BEFORE THE SUPREME COURT OF MISSISSIPPI

CAROLYN EPPERSON	**APPELLANT**
VS.	**CAUSE NO. 2010-CA-56**
SOUTHBank	**APPELLEE**

APPEAL FROM THE CIRCUIT COURT
OF ALCORN COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES

DOES A BANK'S CONSUMER ACCOUNT AGREEMENT THAT ALLOWS ANY DEPOSITOR WHO SIGNS THE ACCOUNT AGREEMENT TO WITHDRAW FUNDS "ON FORMS APPROVED BY US" MEAN THAT THE BANK MAY ADDITIONALLY REQUIRE THE DEPOSITOR TO PRODUCE THE ORIGINAL CERTIFICATE OF DEPOSIT?

A. Brief Restatement of the Facts

Carolyn Epperson was the co-owner of four Certificates of Deposit with her step-brother and step-mother styled "Juanita Rickman or Carolyn Epperson or Randy Thompson." On February 15, 2005, Carolyn Epperson went to SOUTHBank to inquire about her money. She obtained a printout of the balances of the four Certificates of Deposit that were on deposit at the Bank. She later returned to SOUTHBank on October 21, 2005, to inquire about her money and the printout revealed that CD# 9021984 had been cashed without Ms. Epperson's knowledge.

Ms. Epperson was concerned and asked Ms. Franks to get her money out of the Bank. However, according to Ms. Franks, the Bank did not let her have her money because Ms. Epperson did not have the Certificates of Deposit. Ms. Franks also had known Ms. Juanita Rickman for many years and believed that the money in the CDs was only her step-mother's and not Ms. Epperson despite the ownership language of the CDs

Five months after Ms. Epperson was denied her money, on February 17, 2006, Ms. Juanita Rickman, Randy Thompson and his wife went to SOUTHBank and consolidated all of the Certificates of Deposit into one $234,000.00 CD and removed Ms. Epperson's name from the account. The Certificate of Deposit was in the name of "Juanita Rickman or Randy Thompson or Doris Thompson." Thus, Ms. Epperson never got any of her money.

B. Brief Restatement of the Law

This is a case concerning the interpretation of the plain language of a contract. "Questions concerning the construction of contracts are questions of law that are committed to the court rather than questions of fact committed to the fact finder.' "*Parkerson v. Smith*, 817 So.2d 529, 532(Miss.2002) (quoting *Miss. State Highway Comm'n v. Patterson Enters., Ltd.*,627 So.2d 261, 263 (Miss. 1993)). The Supreme Court employs the *de novo* standard of review for questions of law. *Starcher v. Byrne*, 687 So.2d 737, 739 (Miss. 1997)

The deposit of money into a bank pursuant to a Consumer Account Agreement is a contract between a depositor and a bank. *Union Planters Nat'l Bank, N.A. v. Jetton*, 856 So.2d 674 (Miss. Ct. App. 2003). As a contract, the Consumer Account Agreement along with the Certificate of Deposit should be interpreted according to contract construction principles that have long been recognized by our courts in an effort to determine the intent of the contracting parties.

C. SouthBank argues that the consumer account agreement authorizes the Bank to restrict the withdrawal of funds.

SouthBank quotes the following language from the consumer account agreement for the proposition that the Bank was entitled to restrict Ms. Epperson's access to the account by requiring her to produce the Certificate of Deposit.

The relevant portions of the contract are as follows:

> AGREEMENT - These terms govern the operation of this account unless varied or supplemented in writing. . .
>
> WITHDRAWALS - Unless otherwise clearly indicated on page 1 any one of you who signs this form including authorized signers, may withdraw or transfer all or any part of the account balance at any time on forms approved by us. . .***We reserve the right to refuse any withdrawal*** or transfer request which is attempted by any other method not specifically permitted. . .Withdrawals from a time deposit prior to maturity or prior to the expiration of any notice period ***may be restricted*** and may be subject to penalty.
>
> AMENDMENTS AND TERMINATION - We may change any term of this agreement. . .For other changes we will give you reasonable notice in writing. . .

In its Brief, SouthBank highlighted the text above to show that the Bank has the right to restrict access to a depositor's funds. The Bank has the right to restrict funds ***in the agreement.*** The Bank says that the Bank chose to exercise it "restrictive authority" (Appellee's Brief, page 7). However, the Bank is electing to ignore the plain language of the agreement that says:

> AGREEMENT - These terms govern the operation of this account unless varied or supplemented ***in writing. . .*** (emphasis added).

