IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
Tommy R. Peeples,	)	Case No.: 04-11019-BGC-13
	)	
Debtor.	)	

ORDER

The matters before the Court are:

1. An Objection to Confirmation filed on January 24, 2005, by Vanderbilt Mortgage and Finance, Inc.;

2. A Motion to Dismiss filed on January 24, 2005, by Vanderbilt Mortgage and Finance, Inc.;

3. An Objection to Confirmation and Motion to Dismiss filed on January 25, 2005, by the Chapter 13 Trustee;

4. Confirmation of the debtor's plan;

5. A Motion to Withdraw as Attorney filed on March 1, 2005, by Donna Beaulieu.

After notice, hearing was held on May 3, 2005. Appearing were the debtor; Amy Thompson for the debtor; James P. Wilson, Jr. for Vanderbilt Mortgage and Finance, Inc.; Burt Newsome for First National Bank of Shelby County; and Sims Crawford, the Chapter 13 Trustee.

At the hearing the debtor made an oral motion to convert the existing Chapter 13 case to Chapter 7. Both appearing creditors opposed the motion.

Based on the plain language of section 1307(a) of the Bankruptcy Code, the Court finds that the debtor has an absolute right to convert this Chapter 13 case to Chapter 7.

In In re J.B. Lovell Corp., 876 F.2d 96 (11th Cir. 1989) the Court of Appeals for the Eleventh Circuit interpreted the language of section 706(a) to provide a debtor with a one-time right to convert a case from Chapter 7 to another chapter. Section 706(a) reads:

> The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

11 U.S.C. § 706(a).

Of that language, the Court wrote, "Under § 706, the Code grants debtors a one-time absolute right to voluntarily convert a Chapter 7 proceeding against them into a Chapter 11 reorganization proceeding or Chapter 13 individual repayment plan...." Id. at 97.

The language in section 1307(a) is almost identical. It reads:

> The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.11 U.S.C.A. § 1307

In In re Frausto, 259 B.R. 201 (Bkrtcy. N.D. Ala. 2000), this court recognized the relationship between these two sections and accepted that a Chapter 13 debtor has the absolute right to convert to Chapter 7. This Court wrote:

> Chapter 13 is a voluntary process. No one can force a debtor into Chapter 13. No involuntary petitions may be filed and debtors cannot be forced to convert cases filed under another chapter of the Bankruptcy Code to Chapter 13. See 11 U.S.C. § 303(a) and § 706(c). And once a debtor files a Chapter 13 case, no one may force a liquidation of that debtor's assets, that is except by requesting and obtaining conversion of the case to Chapter 7. See 11 U.S.C. § 1307(c).
>
> There are however, no such limitations on the Chapter 13 debtor. Like a Chapter 7 trustee, a Chapter 13 debtor has the authority to and choice to administer the "property of the estate." That debtor may avoid the liquidation of assets by voluntarily filing a Chapter 13 petition or may accept liquidation by voluntarily converting a Chapter 13 case into a case under Chapter 7. See 11 U.S.C. § 706(a). The Chapter 13 debtor, rather than the Trustee, is specifically endowed, pursuant to section 1303, with the authority, "exclusive of the trustee," to use, sell or lease property of the estate. 11 U.S.C. § 1303 (emphasis added). Section 1306(b) mandates that "the debtor shall remain in possession of all property of the estate." 11 U.S.C. § 1306(b)(emphasis added). "Property of the estate," which, pursuant to section 1306(a), includes all property specified in section 541 plus all property and earnings acquired by the debtor after the bankruptcy filing, "vests ... in the debtor " (section 1327(b)) "free and clear of any claim or interest of any creditor provided for in the plan" (section

> 1327(c)) (emphasis added) upon confirmation. And a debtor who exercises the **absolute right to convert to Chapter 7**, continues following conversion, (pursuant to section 348(f)), to be in complete charge and control of property acquired after filing the original Chapter 13 petition.

Id. at 211 (emphasis added).

This case has not been converted before, therefore based on the above, the Court finds that the debtor's oral motion is due to be granted.

It is therefore ORDERED:

1. The debtor's Oral Motion to Convert to Chapter 7 is **GRANTED**;

2. The Objection to Confirmation filed by Vanderbilt Mortgage and Finance, Inc. Is **MOOT**;

3. The Motion to Dismiss filed by Vanderbilt Mortgage and Finance, Inc. Is **MOOT**;

4. The Objection to Confirmation and Motion to Dismiss filed by the Chapter 13 Trustee is **MOOT**;

5. Confirmation of the debtor's plan is **MOOT**;

6. The Motion to Withdraw as Attorney filed by Donna Beaulieu is **GRANTED**;

7. This order is a written opinion for purposes of the E-Government Act, Pub. L. No. 107-347.

Dated: May 9, 2005

/s/Benjamin Cohen
BENJAMIN COHEN
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
Trenton O. Turner,	)	Case No.: 02-00997-BGC-7
	)	
Debtor.	)	
Trenton O. Turner,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	A. P. No.: 02-00155
	)	
United States of America;	)	
U.S. Army,	)	
	)	
Defendants.	)	

ORDER

The matter before the Court is the Federal Defendant's Motion in Limine filed on April 18, 2005.

In summary, these are the facts. The debtor applied for a position with the U.S. Army around the same time of filing a Chapter 7 bankruptcy. He was offered the position, but that offer was later withdrawn. The debtor contends that the Army denied him the position because of the bankruptcy position and when it did it violated anti-discriminatory provisions of section 525(a) of the Bankruptcy Code. The Army contends there were other reasons for denying the position.

Section 525(a) reads:

> (a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or

> another person with whom such bankrupt or debtor has been associated, **solely because** such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525 (emphasis added).

In its motion, the Army asks the Court for a determination that section 525(a) should be interpreted narrowly such that "solely because" should be given its "plain meaning."

The debtor contends that the section and the phrase should be interpreted broadly beyond its plain meaning to include other reasons.

