IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2006-CA-01658

IN THE MATTER OF THE ESTATE OF NATHAN McGEE, DECEASED

FRANCES CAROLYN HARRIS PHILIP, SUSAN CATHERINE HARRIS COUCH, SAMUEL KING HARRIS, DAVID WALTON LONGMIRE, JAMES ALAN LONGMIRE, and ROBERT WILLIAM LONGMIRE — **APPELLANTS**

v.

MARGARET McDANIEL HARVESTON, ADMINISTRATRIX, and RLI INSURANCE COMPANY, SURETY — **APPELLEES**

APPELLANTS' BRIEF

On Appeal from the Chancery Court of Adams County, Mississippi

Respectfully submitted,

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons as having interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Honorable George Ward, Chancellor

THE NATHAN McGEE HEIRS:
Frances Carolyn Harris Philip, Appellant
Susan Catherine Harris Couch, Appellant
Samuel King Harris, Appellant
David Walton Longmire, Appellant
James Alan Longmire, Appellant
Robert William Longmire, Appellant

John W. Christopher
Christopher & Ellis, PLLC
Attorneys for Appellants

Margaret McDaniel Harveston, Administratrix, Appellee

Claude Pintard, Jr.
Pintard & Pintard
Attorney for Margaret McDaniel Harveston, Appellee

RLI Insurance Company, Surety, Appellee

Ron A. Yarborough
Brunini, Grantham, Grower & Hewes
Attorneys for RLI Insurance Company, Appellee

JOHN W. CHRISTOPHER
Attorney for Appellants

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ORAL ARGUMENT

Appellants believe that oral argument of the case will assist the Court in rendering its opinion and a just result.

STATEMENT OF THE CASE

Nathan McGee (Nathan) was an elderly gentleman who lived most of his life in Natchez, Adams County, Mississippi. Margaret McDaniel Harveston (Margaret) was also a resident of Natchez in Adams County, Mississippi.

At the relevant times, Nathan was a resident of River Breeze Apartments in Natchez. Nathan was blind but rather than having a "seeing eye dog" or other aide to assist him in navigating about the community, he would count his steps. Margaret would observe him from time to time get disoriented, and she would step in to assist him. At some point, Margaret went to work at River Breeze Apartments on a part-time basis, and Nathan asked Margaret if she would assist him in some of his affairs, to which she agreed. Margaret would go to Nathan's apartment at his request and review his mail to tell him what was there and to review and read portions of Nathan's investment statements from Merrill Lynch. Margaret testified that she had known Nathan for approximately 25 to 30 years before his death and that she believed it was in 1988 that she began to help Nathan with his paperwork.

During the years that Margaret assisted Nathan, he told her that he had an aunt, Carolyn Harris, that lived in Fayetteville, Arkansas, but who he thought was dead or in a nursing home. Nathan also mentioned to her that he had a cousin named Jim Willetts Harris who had visited him previously.

Nathan died intestate on September 23, 1999, and on September 30, 1999, Margaret filed a petition for appointment of administratrix with the Chancery Court of Adams County, Mississippi. In the petition, she alleged that Nathan left an estate consisting of approximately $66,000.00 plus bonds and stocks of an unknown value. She further alleged that to her knowledge Nathan McGee had no living relatives or heirs.

The chancellor entered an order appointing Margaret as administratrix of the estate of Nathan McGee and required her to post a bond in the sum of $80,000.00. Upon making application with a local insurance agent in Natchez, a surety bond was secured through RLI Insurance Company for the sum of $80,000.00.

When Margaret filed her inventory in the estate, she disclosed to the court that Nathan had a Merrill Lynch account in which was invested the sum of $1,998,586.00. In addition, she revealed that Nathan had Prudential Securities valued at $193,320.09 plus other lesser accounts giving a total value to Nathan's personal property of $2,254,199.84. The chancellor then ordered that the surety bond be increased to the sum of $2,255,000.00 and Margaret secured the additional bond through RLI Insurance Company.

Margaret then petitioned the court for authority to transfer all financial assets to an account with Edward Jones at its office in Vidalia, Louisiana. The chancellor entered the order authorizing Margaret to transfer the stock from the Merrill Lynch account in Baton Rouge, Louisiana, to a stock account at Edward Jones in Vidalia, Louisiana.

At the time of Nathan's death, his stock portfolio invested at Merrill Lynch consisted of five stocks. Margaret had those same five stock accounts transferred to the account with Edward Jones without making any change.

Accordingly, in January 2000, Margaret transferred all of the cash and stock assets to an account at Edward Jones in Vidalia.

Margaret filed the estate tax returns with both the Internal Revenue Service and the Mississippi State Tax Commission and received approval from the chancery court to withdraw funds and pay the taxes.

From January 2000 until October 2002, Margaret made no change in the investments at Edward Jones in Vidalia, even though there had been substantial losses sustained by the investments. Finally, on October 8, 2002, Margaret filed a petition with the chancery court seeking authority to diversify the account to transfer it out of the stocks into less volatile investments. The Chancellor entered an order which authorized Margaret to transfer the assets from stock to mutual funds or bonds

As a result of the assets of the estate being left in five issues of stock during a volatile stock market cycle, the estate suffered a principal loss of $145,802.66. The McGee heirs produced evidence that had the money been invested in fully insured U.S. Treasuries or fully insured certificates of deposit, the estate account would have earned $415,915.19 in interest, making a complete loss to the estate of principal and interest of $561,717.85.

