IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
APPEAL NO. 2014-TS-00829

IN THE MATTER OF THE ESTATE OF
JAMES O. SMITH, JR., DECEDENT
LELA SMITH FLOWERS; CHRISTY G. NOAH,
INDIVIDUALLY AND AS ADMINISTRATOR OF THE
ESTATE OF JINX P. SMITH, JR.; AND CHRISTOPHER
STANTON SMITH **APPELLANTS**

VS.

TODD BOOLOS, TRUSTEE OF THE J.O. SMITH, JR. FAMILY TRUST;
TRUSTMARK NATIONAL BANK, AS CO-EXECUTOR OF THE
ESTATE OF JAMES O. SMITH, JR., DECEDENT; AND
ERNEST LANE, ESQ., AS CO-EXECUTOR AND ATTORNEY
FOR THE ESTATE OF JAMES O. SMITH, JR., DECEDENT **APPELLEES**

BRIEF OF APPELLANT

FROM THE CHANCERY COURT OF WARREN COUNTY

David M. Sessums, MSB #6714
ATTORNEYS FOR LELA SMITH FLOWERS, APPELLANT
VARNER, PARKER & SESSUMS
1110 Jackson Street
Vicksburg, MS 39183
Ph: (601) 638-8741

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
APPEAL NO. 2014-TS-00829

IN THE MATTER OF THE ESTATE OF
JAMES O. SMITH, JR., DECEDENT
LELA SMITH FLOWERS; CHRISTY G. NOAH,
INDIVIDUALLY AND AS ADMINISTRATOR OF THE
ESTATE OF JINX P. SMITH, JR.; AND CHRISTOPHER
STANTON SMITH **APPELLANTS**

VS.

TODD BOOLOS, TRUSTEE OF THE J.O. SMITH, JR. FAMILY TRUST;
TRUSTMARK NATIONAL BANK, AS CO-EXECUTOR OF THE
ESTATE OF JAMES O. SMITH, JR., DECEDENT; AND
ERNEST LANE, ESQ., AS CO-EXECUTOR AND ATTORNEY
FOR THE ESTATE OF JAMES O. SMITH, JR., DECEDENT **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following have an interest in this action. These representations are made so that the Justices of this Court may evaluate possible disqualification or recusal:

1. Hon. Hollis McGehee
   Special Chancellor
   7257 Hwy 57 South
   Lucedale, MS 39452
   judgehollismcgehee@yahoo.com

2. David M. Sessums, Esquire
   Varner, Parker & Sessums, P.A.
   Attorney for Appellant Lela Smith Flowers
   1110 Jackson Street
   Vicksburg, MS 39180

3. Lela Smith Flowers

4. Patricia Peterson Smith, Esquire
Attorney for Appellant - Christy G. Noah, Individually and as Administrator of the Estate of Jinx P. Smith, Jr.; and Christopher Stanton Smith
P.O. Box 589
Vicksburg, MS 39181

5. Christy G. Noah, Individually and as Administrator of the Estate of Jinx P. Smith, Jr.; and Christopher Stanton Smith

6. Earnest Lane, III, Esquire
P.O. Box 1499
Oxford, MS 38655

7. J. Niles McNeel, Esquire
P.O. Box 28
Louiseville, MS 39339

8. William R. Armstrong, Jr., Esquire
1675 Lakeland Drive
Suite 308
Jackson, MS 39216

9. William F. Ray, Esquire
Stephanie M. Rippee, Esquire
Steven D. Orlansky, Esquire
Watkin & Eager, PLLC
400 East Capital Street
Jackson, MS 39205

10. Edward Otis Johnson, Jr., Esquire
P.O. Box 14028
Jackson, MS 39236

11. William R. Striebeck, Esquire
P.O. Box 519
Greenville, MS 38702

12. David R. Lynch, Esquire
4500 I-55 North, ste 245
Jackson, MS 39211-5958

13. A. Spencer Gilbert, III, Esquire
P.O. Box 13187
Jackson, MS 39236

14. Lisa A. Reppeto, Esquire
P.O. Box 427
Jackson, MS 39205-0427

15. Alan D. Lancaster, Esquire
P.O. Box 645
Winona, MS 38967

16. J. O. Smith, III

17. Patrick Raymond Smith

18. Todd Boolos, Trustee of the J.O. Smith, Jr. Family Trust

19. Trustmark National Bank, as Co-Executor of the Estate of James O. Smith, Jr., Decedent

20. Ernest Lane, Esquire, as Co-Executor and Attorney For the Estate of James O. Smith, Jr., Decedent

21. Jinx Peterson Smith, Jr.

22. Christopher Stanton Smith

23. Patricia Stafford Smith

24. Christy S. Noah

25. Big River Ship Builders, Inc.

26. Yazoo River Towing, Inc.

27. Vicksburg Plant Food, Inc.

Respectfully submitted,

By: /S/ David M. Sessums
DAVID M. SESSUMS
MSB #6714

OF COUNSEL:

VARNER, PARKER & SESSUMS, P.A.
1110 Jackson Street
Vicksburg, Mississippi 39183
Telephone: 601/638-8741
Facsimile: 601/638-8666

TABLE OF CONTENTS

TABLE OF AUTHORITIES

19. *Bailey v. Estate of Kemp,* 955 So.2d 777 (Miss. 2007)

20. *Godfrey Bassett Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co.,* 584 So.2d 1254 (Miss. 1991)

21. *Perrien v. Mapp*, 374 So. 2d 794 (Miss 1979)

22. *Stevens v. Illinois Cent. R. Co.*, 137 F. Supp. 333, (S.D. Miss. 1955)

23. *Frierson v. Sheppard*, 29 So. 2d 726 (Miss. 1947)

24. *Magee v. Magee's Estate*, 111 So. 2d 394 (Miss. 1959)

25. *Yeates v. Box*, 22 So. 2d 411 (Miss. 1945)

26. *McWIlliams v. McWilliams et rel Weathersby*, 994 So. 2d 841 (Miss. App. 2008)

27. *Ramsdell v. Union Trust Co.*, 202 Conn. 57, 519 A. 2d 1185, 1186 (1987)

28. *Nutt v. State*, 51 So. 401 (Miss. 1910)

29. *In Re: Conservatorship of Estate of Lloyd*, 868 So. 2d 363 (Miss. App. 2004)

30. *McWilliams v. McWilliams ex rel Weathersby*

31. *Byrd v. Stein*, 204 F. 2d 122 (5th Cir. Miss. 1953)

32. *Hubbard ex rel Hubbard v. McDonalds Corp.*, 41 So. 3d 670 (Miss. 2010)

33. *Thompson v. Dung Thi Hoang Nguyen*, 86 So. 3d 232 (Miss. 2012)

34. *Investor Resource Services, Inc. v. Cato*, 15 So. 3d 412 (Miss. 2009)

35. *Faught v. Morris and Investor Resource Services, Inc.*, 543 So. 2d 167 (Miss.1989)

36. *Sanders v. Neely*, 19 So. 2d 424 (Miss. 1944)

37. *Griffith v. Griffith*, 997 So. 2d 218 (Miss. App. 2008)

38. *In Re: Estate of Thomas*, 28 So. 3d 627 (Miss. App. 2009)

STATEMENT OF ISSUES

1. The lower court erred in finding there was no conflict of interest regarding the actions of Substituted Trustee Todd Boolos.

2. The lower court erred in finding that the filing of the Declaratory Judgment Petition, and amendments, by Substituted Trustess Todd Boolos was not a breach of fiduciary duty.

3. The lower court erred in finding the Successor Trustee managed the J.O. Smith Family Trust in a prudent and impartial manner and in the best interest of the beneficiaries.

4. The lower court erred in failing to find that there was an actual conflict of interest by the Successor Trustee Todd Boolos.

5. The lower court erred in not allowing Lela Smith Flowers access to the corporate books and records of the companies owned by J.O. Smith, Jr. at the time of his death.

6. The lower court erred in ordering that Lela Smith Flowers surrender the limited financial information produced to her by the intervener companies/companies owned by J.O. Smith, Jr. at the time of his death.

7. The lower court erred in finding that the ruling of the court dated March 30, 2011, regarding the indebtedness from the J.O. Smith, Jr. Family Trust to the Estate of J.O. Smith, Jr. was res judicata regarding the amount actually owed by the Estate to the Trust.

8. The lower court erred in finding that the interlocutory order of March 30, 2011, prohibited Lela Smith Flowers from later contesting the actual amount of money due by the Estate of J.O. Smith, Jr. to the J.O. Smith, Jr. Family Trust

STATEMENT OF THE CASE

J.O. Smith, Jr. was a self made millionaire, making his money in the Mississippi River tow boating business. He married Petesy Smith and together they had four children Lela Smith (now Flowers), J.O. Smith, III and Jinx Smith, Sr. (twins), and Patrick Smith.

Many years ago J.O., Jr. and Petesy were divorced and neither J.O. nor Petesy remarried. J.O. III and Jinx, Sr. worked with their father in the tow boat business and unfortunately Jinx, Sr. died in a tragic diving accident on the river prior to the death of J.O. Smith, Jr. Jinx, Sr. was survived by three children.