This issue has been considered extensively. See In re Valentin, 309 B.R. 715 (Bkrtcy. E.D. Pa. 2004), and the cases that opinion discusses. However, for the resolution to the pending motion, the answer lies in the recent decision of the U.S. Supreme Court in Federal Communications Comm'n. v. NextWave Personal Communications, Inc., 537 U.S. 293, 123 S.Ct. 832, 154 L.Ed.2d 863 (2003). While NextWave involved another portion of section 525(a), the Supreme Court's interpretation of the meaning of "solely because" is binding here. In NextWave, the Court interpreted section 525(a) to mean:

> When the statute refers to failure to pay a debt as the sole cause of cancellation ("solely because"), it cannot reasonably be understood to include, among the other causes whose presence can preclude application of the prohibition, the governmental unit's motive in effecting the cancellation. Such a reading would deprive § 525 of all force. It is hard to imagine a situation in which a governmental unit would not have some further motive behind the cancellation--assuring the financial solvency of the licensed entity, e.g., Perez v. Campbell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971); In re The Bible Speaks, 69 B.R. 368, 374 (Bkrtcy.D.Mass.1987), or punishing lawlessness, e.g., In re Adams, 106 B.R. 811, 827 (Bkrtcy.D.N.J.1989); In re Colon, 102 B.R. 421, 428 (Bkrtcy.E.D.Pa.1989), or even (quite simply) making itself financially whole. **Section 525 means nothing more or less than that the failure to pay a dischargeable debt must alone be the proximate cause of the cancellation**--the act or event that triggers the agency's decision to cancel, whatever the agency's ultimate motive in pulling the trigger may be.

Id. at 301-02 (emphasis added).

To this Court, that interpretation restricts this Court's consideration of "solely because" to its plain meaning.[1] Therefore, the Court will consider whether the Army's actions were the sole reason for denying the position to the debtor.

Whether the Army's actions were alone the proximate cause of the denial of the position to the debtor is a purely factual issue. To resolve that issue, this Court must determine if the Army's actions were based solely on the fact the debtor, as section 525(a) reads, "is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act. " Id.

Based on the above, it is **ORDERED, ADJUDGED and DECREED**:

1. The Federal Defendant's Motion in Limine is **GRANTED**;

2. The Court encourages the parties again to consider mediation;

3. A scheduling conference will be set by separate notice;

4. This order is a written opinion for purposes of the E-Government Act, Pub. L. No. 107-347.

DONE this the 1st day of June, 2005.

/s/Benjamin Cohen
BENJAMIN COHEN
United States Bankruptcy Judge

BC:pb
cc: Thomas Corbett

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[1] Section 525(b) contains the same "solely because" phrase in reference to private employers. The Court of appeals for the Sixth Circuit recently interpreted section 525(b) in White v. Kentuckiana Livestock Market, Inc. ,397 F.3d 420 (6th Cir. 2005) and attributed to it the words' plain meanings. Citing Everett v. Lake Martin Area United Way, 46 F.Supp.2d 1233, 1237 (M.D. Ala. 1999) the court quoted, "[T]he term 'solely' as used in the statute means what it says--i.e. that a person seeking relief under [§ 525(b)] for a termination must prove that the filing of a bankruptcy was the sole reason for termination").

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
T. Morris Hackney,	)	Case No.: 04-06193-BGC-7
	)	
Debtor.	)	
AmSouth Bank,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	A. P. No.: 04-00136
	)	
T. Morris Hackney,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter came before the Court on a Motion to Substitute Trustee as the Real Party in Interest filed on April 11, 2005, by the Trustee; and on Objections of AmSouth Bank to the Trustee's Motion to Substitute the Trustee as the Real Party-in-Interest in Adversary Proceeding No. 04-00136 filed on April 26, 2005, by AmSouth Bank.

After notice, a hearing was held on April 27, 2005. Appearing were: Kimberly Glass and Bill Meyers for the debtor; David Donaldson for Wilmington Trust, Sheldon Hackney, Hackney Family Trusts, Hackney Investments LLC II, and Hackney Investments LLC III; Dennis Schilling for the Trustee; Dave Evans for AmSouth Bank; Brandy Lee for Morris Hackney Irrevocable Trust, Wilmington Trust Company; Hackney One Investments LLC and Sheldon Hackney; Eddie Leitman for Brenda Hackney; Von Memory for Sterling Bank; Matt Grill for First American Bank; Daniel Sparks for Citizens Business Credit; and Edward Hutton a representative for AmSouth Bank.

In summary, the basis facts are these. AmSouth filed a complaint in state court against the debtor and others alleging the fradulent conveyance of certain property. That case was removed to this Court by the debtor after the debtor filed the instant case. AmSouth is neither a judgment creditor nor a lien creditor of the debtor.

The trustee asks to be replaced as the plaintiff in the removed proceeding. AmSouth contends that the allegedly fraudulently conveyed property is not property of the estate and that it, (AmSouth), remains the proper party to prosecute any fraudulent conveyance claims.

Section 544 of the Bankruptcy Code defines a bankruptcy trustee's powers in regard to estate property that may have been transferred. Section 544 empowers a trustee to avoid certain transfers. See 11 U.S.C. § 544.

There is little dispute about what authority that section imparts on a trustee in regard to a fraudulent conveyance, in relation to a general creditor of the debtor. In Rowe v. Bonneau-Jeter Hardware Co., 245 Ala. 326, 16 So.2d 689 (Ala. 1943), the Alabama Supreme Court recognized:

> The principle is well sustained that in general a creditor of a bankrupt cannot after bankruptcy maintain an action to set aside a fraudulent conveyance made by the bankrupt; and that after the appointment of a trustee, he alone may do so, though the conveyance was executed more than four months before the bankruptcy. 6 Amer.Jur. 657, section 243; Ruhl-Koblegard v. Gillespie, 61 W.Va. 584, 56 S.E. 898, 10 L.R.A.,N.S., 305, 11 Ann.Cas. 929, 22 A.B.R. 643; Trimble v. Woodhead, 102 U.S. 647, 26 L.Ed. 290; Neuberger v. Felis, 203 Ala. 142, 82 So. 172; see Maynor v. Schaefer, Ala.Sup., 11 So.2d 846; Barrett v. Kaigler, 200 Ala. 404, 76 So. 320.

Id. at 330. See this Court's opinion in In re Speir, 190 B.R. 657 (Bkrtcy. N.D. Ala. 1995).

The Court of Appeals for the Fifth Circuit reached the same conclusions in Carlton v. Baww, Inc., 751 F.2d 781 (5th Cir. 1985). That court recognized:

> [The debtor's]... bankruptcy clearly had a profound impact on this action. In In re Mortgageamerica Corp., 714 F.2d 1266 (5th Cir.1983), we examined the effect of the transferor's intervening bankruptcy on a creditor's state-law attempts to void a fraudulent transfer. We held that property that the debtor has fraudulently conveyed remains "property of the estate," see 11 U.S.C. § 541(a)(1): "The automatic stay under [11 U.S.C.] section 362(a) thus applies and prevents a creditor from continuing to pursue a cause of action under the Texas Fraudulent Transfers Act after a petition for bankruptcy has been filed [by the transferor]." Id. at 1275. Thus, Shelton's bankruptcy, standing alone, barred prosecution of this lawsuit.
>
> Bankruptcy did not, however, forever extinguish the right to recover property that... [the debtor] may have fraudulently conveyed. **Bankruptcy simply caused that right to vest in the trustee and placed the future of this lawsuit within the control of the bankruptcy court**. See In re Mortgageamerica Corp., 714 F.2d at 1275 (citing Glenny v. Langdon, 98 U.S. 20, 30, 25 L.Ed. 43 (1878)).