The McGee heirs, after receiving a partial distribution of the assets pursuant to order of the chancery court in December 2003, and after reviewing the estate documents determined that it was in their best interest to file a complaint against Margaret Harveston and her surety for the losses which had been sustained by the estate during her administration. On November 18, 2004, the McGee heirs filed their complaint in the Chancery Court of Adams County, Mississippi, (C.P. 89-98; R.E. 4). The complaint alleged in Count I that Margaret breached the fiduciary duty owed to the heirs; in Count II the heirs allege that Margaret breached a duty by removing property out of the state of Mississippi in violation of § 91-7-257, Miss. Code Ann. (1972); Count III alleged liability of the surety, RLI Insurance Company; Count IV alleges gross negligence seeking punitive damages and attorney's fees in addition to compensatory damages and the MeGee heirs prayed for judgment for compensatory damages, punitive damages and attorney's fees in such an amount as the court should deem proper and appropriate.

Margaret Harveston filed a response of general denial and RLI filed a response of general denial plus a cross claim against Margaret Harveston seeking indemnification from her in the event the court awarded the plaintiffs a judgment against RLI and also seeking reimbursement for Margaret Harveston for any attorney's fees and costs expended by RLI in defending the case.

The cause came on for trial on August 1, 2006, in the Chancery Court of Adams County with all parties being present and represented by counsel.

After the McGee heirs rested their case in chief, the defendants made a motion to dismiss the complaint arguing that plaintiffs had failed to prove a *prima facia* case of breach of the fiduciary duty by Margaret Harveston in the investments that she had made and that the resulting losses to the estate were not the result of her breach of any duty. The chancellor, in the bench opinion, found that there had been no breach of duty by Margaret Harveston and dismissed the complaint.

Feeling aggrieved by the chancellor's dismissal of their complaint, the McGee heirs, plaintiffs, have appealed the decision of the chancery court for review.

STATEMENT OF THE FACTS

Margaret McDaniel Harveston (Margaret) and Nathan McGee (Nathan) were both lifelong residents of Natchez, Mississippi. Margaret testified that she first met McGee about 25 to 30 years ago on an informal basis and over the years, she observed Nathan walking in the neighborhood. She would notice at times that he would get turned around or confused, and if she were in her automobile, she would stop and offer him a ride, and in other ways assist him in getting reoriented as to where he was. (T. 70).

Nathan became blind after reaching adulthood, but many years before the times which are relevant to this case, and he was blind at the time he and Margaret first met. (T. 5).

Margaret testified that in the beginning of her association with Nathan that he lived at the River Breeze Apartments in Natchez where her mother lived. She would see Nathan walking the neighborhood, and she noticed that sometimes he would get disoriented, and on those occasions she would help him get his bearings and on occasion would help him find his way back to his apartment. (T. 5).

Later, Margaret went to work at River Breeze Apartments on a part-time basis and one day she took a message to Nathan's door at which time he asked her if he could hire her to assist him. Margaret agreed and this began the relationship which lasted until Nathan's death. Margaret would go to Nathan's apartment as and when requested by Nathan to help him with his paperwork, sort through his mail, write checks for him, and read designated portions of his Merrill Lynch monthly statement. Nathan would direct Margaret's attention to certain pages of the statement and ask her to read certain portions. Margaret further stated that she began helping Nathan in 1988. (T. 7-9).

As Margaret stated:

> "He would give me his statement, and he would ask the date, and he would just say, 'go to, like the dividends' and then he would say 'I will give you the positions,' and that was what he had invested. And when I would tell him what was there, he would sit and add it up in his head, and he was always to the penny. He could tell you what he had in each of those few stocks that he had." (T. 9)

Margaret further stated that Nathan had investments at Merrill Lynch and Prudential Securities. (T. 9)

Shortly after Margaret began to assist Nathan, he discussed his family with her and told her that he had an aunt by marriage named Carolyn Harris that lived in Fayetteville, Arkansas. He further told Margaret that he had sent her a card which had been returned and since Carolyn was advanced in years, he assumed that she had died. (T. 9-10)

In addition to Carolyn Harris, Nathan also told Margaret that a cousin, James Willetts Harris, had come to visit him on one occasion. (T. 10)

Margaret then testified as to the course of events leading up to locating Carolyn Harris in Fayetteville, Arkansas, and the taking of her deposition for the purpose of establishing the heirs at law of Nathan McGee. Since the facts surrounding the adjudication of heirship are not relevant to any issue raised in this appeal, those facts will be omitted from this statement.

