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 BRIEF

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ORAL ARGUMENT REQUESTED

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II. STATEMENT OF THE CASE

A. Nature of the Case

In this case, the Bank seeks to foreclose on Appellant's farm, which has been in his family for generations, based on loans the Bank made to the Appellant's grandson.

There is no dispute that the deed of trust that the Bank prepared, and Appellant signed before the Bank loaned all of this money to his grandson, explicitly provided that the Appellant be notified and agree to any loan before the farm could be used as collateral. There is also no dispute that the Appellant was never contacted or agreed to any of the loans in dispute.

However, after the loans matured, and it was clear that Appellant's grandson could not repay the loans, the Bank drafted a new deed of trust which listed all of the notes and told the grandson, if he could get his grandfather to sign it, the Bank would continue to loan him more money. However, after obtaining the new deed of trust, the Bank said it was not lending him any more money; and the Bank now seeks to use the reformed after the fact deed of trust to foreclose on the farm.

The Bank claims that the original deed of trust was in error and was supposed to entitle the Bank to use the farm as collateral whether the Appellant knew about the loans or not. The issue before this Court is whether the action the Bank took after the money had already been loaned is an acceptable alternative to proving a case of entitlement to reform the only deed of trust which existed while the Bank was loaning all of this money to the Appellant's grandson.

B. The Course of Proceedings and Disposition in the Court Below

The dispute between the parties began when Michael Dudley, President of the Commercial

Bank of Dekalb, called Mr. Ballard to advise him that he may loose the farm which has been in his family for generations, if Mr. Ballard's grandson, Kiley Moody, could not repay over $600,000 in loans which the Bank had extended to Mr. Moody. Mr. Ballard advised Mr. Dudley that he was wrong, he knew nothing about any outstanding or overdue loans of his grandson, and he had certainly not agreed to allow his family's farm to stand as collateral for loans he knew nothing about. (P-24 at p 32-33; 58-62)

Mr. Ballard called his son, Richard Ballard, who is an attorney and has also held his father's power of attorney since he retired from business due to his health about a decade earlier. Richard Ballard telephoned Mr. Dudley to see what this was all about; and Mr. Dudley explained that he had two deeds of trust which pledged the family's farm as collateral for any and all loans which the Bank may ever decide to extend to Mr Moody; and it now had over $600,000 in outstanding and overdue loans which it had made to Mr. Moody. Richard Ballard asked for copies of the deeds of trust. However, despite the fact that deeds of trust would obviously be public record, Mr. Dudley stated that the matter was between the Bank and Mr. Ballard, and the Bank could not provide the deeds of trust to Richard Ballard. Richard Ballard explained that he was his father's attorney and also held his father's power of attorney and faxed Mr. Dudley a copy of the power of attorney. However, Mr. Dudley still refused to provide a copy of the deeds of trust. Accordingly, Richard Ballard had the records of the Chickasaw County Chancery Court searched and obtained a copy of the deeds of trust. (R. Vol. 5 p. 13-18; Vol. 6 p. 228-230)

After seeing that there were two deeds of trust, one dated in 2001, which made no reference to standing as security for any and all of Mr. Moody's loans and a more recent one which referenced several loans which the Bank had apparently recently made to Mr. Moody, Richard Ballard called

Mr. Dudley back and asked why there were two different deeds of trust and to see the notes which the deeds of trust were supposed to secure. Again, however, Mr. Dudley advised that he could not discuss any of those matters with Richard Ballard. (R. Vol. 5 p.13-18; Vol. 6 p. 228-230)

After a further period of time in which the parties were represented by counsel, the Bank advised that it was going to take the position that either one or both of the deeds of trust made the farm security for all of Mr. Moody's loans. However, it could not discuss any of those loans with either Mr. Ballard, Richard Ballard or Mr. Ballard's counsel or provide any documentation with respect to the loans, because that was private business between the Bank and Mr. Moody. (R. Vol. 5 p.13-18; Vol. 6 p. 228-230)

Accordingly, on June 3, 2004, Mr. Ballard filed his Complaint in the Chancery Court of Chickasaw County, Mississippi, seeking to declare the deeds of trust void and cancelled as a cloud on title, as well as interrogatories and request for production of documents to learn something about the notes upon which the Bank was threatening foreclosure against Mr. Ballard's farm. (R. Vol. 1 p. 4-39) On August 13, 2004, the Bank filed its Answer as well as a Counterclaim seeking a declaration that the deeds of trust allowed the Bank to foreclose upon the farm for any and all debts of Mr. Moody. (R. Vol.1 p. 43-60)

Thereafter, the parties traded written discovery and took depositions of the parties as well as certain other witnesses. In a nutshell, *inter alia*, it was learned that the original deed of trust explicitly stated that the farm would only stand as security for loans which were made to Mr. Ballard or those which he cosigned and guaranteed and said absolutely nothing about serving as a sort of *carte blanche* security for any and all loans which may ever be made to Mr. Moody. (Ex. P-1) (R.E. p. 27-33) The Bank admitted that Mr. Ballard had never taken out any loans or co-signed or

guaranteed any loans of Mr. Moody and, in fact, Mr. Ballard had never been contacted in any shape form or fashion about any of the loans which the Bank made to Mr. Moody. (R. Vol. 5 p. 9, 43, 76, 101-104)

