IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-CA-00014

RICHARD E. WILBOURN III, as Co-Trustee and Remainder Beneficiary of the Deanna A. Wilbourn Marital Trust B — **APPELLANT**

V.

DEANNA A. WILBOURN, as Co-Trustee of the Deanna A. Wilbourn Marital Trust B, ELIZABETH W. WILLIAMSON and GARNETT W. HUTTON — **APPELLEES**

APPEAL FROM THE CHANCERY COURT OF LAUDERDALE COUNTY, MISSISSIPPI

BRIEF OF APPELLEES ELIZABETH W. WILLIAMSON AND GARNETT W. HUTTON

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. Richard Eggleston Wilbourn, III, Appellant;
2. Glenn Gates Taylor, William O. Brown, Jr., Christy M. Sparks, Copeland, Cook, Taylor & Bush , P.A, Counsel for Appellant Richard E. Wilbourn, III;
3. Henry W. Palmer, Lawyers PLLC, Counsel for Appellant Richard E. Wilbourn, III;
4. Deanna A. Wilbourn, Appellee;
5. William C. Hammack and Kacey Guy Bailey, Hammack, Barry, Thaggard & May, LLP, Counsel for Deanna A. Wilbourn, Appellee;
6. Kathryn H. Hester, Watkins Ludlam Winter & Stennis, P.A., Counsel for Deanna A. Wilbourn, Appellee;
7. Elizabeth Wilbourn Williamson, Appellee;
8. Garnett Wilbourn Hutton, Appellee;

9. W. Wayne Drinkwater and Mary Clay W. Morgan, Bradley Arant Boult Cummings, LLP, Counsel for Elizabeth W. Williamson and Garnett W. Hutton, Appellees;

10. Honorable Larry Primeaux, Trial Court Judge.

So certified, this the 9th day of June, 2011.

Mary Clay W. Morgan
Counsel for Appellees Elizabeth W. Williamson and Garnett W. Hutton

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STATEMENT OF THE ISSUES

1. Did the chancellor commit manifest error in finding that Richard III breached the fiduciary duties he owed the beneficiaries and co-trustee of Marital Trust B, where Richard III surreptitiously recorded conversations with the beneficiaries and co-trustees, attempted to use the Trust B shares in an effort to settle his own personal claims, and refused to vote the Trust B shares to further his own personal interests?

2. Did the chancellor commit manifest error in finding that the hostility that exists between Richard III and the beneficiaries and co-trustee of Marital Trust B was created by Richard III, not by his mother and sisters?

3. Did the chancellor err in admitting evidence that Richard III attempted to leverage a settlement of his personal claims against the beneficiaries and co-trustees of Marital Trust B by refusing to vote the shares of Marital Trust B, in violation of the testator's intent?

4. Did the Chancery Court of Lauderdale County have sole jurisdiction and venue over this dispute regarding the removal of a trustee of a testamentary trust, where the will creating the trust was probated in Lauderdale County and the testator lived in Lauderdale County throughout his life and at the time of his death?

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Court Below.

Richard E. Wilbourn III ("Richard III") filed this action in the Chancery Court of Madison County seeking reinstatement as co-trustee of Marital Trust B ("Trust B"), R. 12,[1] from which he had been removed by a Notice of Removal served pursuant to the will of his father, Richard E. Wilbourn II ("Richard II").[2] Richard III also sought to have his mother Deanna Wilbourn ("Deanna") removed as co-trustee of Trust B, and to disqualify his sisters Elizabeth W. Williamson ("Elizabeth") and Garnett W. Hutton ("Garnett") from serving in that position. R. 533. Deanna, Elizabeth and Garnett counterclaimed, seeking Richard III's removal as co-trustee for breaches of trust, conflicts of interest and hostility, to the extent the Notice of Removal had not been effective. R. 853, 867.

Because Trust B was created by a will made and probated in Lauderdale County, the Chancery Court of Madison County transferred venue to Lauderdale County. R. 8. Richard III sought interlocutory review of that order, but dismissed his appeal. R. 603; 845.

Prior to trial, the Chancery Court (Primeaux, J.) held that the Notice of Removal did not properly effect Richard III's nonjudicial removal, but found that material issues existed with respect to whether Richard III was guilty of conduct for which he could be judicially removed as co-trustee. R. 4250-51. Accordingly, the case proceeded to trial on Richard III's claims and on Defendants' counterclaims. *Id.*

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[1] The Clerk's Papers are cited "R. ____." The trial transcript is cited "Tr. ____." Trial exhibits are cited "Ex. ___." The record excerpts of Appellant Richard E. Wilbourn III are cited "Richard III R.E. ___", and the record excerpts of Appellees Elizabeth Williamson and Garnett Hutton are cited "E&G R.E. ___".

[2] The Last Will and Testament of Richard E. Wilbourn II (the "Will") provided that a co-trustee other than Deanna could be removed without judicial proceedings if the co-trustee was incompetent, unable to serve, or grossly mismanaged Trust B. R. 1645. Removal could occur by unanimous vote of Deanna and Richard II's remaining children. R. 1645, 46. Removal for other reasons permitted by law required legal proceedings.

At the conclusion of Richard III's case, the chancellor dismissed Richard III's remaining claims pursuant to Miss. R. Civ. P. 41(b). R. 2995-3007. Thereafter, the chancellor issued a 71-page opinion containing extensive findings of fact and conclusions of law on the Defendants' counterclaims. R. 5914-5984 (Opinion, Richard III R.E. tab 2). Ruling in favor of Defendants, the trial court removed Richard III as co-trustee of Trust B on multiple, independent grounds. R. 5983 (Opinion, Richard III R.E. tab 2).

The trial court found that Richard III had breached fiduciary duties to Defendants in his capacities as trustee, attorney and family member. R. 5961-67 (Opinion, Richard III R.E. tab 2). The trial court found that Richard III's surreptitious recordings of conversations with Defendants, his attempt to vote the Trust B shares to regain his personal positions at the Bank and Holding Company, his self-interested and dishonest dealings with Deanna, Elizabeth and Garnett, as well as other actions, warranted his removal. R. 5968-74 (Opinion, Richard III R.E. tab 2). The trial court also found that if Richard III remained as co-trustee of Trust B, the testator's intent that Trust B's shares be voted to preserve the Wilbourn family's control of the Bank could not be fulfilled. R. 5960 (Opinion, Richard III R.E. tab 2).

This appeal followed. R. 5856.

II. Statement of Facts.

A. Richard II Obtains Control of the Bank, Establishes Trust B, and Forms the Holding Company.

Richard II was a successful Meridian lawyer and businessman whose largest business interest related to Citizens National Bank (the "Bank"). *See, e.g.,* Ex. 402 (Jan. 6, 1999 Memorandum of Agreement, at 1188, Richard III R.E. tab 4). By the 1990s, he and his wife and children were, collectively, the Bank's largest shareholders.[3] In 1998, Richard II made a

[3] During his life, Richard II gave or sold significant amounts of Bank stock to his children. Effective voting control of stock owned by any member of the family rested with Richard II.

successful tender offer for control of the Bank. Thereafter, Richard II and his family owned a majority of the Bank's stock. Tr. 2322-23 (Richard III testimony, E&G R.E. 460-61). The following year, Richard II became the Bank's chairman. Ex. 2 (June 8, 1999 Strategic Plan of Bank, Richard III R.E. tab 5).

1. Richard II and Archie McDonnell, Jr. Implement a Successful Plan for the Bank.

Richard II made long-time bank officer Archie McDonnell, Jr. ("Archie") the Bank's chief executive officer ("CEO").[4] Tr. 69 (Archie testimony, E&G R.E. 286). Archie and Richard II had a common vision for the Bank. Tr. 461-63 (Archie testimony, E&G R.E. 305-07); Tr. 2024-25 (Garnett testimony, E&G R.E. 445-46). That vision was that the Bank should remain independent, grow in financial strength, and improve its loan to asset ratio. *See* Ex. 2 (Bank Strategic Plan, Richard III R.E. tab 5); Tr. 451-52 (Archie testimony, E&G R.E. 300-01); R. 5922-23 (Opinion, Richard III R.E. tab 2). Led by Richard II and Archie, the Bank in 1999 developed a strategic plan that outlined these and other objectives. *See* Ex. 2 (Bank Strategic Plan, Richard III R.E. tab 5).

Richard II and Archie had an excellent relationship. Richard II focused on broad strategy, not management, and respected the Bank's organizational structure. Archie and his team ran the Bank on a day-to-day basis subject to general oversight from the board. Tr. 435, 456-57 (Archie testimony, E&G R.E. 292, 302-03); R. 5923 (Opinion, Richard III R.E. tab 2). As the trial court found, the Bank grew and ran smoothly with this approach. R. 5923 (Opinion, Richard III R.E. tab 2).

2. Richard III Joins the Bank Board.

Richard II wished his family to continue to control the Bank. Thus, Richard II opposed mergers, stock sales or other events that would reduce his family's majority ownership interest or

[4] Archie's father, Archie McDonnell, Sr., had been CEO of the Bank prior to Richard II's tender offer.

influence. *See* Ex. 1 at ITEM V(d) (Will, Richard III R.E. tab 6); Ex. 402 (Memorandum of Agreement, Richard III R.E. tab 4); R. 5921-22 (Opinion, Richard III R.E. tab 2); Tr. 2022-23 (Garnett testimony, E&G R.E. 443-44). In 1999, Richard II added Richard III to the Bank's board. Richard III was a lawyer who joined his father's Meridian-based law firm, Wilbourn & Rogers (the "Firm"), as a partner in 2001, opening an office of the Firm in Jackson. Tr. 2535 (Richard III testimony, E&G R.E. 467); Tr. 3063 (Don Rogers testimony, E&G R.E. 568).

When Richard II offered Richard III a board seat, Richard II insisted that Richard III agree to resign from the board if Richard III's service proved unsatisfactory to Richard II. The resulting January 6, 1999 Memorandum of Agreement between Richard II and Richard III illustrated Richard II's desire that his family maintain control over the Bank, and his concerns about Richard III.

> [I]f in the sole opinion of Richard [II] . . . [Richard III's] services as a Board member are no longer advantageous to the Wilbourn family's overall interest then at the request of Richard [II] . . . , [Richard III] agrees to resign from the Board and not offer his name for re-election . . . during the lifetime and service of Richard [II] on the Board.

Ex. 402, at 1188-89 (Memorandum of Agreement, Richard III R.E. tab 4). Richard II did not ask any other board member to sign such an agreement. Tr. 2033 (Garnett testimony, E&G R.E. 447). After joining the board, Richard III served without incident. Tr. 443-44 (Archie testimony, E&G R.E. 293-94). Richard II was dominant in their relationship. As long as Richard II was alive, Richard III remained passive. R. 5922 (Opinion, Richard III R.E. tab 2).

3. Richard II Establishes Trust B.

On May 7, 1999, Richard II signed the Will, which established two marital trusts. Ex. 1 (Will, Richard III R.E. tab 6). Trust A contained the residuary portion of Richard II's estate. Trust B contained all 41,910 shares of Bank stock owned by Richard II, for Deanna's use and

benefit during her lifetime, as the trust's sole income beneficiary. *Id.* at ITEM V. Deanna and Richard III were co-trustees of Trust B.

After payment of expenses, Deanna was to receive all of Trust B's net income at least annually during her lifetime. *Id.* at ITEM V(b). The co-trustees were collectively to receive a trustee's fee of 6% of Trust B's current income, which consisted of dividends from the Bank stock. Trust B was Deanna's primary source of support. Under the Will, the only discretionary duty of the co-trustees was to vote the Trust B stock. *See, e.g.*, Tr. 2573 (Richard III testimony, E&G R.E. 477). The Will contained the following provision, which reflected Richard II's goals for the Bank and Trust B:

> I am committed during my lifetime to voting against any mergers of the bank that would *dilute my interest* and to opposing the sale of stock to another bank, bank holding company or individual. I believe that I have acquired enough stock to be able to unilaterally prevent this. Having expressed these thoughts and desires . . . neither the Co-Trustees nor the proxy of the trust shall sell this stock or vote in favor of any merger or other corporate action which is calculated to lead to a merger which would *dilute the voting power or ownership* of the stock in [t]he . . . Bank . . . or would lead to the sale or exchange of this stock, without the unanimous consent in writing of all of the beneficiaries of the income and the principal of this trust.

Ex. 1, at ITEM V(d) (Will, Richard III R.E. tab 6) (emphases added).

The trial court found that Richard II had two goals relating to Trust B. *First*, he wished the Bank to remain an independent institution, and "wished *for his family* to continue to control the . . . Bank". R. 4738. *Second*, to preserve that family control, he wanted the shares held in Trust B *to be voted* so as not to dilute that control and influence. *See id.* ("As long as the stock can not be voted, the intent of the trustor can not be fulfilled.").

Richard III, Elizabeth, and Garnett were Trust B's remainder beneficiaries. *See* Ex. 1, at ITEM V(f) (Will, Richard III R.E. tab 6). The Will provided that if Richard III or Deanna

became unable or unwilling to serve as co-trustee, Elizabeth would become successor trustee; if Elizabeth could not serve, Garnett would succeed. *Id.* at ITEM V(g).

The Will did not permit Deanna's removal as co-trustee. It contemplated only the removal of "child" co-trustees and required Deanna's consent for any removal:

> [I]f and only if a Co-Trustee shall become incompetent, unable to serve or grossly mismanages the trust, my wife and children, other than the child serving as Co-Trustee, acting unanimously, shall have the power to remove any Co-Trustee or Successor Co-Trustee and to appoint a Successor Trustee or Co-Trustee, such action to be accomplished by the execution and acknowledgement of a written instrument to that effect, and delivery of that instrument to all Co-Trustees.

Id.

4. The Holding Company Is Formed.

Richard II's son-in-law, Russell Williamson ("Russell"), was a successful banker employed by another financial institution, Tr. 444-45, who advised Richard II in many Bank matters. Tr. 1076-77 (Russell testimony, E&G R.E. 413-14); R. 5924 (Opinion, Richard III R.E. tab 2). The Bank employed Russell to manage part of the Bank's investments, with excellent results. Tr. 446 (Archie testimony, E&G R.E. 296); Tr. 1081-82 (Russell testimony, E&G R.E. 415-16).

In 2003, the Bank formed the Holding Company. *See* Ex. 405 (Holding Company Bylaws); Tr. 448-49 (Archie testimony, E&G R.E. 297-98). Bank stock was exchanged for Holding Company stock, and Bank shareholders became Holding Company shareholders. The Holding Company was the Bank's sole shareholder. Tr. 448-49 (Archie testimony, E&G R.E. 297-98).

There were 142,459 outstanding shares in the Bank and, after 2003, in the Holding Company. *E.g.*, Tr. 636, 639 (Archie testimony, E&G R.E. 379-80); Ex. 563 (Table of Holding Company shareholders). Of these, 74,369, or 52.2%, were owned by Richard II and members of

his family. Trust B contained 41,910 of those shares, or 29.4% of the stock.[5] Another 23,561 shares, or 16.5%, were owned by members of the McDonnell family. A further 13,959 shares, or 9.8%, were owned by the families of Richard II's brother Jim Wilbourn and sister Margaret Wilbourn Vise. The remaining 30,750 shares, or 21.5%, were owned by other shareholders. R. 5924 (Opinion, Richard III R.E. tab 2).