Margaret continued to assist Nathan with his affairs until he died on September 23, 1999. On September 30, 1999, Margaret filed a petition for appointment of administratrix in the Chancery Court of Adams County, Mississippi, in which she alleged that Nathan died intestate and further alleged:

> "That so far as it is known to the petitioner, Nathan McGee, deceased, was a single person, who left no children or parents, or any known or living relatives, but that your petitioner shall make a diligent search and inquiry to determine any known heirs of the deceased, Nathan McGee." (R.E. 7)

In her petition for appointment of administratrix, Margaret further alleged:

> "At the time of his death, Nathan McGee left an estate consisting of several bank accounts of approximately $66,000.00, a few household furnishings and possessions valued at no more than $600.00, but it is believed that he did have some bonds or stocks of unknown value at this time, but the known personal property value at this time is estimated to be no more than $80,000.00 subject to an inventory to be provided unto the court." (R.E. 7; T. 17-18)

Margaret further testified that even though she read Nathan McGee's monthly statements from Merrill Lynch to him, she never knew how much money he had invested in the stock market. (T. 17)

In addition, Margaret testified that she did not understand the stock market and had never had any funds invested in stocks. (T. 17-19, 33, 37, 39, 49, 69)

Margaret, with court approval, retained the services of Thomas M. McNeely, an attorney in Natchez to represent the estate. After the court appointed Margaret as administratrix, she prepared and filed her inventory in this case (R.E. 8) in which it was disclosed that the total value of Nathan's personal property to be $2,254,199.84, of which $1,998,586.00 was invested with Merrill Lynch.

On December 16, 1999, Margaret filed a "Petition for Transfer of Some Assets and for Other Relief" in which she prayed for authority to transfer the assets held by Bancorp South, Merrill Lynch and Prudential Securities to Edward Jones Investments, 309 Texas Street, Vidalia, Louisiana. (R.E. 18)

Margaret testified that the reason for transferring the investment accounts to Edward Jones in Vidalia was for the purpose of consolidating all of the money in one location. (T. 19-20)

Margaret also stated that the only reason for transferring the money to an Edward Jones office in Vidalia, Louisiana, was that "Mr. McNeely had said that Edward Jones was a good

company. Well, Mr. McDonough had Edward Jones in Vidalia and I had a court order, and so we moved it where my daughter worked. I felt it would be very protected." (T. 20-21)

Margaret also admitted that Edward Jones had an office in Natchez. (T. 21)

When Margaret petitioned the court for authority to transfer the funds from Merrill Lynch to Edward Jones, she did not meet with the court nor did she advise the court that she had no experience or knowledge in trading stocks on the stock market. (T. 22)

When Margaret opened the account at Edward Jones in Vidalia, and transferred the funds, she gave information to the broker at Edward Jones in the form of "Contact Information" in which she stated that she had limited investment experience and the investment objectives were "cash". (T. 22-24; R.E. 9, Ex. 2) Margaret also testified that it was her thinking that the funds would be consolidated and it was "going to be disbursed to whomever shortly." (T. 24)

Margaret again testified that she didn't understand anything about the stock market and that she was placing in excess of $2 million in Edward Jones for disbursement and that she thought the disbursements would be made within a short period of time. (T. 24-25, 33, 37, 39, 49, 69)

During Nathan's lifetime, he had his money invested at Merrill Lynch into five issues of stock which Margaret recognized to be a risky investment strategy. (T. 26)

When Margaret transferred the stock from Merrill Lynch to Edward Jones, she merely transferred the same five issues of stock which Nathan had during his lifetime without any changes. (T. 27)

The money was transferred to Edward Jones in January 2000 and almost immediately began to lose investment value. The March 2000 statement reflected a loss of approximately $138,000.00. However, Margaret made no change in her investment strategy. (T. 27-28)

Margaret also admitted that neither she nor her attorney informed the court that the investment portfolio had lost $138,000.00 within the second month of being under her control, and in fact, she admitted that she did not present to the court information that the investments were sustaining substantial losses until October 2002 when she petitioned the court to liquidate the funds remaining at Edward Jones and place them in more conservative investments. (T. 27-31)

The March 2001 statement from Edward Jones shows that the investments had lost $121,499.70. (R.E. 12, Ex. 5) On the third page of exhibit 5 of the Edward Jones statement, there was a bar graph which showed the five types of investments that were in the estate portfolio, and it also showed by each type of investment Edward Jones' recommendations for investments. Eighty-one percent (81%) of the estate's portfolio was in growth stock while Edward Jones only recommended 16%. Margaret stated that she knew what a money market was but she did not understand income stock, growth and income, growth or aggressive growth stocks. (T. 36-38) In exhibit 6 (R.E. 13), the June 2001 Edward Jones statement had the same bar graph on the third page as did exhibit 5. The bar graph still shows that 82% of the estate's investments was in growth, or high risk stock, while Edward Jones recommended only 16% be in such stock. The same statement shows that during the month of June 2001, there was a loss of investment value of $264,205.59. (T. 32)

Exhibit 7 (R.E. 14) is the Edward Jones statement for August 2001 which shows a loss of $218,251.08, which Margaret admitted in her testimony. (T. 40)

Exhibit 8 is the September 2001 Edward Jones statement. (R.E. 15) which showed a loss of $464,639.69 which was admitted to by Margaret. (T. 41)

On October 8, 2002, Margaret filed a "Petition for Authority to Transfer Assets" with the court (Ex. 20). In paragraph 2 of the petition, Margaret alleges, *inter alia*, that "the administratrix considers it necessary to transfer and diversity certain listed investments consisting of five assets which represent 80% of the estate portfolio." She then sets forth the losses which have been sustained in the investments and ends the petition in her prayer that "she be authorized to make diversified transfers of the above account and stock as set forth herein ..."

