

IN THE CHANCERY COURT OF HINDS COUNTY
FIRST JUDICIAL DISTRICTMISSISSIPPI
SEP 16 2016
DODIE JEAN CARR, CHANCERY CLERK

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 June 21, 2016, on the determination of 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 to aid the Court's determination of damages*. Having heard arguments on the matter and all premises considered, this Court finds the following:

FACTS

Regions and its predecessors (Deposit Guaranty Bank and AmSouth Bank, which will collectively be referred to as “Regions”) served as Trustee and administered the Patricia Hall Sheppard Trust for thirteen (13) years, from 1998 to the end of 2011, during which income and principal from the Trust was paid to or on behalf of Mrs. Sheppard. At the inception of the Trust in 1998, the Trust was funded when the estate transferred \$2,615,292.00 in non-real estate assets and thirty-three (33) residential rental properties. When Regions was terminated as Trustee at the end of 2011, \$602,858.61 in non-real estate assets as well as the residential rental properties were transferred to the successor trustee.

Plaintiffs alleged that \$3,617,249.75 of trust principal was paid out during the thirteen (13) years that Regions was Trustee, which Plaintiffs allege constituted principal invasions. Regions counters that \$2,383,597.35 in disbursements of principal were paid out over the thirteen year period that Regions administered the Trust.

A bench trial commenced in November of 2013 and concluded in July of 2014, with approximately nine (9) days of testimony given, and the Court subsequently issued its thirty-four (34) page *Order and Opinion of the Court* addressing liability, but declining to rule on damages. Instead, the Court elected to appoint a Special Master to aid the court in determining damages pursuant to MRCP 53. Each party was ordered to submit their candidates for consideration as special master. After having submitted the candidates, the Court appointed two (2) special masters for the task of calculating damages, Mr. Charles Phillips and Mr. John Perry. Mr. Phillips resigned before rendering an opinion or submitting a report.

Mr. Perry provided his initial report on December 3, 2015 and found damages in the amount of \$2,414,151.00 for investment portfolio costs and \$863,711.00 for real estate costs for a

total of \$3,277,862 in losses. However, Mr. Perry resigned prior to the first damage hearing due to his unavailability to attend the court hearing. Ultimately, the Court appointed Mr. Mercer Bullard as the Special Master, who is an expert within the securities/corporate field and has acted as an expert witness in major securities cases.

Special Master Bullard prepared his initial report on November 30, 2015, presenting a damage amount of \$2,313,438.00 before subtracting the transfer amount or adding any prejudgment interest. He then presented an amended report in January 2016, but his damage calculation did not change. The first damage hearing was held in February 2016, and it was discovered that the Special Master had not reviewed the Court's *Order and Opinion* on liability. The hearing recessed and the Special Master subsequently revised his report, applying a different methodology.

In the next report, the Special Master's damage amount changed to \$2,817,204.39 before subtracting the transfer amount or adding any prejudgment interest. Then, on June 17, 2016, before the second damage hearing, the Special Master again changed his damage amount, this time increasing it to \$3,080,473.95, before subtracting the transfer amount or adding prejudgment interest. He provided these amendments via email.

The second damage hearing resumed on June 21, 2016. At the conclusion of the hearing, the parties were instructed to submit findings of fact and conclusions of law as to financial loss. The Court shall consider the same and finds the following:

Option One: Submitted by the Special Master

The Special Master asserts that the allocation of assets in a Trust's portfolio should reflect the purpose that the Trust is intended to serve. In this case, he provides that the primary purpose of the Trust was to ensure that Mrs. Sheppard would have sufficient income to maintain her

standard of living for the rest of her life. Sheppard's expected pre-tax maintenance would have required distributions of \$170,631 in 1999.

Further, the Special Master submits that The Trust's assets should have been invested to provide for 100% of Sheppard's maintenance needs for the rest of her life. Sheppard was unemployed and did not have the ability to earn more income than a small fraction of what would be necessary to support her standard of living. There is no evidence that she had any source of income outside of the Trust. The Trust therefore should have been treated as her sole source of income.

