IN THE SUPREME COURT OF MISSISSIPPI

CONGRESS STREET PROPERTIES LLC AND 930 BLUES CAFÉ, LLC — APPELLANTS

VERSUS — NO. 2010-CA-01584

BMR FUNDING, LLC — APPELLEE

BRIEF OF APPELLEE BMR FUNDING, LLC

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ON APPEAL FROM HINDS COUNTY CHANCERY COURT

IN THE SUPREME COURT OF MISSISSIPPI

CONGRESS STREET PROPERTIES LLC AND 930 BLUES CAFÉ, LLC	**APPELLANTS**
VERSUS	**NO. 2010-CA-01584**
BMR FUNDING, LLC	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. Honorable Dwayne Thomas
   Hinds County Chancery Judge

2. William L. Smith
   Donald Alan Windham
   Tara P. Ellis
   Balch & Bingham LLP
   Counsel for Appellee BMR Funding, LLC

3. Congress Street Properties LLC
   930 Blues Café, LLC
   Appellants

4. Suzanne Keys
   Byrd & Associates, PLLC
   Counsel for Appellants

5. Isaac K. Byrd, Jr.

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Attorney for Appellee BMR Funding, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATISES

STATEMENT OF THE ISSUES

The resolution of this case turns on questions of fact regarding the validity of two deeds of trust granted by Congress Street Properties LLC ("CSP") and 930 Blues Café, LLC ("930 Blues Café"), two entities wholly owned by Mr. Isaac K. Byrd ("Byrd"):

- The first deed of trust was executed by CSP and originally recorded without its Exhibit "A" containing the legal description. Accordingly, the closing attorney's office re-recorded it. Appellants assert that the re-recording was a fraudulent alteration that voided the deed of trust. However, the Chancellor found that the omission of Exhibit "A" was a mere mistake, and further, that Exhibit "A" nevertheless described exactly the property intended. The issue for the appellate court is whether the Chancellor erred in making these findings of fact.
- The second deed of trust was executed by 930 Blues Café to provide additional security for the indebtedness after other property owned by a different Byrd entity was sold at a short sale. Appellants assert this deed of trust was only intended to secure payment of $200,000 and was satisfied, although the deed of trust expressly secures the entire indebtedness owed by Byrd and the entities owned by him. Based on the language of the deed of trust and other transactional documents – and the subsequent actions of Byrd – the Chancellor found that the second deed of trust was intended to secure the entire indebtedness. The issue for the appellate court is whether the Chancellor erred in making this finding of fact.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW[1]

On December 10, 2009, BMR Funding, LLC ("BMR") filed two lawsuits to eject CSP and 930 Blues Café – two business entities owned by Byrd (collectively, the "Appellants," and, together with Byrd and Northgate Properties LLC, the "Byrd Group") from commercial properties that it had acquired through foreclosure proceedings. V. 1/2-14 (RE 1) and V. 1/66-78 (RE 2). Those cases were consolidated, and after holding a trial and hearing the evidence, the Chancellor ultimately ejected CSP and 930 Blues Café and ordered them to relinquish possession of the properties to BMR. V. 5/709-715 (RE 3). In defense of the claims, Appellants offered parol evidence regarding Byrd's intent in signing the deeds of trust, and asserted that the deeds of trust were void or satisfied and that these entities should keep their respective properties despite admittedly being in default on their indebtedness. The Chancellor held that Byrd's testimony regarding his intent lacked credibility, and ruled in favor of BMR based on the testimony, documentary evidence, and the long course of dealings between the parties.

II. STATEMENT OF FACTS

The foreclosures were based on two separate but related deeds of trust. This brief addresses them separately because they were executed at different times and because different arguments have been raised by Appellants regarding the validity of each.

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[1] The Clerk's Record on Appeal includes the Record on Review, which consists of the following: seven (7) volumes of documents containing numbered pages within each volume, referenced herein as "V. ___/____," and two (2) volumes of exhibits, referenced herein as "Ex. ____." References to BMR's record excerpts will appear as "RE ___."

A. The deed of trust on the CSP property described exactly the property intended, was not fraudulently altered, and was therefore valid and enforceable at the time of the foreclosure.

CSP is a limited liability company wholly owned by Byrd. V. 5/675 (RE 4). In 2004, CSP purchased certain real property located between President and Congress Streets in Jackson, Mississippi. The property was conveyed to CSP via a special warranty deed from Protective Life Insurance Company. *See* Special Warranty Deed, Ex. 2 (RE 5). CSP borrowed the $618,000 used to purchase the property from SouthTrust Bank[2] ("SouthTrust") with Byrd personally guaranteeing the debt.[3] *See* Promissory Note, Ex. 3 (RE 7); Commercial Guaranty, Ex. 4 (RE 8). To secure payment of this debt, CSP granted to SouthTrust a deed of trust (the "CSP Deed of Trust"). *See* Deed of Trust, Ex. 6 (RE 9). For its property description, the first page of the CSP Deed of Trust provides:

> See Exhibit "A", which is attached to this Deed of Trust and made a part of this Deed of Trust as if fully set forth herein,
>
> The Real Property or its address is commonly known as 939 North President Street, Jackson, MS 39201.

Ex. 6 (RE 9). Exhibit "A" to the Deed of Trust contained a legal description identical to the legal description in the special warranty deed. *See* Ex. 2 (RE 5) and Ex. 6 (RE 9). Appellants do not dispute that CSP is in default on the secured debt; Appellants have stipulated that CSP is in

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[2] The Byrd Group's debt with SouthTrust is the same debt at issue in these proceedings. In January 2005, SouthTrust was merged into Wachovia Bank, National Association ("Wachovia"); thus, Wachovia become the owner of the debts owed by the Byrd Group and the holder of the CSP Deed of Trust and the deed of trust granted by another Byrd entity, Northgate Properties LLC. V. 5/677 (RE 4). In December 2005, Wachovia assigned the CSP Deed of Trust and the Northgate Deed of Trust to SPCP Group, LLC ("SPCP"). *Id.* Finally, on April 14, 2009, SPCP assigned these Deeds of Trust to BMR. *Id.*

[3] This purchase was 100% financed by SouthTrust, contrary to the unsupported assertion of CSP in its Brief. On p. 5 of its Brief, CSP asserts it paid $10,000 cash as a down payment, with $618,000 due upon closing. That assertion is made without any reference to the record, and is unsupported. The $10,000 payment by CSP was earnest money that was refunded from the $618,000 loan proceeds. *See* Settlement Statement, Exhibit "C" of Ex.1/1 (RE 6).

default on the loan. V. 5/676 (RE 4). Instead, Appellants suggest that the CSP Deed of Trust is void due to a fraudulent material alteration.