The five-person Holding Company board was initially comprised of Richard II, Richard III, Garnett, Archie McDonnell, Sr., and Archie. Richard II was chairman of the Holding Company and Bank boards. The Holding Company board elected the Bank board and determined dividends to be paid to shareholders, but had no direct role in governing the Bank. Tr. 450 (Archie testimony, E&G R.E. 299). Bank governance functions and oversight were exercised by the Bank board, which was for that reason far more active than the Holding Company board. *See* Ex. 401 (Bank Bylaws).

B. Richard II Dies, and Is Succeeded by Richard III, Who Disrupts the Bank.

Richard II died unexpectedly on October 24, 2004. Archie believed that because the Wilbourn family controlled the Bank, a Wilbourn family member should hold both chairmanships. R. 5925 (Opinion, Richard III R.E. tab 2). Of the Wilbourn family members, only Richard III was interested in serving in those positions. Richard III lacked experience, but Archie felt that he could mentor Richard III. Tr. 492 (Archie testimony, E&G R.E. 310); R. 5925 (Opinion, Richard III R.E. tab 2). Accordingly, Archie recommended to Deanna, Elizabeth and Garnett that Richard III be named chairman of both the Bank and Holding Company. Ex. 408 (Transcript of Oct. 29, 2004 and Oct. 30, 2004 meetings).

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[5] Because the Will was not amended after the Holding Company's formation, it continued to provide that stock in the Bank, rather than the Holding Company, would be placed in Trust B. To cure this inadvertence, the trial court reformed the Will so that the Holding Company stock was placed in Trust B. R. 44.

The Defendants were concerned that Richard III's lack of leadership and social skills and distrust of others made him ill-suited for the positions. Tr. 489-90 (Archie testimony, E&G R.E. 308-09); Tr. 2041-42 (Garnett testimony, E&G R.E. 452-53); Tr. 2578-79 (Richard III testimony, E&G R.E. 478); R. 5925 (Opinion, Richard III R.E. tab 2). Nevertheless, after Archie offered to mentor Richard III and keep the other family members advised of Richard III's performance, the family agreed to support Richard III. R. 5930 (Opinion, Richard III R.E. tab 2). As the trial court found, once this decision was made, Archie and the Defendants were fully supportive of Richard III in his new roles. Tr. 1580-81 (Elizabeth testimony, E&G R.E. 429-30); R. 5926 (Opinion, Richard III R.E. tab 2).

Richard III lived in Ridgeland, 100 miles from Meridian. Consistent with the part-time nature of the positions, which did not involve management duties, Richard III travelled to Meridian one day each week. His practice was to drive to Meridian on Monday, spend the night with Deanna, and remain Tuesday at the Bank, where he would attend to Bank business before returning to his home at the end of the day on Tuesday. Tr. 2550-54 (Richard III testimony, E&G R.E. 472-76); R. 5926 (Opinion, Richard III R.E. tab 2).

1. Richard III's Performance Is Problematic.

Unfortunately, rather than serving in an oversight role, as Richard II had done, Richard III involved himself deeply in Bank management and operational matters, with destructive results. Immediately after his selection as chairman, Richard III sent Archie a detailed e-mail, seeking information, making management suggestions, and asking for prior notifications of management activities, in which Richard III intended to participate. Ex. 411 (Nov. 10, 2004 e-mail) (E&G R.E. 273-74); Tr. 493-97 (Archie testimony, E&G R.E. 311-15); R. 5926 (Opinion, Richard III R.E. tab 2).

Within a month, Richard III suggested that the Bank change its name. Tr. 504-05 (Archie testimony, E&G R.E. 316-17). Shortly thereafter, Richard III conferred with Bill Meredith, a Bank consultant, about the Bank's capital plan and governance practices. *See* Ex. 429. Richard III did not tell Archie or any other board member of this action, or that he gave Meredith the Bank's capital plan for review. Tr. 2674-75 (Richard III testimony, E&G R.E. 536-37). The Board did not authorize any of these actions. *Id.*; *see also* Tr. 505-08 (Archie testimony, E&G R.E. 317-20).

Richard III ignored the Bank's management structure, bypassing Archie and seeking information from or giving instructions to officers who were under Archie's direction. Richard III had no board authorization for these actions. Richard III dealt with employees in a way that demonstrated that Richard III did not trust them, or Archie. Tr. 2039 (Garnett testimony, E&G R.E. 450). Richard III also attended management committee meetings, where his participation chilled discussion and confused employees, who began to believe that they had two bosses. Tr. 460 (Archie testimony, E&G R.E. 304); R. 5927 (Opinion, Richard III R.E. tab 2).

Among examples of Richard III's disruptive behavior:

a. The 2006 Bank Budget and Capital Plan.

Richard III objected to the 2006 Bank budget. Richard III thought that the proposed "Stakeholder Program" – an employee bonus plan – was too generous. Without informing Archie, and without board authority, Richard III asked Mike Higgins, a consultant who worked with the Bank to develop the budget, to change the Stakeholder Program to reduce the bonuses. Higgins refused and suggested that Richard III work with Archie. Ex. 472 (Feb. 9, 2006 e-mail from Higgins to Richard III, E&G R.E. 275-76). Instead of discussing the matter with Archie, Richard III asked the Bank's chief financial officer ("CFO"), Cindy Wilson, to make the changes. Ex. 474 (Feb. 10, 2006 email from Richard III to Wilson, E&G R.E. 272). Cindy

referred Richard III's request to Archie. Ex. 478 (Feb. 13, 2006 email from Wilson to Archie, E&G R.E. 278-79). Budget preparation is a management function. It was improper for a single board member to insert himself into this process without notifying the Bank's CEO or other board members. Richard III's objections garnered no support. Archie's budget was approved unanimously.[6] Tr. 522 (Archie testimony, E&G R.E. 321); *see also* Ex. 479 (minutes of board meeting) at CNB 1098. Richard III also objected to the Bank's 2006 capital plan. Nevertheless it was overwhelmingly adopted; all directors except Richard III voted to approve it. *See* Ex. 494 (minutes of June 13, 2006 board meeting) at CNB 1162.

b. Richard III's Interactions with Persons Outside the Bank.

Richard III undermined Archie and questioned his honesty. In a conversation with Bob Walters, a Bank consultant, Richard III called Archie a "silver-tongued devil", indicating to Walters that Richard III believed that Archie could not be trusted. Tr. 3095 (Bob Walters testimony, E&G R.E. 3095); *see also* Tr. 522-25 (Archie testimony, E&G R.E. 321-24); R. 5926, 5930 (Opinion, Richard III R.E. tab 2). Richard III also challenged Archie's integrity and willingness to consider dissenting views. Walters was shocked to hear these comments about Archie, whom Walters had trusted for 15 years. Although Richard III asked Walters *not* to tell Archie about his remarks, Walters felt that Richard III's opinions were so serious – and so baseless – that Archie should know of them. Accordingly, Walter relayed them to Archie, who concluded that Richard III did not trust him. Tr. 523-25 (Archie testimony, E&G R.E. 322-24). The trial court found that this episode demonstrated that the relationship between Archie and Richard III was not one of trust and mutual respect. R. 5926 (Opinion, Richard III R.E. tab 2).

[6] Although Richard III spoke in opposition to the budget and Stakeholder Program, it appears that he ultimately voted in favor of the budget upon realizing that his arguments failed to persuade any other director.

c. Richard III's Interactions with Bank Employees.

Richard III's relationships with Bank employees created problems. For example, Richard III's dealings with CFO Cindy Wilson indicated that he did not trust her. Tr. 720-21, 739, 761 (Cindy Wilson testimony, E&G R.E. 381-385). Richard III requested extensive financial information from Cindy, without seeking the information from Archie or even telling Archie about it. *Id.* As the trial court found, Richard III's actions made Wilson very uncomfortable. R. 5927 (Opinion, Richard III R.E. tab 2).

Richard III also told Wilson that he intended to change the Bank's management structure so that she would report to him, rather than to Archie. Wilson concluded that Richard III wished to run the Bank, and that Richard III did not trust her or Archie. Tr. 720-21, 739, 751, 761-62 (Cindy Wilson testimony, E&G R.E. 381-86); *see also* R. 5927 (Opinion, Richard III R.E. tab 2). At one point, Richard III told Wilson that, like Archie, she would manipulate the facts to fit her needs. Tr. 761 (Cindy Wilson testimony, E&G R.E. 385). Wilson felt that she could not work for Richard III and told Archie and Elizabeth that she would resign if Richard III ran the Bank. Tr. 768, 770 (Cindy Wilson testimony, E&G R.E. 387-88).

Other Bank officers, employees and contractors complained about Richard III. Tr. 258, 556-564 (Archie testimony, E&G R.E. 287, 338-45); R. 5927-28 (Opinion, Richard III R.E. tab 2). Archie was required to perform "damage control" by talking at length to employees who were intimidated or demoralized by Richard III's distrustful attitude and behavior. Tr. 565 (Archie testimony, E&G R.E. 565); R. 5928 (Opinion, Richard III R.E. tab 2). For example:

- Jeffrey Smith, the Bank's chief credit officer, complained to Archie about criticisms that Richard III had made concerning Archie and Smith. Tr. 561-62 (Archie testimony, E&G R.E. 342-43).
- Jim Resnick, an outside architect who designed branches for the Bank, complained to Archie about Richard III's interference with his work. Tr. 558 (Archie testimony, E&G R.E. 339).

- Virgie Palmer, Archie's administrative assistant, complained to Archie about Richard III's conduct. Tr. 557, 563 (Archie testimony, E&G R.E. 338, 344).

- Penny Rainer complained to Archie about Richard III, and told Archie that she was considering a job with another bank. Tr. 557, 562 (Archie testimony, E&G R.E. 338, 343).

- David Barr, the Bank's chief operating officer, observed Richard III's failure to honor proper lines of communication within the Bank – Richard III saw middle managers about matters that should have been addressed to Archie. Barr received complaints about Richard III from employees, including Lamar Moore, the Bank's facility manager; and Shane Callahan, the information systems manager. These employees also complained to Archie. Tr. 557, 563 (Archie testimony, E&G R.E. 338, 344). Barr concluded that Richard III had no confidence in Bank management, and that Richard III intended to involve himself in day-to-day operations. Had Richard III's actions continued, Barr intended to resign; Barr thought that Cindy Wilson and Jeffrey Smith felt the same way. Barr told these facts to Archie and Elizabeth. Tr. 563 (Archie testimony, E&G R.E. 344); Tr. 3028-29, 3031-33 (David Barr testimony, E&G R.E. 563-67).

Based on this evidence, the trial court found that Richard III's actions made employees concerned about their job security, and made them believe that Richard III did not trust them. R. 5928 (Opinion, Richard III R.E. tab 2).[7]

The trial court found that "there did not exist a relationship of trust" between Richard III and Archie, and "that it was Richard III who brought an attitude of suspicion and distrust into his position . . ." *Id.* at 5929. The trial court also found that "Richard III interjected himself into the CEO's job and upset the balance between Board and management. Richard III did not respect the bounds of that relationship, and he undermined management." *Id.* at 5930. Finally, the trial court found that the actions of Richard III were not in keeping with the intent of Richard II, who "intended through marital Trust B for the bank to build on the foundation he had laid before his

[7] In his brief, Richard III claims that "no employee of the bank quit or threatened to quit because of [him]." Appellant's Brief at 21. As the trial testimony cited above demonstrates, this statement is misleading. Penny Rainer threatened to quit her position at the Bank because of Richard III's disruptive behavior. Tr. 557, 562 (Archie testimony, E&G R.E. 338, 343). David Barr testified that he intended to resign his position at the Bank if Richard III continued as Chairman of the Board. Tr. 563 (Archie testimony, E&G R.E. 344); Tr. 3028-29, 3031-33 (David Barr testimony, E&G R.E. 563-67).

death, and that the cooperative relationship of board to management, with Wilbourns and McDonnells working together for the benefit of all shareholders should continue." *Id.*

2. Archie and the Wilbourn Family Counsel with Richard III.

Archie became concerned that Richard III's actions could harm the Bank. *Id.* at 5928-29. At Archie's request, Archie and Richard III met in February 2006. Tr. 528-31 (Archie testimony, E&G R.E. 325-28). Archie told Richard III of his concern over Richard III's performance, and that Richard III was interfering in management. *Id.*; *see also* R. 5930-31 (Opinion, Richard III R.E. tab 2). Archie assured Richard III that he would provide Richard III with any information that he wanted, and asked Richard III to address such requests directly to him. Archie also expressed his disappointment at Richard III's comments to Bob Walters. Tr. 529 (Archie testimony, E&G R.E. 326); R. 5930-31 (Opinion, Richard III R.E. tab 2).

After this meeting, Richard III wrote a letter to Archie apologizing for some of his comments to Walters. Ex. 481 (Feb. 26, 2006 letter). However, Richard III did not indicate that he would change his methods of dealing with employees or his involvement in management. Tr. 531-32 (Archie testimony, E&G R.E. 328-29). Nor did Richard III disavow his stated distrust of Archie. *Id.* Indeed, and as the trial court found, Richard III showed no remorse and repeated to Archie his intention to have Wilson report to him. Tr. 266-67 (Archie testimony, E&G R.E. 288-89); R. 5931 (Opinion, Richard III R.E. tab 2). Richard III made this statement even though the Bank's Strategic Plan called for the CFO to report to the CEO. Ex. 2 (Richard III R.E. tab 5) at 000501; Tr. 534 (Archie testimony, E&G R.E. 331).

Concluding that Richard III did not trust him, Archie spoke to Deanna about his concerns. Tr. 533 (Archie testimony, E&G R.E. 330) Tr. 846-49 (Deanna testimony, E&G R.E. 389-92). Archie's report to Deanna was consistent with his promise that he would keep the family advised of Richard III's performance. Tr. 492, 535 (Archie testimony, E&G R.E. 310,

332). After Archie's conversation with Deanna, Deanna, Elizabeth, and Garnett then conveyed to Richard III their concerns with his performance. They reminded Richard III that Richard II had wanted Archie to run the Bank, and that Richard III needed a better and trusting relationship with Archie. Tr. 2040-42 (Garnett testimony, E&G R.E. 453-55). Richard III denied that his behavior was problematic and refused to express support for, or trust in, Archie. Tr. 1355-56 (Elizabeth testimony, E&G R.E. 417-18); Tr. 2040-42 (Garnett testimony, E&G R.E. 453-55); R. 5931 (Opinion, Richard III R.E. tab 2).[8]

3. Richard III Continues His Destructive Behavior.

In mid-2006, the Bank underwent a strategic program to improve efficiency and profitability. The program reduced the Bank's staff by 10%, a stressful event for employees. Tr. 547-48. Almost immediately, Richard III suggested that the Bank engage in another strategic program. Archie felt it was insensitive to expose employees to such a program so soon after large layoffs, and the Bank board rejected Richard III's idea overwhelmingly. Richard III was the only board member who supported it. Tr. 546-550; R. 5932 (Opinion, Richard III R.E. tab 2).