When the petition was presented to the chancellor, an order was entered on October 9, 2002, authorizing Margaret to transfer the Edward Jones cash interest account to government bonds and to diversify the stocks by transferring those funds to fixed bonds or mutual funds. (C.P. 41)

Even though Margaret had an order authorizing her to liquidate all of the stock at Edward Jones and to transfer the funds into secure accounts, there is no evidence that she ever did so. The record does disclose that after October 2002, Margaret's investments continued to suffer losses in the following months and in the following amounts: (R.E. 20; Ex. 28)

October 2002	$4,997.15
November 2002.....	$76,124.82
December 2002	$4,275.86
January 2003	$2,471.96
July 2003	$19,143.95
August 2003	$7,806.35

Finally, on November 3, 2003, Margaret acting by and through her attorney, filed a "Motion To Liquidate And Transfer Stocks, Bonds And Other Monetary Assets Held By Edward Jones Investments" and states in paragraph 1 of the motion that:

> "That the attorneys representing the heirs have requested that the assets being held by Edward Jones Investments, 309 Texas Street, Vidalia, Louisiana 71373, be liquidated and placed in a separate money market account, subject to the administratrix filing a petition to close the estate ..."

The motion ended with the attorney moving the court to liquidate the assets and place them into a money market account. (C.P. 72-73)

On November 3, 2003, upon hearing the motion, the chancellor entered an order which provided:

> "IT IS THEREUPON ORDERED that the stocks, bonds and other monetary assets held by Edward Jones Investments be liquidated and placed in a money market account subject to further orders of the court." (Ex. 23)

On August 23, 2003, the chancellor entered a judgment adjudicating heirship in this case (C.P. 63-71).

On November 12, 2003, the McGee heirs filed a "Motion to Compel Partial Distribution of Assets to Beneficiaries" (C.P. 74-77) and on December 10, 2003, the chancellor entered a "Decree Authorizing Partial Distribution." (Ex. 24)

Plaintiffs, the McGee heirs, called Stacy Wall, who was qualified by the court as an expert in the field of money and wealth management and fiduciary investments. Mr. Wall testified that he was familiar with the standard of care set forth in § 91-13-3, Miss. Code Ann. (1972) for investments made by fiduciaries. (T. 103-107)

Mr. Wall expressed his opinion that Margaret breached the standard of care in her investing the McGee estate assets in the stock market. He stated that her investments were heavily concentrated in only four to five stock positions, which Nathan McGee was free to do during his lifetime since it was his money, but which Margaret, as the administratrix, was not allowed to do under the standard of care. (T. 110-111)

Mr. Wall further testified that in his opinion the prudent thing would have been to liquidate the stock and to invest the money in guaranteed investments such as treasuries, certificates of deposit, and possibly money market accounts. (T. 111)

Mr. Wall further testified that Margaret Harveston, from her testimony, did not understand the stock market and didn't know what she was doing in her management of the assets. (T. 112)

He also opined that Margaret breached the standard of care for fiduciary investments concerning the safety factor. (T. 113)

Mr. Wall then identified an accounting summary prepared by personnel at his office under his supervision which showed gains and losses on a monthly basis from January 2000 through November 2003. (T. 113-115; R.E. 20, Ex. 28)

Mr. Wall further identified a bar graph, Exhibit 29, which is a graphical representation of the spreadsheet introduced as Exhibit 28 (T. 115-116; R.E. 21, Ex. 29)

Mr. Wall also testified that based upon his calculations that the investment strategy of Margaret in investing estate assets had resulted in a principal loss of $145,802.66. (T. 114) He further testified that had the estate funds been invested in a prudent manner in U.S. Treasuries, certificates of deposit or money markets not to exceed the FDIC insured amount that the estate would have received interest on the investment of $415,915.19. (T. 116-118) The combined loss of principal and interest was approximately $560,000.00. (T. 118)

After Mr. Wall completed his testimony, Plaintiffs, McGee heirs, rested, after which RLI Insurance made a motion pursuant to Rule 50, Miss. Rules of Civil Procedure, for a directed verdict. Margaret's attorney joined in the motion.

The chancellor then rendered a bench opinion and found that "there is no genuine issue as to any material fact", found that Margaret had not violated her fiduciary duty, had committed no waste of estate assets, and dismissed the complaint. (T. 144-150)

Feeling aggrieved by the chancellor's decision, the McGee heirs, plaintiffs, have appealed for review.

SUMMARY OF THE ARGUMENT

Nathan McGee died intestate and Margaret Harveston was appointed administratrix of his estate. She was under a duty imposed by § 91-13-3 for the investing of estate assets. That fiduciary duty required, *inter alia*, Margaret Harveston to "exercise the judgment and care under the circumstances then prevailing which men of prudence, discretion and intelligence exercised in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital."