However, it was learned that in November, 2003, the Bank began reviewing the loans it had extended to Mr. Moody in preparation for an upcoming FDIC examination. (R. Vol. 5 p. 84-87) At that time, the notes showed that not a single one of the notes at issue had ever been repaid in accordance with its original terms, the Bank had extended many of the notes without any repayment, and many of the loans had matured without either repayment or extension. (R. Vol. 5 p.19-36, 51-56) It was also learned that Mr. Moody was bouncing virtually every check he wrote out of his checking account with the Bank at that time; and the Bank was trying to get some information from Mr. Moody in the form of tax returns and other information to try to get a handle on Mr. Moody's ability to repay the loans. However, all Mr. Moody would do was make oral representations about his ability to repay the loans and did not provide the Bank with the documentary proof of his ability to repay, which it was requesting. (R. Vol. 5 p. 84-93; Vol. 7 p. 339-349)

Therefore, without requiring a single dime from Mr. Moody in interest, principal, re-financing fees or anything, the Bank restructured all of Mr. Moody's notes so that none would appear to have matured; and the notes would appear as if they had recently been made with maturity dates in the future. Then, the Bank listed all of the notes on a new deed of trust; and without so much as a single phone call to Mr. Ballard, told Mr. Moody that, if he could get his grandfather to sign the new deed of trust, the Bank would continue to loan Mr. Moody more money. (R. Vol. 5 p. 37, 100-107; P-2) In fact, however, the Bank never loaned Mr. Moody another dime; and after receiving the reformed after the fact deed of trust, sought to begin collecting the long overdue notes.

(R. Vol. 5 p. 103-106)

Based upon what was learned in discovery, on November 16, 2006, Mr. Ballard filed his Motion for Summary Judgment claiming that, as a matter of law, the Bank's attempt to reform or alter the original deed of trust which existed while the loans were being made was an ineffective attempt at reformation, and that the second deed of trust was a *nudum pactum* which could not be supported by any consideration. (R. Vol. 1 p.111) The Bank responded to the Motion; and the Plaintiff filed his Reply in support of the Motion. (R. Vol. 2 p. 163; Vol. 3 p. 35) However, before the Motion could be heard or considered, Mr. Ballard passed away; and Mr. Ballard's estate was substituted as the party Plaintiff.[1] (R. Vol. 3 p. 378) A hearing was held on Plaintiff's Motion for Summary Judgment on February 5, 2007. However, by Order dated February 21, 2007, Plaintiff's Motion for Summary Judgment was overruled; and the matter was set for trial to begin on May 10, 2007. The parties, then, tried this case on May 10, 11 and June 7, 2007. (R. Vol. 3 p. 382)

Thereafter, on July 5, 2007, the Court entered its Final Judgment, adjudicating that the Bank should not be bound by the deed of trust it drafted and which existed while all of the loans were being made to Mr. Moody. (R. Vol. 4 p. 453) (R.E.p. 10-26) Rather, the Court discounted the terms of the original deed of trust and Mr. Ballard's testimony and assigned credibility to the Bank's testimony that the document it drafted did not reflect the intentions of the parties and that the true intention of the original deed of trust was to allow the farm to stand as collateral for whatever loans the Bank may elect to make to Mr. Moody. (R. Vol. 4 p. 453) (R.E.p. 10-26) The Court further adjudicated that, despite the fact that the deed of trust explicitly stated that the farm would not stand as security unless Mr. Ballard actually took out the loan or co-signed or guaranteed a loan, the Bank

[1] However, Mr. Ballard's testimony had been preserved in his deposition.

was not under any duty to even advise Mr. Ballard when a loan was being made. Rather, it was Mr. Ballard's burden to determine if the deed of trust was actually being used by the Bank in a manner contrary to its explicit terms. (R. Vol. 4 p. 453) (R.E.p. 10) Further, despite the fact that the loans to Mr. Moody had repeatedly matured without any payment having been made, some of the loans had matured several times without any repayment, renewal or extension, Mr. Moody would not provide the documents the Bank was requesting to insure his ability to repay the loans and Mr. Moody was bouncing most all of the checks from his checking account at the Bank, the Bank should not be charged with knowledge of any of these facts.(R. Vol. 4 p. 453) (R.E.p. 10) Further, the Court found that when the Bank changed the terms of the original deed of trust and restructured the notes so that they would appear to be new notes which had not matured, without seeking one dime from Mr. Moody for any renewal or extension or even a request to extend any of the notes, this was nothing more than activity which occurred in the normal course of business of a bank. (R. Vol. 4 p. 453) (R.E.p. 10) Accordingly, the Court adjudicated that the Bank could now foreclose on Mr. Ballard's farm for all notes of Mr. Moody, with the exception of those notes which the Bank admitted that it erroneously placed on the second deed of trust. (R. Vol. 4 p. 453) (R.E.p. 10)

Therefore, on August 2, 2007, Plaintiff filed its Notice of Appeal to this Court. (R. Vol. 4 p. 481)

C. Statement of the Facts

1. Background

In this case, the Commercial Bank of Dekalb seeks to take Mr. Ballard's farm, which has

been in his family for generations[2], based on $600,000 in claimed debt of his grandson, Kiley Moody.