J.O. Smith, Jr. left a last will and testament, with three codicils, where he left his residuary estate ¼ to each of his children with the surviving children of Jinx, Sr. taking their father's ¼ share. Under his third codicil his stock interests in his companies were not left ¼ each.

J.O. Smith, Jr. also created the J.O. Smith, Jr. Family Trust which was funded by insurance. It was designed to pay taxes but unfortunately J.O. Smith, Jr. did not live long enough after the creation of this Trust for this to work and at his death the Estate of J.O. Smith, Jr. owed some six million dollars in taxes.

At a time when Lela Smith Flowers was unrepresented, an agreement was reached whereby the J.O. Smith, Jr. Family Trust (hereinafter "the Trust") would loan the Estate of J.O. Smith, Jr. (hereinafter "the Estate") $2,020,000.00 to pay taxes. In exchange the Estate gave the Trust it's note and deed of trust covering several parcels of real property owned in

the individual name of J.O. Smith, Jr. at the time of his death. (this is unusual as under Mississippi law real estate passes directly to the heirs and does not pass through the Estate unless there is a need to pay claims of creditors.)

The terms of the promissory note and deed of trust from the Family Trust to the J.O. Smith, Jr. Estate conflicted. The note did not provide for penalties or late fees or compound interest while the terms of the deed of trust did provide for late fees, charges and, arguably, compound interest. There was several renewals of the note and deed of trust before Lela was represented by any counsel. She signed off on an order on March 30, 2011, which recited the amount of indebtedness between the Estate and the Trust.

Later Lela became dissatisfied that the Estate was being dragged out and hired counsel to contest the conflict between the terms of the note and deed of trust from the Estate to the Family Trust. There was extensive litigation over this and afterwards the newly appointed Special Chancellor did not reach the merits of the argument but instead found that because Lela had agreed to the previous March 30, 2011, order that this was res judicata on the issue.

In the litigation regarding the amount of indebtedness owed by the Estate to the Trust the Substituted Trustee of the Family Trust, Todd Boolos, took a position, contrary to that argued by Lela, that the Estate actually owed less money to the Family Trust than contended by Lela and sided with the attorneys and representatives of the Estate were are arguing for a lesser amount being owed by the Estate to the Trust. The Trustee took a position contrary

to the best interest of his own Trust and engaged in extensive litigation arguing that the Estate owed his client, the Trust, a lesser amount of money than contended by Lela as a Trust beneficiary.

During the course of the above litigation it developed that the Successor Trustee for the Family Trust (creditor) was also the CPA for the Estate of J.O. Smith, Jr. (debtor), was the CPA for J.O. Smith, III and Patrick Smith and was the CPA for each of the companies controlled by J.O. Smith, III and Patrick Smith. Each of these persons and entities sided with the Trust on the indebtedness issue. On this basis Lela moved that the Successor Trustee/CPA be removed because of multiple conflicts of interest.

At the hearing on the conflicts issue a CPA appeared and testified that Boolos' actions did not violate the code of ethics for CPAs and because Lela offered nothing to the contrary, the Special Chancellor felt he was bound by this testimony and even after stating to effect, "If you were an attorney, I would have no hesitation in removing you for conflict of interest," declined to remove the CPA.

During the course of the Estate, Lela was initially a member of the Board of Directors of the closely held corporations (controlled by her two brothers J.O. Smith, III and Patrick Smith) but her requests to see the books and records of the companies were denied. Extensive litigation resulted and the court denied her request as a director to see the books and records of the companies upon whose Boards she sat. During this time between 69% and 80% of the shares of each of the closely held corporations was held by the

Executor/Administrator of the Estate who refused to vote to elect a new Board and in turn elect new officers, and direct that Lela be allowed to see the books. To solve this "problem" the Executor/Administrator and Lela's two brothers fired her from the Board of Directors and fired her as an officer and employee of the corporations and then claimed that since she was no longer a director/officer/employee that she had no rights to see the books.

The Chancellor later revisited the denial of Lela being able to see the books and Lela and the heirs of Jinx Sr. were allowed a very limited access to the books and were directed to make the Administrator aware of anything they saw "wrong" and after which the Administrator would look into it and report back to the Court. This was done but the Administrator only did a cursory review and basically took the word of J.O. Smith, III and Patrick Smith and admittedly did not perform any audit of the books and records of the closely held corporations.

SUMMARY OF THE ARGUMENT

Because the promissory note and the deed of trust from the Estate of J.O. Smith, Jr. to the J.O. Smith, Jr. Family Trust were part of a single transaction and executed by the same parties at the same time they should have been interpreted as a global transaction under Mississippi law. The lower court was in error in failing to do so. The lower court was in further error in finding that the interlocutory order entered by Chancellor V. R. Barnes [before her recusal] dated March 30, 2011, constituted res judicata so as to prevent Lela and the heirs of deceased child Jinx Smith, Sr. from later contesting the actual indebtedness

owing by the Estate to the Trust.

Lela Smith Flowers is a specific beneficiary of a considerable amount of stock owned by J.O. Smith, Jr. at the time of his death in Big River Ship Builders, Inc., Yazoo River Towing, Inc., Vicksburg Plant Food, Inc. and other corporations, including Smith Towing, Inc. While she is not actually vested with legal ownership of these shares of stock [all claims of creditors have been paid] until the Estate is closed the lower court was in error in denying Lela's repeated requests and applications to the Court for entry of its order allowing her as a stockholder to see the corporate books and records of these companies.

Further, at the time she made her requests both to the corporations and to the Court, Lela was a sitting member of the Board of Directors of Big River Ship Builders, Inc., Yazoo River Towing, Inc., Vicksburg Plant Food, Inc. Smith Towing, Inc. and all other closely held corporations whose stock was owned by her father at the time of his death. The lower court was in error in denying and/or restricting the requests of Lela as a sitting director to see the books and records of the corporations on whose boards she sat.

Todd Boolos, a CPA practicing in Vicksburg, is a fiduciary who serves as Successor Trustee in the J.O. Smith, Jr. Family Trust. He is also the CPA for the Estate of J.O. Smith, Jr. The Estate of J.O. Smith, Jr. owes the J.O. Smith, Jr. Family Trust $2,020,000.00, plus interest, and according to Lela late penalties, compound interest and other fees. Boolos represents both the Estate as debtor and the Trust and creditor and has a direct conflict of interest.

Further, Boolos is the CPA for Big River Ship Builders, Inc., Yazoo River Towing, Inc., Vicksburg Plant Food, Inc. and the other closely held corporations and has possession of their books and records. Boolos at the direction of these corporations refused to provide Lela copies of the books and records of these corporations.

Boolos is also the personal CPA for J.O. Smith, III and Patrick Smith, the CEOs of the corporations which have refused Lela's request to see their books and records.

Under the terms of the J.O. Smith, Jr. Family Trust, Lela Smith Flowers, J.O. Smith, III, Patrick Smith and the children of Jinx Smith, Sr. each receive a 25% interest in the Trust. However, these percentage interests are not the same under the Estate of J.O. Smith, Jr. because of the codicils, specifically the third, to the last will and testament of J.O. Smith, Jr. By refusing to take steps to collect the indebtedness due from the Estate to the Trust, Boolos has favored the financial interests of his CPA clients, J.O., III and Patrick, the corporations and the Estate as debtor.

When questions arose as to the correct amount of indebtedness due and owing from the Estate to the Trust, Boolos filed a declaratory judgment action. This itself was fine. However, Boolos did not file a "neutral" declaratory judgment action simply setting forth the facts and letting the court make its own determination after the issue was litigated between the opposing sides. Instead Boolos took an adversarial position favoring the position advocated by J.O. Smith, III, Patrick Smith, and the Estate and directly against the position advocated by Lela and the heirs of Jinx Smith, Sr.

The lower court was in error in refusing to remove Boolos as Trustee.

ARGUMENT

J.O. Smith, Jr. died August 24, 2006, leaving a last will and testament dated November 10, 1987, a first codicil dated November 18, 1988, a second codicil dated July 27, 2005, and a third codicil dated December 12, 2005. In the last will and testament Ernest Lane, III and Trustmark National Bank were named as Co-Executors and the will waived bond, inventory and accounting. (Vol. 1, Pg. 36) [R.E. 2]

The heirs of James Oldrum Smith, Jr. were James Oldrum Smith, III, Patrick Raymond Smith, Lela Smith Flowers, his grown children, and Jinx Peterson Smith, Jr., Christopher Stanton Smith and Patricia Stafford Smith, minor children of Jinx Peterson Smith, Sr. who predeceased his father James Oldrum Smith, Jr. (Vol. 1, Pg 36-38) [R.E. 2]

An order was entered admitting the will to probate on September 11, 2006 (Vol. 1, Pg. 49) [R.E. 3]

On June 11, 2011, an order was entered allowing Trustmark National Bank to resign as Executor. (Vol. 1, Pgs 55-58) [R.E. 4]

During administration it became apparent to the Estate of J.O. Smith, Jr. would owe substantial estate taxes and did not have sufficient cash on hand with which to pay said taxes. As a result of discussions between the J.O. Smith, Jr. Family Trust and the Estate of J.O. Smith, Jr. it was agreed that the Trust would loan the Estate $2,020,000.00 to be evidenced by a promissory note from the Estate to the Trust and secured by a deed of trust

from the Estate to the Trust. The loan was made and the estate taxes were paid.