Margaret Harveston had never invested in the stock market, knew nothing about the stock market, knew nothing about investing, but undertook to invest in excess of $2 million in five issues of stock by opening an account at Edward Jones in Vidalia, Louisiana, in December 1999, and continuing to invest in the five issues of stock until November 2003. During this period of time, the stock market was very volatile with the estate investments experiencing substantial losses and gains month-to-month. However, overall, there was a significant loss of assets to the estate.

The chancellor was manifestly wrong in his finding that under the facts of this case Margaret Harveston acted as a reasonably prudent investor. The chancellor was further manifestly wrong in his application of the law contained in § 91-13-3, Miss. Code Ann. (1972) to the facts of this case.

The undisputed evidence reflects that Margaret Harveston breached the fiduciary duty of making prudent investments as required by law and as a result the estate sustained substantial losses. The Plaintiffs, the McGee heirs, whose evidence was uncontradicted, proved by more than a preponderance of the evidence that the fiduciary duty was breached resulting in loss to the

estate and the opinion and judgment of the chancery court dismissing the complaint should be reversed and rendered with an adjudication by this Court that based upon the facts of the record, Margaret Harveston breached her fiduciary duty and the Plaintiffs are entitled to receive judgment for the loss of principal and interest which were proximately caused by Margaret Harveston's breach of duty.

ARGUMENT

I. THE COURT COMMITTED MANIFEST ERROR IN FINDING THAT MARGARET HARVESTON MCDANIEL, AS ADMINISTRATRIX, DID NOT BREACH THE STANDARD OF CARE ESTABLISHED BY § 91-13-3, MISS. CODE ANN. (1972) TO INVEST ESTATE ASSETS PRUDENTLY

II. THE CHANCERY COURT COMMITTED MANIFEST ERROR IN DISMISSING THE PLAINTIFFS' COMPLAINT SEEKING A JUDGMENT AGAINST THE DEFENDANTS FOR FINANCIAL LOSSES SUSTAINED BY THE ESTATE OF NATHAN MCGEE, DECEASED, DURING THE ADMINISTRATION OF THE ESTATE

While these arguments have been stated separately, they will be briefed and argued together because of their overlapping nature.

It is respectfully submitted that first the issue of standard of review must be determined and in reaching that point, it will be necessary to review the motion that was made by RLI Insurance Company and Margaret Harveston at the conclusion of the plaintiffs' case in chief. When the plaintiffs rested, RLI Insurance Company, through counsel, made the following motion:

> "And now in court through counsel comes RLI Insurance Company and pursuant to Rule 50, Mississippi Rules of Civil Procedure, moves for a directed verdict in its favor and also in favor of its principal, Mrs. Harveston." (T. 139-140)

M.R.C.P. 50 entitled "Motions for a Directed Verdict and for Judgment Notwithstanding the Verdict" applies to jury trials and not bench trials. The comment to Rule 50 states:

> "It does not apply to cases tried without a jury nor to those tried to the court with an advisory jury."

The motion to dismiss made by RLI Insurance Company was a motion properly to be brought pursuant to MRCP 41(b) which states in part:

> "... After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no

right to relief. The court may then render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court may make findings as provided in Rule 52(a) unless the court in its order for dismissal otherwise specifies. A dismissal under this subdivision and any other dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

Even though the motion was presented as one made under Rule 50 and the court treated it as a motion made under Rule 50, the plaintiffs will treat it as a motion made under Rule 41(b).

A. ***STANDARD OF REVIEW***

As the Mississippi Supreme Court has stated:

> "The standard of review applicable on motion to dismiss under Rule 41(b) is different than applicable to a motion for directed verdict. (citations omitted) In considering a motion to dismiss, the judge should consider 'the evidence fairly, as distinguished from in the light most favorable to the plaintiff' and the judge should dismiss the case if it would find for the defendant. (citation omitted) 'The court must deny a motion to dismiss only if the judge would be obliged to find for the plaintiff if the plaintiff's evidence were all the evidence offered in the case.' (citation omitted) 'This Court applies the substantial evidence/manifest error standard to an appeal for a grant or denial of the motion to dismiss pursuant to M.R.C.P. 41(b).'" (citation omitted)

Stewart v. Merchants National Bank, 700 So.2d 255, 258-259 (Miss. 1997)

Therefore, the plaintiffs accept the standard of review as being one of substantial evidence/manifest error.

B. ***FIDUCIARY STANDARD OF CARE***

The analysis of the case must begin with establishing the standard of care required of Margaret Harveston in investing trust assets. The beginning point is § 91-13-3, Miss. Code Ann. (1972) which states in relevant part the following:

> "In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property held in fiduciary capacity, the fiduciary shall exercise the judgment and care under the circumstances then prevailing which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to

speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital."

In addition to being bound by the prudent investor standard, principal among Ms. Harveston's duty as the administratrix was the marshaling of the assets of the estate and to protect them from waste. *Jackson v. Jackson,* 732 So.2d 916, 921 (Miss. 1999).