According to trial testimony, Mrs. Sheppard was 45 years old when her husband died; at that time, the Special Master argues that her life expectancy would have been about 80 years old. There was a significant risk that Mrs. Sheppard would live longer than average, which would require planning for a number of years to account for the possibility that she would live longer than expected. Therefore, the Special Master applied a ten-year buffer on the assumption that Mrs. Sheppard might have lived to age 90. Under this assumption, the Special Master argues that Regions was obligated to allocate Trust assets to ensure that it would support Mrs. Sheppard for 45 years, or until 2043.

The Special Master submits that modern portfolio theory holds that the expected investment performance of a portfolio over the long term is increased by diversifying among different asset classes. The Trust therefore should have been invested in a mix of fixed income and equity investments. He notes that, in this sense, it is widely accepted that "equity" includes equity investments in real estate.

Mr. Bullard contends by providing that real estate and stocks should not be viewed as a single class asset. A portfolio that includes stocks and some real estate assets would be less risky

than a portfolio that comprised only stocks. The Special Master also notes that there is no widely accepted view regarding the appropriate mix of stocks and real estate in the equity part of a portfolio. Early in the damages period, approximately 40% of the Trust's assets were invested in real estate, 40% in stocks (7.4% in Worldcom stock), and 20% in fixed income investments. This, he argues, represents an overly aggressive allocation to real estate.

In light of the Trust's 40% allocation to real estate, the Special Master found that Region's allocation of up to 93% of the portfolio's aggregate assets to equity, including more than 82% of its securities portfolio to stocks, was a breach of its fiduciary duty for purposes of the Court's finding of mismanagement of the securities portfolio. While a 40% allocation to real estate may have been permissible, this allocation "militated for a more conservative treatment of the securities portfolio."

On this basis, the Special Master initially allocated the Trust evenly between stock and fixed income. After modeling various assumptions regarding expected future income on stocks, fixed income instruments and the real estate portfolio, he concluded that, as of 1998, an initial 50/50 securities portfolio allocation would have supported Sheppard until 2043 and provided a substantial residual amount for the Residual Beneficiaries. This initial allocation was made with the understanding that each year the Trust's balance and expected income would be reviewed to ensure that such a 50/50 allocation continued to be appropriate.

Although Mr. Bullard contends that a 50/50 baseline allocation would have been reasonable, he opined that a 60/40 allocation would not have been unreasonable, but would reduce the damages by \$134,000. Therefore, the Special Master opined that assuming a 50/50 stock/fixed income allocation, a trustee would have refined the portfolio allocation on an ongoing basis to generate enough, but not more than enough, for Sheppard's maintenance.

Further, he notes that a trustee, therefore, would have managed the Trust's income so as to avoid distributions that were not necessary to support Sheppard. Such excess income would have provided Sheppard with a windfall at the expense of the Residual Beneficiaries. Therefore, this Court will consider both the 60/40 and 50/50 baseline allocations in making its determination.

Plaintiffs contends that damages should include disgorgement of Region's fees and the Special Master agreed. He divided the fees into four categories. One category appears to relate to the loan to Sheppard that financed the purchase of the Lodge. He concluded that this is not an ill-gotten fee as it was a Sheppard expense.

Another category relates to transactions involving the real estate portfolio. This would constitute an ill-gotten fee, as it was paid to Regions in connection with its Trustee services. However, this fee would have been restored to the Trust via either the estimated real estate income or principal invasions. In other words, the Special Master argues that Regions' repayment of these fees is reflected in the damages estimate.

A third category ("Management fee-- AmSouth Bank from fees & commissions nonaccrual sale of property fee") also appears to relate to the real estate portfolio. This was an ill-gotten fee, but it would have been reflected in the damages estimate.

The fourth category reflects general fiduciary fees and totals \$457,780.97. This fee presumably covers the management of the securities and real estate portfolios. The Special Master concludes that these were ill-gotten fees. However, the damage estimate as related to the real estate portfolio reflects Regions' repayment of the general fees attributable to the real estate portfolio.

Regarding Cheryl Lee's invoice, Plaintiffs' contend that Regions is liable for an invoice of approximately \$22,000 for professional services provided by Cheryl Lee and her staff in 2010. Mrs. Sheppard had asked Lee to do this review, which would appear to make this a Sheppard

expense. However, Plaintiffs claim that Lee billed the Trust for these services, and she testified that it was her intention to do so.