Appellants' argument arises from a re-recording of the CSP Deed of Trust by the closing attorney. Although the deed of trust, even as originally recorded, expressly referenced Exhibit "A" on its face, Exhibit "A" was initially omitted when it was recorded. *See* Deed of Trust, Ex. 5 (RE 10). Subsequently, the closing attorney re-recorded the deed of trust including Exhibit "A." *See* Ex. 6 (RE 9). *See also* Affidavit of Jennifer Wilson, Ex. 1/1 (RE 6).[4] The closing attorney then sent Byrd a copy of the re-recorded deed of trust along with the other transactional documents. *See* Ex. 1/1 (RE 6), which includes as Exhibit "B" thereto a copy of the letter and re-recorded CSP Deed of Trust sent to Byrd.

Appellants allege that the CSP Deed of Trust was fraudulently materially altered by adding Exhibit "A." In support of this assertion, Byrd testified in his affidavit: "With respect to the 939 N. President Street loan, I only agreed to put up the lot at 939 N. President as collateral. I signed the paperwork, including the Deed of Trust that showed 939 N. President as collateral." *See* Affidavit of Isaac Byrd, Ex. 1/14 (RE 11). In their Brief, Appellants point out at length that prior to CSP's purchase from Protective Life Insurance Company, the property purchased had been owned separately, with one parcel being described as 933 N. President Street. However, the CSP Deed of Trust and all transactional documents clearly indicate that the parties intended to include both lots in the property encumbered by the CSP Deed of Trust.

Contrary to his self-serving assertion in his affidavit, all of the "paperwork" signed by Byrd included both the 933 N. President St. and 939 N. President Street properties. In fact, both properties were included together in the Special Warranty Deed, by which CSP was vested title

[4] Exhibit 1 to the August 11, 2010, hearing included the nineteen (19) exhibits entered into evidence at the February 26, 2010 hearing. References herein to a document contained within Exhibit 1 will be noted as "Ex. 1/___, with the second number indicating the number of the exhibit introduced into evidence at the February 26, 2010 hearing.

to the property at the time of closing. *See* Ex. 2 (RE 5).[5] Appellants suggest, however, that because the CSP Deed of Trust included language that the property was "commonly known as 939 N. President Street," it could not have also included 933 N. President Street, which is an unimproved empty lot. *See* Contract of Purchase and Sale, Exhibit "A" to Ex. 1/1 (RE 6).

But even as originally recorded, the CSP Deed of Trust, which Byrd undisputedly signed, described the property by reference to Exhibit "A." Byrd never testified, either in his affidavit or at the trial of this matter, that he was never presented with Exhibit "A," or that at the closing, he was presented an Exhibit "A" that was different from what was ultimately recorded. Further, at trial, Byrd offered no explanation why he failed to read or inquire about Exhibit "A" despite its incorporation by reference in a document that he admittedly signed. Nevertheless, in their Brief, p. 23, Appellants assert:

> ...the Trial Court found that Exhibit A was not attached to the deed of trust when it was recorded; this is true, but more importantly, absent any proof to the contrary, Exhibit A was also not attached at the time the deed of trust was signed. This is undisputed, as the originally recorded deed of trust did not have Exhibit A.

(emphasis omitted). This statement, in addition to lacking logic and misstating the burden of proof, is completely unsupported by the record (as evident by the fact that no record cite is provided by Appellants). ***Byrd did not testify that Exhibit A was not attached at the time he signed the deed of trust.*** *See* Ex. 1/14 (RE 11). Further, as set forth herein, there is ample proof that. Byrd not only knew that Exhibit "A" was attached but also that 933 N. President Street was to be included in the description of the property encumbered by the CSP Deed of Trust.

Appellants ignore the reference to Exhibit "A" in the deed of trust and focus instead on the language, "The Real Property or its address is commonly known as 939 North President Street, Jackson, MS 39201." Ex. 6 (RE 9). However, the key phrase therein is "commonly known as;" the transactional documents, which were signed by Byrd, define what is "commonly

[5] The last paragraph of the legal description refers to 933 N. President Street.

known as 939 N. President Street," repeatedly referring to the entire property purchased, including 933 N. President Street, as "939 North President Street." The Contract of Purchase and Sale provides:

> The subject property consists of a two story office building located at 939 North President Street one block south of Fortification Street in Jackson, Mississippi. The legal descriptions are below:
>
> * * *
>
> **Adjacent Vacant Lot: (acquired-1995)**
> ***Lot 1, Hamilton Subdivision*** of the S1/2 of the NE ¼ of 10 acre Lot No. 8, North Jackson...***being the property situated at and numbered 933 on North President Street, Jackson, Mississippi.***

Exhibit "A" of Ex.1/1 (RE 6) (emphasis added). Similarly, the Closing Statement describes all of the property collectively with a parenthetical describing the property as "939 North President Street." Specifically, the Closing Statement describes the property as "Lots 1, 2 and 4, Florence Green Partition, ten (10) feet of the North End of Lot 2 Hamilton Subdivision and Lot 1 Hamilton Subdivision, Hinds County, Mississippi (939 North President Street)." Exhibit "C" of Ex. 1/1 (RE 6). Although all of the property is described by the parenthetical "939 North President Street,", "Lot 1 Hamilton Subdivision" is the property referred to as 933 N. President Street.