Section 91-7-257, Miss. Code Ann. (1972) prohibits an executor or administrator from removing any property of the estate out of the state of Mississippi. In her duty to marshal the assets, it is respectfully submitted that Margaret was required by her duty and by § 91-7-257 to marshal all of the assets within the territorial limits of the state of Mississippi.

Margaret began her term as administratrix by violating her duty to marshal the assets within the state of Mississippi and continued to violate her duty by making investments which were contrary to the standard of care required for fiduciaries in investing estate funds.

The Mississippi Supreme Court has held that Miss. Code Ann. §91-13-3 imposes a duty upon the fiduciary to invest funds prudently. *McNeil v. Hester*, 753 So.2d 1057, 1072-1073.

In addition to the prudent investor obligation imposed upon Margaret , as the administratrix of the estate, there were other standards of care applicable to her. The Mississippi Supreme Court has held that:

> "In **Harper v. Harper**, 491 So.2d 189 (Miss. 1986), this Court determined that we hold trustees and other fiduciaries accountable to the same standard of care that we use to review the actions of the executor who has been charged with maladministration of an estate. **Id.** at 194. In **Harper** we specifically addressed the duties of executors and the standard of care by which we expected those duties to be executed:
>
> > 'The executor's duties are '(1) to reduce to possession the personal assets of the testator; (2) to pay the testator's debts; (3) to pay legacies; and (4) to distribute the surplus to the parties entitled thereto.' [**Yates v. Box**, 198 Miss. 602, 22 So.2d 41 (1945) ..."

> "... *One serving in the capacity of executor or administrator is an officer of the Court and holds a fiduciary relationship to all parties having an interest in the estate.* A trust arises from the appointment of the executor or administrator. (citation omitted) (emphasis in the original)
>
> Thus, in answering the question of powers, duties, and liabilities of executors, this Court applies the above Mississippi statutory and case law, as well as the express intent of the testamentary instrument itself.
>
> In answering these questions, this Court must establish a standard of care chargeable to an executor in evaluating charges of maladministration. *It appears proper that since a trust and fiduciary relationship is established by these connections, this Court holds that the same standard of care applicable to a general trustee applies to an executor or administrator. This standard is expressed as follows:*
>
> > *Ordinary care, skill and prudence are normally required of trustees in the performance of all their duties, unless the trust instrument provides otherwise. The rule is that 'trustees are bound by the management of all of the matters of the trust to act in good faith and employ such diligence, sagacity, diligence and prudence as in general prudent [persons] of discretion and intelligence in like matters employed in their own affairs ...'* (emphasis in original)

In Re Estate of Carter, 912 So.2d 138, 144-145 (Miss. 2005)

The Supreme Court further stated in *Estate of Carter* that:

"... Clearly, Mississippi law recognizes the important role that fiduciaries play in the administration of estates. Coordinately, our law fully considers the unique position of power given to executors, trustees and attorneys-in-fact when executing their duties and mandates, and we hold these fiduciaries strictly accountable to this high standard of care when we review the execution of such duties. Our chancery courts thus no doubt have an essential role in serving to protect a weaker, dependent party who has conferred power to a fiduciary under the auspices of confidence and influence." *Id.* at 145.

It has long been the law in Mississippi that fiduciaries such as executors and administrators are held to a high duty of care in the management of estate assets. Further, in stating unequivocally the duty to which administrators will be held, the Supreme Court stated:

> "... It is a general rule, applicable to all persons standing in the relation of trustee, whether they be receivers, guardians, executors, or administrators, or trustees of any description, so long as they keep themselves strictly within the line of duty, and exercise reasonable care and diligence, they cannot be made responsible for any loss or depreciation in the funds entrusted to them; but if they do not strictly pursue that line, and a loss ensues, they are liable to make that loss good, although such loss may have been wholly unexpected."

In Re Adams Guardianship, 169 Miss. 20, 152 So.2d 836, 837 (1934).

Further, in the marshaling of assets, and in following through with the administrator's duties, § 91-13-6, Miss. Code Ann. (1972), authorizes the administrator to marshal the assets and make insured investments without a court order. The statute states:

> "All trustees, guardians, administrators, executors and other fiduciaries may, **without court order**, if not prohibited by the instrument, judgment, decree or order establishing the fiduciary relationship, invest or deposit funds held in a fiduciary capacity in time certificates of deposit, savings accounts or other interest-bearing accounts of (a) any state or national bank (including itself, if such fiduciary be a bank) whose main office is located in the state and the deposits of which are insured by the Federal Deposit Insurance Corporation, or (b) any state or federal savings and loan association (including itself if such fiduciary be a savings and loan association) whose main office is located in the state and the deposits of which are insured by the Federal Savings & Loan Insurance Corporation." **(emphasis added)**

C. ***WHERE THE CHANCELLOR WENT MANIFESTLY WRONG***

In rendering his bench opinion, the chancellor missed the mark and failed to follow the law contained in the cited cases and statutes, and thereby committed manifest error in both his findings of fact and the application of the law.