Lee testified that the expense was substantially increased because of the difficulty in obtaining and evaluating Regions' documents relating to the Trust's real estate portfolio. She testified regarding this difficulty and there is substantial evidence in the Record that supports her testimony. Therefore, the Special Master assumed that the Court's finding that Regions mismanaged the real estate portfolio includes a finding consistent with Lee's testimony, and that the Court therefore would view Regions as responsible for extra work that was required of Lee on that account.

With regard to principal invasions of the Trust, the Special Master calculated Mrs. Sheppard's loss for years 2005, 2007, 2009, 2010, and 2011. Special Master Bullard considered the effect of applying his alternative measure of education expenses. The shortfall for 2007 was reduced to \$42,974.00; in 2009 to \$74,617.00; in 2010 to \$69,164.00; and in 2011 to \$147,704.00. In each year, the Special Master found that Mrs. Sheppard's net excess income was higher. These incomes, he reported, resulted in lower invasions and higher damages. In his professional opinion, he testified that he would have invaded the principal to cover only half (rather than all) of the 2011 shortfall based, in part, on Sheppard's net excess income of \$279,721. In 2005, Sheppard's income fell short of her maintenance by \$23,400, primarily due to \$19,275 in education expenses and the purchase of the RV for \$45,000. At this point, Sheppard had received \$351,948 in income in excess of her maintenance.

In 2007, Sheppard's income fell short of her maintenance by \$65,915, primarily due to \$43,363 in education expenses and the purchase of a \$73,515 Lexus 480 for Sheppard. At this point, Sheppard had received \$365,494 in income in excess of her maintenance.

In 2009, Sheppard's income fell short of her maintenance by \$69,559, primarily due to \$30,262 in education expenses and a \$35,000 decline in income from 2008. At this point, Sheppard's net excess income had declined from \$365,494 in 2007 to \$300,500 in 2009.

In 2010, Sheppard's income fell short of her maintenance by \$93,147, primarily due to educational expenses. These include \$10,000 for Victoria's New York apartment, \$11,170 for her Millsap tuition, and \$5,820 for James' high school tuition. She also paid \$2,734 for Victoria's car loan and \$2,000 for medical expenses above her medical maintenance allotment. At this point, Sheppard's net excess income had declined to \$265,303, and she could reasonably expect to experience shortfalls until her children concluded their schooling (or interest rates increased).

In 2011, Sheppard's income fell short of her maintenance by \$177,348, primarily due to educational expenses. These include \$29,300 for Victoria's New York apartment and \$11,755 for James' high school tuition. Sheppard also paid \$21,701 for Victoria's car loan, and Trust income had declined more than \$40,000 from its peak in 2008. At that point, her net excess income had declined to \$218,729. Again, a significant part of the shortfall was due to expenses that benefited certain Remainder Beneficiaries over others, including \$21,701 for Victoria's car loan. In view of Sheppard's declining net excess amount, rising shortfalls, the likelihood of education expenses rising further, and reduced Trust income, the Special Master concluded that principal should be invaded to cover the entire shortfall. As of January 2012, her net excess income remained at \$218,729, and invasions totaled \$259,118.53.

Based on the above assumptions and analysis, the Special Master estimated that the total value of the Trust's securities portfolio would have been \$2,817,204.39 as of January 1, 2012.

Option Two: Submitted by the Estate of Patricia Hall Sheppard

The estate of Patricia Hall Sheppard contends that Regions was grossly negligent in disbursing \$3,850,000 in trust principal. The estate further contends that there was no need for a trust to preserve the assets for the remaindermen if Regions was going to treat principal and income as “one pot of money.” Under Regions’ theory of the trust document, Buddy Sheppard could have saved considerable fees by appointing an investment company to invest the funds while allowing Pat Sheppard to draw out unlimited principal for any reason. This was clearly not Mr. Sheppard’s intent and this Court found Regions was liable for breach of trust.

The estate believes that the Court has several options for determining the amount of damages. These options include:

- adopt John Perry’s Special Master Report;
 - *Mr. Perry did not make himself available to the Court and as such, his report was not considered.*
- adopt The Special Master Bullard’s Report after adding the amount of damages caused by Regions’ mismanagement of the Trust rental property; or
- take both Special Masters’ Reports under advisement and determine damages on its own.