Id. at 785 (certain parentheticals added) (emphasis added).

Section 541 of the Bankruptcy Code defines the property of a bankruptcy estate to include, “all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). In In re Mortgageamerica Corp., 714 F.2d 1266 (5th Cir. 1983) explained the relationship of section 541 to section 544. The court wrote:

> We think that when... a debtor is forced into bankruptcy, it makes the most sense to consider the debtor as continuing to have a "legal or equitable interest[ ]" in the property fraudulently transferred within the meaning of section 541(a)(1) of the Bankruptcy Code.
>
> ****
>
> The legislative history of section 541(a)(1) reinforces this conclusion. The House report accompanying the bill stated that section 541(a)(1) was intended to "include[ ] all kinds of property, including tangible or intangible property, causes of action ..., and all other forms of property currently specified in section 70a of the Bankruptcy Act ...." H.R.Rep. No. 595, supra, at 367, 1978 U.S.Code Cong. & Ad.News at 6323. Section 70(a), in turn, included a reference to "property transferred by [the debtor] in fraud of his creditors," Bankruptcy Act of 1898, ch. 541, § 70(a)(4), 30 Stat. 544, 566 (repealed 1979) (reenacting without material change Bankruptcy Act of 1867, ch. 176, § 14, 14 Stat. 517, 523), which was apparently meant to include a reference to state, as well as federal law. See 4A Collier on Bankruptcy ¶ 70.14[1] (14th ed. 1978). In any event, the Supreme Court held in 1878 that an action based on such a fraudulent transfer "vested in the [trustee]," and therefore could not be brought by a creditor acting alone and without the court's express permission. Glenny v. Langdon, 98 U.S. 20, 22, 27-31, 25 L.Ed. 43 (1878). We do not think that the 1978 Congress meant to change this result when it eliminated the old section 70(a)(4) in favor of the new sections 541(a)(1) (property of the estate), 544 (incorporation of state fraudulent conveyance law), and 548 (federal fraudulent conveyance law).
>
> This result also does the most to further the fundamental bankruptcy policy of equitable distribution among creditors. See 11 U.S.C. § 726. The "strong arm" provision of the current Code, 11 U.S.C. § 544, allows the bankruptcy trustee to step into the shoes of a creditor for the purpose of asserting causes of action under state fraudulent conveyance acts for the benefit of all creditors, not just those who win a race to judgment. See 4B Collier on Bankruptcy ¶ 70.71, at 788-89 (14th ed. 1978). A trustee acting under section 544 "acts as a representative of creditors," Hassett v. McColley (In re O.P.M. Leasing Services, Inc.), 28 B.R. 740, 760 (Bkrtcy.S.D.N.Y.1983), and any property recovered is returned to "the estate for the eventual benefit of all creditors." Johnson v.

> First National Bank (In re Johnson), 28 B.R. 292, 297 (Bkrtcy.N.D.Ill.1983) (emphasis added); accord, Segarra v. Banco Central y Economias (In re Segarra), 14 B.R. 870, 878 (Bkrtcy.D.P.R.1981) ("These 'strong arm' provisions help a trustee to avoid certain obligations of a debtor for the benefit of all creditors."). The Supreme Court has, in fact, expressly noted that section "541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code," which would include property made available through section 544. Whiting Pools, supra, 103 S.Ct. at 2313. Actions for the recovery of the debtor's property by individual creditors under state fraudulent conveyance laws would interfere with this estate and with the equitable distribution scheme dependent upon it, and are therefore appropriately stayed under section 362(a)(3). Any other result would produce near anarchy where the only discernible organizing principle would be first-come-first-served. Even without the Bankruptcy Code and the policies that support it, we would be reluctant to elevate such a principle to a rule of law.

Id. at 1275-76.

AmSouth is not a lien creditor of this debtor. AmSouth is not a judgment creditor of the debtor. Therefore AmSouth, like all other general creditors will be represented by the trustee in any fraudulent conveyance actions that might be brought in this case. Consequently, the trustee, not AmSouth, is the proper party to prosecute any fraudulent conveyance action in this case.

Finally, AmSouth argues that if the Court allows the trustee to become the plaintiff that the trustee would compromise the fraudulent conveyance claims for less than AmSouth believes those claims are worth. If the trustee enters into any compromise or settlement, that settlement must be approved by this Court. See this Court's opinions in In re Golden Mane Acquisitions, Inc., 221 B.R. 963, (Bankr. N.D. Ala. 1997) and In re Speir, 190 B.R. 657 (Bkrtcy. N.D. Ala. 1995). If such a settlement or compromise is presented to the Court, AmSouth, like all creditors may take a position before this Court.

Based on the arguments of counsel and the pleadings, it appears to the Court that the Motion to Substitute Trustee as the Real Party in Interest is due to be granted and the Objections of AmSouth Bank to the Trustee's Motion to Substitute the Trustee as the Real Party-in-Interest in Adversary Proceeding No. 04-00136 is due to be denied. A separate order will be entered contemporaneously with this Memorandum Opinion.

Dated: June 1, 2005

/s/Benjamin Cohen
BENJAMIN COHEN
United States Bankruptcy Judge

BC:pb

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
T. Morris Hackney,	)	Case No.: 04-06193-BGC-7
	)	
Debtor.	)	
AmSouth Bank,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	A. P. No.: 04-00136
	)	
T. Morris Hackney,	)	
	)	
Defendant.	)	

ORDER

In conformity with and pursuant to the Memorandum Opinion entered contemporaneously herewith, it is **ORDERED, ADJUDGED AND DECREED** that:

1. The Motion to Substitute Trustee as the Real Party in Interest is **GRANTED**; and

2. The Objections of AmSouth Bank to the Trustee's Motion to Substitute the Trustee as the Real Party-in-Interest in Adversary Proceeding No. 04-00136 is **DENIED**;

3. This order is a written opinion for purposes of the E-Government Act, Pub. L. No. 107-347.

Dated: June 1, 2005

/s/Benjamin Cohen
BENJAMIN COHEN
United States Bankruptcy Judge

BC:pb

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
Sharon Wiliams,	)	Case No.: 03-11263-BGC-13
	)	
Debtor.	)	

ORDER

The matter before the Court is the debtor's Objection to Claim filed on April 14, 2005. The debtor's objects to claim number 8 of Mortgage Electronic Registration Systems, Inc. in the amount of $1,547.54. After notice, a hearing was held on May 17, 2005. Appearing were the debtor and her husband; Harold Ackerman for the debtor; Jim Greer for Daniel Feinstein, the attorney for Mortgage Electronic; and Charles King, the Assistant Chapter 13 Trustee.