Further, although Byrd claims not to have known that the disputed property was included as collateral or about the re-recording of the deed of trust, on several occasions, Byrd was forwarded copies of the various loan documents containing the full legal description, including 933 N. President Street. On July 8, 2002, Byrd was forwarded a copy of the re-recorded deed of trust and other closing documents. *See* Ex. 1/1 (RE 6). According to the Affidavit of Jennifer Wilson, a paralegal with the law firm of the closing attorney, "I personally forwarded a copy of the re-recorded Deed of Trust to Isaac Byrd." *Id.* At the time of closing, Byrd also executed an Assignment of Rents related to the subject property, whose legal description and Exhibit "A"

were exactly the same as that of the CSP Deed of Trust. *See* Ex. 6 (RE 9) and Assignment of Rents, Ex. 35 (RE 12). Byrd's own correspondence acknowledges that he received a copy of the Assignment of Rents, which included Exhibit "A." *See* Exhibit 70 (RE 13).

In addition, Byrd has repeatedly reaffirmed and acknowledged the validity of the CSP Deed of Trust. On February 15, 2005, Wachovia, which had merged with SouthTrust, began foreclosure proceedings by posting a "Substituted Trustee's Notice of Sale." Substituted Trustee's Notice of Sale, Ex. 33 (RE 14). The notice of sale contained exactly the same legal description as Exhibit "A," including an explicit reference to 933 N. President Street. *Id.* Byrd did not contest the foreclosure, but instead executed, on behalf of CSP, a Forbearance Agreement which contained an acknowledgement of the validity of the security instruments and a waiver of all defenses. *See* Forbearance Agreement, Ex. 9 (RE 15). This Forbearance Agreement contained a list of all the collateral for the various loans, including 933 N. President Street. *See id.* (Exhibit 1 thereto includes tax parcel 39-51, which Exhibits 28 (RE 16) and 32 (RE 17) establish to be 933 N. President Street). Byrd subsequently executed similar instruments on two other occasions. *See* Forbearance and Modification Agreement, Ex. 11 (RE 18), and Reaffirmation Agreement, Ex. 13 (RE 19). Even though Byrd has had prior litigation with his lender, he has never raised any issue with the security instruments. In fact, the complaint filed in the United States District Court for the Southern District of Mississippi against the Byrd Group related to their indebtedness resulted in a default judgment. *See* Federal Complaint, Ex. 10 (RE 20), and Default Judgment, Ex. 12 (RE 21).

Finally, when the actual foreclosure sale at issue here occurred, Byrd never raised any issue related to the foreclosure of property that he now claims was never intended to be included in the CSP Deed of Trust. Byrd had notice of the foreclosures. *See* Ex. 19 (RE 22).[6] The notice

[6] CSP stipulated that Byrd was aware of the contents of this correspondence. V. 5/677 (RE 4).

of foreclosure on the 939 N. President Street Deed of Trust described the entire property, including the disputed property. *Id.* Not only did Byrd not object to the foreclosure of the disputed property, he paid BMR additional sums to continue the foreclosure and then again to hold off on recording the deeds. V. 5/676. *See also* Ex. 17 (RE 23), Ex. 22 (RE 24), and Ex. 23 (RE 25).

Ultimately, the validity of this deed of trust rests on one factual determination: was the re-recording of the CSP Deed of Trust with Exhibit "A" merely the correction of a mistake, or a fraudulent alteration as asserted by Appellants? Setting out all of the evidence referenced above to support its decision, the Chancellor found, "***Exhibit "A" was merely mistakenly omitted*** when the original deed of trust was filed ... ***the attachment of Exhibit "A" to the re-recorded deed of trust was only the correction of an obvious mistake.***" V. 5/712 (RE 3) (emphasis added). According to the Chancellor, "[t]he re-recorded deed, including Exhibit "A", describes no more or less than the exact property purchased and no more or no less than the exact property intended to be encumbered by the deed of trust." *Id.* Finally, the Chancellor weighed in on the credibility of Byrd's testimony, finding "it is now disingenuous to claim that the successfully foreclosed property was never intended to be included in the deed of trust." *Id.*

B. The 930 Blues Café Deed of Trust expressly secured the entire indebtedness, was not satisfied, and therefore still represented a valid security interest in the property at the time of foreclosure.

The promissory note for the purchase of the 939 N. President Street property was not the only loan Byrd or his business entities obtained from SouthTrust.[7] Another Byrd entity, Northgate Properties LLC ("Northgate") also re-financed the purchase money loan it used for the purchase of certain commercial property referred to as the "Northgate Property." *See* Promissory Note, Ex. 8 (RE 26). This loan added an additional $1,308,333.41 to the indebtedness owed by

[7] As set forth in footnote 2, *supra*, BMR is the successor in interest, through Wachovia, and then SPCP, to SouthTrust.

the Byrd Group,[8] and the CSP Deed of Trust was pledged as additional collateral for this loan. *Id.* The Northgate loan and deed of trust are not at issue in this litigation, since Northgate previously sold the Northgate Property. However, because that transaction was a short sale, Byrd executed another deed of trust on property owned by 930 Blues Café (the "930 Blues Café Deed of Trust") as additional security. *See* Deed of Trust and Security Agreement, Ex. 14 (RE 26).

As part of that transaction, Byrd also executed a "Reaffirmation Agreement," which describes the terms of the transaction. Ex. 13 (RE 19). The Northgate Property sold for only $900,000, well below the amount of the $1.3 million dollar loan.[9] *See id.* As a result, in exchange for releasing the deed of trust on the Northgate Property and allowing the sale, the Byrd Group was required to post additional security and make a cash payment of $200,000 Northgate Property. *See id.* 930 Blues Café' now claims the deed of trust was only supposed to secure the payment of $200,000. The issue related to the 930 Blues Café Deed of Trust is whether it was intended to secure only the payment of $200,000 or whether it was intended as additional security for the entire outstanding indebtedness owed by the Byrd Group.

This question is answered by the plain language of the deed of trust. The 930 Blues Café Deed of Trust states:

> Grantor is executing this Deed of Trust to secure the following ... payment of the Two Hundred Thousand and 00/100 Dollars ($200,000) required under the Reaffirmation Agreement, and any and all debts, obligations or liabilities, direct or contingent, of the Obligors or any of them to the Beneficiary, whether now existing or hereafter arising at any time before the cancellation of this instrument on the public records of mortgages and deeds of trust, as well as the any [sic] andand [sic] all interest, late charges and prepayment fees thereon and all extensions, renewals and amendments thereof ... ***and other amounts due and***

[8] By the time litigation in Federal Court resulted in a judgment against the Byrd Group, the total indebtedness was $1,824,517.94. *See* Ex. 12 (RE 21).