On September 25, 2012, the J.O. Smith, Jr. Family Trust filed a declaratory judgment action in the estate proceeding. In such dec action, the Trust, rather than taking a neutral position, asserted an adversarial position contrary to the position of certain trust beneficiaries, including Lela Smith Flowers. The Trust alleged that a lesser amount was owned by the Estate to the Trust than was contended by Lela Smith Flower and the heirs of Jinx Smith, Sr. (Vol. 1, Pgs 70-98) [R.E. 5]

The declaratory judgment action is an excellent source of facts, dates and figures which are not disputed by any party hereto. The dec action states that estimated estate taxes were due nine (9) months after the death of J.O. Smith, Jr. and that the Estate had insufficient cash on hand with which to pay such taxes. To pay the estate taxes a decision was made by the Co-Executors and the Trustee for the Trust to loan the Estate $2,020,000.00 to be secured by four (4) parcels of real estate owned by J.O. Smith, Jr. at the time of his death. (Vol. 1, Pg. 80) [R.E. 5]

A note and deed of trust were prepared from the Estate to the Trust and signed on May 23, 2007, by the Co-Executors. (Vol. 1, Pg. 81) [R.E. 5]

Court approval was neither sought nor received for the execution of the note and deed of trust nor was same authorized under the last will and testament and codicils of J.O. Smith, Jr. However all the beneficiaries, including Lela, who was not represented by counsel at the time, joined in execution of the deed of trust from the Estate to the Trust. (Vol. 1, Pg. 81)

[R.E. 5]

While there was no late payment penalty provision in the note itself, the deed of trust from the Estate to the Trust provided for a late payment charge not exceeding $5.00 or 4% of the amount of the delinquency, whichever was greater, which would be due upon any installment of interest or principle which was not received by the Trust when more than fifteen (15) days past due. (Vol. 1, Pg 83) [R.E. 5]

On May 23, 2008, the original note from the Estate to the Trust matured, no payment had been made and the Co-Executors and the Trustee, again without seeking or receiving court approval, renewed the promissory note for one (1) year. (Vol. 1, Pg. 85-86) [R.E. 5]

On May 23, 2009, the promissory note from the Estate to the Trust was again renewed without any payments made and again without court approval (Vol. 1, Pg 86) [R.E. 5] and two (2) additional loan advances were made by the Trust to the Estate on January 7, 2009, and January 7, 2010, again without seeking or receiving court approval. (Vol. 1, Pg 86) [R.E. 5]

On March 11, 2011, the Co-Executors filed a petition asking the Chancery Court, Chancellor V. R. Barnes then presiding, to ratify the original note and the renewals thereof and the deed of trust. A petition to this effect and an amended petition was filed on March 23, 2011, which was served on all beneficiaries including Lela. Lela, while unrepresented, did not sign the Petition. (Vol. 1, Pg 87) [R.E. 5] No payments had yet been paid.

On March 16, 2011, Christy S. Noah as guardian of her children by Jinx Smith, Jr.,

Jinx Peterson Smith, Jr. and Christopher Stanton Smith, filed an objection to the Petition citing, inter alia, that no court approval for the execution of the note and deed of trust had ever been sought or received. (Vol. 1, Pg 87) [R.E. 5]

On March 21, 2011, Lyn Smith, as mother of Patricia Stafford Smith by Jinx Smith, Sr., also filed her objection to the Petition and Amended Petition on the basis, inter alia, that no court approval had ever been sought or received for the original note and deed of trust. (Vol. 1, Pg 87) [R.E. 5]

On March 23, 2011, the adult Trust beneficiaries, J.O. Smith, III, Patrick Raymond Smith and Lela Smith Flowers, exercised their cumulative rights as beneficiaries and removed Steve Sessums as original Trustee and appointed Todd A. Boolos, Successor Trustee. (Vol. 1, Pg 88) [R.E. 5]

On March 30, 2011, an Agreed Order was entered authorizing the Estate to borrow from the Trust and to renew the outstanding note to the Trust and all beneficiaries, including Lela, still unrepresented, signed this Agreed Order. (Vol. 1, Pg 88) [R.E. 5]

On April 13, 2011, the Co-Executors signed the renewal note from the Estate to the Trust. (Vol. 1, Pg 88) [R.E. 5] No payments were made on the note.

On April 12, 2012, counsel for Lela contacted Trustee Boolos contending that more money was due to the Trust by the Estate than was thought by Boolos and the Estate. (Vol. 1, Pg 90) [R.E.5]

On July 3, 2012, counsel for Lela asserted, for the first time, that Boolos had a

conflict of interest between his role as Trustee and as CPA representative of parties other than the Trust. (Vol. 1, Pg 91) [R.E. 5]

On October 18, 2012, Lela filed her Answer to the Amended Petition for declaratory relief filed by the Trustee. (Vol. 4, Pg 498) [R.E. 6] On October 18, 2012, Lela also filed her motion for the removal of Todd Boolos as Successor Trustee based on conflicts of interest. (Vol. 4, Pg 506) [R.E. 7] Said motion asserted that Boolos had taken a position directly contrary to the best interests of the Trust.

On November 11, 2012, Lela filed her motion for examination of the corporate books and records alleging that as a sitting director of the Board of Directors of Big River Ship Builders, Inc., Yazoo River Towing, Inc., and Vicksburg Plant Food, Inc., and further as a contingent beneficial owner of the interest of stock in each of the referenced corporations, that she was entitled to review the books and records of each of said companies. (Vol. 4, Pg 524) [R.E. 8]

On March 5,2013, Trustmark resigned for a second and final time as Executor of the Estate. (Vol. 6, Pg 884) [R.E. 9]

On April 8, 2013, Lela filed her trial memorandum requesting removal of the Executor and removal of the Trustee. (Vol. 7, Pg 935) [R.E. 10] Lela alleged that Ernest Lane, III, as Executor of the Estate controlled between sixty-nine percent (69%) and eighty percent (80%) of outstanding stock in Big River Ship Builders, Inc., Yazoo River Towing, Inc., and Vicksburg Plant Food, Inc. and yet refused to use such voting power to allow Lela

access to the books and records of the corporations, thereby siding with J.O. Smith, III and Patrick Smith in their efforts to deny Lela access to the books and records of said corporations.

By April 19, 2013, the corporations, controlled by J.O., III and Patrick, had hired separate counsel to object to Lela's requests to see the books and records of the corporations. By April 19, 2013, Ernest Lane as Executor, acting in concert with J.O. Smith, III and Patrick Smith, Lela was removed from her position as a member of the Board of Directors of the corporations. (Vol. 7, Pg 1038) [R.E. 11]

A hearing was held by the Court on April 22 - 23, 2013, and May 2, 2013, resulting in a decision of the Court on May 8, 2013, which decision was later amended by Amended Judgment entered November 19, 2013. (Vol. 11, Pg 1562) [R.E. 12]

In the Amended Judgment of November 19, 2013, the Court [Honorable Hollis McGehee, Special Chancellor] found that the Court's previous order of March 30, 2011, [per Chancellor V. R. Barnes] was binding on the parties and controlled the law of the case. (Vol. 11, Pg 1565) [R.E. 13] The Court found that the actions of the Co-Executors in borrowing money and granting a lien on Estate assets were done without prior court approval and therefore in violation of §91-7-213 and 215 Miss. Code. Annotated, but that the Court by its previous order [per Judge Barnes] of March 30,2013, had effected a ratification of the propriety of the prior actions of the Co-Executors in borrowing money and executing the promissory notes and deeds of trust.

On November 11, 2013, the Court further found that the effect of the March 30, 2011, order was binding on the parties, including Lela. (Vol. 11, Pg 1567) [R.E. 14]

On November 19, 2013, the Court further found that although it was very troubled by the various "hats" worn by Boolos, and the previous Trustee, because of the unrebutted testimony from Angela Heeley, LLM, who testified that the actions of CPAs Sessums and Boolos did not violate the ethical restrictions and rules of certified public accountants, that the Court was compelled to accept that evidence and find that Boolos did not have any conflicts of interest warranting removal. (Vol. 11, Pg 1568-1569) [R.E. 15]

Finally, the Court on November 19, 2013, also found that the parties, including Lela, could not be permitted to attempt to alter or amend the prior order of the Court of March 30, 2011.(Vol. 11, Pg 1569) [R.E. 15]

On November 19, 2013, the Court, per Special Chancellor McGehee, entered an order providing that ten (10) days from the date of the order the corporations would provide the Court copies of the corporate documents contained in the "Peachtree system" of the corporations relating only to the time when Lela Flowers was a director of the companies and that the referenced documents would be held and sealed and not opened except upon subsequent court order if Lela demonstrated the need for said documents which were directly related to her duties as director. (Vol. 11, Pg 1587) [R.E. 16]

On November 19, 2013, the Court also entered an order regarding production of corporate records be produced to Lela Flower and Christy Noah provided that such records

were kept confidential from all parties. (Vol. 11, Pg 1589) [R.E. 17]

On December 4, 2013, the Court entered its order denying the motion for removal of Successor Trustee Boolos. (Vol. 11, Pg 1614) [R.E. 18]

On December 9, 2013, Lela filed her Motion to Reconsider the order refusing to remove Boolos as Trustee (Vol. 11, Pg 1615) [R.E. 19] and on February 11, 2014, the court entered its order on the Motion for Reconsideration and other issues, reopening the matter to allow the parties to present additional evidence regarding the actions of Executor Ernie Lane, III and Trustmark in handling the corporate entities whose stock was owned by J.O. Smith, Jr. at the time of his death, and allowing substantive evidence to support the claim that Todd Boolos should be removed as Successor Trustee. (Vol. 12, Pg 1705) [R.E. 20]

On February 18, 2014, Lela filed her Motion for Inspection, Production and Copying of Financial Books and Records. (Vol. 12, Pg 1707) [R.E. 21]

On March 21, 2014, the Court entered its Final Judgment Under Rule 54(b) as to validity and amount of promissory note and as to correction of mistake in description of deed of trust. (Vol. 14, Pg 2066) [R.E. 22] In that judgment the Court referenced its prior judgment of May 8, 2013, and the Amended Judgment of November 19, 2013, as final.