Richard III proposed changes to the Bank's profit-sharing program that would have increased the contributions of highly compensated employees. However, the proposal would have required lower earning employees to increase their contributions at a time when many of them could not afford reductions in their take-home pay. The idea won no support. Tr. 566-69 (Archie testimony, E&G R.E. 346-49); R. 5932 (Opinion, Richard III R.E. tab 2).

At the 2006 shareholder meeting, Richard III reported on a proposed amendment to an existing shareholder agreement which gave the Bank a right of first refusal to purchase stock

[8] Thereafter, Elizabeth investigated Archie's charges herself, interviewing Cindy Wilson and David Barr. Her investigation confirmed Archie's concerns. *See* Ex. 507; Tr. 1426-27, 1432-35 (Elizabeth testimony, E&G R.E. 419-20); Tr. 2047 (Garnett testimony, E&G R.E. 454); R. 5931 (Opinion, Richard III R.E. tab 2).

from shareholders who desired to sell. The agreement existed to protect the Bank's status as a "subchapter S" corporation.[9] The proposed amendment allowed shareholders to transfer stock to relatives without triggering the Bank's right of first refusal. The amendment was intended to institute the IRS "family election rule", which permitted sales to related shareholders without jeopardizing subchapter S status. Tr. 570-71 (Archie testimony, E&G R.E. 350-51).

However, Richard III made an additional change to the 2006 amendment. He altered the definition of a "permitted shareholder" so that the Bank's right of first refusal was eliminated in *any* sale of stock, whether or not the seller and purchaser were related. Ex. 487 (Apr. 24, 2006 Second Amended & Restated Shareholder Agreement) at 4-6. This added change was not authorized by nor disclosed to the Holding Company board. Tr. 572-73 (Archie testimony, E&G R.E. 352-53). When Richard III presented the proposed amendment at the shareholder meeting, he did not mention the change to the shareholders, either. Ex. 485 (Mar. 7, 2006 Shareholder Meeting Remarks) at 6. Nor did he say that the amendment would permit shareholders to transfer stock to *unrelated* shareholders without giving the Holding Company a right of first refusal. Tr. 577 (Archie testimony, E&G R.E. 354). No one noticed Richard III's change, which was inconsistent with the Holding Company board's authorization. *Id.* As a result, the agreement was approved.

In the fall of 2006, three Bank directors made separate visits to Archie: Ray Long, Charlie Woodall and Don Rogers. Each expressed concern about Richard III's performance, and told Archie that they represented other directors with similar concerns. Tr. 586-88 (Archie testimony, E&G R.E. 355-56); R. 5932 (Opinion, Richard III R.E. tab 2). Mr. McDonnell also

[9] In 2000, the Bank elected subchapter S status, in which shareholders are taxed personally for their share of the Bank's net income. Subchapter S status avoids double taxation on dividends. The status is available only to corporations with fewer than 75 shareholders, and the shareholder agreement was a safeguard to prevent the number of shareholders from exceeding this limit. Tr. 569 (Archie testimony, E&G R.E. 349). The Holding Company succeeded to the Bank's subchapter S status.

expressed concerns about Richard III. Tr. 588-89 (Archie testimony, E&G R.E. 356-59). In September-October 2006, Richard III again sought to involve himself in budgeting and attend management meetings. Employee complaints about him continued. Tr. 589-590 (Archie testimony, E&G R.E. 359-60); R. 5932 (Opinion, Richard III R.E. tab 2).

In October 2006, Archie again contacted Deanna about Richard III. Tr. 591 (Archie testimony, E&G R.E. 3561). Deanna decided to have a discussion with Richard III about his performance. On October 23, Deanna told Richard III that she wanted to talk to him about his future at the Bank. On October 24, while Richard III spent the night with Deanna at her house, Deanna read to him a statement that she had prepared. Ex. 297 (transcripts of all secret recordings, E&G R.E. 1-8); *see also* Ex. 587 (surreptitious recording of Oct. 24, 2006 conversation between Deanna and Richard III); Ex. 578 (Deanna's written statement) (E&G R.E. 283-84). In the statement, Deanna told Richard III that his role at the Bank was not working, that what he was doing was not in the best interest of their family, that he did not have good rapport with employees, and that he had an adversarial relationship with, and intense distrust of, Archie. *Id.* This led to a discussion concerning Richard III's performance at the Bank, and his poor relationships with Archie and Bank employees. *Id*; *see also* R. 5939 (Opinion, Richard III R.E. tab 2). The trial court found that Deanna's statement to Richard revealed her depth of concern over Richard III's performance, and that Deanna "was losing faith that Richard III could carry out Richard II's vision for maintaining the Wilbourn family influence in the bank by maintaining a viable working relationship with the McDonnells." R. 5940 (Opinion, Richard III R.E. tab 2).

Richard III's immediate response was to interrogate Deanna about her intent and the meaning of her statements and complaints. *Id.* Richard III's aggressive questioning stemmed

from the fact that, without Deanna's knowledge, he was secretly recording their conversation with a hidden recording device.

C. Richard III Secretly Records Conversations with His Mother and Sisters.

The October 24 conversation marked the beginning of Richard III's practice of secretly recording conversations with his mother and sisters without their knowledge. Some recorded conversations occurred in Deanna's own home. In each case, Richard III knew the conversations were recorded, and the other participant(s) did not. Richard III was therefore able to pose questions, structure his statements, and guide the discussion in ways that were favorable to him.

The recordings continued through January 2, 2007, and resumed in April 2007. *See* Ex. 297 (transcripts of all secret recordings, E&G R.E. 1-272); R. 5943-45 (Opinion, Richard III R.E. tab 2). At trial, Richard III was unapologetic about his actions, which he felt were reasonable and appropriate. Tr. 2645-48 (Richard III testimony, E&G R.E. 532-35). He claimed that he made these recordings to have accurate records of his conversations. Tr. 2634-35, 2645-48 (Richard III testimony, E&G R.E. 521-22, 532-35). He made it apparent that he would continue secretly recording family members in the future, should the opportunity arise. *Id.* As the trial court found, none of the recordings made prior to January 2, 2007 was made under circumstances that reasonably would have led Deanna, Elizabeth or Garnett to believe that the conversations would be recorded. R. 5947-48 (Opinion, Richard III R.E. tab 2).

After hearing and observing Richard III's testimony and the testimony of other witnesses, the trial court rejected Richard III's explanation of his motives. R. 5944 (Opinion, Richard III R.E. tab 2). The evidence at trial established, and the trial court found, that Richard III made the recordings for adversarial purposes. He knew that there was dissatisfaction with his performance

at the Bank, and knew that legal proceedings might result.[10] As the trial court found, "Richard III's taping was not for the purpose of preventing a misunderstanding, but rather was intended to obtain and memorialize what he considered to be negative information on his mother." *Id.* Richard III recorded the conversations to secure for himself an advantage in any dispute. The trial court stated:

> Richard III's actions are in this court's opinion outrageous and inconsistent with his roles as son, co-trustee, fiduciary and lawyer. Indeed, his actions are a violation of the sensitive nature of those roles, which require integrity, honest dealing, straight communication and a relationship of trust. The surreptitious recording in this situation was the action of an opponent, a person looking for evidence, an adversary, a combatant looking for an advantage over an enemy, a sharp dealer. The court finds his attempt to justify his actions entirely self-serving, disingenuous and unconvincing.

Id. at 5948.

Richard III had made recordings without the knowledge of persons recorded on other occasions. Tr. 2636-43 (Richard III testimony, E&G R.E. 523-30). In each instance, litigation was underway or contemplated. As a lawyer, Richard III secretly recorded conversations with witnesses in litigated matters. Tr. 2640-41 (Richard III testimony, E&G R.E. 527-78). He recorded a conversation with his uncle Jim Wilbourn in a dispute concerning the will of their great aunt Anne. Tr. 2641-43 (Richard III testimony, E&G R.E. 578-80). Richard III secretly installed a voice-activated recording device in his home in order to record conversations involving his wife Victoria, with whom he was involved in domestic litigation. Tr. 2638-39 (Richard III testimony, E&G R.E. 525-26). He secretly recorded conversations with his minor children, also in connection with that litigation. Tr. 2644-45 (Richard III testimony, E&G R.E. 531-32).

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[10] Shortly after the October 24, 2006 conversation with Deanna, Richard III sought legal advice from Leigh Allen, a prominent Jackson lawyer who specializes in corporate law. R. 5940; Tr. 2751.

The recordings that Richard III made were used against the Defendants. After this case was filed, Richard III argued against early production of the recordings, contending that their subject matter was so closely related to the lawsuit that if the Defendants had access to the recordings, they might tailor their testimony. R. 846, 941; 5970 (Opinion, Richard III R.E. tab 2).

D. Richard III Represents the Defendants in Other Positions of Trust.

Richard III advised and represented the Defendants in other capacities, including as a lawyer. From 2001 until 2007, Richard III was a partner in the Firm, which represented Deanna on a continuing basis. Tr. 2535-36 (Richard III testimony, E&G R.E. 467-68); Tr. 3063-66 (Don Rogers testimony, E& G R.E. 568-71). The Firm advised Deanna concerning her widow's allowance, her right to renounce Richard II's Will, a real estate purchase, and other matters. Tr. 3071 (Don Rogers testimony, E&G R.E. 573). Richard III also served as a legal adviser to his father's estate, representing Deanna as executrix, and performed legal services for the Defendants in connection with the estate. *See* Ex. 17 (Minutes of Richard II's Estate Meetings); Tr. 2590-93, 2622-24 (Richard III testimony, E&G R.E. 480-83, 509-11).

Richard III represented Deanna as a lawyer in creating the Wilbourn Family LLC, and advised her, as its sole member, concerning its funding and the purchase of a condominium, for which Deanna personally contributed $750,000. *See* Exs. 120, 297 (transcripts of all secret recordings, E&G R.E. 1-272), 486, & 592; Tr. 2611-13, 2619-20 (Richard III testimony, E&G R.E. 498-500, 506-07). He represented Deanna, the Wilbourn Family LLC, and Richard II's estate as a lawyer in pursuing claims against a homeowners' association for uninsured damage to the condominium, as well as to a separate condominium owned by the estate. *See* Ex. 564 (3/13/07 Letter from Richard III to Deanna, E&G R.E. 282); Ex. 17 (Minutes of Richard II's Estate Meetings) at 1151-53, 1160-65, 1185-87, 1125-26; Tr. 2538-40 (Richard III testimony,

E&G R.E. 469-71). Richard III billed the estate for his time on that litigation. Tr. 2590-93 (Richard III testimony, E&G R.E. 480-83). Richard III withdrew from these representations shortly before filing this lawsuit against Deanna. Ex. 564 (Mar. 13, 2007 letter from Richard III to Deanna, E&G R.E. 282).

Richard III also gave Deanna legal advice regarding the Providence Trust which was established for estate planning purposes. Richard III did legal work on and advised Deanna concerning the trust, billing the estate. Tr. 2592-98 (Richard III testimony, E&G R.E. 482-88); *see also* Ex. 17 (Minutes of Richard II Estate Meetings) at 1059-61; Ex. 448 (Minutes of Sept. 12, 2005 Estate Meeting). The Defendants relied on Richard III's legal advice. Tr. 1537.

Richard III arranged to be named co-trustee of the Providence Trust, then obtained Deanna's agreement to transfer her personal Holding Company stock – 3,440 shares – into that trust. Tr. 2598 (Richard III testimony, E&G R.E. 488); Ex. 457 (Wilbourn Family Providence Trust) at 7-8. This enabled Richard III to control the votes of those shares.[11] Richard III also sought to have all of the shares held in Trust B transferred into the Providence Trust. Tr. 2602-03 (Richard III testimony, E&G R.E. 492-92).

Had this occurred, Richard III would have controlled the voting of 45,350 shares of Holding Company stock, a power that would have given him control of the Holding Company and Bank. R. 5941-42 (Opinion, Richard III R.E. tab 2). Deanna refused to agree to this additional transfer. Tr. 2602-03, 2606-08; (Richard III testimony, E&G R.E. 491-92, 495-97); Ex. 508 (Nov. 15, 2006 Memorandum from Richard III) (E&G R.E. 280-81); R. 5941 (Opinion, Richard III R.E. tab 2). The trial court found that Richard III's plans for the Providence Trust

[11] Richard III also persuaded the Defendants to allow Richard III's friend Kirk Reasonover to be named the other co-trustee of that trust. Provisions of the trust permitted Richard III to remove Reasonover as co-trustee, a power that gave Richard III effective control of the Providence Trust and the stock it contained. Ex. 457 (Wilbourn Family Providence Trust) at 1863.

violated the terms of Richard II's will, and that those plans were "evidence that Richard III put his own interest ahead of his beneficiary's . . ." R. 5939 (Opinion, Richard III R.E. tab 2).

On July 24, 2007, after this lawsuit was filed, in yet another conversation with Deanna that Richard III recorded without her knowledge, Richard III sought to persuade Deanna to personally guarantee a $12 million construction loan for a hotel in which she had no financial interest, but in which Richard III did have an interest. Ex. 297 (transcripts of all secret recordings, at G&E R.E. 252-56)); Ex. 606 (Transcript of Surreptitious Recording). The transaction would have benefited Richard III, who otherwise would have had to sign the guaranty himself.

E. Richard III Advised Deanna to Make Business Decisions that Benefitted Him Even Though He Believed that She Was Mentally Incompetent.

The advice and legal representation that Richard III gave Deanna on these and other matters, as well as his recordings of his conversations with her, came during a time when Richard III believed that his mother was not mentally competent. Throughout this litigation, Richard III has claimed that, beginning 1-2 years prior to Richard II's death, Deanna has lacked mental capacity to serve as co-trustee of Trust B. R. 12-22; 5944 (Opinion, Richard III R.E. tab 2).[12] Thus Richard III sought to involve Deanna in transactions that benefitted him even though he believed that Deanna lacked the mental capacity to understand and evaluate those transactions. At no time did Richard III advise his mother to get independent advice. Nor did he seek the appointment of a conservator to protect her interests.

On November 14, 2006, Deanna told Richard III that she no longer trusted him, and asked him to resign as co-trustee of that trust. *See* Ex. 508 (Nov. 15, 2006 Memorandum of

[12] In fact, Deanna does not lack mental capacity, as the chancellor found. R. 4265-4277. The chancellor further found that Richard III's attempts to involve her in business transactions that favored him, at a time when he believed her to be incompetent, reflects powerfully on his lack of good faith in his dealings with his mother. R. 5975-76 (Opinion, Richard III R.E. tab 2).

Richard III, E&G R.E. 280-81); Tr. 2747-48 (Richard III testimony, E&G R.E. 541-42). Deanna made clear to Richard III that, so long as he was co-trustee, she would not fund the trust beyond the initial 3,440 shares. *Id.* Richard III refused to resign as co-trustee even though his refusal defeated the trust's estate-planning purpose, as Deanna would not transfer more assets into it if Richard III remained as co-trustee. Tr. 2605-08 (Richard III testimony, E&G R.E. 494-97). This was to the detriment of Elizabeth and Garnett as beneficiaries of that trust. However, resignation as co-trustee would have defeated Richard III's ability to vote the 3,440 shares of Holding Company stock that the trust contained. Richard III's desire to maintain that control for his own benefit outweighed his interest in the beneficiaries of the trust.