Moreover, the estate argues 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 estate presented the Court with the following chart, summarizing the damages opinions and recommendations from the experts and special masters: *Note: Mr. Fender is an investment*

consultant called by the Plaintiff to testify in the liability phase hearing.

	Fender investment portfolio model	Fender principal reimb. model	Special Master Perry Report	The Special Master Report 2
Investment/ principal	\$2,414,151	\$3,850,000	\$2,414,151	Not specified
Real estate	\$863,711	\$863,711	\$863,711	Not specified
Total	\$3,277,862	\$4,713,711	\$3,277,862	\$4,291,617

The estate is of the opinion that the Court should adopt one of these amounts as the amount of damages to the Trust, subject to an adjustment for rental property damages if the Court adopts The Special Master's report.

The Special Master testified at the June 21, 2016 hearing and states in his report that he did not add damages caused by Regions' mismanagement of the Trust rental property. The Special Master's report contained a thirteen page discussion of real estate income even though he did not plan to include an amount in his damages computation.

Mr. Bullard's reasoning for not including rental income was because the rental income was to be paid out to Ms. Sheppard. However, the estate argues that this reasoning is flawed considering that Regions never argued that damages from mismanagement of the rental property were not recoverable.

The estate argues that this is consistent with the Restatement of Trusts, which states

“ordinarily the trustee (or a successor) receives the amount of a recovery and retains it or distributes it, in whole or in part, as appropriate to the terms and circumstances of the trust.” *Restatement (Third) Trusts* § 100 p. 63.

Submitted by Remainder Beneficiaries James Patrick Sheppard, Jr. and Alexandria Victoria Sheppard

The Plaintiffs contend that if the Court is going to adopt in whole or in part any of the Special Masters’ reports, they suggest utilizing one of the following two (2) reports:

- A. The first report as corrected, Trial Exhibit 135 totaling \$4,648,946.00 and add an appropriate amount for pre-judgment interest and add the amount for Cheryl Lee’s charges.
- B. If the Court is going to adopt the most latest rendition of Mr. Bullard’s report dated June 18, 2016, Plaintiffs suggest the Court award the amount of \$2,477,615.00, add the Defendant’s 8% in prejudgment interest starting on June 22, 2012, the day the *Complaint* was filed through the date of the hearing and add in the amount of Cheryl Lee’s charges, and add in the \$863,711.00 for Real Estate damages plus pre-judgment interest on this amount.

In the alternative, Plaintiff requests this Court take all of these Special Master reports under advisement, giving them only an advisory effect, and fashioning an appropriate remedy based on the evidence presented and the testimony heard during the trial. The Court should consider the applicable law relating to the appropriate assessment of damages and any other factors the Court deems relevant and fashion an appropriate award with the end goal of making the Sheppard Trust whole.

Option Three: Submitted by Regions Financial Corp.

The Defendants, Regions, Financial Corp., requests this Court to deny damages, or, in the alternative, award a reasonable amount based on the credible evidence, applicable case law and statutes.

Regions argue that if damages are awarded in this case, Regions submits that only the benefit received by Regions during the administration of the Trust should be awarded. In the alternative, should the Court adopt The Special Master's damage calculations, Regions requests that several modifications be made to conform to the credible evidence, applicable case law and statutes.

Further, Regions adopted and renewed all previously raised objections pertaining to damages, including evidentiary objections, and to the Court's use of special masters, both substantively and procedurally. Regions continues to maintain that it did not breach any fiduciary duty owed to the Plaintiffs and no damages should be awarded because the purpose of the Trust was to take care of Mrs. Sheppard. Regions further makes the argument that rather than laying down a network of restrictions in great detail, Mr. Sheppard intended, and in turn, gave the Trustee (Regions) greater latitude in distributive decisions, all of which Regions contends is evidenced by the language used in his Will.

According to Regions, the damage calculations used throughout the course of this litigation are neither credible nor reliable. Regions contends that the Plaintiffs' expert during the trial, Mr. Fender, nor the special master proposed by the Plaintiffs, Special Master Bullard, were able to calculate damages with any degree of certainty. To support this argument, the Defendants argue that Mr. Fender "repeatedly miscalculated his damage models" because his damage calculations for "lost principal of investment portfolio" began at \$5,794,334.60, but were later reduced to

\$2,414,151.00. Further, they argue that Mr. Fender then miscalculated the present value of the alleged damages.