To start, there is no dispute that Mr. Ballard had no ownership interest in Mr. Moody's timber business-for which the loans were supposedly made, he had nothing to do with the operation of the business, he had nothing to do with the initiation of the relationship between the Commercial Bank and Mr. Moody for the financing of the business, the Bank had financed numerous loans for Mr. Moody before it even met Mr. Ballard, Mr. Ballard did not guarantee or co-sign a single one of the notes, Mr. Ballard did not receive any of the funds of the loans and Mr. Ballard was never even contacted about a single one of the loans at issue, either when they were made, when they matured or when they were all later restructured by the Bank in November, 2003. (R. Vol. 5 p. 9, 43, 76, 101-112)

2. <u>May/June 2001</u>

It is also undisputed that Mr. Ballard's **only** dealing with the Commercial Bank of Dekalb was in May and June of 2001. Specifically, according to Mr. Ballard, at one point in May, 2001, Mr. Moody did not have sufficient equity for a particular timber loan. Therefore, Mr. Ballard and his wife agreed to pledge some stock they owned as additional collateral for a single short term loan. It is undisputed that, within one month, the timber for that loan was harvested, the loan was paid off and Mr. Ballard and his wife retrieved their stock. (R.Vol. 5 p. 112) (P-24 at p. 6-11)

At that time, according to Mr. Ballard, he was asked whether he wanted to continue helping

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[2] This property has been in the Ballard family for generations; it was Mr. Ballard's birthplace as well as that of several of his brothers and sisters and his daughter; and the place where they were raised. Title to the property has remained in Mr. Ballard at all relevant times at issue in this lawsuit. (R. Vol. 6 p. 227-228)

Mr. Moody with the financing of his timber business by pledging the family's farm as collateral for future loans. Mr. Ballard advised that he was retired and knew nothing about the timber business, and he did not want to get into it. The Bank explained that Mr. Moody had been doing very well in the timber business, the Bank would take a timber deed for each loan and the only time Mr. Moody would need any assistance in gaining any further loans was when Mr. Moody needed some additional equity to provide him the Bank's requisite 20% equity in each deal. Mr. Ballard advised the Bank that, if Mr. Moody needed that type help with some future loan, the Bank could provide him the background facts with respect to the loan, and he would consider whether he wanted to get into it at that time. (P-24 at p. 4-17) The Bank suggested that Mr. Ballard go ahead and sign a deed of trust on the farm to extend Mr. Ballard a line of credit with the Bank for that purpose. However, Mr. Ballard did not have anything with him at the time which contained a description of the property in Chickasaw County. Therefore, the Bank suggested that Mr. Ballard go ahead and sign a deed of trust for that purpose; and he could fax a description of the property when he got home and obtain a copy of the deed; and that is precisely what was done. (P-1) (R.E.p. 27) Without dispute, the Bank prepared a deed of trust which provided that Mr. Ballard's farm would stand as collateral for any loan which Mr. Ballard took out with the Bank or which he cosigned or guaranteed. (P-1) (R.E.p. 27)

From that point, it is undisputed that the Bank never had any further contact of any type with Mr. Ballard until it called him to tell him that he would loose the farm, if Mr. Moody did not repay over $600,000 in loans which it had extended to Mr. Moody. (R. Vol. 5 p. 43, 76, 101-107)

Conversely, the Bank position as to what occurred in May and June of 2001 is more one of explaining, then coming up with new explanations, as to why its own documents do not support its

various positions. Specifically, the Bank claims that Mr. Ballard actually agreed to pledge his farm as collateral, before Mr. Ballard and his wife pledged their stock as collateral for the earlier loan in May. However, since it was land, it would take some time to get a description of the property, get a title opinion and get an appraisal so that the land could be pledged; and according to the Bank, the Ballards only pledged their stock for that one loan as an interim method of financing that deal, while waiting for the Bank to get the information it needed to use the farm as collateral. (Deposition of Greg McMahon at p. 70-75[3]) However, it is undisputed that the Bank never made any effort to obtain an appraisal, title opinion or anything on the property until over two years later, after all of the loans had already been made, and the Bank was restructuring the loans in preparation for an FDIC examination. (R. Vol. 5 p. 108)

Further, if June 29, 2001 was the time that the Bank was finally ready to take the farm as security for all of Mr. Moody's loans, it is interesting that the Bank did not even have a description of the property at that time, and the description of the property had to be later faxed to the Bank. (P-1) (R.E.p. 27)

Then, after explaining that it was waiting to do something that it's own documents show that it never made any effort to do, the Bank then obviously had to explain why the deed of trust it drafted did not state that the property was to stand as security for any and all of Mr. Moody's loans, if that is what was intended. In that regard, the Bank initially stated that the deed of trust was intended to secure any and all loans of Mr. Moody or his business; but due to a clerical error, the deed of trust made no mention of that fact. The Bank further explained that the reason none of Mr.

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[3] Greg McMahon's deposition was presented as an unnumbered exhibit and is contained with the exhibits in the record.

Moody's loans were referenced in the space provided in the deed of trust specifically for that purpose, was because Mr. Moody did not have any outstanding loans at that time. (P-16 at p. 3, 4)

However, when the Bank finally produced some of the notes, it was discovered that two of the notes which were listed on the November 2003 deed of trust did, in fact, exist and were outstanding at the time the 2001 deed of trust was signed. Again, to explain why its own documents do not support its position, the Bank simply changed its position to state that the deed of trust was intended to secure certain of Mr. Moody's notes, but not others; and the listing of the notes which preexisted the June 2001 deed of trust in the later drafted November, 2003 deed of trust was simply another clerical error. (R. Vol. 5 p. 44-49, 66)

The Bank also explained that the farm was to serve as 20% equity for a line of credit for Mr. Moody. However, the Bank admitted that it has a line of credit agreement which the customer signs when it provides a line of credit, and the Banks maintains a running ledger of advances and payments made under the line of credit. However, in this case, no line of credit agreement was ever signed, and no running ledger of advances and payments was ever kept. (R. Vol. 5 p. 10-11) To the contrary, each loan the Bank extended to Mr. Moody was made on a deal by deal basis. Each time, Mr. Moody would have to sign a new note; and each note provided a place to list the collateral that was being taken against the note; and not a single one of the Bank's own notes makes any reference to Mr. Ballard's farm standing as security for a single one of the notes, until November, 2003, after all of the loans had already been made and the Bank was trying to restructure the notes in preparation for an upcoming FDIC examination. (R. Vol. 5 p. 12, 82) (P-3-P-11)

Finally, although one of its many explanations is that Mr. Ballard's farm was intended only as 20% security when it was needed, the Bank claimed that it was under no obligation to advise Mr.