F. Richard III Is Removed from His Bank and Holding Company Positions.

In November 2006, Archie and the Defendants met to consider issues relating to Richard III. Tr. 590-91 (Archie testimony, E&G R.E. 359-60). As the evidence demonstrated, and the chancellor found, all of them acted in good faith, in the best interest of the Bank and Holding company. Tr. 591-92 (Archie testimony, E&G R.E. 360-61); R. 5949 (Opinion, Richard III R.E. tab 2). To verify Archie's descriptions of the problems that Richard III was creating, Elizabeth had met privately with Cindy Wilson and David Barr. *See* Ex. 507 (Elizabeth's notes of meeting with Cindy Wilson); Tr. 1426-27, 1432-35 (Elizabeth testimony, E&G R.E. 419-24); R. 5931 (Opinion, Richard III R.E. tab 2). Both confirmed Archie's reports. *Id.*; *see also* Tr. 1439-41 (Elizabeth testimony, E&G R.E. 425-27).

1. Deanna Learns of the Secret Recordings.

On January 1, 2007, during a conversation between Richard III and Deanna, secretly recorded by Richard III, Richard III asked Deanna her intentions concerning Richard III's status at the Bank. Ex. 297 (Transcripts of all secret recordings, at E&G R.E. 219-20). Richard III wished to commit Deanna to supporting him, and to record that commitment. Deanna asked

Richard III whether he was recording their conversation. After an attempt to deflect Deanna's inquiry, Richard III admitted that he was. *Id.* This admission led to further discussions between Richard III and Deanna, both on January 1 and in a second conversation the following morning. R. 5942 (Opinion, Richard III R.E. tab 2); Tr. 2053; Tr. 2691-92 (Richard III testimony, E&G R.E. 538-39).

In these conversations, Richard III was defiant, telling Deanna that she "need[ed] to assume that . . . all conversations with me are recorded"; and that such an assumption would be "a fair assumption for [a person] to make". Ex. 297 (Transcripts of all secret recordings, at E&G R.E. 226, 233); Ex. 522 (Transcript of 1/1/07 secret recording); Ex. 524 (Transcript of 1/2/07 secret recording); R. 5942 (Opinion, Richard III R.E. tab 2). The conversation included a discussion of whether Richard III was tapping Deanna's private telephone line, and Deanna's statement to Richard III that he was "dramatically paranoid." Ex. 297 (Transcripts of all secret recordings, at E&G R.E. 226).

In the January 2 conversation, Deanna expressed outrage at Richard III's conduct, which she called "duplicitous" and a "breach in confidence". Ex. 297 (Transcripts of all secret recordings, at E&G R.E. 235, 243); R. 5942-43 (Opinion, Richard III R.E. tab 2). Deanna concluded by telling Richard III, in response to his inquiry about his status, that any commitments she had made him were nullified, and that there would be meetings held and decisions made to answer Richard III's question. Ex. 297 (Transcripts of all secret recordings, at E&G R.E. 244); R. 5942-43 (Opinion, Richard III R.E. tab 2). By the end of the January 2, 2007 conversation, Deanna had decided that Richard III must be removed from his Bank and Holding Company positions. Tr. 1624-26 (Elizabeth testimony, E&G R.E. 433-35).

2. Richard is Removed from His Bank and Holding Company Positions.

The Bank and Holding Company Boards removed Richard III from his positions on those boards in January 2007. The Bank and Holding Company boards made this decision in good faith, believing Richard III's removal to be in the best interest of the Bank. Tr. 621-24 (Archie testimony, E&G R.E. 374-76); Tr. 1972-75 (Garnett testimony, E&G R.E. 435-38).[13] David Grishman, a lawyer engaged to advise concerning Richard III's removal, was asked to speak to Richard III before the January 9, 2007 Holding Company board meeting, in an effort to persuade Richard III to resign voluntarily. Tr. 596-97 (Archie testimony, E&G R.E. 362-63). Grishman presented Richard III with a proposed notice of resignation. Ex. 205 (Notice of Resignation form, Richard III R.E. tab 8). The notice listed positions from which Richard III would resign and included not only Richard III's Bank positions and his position as co-trustee of the Providence Trust, but also his position as co-trustee of Trust B. *Id.* Defendants did not know that Grishman would request Richard III to resign as co-trustee of Trust B. Tr. 1985-87 (Garnett testimony, E&G R.E. 440-42). There is no evidence that any of the Defendants then intended Richard III's removal from that position, and the trial court made no such finding.

Richard III refused to resign voluntarily, and at the board meeting, Richard III was removed as chairman by the four other Holding Company directors. Ex. 530 (Minutes of 1/9/07 meeting minutes). On the same day, Richard III was removed from the Bank board and was

[13] Richard III speculates that Elizabeth wished to remove him as chairman of the Bank board so that her husband, Russell Williamson, could assume that position. *See, e.g.,* Appellant's Brief at 9. The evidence does not support that speculation. Russell agreed to become chairman only to assist the Bank; his doing so resulted in a substantial reduction in his income. Tr. 1622-24. He agreed to assume the positions out of loyalty to the family and the Bank. *Id.* In any event, the propriety of Richard III's removal from his Bank positions is not at issue in this appeal.

terminated as the Bank's general counsel. *See* Exs. 530-34; Tr. 557-63, 597-98 (Archie testimony, E&G R.E. 338-44, 363-64).[14]

The Holding Company board had good reason to remove Richard III from his positions. Richard III distrusted and interfered in Bank management, and disrupted the operation of the Bank. His behavior would have caused valuable management employees to leave, with resulting damage to the Bank and consequently to Trust B. Tr. 557-63 (Archie testimony, E&G R.E. 338-44).

3. Richard III Falsely Promises Never to Record His Mother Again.

On January 25, 2007, during a meeting with Richard III's uncle Jim Wilbourn, Jim's wife Jane, and Deanna, Richard III apologized to Deanna for secretly recording their conversations, and promised Deanna that he would never do so again. Tr. 2692-93 (Richard III testimony, E&G R.E. 539-40); R. 5945 (Opinion, Richard III R.E. tab 2). On January 30, 2007, Richard III wrote Deanna and Archie a letter seeking to settle what he felt were his personal claims arising out of his removal from his positions with the Bank and Holding Company. Ex. 545 (included in Richard III R.E. tab 9). In the letter, Richard III repeated his earlier promise never again to record conversations with Deanna. *Id.* His proposals to settle his personal claims included actions that Richard III proposed to take or forbear as co-trustee of Trust B, demonstrating his willingness to use his position as co-trustee to advance his personal interests by settling a personal claim. *See id.*

[14] At trial, the parties spent significant time discussing the profitability of the Bank while Richard III was chairman and thereafter. The evidence showed that profitability increased significantly since Richard III's removal. Tr. 609-615 (Archie testimony, E&G R.E. 365-71). This increase in profits is attributable to decisions made by Archie and Russell Williamson. Richard III had no positive impact on Bank profitability because the Bank never adopted any proposal that Richard III made. Tr. 615-17 (Archie testimony, E&G R.E. 371-73).

Richard III's promises to never again secretly record his mother proved false. On four later occasions, Richard III recorded Deanna without her knowledge. R. 5945 (Opinion, Richard III R.E. tab 2). The first three occurred in April 2007, prior to his removal as co-trustee of Trust B. Ex. 297 (Transcripts of all secret recordings, at E&G R.E. 247-51). The final recorded conversation occurred in the summer of 2007, after Richard III had filed this lawsuit against Deanna, Elizabeth and Garnett. *Id.* at E&G R.E. 252-56. As the trial court found, in this final conversation he sought to persuade Deanna to sign a $12 million personal guaranty, guaranteeing for Richard III's benefit a construction loan in which she had no interest. R. 5947 (Opinion, Richard III R.E. tab 2). At this time, Richard III believed that Deanna lacked the mental capacity to serve as co-trustee of Trust B. The trial court found that "Richard III was recording the conversation in order to get her [to] commit 'on the record . . .'" to the guaranty. *Id.*

Richard claims that, in his third post-January recorded conversation, Deanna gave him permission to record future conversations. The transcript and audio recording of this conversation reveal that Deanna gave no such permission, as the trial court found. Ex. 297 (Transcripts of all secret recordings, at E&G R.E. 251); R. 5946 (Opinion, Richard III R.E. tab 2). In any event, after his promise never to record his mother again, Richard III had already recorded two conversations with her, and was in the process of recording a third, at the time she made the statement upon which he relied to justify his resumption of this practice. R. 5946 (Opinion, Richard III R.E. tab 2).

G. Richard III Seeks to Vote the Trust B Stock in an Effort to Reclaim His Bank and Holding Company Positions.

Holding Company directors are elected at the annual shareholder meeting. The Holding Company stock contained in Trust B is voted by the co-trustees, both of whom must agree for the stock to be voted. At the March 6, 2007 annual shareholder meeting, Richard III and Deanna did not agree on how to vote the Trust B shares. Deanna wanted to vote for a slate proposed by the

Holding Company board. Originally, the board-proposed slate included Deanna, Garnett, Archie, Mr. McDonnell, and Russell Williamson. *See* Exs. 551 (2/7/07 letter from Deanna to Richard III), 530 (1/9/07 Minutes of Board of Directors Meeting). In an effort to reach an agreement with Richard III and ensure the Trust B shares were voted, Deanna and Archie proposed removing Garnett from the slate, and adding Richard III in her place. Even though the proposed alternative slate would have restored Richard III to a position on the Holding Company board, Richard III refused to agree to vote the Trust B shares for the proposed alternative slate. Ex. 553 (2/9/07 letter from Richard III to Deanna), Ex. 559 (3/6/07 Minutes of Bank Shareholder Meeting); Tr. 2483 (Richard III testimony, E&G R.E. 462); Tr. 916-19 (Deanna testimony, E&G R.E. 405-08).

Richard III's opposition was based in part on his refusal to vote for Deanna, Garnett or Archie, all of whom he distrusted and resented. *See* Tr. 2483-84, 2493 (Richard III testimony, E&G R.E. 462-65). He also had concerns about Russell. *Id.* Principally, however, Richard III wished to vote the Trust B shares for himself and his friends Bill Grete and Kirk Reasonover. Tr. 931-32 (Deanna testimony, E&G R.E. 409-10), Tr. 2497 (Richard III testimony, E&G R.E. 466). Grete had no professional banking experience, had never served on any bank or other corporate board, and had no connection to the Bank or Meridian. As Richard III admitted, Grete was Richard III's best friend. Tr. 2752 (Richard III testimony, E&G R.E. 544). Reasonover was also a good friend of Richard III's. Tr. 2598 (Richard III testimony, E&G R.E. 488).[15] Richard III's desire to vote for his friends was not social: Richard III wished to regain his positions as chairman of the Bank and Holding Company. His proposed votes for himself, Grete and

[15] Richard III argues that by the date of the shareholder meeting, when he first announced his intentions about Grete and Reasonover, the time for nominating directors for 2007 had passed. Nevertheless, Richard III's intentions were not good for that day only. It was clear that this remained Richard III's intent for all future elections.

Reasonover were intended to secure the election of a majority of the Holding Company board, which would elect Richard III as Bank board chairman.

At trial, Richard testified that he believed it was in the Bank's best interest for him to serve on the Bank board. He testified that he would do anything he could to gain election to that board. Tr. 2757-59 (Richard III testimony, E&G R.E. 545-57). The trial court's finding that Richard III intended to use the voting power of Trust B – through his status as co-trustee – to reinstall himself as chairman of the Bank and Holding Company is supported by substantial evidence. R. 5953 (Opinion, Richard III R.E. tab 2); Ex. 545 (included in Richard III R.E. tab 9); Tr. 931-32 (Deanna testimony, E&G R.E. 409-10); Tr. 2497, 2765-66 (Richard III testimony, E&G R.E. 466, 548-49).

The chancellor found that the proof at trial demonstrated that Richard III's actions as chairman of the Bank and Holding Company created significant strife and discord within the Bank, and that this strife and discord would resurface if Richard III regained those positions. R. 5976-77 (Opinion, Richard III R.E. tab 2). His reinstatement would risk destabilizing the Bank, upon which Trust B's health depends. The proof also demonstrated that, were Richard III to succeed in his goals, Archie and other members of his team would be terminated or would resign, putting the well being of the Bank, and thus Trust B, in jeopardy.

Because Richard III and Deanna could not agree, the Trust B shares were not voted. Tr. 412-13 (Archie testimony, E&G R.E. 290-91). To note her wishes for the record, Deanna filled out a ballot in favor of the alternative slate that she had proposed. Deanna did not seek to have the ballot counted. Tr. 933-34 (Deanna testimony, E&G R.E. 411-12); Tr. 1976-77 (Garnett testimony, E&G R.E. 438-39). Based on testimony, the trial court found that Deanna did not attempt to vote the Trust B shares. R. 5952 (Opinion, Richard III R.E. tab 2). Her ballot was not counted. Tr. 412-13 (Archie testimony, E&G R.E. 290-91); Tr. 933-34 (Deanna testimony, E&G

R.E. 411-12). Richard III's assertion that Deanna sought to vote the Trust B shares without his agreement, Brief of Appellant at 27, was rejected by the trial court and refuted by all witnesses who testified on the subject. R. 5952 (Opinion, Richard III R.E. tab 2); Tr. 412-13 (Archie testimony, E&G R.E. 290-91); Tr. 933-34 (Deanna testimony, E&G R.E. 411-12); Tr. 1976-77 (Garnett testimony, E&G R.E. 438-39).

Richard III testified that he knew that, in light of commitments he had received from his uncle Jim Wilbourn and his aunt Margaret Wilbourn Vise, he would be elected to the Holding Company board if the Trust B stock were *not* voted at the 2007 shareholder meeting. If that stock *were* voted, his election would be in doubt. Tr. 2765-66 (Richard III testimony, E&G R.E. 548-49). Based on this testimony, the trial court found that an additional reason that Richard III opposed the voting of the Trust B stock was to ensure his election as a Holding Company director. R. 5953 (Opinion, Richard III R.E. tab 2). With the Trust B stock immobilized, and with the support of his aunt and uncle, Richard III was re-elected as a Holding Company director, along with Archie, Deanna, Mr. McDonnell, and Russell Williamson.

H. The Defendants Remove Richard III as Co-Trustee of Trust B.

After the March 6, 2007 shareholder meeting, it was apparent that the Trust B stock would never be voted so long as Richard III and Deanna were co-trustees. Richard III would never vote for any member of his family, or for Archie. His refusal was not based on a principled disagreement about the Bank's direction. Rather, it was based on Richard III's subjective and false views about his conduct while serving in his Bank and Holding Company positions, his removal from those positions, and his flawed perception of the motivations of his family members and Archie. R. 5973-74 (Opinion, Richard III R.E. tab 2). As the trial court found, so long as Richard III and Deanna were co-trustees, the Trust B stock would never be voted. *Id.* at 5977-78; Tr. 2080 (Garnett testimony, E&G R.E. 459).