[9] Due to the payment of back taxes, realtor's commissions, and other items, the amount credited against the indebtedness was actually well below $900,000.

> ***payable or which may become due and payable under*** this Deed of Trust, ***the Reaffirmation Agreement*** or any other agreement between Grantor and Beneficiary...

Ex. 14 (RE 26) (emphasis added). Further, under "Default," the Reaffirmation Agreement provides: "Grantor shall be in default hereunder if ... Grantor shall (a) fail to pay when due all amounts payable by Grantor to Beneficiary pursuant to the Reaffirmation Agreement and this Deed of Trust." *Id.* at §12.

The Reaffirmation Agreement defines the "amounts due and payable" or "amounts payable." Specifically, it defines the "Indebtedness" as the debt "represented by the Judgment" and refers to the payment of $200,000 as "a partial credit against the indebtedness." Ex. 13 (RE 19). The "Judgment" is defined as "a judgment against the Obligors in the United States District Court for the Southern District of Mississippi in Cause No. 3:05CV69, and enrolled in Hinds County Mississippi." *Id.* The Reaffirmation Agreement defines "Obligors" as including CSP and Byrd, providing: "Obligors acknowledge and agree that they are indebted to the Lender for repayment of the Indebtedness." *Id.* Finally, in the Reaffirmation Agreement, the Byrd Group reaffirmed the validity of the 930 Blues Café Deed of Trust, acknowledging "the validity and enforceability of the lien of the Judgment and the other security interests granted in favor of the Lender, ***other than as specifically released as provided herein***." *Id.* (emphasis added). The Reaffirmation Agreement specifically provided for the release of the "deed of trust recorded in Book 554 at page 342, as modified, and also from the lien of its assignment of rents recorded in Book 6151, at page 348." *Id.* There is no reference to the release of the 930 Blues Café Deed of Trust, which was recorded at Book 6900 at Page 327. *See* Ex. 14 (RE 27).

At the hearing on this matter, and now in their Brief, Appellants utilize selective editing of the transactional documents, and focus only on those portions of the 930 Blues Café Deed of Trust and Reaffirmation Agreement related to the payment of the $200,000. Appellants ignore,

misrepresent through the use of ellipses, and otherwise fail to present to the Court those sections regarding the payment of the entire indebtedness or specifically describing which deeds of trust were to be released. Additionally, Appellants focus on several pieces of extrinsic evidence. Specifically, they rely upon a limited liability company resolution attached to the Reaffirmation Agreement which references only a payment of $200,000 (but expressly authorizes execution of the 930 Blues Café Deed of Trust and Reaffirmation Agreement). Ex. 13 (RE 19). Further, Appellants rely upon two pieces of correspondence with the realtors on the sale: (1) an email between a prior attorney for the lender and a representative of the real estate agents; and (2) a facsimile between Byrd and a representative of the real estate agents. *See* Ex. 63 (RE 28) and Ex. 1/18 (RE 29). While this parol evidence references only the payment of $200,000, none of these documents state that the deed of trust would encumber ***only*** the payment of $200,000.

On the other hand, after the payment of $200,000, Byrd paid an additional $100,000 to prevent the foreclosure of the 930 Blues Café Deed of Trust property and agreed to pay an additional $50,000 more for the release of the 930 Blues Café Deed of Trust. V. 5/676 (RE 4); Ex. 17 (RE 23) and Ex. 18 (RE 30). In other words, although Appellants now claim it was only intended to secure payment of $200,000, Byrd paid at least $300,000 toward release of the 930 Blues Café Deed of Trust and reached an agreement for its release upon payment of additional sums. Even after the foreclosure, Byrd paid additional sums in exchange for BMR's forbearance in recording the substitute trustee's deeds. *See* V. 5/676-677. *See also* Ex. 22 (RE 24) and Ex. 23 (RE 25).

Ultimately, the enforceability of this deed of trust turns on whether or not it secured only the payment of $200,000 and therefore should have been released, or whether it secured the payment of the entire indebtedness and was in default. The Chancellor found that the plain language of the 930 Blues Café Deed of Trust and Reaffirmation Agreement provides that the

930 Blues Café Deed of Trust secured payment of the entire indebtedness. V. 5/714 (RE 3). Accordingly, the Chancellor found that the extrinsic evidence relied upon by Appellants was inadmissible parol evidence. *Id.* Nevertheless, the Chancellor further found that even if he had considered extrinsic parol evidence, he would have found in favor of BMR, finding that "***Mr. Byrd and CSP knew and actively acknowledged that the 930 Blues Club Deed of Trust secured the entire indebtedness and not merely the payment of $200,000.***" *Id.* (emphasis added).

SUMMARY OF THE ARGUMENT

Throughout their Brief, Appellants ignore the applicable standard of review for the Chancellor's decision. The Chancellor's findings must be upheld if there is substantial evidence to support his findings. *See, e.g., City of Picayune v. S. Reg'l Corp.,* 916 So. 2d 510, 518-19 (Miss. 2005). In this case, the Chancellor's decision was clearly supported by ample record evidence.

The CSP Deed of Trust, which Appellants claim was materially altered, was, as the Chancellor found, simply re-recorded to correct a mistake. Correcting a mistake or omission, in the absence of fraud, does not render a deed void. *Mullins v. Merchandise Sales Co.*, 192 So. 2d 700 (Miss. 1966). Further, in this case, the alleged charge was not made by a party to the instrument, as is required for a deed to be void by alteration, but by the closing attorney. *See Francis v. Hughes*, 64 So. 2d 351, 352 (Miss. 1953). In making his determination that the CSP Deed of Trust as re-recorded included the property intended to be used as collateral, the Chancellor relied upon the evidence presented by the parties, including: the language of the CSP Deed of Trust itself, which specifically provided that the property was described on Exhibit "A"; the other transactional documents that described the property exactly as Exhibit "A" did; and Byrd's receipt of numerous documents containing the legal description of both parcels of property. Finally, the Chancellor found that Byrd's testimony lacked credibility.