On May 21, 2014, the Court entered another Rule 54(b) Judgment certifying the denial of the request that Boolos be removed as Successor Trustee, certifying the denial of Lela to access to corporate books and records, and at Volume 15, Page 2072 adopted and incorporated into the order of May 21, 2014, the Court's prior judgment of May 8, 2013, and

Amended Judgment of November 19, 2013, (Vol. 14, Pg 2072) [R.E. 23] which related to the amount of the indebtedness to the Trust.

On June 13, 2014, Lela filed her notice of appeal (Vol. 15, Pg 2194) [R.E. 24]

On July 12, 2014, an order granting motion to alter or amend Rule 54(b) Judgment was entered (Vol. 15, Pg 2193) [R.E. 25] and Lela re-filed her notice of appeal on July 23, 2014. (Vol. 15, Pg 2207) [R.E. 26]

THE TESTIMONY

Ernest Lane, III

Ernest Lane, III a/k/a Ernie Lane ("Lane") testified that Lela Smith Flowers ("Lela") owns 25% of the J.O. Smith Family Trust as did each of the four (4) children of J.O. Smith, Jr., with the 25% interest of Jinx Smith, Sr. passing to his three children at the time of his death. (Vol. 19, Pg 331) [R.E. 27]

Lane testified that all of the Estate's real property is owned 25% by each child. (Vol. 19, Pg 332) [R.E. 28]

Lane testified that under Codicil 3 to the will, J.O. Smith, III has a greater percentage interest greater than 25% in the closely held corporations owned by J.O. Smith, Jr. at the time of his death. (Vol. 19, Pg 332) [R.E. 28] He testified that Big River Ship Builders, Inc. ("Big River"), Yazoo River Towing, Inc. ("Yazoo River") and Vicksburg Plant Food, Inc. ("Plant Food") produce the vast majority of the income to the Estate (Vol. 19, Pg 333) [R.E. 29] and, that during pendancy of the Estate some of the corporations paid the Estate's tax.

(Vol. 19, Pg 333) [R.E. 29] Lane was clear that the Estate had no way of generating income except for the income of these companies. (Vol. 19, Pg 336) [R.E. 30]

Lane testified that at the time the Estate signed the note to the Trust, Lane didn't think the Estate could repay the loan. (Vol. 19, Pg 336) [R.E. 30]

While the Estate was open Lane served as attorney for the Estate, served as Executor, and was attorney for Patrick Smith. (Vol. 19, Pgs. 338-339; Vol. 25, Pg. 1324) [R.E. 31] Also while the Estate was open Lane represented Yazoo River Towing (Vol. 19, Pg 340-341; Vol. 25, Pg. 1322) [R.E. 32] and Lane testified that Patrick Smith was the CEO of Yazoo River. (Vol. 19, Pg 333) [R.E. 29]

While the Estate was open Lane also represented Big River Ship Builders, Inc. of which J.O. Smith, III is the CEO. (Vol. 19, Pg 334; Vol. 25, Pg. 1321) [R.E. 33]

While the Estate was open Lane represented Vicksburg Plant Food, Inc. (Vol. 19, Pg 345-346; Vol. 25, Pg. 1324) [R.E. 34]

While the Estate was open Lane set up an LLC for Patrick or J.O. Smith, III. (Vol. 19, Pg 336; Vol. 25, Pg. 1325-26, 1329) [R.E. 35]

Lane admitted that Lela did not sign the Petition seeking court authorization for renewal of the third promissory note but only signed the resulting Agreed Order. (Vol. 19, Pg 348-349) [R.E. 36]

Lane testified that written minutes were not kept of all board meetings of the corporations (Vol. 25, Pg 1307) [R.E. 37] and that the Estate did not keep any records of

any estate meetings. (Vol. 25, Pg 1308) [R.E. 38]

Lane admitted that he had resigned from the Board of Directors of the corporations and that this resignation was not in the best interest of the Estate. (Vol. 25, Pg 1311) [R.E. 39]

Lane claimed to not know whether Lela had voted off of the various boards. (Vol. 25, Pg 1312) [R.E. 40]

Lane was clear that he never believed that Lela was looking to him to be her attorney. (Vol. 25, Pg 1319) [R.E. 41]

Lane admitted that he let Yazoo River dispose of corporate assets without a court order. (Vol. 25, Pg 1335-1336) [R.E. 42]

Lane admitted to allowing the Estate to pay non probated claims. (Vol. 25, Pg 1342) [R.E. 43]

Todd Boolos

Todd Boolos ("Boolos") testified on April 23, 2013, that he was the CPA representing the Estate as debtor to the Trust. (Vol. 19, Pg 450; Vol. 24, Pg. 1056) [R.E. 44] Boolos is the Trustee as creditor of the Estate. (Vol. 19, Pg 450) [R.E. 44]

Boolos is also personal CPA for J.O. Smith, III (Vol. 19, Pg 450; Vol. 24 Pg. 1057 [R.E. 44], is personal CPA for Patrick Smith (Vol. 19, Pg 450; Vol. 24, Pg. 1057) [R.E. 44], is CPA for Big River Ship Builders, Inc. of which J.O., III is CEO (Vol. 20, Pg 451; Vol. 24, Pg. 456) [R.E. 45]. Boolos is also CPA for Yazoo River Towing, Inc. of which Patrick

is CEO. (Vol. 20, Pg 451; Vol. 24, Pg. 457) [R.E. 45] Boolos is also CPA for Vicksburg Plant Food, Inc. on which Board J.O., III and Patrick sit to the exclusion of Lela. (Vol. 20, Pg 451; Vol. 24, Pg. 1057) [R.E. 45] Boolos is CPA for Smith Towing, Inc. (Vol. 20, Pg 451; Vol. 24, Pg. 457) [R.E. 45]

Boolos is not the CPA for the children of Jinx Smith, Sr. nor is he the CPA for Lela. (Vol. 20, Pg 451; Vol. 24, Pg. 1056-1057) [R.E. 45]

Boolos agreed that it would be in the best interests of his Trust that the Trust receive all money to which it was legally entitled. (Vol. 20, Pg 451) [R.E. 45] He admitted that the declaratory judgment action filed by him took a position that the note from the Estate to the Trust needed to be interpreted in a particular way [ie: less money to the Trust] (Vol. 20, Pg 451) [R.E. 45] and stated that he decided against taking a neutral position on the issue of the indebtedness. (Vol. 20, Pg 452) [R.E. 46]

Boolos testified that he did not know who decided to delete the requirement regarding payments on the Estates indebtedness to the Trust. (Vol. 23, Pg 453-454) [R.E. 47] No payments were ever made by the Estate to the Trust.

Boolos also testified that he only gave a quick glance at Lela's calculations regarding the indebtedness of the Estate to the Trust (Vol. 20, Pg 462) [R.E. 48] and that not being a banker he was unable to give any weight to Lela's calculations. (Vol. 20, Pg 462-463) [R.E. 48] He could not say whether Lela had made any mathematical errors in her calculations. (Vol. 20, Pg 463) [R.E. 48]

Boolos testified on November 18, 2013, that he had taken no steps since the Court entered a judgment against the Estate in favor of his Trust to collect the money owing his Trust. (Vol. 24, Pg 1058) [R.E. 49]

Boolos claimed that he did not know if there would be any adverse effect on J.O. Smith, III (his client) or his client's stock ownership in Big River if Boolos attempted to collect the debt owing from the Estate to the Trust. (Vol. 24, Pg 1059) [R.E. 50]

Boolos claimed he did not consider the interests of J.O., III and Patrick in deciding whether or not to collect the debt admittedly owing from the Estate to the Trust. (Vol. 24, Pg 1062) [R.E. 51]

Boolos claimed not to know if the stock in the closely held corporations were assets which could be used to satisfy the judgment against the Estate in favor of his Trust. (Vol. 24, Pg 1062-63) [R.E. 51]

Boolos admitted that Lela was the beneficiary of the Trust he administered and that Boolos had possession of the records of the closely held corporations but could not explain why he would not let Lela as his beneficiary see such records. (Vol. 24, Pg 1063-1066) [R.E. 51]

Lela Smith Flowers

Lela testified on May 2, 2013, that her parents were J.O. Smith, Jr. and Patricia Peterson Smith who were divorced after having four (4) children; Lela Smith Flowers, J.O. Smith, III, Jinx Smith, Sr. and Patrick Smith, and that Jinx, Sr. died before J.O. Smith, Jr.