Ballard when such equity was needed. Further, the Bank claims that it should not be limited to that 20% equity and that it should be entitled to foreclose against the farm for the full value of each loan.

In sum, Mr. Ballard's explanation of what occurred in May and June of 2001 is consistent with the deed of trust as well as the subsequent notes which fail to reference the farm standing as security for a single one of the notes; and these are the documents the Bank drafted at the time. Conversely, the Bank's explanation of what occurred in May and June of 2001 is simply that it was something other than what its own documents state and that it should entitle it to foreclose on the farm for the full value of each of Mr. Moody's loans.

3. June 2001-November, 2003

There is no dispute that Mr. Ballard had absolutely no contact of any type whatsoever with the Bank from June, 2001 to November, 2003. (R. Vol. 5 p. 43, 76, 101-113)

Obviously, however, the Bank made several loans to Mr. Moody during this time.

Interestingly, however, just like the deed of trust, when the notes were finally produced, it was learned that each and every one of the loans that were made to Mr. Moody had a specific place to list the collateral that was being taken against the note; and not a single one of the notes that the Bank was able to produce and which is in issue, makes any reference to the farm serving as collateral for that loan. (R. Vol. 5 p. 82) (P-3 - P-11) Accordingly, from the time the first loan at issue was made to the time the last loan at issue was made, neither any note or nor any deed of trust provided that the farm was to stand as security for any of the notes. Further, since the Bank never had any contact with Mr. Ballard during this time, it is obvious that Mr. Ballard did not co-sign or guarantee a single one of these loans, as would be required in order for the June, 2001 to stand as

security therefore.

4. November, 2003

Still, there is no dispute that the Bank did not have any contact of any type with Mr. Ballard in November, 2003. (R. Vol. 5 p. 43, 76, 101-113)

However, according to the Bank, it undertook a review of Mr. Moody's loans at this time in preparation for an upcoming FDIC examination. (R. Vol. 5 p. 84-89) In reviewing the loans, the Bank obviously discovered that the loans which Mr. Moody had prior to June 2001, which were supposed to be paid in six months and nine months respectively, had still not been repaid over two years later. With respect to the loans which had been made since that time, the Bank would have also discovered, not only that some of those notes had also been extended, sometimes several times beyond their original maturity dates, but several loans had also matured without being repaid, renewed or extended. (R. Vol. 5 p. 19-37, 51-56) (P-18) Further, the Bank also admitted that it knew that Mr. Moody was bouncing virtually every check written on his checking account at the Bank, at this time because the Bank's President had to personally authorize that the Bank make certain payments, despite Mr. Moody's lack of funds, in order to try to keep Mr. Moody's head above water. (R. Vol. 7 p. 339-349) The Bank also admitted that, at this time, it asked Mr. Moody for some tax returns or other documentation with respect to his income to try to document Mr. Moody's ability to repay the loans. However, all that Mr. Moody ever gave the Bank was oral assurances that there was still some timber on some of the tracts of land. (R. Vol. 5 p. 89-93; Vol. 7 p. 340-349)

With this knowledge, after reviewing the notes, by the Bank's own admission, without

requiring that Mr. Moody pay a single dime on interest, principal, renewal or extension fees or even title opinion or appraisal costs, the Bank created new notes to pay off certain of the old notes, then extended the remainder of the other notes, so that the maturity date of all notes was now sometime in the future, despite the fact that all of the money had already been loaned months to years earlier and none of the notes had ever been repaid in accordance with their original terms. Then, the Bank listed all of the new or renewed notes on a new deed of trust to the farm; and for the first time, obtained an appraisal on the farm. (R. Vol. 5 p. 84-100)

Obviously, if the Bank believed that it already had a security interest in the farm based on the June 29, 2001 deed of trust, there would be no need for a second deed of trust. However, according to the Bank, it simply thought that two years and $600,000 later may be a good time to get a second deed of trust signed.

This time, however, there was no meeting at the Bank; and in fact no contact of any type whatsoever between the Bank and Mr. Ballard with respect to what it wanted and could not get from Mr. Moody, the fact that Mr. Moody had over two years of outstanding loans which had never been repaid in accordance with their original terms, that Mr. Moody was bouncing virtually every check out of his checking account, that it had to rework all of Mr. Moody's old loans without a single dime of payment for principal, interest or anything, why it wanted Mr. Ballard to sign a new deed of trust or anything. (R. Vol. 7 p. 340-349) Rather, the Bank simply sent Mr. Moody out with the new deed of trust and told him, if he could get his grandfather to sign it, the Bank would continue to lend Mr. Moody more money. Without dispute, Mr. Moody told Mr. Ballard that the deed of trust was simply a renewal of the old deed of trust; and Mr. Ballard never read it. (P-24 at p. 33-34; P-25 at p. 44) However, Mr. Ballard wanted his son, Richard Ballard, to look at it, before Mr. Moody took it back

to the Bank. (P-24 at p. 33-34) However, Mr. Moody went ahead and took it back to the Bank. When Mr. Moody brought the deed of trust back, the Bank told Mr. Moody: thank you, but you are crazy if you think we are lending you another dime; and it is undisputed that the Bank never loaned Mr. Moody another dime or extended any notes, after it obtained the new deed of trust. (R. Vol. 5 p. 105-106)

III. SUMMARY OF THE ARGUMENT

This case should be fairly simple. Mr. Ballard claims that he only intended for his farm to stand as collateral for loans he knew about and agreed to; and that is precisely the way the Bank drafted the deed of trust. Conversely, the Bank claims that the deed of trust it drafted is in error. Instead, the Bank claims that the farm was supposed to stand as collateral for any and all loans it made to Mr. Moody, whether Mr. Ballard knew about the loans or not. However, the Bank claims that it simply forgot to mention anything about this in the deed of trust it drafted before it loaned all of the money to Mr. Moody.