This Court chose not to adopt his damage models and instead, elected to appoint special masters to determine the issue of damages.

Regions submits that the resulting damage calculations submitted by the Special Master are arbitrary and capricious and should not be adopted. This Court should not award damages based on the uncertainty and speculation presented. Instead, if the Court elects to award damages at all, it should award damages which represent the amount of benefit to the trustee personally as a result of the breaches found, which is the only measure of damages they feel can be determined to a reasonable certainty.

Regions further provides that awarding damages which represent the monetary amount Regions received while administering the Trust is also the most equitable approach in this case, as Mrs. Sheppard and her children received the benefit of principal distributions during the administration of the Trust. Accordingly, they personally benefitted from what the Court has ruled were breaches of fiduciary duties. If the Court were to follow this damage approach, it would be prohibiting Regions from receiving benefit for its administration of the Trust. At the same time, it would respect the rule that Mrs. Sheppard, a competent trust beneficiary who requested and benefitted from all of the challenged disbursements, may not receive an inequitable windfall from the Trustee.

Moreover, Regions argue that if the Court should adopt the Special Master's recommendations as to damages in this case, Regions requests that modifications be made to conform to the credible evidence, applicable case law, and statutes. Regions further submits and Special Master acknowledged, that the portfolio's ending value of \$602,858.61, which was

transferred along with the real estate to the successor trustee, must be subtracted from his estimation of what the portfolio value would have been, which was \$3,080,473.95.

With regard to the investment model, Regions submits that damages based on Special Master Bullard's 50/50 investment model is "entirely arbitrary and capricious," and \$134,000.00 should be subtracted from his damage calculation.

Regions has continually objected to the tax rate Special Master Bullard applied to Mrs. Sheppard, arguing that Bullard's application of a 20% tax rate for Mrs. Sheppard is "implausible and unsupported by the evidence." Regions further contend that there must be evidence to support an enormous amount of deductions to reach the 20% tax rate applied by Special Master Bullard and that application of a higher tax rate in Bullard's damage calculations raises the amount of money Mrs. Sheppard needed annually for support, thereby reducing damages.

Regions provides that the only evidence in the record upon which to reduce Ms. Sheppard's tax rate is the fact that she had two (2) dependent children, charitable contributions of \$500 per month (\$6,000 per year), and real estate taxes on her home, the amount of which was between \$7,000-8,000 each year; even giving Plaintiffs the benefit of adding every conceivable deduction, like car tags, medical expenses, and additional amounts for miscellaneous deductions, Ms. Sheppard would never achieve the 20% tax rate applied by the Special Master. The Special Master admits that he "didn't do that analysis," that his method was more of a "rough estimate.

Regions also objects to an application of less than a 28% tax rate and requested that, based upon the evidence, the Special Master should revise his entire damage model to reflect a higher tax rate for Ms. Sheppard or provide explanation as to what evidence supports other deductions. To support this claim, Defendant had sample tax returns prepared for each year, allowing for all deductions supported by the evidence, and provided a summary of these resulting tax rates to the

Special Master. The resulting effective tax rates never fell below 28% and went as high as 33%.

Regions also objects to the Special Master's approach of not treating management fees as an allowable expenditure because it results in an "inequitable windfall to the Plaintiffs." Essentially, Regions is arguing that this puts the Plaintiffs in a better position than they would have been, stating, "For any bank to serve as the Trustee for thirteen (13) years, the Trust would have incurred fees. Thus, in determining what the amount of damages should be in this case, if the Court elects to award a monetary judgment to restore the Trust where it would have been, the Court should allow for management fees to be charged."

Accordingly, Regions submits that the Special Master's damage model, if adopted, should be revised to allow for the management fees to be paid as allowable expenses from the Trust. This modification results in an additional \$461,950.40, in allowable trust expenditures and decreases damages accordingly.

The Special Master found some expenses, such as fees paid for fiduciary tax returns and legal fees associated with the estate, to be Trust expenses and not costs associated with Mrs. Sheppard's standard of living. Regions agrees to this. However, they add that the special master's calculations fail to account for how those expenses would then be paid. Similarly, storage fees for Mr. Sheppard's business records were also a trust expense for which the Special Master did not account. Therefore, Regions contends that this results in the damage calculations improperly excluding \$158,942.28 in administrative expenses, such as the costs of preparing fiduciary tax returns (\$22,301.99), the actual fiduciary tax payments (\$121,115.00), legal fees incurred by Mr. Sheppard's estate (\$13,644.29), and costs to store Mr. Sheppard's business and real estate records (\$1,881.00).