(Vol. 20, Pg 505) [R.E. 52]

Lela holds a B.S. degree from Mississippi State in business administration and is nine hours short of receiving her masters in accounting from Mississippi College. (Vol. 20, Pg 506) [R.E. 53]

At the time of the origination of the loan from the Estate to the Trust Lela reviewed the documents and because she felt they were good investments, particularly because they called for interest, penalties and late fees. (Vol. 20, Pg 510) [R.E. 54]

At trial Lela explained the methodology of her calculations regarding the indebtedness (Vol. 20, Pg 514-517) [R.E. 55] and testified that the correct amount due from the Estate to the Trust as of May 23, 2013, was $7,013, 099.43. (Vol. 20, Pg 518) [R.E. 56]

Lela also did other calculations (such as not compounding the unpaid late fees) under which scenario the indebtedness from the Estate to the Trust would be $4,899,220.16. (Vol. 20, Pg 521) [R.E. 57]

Lela testified that she was asking the Court interpret the deed of trust in conjunction with the note and renewal notes. (Vol. 20, Pg 524) [R.E. 58]

Ken LeFoldt

Ken LeFoldt as Successor Administrator testified on February 3, 2014, that he did not review the limited corporate "Peachtree records" which had been provided to Lela. (Vol. 28, Pg 1653) [R.E. 59]

LeFoldt testified that he decided not to become a board member of the corporations

because of potential conflicts of interest. (Vol. 28, Pg 1657) [R.E. 60]

LeFoldt testified that although he votes up to 80% of the stock (Vol. 28, Pg 1658) [R.E. 61] that he decided to elect J.O. Smith, III, Patrick Smith and Teresa White to the Board of Directors to the exclusion of Lela. (Vol. 28, Pg 1658-1659) [R.E. 61]

The Lower Court Erred in Finding the Judgment of March 30, 2011, Res Judicata and In Not Addressing the Global Interaction Between the Promissory Note and Deed of Trust

The lower court's opinion was that because the Court [Chancellor Barnes then presiding] had on March 30, 2011, authorized a third renewal of the promissory note on the terms and conditions as set forth in the Petition and Amended Petition seeking such approval, that the Court [Special Chancellor McGehee, presiding] would not allow any party, specifically Lela, from contesting the amount of the indebtedness due and owing from the Estate to the Trust.

The order of March 30, 2011, was not a final order as it was not appealable. An order not appealable is interlocutory in nature and is not res judicata. *TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So. 2d 991 (Miss. 1998) (res judicata is not applicable to a chancellor's judgment in the initial phase of an estate as there is no final judgment until the chancellor's final judgment is filed in the clerk's office after accounting)

Some parties contended that the March 30, 2011 Order of the Court constituted judicial estoppel against Lela. This is not so, as judicial estoppel is the fundamental concept that a party in a judicial proceeding is barred from denying or contradicting a sworn

statement made therein. *Franklin v. Thompson*, 722 So.2d 688 (Miss. 1998). The doctrine of judicial estoppel bars a party by his pleadings under oath from later assuming an inconsistent position. *Ivy v. Harrington*, 644 So.2d 1218 (Miss. 1994). Lela did not sign any petitions, much less under oath.

Willfulness is an element of judicial estoppel, *Lone Star Industries v. McGraw*, 90 So.3d 564 (Miss. 2012) and there is no judicial estoppel where the alleged statements were made through mistake or without full knowledge. *Thomas v. Bailey*, 375 So.2d 1049 (Miss. 1979).

When Lela signed the Order of March 30, 2011, she was unrepresented by counsel. She did not sign the Order under oath nor was the Order "her pleading." She signed it based upon representations her signature was necessary for the Estate to borrow money from the Trust to pay more taxes. Lela Flowers is not judicially estopped in this matter.

The original promissory note and the deed of trust from the Estate to the Trust were executed at the same time and as part of the same transaction whereby the Trust loaned the Estate $2,020,000.00.

Documents simultaneously issued regarding the same transaction are construed globally. *Sullivan v. Mounger*, 882 So. 2d 129 (Miss. 2004) *Sullivan v. Protex Weatherproofing, Inc.*, 913 So. 2d 256 (Miss. 2005), *Neal v. Hardee's Food Systems, Inc.*, 918 F. 2d 34 (5th Cir. 1990), *Personal Securities & Safety Systems, Inc. v. Motorola, Inc.*, 297 F. 3d 388 (5th Cir. 2002)

In *Sullivan v. Mounger*, supra, the court explained:

> **"**However, in Neal, the Court stated: "Under general principles of contract law, separate agreements executed contemporaneously by the same parties for the same purposes, and as part of the same transaction are to be construed together." Neal, 918 F. 2d at 37 (emphasis added). In other words, when separate documents are executed at the same time, by the same parties, as part of the same transaction, they may be construed as one instrument." 882 So. 2d at 135

In this matter the lower court never even got to this principle of law. The Court simply held that the interlocutory order of March 30, 2011, was the Alpha and Omega of the matter and made no attempt to construe the note and deed of trust together.

In *Sullivan v. Protex Weatherproofing, Inc.*, supra, the Court reiterated:

> "Sullivan must arbitrate his claims for a second reason. The Asset Purchase Agreement and the Employment Contract were part of a global transaction. In *Sullivan v. Mounger*, 882 So. 2d 129 (Miss. 2004), an employment agreement containing an arbitration provision and other agreements not containing arbitration provisions, were executed as part of a global transaction. When a dispute arose under a document which did not contain an arbitration provision, we held that "when separate documents are executed at the same time, by the same parties, as part of the same transaction, they may construed as one instrument." Id. at 135
>
> In *Mounger* we cited with approval *Neal v. Hardee's Food Systems, Inc.*, 918 F. 2d 34 (5th Cir. 1990), and *Personal Security & Safety Systems, Inc. v. Motorola, Inc.*, 297 F. 3d 388 (5th Cir. 2002). The *Neal* court held:
>
> "Under general principles of contract law, separate agreements executed contemporaneously by the same parties for the same purposes and as part of the same transaction are to be construed together." Neal 918 F. 2d at 37 (emphasis added)
>
> *Mounger*, 882 So. 2d at 135. The *Personal Security & Safety Systems, Inc.* court held:

> "[T]he licensing agreement's arbitration provision governs claims arising out of the stock purchase agreement because the agreements were executed together as part of the same overall transaction and therefore are properly construed together. *Personal Security & Safety Systems, Inc.*, 297 F. 3d at 390." 913 So. 2d at Page 259

The initial promissory note and the deed of trust are both dated May 23, 2007. The deed of trust refers to the indebtedness, "evidenced by promissory note of even date herewith" in favor of the Trust while the note refers to being "secured by a first-lien deed of trust of even date herewith . . .," the documents obviously referencing and incorporating each other.

It is old law that two written instruments executed on the same date relating to the same subject matter and referring to each other create a presumption that they evidence but a single contract. *Doe ex dem Caillaret v. Bernard*, 15 Miss. 319 (Miss. App. 1846).

Instruments executed on the same date by the same parties and for the same purpose are read in conjunction with one another and should be interpreted collectively. *Hardy v. First National Bank of Vicksburg*, 505 So. 2d 1021 (Miss. 1987) Separate agreements executed contemporaneously by the same parties for the same purposes and as part of the same transaction are to be construed together.

One South Inc. v. Hollowell, 963 So. 2d 1156 (Miss. 2007) the defendant executed a lease agreement and also executed a guaranty agreement. The lease agreement provided for attorneys fees in the event of default while the guaranty agreement did not. On appeal the debtor asserted that the assessment of attorneys fees against the guarantors under the

terms of the lease agreement was inappropriate. The *One South* court rejected this argument holding because the lease agreement and guaranty agreement were executed at the same time as a part of the same transaction that the two documents were to be construed as one instrument and therefore the guarantors were liable for reasonable attorneys fees even though the guaranty agreement itself did not provide for same.

Swindle v. Harvey, 23 So. 2d 562 (Miss. App. 2009) involved a situation where a deed of trust did not contain a reference to or description of a three acre tract upon which the debtor's house set. The bank asserted that other loan related documents, including a promissory note, showed that the three acres were supposed to be pledged as security for the loan and the borrows admitted that they did not read the loan documents. The court reiterated the law that parties to a contract have an inherent duty to read the terms and that a party may neither neglect to become familiar with the terms and then later complain of lack of knowledge nor avoid a written agreement merely because they failed to read it. Specifically the *Swindle* court held, "Accordingly, the deed of trust should be construed together with the other loan documents and, therefore, governed by the arbitration agreement." 23 So. 3d at 571.