I. Background

On November 16, 2004, Mortgage Electronic filed a Motion for Relief from Stay and Co-Debtor Stay. After notice, a hearing was held on February 15, 2005. Appearing were the debtor; Mr. Ackerman; Mr. Greer; and Mr. Sims Crawford, the Chapter 13 Trustee. The hearing was continued by agreement to March 8, 2005.

The March 8, 2005, hearing was held. Appearing were Mr. Ackerman; Mr. Greer; and Mr. Crawford. The hearing was continued by agreement to March 29, 2005.

The March 29, 2005, hearing was held. Appearing were Mr. Ackerman; Mr. Greer and Mr. Crawford. At the hearing, Mr. Greer represented to the Court that the account was current except for the attorney fees and costs associated with the filing of the motion. Mr. Greer also stated to the Court that Mr. Ackerman would be objecting to the fees and costs, because the debtor believed she had been current on her mortgage payments.[1] Based on the representations of counsel, the Court entered an order on

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[1] As a legal matter, a claimant is not entitled to a fee for unnecessary services or for services rendered necessary by the sole or contributing wrong of the other party...." Kennedy v. Sorsby, 209 Ala. 188, 95 So. 891, 893 (1923) (emphasis added). The "employment of an attorney must be in good faith and for the purposes provided by the contract." Id. "Good faith" means that, "the party claiming the right to attorney's fees, pursuant to a contract, acted reasonably in employing counsel; and... the services, for which attorney's fees are claimed, [were] reasonable under the circumstances." King v. Calvert & Marshall Coal Co., 362 So.2d at 893 (parenthetical added) (emphasis added). As a matter of both Alabama law and bankruptcy law, reimbursement may be authorized only in an amount that is reasonable for the services

March 31, 2005, denying the motion as to the debtor and co-debtor. The Court allowed the movant to file a claim for any arrearage.

On April 13, 2005, Mortgage Electronic filed Claim No. 8 for $1,547.54. On April 14, the debtor filed an objection to the claim.

At the hearing on May 17 on the debtor's objection to Claim No. 8, informal representations were made to support the parties' positions. After hearing those representations, the Court encouraged the debtor to present evidence at a formal hearing. The Court gave the parties the option of presenting that evidence later in the day, or on another day. The Court's offer was rejected. The debtor asked the Court to decide the matter based on the record.

The evidence in the record is very limited; however, there is sufficient evidence to resolve the specific matter before the Court.[2]

II. Objection to Claim

Rule 3001(f) of the Federal Rules of Bankruptcy Procedure reads, "A proof of claim filed in accordance with the rules constitutes prima facie evidence of the validity and amount of the claim." Fed.R.Bankr.P. 3001(f). Courts have consistently interpreted this clear language to mean:

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rendered. See Twickenham Station, Inc. v. Beddingfield, 404 So.2d 43 (Ala. 1981); King v. Calvert & Marsh Coal Co., Inc., 362 So.2d 889 (Ala. 1978); Pizitz-Smolian Co-op. Stores v. Randolph, 221 Ala. 458, 129 So. 26 (Ala. 1930); Kennedy v. Sorsby, 209 Ala. 188, 95 So. 891 (Ala. 1923); Richards v. Bestor, 90 Ala. 352, 8 So. 30 (Ala. 1890). See also this Court's order in In re Health Science Products, 191 B.R. 895, 910 n.20 (Bankr. N.D. Ala. 1995)(applying Alabama law).

[2] That record consists of the Court's records only. But, the Court may take judicial notice of its own records, see Rule 201, Federal Rules of Evidence and Board of Trustees of the Internal Improvement Trust Fund v. Charley Toppino & Sons, Inc., 514 F.2d 700, 704 (5th Cir.1975), and may take judicial notice of the documents in the debtor's file. See Freshman v. Atkins, 269 U.S. 121, 46 S.Ct. 41, 70 L.Ed. 193 (1925) (court may take judicial notice of and give effect to its own records in another, but interrelated, proceeding, so that district court could take judicial notice of pendency of application for discharge in prior bankruptcy proceedings and thereby preclude discharge in a second voluntary proceeding in respect to the same debts as listed in first proceeding); Cash Inn of Dade, Inc. v. Metropolitan Dade County, 938 F.2d 1239 (11th Cir.1991) (district court may take judicial notice of public records within its files relating to particular case before it or to other related cases); ITT Rayonier, Inc. v. U.S., 651 F.2d 343 (5th Cir.1981) (court may take judicial notice of its own records or of those of inferior courts); Kinnett Dairies, Inc. v. Farrow, 580 F.2d 1260 (5th Cir.1978) (trial court did not err in taking judicial notice of materials in court's own files from prior proceedings).

> A properly executed and filed proof of claim constitutes prima facie evidence of the validity of the claim. See Fed.R.Bankr.P. 3001(f). To overcome this prima facie evidence, the objecting party must come forth with evidence which, if believed, would refute at least one of the allegations essential to the claim. In re Allegheny Int'l, Inc., 954 F.2d 167 (3d Cir.1992). See also In re Giordano, 234 B.R. 645, 650 (Bankr.E.D.Pa.1999).

In re Reilly, 245 B.R. 768, 773 (2nd Cir. BAP 2000) aff'd 242 F.3d 367.

This Court agrees, as does another division of this Court where that division explained:

> A proof of claim filed in accordance with the rules constitutes prima facie evidence of the validity and amount of the claim. Fed.R.Bankr.P. 3001(f); In re Fullmer, 962 F.2d 1463 (10th Cir.1992); Green Tree Acceptance Inc. v. Calvert (In re Calvert), 907 F.2d 1069, 1071 n. 1 (11th Cir.1989); Matter of Fidelity Holding Co., Ltd., 837 F.2d 696, 698 (5th Cir.1988). This evidence places on the party disputing the claim the burden of going forward with evidence of probative force equal to that of the allegations of the claimholder's claim. In re VTN, Inc., 69 B.R. 1005, 1008 (Bankr.S.D. Fla.1987); In re Wells, 51 B.R. 563, 566 (D.Colo.1985); Matter of Townview Nursing Home, 28 B.R. 431 (Bankr.S.D.N.Y.1983); In re Breezewood Acres, Inc., 28 B.R. 32 (Bankr.M.D.Pa.1982). If the objecting party fails to offer sufficient evidence to overcome the evidentiary effect of the properly filed proof of claim, the objection will be denied and the claim will be allowed as filed. Matter of Texlon, 28 B.R. 525 (Bankr. S.D.N.Y. 1983); In re Trending Cycles for Commodities, Inc., 26 B.R. 350, 351 (Bankr.S.D.Fla.1982).