The law recognizes a claim that a document may contain an error, and through mistake, fails to properly reflect the intentions of the parties, and the law prescribes the burden of proof that must be met in order to reform the document. However, the Bank could not meet that burden of proof under the facts of this case and never sought to reform the deed of trust.

Rather, when the Bank realized that Mr. Moody was bouncing virtually every check in his checking account, had several hundred thousands of dollars of debt which had never been repaid in accordance with the original terms of any of the notes, that Mr. Moody could not provide it any documentary evidence that he may be able to repay the loans, and that there was not sufficient

collateral to cover the loans, the Bank simply reworked all of Mr. Moody's loans so that their maturity dates were in the future, placed the new notes on a new and completely different deed of trust and told Mr. Moody, if he could get his grandfather to sign it, it would continue to lend him more money. However, when it got the new deed of trust, the Bank told Mr. Moody: thank you, but you're crazy if you think we're loaning you any more money.

The Trial Court was obviously impressed with the Bank's alternative to reformation, and the Trial Court did not require that the Bank prove the elements which would entitle it to correct its claimed mistake.

Instead, the Trial Court fashioned the same remedy as an action for reformation by other means.

In order to fashion the same remedy by other means and endorse the Bank's alternative, the Trial Court concluded that all of the various maturity dates which appeared in the various notes were immaterial and meaningless. Instead of the maturity dates which the Bank wrote in each of the notes when they were made, the Trial Court found that the actual terms of the notes was that the Bank would loan the money and Mr. Moody would pay the money back whenever Mr. Moody or the Bank thought it was appropriate. Obviously, however, in November of 2003, neither Mr. Moody nor the Bank felt that it was appropriate to repay a dime of the money. Therefore, none of the loans could be considered to be in default when the Bank embarked upon drafting a new and completely different deed of trust. (R. Vol. 4 p. 453)(R.E. p.10) In sum, by finding the Bank's oral testimony more credible that what the Bank placed in the written documents, the Trial Court concluded that none of the loans were in default at the time that the Bank fashioned its alternative remedy. (R. Vol. 4 p. 453)(R.E. p. 10)

As it respects the fact that the Bank also knew that Mr. Moody was bouncing virtually every check out of his checking account and that the Bank was asking for written documentation of Mr. Moody of assets, income and ability to repay the loan and receiving nothing in return and that the Bank violated its own policy and practice of restructuring all of the notes without requiring a single dime from Mr. Moody, the Trial Court omitted any reference to these facts and summarily concluded that the Bank was blissfully ignorant of whether Mr. Moody could actually repay over $600,000 when it drafted the new and completely different deed of trust. (R. Vol. 4 p. 453)(R.E. p. 10)

Further, the Trial Court required no explanation as to why the Bank would even undertake to draft a second deed of trust, if it already believed that the first deed of trust entitled it to foreclose upon the farm for the debts of Mr. Moody and it was never under any duty to apprise Mr. Ballard of any of the debt. Nevertheless, the Trial Court concluded that the Bank's violation of its own policy and procedure to extend the maturity date on notes and placing them on a new deed of trust which was unnecessary and served no purpose, was simply part of the Bank's ordinary course of business. (R. Vol. 4 p. 453)(R.E. p. 10)

Accordingly, by omitting everything the Bank knew when it undertook its alternative to reformation, the Trial Court concluded that the Bank was blissfully ignorant of the fact that Mr. Moody may not be able to repay these loans and endorsed the drafting of the new deed of trust, which had no purpose, as an effective alternative to reformation.

Further, the Trial Court cited the rule of law that a person is charged with knowledge of a written instrument whether they read it or not as well as the rule of law that one may not reasonably rely on oral representations which contradict the plain language of documents. (R. Vol. 4 p.

453)(R.E. p. 10) For some reason, however, the Trial Court determined that these rules of law were not applicable to the Bank. Specifically, the Trial Court determined that the Bank had no knowledge that it had erroneously drafted its own deed of trust and that the Bank was entitled to rely on a claimed oral representation that the deed of trust would cover all of Mr. Moody's loans as opposed to the language of the only deed of trust which existed when the Bank was making all of these loans to Mr. Moody. (R. Vol. 4 p. 453)(R.E. p. 10) Further, by allowing the claimed oral representation to trump the written terms of the document, the Trial Court then specifically adjudicated that Mr. Ballard had no right to rely on the terms of the written document that he would be notified and allowed to agree to the loans, the Bank had no duty to tell Mr. Ballard anything about the loans; and if Mr. Ballard wanted to know whether the deed of trust meant what it said, or if Mr. Ballard wanted to know anything about any loans, it was his burden to find out. (R. Vol. 4 p. 453)(R.E. p. 10)

Appellant respectfully submits that, when a party claims that the agreement it drafted to reflect the intent of the parties does not accurately achieve that purpose, that party should be compelled to meet the prescribed burden of proof to be entitled to reform that document. The Bank's alternative method of achieving that same result without meeting that burden is not one that should be endorsed by this Court as an alternative to the prescribed burden of proof. The rules of law cited by the Trial Court should have been applied to the documents and facts as they existed at the time the Bank was making all of the loans to Mr. Moody, not to a document which did not even exist until after everything had already been said and done and which served no purpose. To conclude otherwise would mean that written contracts serve no purpose, as a party could always trump the written document simply by claiming that there was an oral agreement which was different than the written document.