The Bank has the authority to place a variety of restrictions on the deposits that it accepts. However, those restrictions may only be ***in writing*** by the plain language of the agreement. The Bank has zero authority to add withdrawal requirement based upon policy, dealings or otherwise unless those restrictions are in writing and a part of the **original** agreement or an amendment ***in writing.***

The consumer account agreement clearly says:

> AMENDMENTS AND TERMINATION - We may change any term of this agreement. . .For other changes we will give you reasonable notice in writing. . .

Again, the Bank wrote the agreement and placed the burden on itself to limit the deposit agreement to the contents of the written agreement which clearly did not require the depositor to return the Certificates of Deposit before withdrawal.

SOUTHBank now takes the position that since the agreement gives the Bank the right to place restrictions on withdrawal that are not contained in the agreement, then that term becomes ambiguous and must be interpreted against the drafter. "Where the language of an otherwise enforceable contract is subject to more than one fair reading, the reading applied will be the one most favorable to the non-drafting party." *Leach v. Tingle*, 586 So.2d 799, 801-02 (Miss. 1991)

D. On pages 11, SouthBank argues that "The 'forms approved by us' language grants SOUTHBank broad authority to require customers to adhere to long-standing bank practices and procedures.

As Ms. Epperson previously cited in her original brief, SOUTHBank's 1993 Certificates of Deposit contained specific language that required the depositor to surrender the Certificates of Deposit before the depositor could receive the funds. However, in 2000, when the Certificates of Deposit were changed following Mr. Rickman's death, the language had been removed from the Bank's Certificate of Deposit form.

In its original Motion for Summary Judgment at the Trial Court, SOUTHBank initially

argued that the language was still in effect. It was not until Ms. Epperson filed her own Counter-Motion for Summary Judgment that SOUTHBank bothered to read its own documents. Then, it discovered that the language had been removed. Despite the undisputed testimony from Ms. Franks that she never would have allowed Ms. Epperson to get the funds under any circumstances except the permission and consent of Ms. Juanita Rickman, the Bank still wants to argue that its custom should control.

SOUTHBank now says that the consumer deposit agreement, the Bank has broad authority to impose restricts as it sees fit. It argues that the Bank must require the depositor to produce the Certificate of Deposit to protect itself stating "Such a procedure is an internal policy that is designed to protect the bank, it may be applied or waives as the bank sees fit." (Appellee's Brief at page 15).

As cited above, SOUTHBank wrote the consumer deposit agreement and chose to restrict itself to the contents of the document. SOUTHBank could have included its "longstanding practice and custom" within the agreement, but is specifically chose to remove the language in the 2000 certificates of deposit. Now, SOUTHBank argues that Ms. Epperson should have known that the practice existed even though the agreement did not address possession of the Certificate of Deposit in any respect. SOUTHBank agrees that it never laid eyes on the depositor yet is now expecting her to be bound by an internal policy that was not included in the bank's depository agreement.

"Where the language of an otherwise enforceable contract is subject to more than one fair reading, the reading applied will be the one most favorable to the non-drafting party." *Leach v. Tingle*, 586 So.2d 799, 801-02 (Miss. 1991). Despite being the drafter of the document, the Bank wants to claim that "on forms approved by us" means that the Bank can later require the Depositor to produce a Certificate of Deposit that the Depositor purchased years earlier. There is simply no language in the consumer deposit agreement that requires the depositor to tender the Certificate of Deposit before withdrawing the funds. If the Bank now argues that this phrase includes broad

authority to place restrictions that are only known to the Bank, then the phrase "on forms approved by us" is ambiguous and must be construed against the drafter.

D. Is the Certificate of Deposit one of the "forms approved by us" that the Depositor must produce to withdraw funds?

Ms. Epperson argued her Appellant's Brief that the Certificate of Deposit is not a "form" within the meaning of the consumer deposit agreement. SOUTHBank says that this argument is "absurd" (Appellee's Brief, Page 10) because the Certificate of Deposit is clearly a form because it allows for the insertion of information into blank spaces. It is true that a Certificate of Deposit is a ***deposit*** form. However, the consumer deposit agreement says the depositor may "withdraw or transfer all or any part of the account balance at any time on forms approved by us." How can a Certificate of ***Deposit*** be a ***withdrawal*** form? Clearly, the Certificate of Deposit is a form for a deposit, but it is not a form for a withdrawal. When the Bank's prior agreement and its unwritten policy required the surrender of the Certificate of Deposit, the purpose was because some Certificate of Deposit have historically been deemed negotiable instruments such that possession of the instrument gave the bearer rights. However, the amendment of MS Code §75-3-104 in 1993 rendered the possession of the CD meaningless. Thereafter, SOUTHBank changed their consumer deposit agreement and the Certificates of Deposit to remove the requirement to surrender the certificate of deposit as a condition of withdrawal.