In re Britt, 199 B.R. 1000, 1008 (Bankr. N.D. Ala. 1996) (footnote omitted).

The court in In re Nantucket Aircraft Maintenance Co., Inc., 54 B.R. 86, 88 (Bankr. D. Mass. 1985) explains the process if the objecting party successfully presents evidence against the claim that would overcome the prima facie evidence of the validity of the claim. That court wrote:

> A proof of claim constitutes prima facie evidence of the validity and amount of the claim. 11 U.S.C. § 502(a); Bankruptcy Rule 3001(f); L. King, 3 Collier on Bankruptcy, ¶ 502.01, at 502-16 (15th ed. Supp.1984). When an objection to the claim is made the objecting party carries the burden of going forward with evidence showing facts tending to defeat the claim but not the burden of ultimate persuasion. Id. at 502-17. The burden of persuasion always remains on the claimant and, therefore, once there is evidence as to the invalidity of the claim, the burden rests on the claimant to introduce rebutting evidence. Id. at 502-18.

Based on the evidence in the record, the Court finds that Claim No. 8 for $1,547.54 was filed in accordance with the Bankruptcy Rules and therefore the claim constitutes prima facie evidence of its validity and amount. At the hearing on May 17, the claimant's counsel agreed that the claim should be reduced to $550.

In contrast, the debtor did not offer any evidence other than that which the record already contained and there is no evidence in that record to refute any allegation essential to the claim. Consequently, no proof was offered to overcome the prima facie evidence of the validity of Claim No. 8.

Therefore, based on the evidence that Claim No. 8 is valid, and the fact that the debtor did not offer sufficient evidence to overcome the evidentiary effect of the properly filed proof of claim, the objection will be denied and the claim will be allowed.

Based on the above, the debtor's Objection to Claim of Mortgage Electronic Registration Systems, Inc. is **OVERRULED**. Claim No. 8 is **ALLOWED** for $550.00.

This order is a written opinion for purposes of the E-Government Act, Pub. L. No. 107-347.

Dated: June 1, 2005

/s/Benjamin Cohen
BENJAMIN COHEN
United States Bankruptcy Judge

BC:pb

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
Martin Bruce Harbison, Jr.,	)	Case No.: 04-06386-BGC-7
	)	
Debtor.	)	
Worry Free Service, Inc.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	A. P. No.: 04-00170
	)	
Martin Bruce Harbison, Jr.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

I. Background

This matter came before the Court on a Motion for Summary Judgment filed on April 27, 2005, by the plaintiff. After notice, oral arguments were held on June 7, 2005. Appearing was Kristen Southworth for the plaintiff. No one appeared for the defendant-debtor. The matter was submitted on the arguments of counsel and the pleadings.

II. Findings of Fact[1]

1. The Defendant, Harbison was an individual engaged in the business of selling and installing heating and air conditioning systems for consumers under the name Home Energy Systems, Inc.

2. On June 30, 2003, the Defendant individually faxed documents relating to the purchase and sale of a furnace, air conditioner and coil to the Plaintiff relating to a sale to Magnolia McKissick, 5108 Main St., Bessemer, Alabama.

3. The documents faxed by the Defendant were:

   A. A Credit Application dated June 20, 2003 from Ms. McKissick.

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[1]These findings of fact are adopted from the plaintiff's Requests for Admission of Fact.

B. A Consumer Credit Installment Sales Contract dated June 20, 2003 signed by Ms. McKissick.

C. A Notice of Right to Cancel dated June 20, 2004[sic] signed by Ms. McKissick.

D. A Completion Certificate dated June 24, 2003 signed by Ms. McKissick.

4. On or about July 3, 2003, Voltview, Inc., in reliance on the Plaintiff's decision to extend credit and purchase the McKissick contract issued a check for $8,998.00 to the Defendant Harbison and/or Home Energy Systems, Inc. for the McKissick purchase and became the initial assignee of the contract.

5. Said payment referred to in Request for Admission No. 4 was made with the understanding that the retail installment sales contract would be assigned to the Plaintiff and the Plaintiff would reimburse Voltview, Inc. for said payment to Harbison and/or Home Energy Systems, Inc.

6. The Defendant received and negotiated check in the amount of $8998.00 and converted the proceeds to his own use and benefit.

7. On July 16, 2003, Voltview, Inc. called the purchaser, Ms. McKissick to verify her satisfaction with the product and confirm her purchase and sale according to the terms of the retail installment sales contract.

8. At that time, Ms. McKissick informed Voltview, Inc. that she had not financed her purchase through Voltview, Inc., but rather had elected to finance her purchase through Alabama Power.

9. When Voltview, Inc. attempted to secure a refund of the monies paid to Harbison and/or Home Energy Systems, Inc., the Defendant provided a bad check and which never honored.

10. On August 27, 2003, the Plaintiff issued a check to Voltview, Inc. the initial assignee of the contract, in the amount of $8,998.00.

11. On July 22, 2004, the Defendant filed a petition for relief under Chapter 7 of The Bankruptcy Code.

12. As of the date of the filing of his Chapter 7 case, the Defendant owed the Plaintiff $8,998.00 on the monies secured by fraud and false pretenses.

13. The documents faxed by the Defendant to the Plaintiff were false representations in that they represented that a sale of a heating and air conditioning

unit had occurred and that the retail installment sales contract had not been previously assigned to another party.

14. The Defendant knew said representations were false at the time he made them or they were made with reckless indifference as to their truth or falsity.

15. The representations were made with the intent that the Plaintiff rely on the representations by taking and assignment of the retail installment sales contract and issuing a check for the proceeds thereof to the Defendant.

16. The Plaintiff did actually and justifiably rely on said representations by taking an assignment of said retail installment sales contract and providing the proceeds which were secured by the Defendant.

17. As a direct and proximate result of the conduct of the Defendant, the Plaintiff has been defrauded of money that would not have been paid but for the Defendant's conduct.

18. The conversion of the proceeds of the retail installment contract by the Defendant with full knowledge of the financing of the purchase by another lender was a wilful, malicious and intentional injury to the Plaintiff.

