

IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

FILED
APR 13 2017
EDDIE JEAN CARR, CHANCERY CLERK
D.C.

**ALEXANDRIA VICTORIA SHEPPARD and
JAMES PATRICK "BUD" SHEPPARD, IN THEIR
REPRESENTATIVE CAPACITY ON BEHALF OF
THE BENEFICIARIES OF THE PATRICIA
HALL SHEPPARD TRUST**

PLAINTIFFS

VS.

CIVIL ACTION NO. G2012-1044 W/4

REGIONS FINANCIAL CORP.

DEFENDANT

ORDER AND OPINION

THIS MATTER is before the Court on January 12, 2017, on the determination of punitive damages. Patricia Hall Sheppard filed this civil action on June 22, 2012. Alexandria Victoria Sheppard and James Patrick Sheppard are also plaintiffs. A bench trial commenced in November 2013 and concluded in July 2014. This Court subsequently issued *Order and Opinion* on liability on November 14, 2014, finding that the Defendants violated its fiduciary duty in the management of the Patricia Hall Sheppard Trust ("Trust"). Patricia Hall Sheppard died on May 23, 2015 and the *Petition to Probate Will of Patricia Hall Sheppard* was filed on July 2, 2015. An *Order* opening the estate was entered in this Court on July 13, 2015.

To the extent that Patricia Hall Sheppard had an interest in this action, the interest is now an asset of her estate. On August 3, 2015, an *Agreed Order of Substitution* was filed, substituting the Estate of Patricia Hall Sheppard as plaintiff in this action and also agreed that Alexandria Victoria Sheppard and James Patrick Sheppard should be substituted as the lead plaintiffs in a

representative capacity on behalf of the beneficiaries of the Patricia Hall Sheppard Trust

Pursuant to Mississippi Rule of Civil Procedure 53, this Court elected to appoint a Special Master and in fact appointed two Special Masters to aid the Court's determination of damages. The damage hearing was held on June 21, 2016 and this Court rendered its *Order and Opinion* on September 16, 2016. The Plaintiffs filed their *Joint Motion to Clarify* on October 18, 2016, relating to the calculation of pre-judgment interest. The Defendants filed their *Response in Opposition re Joint Motion to Clarify* on October 20, 2016. Afterward, the Plaintiffs filed their *Joint Motion for Attorney's Fees* on November 2, 2016. This Court heard arguments on Plaintiffs' *Motion for Punitive Damages, Motion for Attorney's Fees, and Joint Motion to Clarify* on January 12, 2017. Having heard arguments on the matter and all premises considered, this Court finds the following:

PUNITIVE DAMAGES

Miss Code Ann. § 11-1-65(1)(a) states: "Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against who punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." (b)" in any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages; (c) If, but only if an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered.

In accordance with the above referenced statute, this court on September 16, 2016 rendered its *Order and Opinion*. The Court adopted and ordered the latest rendition of Special Master

Bullard's report dated June 18, 2016 in which the amount of the award for damages to the Plaintiffs was \$2, 477, 615.00 to be paid by Regions. An additional eight (8%) in prejudgment interest shall be added to this amount beginning June 22, 2012, the day the complaint was filed through the date of the hearing, compounded annually. Further, the court added the amount of Cheryl Lee's charges of \$22,000.00 and \$863,711.00 for real estate damages. The Court further instructed the parties to compute the amount based on the Court's damages award and submit the same for this Court's approval.

During the hearing on January 12, 2017, the Court rendered a bench ruling in regard to the *Joint Motion to Clarify*. The Court ordered that the eight (8%) interest shall be applied to the total damage award of \$2,477,615.00. As it relates to the date of the hearing on the pre-judgment interest, that date shall terminate from the date of filing to September 16, 2016.

To conclude, the Court is satisfied through its Finding in the *Order and Opinion* dated November 14, 2014 that the Plaintiffs have proven by clear and convincing evidence that Regions acted with actual malice, gross negligence which evidenced a willful, wanton or reckless disregard toward the Plaintiffs. A damage award was considered and ordered. An evidentiary hearing was had for the purpose of this Court to determine whether punitive damages may be considered. The prerequisites factors necessary to consider punitive damages have been satisfied.

Miss Code Ann. § 11-1-65(1) (e) states:

In all cases involving an award of punitive damages, the fact finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being

caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.

LEGAL ANALYSIS

The defendant's financial condition and net worth

The parties stipulated at trial that Regions' net worth is approximately \$15 billion. One percent of Regions' net worth is \$150 million. However, under Miss. Code Ann. § 11-1-65(3) (a) the statutory cap on punitive damages for a defendant with a net worth of more than \$1 billion is \$20 million.

The nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff

It is not disputed that Regions had a fiduciary duty to the Trust and its beneficiaries. "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property and if the trustee has or procures his appointment as trustee by representing that he has a greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill. *Restatement (Second) of Trusts section 174.*

The rephensions of the defendant's wrongdoing begin first with Mr. Frank Parent. As found in the November 14, 2014 *Order and Opinion*, the record is clear that not only did Regions did not independently ascertain Mrs. Sheppard's needs, Regions also did not know Mrs.

Sheppard's standard of living, they also did not know her economic needs. Mr. Parent testified that he was only aware of how Mrs. Sheppard spent the money from the trust if she told him, or had bills sent directly to Regions. Mr. Parent had no idea how Mrs. Sheppard spent monthly disbursement or money that was directly transferred into her checking account. Mr. Parent testified that his regular operating procedure was to give Mrs. Sheppard anything that she asked for, and that is how he administered the trust during the 13 years he acted as the trust officer. Mr. Parent testified that he did not calculate how much principal was disbursed to Mrs. Sheppard annually. After having considered all the actions by Regions from the inception of the Trust until it was terminated, this Court finds that the overall breach of duty to be reprehensible.

Mrs. Sheppard testified during trial that when she learned she had no money, she "rolled up her sleeves and went to work." This was her effort to preserve the Trust value. She began taking care of the real property herself. She knew that the Trust funds were "severely eroded" and as a result, she did a significant amount of the upkeep to the properties. She cut tile herself, she recharged (or refilled) Freon on the air conditioners to save money, and she cleaned toilets. She also testified that she began the process of managing and repairing 35 duplex apartment rental units. She took over almost immediately the management process of the 35 units via dealing with tenants and even installed a phone in her house to communicate with tenants.

Evidence provided that Mrs. Sheppard acted swiftly and began to protect her own interests. She immediately sold the house in Florida, which she purchased for \$800,000, but sold it for an immediate loss. Further, Cheryl Lee, a forensic accountant, testified that she could not make sense of the records left by Regions' mismanagement of the properties. Regions was required to delegate the task of managing the properties with prudence and reasonable care. However, evidence revealed that Regions' incompetency with managing the Trust rental property caused a loss of

income to the Trust of \$863,711 between the years 1999-2011, broken down as follows:

- a. Lost revenue: \$52,235; and
- b. Excess expenses: \$811,477.

The Court also notes that Regions' actions and intentional concealment regarding the Trust really set the family on a course that would have been very different if Regions had performed its duties and informed Mrs. Sheppard that she had less than a million dollars in the trust. Instead of managing the trust with transparency, honesty, and competence, the Defendants failed to disclose that the trust had been eroded. Evidence reveals that the Defendant's actions had a severe impact on the family and the Trust. Ironically, the impact on the family Trust was exactly what Mr. Sheppard was trying to ensure never happened.

The defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm

Mr. Parent, the Trust officer, realized that the account had substantially eroded in 2008. He testified that he intentionally withheld this information from Mrs. Sheppard for over a year. Mr. Parent testified that he waited to tell Mrs. Sheppard that the Trust had less than a million dollars because he was hoping that the market would pick up. Also, Mr. Parent prepared a loan document that said Mrs. Sheppard was a retired investor making \$18,000 per month for three years. It is also the same loan document that he prepared so she could purchase the house in Florida.

The estate argues that Regions' motivation for withholding this information was to keep Mrs. Sheppard happy and to keep hundreds of thousands of dollars of the fees that Regions was generating from the Trust. The Court realizes that Regions was giving Mrs. Sheppard money at any time she wanted it and failed to inform her that she was headed for financial disaster.

Regarding the C37, the lack of institutional control document, this document was given to

the Plaintiffs during the course of this litigation. It revealed that Regions knew they had lost over \$18,545 of rent money they could not account for, and they concealed this information from Mrs. Sheppard. Mr. Womack, the Trust property manager, testified that he should have been told about it. He also testified that the bank should have disclosed this information to the beneficiaries as well.

The record is clear that not only did Regions not independently inform Mrs. Sheppard of the status of the Trust; Regions also did not ascertain her economic needs. Mr. Parent testified that he never tracked how much principal was paid to Mrs. Sheppard for her benefit. Mr. Parent testified that he was only aware of how Mrs. Sheppard spent the money from the trust if she told him, or had bills sent directly to Regions.

Regions' 30(b) (6) designee stated in his deposition that a needs analysis has to be performed. Regions knew they were required to conduct a needs analysis, yet they never did. There were hundreds of transactions conducted over the course of 11 years and not once did Regions take into consideration the needs of Mrs. Sheppard to maintain her present standard of living. They were giving her money any time she asked for it, distributing principal when income was available in the trust, and they never swept the account. They violated their own policies and this rises to the level of reckless behavior.