Accordingly, Regions submits that Special Master's damage model must be adjusted to account for expenditures necessary for any prudent trustee to manage the Trust, specifically including the fiduciary taxes paid and the expenses associated with the preparation of the same. Therefore, Regions requests this Court to adjust the damage calculation to account for an additional \$158,942.28 in allowable expenses and decrease damages accordingly.

Further, if damages are awarded in this case, Regions submits that only the benefit received by Regions during the administration of the Trust should be awarded, which equates to the \$461,950.40 in management fees collected by the Defendant. They further contend that this amount is not speculative and can be determined without conjecture. In the alternative, should the Court adopt the Special Master's damage calculations, Regions requests that the Court take Mr. Bullard's damage calculation of \$2,477,615.34 and, in order to conform to the credible evidence, applicable case law and statutes, make the following reductions:

- \$134,000 in applying the 60/40 investment model;
- \$124,000 in applying a 25% tax rate to Mrs. Sheppard;
- \$461,950.40 for management fees; and
- \$158,942.28 for administrative expenses.

Thus, Regions submits that the damage calculation should be reduced to \$1,598,722.66. Regions further requests that both Cheryl Lee's litigation costs and pre-judgment interest be denied.

Considering all the testimony provided, findings, and all parties' recommendations, this Court is persuaded by Option 1 submitted by the Special Master.

LEGAL ANALYSIS

Mississippi Rules of Civil Procedure, Rule 53 provides that “the court shall accept the special master’s findings of fact unless manifestly wrong. The court after hearing may adopt the report or modify it or may reject it in whole or in any part or may receive further evidence or may recommit it with instructions.” This Court is provided broad discretion in making a finding concerning damages. *Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc.*, 716 So.2d 200, 204 (Miss.1998).

However, it is well settled within Mississippi law that the plaintiff has the burden of proving any amount of damages with reasonable certainty. *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736, 740 (Miss.1999). To satisfy this burden, plaintiffs must provide the court with a “reasonable basis” for determining the amount of damages caused by the defendant’s conduct. *Par Indus. v. Target Container Co.*, 708 So. 2d 44, 50 (Miss. 1998). Specifically, plaintiffs must prove that both the claimed losses can be calculated with reasonable certainty and that the losses can be traced to the alleged breach of duty with reasonable certainty. *Southeastern Med. Supply, Inc. v. Boyles, Moak & Brickell Ins., Inc.*, 822 So. 2d 323, 328 (Miss. Ct. App. 2002).

The reasonable basis rule ensures that damages are not awarded on speculation and conjecture. *Adams v. U.S. Homecrafters, Inc.*, 744 So. 2d 736, 740 (Miss. 1999); *see also Par Indus.*, 708 So. 2d at 50; *First Nat’l Bank v. Olive*, 330 So. 2d 568, 572 (Miss. 1976) (“As a general rule, damages which are uncertain, contingent or speculative are not recoverable.”) The rule must be carefully applied when plaintiffs allege losses that could be attributable to causes other than the defendant’s conduct. In such cases, plaintiffs must prove the part of their damages that was caused by the defendant; the fact finder may not speculate when apportioning part of a loss to the conduct

of a particular defendant. *Reeves*, 141 So. 3d at 382-83; *Dennis v. Prisock*, 181 So. 2d 125, 128 (Miss. 1965).

Both The Restatement (Third) of Trusts §100 and Mississippi Code § 91-8-1002(a) (2014) provide that a trustee who commits a breach of trust is liable for either the amount required to restore the Trust to what it would have been had the breach not occurred or the profit the Trustee made by reason of the breach - whichever is greater.

Regions contends that since the amount required to restore the trust cannot be determined with any certainty, the Court should not attempt to guess, speculate, or assume. Rather, the Court should use the fiduciary fees collected by Regions, which total \$461,950.40, as the only appropriate measure of damages in this case. On the other hand, the Plaintiffs presented the Court with three (3) options to consider, which have been previously outlined.