III. Issue

Is the debt the plaintiff contends is owed to it by the debtor dischargeable in this case pursuant to section 523(a)(2)(A) of the Bankruptcy Code?

IV. Applicable Law

A. Admissions

The plaintiff relies on its unanswered Requests for Admission of Fact. Rule 36 of the Federal Rules of Civil Procedure, applicable to this matter through Rule 7036 of the Federal Rules of Bankruptcy Procedure, governs the applicability of such evidence. The Rule reads in part:

> (a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. Request for admissions.

Fed. R.Civ.P. 36.

There are limits on this Rule, see Perez v. Miami-Dade County, 297 F.3d 1255 (11th Cir. 2002), but none of the exceptions apply here. The general rule, applicable here is described in U.S. v. 2204 Barbara Lane, 960 F.2d 126 (11th Cir. 1992) as:

> Federal Rule of Civil Procedure 36:
>
> > expressly provides that requests for admissions are automatically deemed admitted if not answered within 30 days, and that the matters therein are 'conclusively established' unless the court on motion permits withdrawal or amendment of the admissions. The rule is designed to expedite litigation, and it permits the party securing admissions to rely on their binding effect. Rainbolt v. Johnson, 669 F.2d 767, 768 (D.C.Cir.1981) (reversed district court because it failed to give binding and conclusive effect to unanswered requests for admissions).

Id. at 129.

The Rule applies in situations such as the instant one where the non-responding party is a pro se litigant. The court in U.S. v. Mishler, 2000 WL 33996189 (M.D. Fla. June 6, ,2000), wrote:

> The United States Court of Appeals for the Eleventh Circuit has recognized that Rule 36 should be applied against parties proceeding pro se when the party received actual notice of the requests for admissions and failed to respond to them. United States v. 2204 Barbara Lane, 960 F.2d 126, 129 (11th Cir.1992); see also Stubbs v. Commissioner, 797 F.2d 936, 938 n .1 (11th Cir.1986). The Eleventh Circuit has also recognized that requests for admissions may may be deemed admitted if the party received constructive notice of the requests. J.D. Pharmaceutical Distribs., Inc. v. Save-On Drugs & Cosmetic Corp., 893 F.2d 1201, 1209 (11th Cir.1990).

Id. at *3.

Based on the above, the Court considers the debtor's failure to answer the plaintiff's Requests for Admission of Fact as admissions of the facts contained in the request.

B. Fraud

1. Section 523(a)(2)

The plaintiff's substantive argument is that the debtor committed fraud in his transaction with the plaintiff regarding the financing of a heating and air conditioner unit. The plaintiff specifically alleges that the fraud is not dischargeable pursuant to section 523(a)(2)(A) of the Bankruptcy Code. That section reads in pertinent part:

> (a) A discharge under section 727... of this title does not discharge an individual debtor from any debt–
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by–
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

11 U.S.C. § 523.

2. Burden of Proof

The burden of proof in section 523 matters is by a "preponderance of the evidence." Grogan v. Garner, 498 U.S. 279 (1991). And the plaintiff has that burden. In addition, exceptions to discharge are to be construed strictly against the objecting creditor and in favor of the debtor in order to give effect to the fresh start policy of the Bankruptcy Code.[2]

3. Fraud under the Bankruptcy Code

The applicable part of section 523, that is section 523(a)(2)(A) of the Bankruptcy Code, makes nondischargeable debts for money, property, services or credit obtained by a debtor by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). To have a debt declared nondischargeable pursuant to 523(a)(2)(A), a creditor must prove, "the debtor made a false statement with the purpose and intention

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[2] Hope v. Walker (In re Walker), 48 F.3d 1161 (11th Cir. 1995); Equitable Bank v. Miller (In re Miller), 39 F.3d 301 (11th Cir. 1994).

of deceiving the creditor; the creditor relied on such false statement; the creditor's reliance on the false statement was justifiably founded; and the creditor sustained damage as a result of the false statement." Fuller v. Johannessen (In re Johannessen), 76 F.3d 347, 350 (11th Cir. 1996).[3]

C. Summary Judgment Standard

The general standards in this Circuit for addressing a summary judgment motion are outlined in the decisions of the Eleventh Circuit Court of Appeals decision in Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir.1993). This Court has applied those standards here.

Specifically, in the context of whether "admissions" should apply against a pro se defendant through a summary judgment action, the Court of Appeals for the Eleventh Circuit recognized in U.S. v. 2204 Barbara Lane, 960 F.2d 126 (11th Cir. 1992):

> Federal Rule of Civil Procedure 56(c) mandates entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Emphasis added). The district court must view the evidence in the light most favorable to the nonmoving party. Sweat v. Miller Brewing, 708 F.2d 655, 656 (11th Cir.1983). Once the movant bears the initial burden of production in demonstrating no genuine issue of material fact, "the nonmoving party has the burden of making a showing sufficient to establish the existence of each essential element to the nonmovant's case on which he will bear the burden of proof at trial." Langston v. ACT, 890 F.2d 380, 383 (11th Cir.1989).

V. Conclusions of Law

The debtor's admissions are conclusive. The plaintiff has met its burden under both section 523(a)(2) and the summary judgment standards in this Circuit.[4]

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[3]The legislative history of section 523(a)(2)(A) indicates that the term "actual fraud" was included in that section, not to expand or define the manner of frauds that might fall within the operation of the non-dischargeability statute, but to clarify and emphasize the fact that only debts resulting from fraud intended to deceive, or frauds involving moral turpitude, are non-dischargeable, and not debts resulting from constructive fraud or fraud implied in law. The House Report discussing the section explains that "Subparagraph (A) is intended to codify current case law e.g., Neal v. Clark, 95 U.S. 704, 24 L.Ed. 586 (1887), which interprets 'fraud' to mean actual or positive fraud rather than fraud implied in law." H.R. Rep. 95-595, 549, 95th Cong., 1st Sess., reprinted in 1978 U.S.C.C. & A.N. 5963 (1977).

[4]The plaintiff also alleges that the debtor converted the funds provided to him and that this action would be a willful and malicious act under section 523(a)(6) of the Bankruptcy Code

The facts establish that the debtor made a false statement with the purpose and intention of deceiving the creditor; the creditor relied on that false statement; the creditor's reliance on the false statement was justifiable; and the creditor sustained damage as a result of the false statement.