The duration of the defendant's misconduct and whether the defendant attempted to conceal such conduct

Mr. Parent testified that he reexamined the Trust in 2006, which resulted in a change in his interpretation. He changed his interpretation from gross versus net and never told anyone. However, the evidence revealed that he was handling it improperly. He knew and testified as much

that Mrs. Sheppard was supposed to get all the income and started invading the principal since 1998.

Additionally, Regions concealed C37, the loss of institutional control document from even their own attorneys and did not produce it until the case was embroiled in litigation. Not only did they conceal that fact, but evidence revealed that they also lied about it. When Mrs. Sheppard had questions, the Defendants lied stating that “we’re doing a great job.”

Any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages

Plaintiffs suggest that an appropriate punitive damages verdict is between \$500,000 and \$1.5 million. They contend that the verdict needs to be substantial in order to punish Regions and deter similar misconduct by Regions and other trustees. Regions is still in the trust business and the Plaintiffs argue that it would be unsurprising if Regions has mismanaged other trust accounts. A substantial punitive damages verdict would send Regions the message that it cannot utilize a “let the buyer beware” mentality when it serves as a fiduciary.

Mississippi’s punitive damages statute allows for punitive damages within the Court’s discretion when there is either gross negligence or actual malice or fraud. And here, we have both. Regions has a Trust department that had a duty to properly administer the trust. However, Regions breached this duty when they commingled trust assets, when they improperly managed the rental property and when they failed to manage the investment portfolio.

Frank Parent, who was in charge of this trust, failed to properly do his job. Jim Purdy was Mr. Parent’s supervisor and Purdy’s job was to supervise Mr. Parent by sitting down with him every year and go through every single trust account and conduct an administrative review of Mr. Parent’s duties. However, Mr. Purdy testified that he didn’t do this because he knew very little

about trusts.

Mr. Purdy's supervisor was Tom Thompson, Regions' 30(b) (6) designee. In his deposition, Thompson testified that he knew what Mr. Purdy's duties were, but he was unaware that Mr. Parent never conducted any administrative reviews.

In the investment department, Mari Scott was in charge of the investment portfolio. However, she failed to properly manage the investment portfolio. Evidence revealed that she took orders from Birmingham and she never questioned why the entire principal was being disbursed from the trust in such a manner.

Mike Womack, the property manager for most of the time that the trust was in Regions' care testified that he did not know if anyone was checking to make sure all of the rent payments were accounted for at the bank. Mr. Womack testified that he did not know if the invoices were reasonable or not. He also testified that he never monitored the net income of the rental property.

A pattern of reckless conduct existed in the administration of this trust, followed by a pattern of concealment that both independently and together justify punitive damages. Accordingly, this Court enters a **punitive damage award of one million dollars (\$1,000,000,00)**.

ATTORNEY FEES

Section 100 of the Restatement (Third) of Trusts covers liability of trustee for breach of trust. The comment to the section notes on two occasions that it is within the Court's judicial discretion to award attorney's fees:

....an award of attorney fees and other costs incurred by the trust or the beneficiaries in remedying the breach is not automatic but a matter of judicial discretion...

(b)(2). Attorney fees and other costs. The 'make whole' objective

(see Comment a) of recovery from a trustee under Clause (a) may include, in and appropriate case, the attorney fees and other litigation costs of a successful plaintiff...This element of recovery, however, is a matter of judicial discretion and not a routine part of trustee liability for breach of trust (see *id.*). Among the facts and circumstances courts consider in exercising their judgment in these matters are the nature and extent of trustee misconduct in committing the breach, the conduct of the trustee in presenting the accounting or defending the surcharge action, and the significance of imposing costs on the trustee as a deterrent to misconduct.

An award of attorneys' fees is proper due to the nature and extent of Regions' misconduct. The fixing of reasonable attorneys' fees is within the sound discretion of the trial court. *Gillis v. Gillis*, 830 So. 2d 640, ¶15 (Miss. 2002). The Mississippi Supreme Court explained the criteria for determining attorneys' fees in *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982). There, the Court stated:

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required. The novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) likelihood, if apparent to the client, that the acceptance of particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience and reputation, ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

In addition, the Mississippi Supreme Court has approved attorney fee awards based on a percentage of the recovery. See *Tupelo Redevelopment Authority v. The Gray Corp.*, 972 So. 2d 495 (Miss. 2007) (affirming award of 40% attorney's fee).

Analysis of the McKee factors

(1) Time and labor required

This case has been pending for over four years. Attorneys Philip Thomas and John Giddens provided the Court with affidavits, explaining the total amount of fees and expenses in this action. This was a complex case involving three distinct areas of conduct by Regions: (1) trust administration; (2) management of trust rental property; and (3) management of trust investment portfolio. There are over 130 filings on the docket reflected by Pacer. Both sides conducted extensive written discovery. There were fourteen depositions taken in the case including depositions in Colorado and Florida. The parties extensively briefed summary judgment issues and argued the motion at a hearing.