A failure to vote the Trust B shares meant that the majority control for which Richard II worked would be nullified. With Trust B's stock unvoted, the remaining members of Richard II's family own or control 32,459 shares, or only 32.3% of the stock remaining to be voted. Tr. 629 (Archie testimony, E&G R.E. 378). To prevent that result, and because they believed that Richard III's actions had been unlawful, in breach of trust, and had defeated the purpose of Trust B, Defendants on May 10, 2007 tendered to Richard III an April 10, 2007 Notice of Removal that removed Richard III as co-trustee of Trust B. Ex. 284 (Notice of Removal, Richard III R.E. tab 11).[16]

Although the trial court ruled that the Notice of Removal was not legally justified, given the limitations the Will placed on the bases for nonjudicial removal, R. 4232,[17] the Notice of Removal was prepared and given to Richard III by the Defendants in good faith, because of their legitimate concern that Richard III's refusal to vote the Trust B stock would harm the trust and would frustrate the intent of its creator, Richard II. R. 5981-82 (Opinion, Richard III R.E. tab 2).

[16] Richard III's assertion, Brief of Appellant at 31-32, that Defendants signed the Notice of Removal on April 10 so that they could withhold payment of Richard III's co-trustee fee for the first quarter of 2007 lacks any evidentiary support. The chancellor made no such finding.

[17] The Notice of Removal did not list breach of fiduciary duty, conflict of interest and the creation of hostility with Defendants – all acts of which Richard III was guilty – as grounds for removal, because the Will had not included those legal violations as bases for nonjudicial removal.

SUMMARY OF THE ARGUMENT

After hearing extensive evidence, observing the manner and demeanor of 18 witnesses, and reviewing the hundreds of exhibits presented by the parties, the chancellor issued a 71-page opinion detailing the multiple breaches of duties that Richard III committed against his co-trustees and the beneficiaries of Trust B. The trial court held that Richard III should be removed for cause as a co-trustee of Trust B on numerous independent grounds, any one of which would have been sufficient to justify Richard III's removal. In order to prevail in this appeal, Richard must prove that the trial court committed manifest error as to *each one* of the multiple grounds of removal stated in the opinion.

The chancellor found that Richard III owed fiduciary duties of loyalty and trust to his mother and sisters, arising out of his position as trustee of Trust B to the co-trustee and beneficiaries, as a lawyer to his client, and as a family member held in a position of trust. In holding that Richard III owed fiduciary duties to his mother and sisters, the chancellor applied settled Mississippi law. A trustee owes a duty of complete loyalty and honesty to the beneficiaries of the trust, and he must place the interests of the trust above his own personal interests.

As the chancellor found, Richard III breached his fiduciary duties in multiple ways. First, he secretly recorded private conversations with his mother and sisters. He wore a tape recorder while staying as a guest in his mother's home. He surreptitiously recorded phone conversations with his mother and sisters. He even continued secretly recording his mother and sisters after he was discovered and promised his mother never again to record their conversations. The trial court found that he made these recordings with an adversarial purpose, to protect himself and use his mother and sisters' words against them, if needed. The chancellor found that Richard III's secret recordings of his mother and sisters violated his fiduciary duties

of loyalty, honesty and candor, and this finding is supported by substantial evidence in the record.

Second, the chancellor found that Richard III refused to vote the shares of Trust B in order to advance his own personal interests. Contrary to Richard III's arguments in his brief, the chancellor did not find that Richard III violated his duties by honestly disagreeing with his mother as to how the shares should be voted, or in wishing to vote the shares for himself. Instead, the trial court found that Richard III used his voting power as co-trustee to attempt to leverage his own personal claims against the bank. He intentionally prevented the shares from being voted, and diluted the voting power of his family, to ensure his own re-election to the Bank board. The chancellor found that Richard III put his own personal interests ahead of the interests of the trusts and its beneficiaries, in violation of his fiduciary duty to act impartially in administering the trust. This finding too is supported by substantial evidence in the record.

Third, the chancellor found that Richard III encouraged his mother to take actions that would benefit him, but that were not in his mother's best interest. He asked her to personally guarantee a $12 million loan for an entity in which she had no interest, but which Richard III owned an interest. He pressed her to transfer all of the Trust B shares out of Trust B, which Richard III and Deanna jointly controlled, and into the Providence Trust, which Richard III would control with his friend Kirk Reasonover; this transfer would have prevented Deanna from having any power over the Trust B shares. The chancellor found Richard III used his influence over his mother to advance his own interests, to his mother's detriment, in violation of his fiduciary duties. Further, the chancellor found that Richard III took these actions at a time when he believed his mother to be mentally incompetent. These findings are supported by substantial evidence in the record.

Fourth, the chancellor found that Richard III's disruptive behavior at the Bank and his hostile attitude toward Bank employees endangered the assets of Trust B. The sole assets of Trust B are shares of the Bank. The trial court found that Richard III's antagonistic interactions with the Bank's management created an atmosphere of distrust, and threatened to destroy the healthy relationship between the Wilbourn family and the Bank's management that Richard II had developed during his lifetime and had intended to continue after his death. In his performance at the Bank, Richard III placed his own interests ahead of Trust B's beneficiaries and ahead of the intent of Richard II. The chancellor found that Richard's conduct at the Bank amounted to a breach of his fiduciary duties as trustee, and this finding is supported by substantial evidence.

Fifth, the chancellor found that Richard III created hostility among the parties which made it impossible for him to administer Trust B. The trial court found that Richard III's secret recordings, his hostile attitude, and his disloyalty to the Trust B beneficiaries has created irreparably damaged the parties' relationship. The chancellor observed the testimony of all of the witnesses, and concluded that Richard III, not his mother and sisters, is to blame for the undeniable hostility that exists between the parties. This finding is supported by substantial evidence.

The chancellor's findings, which are subject to deferential review by this Court, have abundant support in the record. The chancellor applied settled Mississippi law regarding the grounds for removal of trustees. For these reasons, the chancellor's findings should not be disturbed.

STANDARD OF REVIEW

In this appeal, Richard III seeks to overturn the chancellor's extensive findings of fact and conclusions of law, reached after the chancellor observed 18 witnesses over 19 days of trial. Where a chancellor's findings are supported by substantial evidence, this Court will not disturb them "unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *American Funeral Assurance Co. v. Hubbs*, 700 So. 2d 283, 285 (Miss. 1983) (quoting *Herring Gas Co. v. Whiddon,* 616 So. 2d 892, 894 (Miss. 1993)); *accord Ballard v. Commercial Bank of DeKalb*, 991 So. 2d 1201, 1204-05 (Miss. 2008); *Cotton v. McConnell*, 435 So. 2d 683, 685 (Miss. 1983).

This Court's review is deferential because the chancellor observed the manner and demeanor of the witnesses and "smelled the smoke of the battle." *Culbreath v. Johnson*, 427 So. 2d 705, 708-09 (Miss. 1983). The chancellor's findings of a witness's credibility are given particular deference. *Id.* at 708. For these reasons, this Court must accept "that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's finding of fact." *Id.* at 707. If the Court finds that the chancellor's findings are supported by substantial evidence, they must be affirmed. *Id.* at 708.

ARGUMENT

A. The Trial Court Correctly Applied Mississippi Common Law, Which Allows Removal of a Trustee on Grounds Independent of Those Contained in the Trust Document.

In Mississippi, a trustee may be removed for reasons other than those enumerated in the Trust. A chancery court may remove a trustee for good cause. The power of removal is an inherent part of the court's duty to oversee the proper execution of trusts and preserve the trust estate. It is "as broad and comprehensive as the exigencies of the case may require". *Yeates v.*

Box, 22 So. 2d 411, 415 (Miss. 1945); *McWilliams v. McWililams ex rel. Weathersby,*994 So. 2d 841, 846 (Miss. Ct. App. 2008); *accord* Miss. Code Ann. § 91-9-303; 76 Am. Jur. 2d Trusts § 257 (power of court to remove trustee is independent of directions contained in trust). "[T]he fact that the trust instrument authorizes the beneficiaries or someone else to remove the trustee does not prevent removal for cause by a court". 2 Austin W. Scott & Mark L. Ascher, Scott and Ascher on Trusts § 11.10.2 (5th ed. 2006); *see also* Restatement (Third) of Trusts (hereinafter "Rest. of Trusts") § 37 (2003) ("A trustee may be removed (a) in accordance with the terms of the trust; or (b) for cause by a proper court.").

As the chancellor found, Mississippi law permits removal of a trustee for cause for a variety of reasons, including a breach of trust; a lack of cooperation among co-trustees that impairs trust administration; unfitness, dishonesty or other misconduct by a trustee; hostility between the trustee and beneficiary created by the trustee; or a serious or irrevocable breakdown in communications between the trustee and the beneficiary. R. 5958-59 (Opinion, Richard III R.E. tab 2); *see also Walker v. Cox*, 531 So. 2d 801-803-04 (affirming removal of trustee due to trustee's hostility toward beneficiary); *McWilliams v. McWilliams ex rel. Weathersby*, 994 So. 2d 841, 846-47 (Miss. Ct. App. 2008) (affirming removal of trustee due to trustee's conflict of interest and breach of duty of loyalty).

1. The Grounds Justifying Trustee Removal Are Not Limited to Misconduct Occurring Only in the Administration of the Trust.

Richard III contends that a trustee may be removed for cause only for "matters that concern the administration of the trust, such as a trustee's failure to perform his duties under the trust, or a breach or misconduct that endangers trust property, or incapacity or unfitness of the trustee." Brief of Appellant at 39. Mischaracterizing his actions, Richard III claims baldly that "[n]one of the alleged breaches occurred in connection with the administration of the Trust, nor

did they endanger the Trust property, and most were not even related to Marital Trust B." *Id.* at 38-39. Richard III's claims are legally and factually incorrect.

First, Trust B was intended to provide for Deanna's support during her lifetime and to help achieve Richard II's goal of maintaining his family's control over the Bank. The Trust's sole asset is Holding Company stock; thus, the health of the Bank is critical to Trust B. Actions harmful to the Bank endanger the Trust. In order for family control over the Bank to be realized, the Trust B stock must be voted. Conduct that prevents the stock from being voted not only concerns administration of the Trust, but also defeats the intent of the trustor.

Second, where a trustee has demonstrated dishonesty, or misconduct or breach of faith with respect to his beneficiary or co-trustee, or where the trustee has created hostility with other trust participants that threatens to interfere with administration of the trust, those actions support the trustee's removal whether they occur in a fiduciary or personal capacity.

Where removal is based on dishonesty or other misconduct, such dishonesty or misconduct need not be connected to the trust itself, or to its administration.[18] *E.g.*, Restatement of Trusts § 37 at cmt. e ("[S]erious or repeated misconduct, *even unconnected with the trust itself*, may justify removal." (emphasis added)); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 527 (2007) ("If a trustee is found guilty of... conduct involving dishonesty, the court may find that he is unfit to be a trustee, even though the reprehensible actions were not connected with the trust administration."); *accord In re Baird*, 204 P.3d 703, 705 (Mont. 2009); Restatement of Trusts § 78, and comment a, b & g. To the extent that Richard III acted dishonestly or improperly, or has engaged in serious misconduct, it is not required that

[18] As an example, the Restatement of Trusts provides the following illustration:

> A's will named her brother B both as executor of her will and as trustee for her minor children. B was guilty of serious misconduct as executor. It is not improper for the court, on its own motion, to remove B as trustee.

Id. at cmt. e, illus. 5.

the wrongful acts occur solely in connection with the trust. Likewise, hostility between a trustee and a beneficiary that imperils administration of the trust need not arise in connection with the trust in order to support removal of the trustee.[19]

B. The Trial Court Correctly Applied Mississippi Law in Finding that Richard III Owed Fiduciary and Other Duties to His Mother and Sisters.

"Fiduciary relationships include not only the relation of trustee and beneficiary but also, among others, . . . attorney-client, and partnership relationships." Rest. of Trusts § 2 cmt. b (2003); *Robley v. Blue Cross/Blue Shield of Mississippi*, 935 So. 2d 990, 994 (Miss. 2006) ("fiduciary relationships are found in cases of trustee and beneficiary, partners, principal and agents, guardian and ward, managing directors and corporation.") "[A] fiduciary relation is one in which the law demands of one party an unusually high standard of ethical and moral conduct with reference to another". George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 1 (Rev. 2d ed. 1984); *see also Herring v. Herring*, 891 So. 2d 143, 149 (Miss. 2004); *Smith v. Sullivan*, 419 So. 2d 184, 187 (Miss. 1982) (fiduciary relationships require "full disclosure, frankness and honesty in [fiduciary's] dealings").

Richard III served as co-trustee of Trust B and the Providence Trust and owed Deanna, Elizabeth and Garnett the fiduciary duties of a trustee. He also owed the Defendants fiduciary duties arising out of his status as a lawyer,[20] as well as similar duties arising out of his status as a son and brother.

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[19] *Accord, e.g. Jones v. McGuirt*, 416 So. 2d 970 (Ala. 1982) (trustee removed for conviction of crime, failure to pay judgments unrelated to trust); *In re Rentschler's Estate*, 139 A.2d 910 (Pa. 1959) (trustee removed for criminal and disbarment proceedings unrelated to trust); *In re: Breckwoldt*, 725 A.2d 721) (N.J. 1956) (trustee removed for mishandling client's property unrelated to trust).

[20] *See In re Estate of Smith*, 827 So. 2d 673, 677 (Miss. 2002) ("Clearly, the attorney-client relationship is a fiduciary one . . . .").

1. Fiduciary Duties as a Co-trustee.

a. The Duty of Loyalty.

"[A] trustee is under a duty of loyalty to the beneficiaries". 8 Jeffery Jackson & Mary Miller, Encyclopedia of Mississippi Law § 73:8 (2001 ed.); *see McWilliams v. McWilliams ex rel. Weathersby*, 994 So. 2d 841, 846 (Miss. Ct. App. 2008) (trustee has "duty of complete loyalty" to beneficiaries). This duty requires the trustee to administer the trust solely in the interest of the beneficiaries, whose interests are "paramount". *Id.*; *see Bryan v. Holzer*, 589 So. 2d 648, 657 (Miss. 1991) (trustee to administer trust solely in interest of beneficiary).

Inherent in this duty are obligations of fairness and candor to the beneficiaries, obligations which bind the trustee both in his administration of the trust, *and* in any personal dealings with the beneficiaries separate from it. "Whether acting in a fiduciary *or personal capacity*, a trustee has a duty in dealing with a beneficiary to deal fairly and to communicate to the beneficiary all material facts the trustee knows or should know in connection with the matter." Rest. of Trusts § 78(3) (emphasis supplied). This duty applies to a trustee's *personal interactions* with beneficiaries "that nevertheless may be affected by the broader confidential relationship the trustee ordinarily has with respect to the trust beneficiaries during the existence of the trust, and thereafter . . . ." *Id.* at § 78 cmt. a. Thus, when a trustee, either in administering the trust or in an unrelated personal capacity, deals with trust beneficiaries, the trustee "must be able to show that the dealings were fair and that all relevant and material information that was known, or that should have been known . . . by the trustee was communicated to the beneficiary or beneficiaries involved".[21] *Id.* at § 78 cmt. g; *see Bryan*, 589 So. 2d at 657.

[21] *See also id.* at cmt. a ("Thus, in any transaction between a trustee and beneficiary, even one that does not involve the trust property and is not within the scope of the trust relationship, . . . the trustee [must] establish that the consent or other transaction was based on full disclosure and was otherwise fair to the beneficiary.").