It is the rule in Mississippi that courts must construe an agreement as made by the parties and give the words of the documents their commonly accepted meaning. *I.P. Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998), as in contract construction cases the focus of the court is upon the objective fact (ie: the language

of the contract) and the court is concerned with what the contracted parties have said to each other and not some secret thought of one not communicated to the other. *Facilities, Inc. V. Rogers-Usry Chevrolet, Inc.*, 908 So. 2d 107 (Miss. 2005)

Here we have the testimony of Ernie Lane, one of the Co-Executors, stating that at the time of original execution of the note and deed of trust, that he did not feel that the Estate could ever pay the note back. (Vol. 19, Pg 336) [R.E. 30] He never said this at the time of the execution nor did he ever state this to Lela. In fact no payment at all has been made.

Notwithstanding Lane's latter expressed personal opinion, the plain language of the note calls for late payments, quarterly payments, and compounded interest. Yet when the time for payment came due, the provisions of the promissory note were simply ignored as if they had never been written in the first place.

When she signed the Agreed Order of March 30, 2011, Lela was unrepresented by counsel. She never signed the Petition. Lane in his testimony made clear that he never considered himself Lela's attorney. (Vol. 25, Pg 1319) [R.E. 41]

Upon obtaining counsel, Lela immediately asserted the position that the plain and ordinary language of the promissory note, calling for quarterly payments, late penalties and interest, should be enforced whereupon she because a pariah to the Estate, the Trustee, and her two surviving brothers.

In Mississippi a person is under the obligation to read a contract before signing it and will not be heard to complain of an error of which would have been disclosed by reading the

contract. *Holland v. People's Bank & Trust Co.*, 3 So.3d 94 (Miss. 2008). A party to a legal agreement is charged with the obligation of reading the document before signing same and enforcement of the terms of the agreement will not be excused upon a claim that the signatory did not read or become acquainted with the terms of the agreement. *Bailey v. Estate of Kemp,* 955 So.2d 777 (Miss. 2007).

The late payment charge contained in the deed of trust plainly provides for a late payment charge of four percent (4%) of the amount of the delinquency. This document was reviewed by the Trust, by the Estate and by the draftsman, who asked for any changes prior to signing, and none of them requested that the late payment provision be removed from any draft.

Written contracts cannot be altered by parole agreements and any parole evidence submitted to vary the written agreement terms is inadmissible. *Godfrey Bassett Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co.,* 584 So.2d 1254 (Miss. 1991). In this case the Special Chancellor allowed parol evidence. Where a mutual mistake is plead parol evidence may be allowed to reform a deed but the burden of proof is on the plaintiff [in this case the Estate] and must be beyond a reasonable doubt. *Perrien v. Mapp*, 374 So. 2d 794 (Miss 1979). Any alleged mistake must be a mutual mistake and not the result of inattention by the party seeking reformation. *Stevens v. Illinois Cent. R. Co.*, 137 F. Supp. 333, (S.D. Miss. 1955) affirmed 234 F. 2d 562. Parol testimony must be received with great caution and distrust. *Frierson v. Sheppard*, 29 So. 2d 726 (Miss. 1947). In this matter parol

testimony was rampant.

There is nothing ambiguous about the very exact and very specific language of the promissory note. Yet all parties except Lela and the children of Jinx Smith, Sr. have ignored such language and the lower court erred in refusing to address such language, instead holding that the interlocutory order of March 30, 2011, was res judicata.

The Lower Court Erred in Refusing to Remove
Todd A. Boolos as Successor Trusee of the J.O. Smith, Jr. Family Trust

The Trust, as creditor, loaned the Estate, as debtor, $2,020,000.00. Boolos represents the debtor Estate as its certified public accountant and at the same time represents the Trust, as creditor, as Successor Trustee. A more direct conflict of interest between debtor and creditor is hard to imagine, this conflict being over two million dollars in size.

Boolos is also the personal CPA for J.O. Smith, III. He is also the personal CPA for Patrick Smith. He is the personal CPA for Big River Ship Builders, Inc. He is the personal CPA for Yazoo River Towing, Inc. He is the personal CPA for Vicksburg Plant Food, Inc., and Smith Towing, Inc. His clients J.O. Smith, III and Patrick Smith are the CEOs and members of the Board of Directors, of these companies to the exclusion of Lela Smith Flowers.

Boolos' responsibilities to the Trust are to see to it's just and proper administration. When it came time to again renew the promissory note from the Estate to the Trust, the issue arose as to the amount of the indebtedness due and owing from the Estate to the Trust. Lela was of the opinion that the terms of the promissory note called for quarterly payments, late

payments and compounded interest. The Estate, J.O. Smith, III, and Patrick Smith, represented by Boolos, were of the opinion that a lower amount was owed. Rather than filing a simple declaratory action setting forth the competing claims of the two sides, Boolos took an adversary position in favor of his CPA clients and against his Trust beneficiary, Lela. Instead of arguing that his Trust was owed more money, Boolos took the position that the Trust was owed less money than contended by Lela and Jinx's children as his beneficiaries. Boolos took a position directly adverse to the best interest of his Trust in favor his clients, the Estate, the corporations, J.O., III and Patrick.

It should be recalled that under the terms of the Trust Lela, J.O., III, and Patrick, along with the children of Jinx, Sr., each receive a twenty-five percent (25%) interest in the Trust. These percentages are not the same in the Estate because of the will, codicils and especially the third codicil. Lela gets less under the Estate. Boolos' position regarding the indebtedness favors his Estate client, J.O. Smith, III and also favors his clients Big River, Yazoo River Towing and Vicksburg Plant Food whose CEOs are J.O., III and Patrick. These companies are the far and away the major sources of income to the Estate from which income the Estate can repay it's debt to the Trust. In that respect, the less the Estate has to pay to the Trust the happier are the Estate, J.O., III, Patrick, Big River, Yazoo River Towing and Vicksburg Plant Food.

The chancery court as a court of equity has the inherent power to remove any trustee, including a testamentary trustee, in order to protect the beneficiaries of the Trust. *Magee v.*

Magee's Estate, 111 So. 2d 394 (Miss. 1959) and *Yeates v. Box*, 22 So. 2d 411 (Miss. 1945)

The court in *McWIlliams v. McWilliams et rel Weathersby*, 994 So. 2d 841 (Miss. App. 2008), held:

> "Trustees may be removed for conflicts of interest. 76 Am. Jur. 2d Trusts, §233 (2007). If a trustee has an interest in the administration of a trust that would interfere with a duty of complete loyalty, removal may be warranted." 994 So. 2d at Page 846

The *McWilliams* court further ruled:

> "When a trustee, because of a conflict of interest, fails or refuses to pursue a claim that would benefit a trust estate, that conflict renders the trustee incapable of performing his fiduciary duties. *Ramsdell v. Union Trust Co.*, 202 Conn. 57, 519 A. 2d 1185, 1186 (1987). Under those circumstances, removal is warranted." 994 So. 2d at Page 846

In this case Boolos failed and refused to take a position that would benefit his trust and removal was warranted.

The chancellor below was initially troubled by the obvious and multiple conflicts of interest suffered by Boolos as the Chancellor so stated. However, the Chancellor felt that because Boolos had put on the testimony of another CPA [who incredibly testified that the multiple representations of Boolos did not violate the accountant's code of ethics] and because this testimony was unopposed that he was obligated to find that Boolos should not be removed.

It is undisputed that Boolos is in a fiduciary relationship to the Trust and that chancery courts have general superintendence of fiduciary relations, *Nutt v. State*, 51 So. 401 (Miss. 1910) as chancellors have the authority and duty to oversee the administration of a

trust under Mississippi law. *In Re: Conservatorship of Estate of Lloyd*, 868 So. 2d 363 (Miss. App. 2004) It is inconceivable that any code of ethics of any professional body, accountants, dentists, or dogcatchers, overrides Mississippi law but this is exactly what the Chancellor initially held.

Upon reconsideration the Special Chancellor determined that because he did not feel that Boolos had been shown to be "hostile" to Lela that removal was not warranted but a finding of "hostility" is not a necessary prerequisite to removal of a trustee. See *McWilliams v. McWilliams ex rel Weathersby*, supra.

Subsequently the chancellor assigned different reasons for not removing Boolos, but the plain fact is that Boolos had two beneficiaries, Lela Flowers and the children of Jinx Smith, Jr. (ie: 50% of his beneficiaries) demanding that he seek a larger repayment from the Estate to the Trust, and on the other hand had the other 50% of his beneficiaries (J.O., III and Patrick), plus his client the Estate, asserting that a lesser amount was owed. Instead of simply presenting this dilemma to the Court under the facts and the documents themselves and letting the Court make its determination, Boolos chose to side with 50% of his beneficiaries, and his Estate client and against the other 50% of his beneficiaries.

A trustee has a duty to act solely in the interest of their beneficiaries, *Byrd v. Stein*, 204 F. 2d 122 (5th Cir. Miss. 1953) and Boolos did not act solely in the interest of all of his beneficiaries.