With respect to the 930 Blues Café Deed of Trust, the Chancellor found that the parol evidence presented by Appellants was inadmissible, as the plain language of the 930 Blues Café Deed of Trust indicated that it was to secure the entire indebtedness owed by the Byrd Group. This finding is clearly not erroneous, as it is well-established contract law that the best evidence of the parties' intent is the language of the document itself. *Farragut v. Massey*, 612 So. 2d 325, 329 (Miss. 1992). Further, the Chancellor found that, even if the 930 Blues Café Deed of Trust was ambiguous, Byrd's actions is making additional payments toward the release of the 930 Blues Café Deed of Trust indicated his intent for it to secure more than the $200,000 he now claims it secured.

Accordingly, under the applicable standard of review, the decision of the Chancellor should be upheld.

ARGUMENT

I. STANDARD OF REVIEW

The applicable standard of review for a decision by a chancellor is the manifest error/substantial evidence rule. *S. Reg'l Corp.*, 916 So. 2d at 518 (Miss. 2005) (*citing Brown v. Miss. Dep't of Human Servs.*, 806 So. 2d 1004, 1005 (Miss. 2000)). "Where there is substantial evidence to support the chancellor's findings, [the appellate court] is without the authority to disturb the chancellor's conclusions ..." *Id.* at 518–19 (citing *In re Guardianship of Savell,*, 876 So. 2d 308, 312 (Miss. 2004)). "In non-jury cases, the trial judge's findings of fact will not be set aside on appeal unless they are 'manifestly wrong,' unsupported by substantial credible evidence (the 'substantial evidence rule'), or 'clearly erroneous.'" BRIDGES & SHELSON, GRIFFITH MISSISSIPPI CHANCERY PRACTICE (2000 Ed.), §674 (quoting *Miss. State Dep't of Human Servs. v. Bennett*, 633 So. 2d 430, 434 (Miss. 1993)). The substantial evidence rule has been summarized by the Supreme Court as follows:

> Under established principles regarding to the description of our scope of review, we are charged with examining the entire record. In so doing, that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact, must be accepted. ***If there is substantial evidence to support the findings made by the trier of fact, those findings must be affirmed here.***

Cotton v. McConnell, 435 So. 2d 683, 685 (Miss. 1983) (emphasis added). Finally, "[t]he credibility of the witnesses and the weight of their testimony, as well as the interpretation of evidence where it is capable of more than one reasonable interpretation, are primarily for the chancellor as the trier of facts." *Johnson v. Gray*, 859 So. 2d 1006, 1014 (Miss. 2003).

II. SUBSTANTIAL EVIDENCE EXISTS IN THE RECORD TO SUPPORT THE CHANCELLOR'S FINDINGS THAT NO MATERIAL FRAUDULENT ALTERATION OF THE CSP DEED OF TRUST OCCURRED.

The material alteration of a deed is an affirmative defense that must be proven by clear and convincing evidence. *Tate v. Rouse*, 156 So. 2d 217, 219 (Miss. 1963). As the Supreme Court recently stated:

> Clear and convincing evidence has been defined as follows: that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.

Niebanck v. Block, 35 So. 3d 1260, 1264 (Miss. 2010). "Clear and convincing evidence is such a high standard of proof that even the overwhelming weight of the evidence does not rise to the same level." *Id.*

Further, to actually render the deed void, the alteration must be the result of fraud rather than mistake or omission. *Mullins*, 192 So. 2d at 704.[10] Finally, for a deed to be void by

[10] In *Mullins*, the case relied upon by Appellants for the proposition that an alteration voids a deed of trust, the Court held that the alteration must be done fraudulently, and not merely to "correct an honest mistake or omission." 192 So. 2d at 704. In that case, the Court found that "[t]he pleadings leave no room for a finding of alteration by mistake or inadvertence," and found that the deed must be void. *Id.* In this case, on the other hand, the re-recording of the 939 N. President Street Deed of Trust was performed to correct a clear oversight, the omission of the exhibit which was clearly referenced and incorporated on

alteration, the alleged change to the deed must be made "by the party entitled to the instrument." *Francis,* 64 So. 2d at 352.[11] If the deed was altered by either mistake or omission, or by one not a party to the transaction, the deed is not void and the unaltered deed can be enforced, reformed, or ratified. *See Mullins*, 192 So. 2d at 219; *Francis*, 64 So. 2d at 352.

Thus, in order to prevail, Appellants must prove, with clear and convincing evidence, not only that the re-recording of the Deed of Trust with Exhibit "A" constituted an "alteration", but also that the alteration was made by SouthTrust and was done with fraudulent intent. Appellants wholly failed to meet its burden of proof, especially with clear and convincing evidence.

To support its assertion that a fraudulent alteration of the CSP Deed of Trust occurred, Appellants rely upon three things: (1) Byrd's self-serving statement that he never intended that the mortgage encumber all the property bought with the mortgage proceeds; (2) the fact that two parcels were purchased with the mortgage proceeds; and (3) the fact that the CSP Deed of Trust was re-recorded. Even were the Chancellor and this Court to accept all of Appellants' assertions as true, these facts are legally insufficient to meet Appellants' burden of proof in this case. On the other hand, to support his finding that the CSP Deed of Trust was not altered and contained exactly the property intended, the Chancellor relied on ample substantial evidence in the record:

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the face of the deed. As the Chancellor found, the Exhibit "A" that was attached contained no more and no less than the exact property purchased by the loan proceeds, and contained exactly the same legal description as every other document related to the transaction. Even if there were evidence of an alteration, and there is not, there is absolutely no evidence, much less clear and convincing evidence, of a fraudulent alteration.