IV. ARGUMENT AND AUTHORITIES

A. The Trial Court Erred in Failing to Require the Bank to Prove that It Was Entitled to Reform the only Deed of Trust It Had While the Loans Were Being Made

There is no dispute that, during the entire time the Bank was making all of these loans to Mr. Moody, the only deed of trust it had on the farm was one which clearly and unambiguously limited its applicability to loans which were made to Mr. Ballard or those which he co-signed or guaranteed and did not contain a single word about serving as any sort of *carte blanche* security for any and all loans to Mr. Moody. Further, there is no dispute that, until the massive restructuring of the notes in November, 2003, not a single one of the notes referenced the farm serving as security for any of the loans There is no dispute that Mr. Ballard did not co-sign or guarantee a single one of the notes at issue. As a matter of fact, there is no dispute that Mr. Ballard did not even know about a single one of the loans at issue, either when they were made, when they matured, when they were extended or renewed, or even when the loans underwent a massive restructuring on November 24-25, 2003. In sum, there was no way any trustee could have used the deed of trust to foreclose upon the farm, based on the claimed debt.

Accordingly, the Bank necessarily had to claim that the deed of trust it drafted, and the only one it ever had during the entire time that it was making all of these loans to Mr. Moody, as well as all of the notes which failed to reference that the farm stood as collateral for a single one of them, were wrong; and due to the Bank's own error, the written documents did not reflect the intention of the parties.

However, if the Bank's claim had any merit, the law recognizes that there are instances in which a document, due to clerical error or mistake, does not correctly reflect the intentions of the parties; and the law prescribes the remedy for such an error and the burden that must be met in order

doubt, it is impossible to prove that the mistake was mutual, because the Plaintiff has testified affirmatively to the contrary. *Brown v. Chapman*, 809 So.2d 772 (Miss. 2002) In *Brown*, a grandmother executed a deed conveying 17 acres to her grandson. The grandmother filed an action to reform the deed, contending that it was her intent to only convey one acre, not seventeen acres. Obviously, the grandmother provided consistent testimony that it was her intent to only convey one acre. However, the grandson disputed this claim and testified affirmatively that the deed was correct as written, conveying seventeen acres.

> Mutual mistake has no application in this case. Chapman testified affirmatively that it was the original intention of both parties to convey the tract as described in the deed. He claimed that, in truth, the problem arose post conveyance when Chapman's uncle discovered the conveyance and began to cause problems within the family. Brown, in her case in chief, presented no evidence that would tend to contradict Chapman's own testimony and show, instead, that Chapman thought that he was to receive only approximately one acre in the conveyance from his grandmother. The Chancellor did not abuse his discretion in denying Brown any relief on the basis of mutual mistake. Even if Brown's testimony as to her intention to convey only one acre is taken as true, that, standing alone, does not entitle her to relief since that constitutes only a unilateral mistake. As the Plaintiff, Brown had the additional burden of presenting evidence to convince the chancellor that her own mistake was accompanied by some bad faith dealing on the part of the grandson that effectively prevented her from discovering the actual contents of the deed.

Id. at 775.

Again, however, even if Mr. Ballard had not testified affirmatively in support of the deed of trust as it was drafted, the Bank could not meet its burden of proof, because Mr. Ballard's and the written document's version of the agreement is a reasonable hypothesis as to why it was drafted that way.

In sum, the Bank's claim is that the only deed of trust that existed during the entire time that

taken, the rule defeats its purpose. Specifically, there would be no need for a written contract.

In the same manner, the Trial Court relied on the rule of law that one may not reasonably rely on oral representations which contradict the plain language of documents. Again, however, the Trial Court failed to apply this rule of law to the Bank with respect to the only deed of trust which existed while all of these loans were being made; and that is precisely what it allowed the Bank to do. Specifically, the only deed of trust which existed while all of the loans were being made clearly and unambiguously provided that the farm would not stand a security unless Mr. Ballard agreed to the loan or to co-sign or guarantee a loan. However, the Trial Court adjudicated that the Bank was entitled to rely on a claimed, but disputed, oral representation that Mr. Ballard wanted the deed of trust to stand a security for any loan Mr. Moody may ever seek, whether he knew about it or not[5].

Accordingly, while noting that the rule of law was that a party was held to the terms of a written contract whether it knew its contents or not and would not be heard to rely on a claimed oral representation contrary to the terms of the written document, that is precisely what the Trial Court allowed the Bank to do. The Trial Court fashioned the same remedy as an action for reformation by allowing the Bank to deny knowledge of the terms of the very deed of trust it prepared before it loaned Mr. Moody this money and allowed the Bank's claimed, but disputed, oral representation to

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[5] It should be noted that the Trial Court used this very same analysis to adjudicate that the Plaintiff had not proven a sufficient claim for fraud or misrepresentation. Specifically, the Trial Court concluded that the Plaintiff could not base its claim for fraud or misrepresentation on a representation contained in the written document that Mr. Ballard would be contacted before the farm would stand as security for any loan; because there was evidently some oral discussion that he would actually not be contacted. However, when these rules are actually applied to the documents as they existed while all of the loans were being made, you have an explicit written representation that the Bank admitted that it never had any intention of performing. *Credit Indus. Co. V. Adams County Lumber & Supply Co.,* 215 Miss. 282; 60 So.2d 790 (Miss. 1952) (claim of fraud or misrepresentation can be predicated on contractual promise made with present undisclosed intention of not performing it).

trump both Mr. Ballard's testimony and the terms of the written document.