Additionally, the parties tried the case over a period of ten (10) days during 2013 to 2014. Seventeen witnesses testified at the trial including seven expert witnesses. Regions had three attorneys in the courtroom at all times during the trial. Post-trial, there was extensive briefing. Since that time, the Court and the parties have engaged in preparation for the examination of special master Mercer Bullard and attendance of two hearings on same, post-trial briefing, and status conferences as well as communications with defense counsel and client communications.

(2) Likelihood, if apparent to the client, that the acceptance of particular employment will preclude other employment by the lawyer

Plaintiffs' counsel contends they were not precluded from accepting other cases during the pendency of this action.

(3) The fee customarily charged in the locality for similar legal services

Plaintiffs' attorneys request a fee of \$300 per hour for Philip Thomas and John Giddens and \$200 per hour for Baskin Jones. These amounts are consistent with hourly rates typically charged by these attorneys and typical rates charged in this locality.

(4) Amount involved and the results obtained

The amount involved and results obtained in this action justify the amount of Plaintiffs' attorney fees.

(5) The time limitations imposed by the client or by the circumstances

Plaintiffs' counsel contends there were no significant time limitations imposed on them in this action.

(6) The experience, reputation and ability of the lawyers performing the services

Plaintiffs' counsels are experienced and highly qualified. Philip Thomas has practiced for 22 years. Philip Thomas has an AV rating by Martindale-Hubbell, a 10 of 10 rating by Avvo, is board certified by the National Board of Trial Advocacy, is listed in the Mid-South Superlawyers and Best Lawyers in America and has tried many complex cases to verdict in state and federal courts throughout Mississippi. Marshune Durham has worked as a legal assistant for almost 20 years.

John Giddens has practiced law in Mississippi for 23 years. Baskin Jones has practiced law in Mississippi for 5 years. Shannon Williams has worked as a legal assistant for almost 12 years.

(7) Whether the fee is fixed or contingent

Plaintiffs' counsel undertook this case on a contingency fee. The amount of the contingency is 33%. In addition, Plaintiffs' counsel advanced the fees in this case and have incurred approximately \$200,000.00 in expenses to date.

Based on the evidence and authorities cited above, the Court awards Plaintiffs attorneys' fees of \$966,740.00 and litigation expenses of \$200,000.00.

Final Special Master bills

Under Miss. R. Civ. P. 53(a), special master fees are taxable as costs. As the losing party, Regions will be taxed with costs regardless of the amount of the judgment in this action. Therefore,

the Court orders Regions to pay the remaining special master bills and further to reimburse Plaintiffs for any payments advanced. Special Master John Perry fee shall be set at \$20,000.00.

JOINT MOTION TO CLARIFY

During the hearing on January 12, 2017, the Court rendered a bench ruling, finding that the eight percent (8%) interest will be applied to the total damage award of \$2,477,615.00. As it relates to the date of the hearing on the pre-judgment interest, that date will terminate from the date of filing to September 16, 2016.

CONCLUSION

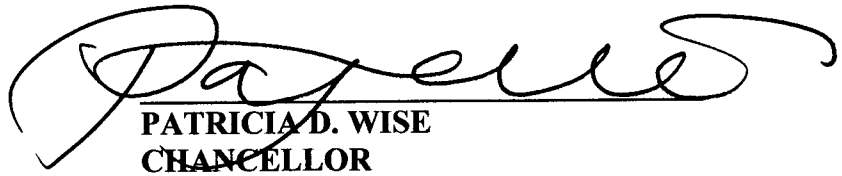
“A trustee who commits a breach of trust is chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered or the amount of any benefit to the trustee personally as a result of the breach.” *Restatement of (Third) of Torts § 100.*

This Court has found that Regions has breached its fiduciary duties to the Patricia Hall Sheppard Trust. Specifically, Regions has breached its fiduciary duty to properly administer the trust, Regions has breached its duty of loyalty, Regions commingled assets, Regions has breached its duty to prudently manage the rental property, and Regions has breached its duty to manage the investment portfolio.

Accordingly, this Court enters a **punitive damage award of one million dollars (1,000,000.00)** awards Plaintiffs **attorneys’ fees of \$966,740.00** and **litigation expenses of**

\$200,000.00, and eight percent (8%) interest shall be applied to the total damage award of \$2,477,615.00, with pre-judgment interest beginning from the date of the filing on June 12, 2012, and terminating on September 16, 2016.

SO ORDERED, ADJUDGED, and DECREED this the 13th day of April 2017.


PATRICIA D. WISE
CHANCELLOR