The Portfolio's Ending Balance

The Special Master acknowledges and agrees that the portfolio's ending value of \$602,858.61, which was transferred along with the real estate to the successor trustee, must be subtracted from his estimation of what the portfolio value would have been, which was 3,080,473.95. Accordingly, the corrected starting value of The Special Master's damage estimation is \$2,477,615.34.

Ms. Sheppard's Applicable Tax Rate

Application of a higher tax rate in the Special Master's damage calculations raises the amount of money Mrs. Sheppard needed annually for support, thereby reducing damages. Therefore, Defendant has continually objected to the tax rate the Special Master applied to Ms. Sheppard, arguing that the Special Master's application of a 20% tax rate for Ms. Sheppard is implausible and unsupported by the evidence. They further contend that there must be evidence to

support an enormous amount of deductions to reach the 20% tax rate applied by the Special Master, or such results in a blatant application of arbitrary methodology.

The evidence supports a finding that a deduction in Ms. Sheppard's tax rate is attributed to the fact that she had two dependent children, charitable contributions of \$500 per month and real estate taxes on her home, which equaled between \$7,000-\$8,000 per year.

The Special Master testified that an application of a 25% tax rate could be viewed as reasonable and also admitted that it would lower his damage calculation by an additional \$124,000.00, yielding \$2,219,615.34 in financial losses.

Mississippi law says that it "will not disturb a chancellor's judgment when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong or clearly erroneous, or applied an erroneous legal standard." *Chapel v. Chapel*, 876 So.2d 290, 292 (¶ 8) (Miss.2004) (citing *Townsend v. Townsend*, 859 So.2d 370, 371-72 (¶ 7) (Miss.2003)). Specifically, this Court is provided broad discretion in making a finding concerning damages. *In re Estate of Temple*, 780 So. 2d 639, 642 (Miss. 2001).

In this case, there was substantial direct evidence of tax payments by Sheppard, but the Special Master contends that they were not useable for purposes of determining her effective tax rate. He also reported that Mississippi tax rates have been approximately 5% since 1998 and federal income taxes on a single person in 1999 would have been 27% on the first \$130,250.00 and 36% on any income above that amount up to \$283,150.00.

Applying these rates, the Special Master reported that Sheppard's blended effective federal/state tax rate would have been approximately 35%. However, the Special Master reported that Sheppard would have had tax deductions that would have substantially reduced her effective tax rate. She had two dependents and substantial real estate taxes.

Therefore, Special Master Bullard concluded that effective federal/state tax rate in 1999 and every year thereafter was 20% and the Court holds that Ms. Sheppard's applicable tax rate should remain the same.

Management Fees

The Special Master agrees with the Plaintiffs that damages should include the disgorgement of Defendant's fees. As previously outlined, the Special Master divided the fees into four categories and the Court reviewed them.

In awarding damages, Mississippi Code Section 91-8-1002(a) provides that a trustee who commits a breach of trust is liable for:

- (1) The greater of:
 - (A) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
 - (B) The profit the trustee made by reason of the breach; and
- (2) Any measure of damages otherwise provided by law.

In this case, the Court held that the Defendant failed to administer the trust properly and should not be allowed to retain any management fees. The Trust would have incurred fees if it had been properly managed. The fees might have been equal to or greater than the fees charged by the Defendant. If so, notwithstanding the possible unjust enrichment to the Defendant there would be no compensable harm to the Trust as a result of having paid fees to the Defendant.

Accordingly, this Court will not treat the management fees as an allowable expenditure.

Trust Expenses

The Special Master and the Defendant both agree that some expenses, like fees paid for fiduciary tax returns and legal fees associated with the estate, to be Trust expenses, not costs associated with Ms. Sheppard's standard of living. However, the Defendant does not agree with the Special Master not accounting for how these expenses will be paid. Also, the Defendant contends that storage fees for Mr. Sheppard's business records were an expense for which Mr. Bullard failed to account, resulting in him excluding \$158,942.28 in administrative expenses from his damages calculations (\$22,301.99 for Cheryl Lee's professional services and the actual fiduciary tax payments of \$121,115.00, \$13,644.29 in legal fees incurred by Mr. Sheppard's estate, and \$1,881.00 for costs associated with storing Mr. Sheppard's business and real estate records).