Interestingly enough, the Bank's prior Certificates of Deposit required the depositor to surrender the Certificate to redeem funds and included a place on the back of the Certificate of Deposit for the depositor to sign to redeem the CD. However, the Court will not find any place on the subject Certificate of Deposit for the depositor or bank official to sign to redeem the account. There is simply not evidence in the record that the subject Certificates of Deposit could ever be construed as a withdrawal form.

SOUTHBank then argues on page 11 of its Brief that "standard banking practice has long required customers to present the original CD endorsed on the back by any owner making a withdrawal request." However, the Uniform Commercial Code changed in 1993 to clarify that a Certificate of Deposit was not a negotiable instrument such that possession of the document was meaningless. SOUTHBank changed its Certificate of Deposit to correspond with the law to say that the CD was not a negotiable instrument, but SOUTHBank never changed its practices to match.

SOUTHBank cites numerous cases in support of its claim. Each of the cases cited by SOUTHBank included Certificates of Deposit that pre-dated the changes to the UCC and each of the Certificates of Deposit contained the same language the required surrender of the document as a condition of withdrawal. This was the same language the existed in the 1993 Certificates of Deposit that were purchased by C. K .Rickman.

E. SOUTHBank acknowledged that the requirement to present the Certificate of Deposit was an "internal policy designed to protect the bank, [that] may be applied or waived as the bank sees fit."

On page 15 of SOUTHBank's Appellee's Brief, it makes the bold statement that the Bank had the authority to create an internal policy that essentially eliminated the co-depositor's right to withdraw funds despite clear contradictory language in the customer deposit agreement. Then, the Bank goes further to say that the Bank may waive or apply the internal policy as its sees fit. The Bank also acknowledged that Carolyn Epperson was never in the Bank and had no way to know of the policy. Ms Epperson's only contact with the Bank was the consumer deposit agreement.

The case of *Union Planters Nat'l Bank, N.A. v. Jetton*, 856 So.2d 674 (Miss. Ct. App. 2003) is worth discussing. Ms. Jetton owned Certificates of Deposit at Union Planters Bank. The CDs contained a clear clause that allowed by the Bank to use the funds to setoff the funds to pay any debts that the owner of the CDs owed to the Bank. Ms. Jetton asked the Bank to add her children's name to the CDs so that the children could have access to the money. The Bank added the children's

names as joint tenant thus making the children joint owners of the money. Later, when the children defaulted on their own loans, the Bank used the CDs to pay the children's loans. Ms. Jetton sued the Bank in chancery court and the Chancellor allowed her to explain what the Bank told her at the time she purchased the CDs. She argued that the Bank explained the effect of the joint tenancy. The Chancellor ordered the Bank to return her money but did not find that the Bank committed fraud.

The Court of Appeals reversed and rendered in favor of the Bank finding that the discussions did not matter since the contract was not ambiguous. The Court of Appeals said:

> Under Mississippi law, where the contract is not ambiguous, the intention of the contracting parties should be gleaned solely from the wording of the contract. *Heritage Cablevision v. New Albany Elec. Power Sys.*, 646 So.2d 1305, 1312 (Miss. 1994). Parol evidence will not be received to vary or alter the terms of a written agreement that is intended to express the entire agreement of the parties on the subject matter at hand. *Turner v. Terry*, 799 So.2d 25, 32 (¶ 16) (Miss. 2001); *Grenada Auto Co. v. Waldrop*, 188 Miss. 468, 195 So. 491, 492 (1940). A "court is obligated to enforce a contract executed by legally competent parties where the terms of the contract are clear and unambiguous." *Merchants & Farmers Bank v. State ex rel. Moore*, 651 So.2d 1060, 1061 (Miss. 1995). As stated in *Delta Pride Catfish, Inc. v. Home Ins. Co.*, 697 So.2d 400, 404 (Miss. 1997), ***the parties are bound by the language of the contract where a contract is unambiguous. We are "concerned with what the contracting parties have said to each other, not some secret thought of one [that was] not communicated to the other."*** *Mississippi State Highway Com'n v. Patterson Enterprises Ltd.*, 627 So.2d 261, 263 (Miss. 1993).
>
> *Id.* at 678 (emphasis added).

The Court of Appeals found that the Bank and its customer were bound by the language of the contract regardless of what Ms. Jetton secretly intended and the conversation that she may have had with the Bank. The Certificate of Deposit was a complete agreement. The Court forbid the admissibility of parol evidence to determine the intent of the parties where the written agreement purported to express the entire agreement of the parties.

In the case *sub judice*, the first sentence of the consumer deposit agreement says that the written agreement controls the entire relationship between the parties unless varied in writing. The Bank has offered on writing that requires the parties to surrender the Certificate of Deposit in order

to withdraw the funds.