Specifically, the Court finds that:

1. The documents the debtor sent to the plaintiff were false representations as those documents represented that a sale of a heating and air conditioning unit had occurred and that the retail installment sales contract had not been assigned to another party, when in fact no such sale had occurred;

2. The debtor knew that the above representations were false at the time he made them and they were made with the intent of deceiving the plaintiff;

3. The Plaintiff justifiably rely on the debtor's representations by taking an assignment of the retail installment sales contract and providing the secured proceeds to the Defendant;

4. The plaintiff suffered damages as a result of the debtor's false representations.

Therefore judgment is due to be entered against the debtor and in favor of the plaintiff.

A separate order will be entered contemporaneously with this Memorandum Opinion.

Dated: June 13, 2005

/s/Benjamin Cohen
BENJAMIN COHEN
United States Bankruptcy Judge

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and therefore a nondischargeable debt. This Court agrees that in certain circumstances conversion may create a nondischargeable debt under section 523(a)(6). See this court's opinion in HOC, Inc. v. McAllister (In re McAllister), 215 B.R. 217 (Bankr. N.D. Ala. 1996).

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
Martin Bruce Harbison, Jr.,	)	Case No.: 04-06386-BGC-7
	)	
Debtor.	)	
Worry Free Service, Inc.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	A. P. No.: 04-00170
	)	
Martin Bruce Harbison, Jr.,	)	
	)	
Defendant.	)	

ORDER

In conformity with and pursuant to the Memorandum Opinion entered contemporaneously herewith, it is **ORDERED, ADJUDGED AND DECREED** that:

1. The Motion for Summary Judgment filed by the plaintiff is **GRANTED**;

2. Judgment is entered in favor of the plaintiff, Worry Free Service, Inc., and against the defendant, Martin Bruce Harbison, Jr., in the amount of $8,998.00, plus interest;

3. This order is a written opinion for purposes of the E-Government Act, Pub. L. No. 107-347.

Dated: June 13, 2005

/s/Benjamin Cohen
BENJAMIN COHEN
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
Woodlawn Gardens, LLC,	)	Case No.: 05-04731-BGC-11
	)	
Debtor.	)	
	)	

ORDER
FINDING PROPERTY NOT PROPERTY OF THE ESTATE AND
GRANTING RELIEF FROM THE STAY

I. Background

The debtor Woodlawn Gardens, LLC, operates an apartment complex in Birmingham, Alabama. The City of Birmingham financed the purchase and renovation of that property. When Woodlawn Gardens, LLC, failed to make any payments under the parties' financial arrangements, and when Woodlawn Gardens transferred the property to another entity, Prayer Tower, LLC, the City foreclosed on the property. When Woodlawn Gardens, LLC, and Prayer Tower, LLC, failed to move from the property, the City attempted to have them ejected. After a hearing on a complaint for an accounting, and other relief, the state court entered a temporary restraining order. Included in that order, the state court awarded the property to the City, appointed an independent property manager for the property, and required the debtor to vacate the premises. Before a scheduled request for a preliminary injunction could be heard, Woodlawn Gardens, LLC, filed the pending Chapter 11 case.[1]

The principal matters before the Court are:

1. The Motion of City of Birmingham to Dismiss, or in the Alternative, for Relief From the Automatic Stay filed by the movant, City of Birmingham, on May 13, 2005;

2. The Motion of City of Birmingham for Emergency Hearing on its Motion for an Order Deeming Certain Property to be Excluded From Debtor's Estate and Additionally or Alternatively, for Relief From the Automatic Stay filed by the movant, City of Birmingham, on May 17, 2005.

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[1]In its petition, Woodlawn Gardens lists Woodlawn Gardens, LLC, and Prayer Tower, LLC, as joint debtors. The joint debtor condition is discussed below.

After notice, a trial was held on June 9, 2005.[2] Appearing were:

1. Mr. Matthew W. Grill, Mr. Brian Walding, and Mr. Casey Grace, attorneys for the City of Birmingham; and Mr. Ken Knox, a representative of the City; and

2. Mr. Brian Bugge and Mr. George Babakitis, the attorneys for the debtor; and Mr. Phillip Ronald Agee and the Rev. Hosea Agee, officers and representatives of Woodlawn Gardens, LLC, and Prayer Tower, LLC.

All matters were submitted on the testimony of Mr. Knox, Mr. Agee, and Rev. Agee; exhibits; the record in this case; and arguments of counsel.[3]

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[2]Two previous hearings have been held before this Court and two prior Orders have been entered. After a hearing on May 18, 2005, this Court entered an Order on May 18, 2005, memorializing the parties' agreement that the essential conditions of the state court's temporary restraining order would remain in effect. After a second hearing on May 25, 2005, this Court entered an Order on May 26, 2005. That Order again caused the state court's temporary restraining order conditions to remain in effect. As this Order states, the May 26, 2005, order shall remain in effect until changed by the state court.

[3]Eight additional matters were set before the Court on the morning of the trial.

Two matters were motions of the City to expedite consideration of its requests. Those were:

1. A Motion of City of Birmingham for Expedited Hearing on Its Motion to Dismiss, or in the Alternative, for Relief From the Automatic Stay filed May 13, 2005; and

2. An Emergency Motion of City of Birmingham for an Order Deeming Certain Property to be Excluded From Debtor's Estate and Additionally or Alternatively, for Relief From the Automatic Stay filed May 17, 2005.

Both motions are due to be granted.

Three matters were show cause matters instituted by the Court on May 26, 2005. Those were:

1. Show Cause Why this Case Should Not be Dismissed because the Debtor/Corporation is not Represented by a Licensed Attorney. See Palazzo v. Gulf Oil Corp., 764 F.2d 1381 (11th Cir. 1985). This matter was resolved when licensed attorneys made appearances for the debtor. This matter is moot;

2. Show Cause Why Woodlawn Gardens, LLC, and/or Prayer Tower, LLC, Should Not be Dismissed under Section 302(a) of the Bankruptcy Code Because Corporations Cannot be Joint Debtors. This matter is discussed in detail in this Order. It too is moot, as to dismissal;

II. Contentions and Summary of Holdings

The City of Birmingham contends that the apartment property is not part of the debtor's bankruptcy estate and that relief from the stay should be granted to allow the City to continue with its state court proceedings.

Woodlawn Gardens, LLC, contends, notwithstanding the foreclosure, that it continues to own the property and that this Court should allow it to reorganize under the Bankruptcy Code and pay the City for the property.

As discussed below, the Court agrees with the City that: (1) the property which is the subject of the pending motions is not property of the debtor's bankruptcy estate; (2) the property belongs to the City; and (3) the City is entitled to relief from the stay to continue a state court lawsuit pending against the debtor. The Court does not agree that the pending Chapter 11 case should be dismissed.