The duty of loyalty also prohibits conflicts of interest. "[O]ne in a fiduciary position, such as a trustee, cannot take advantage of that position of trust in administering the assets entrusted to him or her." 8 Encyclopedia of Mississippi Law § 73.8.; *see also Holmes v. Jones*, 318 So. 2d 865, 869 (Miss. 1975) ("A fiduciary cannot take advantage of his position of trust in administering the estate entrusted to him.").

Accordingly, "the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests". Rest. of Trusts § 78(2). This prohibition applies not only to a trustee's dealings with his fiduciaries, but also to a trustee's personal dealings with others. *See id.* at § 78 cmt. b ("[A] trustee must refrain, whether in fiduciary or personal dealings with third parties, from transactions in which it is reasonably foreseeable that the trustee's future fiduciary conduct might be influenced by considerations other than the best interests of the beneficiaries."). If a trustee has a conflict of interest, "he has a duty to refuse the trust, resign, or remove the conflicting personal interest". *Smith v. Holmes*, 921 So. 2d 283, 287 (Miss. 2005) (internal quotation marks omitted). A trustee violates this prohibition by, among other things, engaging in "transactions by which the trustee . . . uses trust property for his or her own benefit". 8 Encyclopedia of Mississippi Law § 73:8.

b. Duties to the Co-Trustee and Settlor.

Each co-trustee has a duty "to participate in the administration of the trust [and] to attempt to prevent a breach of trust". Miss. Code Ann. § 91-9-113. "Implicit in th[e] requirement of prudent participation is a duty of reasonable cooperation among the trustees." Rest. of Trusts § 79 cmt. c.. "It goes without saying that co-trustees owe to each other, as well as to the beneficiaries of the trust, the duty and obligation to so conduct themselves as to foster a

spirit of mutual trust, confidence, and cooperation to the extent possible." *Ball v. Mills*, 376 So. 2d 1174, 1182 (Fla. Ct. App. 1979).

"Even under the broadest grant of fiduciary discretion, a trustee must act honestly and in a state of mind contemplated by the settlor." Rest. of Trusts § 50 cmt. c (2003). As trustee of Trust B, Richard III had the duty to effectuate the intentions of Richard II, and to exercise his authority as trustee in a reasonable manner. *See, e.g., Reedy v. Johnson's Estate*, 26 So. 2d 685, 687-88 (Miss. 1946).

2. Fiduciary Duties as a Lawyer.

As a lawyer, Richard II owed his family member-clients fiduciary duties of loyalty, candor, and disclosure. *E.g., Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1215 (Miss. 1996); *Singleton v. Stegall*, 580 So. 2d 1242, 1245 (Miss. 1991).

> The duty of loyalty is fiduciary in nature. In the present context its breach may take one of two forms. The first involves situations in which the attorney obtains an unfair personal advantage, such as acquiring property from a client; the second involves situations in which the attorney or other clients have interests adverse to the client in question. We have recently defined the lawyer's duty of loyalty to include a duty to . . . 'safeguard the client's confidences and property, avoid conflicting interests that might impair the representation, and not employ adversely to the client powers conferred by the client-lawyer relationship'.

Tyson v. Moore, 613 So. 2d 817, 823 (Miss. 1992) (quoting *Singleton*, 580 So. 2d at 1245). The duty of loyalty requires "[a]n attorney [to] deal with the client in a manner of utmost honesty, good faith, fairness, integrity, and fidelity". *Id.; accord Lowrey v. Will of Smith*, 543 So. 2d 1155, 1161 (Miss. 1989).

Because of the legal work and advice that he and the Firm provided, Richard III owed these fiduciary duties to Defendants. From 2001 until June 2007, Richard III was a partner in the Firm which represented Deanna in her legal affairs on a continuing basis. After Richard II's death, Richard III and Firm partner Don Rogers continued to do legal work for Deanna until the

filing of this suit. Deanna was a client of the Firm at all relevant times. Tr. 3064. As the Firm represented Deanna and owed her fiduciary duties, so too did Richard III as a partner. *See*, *e.g.*, Miss. R. Prof'l Conduct 1.10 cmt. ("[A] firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, . . . [and] each lawyer is vicariously bound by the obligation of loyalty owned by each lawyer with whom the lawyer is associated.").[22]

Richard III represented his family members in other ways. Beginning in 2005, he served and was paid as a legal adviser to his father's estate. *See* Ex. 17 (Minutes of Richard II Estate Meetings); Tr. 2590-93, 2622-24 (Richard III testimony, E&G R.E. 480-83, 509-11). He had an attorney-client relationship with Deanna in her capacity as executrix, as well as with Deanna and his sisters as estate beneficiaries.

Richard III also represented his mother in creating the Wilbourn Family LLC, and advised her, as its sole member, concerning its funding and purchase of a three-bedroom condominium. *See* Ex. 120 (4/19/06 letter from Richard III to Deanna), Ex. 297 (Transcripts of all secret recordings, E&G R.E. 1-272), Ex. 486 (4/19/06 letter from Richard III to Deanna), Ex. 592 (Transcript of secret recording of conversation between Richard III and Deanna regarding Wilbourn Family, LLC); Tr. 2611-20 (Richard III testimony, E&G R.E. 498-507). He represented Deanna, the Wilbourn Family LLC, and Richard II's estate in pursuing claims for uninsured damage to that condominium, and a separate two-bedroom condominium owned by the estate. *See* Ex. 564 (March 13, 2007 letter from Richard III to Deanna, E&G R.E. 282); Ex.

[22] This is consistent with Mississippi professional-responsibility law, which provides that "if one lawyer in a law firm has a conflict of interest under Miss. R. Prof. Cond. 1.7, 1.8(c), 1.9 or 2.2, every lawyer in that law firm has that conflict." 6 Encyclopedia of Mississippi Law § 59.85. "This conflict of one lawyer is thus imputed to every lawyer in the law firm." *Id.* The rule of imputation is accepted throughout the United States. *See* Restatement (Third) of the Law Governing Lawyers § 123 (2009). Tellingly, when Don Rogers discussed severing his law partnership with Richard III upon learning of the filing of this action, Richard III suggested having his mother sign a conflicts waiver or consent. Tr. 3067. Richard III made this suggestion because he understood that the Firm's ongoing representation of Deanna meant that, as a partner in the Firm, he owed fiduciary duties to Deanna that his lawsuit against her would breach.

17 (Minutes of Richard II Estate Meetings), at 1151-53, 1160-65, 1185-87, 1125-26. Richard III billed the estate for his time spent on that litigation. Tr. 2590-93 (Richard III testimony, E&G R.E. 480-83). In addition, he advised Deanna regarding the Providence Trust and did legal work on the trust document itself, dealing with Gina Silvestri and billing his time spent to the estate. Tr. 2592-98 (Richard III testimony, E&G R.E. 482-88); *see also* Ex. 17 (Minutes of Richard III Estate Meetings), at 1059-61; Ex. 448 (Minutes of 9/22/05 Estate Meeting).

3. Fiduciary Duties as a Family Member.

"A confidential relation exists between two persons in many circumstances in which one has gained the confidence of the other and purports to act or advise with the other's interests in mind." Rest. of Trusts § 2 cmt. b(1).[23] "Thus, a confidential relation may exist although there is no fiduciary relation *and is particularly likely to arise between family members . . .* ." *Id.* (emphasis added); *see also Saulsberry v. Saulsberry*, 78 So. 2d 758, 760 (Miss. 1955) (confidential relationship may exist where one person trusts in and relies upon another). In such a relationship, transactions and dealings are improper where one party "placed confidence in the other and the other abused that confidence by fraud, undue influence, or otherwise". *Id; see also Friendly Ice Cream Corp. v. Beckner*, 597 S.E.2d 34, 40 (Va. 2004) (confidential relationship exists between family members when one family member provides financial advice or handles the finances of another).

Such a confidential relationship existed here. In important areas – Richard II's estate, the Providence Trust, the Wilbourn Family LLC – Richard III was the family's representative. Tr. 2538-40, 2592-98, 2611-13, 2619-20 (Richard III testimony, E&G R.E. 469-71, 498-500, 506-

[23] *Accord In re Estate of Holmes*, 961 So. 2d 674, 680 (Miss. 2007) (confidential relationship may be moral, domestic, or personal); *In re Estate of Laughter*, 23 So. 3d 1055, 1063 (Miss. 2009) (confidential relationship in which one person is in position to exercise dominant influence upon the other because of the latter's dependency on the former arising from weakness of mind or body, or through trust).

07). Defendants relied on Richard III in these and other matters. Accordingly, in addition to Richard III's fiduciary duties arising out of his status as trustee and attorney, he owed his mother and sisters a duty of honesty arising from his familial status.

C. Richard III Breached His Duties to the Defendants.

Richard III committed numerous violations of these duties. These violations demonstrate that Richard III cannot serve as co-trustee of Trust B, and the chancellor committed no error in removing Richard III as co-trustee on multiple grounds.

1. Richard III Secretly Recorded Conversations with His Mother and Sister for Adversarial Purposes.

Beginning on October 24, 2006, Richard III began secretly recording conversations with his mother and sisters. *See* Ex. 297 (Transcripts of all secret recordings, at E&G R.E. 1-8). As the trial court found, these recordings were made for adversarial purposes. R. 5969-71 (Opinion, Richard III R.E. tab 2). When his recording practice was discovered by Deanna, Richard III was not apologetic, but rather told her that she "need[ed] to assume that . . . all conversations with me are recorded", and that such an assumption would be "a fair assumption for [a person] to make". Ex. 297 (Transcripts of all secret recordings, at E&G R.E. 226, 233); Ex. 522 (Transcript of 1/1/07 secret recording); Ex. 524 (Transcript of 1/2/07 secret recording); R. 5942 (Opinion, Richard III R.E. tab 2).

Such secret recordings – in which only one party to a conversation knows that the conversation is being recorded – have long been frowned upon by Mississippi courts. *See Lee v. Lee*, 798 So. 2d 1284, 1293 (Miss. 2001) ("the recording of private telephone conversations is reprehensible"); *Campbell v. Miss. Employment Security Comm'n*, 782 So. 2d 751, 758 (Miss. Ct. App. 2000) ("Secretly creating a recording of a private meeting shows a deceitfulness that an employer is entitled to prohibit in relations with employees.") (Southwick, J. dissenting).

In his brief, Richard III points to *no* cases holding or even suggesting that such deceptive conduct is permitted among fiduciaries. To the contrary, consistent with Mississippi's disapproval of the practice, numerous cases hold that secretly recording conversations is improper, and constitutes a breach of the duty of honesty and loyalty, as well as insubordination warranting termination. *See Shoaf v. Kimberly Clark Corp.*, 294 F. Supp. 2d 746 (M.D.N.C. 2003) (secret recordings breach duty of honesty and loyalty); *Peterson v. West*, 122 F. Supp. 2d 649 (W.D.N.C. 2000) (secret recordings are a clear example of insubordination warranting employee admonishment); *see also, e.g.*, *Perkovich v. Roadway Express*, 106 F.3d 401 (6th Cir. 1997); *Brooks v. S.E. Public Serv. Auth.*, 105 F.3d 646 (4th Cir. 1996).

Other than for adversarial purposes, there is no plausible reason for these recordings, nor is there any innocent explanation for them. Had Richard wanted merely to create an accurate record of his conversations with his mother, so as to avoid future misunderstandings – as he claimed at trial[24] – he could have advised his mother of his intent to record the conversations then sent her a copy. He could have taken notes, openly; or, he could have written his mother, respectfully confirming and summarizing their discussions, and inviting a response if he had misunderstood anything.

Richard III acted for an obvious reason: by recording Deanna without her knowledge, he could lead her into statements that he might later use against her. The fact that the recordings were made by Richard with a specific intent that their existence would never be known, demonstrates that he did not intend to use them for any benign purpose. Richard III could not have used them to correct her memory, because the existence of the recordings would then be

[24] Of course, this explanation does nothing to justify the October 25, 2006 recording of Richard's conversation with Elizabeth. *See* Ex. 297 (Transcripts of all secret recordings, at E&G R.E. 9-18); Ex. 502. Further, there is no evidence reflecting that Richard told his mother that, after her January 2007 demand that Richard III stop recording secretly recording their conversations, that he would resume, or had resumed, recording their conversations in the interest of maintaining an accurate record.

revealed. Richard III admitted at trial that he "never, ever wanted these recordings of my mother to come out." Tr. 2648 (Richard III testimony, E&G R.E. 535). Richard III could use them only in an adversarial context as he did here. Richard III's history of secret recordings shows that he always makes them for adversarial purposes, in the context of pending or prospective legal proceedings. Tr. 2636-2643 (Richard III testimony, E&G R.E. 523-30).

Even in cases in which secret recordings are made by an attorney of an adversary or of a third-party witness, they are permissible in Mississippi *only when* "'the information requested [by the attorney during the telephone conversation] was of such a nature as reasonably to import to the person called the probability, if not certainty, that it would be taken down in some manner for future use'". *Attorney M v. Miss. Bar*, 621 So. 2d 220, 223 (Miss. 1992) (quoting *Netterville v. Miss. State Bar*, 397 So. 2d 878 (Miss. 1981)). As the trial court found, that was not the case here.

> There is nothing about the conversations between Deanna and Richard III that could even remotely fall within the quoted language from the *Attorney M* case. Obviously, a mother having discussions with her son in her own home is not on notice of a "probability, if not certainty" that her conversations would be secretly recorded. A mother having telephone conversations with her son after he has promised not to record those conversations also has no reason to assume that her son has lied to her.

R. 5970-71 (Opinion, Richard III R.E. tab 2).[25]

But the situation here is even worse. At the time he made the secret recordings, Richard III was not only son and sibling to the persons he taped; he also occupied positions of trust and confidence with respect to them as a trustee and lawyer. He had a fiduciary as well as a filial relationship to the Defendants and, therefore, owed them duties of utmost good faith, care, and honesty. *See supra.* He violated all of these duties through his deceptive and calculated acts.

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[25] A trustee may be removed for conduct that provides a basis for attorney disciplinary proceedings. *See In re Breckwoldt*, 125 A.2d 721, 722 (N.J. 1956).

Richard III's conduct is utterly inconsistent with the fiduciary duties owed by a trustee to his beneficiaries and by a lawyer to his clients. *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) ("As other courts have held, [l]ying is inconsistent with the duty of loyalty owed by all fiduciaries . . ." (internal quotation marks omitted)). It goes without saying that Richard's conduct is inconsistent with a confidential and trusting relationship between a son and his family members.

The facts surrounding these recordings demonstrate that Richard III cannot be trusted by his family members, and, therefore, they constitute a sufficient and independent ground for Richard III's removal as co-trustee.[26] *See, e.g., Malachowski v. Bank One*, 667 N.E. 2d 780, 791 (Ind. Ct. App. 1996) (affirming removal of trustee where misrepresentation jeopardized relationship of trust, even though it was not actionable fraud or a breach of the trust), *rev'd in part on other grounds*, 682 N.E.2d 530 (Ind. 1997).

2. Richard III Broke His Promise Never to Record His Mother Again.

Ultimately, Richard III promised never to record his mother again. He broke those promises on four occasions, recording his mother three times in April 2007, and again in July 2007 *after he had filed this lawsuit against her*. His justification for these violations was that he thought it was in his interest to make the recordings – *i.e.*, he needed them for his legal dispute with his wife and his lawsuit with his mother – and that his mother told him to do it.