[11] In *Francis*, the Court held that for an alteration to render a deed void, it must be made by a party to the instrument. 64 So. 2d at 352. The Court noted, "'[t]here is a distinction to be observed between an alteration and a spoliation of an instrument, as to the legal consequences'". *Id. (quoting Bridges v. Winters*, 42 Miss. 135, 143 (Miss. 1868)). The term "alteration" 'is applied when the act is done by the party entitled to the instrument. But the act of a stranger, without the participation of the party interested, is a mere spoliation or mutilation of the instrument, not changing its legal operation, so long as the original writing remains legible'". *Id.* (citing *Bridges*, 42 Miss. at 143). In this case, the alleged alteration was made not by anyone from SouthTrust, but instead by the closing attorney. Thus, even if there were an alteration – and there is no proof that there was – it would merely be a spoliation of the CSP Deed of Trust and would not render it void.

- The CSP Deed of Trust, even as originally recorded and admittedly signed by Byrd, expressly referenced Exhibit "A" as containing the legal description. V. 5/711 (RE 3); *see also* Ex. 6 (RE 9).
- Exhibit "A," as re-recorded, is consistent with all of the transactional documents, which referenced both properties collectively, and never separated 933 N. President for any reason. V. 5/711 (RE 3); *see also* Contract of Purchase and Sale, Exhibit "A" to Ex. 1/1, and Closing Statement, Exhibit "C" to Ex.1/1 (RE 6).
- Contradicting Appellants' assertion in their Brief that Byrd never knew of the re-recording of the deed of trust, the re-recorded deed of trust was forwarded to Byrd at the time it was re-recorded. V. 5/711 (RE 3); *see also* Ex. 1/1 (RE 6).
- Byrd specifically acknowledged receipt of the Assignment of Rents, which contained the same legal description and was also originally recorded without Exhibit "A" and re-recorded with Exhibit "A." V. 5/711 (RE 3); *see also* Ex. 70 (RE 13).
- Byrd repeatedly reaffirmed of the validity of the re-recorded deed of trust. V. 5/717 (RE 3); *see also* Ex. 11 (RE 18) and Ex. 13 (RE 19).
- A notice of foreclosure was published in 2005 and forwarded to Byrd, including both collectively 939 N. President Street 933 N. President Street properties, and Byrd raised no objection. *See* Notice of Foreclosure, Ex. 33 (RE 14).
- The Notice of Foreclosure in 2009 included both properties, and Byrd made no objection prior to the foreclosure occurring. V. 5/712 (RE 3); *see also* Notice of Foreclosure, Ex. 67 (RE 31).

- The Substitute Trustee's Deed included both parcels, and Byrd made no objection to both properties' inclusion in the Substitute Trustee's Deed, and even paid additional sums to BMR to postpone recording of the Deed. *See* V. 5/712 (RE 3); *see also* Ex. 21 (RE 32), Ex. 22 (RE 24) and Ex. 23 (RE 25).
- Finally, the Court expressly found that Byrd's assertions regarding his intent lacked credibility, noting "it is now disingenuous to claim that the successfully foreclosed property was never intended to be included in the deed of trust." V. 5/712 (RE 3).

Under the standard of review, there is far more than mere substantial evidence supporting the Chancellor's decision, and thus these findings of fact must be affirmed. The record is replete with evidence supporting the Chancellor's findings of fact, which expressly involved the weighing and interpretation of the evidence and the weighing of the credibility of the witnesses. It was not by mistake that Appellants omitted the standard of review from their Brief; not only did the Chancellor provide much more evidence than is necessary to support his findings, Appellants utterly failed to meet its clear and convincing burden of proof.

Finally, although there is no proof that any alteration of the deed of trust ever occurred, Appellants have utterly failed to meet their burden of proof to establish a fraudulent alteration, which is required to void the deed. Thus, in addition to proving that Byrd knew exactly what was encumbered by the deed of trust, Byrd's repeated reaffirmations and ratifications of the deed of trust cured any defect. In order to avoid this result, however, Appellants suggest erroneously that "subsequent actions to validate [a deed of trust] do not cure its defects." Appellants' Brief, p. 30. To support this assertion, Appellants cite *Craddock v. Brinkley*, 671 So. 2d 662, 664 (Miss. 1996), but in so doing, they generalize a rule from specific circumstances to suggest an absurd result; that no deed or deed of trust containing mistakes or omissions could ever be

reformed or corrected. But *Craddock's* holding is not so broad, Craddock specifically relates to *Miss. Code Ann.* § 89-1-29, the homestead statute, which renders a deed conveying homestead property void if it lacks the spouse's signature.[12]

Contrary to Appellants' argument, the Mississippi Supreme Court has long held that where a deed of trust is not void, defects can be corrected through reformation or ratification. *See, e.g., First Nat'l Bank v. Huff*, 441 So. 2d 1317, 1321 (Miss. 1983) ("To reform a deed of trust containing a mistake and establish an equitable lien the evidence must be clear and convincing."). Finally, in this specific context, cases addressing alterations suggest that reformation or ratification would be possible if the alteration was not fraudulent, but merely by mistake. *See Mullins*, 192 So. 2d at 704 (finding that alterations to "correct an honest mistake or omission" do not void the deed).

The legal description in the CSP Deed of Trust was exactly as the parties intended, and even if it were not, CSP has ratified any mistake.

III. UNDER THE PLAIN LANGUAGE OF THE 930 BLUES CAFÉ DEED OF TRUST, THE DEED OF TRUST SECURED THE ENTIRE INDEBTEDNESS AND WAS NOT SATISFIED AT THE TIME OF FORECLOSURE.

"When an indebtedness to pay has been established, the burden of proving payment is on the party who alleges it. It is an affirmative defense." *Tate*, 156 So. 2d at 218. In this case, the issue is whether the 930 Blues Café Deed of Trust was intended to secure the payment of only $200,000 or the entire outstanding indebtedness. Thus, the issue is one of contract interpretation. The rules of contract interpretation are well established. First the Court must look to the four corners of the contract:

[12] Appellants also overstate the law regarding deeds conveying homestead. Appellate courts have held that obtaining the spouse's signature at a later date does not void the deed where there is evidence that each spouse consented to the conveyance at the time the other signed. *Harrell v. Lamar Co., LLC*, 925 So. 2d 870, 875 (Miss. Ct. App. 2005).

> When the language of the deed or contract is clear, definite, explicit, harmonious in all its provisions, and free from ambiguity throughout, the court looks solely to the language used in the instrument itself, and will give effect to each and all its parts as written.

Farragut, 612 So. 2d at 329.