> We search for intent, but when we search for intent we accept that the law directs our search and points first and foremost to the text the parties created.

Cooper v. Crab 587 So.2d 236 (Miss. 1991); *Matter of Estate of Anderson*, 541 So.2d 423 (Miss. 1989); *Ford v. Hegwood*, 485 So.2d 1044 (Miss. 1986)

> We spend so much of our time in search of intent that we often overlook the source of intent most credible *de facto* and legitimately *de jure*, the words of the text itself

Cooper v. Crab, supra

> With contract or wills, legal purpose or intent should first be sought in an objective reading of the words employed *Matter of Estate of Anderson*, 541 So.2d 423 (Miss. 1989) to the exclusion of parole evidence. Courts are not at liberty to infer an intent contrary to that emanating from the text at issue.

Id.

Accordingly, the Trial Court misapplied the very rules of construction upon which it relied to fashion the same remedy as an action for reformation.

C. The November 28, 2003 Deed of Trust Cannot Stand on Its Own, and The Trial Court's Findings With Respect Thereto Are Not Supported By the Evidence

It is obvious that the Bank could not have relied on the November 28, 2003 deed of trust in order to make the loans to Mr. Moody, because that deed of trust simply did not exist at the time it was making the loans to Mr. Moody. As a matter of fact, the new deed of trust was simply an idea the Bank had when it was restructuring all of Mr. Moody's loans on November 24-25, 2003. The Bank had no discussion with Mr. Ballard to see if he would sign a new deed of trust or not. All of the restructuring of Mr. Moody's loans was a done deal without any inkling as to whether Mr.

was left with the deed, drove herself to a notary and had her signature on the document notarized. Nevertheless, she did not really pay any attention to what the deed said, because the man that was asking her to sign it told her it was just like previous timber deeds she had signed for him. However, it was not. Rather, it was materially different as to the timber that she would allow to be cut; and she would have never made the deal if she knew it was with Memphis Hardwood, because she had bad dealings with them in the past. This Court found that, although Memphis Hardwood may not have directly perpetrated the fraud, it was the one that prepared the deed, and it was the one that gave it to the person with whom Ms. Daniel had trust and confidence to get her to sign it. Accordingly, the Court held:

> The fact that Daniel signed the contract without reading it is of no consequence under the facts of this case.
>
> * * *
>
> The deeds are void. The consent is gone.

Similarly, in this case, the Bank prepared the deed of trust and used the debtor to get it signed, representing that it was just like the old one, when it clearly was not.

In considering equity, it should be noted that Mr. Ballard never did anything which caused the loss that the Bank now seeks to transpose on to the family farm. Mr. Ballard did not prepare the June 29, 2001 deed of trust. The Bank did. Mr. Ballard did not know about, and certainly did not receive, any of the money being loaned. The fact is that the Bank had multiple ways to protect itself against getting into the situation in which it now finds itself. Obviously, it could have drafted the June 29, 2001 deed of trust in accordance with what it now says it should have said. It could have enforced the original notes in accordance with their terms. However, it was the Bank who decided to continue to lend more and more money and get itself deeper and deeper into the hole; and Mr. Ballard had nothing to do with any of this. To suggest that some equity can be found in taking a

man's birthplace, which has been in his family for generations, by avoiding a judicially prescribed remedy, in favor of using the debtor to have another new and completely different deed of trust signed by a man the Bank believes was too sick to come in to sign it, without so much as a single phone call to explain what it was wanting or why, totally and completely after the fact, would be to substitute equity with chicanery.

E. The Trial Court Erred in Dismissing The Plaintiff's Claim of Fraud and Misrepresentation

As set forth is Section IV C above, Appellant respectfully submits that there is simply no evidence in the record which can support a finding that the Bank was blissfully ignorant of Mr. Moody's ability to repay over $600,000 in loans, when it knew that Mr. Moody could not write a check out of his checking account without bouncing it; or that banks regularly violate their own practice and procedures in refinancing loans and prepare deeds of trust with no purpose, in the ordinary course of business.[6]

Moreover, the basis under which the Trial Court summarily dismissed Appellant's claim of fraud and misrepresentation was because it concluded that a party could not premise a claim for fraud or misrepresentation upon a claimed oral promise which was contrary to the terms of a written document. However, Appellant's claim of fraud and misrepresentation was not based on an oral promise which was contrary to the terms of the written document. To the contrary, the deed of trust the Bank drafted explicitly provided that the Bank had to notify Mr. Ballard and Mr. Ballard had to agree to the loan before the loan would stand as collateral. Moreover, if the Trial Court were to

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[6] This argument has already been set forth in section IV C at pages 26-32

believe the Bank, it had already admitted that it never had any intention of performing that written promise. Therefore, the rule of law relied upon by the Trial Court actually supports Appellant's claim of fraud and misrepresentation, and does not serve as a basis for its summary dismissal.