As stated in *McWilliam*, supra:

"In *Walker*, the Mississippi Supreme Court quoted Bogert's Trusts. The

following language from Bogert is persuasive:

> "The trustee owes a duty to the beneficiaries to administer the affairs of the trust solely in the interests of the beneficiaries, and to exclude from consideration . . . the welfare of third persons. This is called the duty of loyalty . . . In enforcing the duty of loyalty the court is primarily interested in improving trust administration by deterring trustees from getting into positions of conflict of interest . . ." *George Bogert, Trusts*, § 95 (6th ed. 1987)" 994 So. 2d at 849.

The lower court was not bound by the testimony of Boolos' "expert CPA witness" as expert testimony is not obligatory or binding on the trier of fact and is solely advisory in nature. *Hubbard ex rel Hubbard v. McDonalds Corp.*, 41 So. 3d 670 (Miss. 2010) As stated by the Court in *Thompson v. Dung Thi Hoang Nguyen*, 86 So. 3d 232 (Miss. 2012);

> "And while it is true that three of Thompson's experts testified that the accident caused or contributed to Thompson's symptoms, these opinions:
>
> [were] not obligatory or binding on triers of fact but [were] advisory in nature. The jury may credit them or not as they appear entitled, weighing and judging the expert's opinion in the context of all the evidence in the case and the jury's own general knowledge of affairs." 86 So. 3d at Page 237

The rule is no different for chancellors. Also see MRE 7.02.

Faced with the conflicting claims of his Trust beneficiaries Boolos did not have an obligation to adopt the position of Lela and the heirs of Jinx, Sr. But just as surely he certainly had a duty to avoid taking a position directly contrary to the financial interests of his Trust and also had a duty to refrain from taking the position advocated by his other Trust beneficiaries, and his client, the Estate.

The Lower Court Erred in Refusing to Allow Lela Smith Flowers Access to the Corporate Books and Records of the Corporations Owned by J.O. Smith, Jr. at the Time of His Death

At the time of his death J.O. Smith, Jr. owed 80 % of the outstanding shares of stock of Big River Ship Builders, Inc., 69.67% of the stock of Yazoo River Towing, Inc., 80 % of the stock of Vicksburg, Plant Food, Inc. and 100% of the stock of Smith Towing, Inc.

Upon the death of J.O. Smith, Jr. the control of his stock, including the right to vote it, became vested in the Co-Executors and ultimately in Ernie Lane as surviving executor after the resignation of Trustmark. It goes without any citation of authority that at any time Ernie Lane chose he could call a special meeting of the shareholders and elect a new Board of Directors of his own choosing and that after having done so, the new Board of Directors could in turn elect new officers of each corporation. Shortly after the death of J.O. Smith, Jr., Ernie Lane, Lela Smith Flowers, J.O. Smith, III and Patrick Smith were each elected to the Board of Directors of all of the corporations.

During the time that Lela sat on the Board of Directors of each of these corporations she decided that she wanted to look at the books and records of the corporations. This was denied her by her brothers who were supported by Ernie Lane as executor and controller of the majority of the stock.

When Lela filed her Motion for Examination of Books and Records of the Corporations the response of her brothers and Lane was to deny this request. Each of the corporations, controlled by Lane, J.O., III and Patrick, hired separate counsel to resist the

request of Lela, as a sitting member of the Board of Directors, to see the books and records of each corporation. Management at this time was vested in J.O. Smith, III and Patrick Smith to the exclusion of Lela.

Under the Last Will and Testament of her father, and the 3rd Codicil thereof, Lela is the specific beneficiary of significant amounts of stock in each of these corporations.

§ 79-4-16.02 Miss Code Ann (1972, as amended), provides:

> "(a) Subject to §79-4-16.03(c), a shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in §79-4-16.01(e) if he gives the corporation written notice of his demand at least five (5) business days before the date on which he wishes to inspect and copy.
>
> (b) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) and gives the corporation written notice of his demand at least five (5) business days before the date on which he wishes to inspect and copy"

The records which the shareholder is entitled to examine include minutes of any meeting of the board of directors, records of any action of a committee of the board of directors, minutes of meeting of shareholders, accounting records of the corporation, the record of shareholders, with the caveat that the demand is made in good faith and for a proper purpose and the shareholder describes with reasonable particularity their purpose and the records they desire to inspect.

§79-4-16.04 Miss Code Ann (1972) provides that if a corporation does not allow a shareholder to inspect and copy any requested records that the chancery court of the county

where the corporation's principal office is located may upon application by the shareholder summarily order inspection and copying the records at the corporation's expense.

While technically Lela may not be a shareholder until her father's estate is closed she is certainly a beneficial owner of such stock and should have been allowed to inspect the corporate records as she requested. The lower court erred in refusing to allow complete access to the accounting and other records of the corporations.

In Mississippi the rules for closely held corporations are not the same rules as those of corporations not closely held.

The Court in *Investor Resource Services, Inc. v. Cato*, 15 So. 3d 412 (Miss. 2009), quoted *Fought v. Morris*, 543 So. 2d 167 (Miss. 1989) where the Supreme Court held:

> "This case involves dissension among shareholders in a close corporation. A close corporation is a business entity with few shareholders, the shares of which are not publicly traded. The Model Statutory Close Corporation Supplement, sub-chapter a, section 3(b), defines it as a corporation having 50 or fewer shareholders. Management typically operates in an informal manner, more akin to a partnership than a corporation. The traditional view that shareholders have no fiduciary duty to each other, and transactions constituting "freeze outs" or "squeeze outs" generally can not be attacked as a breach of duty, of loyalty, or good faith to each other, is out-moded.
>
> * * *
>
> We find Orchard court rationale and standard more appropriate and therefore, hold that in a close corporation where a majority stockholder stands to benefit as a controlling stockholder, the majority action must be "intrinsically fair" to the minority interest. Thus, stockholders in close corporations must bear towards each other the same relationship of trust and confidence which prevails in partnership, rather than resort to statutory defenses." 543 So. 2d Page 169, 171 (emphasis added)

Faught v. Morris and Investor Resource Services, Inc., supra, make it clear that "blind adherence to corporate statutes" may not be used to circumvent the rights of a minority stockholder and certainly not those of a director.

Even though Lela is not quite yet the "legal owner," of her shares of these corporations, at the time of her initial request and at the time she applied to the Court for entry of its order ordering inspection, she was without question a director of each of the corporations.

§79-4-16.05 Miss Code Ann (1972) provides:

> "(a) A director of a corporation is entitled to inspect and copy the books, records and documents of the corporation at any reasonable time to the extent reasonably related to the performance of the directors duties as a director, including duties as a member of a committee, if not for any other purposes for any manner that would violate any duty to the corporation."

This same code section goes on to provide that the chancery court in the county where the corporation's principal office is located may order inspection and copying of the books, records and documents at the corporation's expense and upon application of a director who has been refused such inspection rights. The court may include in its order provisions protecting the corporation from undue burden or expense or prohibiting the director from using information obtained in a manner that would violate a duty to the corporation and may also order the corporation to reimburse the director for the director's costs, including reasonable attorneys fees, incurred in connection with the application.

After Lela made her application to the Court to allow her as director to see the books

and records, Lane, J.O., III and Patrick solved this problem by voting Lela off of each Board of Directors.

The lower court did allow Lela a limited examination of certain records of the corporations kept on a computer program called "Peachtree," but severely restricted and otherwise denied her request for complete access to the books and records of the corporations. The Court after allowing a severely limited look ordered Lela to return the "Peachtree" documents to the corporations and even directed that the corporations could examine her personal computer to make sure she did not retain any of the records.

Even prior to adoption of Mississippi's business corporation act, a stockholder in Mississippi had a common law right to inspect the books and records of their corporation, as set forth in *Sanders v. Neely*, 19 So. 2d 424 (Miss. 1944) where the Court stated:

> "The common law right of a stockholder to inspect the books and records of his corporation is stated in 13 Am. Jur. 480 as follows:
>
> "A stockholder in a corporation has, in the very nature of things and upon principles of equity, good faith and fair dealing, the right to know how the affairs of the company are conducted and whether the capital of which he had contributed his share is being prudently and profitably employed. In order to obtain this information he has
>
> * * *
>
> a common-law right, at proper and seasonable times, to inspect all the books and records of the corporation." And, it is not contended by counsel for the appellees herein that this is not an accurate statement of the rule, but it is stated by them, and correctly so, that this common-law right can be exercised by the stockholder only in good faith and for a just, useful or reasonable purpose to germane to his interest as a stockholder; and that such right will not be enforced by the courts for speculated purpose or to gratify ideal curiosity,

and particularly when the purpose of the inspection is hostile to the corporation." 19 So. 2d at 425-426

No one has demonstrated or suggested how Lela's request to see the corporate books and records is hostile, or harmful, to the companies. Lela has a proprietary interest in the profitability of each of the corporations. To be hostile to the corporations would be hostile to her own best interests.

As a director of the corporations Lela stands charged with a duty of loyalty and good faith in her discharge of corporate office since as a director she stands in a fiduciary relationship with each of her corporations and with the shareholders thereof. *Derouen v. Murray*, 604 So. 2d 1086 (Miss. 1992) Lane, J.O., III, and Patrick had this same duty to Lela.