Appellants have relied heavily on parol evidence to suggest that documents which expressly secured the entire indebtedness were never actually intended to do so, but such arguments fail as a matter of law. "[T]o permit a party, when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts." *Anderson v. Equitable Life Assurance Soc'y of the United States*, 248 F.Supp.2d 584, 590 (S.D.Miss. 2003) (quoting *Turner v. Terry*, 799 So. 2d 25, 36 (Miss. 2001)). The Court in *Anderson* continued:

> Questions regarding interpretation of the contract should be resolved by the language of the contract. The intent of the "contracting parties should be gleaned solely from the wording of the contract." The court will generally not consider prior oral agreements, misunderstandings between the parties, or any other form of parol evidence.

Id. at 590-591 (internal citations omitted). According to the Mississippi Supreme Court, "[o]ur concern is not nearly so much with what the parties may have intended, but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy." *In re Estate of Fitzner*, 881 So. 2d 164, 169 (Miss. 2003). Further, under Mississippi law, "[p]arol evidence will not be received to vary or alter the terms of a written agreement that is intended to express the entire agreement of the parties on the subject matter at hand." Finally, parol evidence is inadmissible to "contradict, vary, alter, add to, or detract from" the written instrument. *Sharpsburg Farms, Inc. v. Williams*, 363 So. 2d 1350, 1355 (Miss 1978) (*quoting Allen v. Allen*, 168 So. 658, 659 (Miss 1936)). Simply put, the parol

evidence relied upon by Appellants is simply not admissible in face of an unambiguous contract.[13]

In this case, the Chancellor found it was unnecessary to look beyond the four corners of the contract, as the deed of trust expressly secures payment of the entire outstanding indebtedness and not just the $200,000. The 930 Blues Café Deed of Trust secured payment of "other amounts due and payable or which may become due and payable under ... the Reaffirmation Agreement." *See* Exhibit 14 (RE 27) at Recitals. Further, failure to pay "all amounts payable by Grantor to Beneficiary pursuant to the Reaffirmation Agreement" is expressly identified as an event of default. *Id.* at ¶12. Thus, the 930 Blues Café Deed of Trust must be construed along with the Reaffirmation Agreement. *See United Mississippi Bank v. GMAC Mortgage Co.*, 615 So. 2d 1174, 1176 (Miss. 1993) ("the main document and other documents to which it refers must be construed together").

The Reaffirmation Agreement defines the "Indebtedness" as the debt "represented by the Judgment" and refers to the payment of $200,000 as "a partial credit against the indebtedness." Ex. 13 (RE 19). The Judgment was defined in the Reaffirmation Agreement as that judgment entered in Civil Action No. 3:05-cv-69 by the United States District Court for the Southern District of Mississippi against the Byrd Group and in favor of their lender, and represented the entire indebtedness between the parties. *See* Ex. 12 (RE 21) and Ex. 13 (RE 19). Further, the Reaffirmation Agreement provides: "Obligors acknowledge and agree that they are indebted to the Lender for repayment of the Indebtedness." Ex. 13 (RE 19). The "Obligors" include CSP and Byrd, individually. *Id.*

[13] Note that the Reaffirmation Agreement was fully integrated and clearly represented the entire agreement between the parties, providing that "[t]he Agreement constitutes the entire agreement of the parties pertaining to the subject matter hereof and all prior negotiations and representations relating thereto are merged herein. ... The parties each acknowledge that they have read and understand this Agreement..." Ex. 13, ¶10.

In addition, the Reaffirmation Agreement unambiguously sets out which security interests were to be released upon payment of the $200,000 and those security interests do not include the 930 Blues Café Deed of Trust. In the Reaffirmation Agreement, Byrd acknowledged "the validity and enforceability of the lien of the Judgment and the other security interests granted in favor of the Lender, ***other than as specifically released as provided herein***." *Id.* (emphasis added). The Reaffirmation Agreement specifically provided for the release of the "deed of trust recorded in Book 554 at page 342, as modified, and also from the lien of its assignment of rents recorded in Book 6151, at page 348." *Id.* Neither of these references refers to the 930 Blues Club Deed of Trust, which was recorded at Book 6900 at Page 327. *See* Ex. 14 (RE 27).

Despite this express and unambiguous language in the 930 Blues Café Deed of Trust and the Reaffirmation Agreement, Appellants argue in their Brief that these documents only provide for securing the $200,000 payment. Appellants' argument misrepresents the record and is based solely upon creative use of selective quotations. For example, Appellants suggest on p. 32 of their Brief that the 930 Blues Café Deed of Trust and Reaffirmation Agreement lack any definition of "what the indebtedness is or whose indebtedness it was."[14] But the Reaffirmation Agreement defines the "Indebtedness" as the debt "represented by the Judgment" and refers to the payment of $200,000 as "a partial credit against the indebtedness." Ex. 13 (RE 19). In fact, the Reaffirmation Agreement specifically identifies the judgment to which it refers. *See* Ex. 12 (RE 21) and Ex. 13 (RE 19).

[14] In suggesting that the term "Obligors" is undefined, Appellants ignore the fact that the two instruments, the 930 Blues Café Deed of Trust and the Reaffirmation Agreement, were executed together, expressly reference one another, and must be construed together. The Reaffirmation Agreement expressly defines the "Obligors" to include CSP and Byrd, individually, and expressly references their indebtedness to BMR as defined in the "Judgment."

The most egregious example of Appellants "selective editing" occurs on p. 33 of their Brief, where they cherry pick their quotation from the Reaffirmation Agreement to omit the language both directly before and directly after the quoted sentence which expressly identifies the indebtedness and sets out specifically which liens will be released upon payment of the $200,000. *See* Ex. 13 (RE 19). The full quotation, with the section quoted by Appellants in italics, is as follows:

> Obligors agree to apply the net sales proceeds from the sale of the Property pursuant to the Contract, after closing costs, ad valorem taxes and broker's commission, against the outstanding indebtedness (the "Indebtedness") represented by the Judgment. *In addition, Obligors agree to pay to Lender the additional sum of Two Hundred Thousand and 00/100 Dollars ($200,000.00) in cash to Lender as a credit against the Indebtedness*[15] *within ten (10) business days from the closing of the Sale of the Property. This obligation shall be secured by a Deed of Trust on certain real property owned by 930 Blues Café, LLC in Jackson, Mississippi.* In return, Lender agrees to release the Property from the lien of the Judgment, and also from the lien of its deed of trust recorded in Book 554 at page 342, as modified, and also from the lien of judgment of its assignment of rents recorded in Book 6151, at page 348.