Further, a claim for fraud can be based on a party's failure to disclose a fact, if they were under a duty to disclose that fact. *Holman v. Howard Wilson Chrysler Jeep, Inc.*, 972 So.2d 564 (Miss. 2008). As it respects the events which were occurring in November 2003, the Bank knew that Mr. Moody had over $600,000 in outstanding loans which had never been repaid in accordance with their original terms, Mr. Moody could not provide any documented evidence of any ability to repay these loans, he could not afford any further refinancing or other type fees which would be required to bring the loans current and further extend their obligations, and he could not even write a check out of his checking account at the Bank without bouncing it. The Bank was also chargeable with knowledge that no trustee in the world could use the only deed of trust the Bank had on the farm as a basis for foreclosing on Mr. Moody's debt. Whether the Bank had some idealistic hope that Ed McMahon may send Mr. Moody some large check very soon, it is patent that anyone would find these facts very material before pledging a farm which has been in the family for generations as collateral. However, instead of disclosing these facts, the Bank avoided any contact or conversation with Mr. Ballard and sent his grandson out to get the completely after the fact deed of trust signed. This is precisely the same type fraud which this Court found in *Memphis Hardwood Company v. Daniel, supra.*[7]

> Q. Let me make sure I understand. You said you thought it was for-there were going to be more loans, there was going to be a line of credit. What came as a surprise, as I

[7] *Memphis Hardwood* was discussed on pages 32–33

understand your testimony, to you is that after this November 25, 2003 deed of trust was signed, Michael wouldn't give you any more credit.

A. No, what came as a surprise to me was the fact that it wasn't a line of credit at all. It was a loan for stuff that I had borrowed already. So he clumped everything up in one big basket and then got me to go down there-and might as well be lying to my grandfather, because I'm telling my grandfather-well no because Michael lied to me. I thought I was going to be doing it for a line of credit. So I go down there, and I tell my grandfather this, and it's all completely the opposite of what the bank has told me. We thought-I thought that I would have the opportunity to get out-for what I owed. I would be able to pay back. But you know they didn't.You know, maybe I've got a lot of fault in this thing, but what about the Bank? What about what they did. I guess they're just covering their tracks, and business is business. Right Michael? Ain't that right? Ain't that what you told me? Business is business?

(P-25 at p. 51-52)

In sum, the claims of fraud and misrepresentation in this case are precisely like those adjudicated by this Court in the *Memphis Hardwood* case, and the Trial Court's basis for summarily dismissing those claims was erroneous.

V. CONCLUSION

Every day in America, people negotiate business deals. Under the law, if two people decide to begin the performance of their final agreement without putting their agreement in writing, they undertake the risk of becoming involved in a he said/she said dispute to determine who is telling the truth about what the deal actually was. Accordingly, people put their agreement in writing for the very purpose of avoiding such a he said/she said dispute. As a matter of fact, in certain dealings, such as matters relating to real estate, the law will not even entertain a he said/she said dispute. Accordingly, in these type instances, the law requires that the parties' agreement be contained in a

written document.

Once the parties undertake to place their agreement in writing, the law must respect the written document, or it would completely defeat its sole purpose of avoiding the he said/she said dispute. Accordingly, under the law, when the parties put their agreement in writing before they begin performance of their agreement, no party will be heard to claim that their agreement was different than what was contained in the written document. However, in this case, that is precisely what the Trial Court allowed the Bank to do. It allowed the Bank to claim that the agreement of the parties was different than the terms contained in the written document, it engaged in a determination of the he said/she said dispute; and it opted to side with the he said, instead of the she said.

What is even more alarming about the Trial Court's ruling, however, is that our law has become so comprehensive that it recognizes that there are situations in which the parties draft a document to evidence their agreement, but through mistake, the document fails to state the true intention of the parties. In such a case, however, the party claiming the mistake must prove that it was not only their mistake, but the other party made the same mistake as well; and the proof of both parties mistake must be so strong as to exclude any other reasonable hypothesis. That is precisely what the Bank was claiming and that is precisely the burden of proof that the Bank should have been required to meet.

However, in this case, the Trial court did not compel the Bank to meet its burden of proof under the law; it cited the applicable rules of law, then refused to apply them to the Bank, and then, it simply ignored all of the proof which defeated the Bank's claim, including multiple of the Bank's own documents, and opted to side with the Bank's claim anyway.

Appellant respectfully submits that the Bank should have been compelled to meet its burden

of proof to correct its claimed mistake. If it had, it is clear that it was a burden that the Bank simply could not meet, because Mr. Ballard offered his version of the events which was perfectly consistent with the document the Bank drafted; and his version is a perfectly reasonable hypothesis which cannot be excluded, as the law requires.

Since the Bank could not meet this burden of proof, the original deed of trust should have been interpreted precisely as it was drafted; and it is undisputed that Mr. Ballard did not take out, co-sign, guarantee or otherwise agree, in any remote respect, to any of the loans at issue. In sum, there are no loans which can be enforced under the original deed of trust. Therefore, it should now be cancelled of record.

As it respects the second deed of trust, it came about totally and completely after the fact, it has no consideration to support its enforcement, and it is a *nudum pactum* under the law. Accordingly, it should likewise be declared void and unenforceable.

Therefore, Appellant respectfully submits that the Trial Court's Final Judgment must be reversed and rendered in favor of the Appellant. To do otherwise would be to totally and completely destroy the value of all written contracts which are drafted before the parties begin performance under their agreement; and from this point forward, there is simply no way for any person to avoid a he said/she said dispute in any of those dealings.

Respectfully submitted, this the 28th day of March, 2008.

EDWARD S. BALLARD

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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.
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Post Office Box 427
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Honorable Kenneth M. Burns
Chancery Court Judge of Chickasaw County
Post Office Drawer 110
Okolona, MS 38860

SO CERTIFIED, this the 28th day of March, 2008.

Wes W. Peters