Lela as a director occupying a position of trust, has an independent duty to be informed of her obligations to each corporation which obligations can not be met by blind reliance on the directions of another corporate officer. *Covingtion v. Covington*, 780 So. 2d 665 (Miss. App. 2001)

The right of a director to examine the books and records of the corporation upon whose board they sit is so well recognized that there are no Mississippi cases which have had to articulate this elemental concept. However, the authors in 19 C.J.S. Corporations §506 had this to say about that:

§506. Inspection

Directors have an unqualified right to inspect the corporate books,

records and documents.

Each director has the right to inspect the books, records and documents of the corporation, irrespective of his motive; but subject to fiduciary obligations not to wrongfully use or disseminate them, as such right is correlative with his duty to protect and preserve the corporation. However, the mere possibility of abuse or misuse of the right does not afford any ground for its denial or restriction.

A director's right to inspection has been held absolute and unqualified, barring a claim of circumstances that his action is inimical to the interests of the corporation, and the other directors can not lawfully exclude him from exercising it.

A presumption exists that inspection of books and records by a director is made in good faith and with honesty of purpose, and all that he need show to entitle him to an inspection is that he is a director of a company, that he has demanded permission to examine and that his demand has been refused; and by making such showing he makes out a prima facia case as to his right of inspection. The burden then shifts to the corporation to show how the direction why the director should not be permitted to exercise his rights or that the exercise should be conditioned.

A director's right of inspection is not affected by the fact that he has not faithfully discharged his duties as a director, that he is a mere dummy, that he represents interest hostile to the corporation or its management, or that an inspection may disclose a right of action against the corporation or its agents.

In exercising the right of inspection, a director may properly avail himself of the aid and assistance of an agent, attorney, or accountant, but he is without authority to wholly delegate his official right and duty of inspection to professional accountant. Agents assisting a director in exercise of his right to examine corporate records must be qualified to perform their duties, and must not have any interest adverse to the corporation.

Corporate books and records generally subject to inspection by a director include the transcript of charter and by-laws, minutes of meetings, account books regarding official doings, and written evidence of business transactions." 19 C.J.S. Corporations § 506 at Pages 117-119

Big River Ship Builders, Inc., Yazoo River Towing, Inc. and Vicksburg Plant Food, Inc. are indeed separate Mississippi corporate entities. However, the Special Chancellor treated these entities as if they were traded on the New York Stock Exchange and allowed counsel for these companies to keep up an iron curtain against Lela's request to see the books and records. However, in Mississippi closely held corporations which are not traded, for example, on the New York Stock Exchange, are treated differently than publicly traded corporations. This was made clear in *Griffith v. Griffith*, 997 So. 2d 218 (Miss. App. 2008) where the court stated:

> "RGC is not a party to this action. Essentially, Tom filed a shareholder's derivative action against Harry. Tom alleged that Harry breached a fiduciary duty to him. This duty is owed to the corporation, RGC, first and foremost, and it is only owed to Tom derivatively . . . However, in the case of a closely held corporation, a chancellor may treat a shareholder's derivative suit as a direct action and order an individual recovery as long as it will not prejudice the interest of creditors, expose the corporation to multiple actions, and prejudice recovery for all other interested parties." 997 So. 2d at Page 222

The rule is no different in estate actions. In *In Re: Estate of Thomas*, 28 So. 3d 627 (Miss. App. 2009) the appellant disagreed with the chancellor allowing litigation of corporate matters in an estate proceeding. (ie: "He argues that it was not proper to litigate the corporate matters in an estate actions. Instead, he argues that his sister should have filed a shareholder derivative suit on behalf of Gibson Products.") 28 So. 3d at Page 634 Rejecting that position the Court ruled:

> "More recently, the supreme court has addressed this issue and has decided that Mississippi would take the position that: [i]n the case of a closely held corporation . . . the [chancery] court in its discretion may treat an action

raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with the fair distribution of recovery among all interested persons.

* * *

Prior to trial, John filed a motion in limine requesting that the corporate matters be excluded from the estate action. In the order denying John's motion in limine, the chancellor stated that he examined the issue and considered its ramifications. The chancellor found that:

inasmuch as the said corporation is a part and property of this Estate, and further that the actions of John D. Thomas, Jr. as Executor herein, his actions as President and Sole Officer and Director of that corporation, and his actions as attorney for the Estate are so inextricably intertwined as to render it inefficient, impractical, and contrary to equitable principles and judicial economy to effect separation of any or all of his said actions into independent legal proceedings.

The chancellor reiterated this finding in the final judgment and also noted that he considered the factors listed in *Derouen*.

All the shareholders of Gibson Products were a party to the lawsuit, and there was no evidence that treating the sister's claim as a direct action would expose the corporation to a multiplicity of lawsuits or that it would prejudice the corporation's creditors. Based on the chancellor's consideration of the issue and in light of the fact that the supreme court has granted the chancellor discretion in deciding whether to treat such derivative actions as direct actions, we find that the chancellor was within his discretion in hearing issues relating to John's management of Gibson Products. Accordingly, we find no merit to this issue." 28 So. 3d at Page 634-635

Big River Ship Builders and the other closely held corporations have loaned money to the Estate and the Estate has paid some of these loans back. There is direct interaction between these corporations and the Estate and these corporations form the major source of

money with which the Estate can repay the indebtedness to the Trust. Lela is a beneficiary owner already of a large, but minority, portion of the stock in these companies and prior to being "frozen out" she was a director of each of the corporations.

These corporations are not publically traded, are closely held and the rules are different regarding closely held corporations in Mississippi and the lower court was in error in refusing to allow Lela access to the books and records.

For reasons never clear, the lower court bought into the arguments of J.O., III, Patrick, Ernie Lane and special counsel for the corporations (hired by J.O., III and Patrick) to exclude Lela from the books and records of the very corporations upon whose boards she sat and whose stock she beneficially owns. The writer now understands Mr. Jackson's lament when he stated:

> "I give up. Now I fully realize what Mark Twain meant when he said, "The more you explain it, the more I don't' understand it." Robert H. Jackson, *Securities Commission v. Chenery Corporation*, 332 U.S. 194, 214 (1947)

The lower court erred in not following Mississippi law regarding closely held corporations and was in plain and clear error in refusing to allow Lela to see all the books and records.

CONCLUSION

In summary, the lower court created huge administrative and other problems by denying Lela and the heirs of Jinx Smith, Sr. access to the books and records of the closely held corporations. This has kept 50% percent of the heirs of J.O. Smith, Jr. totally in the dark about the actions, income, financial stability, value, of what Ernie Lane admitted were the Estate's main source of income with which to repay the Trust. For example if Lela wanted to settle her interests in her father's Estate with her brothers, who denied her access to the financial information she would need to do so, she would have no way of independently verifying the value of her interest in these corporations, the stock of which is admittedly a major Estate asset. If she could find a third party to buy her minority interest (no small task in a closely held corporation) how would she know how to value her ownership?

The lower court erred in refusing to apply Mississippi law to a global consideration of the note and deed of trust from the Estate to the Trust and was in further error in holding that the former chancellor's interlocutory order of March 30, 2011, was res judicata and/or barred Lela and the heirs of Jinx, Sr. from contesting the amount of the indebtedness before closure of the Estate.

Finally, the host of conflicts suffered by Boolos are truly staggering and the court was in manifest error in refusing to remove Boolos as Successor Trustee.

This Court should reverse and remand on the issues of access to the corporate books

and records and the indebtedness of the Estate to the Trust, and reverse and render on the issue of Boolos' conflicts of interest and remove him as Successor Trustee.

Respectfully submitted,

LELA SMITH FLOWERS

By: /s/ David M. Sessums
David M. Sessums, MSB # 6714

CERTIFICATE OF SERVICE

I, David M. Sessums, attorney for Appellant, Lela Smith Flowers, does hereby certify that I have this day mailed, postage prepaid, by United States Mail, hand-delivered, or via facsimile, a true and correct copy of the above and foregoing document to the following counsel of record:

Hon. Hollis McGehee
Special Chancellor
7257 Hwy 57 South
Lucedale, MS 39452
judgehollismcgehee@yahoo.com

Earnest Lane, III, Esquire
P.O. Box 1499
Oxford, MS 38655

J. Niles McNeel, Esquire
P.O. Box 28
Louiseville, MS 39339

Patricia Peterson Smith, Esquire
P.O. Box 589
Vicksburg, MS 39181

William R. Armstrong, Jr., Esquire
1675 Lakeland Drive
Suite 308
Jackson, MS 39216

William F. Ray, Esquire
Stephanie M. Rippee, Esquire
Steven D. Orlansky, Esquire
Watkin & Eager, PLLC
400 East Capital Street
Jackson, MS 39205

Edward Otis Johnson, Jr., Esquire
P.O. Box 14028
Jackson, MS 39236

William R. Striebeck, Esquire
P.O. Box 519
Greenville, MS 38702

David R. Lynch, Esquire
4500 I-55 North, ste 245
Jackson, MS 39211-5958

A. Spencer Gilbert, III, Esquire
P.O. Box 13187
Jackson, MS 39236

Lisa A. Reppeto, Esquire
P.O. Box 427
Jackson, MS 39205-0427

Alan D. Lancaster, Esquire
P.O. Box 645
Winona, MS 38967

This the 21st day of July, 2015.

/s/ David M. Sessums
David M. Sessums