Id. at ¶2. Elsewhere, the Reaffirmation Agreement defines the term "Property," providing "Northgate Properties LLC and Byrd have contracted to sell the real property (the "Property") of Northgate Properties LLC..." *Id.* at Recitals. This inventive quotation of the primary documents is misleading and misrepresents these documents' contents to the Court. Appellants' entire argument rests on ignoring inconvenient portions of the 930 Blues Café Deed of Trust and Reaffirmation Agreement.

Because the 930 Blues Café Deed of Trust specifically provides that it secures the entire indebtedness and that the Reaffirmation Agreement specifically stipulates which deed of trust would be released upon payment of the $200,000 (and did not include the 930 Blues Café Deed of Trust), the Chancellor found that "***the clear and unambiguous language of the relevant***

[15] Note that in quotation in 930 Blues Café's Brief, the term "Indebtedness," was not capitalized as it was in the Reaffirmation Agreement, which would indicate a defined term.

documents provides the full and complete agreement between the parties." V. 5/714 (RE 3). Based on that finding, the Chancellor applied the parol evidence rule and found that "[t]his Court need not look beyond those writings to determine intent or infer interpretation." *Id.*

The Chancellor's ruling was more than supported by substantial evidence and should be affirmed. To support his ruling that the 930 Blues Café Deed of Trust secured the entire indebtedness, the record shows (1) the Deed of Trust secured payments due under the Reaffirmation Agreement, (2) the Reaffirmation Agreement expressly reaffirmed the entire indebtedness, and (3) the Reaffirmation Agreement expressly listed which liens would be released, and did not list the 930 Blues Café Deed of Trust. Supported by this evidence, the Chancellor's findings of fact should not be set aside.

Nevertheless, the Chancellor found that if it were to consider parol evidence; it would not help the Appellants. It is only where the interpretation of the contract is not clear within its four corners, and the contract is ambiguous, that the Court may look to extrinsic evidence, with the greatest weight given to the "practical construction" given to the contract by the parties.

> ...when the parties have for some time proceeded with or under the deed or contract, a large measure, and sometimes a controlling measure, of regard will be given to the practical construction which the parties themselves have given it, this on the common sense proposition that ***actions generally speak even louder than words***.

Farragut, 612 So. 2d at 329. (*quoting Sumter Lumber Co. v. Skipper,* 184 So. 296, 298-99 (Miss. 1938)) (emphasis added). Applying these principles, the Chancellor found that even if the documents were ambiguous, Byrd nevertheless intended that the Deed of Trust secure the entire outstanding indebtedness, as Byrd's actions proceeding under the agreements certainly speak louder than his words. V. 5/714 (RE 3).

After having paid the $200,000, Byrd did not ask that the deed of trust be released, but instead agreed to pay an additional $100,000 to prevent foreclosure. *See* Ex. 17 (RE 23). In fact,

he reached a specific agreement that the deed of trust be released upon payment of an additional $50,000 which he was ultimately unable to pay. *See* Ex. 18 (RE 30). Byrd raised no objection when he received the Notice of Foreclosure on property which he now claims was supposed to be released, and even after foreclosure, he paid BMR additional sums to forbear recording of its Trustee's deeds. *See* V.5/676-677. *See also* Ex. 22 (RE 24) and Ex. 23 (RE 25).

If Byrd had only intended that the 930 Blues Café Deed of Trust secure payment of $200,000, why did he pay more than $300,000? If the 930 Blues Café Deed of Trust should have been released upon payment of $200,000, why did he reach an agreement for its release upon payment of $350,000? If the entire amount secured had been paid, why did Byrd not raise any objection to the foreclosure sale? As the Supreme Court stated in *Farragut*, actions do speak louder than words, and Byrd's actions speak quite loudly of his intent in signing the Reaffirmation Agreement and 930 Blues Café Deed of Trust. Based on these facts, and exercising his discretion as the finder of fact, the Chancellor weighed the evidence and found that "Mr. Byrd's own actions demonstrate that he legitimately believed the 930 Blues Club Deed of Trust secured the entire indebtedness. Therefore, this Court finds that Mr. Byrd and CSP knew and actively acknowledged that the 930 Blues Club Deed of Trust secured the entire indebtedness and not merely the payment of $200,000." V. 5/714 (RE 3).

Again, this ruling is amply supported by substantial evidence in the record. Despite now claiming the Deed of Trust only secured payment of $200,000, Byrd paid well in excess of that amount and agreed to pay additional sums for release of the Deed of Trust. Further, Byrd made no objection to the foreclosure, and paid additional sums for additional forbearance after foreclosure. As set forth above, actions speak louder than words, and the Chancellor's findings of fact should not be set aside.

CONCLUSION

This case turned on the Chancellor's determination of questions of fact in BMR's favor. Thus, this Court applies the highly differential "substantial evidence" standard of review for a Chancellor's findings of fact. Here, the Chancellor cited ample evidence in the record to support each of his findings of fact, interpreted the evidence, and weighed the credibility of the witnesses. Thus, his judgment must be affirmed. In their Conclusion, Appellants request not only that the Chancellor's findings be overturned, but that judgment be entered in their favor. But Appellants have not only failed to show the "manifest error" required to overturn the Chancellor's findings, they have failed to meet their own burden of proof. Appellants have failed to demonstrate clear and convincing evidence of a fraudulent alteration of one deed of trust, and their arguments regarding the other are based on omitting the primarily relevant portions of the agreements. For those reasons alone, the Chancellor's judgment must be affirmed.

Respectfully submitted, this the 20th day of June, 2011.

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CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that I have this day served, via U.S. Mail, a true and correct copy of the above and foregoing Brief to:

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Honorable Dewayne Thomas
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This the 20th day of June, 2011.

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