Richard III's claim that Deanna told him to record their future conversations is preposterous, and is belied not only by common sense, but also by the very statement upon

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[26] As discussed *supra*, a trustee can be removed for dishonest or improper conduct towards his beneficiaries regardless of whether the conduct relates to the trust or arises in the course of its administration. In any event, these secret recordings directly relate to the subject matter and transactions that form the basis of this lawsuit. They deal with the Bank and Holding Company, stock of which constitutes the Trust B's sole asset. Richard III felt they were so closely related that he successfully resisted producing the recordings until *after* he had deposed his mother and sisters.

which he supports his claim. Ex. 297 (Transcripts of all secret recordings, at E&G R.E. 251). The statement gives no such permission. Further, the statement says nothing about recording future conversations, and says nothing about *secret* recordings. Nor does it allow Richard to secretly record conversations with his mother after he later sued her, as part of an effort to gather evidence against her. It is ironic that Richard had already recorded two telephone conversations with his mother in April 2007, and was in the process of recording a third, at the time she made the statement upon which he now relies to justify his resumption of this practice in the first place.

3. Richard III Improperly Sought to Use Trust B Property to Settle His Own Personal Claims.

Despite his fiduciary duties, in a January 30, 2007 letter, Richard III attempted to use the Trust B shares, as well as his status as co-trustee of both that trust and the Providence Trust, to aid him in settling personal claims arising out of his removal from his Bank and Holding Company positions. *See* Ex. 545 (included in Richard III R.E. tab 9). That letter – written to his mother and co-trustee, and to Archie McDonnell, Jr., with copies to his sisters Elizabeth and Garnett and brother-in-law Russell Williamson – contains numerous examples of improper self-dealing in which Richard III sought to engage in order to benefit himself. For example:

- Richard III stated his intent as trustee not to permit the shares of Trust B to be voted at the March 2007 Holding Company director election. (*Id.* at ¶ 1.)

- He agreed not to exercise independent judgment as co-trustee of the Providence Trust but to allow his co-trustee, Kirk Reasonover, to vote the Holding Company stock in the Providence Trust in the March 2007 election. (*Id.* at ¶ 2.)

- He stated his intent to vote the stock of Trust B for himself at the March 2008 election, and demanded that his mother, as co-trustee, also vote the Trust B stock for him in that election. (*Id.* at ¶ 6.)

- He stated that, as co-trustee of Trust B, he would not challenge his mother's service as co-trustee in 2007. (*Id.* at ¶ 9.) Richard III took this position even though he then believed that his mother was mentally incompetent to serve in that role.

- He demanded that, as trustee, he be allowed to handle all deposits and disbursements of funds from Trust B. (*Id.* at ¶ 15.)

- He demanded that either Trust B or the Bank pay his personal attorney's fees as a condition of the settlement, even though Trust B had no connection with those expenses. (*Id.* at ¶ 14.)

- Finally, he conditioned settlement of his personal claims related to his removal from his Bank and Holding Company positions on the agreement of the Bank and Richard II's estate to employ him in the future as an attorney. (*Id.* at ¶¶ 11, 12.)

Richard III's attempt to use the Trust B shares, and his status as co-trustee, constitutes self-dealing and, therefore, breaches the fiduciary duty of loyalty owed to his beneficiaries.

Richard III argues that the chancellor's consideration of this letter violated Mississippi Rule of Evidence 408. *See* Appellant's Brief at 48-49. But Rule 408 bars admission of evidence of settlement offers for the purpose of proving liability for the invalidity of the claim at issue. It does not bar such evidence offered for a different purpose.

Here, the bar of Rule 408 does not apply for two different reasons. *First*, the "compromise and settlement" communications at issue, which concerned Richard III's removal from his Bank and Holding Company positions, do not concern the claims at issues *in this action*, which concern Richard III's removal as co-trustee of Trust B. *See* Ex. 545, 546, 547, 553. Indeed, these communications *preceded* Richard III's removal as co-trustee of Trust B, and *no* legal proceedings of any kind relating to that removal had then been commenced. *See Morley v. Jackson Redev. Auth.*, 632 So. 2d 1284, 1292-93 (Miss. 1994) (appraisal made before eminent domain proceedings were initiated was *not* inadmissible under Rule 408 because no disputed "claim" existed until proceedings were begun); *see also HeartSouth, PLLC v. Boyd*, 865 So. 2d 1095, 1103 (Miss. 2003) (letter *not* inadmissible under Rule 408 where letter was written "before any controversy concerning [plaintiff's] breach of contract [claim had] occurred").

Second, the chancellor did not consider the January 30, 2007 letter for any purpose forbidden by Rule 408, but for another purpose – to show that Plaintiff *sought to regain* his Bank and Holding Company positions, and that his attempt to do so was accompanied by self-dealing

breaches of fiduciary duty. *See* Ex. 545 (included in Richard III R.E. tab 9) (requesting, *inter alia*: "return . . . to the bank board where I will retain the committee memberships that I previously held"; and "elect[ion] . . . both boards in March 2008").

The trial court committed no error in considering Richard III's letter as evidence of his intent to use his trustee's position of power over the Trust B shares for his own personal gain.

4. Richard III Improperly Blocked the Voting of the Trust B Shares at the March 2007 Shareholder Meeting for Self-Interested Reasons.

At the March 6, 2007 annual shareholder meeting, Richard III again used his power as co-trustee for his own benefit by preventing the voting of the Trust B shares. Richard III sought to vote for his friends Bill Grete and Kirk Reasonover, because he believed they would support his personal agenda to regain his former Bank positions; he refused to vote for Archie and any of the Defendants because he knew they would not support him.[27]

The Defendants opposed Richard III's wishes, realizing that if Richard III returned to his positions, the discord would resurface, with destructive results for the Bank and Trust B. As Richard III admitted, he knew that he would be elected to the Holding Company board if the Trust B stock was *not* voted; if that stock *were* voted, however, his election would have been in doubt. This was an additional reason supporting his voting preference.

When it became apparent that Richard III's personal interest conflicted with the views and interest of the other beneficiaries, his duty was either to accept their decision or to resign as trustee. He did *not* have the right to use his power as trustee to defeat the wishes of all of the

[27] Richard III mischaracterizes the evidence and the finding of the trial court as basing his removal on the naked fact of a disagreement between Deanna and him over how to vote. The trial court rejected that conclusion, holding that Richard III's position was not based on any good-faith business considerations, but arose from self-interest. R. 5972-74 (Opinion, Richard III R.E. tab 2). The evidence overwhelmingly supports this finding. *See, e.g.*, Tr. 2064-67 (Garnett testimony, E&G R.E. 455-58).

beneficiaries, his co-trustee, and the settlor of the trust. His self-interested actions violated his fiduciary duties.

Richard III's self-interested acts would disqualify him as co-trustee even if those acts had not threatened harm to the beneficiaries of Trust B. When a trustee acts in his own self-interest, that fact alone justifies his removal. All beneficiaries have a right to insist that their trustees put the interest of the trust, and its beneficiaries, ahead of the trustee's own interest.

Here, Richard III's self-interested actions sounded to the detriment of the other Trust B beneficiaries, as he sought to regain positions from which he had been removed by the four other Holding Company board members. The evidence demonstrates that Richard III's activities created significant discord, which would return if he were reinstated.

These actions also violated Richard III's duty to reasonably cooperate with his co-trustee, and to act in a manner consistent with Richard II's intent. As discussed *supra,* Richard III's disagreement over the voting of the trust shares was not based on legitimate business matters, but on his own self interest, and his subjective and false views about his removal from his Bank and Holding Company positions.

Richard's expressed intent not to vote for Deanna, Elizabeth, Garnett, or Archie for Holding Company director demonstrates that he is unable to work with his co-trustee, or the other Trust B beneficiaries, in order to effectuate Richard II's intent with respect to the trust – *i.e.*, continued family control over the Bank.

5. Richard III Sought to Have Deanna Engage in Transactions that Were Not in Her Interest, but Benefitted Him.

Richard III engaged in other conduct that demonstrates his unfitness as co-trustee. For example, Richard III advised and encouraged his mother to take actions that benefitted him financially, but that were not in her financial interest:

- On July 24, 2007, Richard III asked his mother to sign a personal guaranty of $12 million to guarantee a construction loan for a hotel in which she had no financial interest, but in which Richard III did have an interest.

- Richard III pressed his mother to buy a $750,000 condominium, and then arranged for the title of the condominium to be placed in the Wilbourn Family LLC, with the intent that ownership of the LLC would later be transferred to Richard III and his sisters. As discussed *supra*, Richard III represented his mother in establishing the LLC and in securing this result.

- In 2005, Richard III recommended that his mother establish and fund the Providence Trust, transferring to that trust a large sum of cash and 3,440 shares of Holding Company stock that Deanna owned outright. He further recommended that she select him and his friend Kirk Reasonover to serve as co-trustees, who could vote that stock. This deprived Deanna of voting control over the stock and the dividends from the stock.

- Richard III sought to persuade Deanna to transfer all of the 41,910 shares of Holding Company stock in Trust B to the Providence Trust, an action that would have given Richard III effective control over those shares and, therefore, the Bank, and that would have deprived Deanna of her right to holding company dividends, which were likely to increase in future years.

Richard III also refused to resign as co-trustee of the Providence Trust when his mother asked him to do so, even though his refusal defeated the estate planning advantages of the trust, as Deanna would not transfer more stock to the trust so long as Richard III remained as its co-trustee. Richard III's insistence on putting his personal interests ahead of the interests of the other beneficiaries of the Providence Trust frustrated its purpose and breached his fiduciary duties to his mother and sisters as its co-trustee.

These self-interested acts breached fiduciary duties Richard III owed to his mother as trustee and lawyer. Remarkably, Richard III took these actions at a time when he believed that his mother was not mentally competent and thus incapable of managing her own affairs. As the trial court ruled prior to trial, Deanna Wilbourn has *never been* mentally incompetent. However, the fact that Richard III gave this advice and took these actions while he believed otherwise shows a complete disregard for the duties that he owed his mother, who was not only a beneficiary of Trust B and the Providence Trust, but also his legal client.

Richard III claims that the trial court erred in considering this evidence because it is not directly related to the administration of Trust B and because his performance of these other duties was not listed as a disputed issue in the pretrial order. *See* Appellant's Brief at 51-52. The trial court did not err in considering this evidence, as it is relevant to Richard III's honesty and integrity as a trustee and his creation of hostility between himself and the Defendants.

To the extent removal is based on a trustee's dishonesty or other misconduct, it is not necessary that such dishonesty or misconduct be connected to the trust itself, or to its administration.[28] *E.g.*, *id.* at cmt. e ("[S]erious or repeated misconduct, *even unconnected with the trust itself*, may justify removal." (emphasis added)); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 527 (2007) ("If a trustee is found guilty of... conduct involving dishonesty, the court may find that he is unfit to be a trustee, even though the reprehensible actions were not connected with the trust administration."). Who could trust a person who sought to take financial advantage of his own mother, who was also his client and fiduciary, at a time when that person believed his mother lacked the mental capacity to understand the transactions that he was proposing to her?

The trial court likewise committed no error in considering this evidence. The issues in the trial court's pretrial order broadly include any alleged breaches of fiduciary duties and other issues that created hostility between the parties. R. 4930-31 (Pretrial Order, Richard III R.E. tab 17). Further, Richard III did not preserve this issue with a timely objection at trial. The parties presented extensive evidence regarding Richard III's actions as attorney for his mother, as co-trustee of the Providence trust, and as a family member. Richard III did not object on the

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[28] As an example, the Restatement of Trusts provides the following illustration:

> A's will named her brother B both as executor of her will and as trustee for her minor children. B was guilty of serious misconduct as executor. It is not improper for the court, on its own motion, to remove B as trustee.

Id. at cmt. e, illus. 5.

grounds that these issues were not itemized in the pretrial order. Indeed, Richard III, not the Defendants, first introduced evidence regarding the Providence Trust in his own case in chief. Tr. 899-910 (Deanna testimony, E&G R.E. 393-94); Ex. 67 (Wilbourn Family Providence Trust). When the Defendants cross-examined him on that topic, he objected on grounds of relevance. Tr. 2600-01 (Richard III testimony, E&G R.E. 489-90). The trial court properly overruled Richard III's relevance objections, stating "[I]t's been gone into on the Plaintiff's side, and I think he's got a right to go into it on the Defendants' side." Tr. 2601 (E&G R.E. 490). Because he first introduced evidence regarding the Providence Trust, and failed to object at trial that the topic was not specifically included in the pretrial order, Richard III has waived any objection to this evidence. *See Boyd v. State*, 977 So. 2d 329, 337 (Miss. 2008).

In any event, Richard III's breaches of duties he owed to his family members as an attorney, trustee of the Providence Trust and as a son and brother were not the only basis for the trial court's opinion. As discussed both above and below, the trial court found that Richard III (1) frustrated the intent of the testator by refusing to vote the Trust B shares, (2) used his position as co-trustee of Trust B to advance his personal interests, and (3) breached his fiduciary duty of trust by secretly recording conversations with his co-trustee and beneficiaries.[29] Each of these grounds is sufficient, standing alone, to warrant Richard III's removal as co-trustee.

6. Richard III Created Hostility Between Himself and the Defendants that Threatened to Interfere with Administration of the Trust.

It is settled in Mississippi that where significant hostility exists between a trustee and his beneficiary, and where that hostility threatens to interfere with the administration of the trust, such hostility is sufficient reason to remove the trustee, particularly where the hostility is not

[29] The chancellor stated, "[i]n this court's opinion, the most egregious violation committed by Richard III involved his surreptitious tape recording" of conversations with his mother and sisters "in an effort to use those conversations against them." R. 5968 (Opinion, Richard III R.E. tab 2).

attributable to the conduct of the beneficiary. *Walker v. Cox*, 531 So. 2d 801, 803-04 (Miss. 1988) (affirming removal of trustee for hostility where hostility could defeat the purpose of the trust); Scott and Ascher on Trusts § 11.10 (if hostility will seriously impede administration of the trust, "the court will remove the trustee, especially if the trustee is at fault.")

Here, no one denies the hostility between Richard III and the Defendants, or that such hostility threatens the purpose of Trust B. Richard III distrusts and resents the Defendants; he will never agree to vote the Trust B stock for any of them. The Defendants reciprocate. These deep feelings make communications among the parties virtually impossible. So long as Richard III remains as co-trustee, the co-trustee's sole discretionary duty – voting the Trust B stock – cannot be discharged, and Richard II's larger purpose for Trust B – to maintain family control of the Bank – will be defeated.

Richard III's sole argument on this score – that the Defendants are responsible for this hostility by virtue of their conspiratorial efforts to remove Richard III from his various positions without reason – has no basis whatever. It is refuted by the findings of the chancellor's opinion, and by the overwhelming evidence discussed in this brief. Responsibility for this tragic turn of events rests with Richard III.