The bench opinion provided, *inter alia*:

> "So far as what occurred in the administration of the estate and the estate assets, the court finds that there is no genuine issue as to any material fact; it's pretty

clear that the estate lost a considerable amount of principal over those few years where the stock market was very volatile, so nobody is disputing that fact and that's just how it occurred.

So really the only thing that's left for the court is whether there is any legal basis for this suit; I don't think there is any dispute as to what occurred. And the authority that the plaintiffs rely on in this particular case is statutory authority, which sets forth the duties held by or – excuse me – the standard that a trustee or guardian or other fiduciary in state is held to when acting, that's basically pursuant to a trust agreement, I think is what those statutes are primarily designed to address. And, of course, that's not the case here; this is not a case where Mr. McGee had created a trust and appointed a trustee to invest and reinvest or to sell or assign any of that as trustees often are left with the power to do. In fact, Ms. Harveston is not a trustee; she is an administrator of an estate; and she is only acting by authority that was granted to her by this Court. Therefore, she was amenable to the court and subject to the authority of the court before she could do anything." (R.E. 3, pp. 145-146)

The chancellor was manifestly wrong in his application of the facts and the law in this part of his opinion. The cases cited herein and the statutes make it abundantly clear that there is no distinction of duty between a fiduciary acting as a guardian, a trustee or an administrator. However, the chancellor held that Margaret was not bound by the same duty as is a trustee and in so holding departed from the Supreme Court's decision of *In re Estate of Carter, supra.* In addition, the decree appointing Margaret Harveston as administratrix (R.E. 7) did not limit her ability to marshal the assets and to make investments pursuant to § 91-13-6, Miss. Code Ann. (1972). Therefore, the court finding that the administratrix was "subject to the authority of the court before she could do anything" is manifestly incorrect.

Continuing with the bench opinion, the chancellor stated:

"That was an interesting statement that was made by the expert testimony, which it was his opinion that Ms. Harveston should not have been in stock to begin with. Well, Mrs. Harveston was not in stock to begin with; Mr. McGee was in stock. This is his estate, and she would not have had any authority to buy stock or sell stock for that matter that was owned by Mr. McGee. In fact, as the administrator, she is prohibited by statute from transferring or selling any stock or any bonds; that is pursuant to § 91-7-255 which prohibits Ms. Harveston as an administrator of an estate from selling or otherwise transferring any stock or bond or negotiable

> paper held by Mr. McGee at the time of his death. The only way that she could make any such decision in assignment or sale or transfer would be by authority from this court." (R.E. 3, p. 147)

Here again the chancellor missed the mark and committed manifest error in both his findings of fact and his conclusions of law. Section 91-7-255, Miss. Code Ann. (1972) states as follows:

> **"§ 91-7-255. Fiduciary not to transfer negotiable papers.**
>
> No executor, administrator, guardian, receiver, or other fiduciary appointed by or acting pursuant to the authority of any chancery court may sell, assign or transfer any notes, bill of exchange, bond, stock certificate or other negotiable papers belonging to the estate committed or entrusted to him by such court, unless he shall be authorized so to do by an order of the court or chancellor, or by the last will and testament of the decedent ..."

The chancellor confused investing in the stock market with transferring stock certificates. A negotiable instrument, the subject matter of § 91-7-255, is defined by § 75-3-104, Miss. Code Ann. (1972) as follows:

> "(a) Except as provided in subsection (c) and (d), 'negotiable instrument' means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it: (1) is payable to bearer or order at the time it is issued or first comes into possession of a holder; (2) is payable on demand or at a definite time; and (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor."

By no stretch of the imagination is a negotiable instrument which is addressed by § 91-7-255 the same as an investment in the stock market. Therefore, the chancellor was wrong and committed manifest error in his findings of fact and conclusions of law that Margaret Harveston could not have sold investment in the stock market without court approval.

The court's opinion continues:

"So the Court can't find from the evidence that she has breached any fiduciary duty that has arisen by statute or otherwise by other rule. She does have the duty or did have the duty as the administrator not to commit waste; thus was allegations that were set forth in the complaint that she committed waste, but there has been no proof before the court that she in any way committed any waste to any asset of the estate. The estate simply – there was a transfer, initial transfer of the account from Merrill Lynch and Prudential, I believe it was, securities over to Edward Jones; that was of no consequence; it was a matter of course. It had no consequence or merit or effect on the account other than to place it into one account with one broker, which was Edward Jones, which was with Mr. McDonough, who was a person that the administrator felt she could trust.

There is no question that Ms. Harveston had any knowledge of the stock market, not even herself having ever invested in the stock market, and she would have had to totally rely on the advice that she would have received from her attorney and her broker or the estate's broker, and that is all the standard that she is held to is to act diligently and to rely on the advice of those who are hired by the estate. That's exactly what the evidence has shown that she has done in this case." (R.E. 3, p. 147-148)

A review of the cited statutes and cases place the burden and the duty on the administrator, Margaret Harveston, and not on the lawyer, the broker or the accountant. Nor do the cases and the statutes support the judge's finding that "that is all the standard that she's held to is to act diligently and to rely on the advice of those who are hired by the estate." The chancellor misapplied the duty that the law holds Margaret Harveston to in investing over $2 million in estate assets. Nowhere in the fiduciary duty of a prudent investor is the word "diligently" used nor do the statutes or cases authorize her to use the advice of counsel, accountants and brokers as a shield to protect her when she violated the duty imposed by law.

