie.

As Plaintiff addressed in its initial brief before this Court, the Bank had a number of opportunities to avoid the situation in which it now finds itself. If it claims the deed of trust is wrong, it could have certainly drafted it correctly. The Plaintiff certainly had nothing to do with creating the mistake the Bank claims exist. This was solely and exclusively the doing of the Bank. The Bank could have demanded that each note be repaid in accordance with its terms; it could have advised the Plaintiff and obtained his consent in order to place any specific note against the property, as the deed of trust required; it could have checked on the status of the property it was taking as collateral when each note matured, as opposed to waiting two years and $600,000 later; it could have acted to reform the deed of trust when it wanted to place it against the first note, or the second or the third; it could have refused to make any new loans until Mr. Moody paid something on his older notes, as originally agreed. The Bank could have done any number of things, and Mr. Ballard could not have done a single thing, since he did not even know about a single one of the loans either when they were made, when they matured or when they were renewed. The Bank was in total and complete control of everything which could have avoided the situation in which it now finds itself; and Mr. Ballard was in control of nothing. There is simply no equity in this entire situation which weighs in favor of the Bank and against the Plaintiff.

Moreover, not only do we have to look at the equities of the situation as it existed before and during the time that all of these loans were being made, but we also have to look at the

equities of the situation as it existed in November, 2003. At that time, whether you believe the Bank's *conclusion* that it did not consider the loans to be in default, the Bank did know, as *fact,* that Mr. Moody had loans which were over two years old, which had never been repaid and which had matured on more than one occasion without being repaid in accordance with the terms of the original loan. The Bank also knew, as *fact,* that these loans totaled over $600,000; and Mr. Moody did not have a dime to pay off, or pay anything, on the interest, principal or refinancing fees for renewing a single one of his outstanding loans. The Bank also knew, as *fact*, that Mr. Moody was bouncing virtually every check in his checking account. The Bank also knew, as *fact*, that it did not know a single thing about what timber may be left on any of the property which had been taken as security; and the Bank also knew, as *fact,* that it had asked Mr. Moody to show it some tax returns or some kind of documentation to reflect his income stream and Mr. Moody did not provide them a single thing.

At the same time that the Bank knew all of these facts, the *fact* was also that the Bank did not have a deed of trust on the farm which any trustee in this state could use to foreclose on the farm for this debt. Mr. Ballard had nothing to do with the drafting of the deed of trust or anything to do with respect to any of these loans. Accordingly, there can certainly be no equity which weighs against Mr. Ballard.

So, where do to the equities weigh in favor of the Bank and against Mr. Ballard hereafter? The Trial Court adjudicated that the Bank did not know the terms of its own deed of trust. Even if this finding is not contrary to the rules of law discussed herein above, the fact is that the original deed of trust had no expiration date; and according to the Bank, it had no obligation to advise the Plaintiff of any of the notes; and accordingly, the second deed of trust served no

purpose whatsoever. So, where is the equity in using a document which is without any purpose; but which, incidentally, totally and completely changes the terms of the first? How is this useless endeavor in which Mr. Ballard was not even engaged weigh in favor of the Bank and against Mr. Ballard?

Further, whether the Bank actually drafted a second deed of trust for the purpose of changing the terms of the first, or the Bank was simply drafting a new document for no purpose, which just, incidentally, had that effect, the bottom line is that, for some reason, the Bank wanted something from the Plaintiff. For some reason, the Bank wanted the Plaintiff to sign a new deed of trust for no purpose. It was not something Mr. Ballard wanted. It was not something Mr. Moody wanted. It was something that the Bank wanted and wanted badly, and no one knows why. Nevertheless, it is something the Bank wanted and had to have. So, does the Bank call Mr. Ballard and tell him what it wants, after not speaking to him once in the last two years? No. Would that have been something that certainly weighed an equity in favor of the Bank. Certainly. However, for some reason, the Bank opted against that route. Would it be an equity in favor of the Bank if it had advised Mr. Ballard that it wanted this new document at the same time that it has recently learned that the debt that was related to this new document is all old debt of several hundred thousand dollars and that the debtor does not appear to have a dime to his name and that the Bank had requested the debtor to provide some evidence of his income and received nothing. Certainly. Again, however, the Bank opted against that route.

Instead, the Bank restructures the debt, again for no known purpose, places the new debt, on a new deed of trust, which also has no purpose, but which, incidentally, changes the terms of the first and leads the debtor to believe that, if he can get it signed, it will continue to lend him

more money.

Throughout the entire situation, there is simply no equity which weighs in favor of the Bank and against Mr. Ballard. Rather, just like *Prudential Credit Services v. Hill*, 10 B.R. 34 (S.D. Miss. Bkrtcy 1981) and *Memphis Hardwood Company v. Daniel*, 771 So.2d 924 (Miss. 2000), discussed in Plaintiff's principal Brief before this court, all equities lie in favor of the Plaintiff and against the Bank.