D. Richard III's Breaches Support the Chancellor's Removal of Richard III as Co-Trustee of Trust B.

Removal of a trustee has been affirmed in circumstances similar to those here. In *Matter of Malone's Estate*, 597 P. 2d 1049 (Colo. App. 1979), the court affirmed the removal of a trustee where: (1) the trustee had, *inter alia*, engaged in "a campaign calculated to secure for himself employment . . . [with co-trustee bank], but which conduct in fact only served to alienate him from . . . the other co-trustees, and from the beneficiaries of the trusts", *id.* at 356; and (2) "there was a complete breakdown in communication and cooperation between [the trustee] and [his] co-trustees and between [the trustee] and the beneficiaries". *Id.* at 355-56. The court held

that the trustee's actions "led to the hostility and impasse among the co-trustees, and that his removal was likely to facilitate the administration of the trusts". *Id.* at 356.

In *In re Estate of Newton*, 619 S.E.2d 571 (N.C. Ct. App. 2005), the court affirmed removal of a co-trustee based on his contempt and deep hostility for the trust beneficiaries, which made it impossible to fulfill his duty of loyalty. *Id.* at 576-77. As the court stated:

> Although respondent introduced several properly filed accountings and offered explanations for his decisions while serving as trustee, it is clear from a reading of the record that much of respondent's actions and inactions were beyond the bounds of reasonable judgment and uncharacteristic of a trustee demonstrating complete loyalty to the trust beneficiaries.
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> * * *
>
> [D]ue to his contempt for petitioners, respondent has failed to exercise that type of unbridled loyalty due to the beneficiaries of the trusts . . . .

Id. at 577 (internal quotation marks omitted).

Here, the trial court found that Richard III must be removed as co-trustee of Trust B due to his multiple breaches of fiduciary duties. *First*, Richard III was guilty of serious breaches of trust with respect to his mother and sisters, including: his surreptitious and duplicitous recordings of his conversations with his mother and sisters; his misuse of his position as trustee in an effort to settle personal claims and to regain his positions at the Bank and Holding Company; his wrongful refusal to permit the voting of the Trust B stock; and his advice to his mother designed to benefit him personally and to disadvantage her, at a time when he believed that she was mentally incompetent to make decisions involving such matters. R. 5971-75 (Opinion, Richard III R.E. tab 2). The dishonesty that Richard III displayed in these and other actions made it obvious that he could not serve for the benefit of his mother and sisters as co-trustee of Trust B.

Second, Richard III demonstrated a lack of cooperation with his co-trustee that substantially impaired the administration of Trust B. Based on the evidence at trial, the chancellor found that Richard III was totally unable to work with any of the Defendants in order to effectuate Richard II's intent with respect to the trust. R. 5977-78 (Opinion, Richard III R.E. tab 2). If the trial court had allowed Richard III to serve as co-trustee, none of the Trust B stock would ever be voted and the family's voting power would be reduced to a minority 32% share. In addition, the trial court found that Richard III's actions created such hostility that communication between him and the Defendants has broken down. It would be impossible for Richard III, as co-trustee, to conduct normal communications with the Defendants regarding Trust B or the Bank. *Id.* at 5979.

Third, and for the reasons outlined above, Richard III's conduct constituted such a persistent failure to administer Trust B that his removal would best serve the interests of the beneficiaries. R. 5979-80 (Opinion, Richard III R.E. tab 2).

Fourth, the events discussed above, which followed the death of Richard II and which continue to this day, constitute a change in circumstances that Richard II did not foresee, and which make imperative a change to the named co-trustees of Trust B. In light of the critical need for the stock in Trust B to be voted if Richard II's intent is to be fulfilled, this change in circumstances requires that Richard III be removed and/or disqualified from serving as co-trustee. R. 5979 (Opinion, Richard III R.E. tab 2).

In addition, the other bases discussed *supra* apply to Richard III's conduct and warrant his removal and/or disqualification. Richard III has breached his fiduciary duties. The hostility that he has created has resulted in a communications breakdown that would defeat the purpose of the trust were he permitted to serve. For these reasons, the chancellor committed no error in removing Richard III as co-trustee of Trust B.

E. The Intent of the Trustor, Richard II, Precludes Richard III from Serving as Co-Trustee of Trust B.

The only discretionary duty of Trust B's co-trustees is to vote the Trust B stock for Holding Company directors. Tr. 2573 (Richard III testimony, E&G R.E. 477); R. 4232. Regarding the voting of this stock, the trial court found that Richard II had two goals. *First,* he "wished *for his family* to continue to control the . . . Bank". R. 4735 (emphasis added). *Second,* in order to preserve that family control, he wanted those shares *to be voted* so as not to dilute his family's control and influence.[30] *See id.* ("As long as the stock can not be voted, the intent of the trustor can not be fulfilled."); Ex. 1 (Will, Richard III R.E. tab 6) at ITEM V(d). These twin goals could not be honored if Richard III remained as co-trustee, and either Deanna, Elizabeth, or Garnett served with him.

Richard III would not vote the Trust B shares for Archie, Deanna, Elizabeth or Garnett; and likely would not vote them for Russell Williamson. Richard intended to vote for his friends Bill Grete and Kirk Reasonover, in the hopes that they would support his effort to regain his former Bank and Holding Company positions. None of the remaining beneficiaries would vote as Richard III wishes.

After evaluating the credibility of Richard III and other witnesses, the trial court found that Richard III's opinion on voting the Trust B shares was *not* based on legitimate business

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[30] In his Will, Richard II stated:

> I am committed during my lifetime to voting against any mergers of the bank that would *dilute my interest* and to opposing the sale of stock to another bank, bank holding company or individual. I believe that I have acquired enough stock to be able to unilaterally prevent this. Having expressed these thoughts and desires . . . neither the Co-Trustees nor the proxy of the trust shall sell this stock or vote in favor of any merger or other corporate action which is calculated to lead to a merger which would *dilute the voting power or ownership* of the stock in [t]he Bank . . . or would lead to the sale or exchange of this stock, without the unanimous consent in writing of all of the beneficiaries of the income and principal of the trust.

Ex. 1 (Will, Richard III R.E. tab 6) at ITEM V(d) (emphases added).

issues. *See* R. 5974 (Opinion, Richard III R.E. tab 2) ("Richard III went beyond honest disagreement by recognizing and exploiting the benefit he stood to gain in the impasse.") Contrary to Richard III's assertions, the trial court did not find that Richard III breached his trustee's duties simply because he disagreed with Deanna on how to vote the shares, or in wishing to vote for himself. Rather, the trial court found that Richard III's intention for the Trust B shares was based on his subjective and false views about his own conduct, his removal from his positions, the motivations of his mother and sisters and on self-dealing: he wished to elect Holding Company board members who would support his own agenda.

Trust B was a key mechanism for effectuating Richard II's intent of continued Bank control by his family. The trust contains 29.4% of the Holding Company's voting stock. If Trust B shares are not voted, the shares controlled by Richard II's immediate family constitute only 32.3% of the remaining voting stock. In that situation, Richard II's immediate family lacks majority control and must depend on the support of other shareholders to retain their board positions.[31] It was the trial court's duty to see that the trustor's intent was carried out. *Deposit Guaranty Nat. Bank of Jackson v. First Nat. Bank of Jackson*, 352 So. 2d 1324, 1327 (Miss. 1977). Richard II spent many years acquiring stock in the Bank. He did so because he wanted his family to control it. He never would have wanted a deadlock which prevented that stock from being voted. Based on this evidence, the trial court found that Richard III's actions wrongfully prevented the voting of the stock, which was inconsistent with Richard II's intent for Trust B. R. 5960-61 (Opinion, Richard III R.E. tab 2). To effectuate Richard II's goals and intent, the trial court found that Richard III could not hold the position of co-trustee.

[31] Richard III claims that nonvoting the Trust B shares did no harm because members of the Wilbourn Family were elected. Brief of Appellant at 29-30. But this ignores the fact that these elections were possible only because other shareholders voted for Wilbourn Family members. The irrefutable fact is that nonvoting the Trust B shares deprives the Wilbourn Family of control of the Bank.

F. **Jurisdiction and Venue Are Solely in Lauderdale County.**

Trust B is a testamentary trust, created and probated in Lauderdale County. Section 91-9-211 of the Mississippi Code confers jurisdiction over such trusts in the county in which they are probated:

> *Jurisdiction to settle the accounts of a trustee who may resign and to appoint a successor is vested in the chancery court of the county in which the will of the deceased has been probated in the case of a testamentary trust where the will is probated in this state* . . . . In all other cases such jurisdiction is vested in the chancery court of the county of the residence of the individual trustee, or one of them, or of the county in which the office, or one of the offices, of a corporate trustee is located . . . .

Miss. Code Ann. § 91-9-211 (emphasis added).

Richard III claims his *own* residency in Madison County made venue proper there, relying on the provision of § 91-9-211 which states that "[i]n all other cases such jurisdiction is vested in the chancery court of the county of the residence of the individual trustee, or one of them, . . ." This provision clearly applies to trusts *other than* testamentary trusts. Testamentary trusts are governed by the *first* sentence of the section, which fixes jurisdiction in the county in which the will is probated. Were this not the case, separate chancery courts would issue orders involving the same will and assets, creating a risk of inconsistent and conflicting rulings. Whenever a chancery court has taken jurisdiction of a will and estate through the probate process, that court takes jurisdiction over trusts created by that will and estate.

However, even if section 91-9-211 gave Madison County jurisdiction over this action, venue and jurisdiction are separate topics. Jurisdiction over the subject matter describes the power of a court to decide a case. "Venue is a separate and distinct matter, having to do with the place where the action may be brought, rather than the authority of the particular court to hear that type of case at all." GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 151 at 111 (2000 ed.). Chancery court venue is governed by section 11-5-1 of the Mississippi Code:

> Suits against executors, administrators, and guardians, touching the performance of their official duties, and suits for an account and settlement by them, and suits for the distribution of personalty of decedents among the heirs and distributees, and suits for the payment of legacies, *shall be brought in the chancery court in which the will was admitted to probate*, or letters of administration were granted, or the guardian was appointed; other suits respecting real or personal property may be brought in the chancery court of the county in which the property, or some portion thereof, may be; and all cases not otherwise provided *may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found*; and in all cases process may issue to any county to bring in defendants and to enforce all orders and decrees of the court.

Miss. Code Ann. § 11-5-1 (emphasis added).

The predecessor of section 11-5-1 was construed to govern lawsuits involving testamentary trusts and trustees. *Nutt v. State,* 51 So. 401 (Miss. 1906). In addition, section 11-5-1 requires that all cases not otherwise provided for shall be brought "in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found." Deanna is the sole income beneficiary of Marital Trust B. Under section 91-9-203, "[i]n any court proceeding to designate a successor trustee or to settle the accounts of the existing trustee, only the beneficiaries then entitled to participate in the trust estate shall be necessary parties thereto." For this independent reason, venue was proper in Lauderdale County, not Madison County.

Finally, Mississippi policy is that resident defendants have a right to be sued in the county of their residence. *Ross v. Ross,* 208 So. 2d 194 (Miss. 1968). "Repeatedly, the Supreme Court has stated that the right to be sued in the county of one's residence is a valuable right, not a mere technicality. The chancery court has no jurisdiction over a defendant who neither resides nor is found in the county where the action is filed, absent a waiver." Griffith, Mississippi Chancery Practice § 152 at 112; *accord Jefferson v. McGee,* 205 So. 2d 281 (Miss. 1967). A plaintiff may not fix venue in his own county of residence when a resident defendant is a party.

Crenshaw v. Roman, 942 So. 2d 806 (Miss. 2006); *see also Capital City Ins. Co. v. G.B. "Boots" Smith Corp.*, 889 So. 2d 505 (Miss. 2004). Richard III's joinder of two non-resident defendants, Elizabeth and Garnett, with Deanna does not change the result. In analogous cases, the Mississippi Supreme Court has held that "the Legislature never intended an interpretation of the venue statutes that would allow a resident defendant to be sued in the plaintiff's county of residence simply because a non-resident defendant be it an individual or corporation is joined in the same suit." *Baptist Memorial Hospital – DeSoto v. Bailey*, 919 So. 2d 1, 3 (Miss. 2005) (discussing analogous venue statute of circuit courts).

The Chancery Court of Lauderdale County is the *only* court in which both jurisdiction and venue of this action were proper. Richard III's argument to the contrary is without merit.

G. Richard III's Claims that Elizabeth and Garnett Should Be Disqualified to Serve as Co-Trustee of Trust B Lack Merit.

Richard III claims that Elizabeth and Garnett breached the terms of Trust B when they removed him as co-trustee, and that they are responsible for the hostility between the parties. Therefore, he claims they should be disqualified to serve as co-trustees of Trust B. *See* Appellant's Brief at 68-70. After hearing Richard III's evidence, the chancellor made findings of fact on the record, and dismissed Richard III's claims to disqualify Elizabeth and Garnett. Tr. 2995-3007 (Ruling on Rule 41(b) Motion, E&G R.E. 550-62). The trial court noted that the Defendants' Rule 41(b) motion must be sustained if Richard III "failed to prove one or more essential elements of his claim, or if the quality of proof offered is insufficient to sustain the Plaintiff's burden of proof." Tr. 2995 (quoting *Beulow v. Bladwell*, 757 So. 2d 216, 220 (Miss. 2000)). The trial court held that, while the Notice of Removal was not legally correct, Garnett and Elizabeth signed the Notice of Removal in good faith. Tr. 2996. The trial court also found that Richard III failed to present sufficient proof to support his claim that Elizabeth and Garnett had engaged in personal acts of hostility toward him. Based on these findings, the trial court

sustained Elizabeth and Garnett's Rule 41(b) motion and dismissed Richard III's claims against them. Tr. 2995-3007.

Richard III disagrees with the chancellor, and argues that Elizabeth and Garnett signed the Notice of Removal in bad faith, for personal motives. But he has made no showing that the chancellor's findings lack substantial support in the record. Evaluating the motives and credibility of the parties lies squarely within the chancellor's province. Here, the chancellor's ruling is supported by extensive evidence and must not be disturbed.

H. Richard III Did Not Serve as a Co-Trustee After April 10, 2007, and Is Not Entitled to a Trustee's Fee.

Richard III claims that he was due a fee for service as co-trustee, even though he performed no service to Trust B after April 10, 2007. He admits that his removal as co-trustee, Deanna took control of Trust B's books, records and bank account. *See* Appellant's Brief at 65. He does not allege that he performed any duties as co-trustee after April 10, 2007.

The trial court found that Trust B entitles a co-trustee to a fee only as compensation for services rendered:

> The Court has reviewed Marital Trust B. And Marital Trust B specifically states that the payment of the trustee's fee is for the services that are rendered. Since the attempted removal of Richard Wilbourn III, there is no evidence before the Court that Richard Wilbourn has rendered any services to the trust. And for that reason, the Court finds that the proof offered by the Plaintiff on the point is insufficient to sustain his burden of proof that he should be granted that relief.

Tr. 3006 (Ruling on Rule 41(b) Motion, E&G R.E. 561).

Because Richard III has performed no services to entitle him to a fee, the chancellor properly dismissed his claim.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED, this the 9th day of June, 2011.

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CERTIFICATE OF SERVICE

I, Mary Clay W. Morgan, hereby certify that I have, on this day, served true and correct copies of the foregoing on the following interested parties via U.S. Mail, postage prepaid:

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This the 1st day of June, 2011.

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