If the Bank's argument is true that the Bank can create and enforce unwritten restrictions at will, then the consumer deposit agreement was worthless since the Bank could create any internal policy and call it a "restriction". The Bank is simply saying that "we can give any depositor money if we want them to have it." which is exactly the position taken by Ms. Franks, the Bank's employee who denied Ms. Epperson access to her funds. She confirmed that she would have given Ms. Juanita Rickman the funds without the Certificate of Deposit because she was the true owner of the money. Transcript of Margie Franks, Page 37 Line 24 – 19.

Mr. Akins	:	Okay, What would have happened if Carolyn Epperson or Randy Thompson or Juanita Rickman had said we've lost those CD's?
Ms. Franks	:	Well, we do have a form for lost CD's.
Mr. Akins	:	Okay.
Ms. Franks	:	But we do have to know that it's Ms. Rickman or whoever owed the CD is signing it.
Mr. Akins	:	Okay.
Ms. Franks	:	I mean, **Carolyn couldn't have come in here and said we've lost these CD's.**
Mr. Akins	:	Okay.
Ms. Franks	:	The ***real owner*** of it would have to come in and say they are lost.
Mr. Akins	:	Okay. And in the case of the CD's that Mrs. Epperson was asking about on October 21st of 2005, I mean, in that case ***Juanita Rickman was the real owner of those CD's***?
Ms. Franks	:	Right.
Mr. Akins	:	Okay. And then based on that ***she would have been the only person who could have gotten that money***.
Ms. Franks	:	Right.

F. What does the Consumer Account Agreement require the Depositor to do in order to withdraw money from an account?

The literal language of the Consumer Account Agreement allows the customer to withdraw funds at any time on forms approved by the Bank. The Trial Court found that Bank was justified in refusing to give Ms. Epperson her money because the "form" that is referred to in the Agreement was the actual Certificate of Deposit. The Trial Court found that the plain language of the Agreement means that when the Agreement says *"on form approved by us"*, the Bank can force the depositor to produce the actual Certificate because it's a "form" within the meaning of the agreement.

It makes no sense that one must bring the CD when the language says that withdrawal must be on forms that the bank does not possess. If the bank does not provide these forms, then from where do they come? Ms. Epperson appeared at the bank and was ready to execute any withdrawal her funds "on forms approved" by the bank according to the language of the contract.

"Where the language of an otherwise enforceable contract is subject to more than one fair reading, the reading applied will be the one most favorable to the non-drafting party." *Leach v. Tingle*, 586 So.2d 799, 801-02 (Miss. 1991). "When construing a contract, we will read the contract as a whole, so as to give effect to all of its clauses." *Brown v. Hartford Ins. Co.*,606 So.2d 122, 126 (Miss. 1992) Applying the principles of contract construction, the Bank chose the language of its Consumer Account Agreement and is now straining to suggest that the "forms approved by us" could somehow mean the production of the original certificate of deposit. This interpretation is inconsistent with the plain language of the remaining provisions of the Agreement.

Finally, Ms. Franks' deposition makes it clear that Ms. Franks believed that since the original money came from C. W. and Juanita Rickman, then it continued to belong solely to Juanita Rickman despite the clear language of the CD. As far as Ms. Franks was concerned, the money belonged to Ms. Rickman and not to Carolyn Epperson. Without the Certificate of Deposit, Ms. Franks was not

going to give any money to Carolyn Epperson despite what the contract said.

CONCLUSION

The plain language of the Certificate of Deposit required the Bank to allow Ms. Epperson to withdraw the funds in the CD without any requirement to produce the CD. By adding a requirement to with withdrawal process that was not present in agreement, the Bank caused Ms. Epperson to lose her money which was then withdrawn by her step-mother. Ms. Epperson is entitled to a judgment in the amount of $234,000.00 representing the amount taken from the account by her step-mother on February 17, 2006 with interest from that date.

The Supreme Court should reverse the judgment of the Circuit Court of Alcorn County, Mississippi and render a judgment against SOUTHBank in the amount of $234,000.00 with interest from February 17, 2006. Alternatively, the Supreme Court should reverse and remand the case for trial on the merits.

THIS, the 23rd day of September, 2010.

Respectfully submitted,

AKINS & ADAMS, P. A.

by: _____

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CERTIFICATE OF SERVICE

I, B. Sean Akins, attorney of record for the Appellant, do hereby certify that I have this day mailed, through United States Mail, proper postage prepaid, a true and correct copy of the foregoing document to the following:

William M. Beasley, Esq.
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Judge Jim S. Pounds
P.O. Drawer 1100
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SO, CERTIFIED, this, the 23rd of September, 2010.

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