The Bank knows that, as between itself and the Plaintiff, it simply has nothing to offer this Court to show that a single equity weighs in its favor and against Mr. Ballard. That is why in the Bank's attempt to address some concept of equity on pages 41-44 of its Brief, the Bank does not offer a single thing about itself or the Plaintiff. Rather, the Bank dedicates its entire discussion to the Plaintiff's son, Richard Ballard. However, Richard Ballard did not draft the deed of trust or have anything to do with any of the loans. Richard Ballard had absolutely nothing to do with the deed of trust, the loans, the security taken against the loans or anything. This is simply another example of when the Bank knows that everything weighs against it and in favor of the Plaintiff, it simply attempts to turn the Court's attention on to something else.[7]

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[7] It is certainly interesting that the Bank would even bring up Richard Ballard to try to argue some equity, or more appropriately-divert this Court's attention from the equities between the parties. Specifically, as admitted by the Bank, in November, 2003, it was looking for some additional collateral to take against the loans it had already made; and it learned that the only additional collateral which Mr. Moody had to offer was a lot in Winston County where Mr. Moody had his home before it burned. The Bank decided to use Richard Ballard to do the title work on this lot; and Richard Ballard personally called the Bank to make sure the Bank knew that the home was no longer on this property, as it had burned, since the last time the Bank was thinking about taking this property as collateral for one of Mr. Moody's loans; and Richard Ballard was concerned that whatever money the Bank was now loaning to Mr. Moody would be in excess of the value of this piece of collateral as it now existed. However, the Bank simply advised, not to worry about that, as no new money was being loaned to Mr. Moody. (R. Vol. 6 p. 232-241) Obviously, this would have been a prime opportunity for the Bank to disclose that it

In sum, the equities weigh in favor of the Plaintiff, and the Bank has done nothing to challenge that, except to try to take the Court's focus off of the issue.

VII. CONCLUSION

Obviously, by claiming that the Plaintiff signed two deeds of trust at two different times and now seeks to totally and completely disavow both of them, it is not difficult for the Bank to paint a picture that this whole case is about nothing more than a provider of security becoming disillusioned when the property actually has to be used against the debt. Further, by claiming that the Plaintiff is seeking to completely disavow both of the deeds of trust, the Bank simply avoids the central fact that the two deeds of trust say two totally and completely different things.

However, when it is seen that, in truth and fact, the Bank never had a deed of trust on the farm which any trustee in this state could have used to foreclose on the farm for the undisclosed and unconsented debts of Mr. Moody; and without any explanation as to why, the Bank drafts a new and completely different deed of trust, after it has loaned every single dime of the disputed funds to Mr. Moody and after it realized that Mr. Moody did not have a dime to his name with which to pay anything on any of the disputed debt, and used the debtor to get the new unexplained deed of trust signed, as opposed to having any discussion with the Plaintiff about what it wanted or why, the case is seen in a completely different light.

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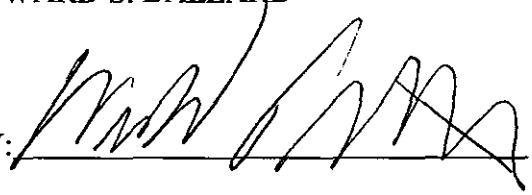
was seeking for Richard Ballard's father to sign a deed of trust as well. However, the Bank obviously determined that it was better to not disclose this fact to Richard Ballard; and the better course of valor, was to use the debtor, who admittedly lied to his grandfather, to get the new deed of trust signed. (P-25, p.51-53)

Under the law, the Bank was charged with the knowledge that it did not have a deed of trust which it could use to foreclose on the farm for the debts of Mr. Moody; and under the law, the Bank could not rely upon some claimed oral discussion which allowed the Bank to place any notes against the farm which it desired. To the contrary, the law required that the Bank meet its burden of proving that it was entitled to reform the deed of trust. This, the Bank failed to do. Therefore, the Trial Court's Judgment should be reversed, and this cause should now be rendered in favor of the Plaintiff.

Respectfully submitted, this the 13th day of May, 2008.

EDWARD S. BALLARD

BY: 

Wes W. Peters

OF COUNSEL:

Wes W. Peters, Esq.
[redacted]
BARFIELD & ASSOCIATES
Attorneys at Law, P.A.
121 Village Boulevard
Madison, Mississippi 39110
Telephone: (601) 856-6411
Facsimile: (601) 856-6411

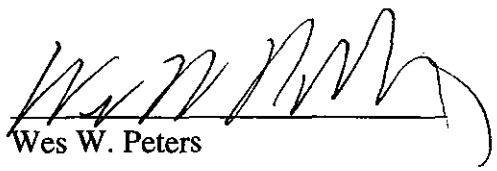
CERTIFICATE OF SERVICE

I, Wes W. Peters, do hereby certify that I have this day mailed, by United States mail, a true and correct copy of the above and foregoing document to:

Keith R. Raulston, Esq.
WATKINS LUDLAM WINTER & STENNIS, P.A.
Post Office Box 427
Jackson, MS 39205

Honorable Kenneth M. Burns
Chancery Court Judge of Chickasaw County
Post Office Drawer 110
Okolona, MS 38860

SO CERTIFIED, this the 13th day of May, 2008.



Wes W. Peters