The chancellor further opined:

"She does have the duty as the administrator, as I said, not to commit waste; there is no evidence that she ever committed any waste. The only other transfer of the assets of the estate were when she did seek authority to sell some of the stock to place in mutual funds; and that, of course, as the evidence shows was actually to the benefit of the estate in that it increased in value after they made that transaction. So certainly she can't be accused of committing waste by making the court-authorized transfer of those assets." (R.E. 3, p. 148)

Here again the chancellor totally misses the mark. The court order to which the chancellor referred was dated November 3, 2003 (Exhibit 23) which ordered as follows:

> "IT IS THEREFORE ORDERED that the stocks, bonds and other monetary assts held by Edward Jones Investments be liquidated and placed in a money market account subject to further orders of this Court."

By the time this order was entered, all of the losses had been sustained in the stock market and all of the waste had already occurred from January 2000 through November 2003. The chancellor totally fails to address the waste committed by Ms. Harveston through the stock market losses which were sustained by the estate as a result of her refusal to liquidate the stocks and invest in money markets or other secure investments before the losses were incurred. For the chancellor to state that placing the funds in a money market account was to the benefit of the estate was an understatement and only then did the losses stop. However, he fails to address why he does not hold the administratrix liable for waiting almost four years to take the only prudent step that was taken during the administration of the entire estate.

The chancellor continued:

> "And the court is going to dismiss this lawsuit inasmuch as the court finds there is no legal basis to hold her accountable to the beneficiaries of this estate for the losses which occurred over the unforeseen circumstances of the stock market, which have all only been shown by, as Mr. Yarborough pointed out, hindsight speculation." (R.E. 3, p. 149)

The facts of the case are very clear that the estate began to lose money in the stock market almost immediately upon the administratrix transferring the funds to the Edward Jones investment account. The funds were invested in Edward Jones in late January and early February 2000 and the first monthly statement received March 31, 2000, showed a loss of $137,171.96. (R.E. 20; Ex. 28)

A review of the Edward Jones account monthly statements as reflected on Exhibit 28 reflects that the funds were first invested in January and February 2000 and the stock account was maintained until November 2003 for a total of approximately 46 months. Of that 46 months, in 18 months there were losses for as little as $2,471.96 in January 2003, and the highest loss of $464,639.69 coming in September 2001, after the events of 9/11. However, even before the events of 9/11, the following losses occurred:

February 2000	$137,171.96
May 2000	$99,455.79
October 2000	$85,792.13
January 2001	$100,171.13
March 2001	$121,499.70
June 2001	$264,205.59
August 2001	$218,251.08

In the lead-up to the events of 9/11 and the falling stock market which resulted from those events, there were substantial losses sustained by the estate. Therefore, for the chancellor to find that the losses "occurred over the unforeseen circumstances of the stock market" shows a failure by the chancellor to review the evidence of actual losses from the very beginning. Therefore, it is respectfully submitted that the chancellor was manifestly wrong in his findings of fact and conclusions of law on this point.

CONCLUSION

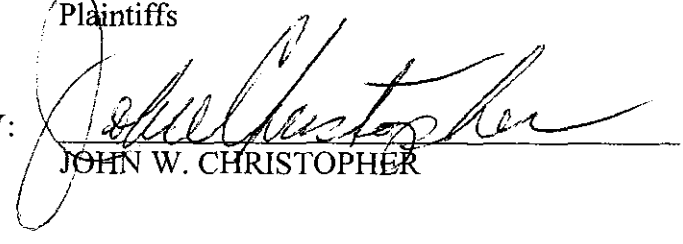
It is respectfully submitted that the chancellor's decision, when judged by the substantial evidence/manifest error rule, fails the test. There is no evidence, let alone substantial evidence, that would support the chancellor's finding that Margaret Harveston did not breach her duty as an administratrix in investing funds in the stock market. The chancellor committed manifest error in not only finding that Margaret Harveston fulfilled her fiduciary obligation as administratrix, but in his dismissing of the complaint and excusing the negligence and the breach of duty committed by Margaret Harveston.

As a result of Margaret Harveston's breach of her duty to invest the funds with prudence as required by § 91-13-3, Miss. Code Ann. (1972), the estate, and the beneficiaries, have sustained substantial losses. The principal loss alone is undisputed to be $145,802.66 and the loss of income which would have been realized in prudent investments is an additional $415,915.19.

It is respectfully submitted that this Court should reverse and render the decision of the chancery court and enter judgment for the plaintiffs for their losses which total $561,717.85 plus interest.

Respectfully submitted,

FRANCES CAROLYN PHILLIP, ET AL,
Plaintiffs

BY: 
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CERTIFICATE OF SERVICE

I, JOHN W. CHRISTOPHER, hereby certify that I have this day forwarded a true and correct copy of the above and foregoing **Brief** via United States Mail, postage prepaid, to the following:

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This the 16th day of February, 2007.

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