During the hearing, the Special Master testified that he reported in his findings that the Defendant maintained "inadequate record keeping." Plaintiffs contend that Regions is liable for an invoice of approximately \$22,000.00 for professional services provided by Cheryl Lee and her staff in 2010. Sheppard had asked Lee to do this review, which would appear to make this a Sheppard expense. However, Plaintiffs claim that Lee billed the Trust for these services, and she testified that it was her intention to do so.

Accordingly, the damage calculation for administrative expenses shall remain at \$158,942.28.

Pre-Judgment Interest Rate

The Defendant objects to an award of prejudgment interest "given that the prime rate is presently 3.5%." Further, the Defendant submits that pre-judgment interest cannot be applied in this case because the damages in this case are not liquidated. Regions provides that application of an 8% interest rate in this case would result in a "windfall" to Plaintiffs and a penalty to the

Defendant. In the event prejudgment interest is awarded by this Court, the Trust should not be entitled to a higher interest rate than the money would have earned in the market.

The issue of prejudgment interest is governed by applicable state law. Under Mississippi Code Annotated §75-17-7, this Court is granted with the discretion to determine the application of pre-interest judgment. Pursuant to the statute:

All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.

Miss. Code Ann. § 75- 17- 7 (2000). However, our Mississippi Supreme Court has interpreted this statute as follows:

An award of prejudgment interest rests in the discretion of the awarding judge. Under Mississippi law, prejudgment interest may be allowed in cases where the amount due is liquidated when the claim is originally made or where the denial of a claim is frivolous or in bad faith. No award of prejudgment interest may rationally be made where the principal amount has not been fixed prior to judgment.

The purpose of pre-judgment interest is to provide the parties with compensation for the detention of money that is overdue. *In re Guardianship of Duckett*, 991 So. 2d 1165, 1182 (Miss. 2008). Stated another way, “prejudgment interest compensates for the time value of money, and thus is often necessary for full compensation.”

If a judgment, years after the fact, provides only the amount of damage sustained by the claimant at the time of the incident, the claimant will have lost the opportunity to invest the amount of the damages and to earn a return on that investment. His compensation will not be complete,

for he has not recovered damages for the opportunity costs incurred between the time of injury and the time of judgment.” *Id.*

While the determination regarding pre-judgment interest is for this Court to decide, the simple rate of 8% has been applied in a number of Mississippi cases as it is the legal rate of interest for “notes, accounts, and contracts” under Mississippi Code § 75-17-1. Therefore, the Plaintiff is entitled to pre-judgment interest of 8% from the date of the filing of the Complaint filed on June 22, 2012, compounded annually.

CONCLUSION

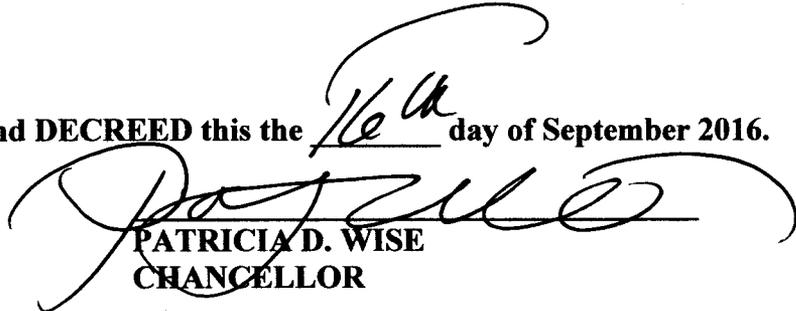
“A trustee who commits a breach of trust is chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered or the amount of any benefit to the trustee 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 adopts the latest rendition of Mr. Bullard’s report dated June 18, 2016, and award the amount of \$2,477,615.00, to the Plaintiffs. An additional 8% in prejudgment interest will be added to this amount starting on June 22, 2012, the day the Complaint was filed

through the date of the hearing, compounded annually. Further, add in the amount of Cheryl Lee's charges of \$22,000.00, and add in the \$863,711.00 for Real Estate damages. The Court further instructs the parties to compute this amount based on the Court's damages award and submit the same for this Court's approval.

SO ORDERED, ADJUDGED, and DECREED this the 16th day of September 2016.



PATRICIA D. WISE
CHANCELLOR