III. Findings of Fact

A. Loans from the City of Birmingham

On February 13, 2003, the City of Birmingham made two loans to Woodlawn Gardens, LLC, an Alabama limited liability company. City's Exhibit A and City's Exhibit B. One loan was made for $5,496,455.66. A smaller loan was made for $398,429.69. Each was made to allow Woodlawn Gardens, LLC, to acquire and to rehabilitate an apartment complex known as the Woodlawn Gardens Project. The loans were also made to allow Woodlawn Gardens to refinance several small outstanding debts.

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3. Show Cause Why this Case Should Not be Dismissed for Failure to File Proper Schedules. This matter will be addressed by a separate order.

Two matters were filed by Rev. Agee on behalf of the debtor. Those were:

1. Motion for Delay filed May 25, 2005. This matter was granted by the Court's order entered May 26, 2005, and the debtor was allowed two additional weeks to retain an attorney;

2. Motion to Set Aside filed May 25, 2005. The debtor asks the Court to set aside portions of a state court order because an attorney that is alleged to have represented Rev Agee previously and is not employed by the City. This matter is outside the jurisdiction of this Court and the motion is due to be denied.

A final item was filed on June 8, 2005, shortly before the trial. It was the debtor's Notice of Appearance and Debtor's Objections to the Pending Motions as Filed by the City of Birmingham. As to the debtor's objections, they are due to be overruled.

To secure payment of the loans, an individual named Milton J. Domit, acting as the "Initial Member of Woodlawn Gardens, LLC," executed two promissory notes on February 13, 2003. City's Exhibit A. The larger note required repayment of the principal amount, plus 3.5% interest per year, in monthly installments of $33,038.72. It was payable on the first day of each month. The first payment became due on September 1, 2003. The smaller note required repayment of the principal amount, plus 3.5% interest per year, in monthly installments of $2,394.93. It was also payable on the first day of each month and its first payment also became due on September 1, 2003.

The notes were secured by two separate mortgages on the apartment complex and related property. City's Exhibit B. Each mortgage expressly included and encumbered not only the real property and appurtenant structures, but also included and encumbered all apartment leases, rents, and personal property located on the realty.

The mortgages were also executed by Milton J. Domit, as the "Initial Member of Woodlawn Gardens, LLC," on February 13, 2003. Both mortgages were recorded on March 6, 2003, in the appropriate county probate office.

B. Default Under the Notes and Mortgages

Under the terms of the mortgages, either: (1) the sale, transfer, or conveyance of the property; or (2) the failure to make any payment due under the notes, would constitute a default. Both have occurred.

First, without the permission of the City, on September 4, 2003, Woodlawn Gardens, LLC, transferred the property by quitclaim deed to Prayer Tower, LLC. City's Exhibit C. The quitclaim deed was executed by Mr. Domit. A contract between Mr. Domit and Rev. Agee effected the transfer.[4] City's Exhibit C.

Second, neither Woodlawn Gardens, LLC, nor Prayer Tower, LLC, has ever made any of the payments due under either note.[5]

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[4]Mr. Domit was referred to in the deed as the, "sole member of Woodlawn Gardens, LLC,...." City's Exhibit C. Rev. Agee was described in the contract as the "sole member" of Prayer Tower, LLC. City's Exhibit C.

[5]Rev. Agee testified that on one occasion the City refused to accept a $25,000 payment. The evidence demonstrates that the payment referred to was tendered after default and for an amount less that the required payment. Consequently, the City was not required to accept less than it was owed at the time, which at the time was about $74,000. And, of course, if it did accept the lesser amount, that acceptance could have been construed as a waiver as to its right to receive timely subsequent payments in full.

Consequently, the failure of Woodlawn Gardens, LLC, or Prayer Tower, LLC, to make the payments required under the two notes, and Woodlawn's transfer of the property to Prayer Tower, constituted defaults under the terms of the mortgages.

C. Foreclosure of the Mortgages

In response to the defaults, the City elected: (1) to accelerate the two notes; (2) to declare the amounts due immediately due and payable; (3) to institute foreclosure proceedings; and (4) to terminate Woodlawn Gardens, LLC's right to collect rents from tenants residing in the property. By a letter dated January 9, 2004, the City's attorneys notified Woodlawn Gardens, LLC, and Prayer Tower, LLC, of its intentions. City's Exhibit D.

The City scheduled a foreclosure sale for February 11, 2004, to occur in front of the Jefferson County, Alabama courthouse during the legal hours of sale. Notice of the sale was advertised in the Alabama Messenger, a newspaper of general circulation published in Jefferson County, Alabama, the county in which the property is located. That notice was published once a week for three consecutive weeks. City's Exhibit E. Specifically, notice was published on January 24, 2004, January 31, 2004, and on February 7, 2004. Id.

The foreclosure sale occurred on February 11, 2004, as advertised.[6] The City purchased the property with a credit bid of $4,000,000, the highest and best bid for the property. On the same day, as mortgagee, the City executed a Mortgage Foreclosure Deed transferring the property to itself, as purchaser. City's Exhibit F. That deed was recorded in the office of the probate judge for Jefferson County, Alabama, on February 11, 2004.

D. Failure to Relinquish Possession of the Property and Failure to Remit Collected Rents

Also on February 11, 2004, the City's attorneys mailed a letter to Woodlawn Gardens, LLC, and Prayer Tower, LLC, demanding that the LLCs relinquish possession of the property within 10 days of receipt of the letter.[7] City's Exhibit G.[8] In addition, the letter instructed Woodlawn Gardens, LLC, and Prayer Tower, LLC, that they were not authorized to collect rents from the property's tenants and demanded that the LLCs remit any such rents.

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[6]There is no evidence to contradict the validity of the foreclosure.

[7]Under Alabama law, a mortgagee may demand possession of property after foreclosure and if the mortgagor does not relinquish the property, the mortgagor may lose its statutory right of redemption. See Code of Ala. 1975, § 6-5-251.

[8]There is no evidence to contradict the validity of the City's 10-day notice to the debtor.

Notwithstanding the City's demand, neither Woodlawn Gardens, LLC, nor Prayer Tower, LLC, tendered possession of the property to the City.[9] Similarly, although rents were collected from the tenants living in the apartment complex, neither LLC remitted those rents to the City.

E. Complaint to Recover the Property and Rents

To obtain possession of the property and to recover rents which had been collected from the tenants, the City filed suit against Woodlawn Gardens, LLC, and Prayer Tower, LLC, in state court on April 15, 2005. City's Exhibit H.

In its Verified Complaint for Temporary Restraining Order, Preliminary and Permanent Injunction and Appointment of Receiver, the City sought: (1) a judgment for the amounts owed under the two notes; (2) possession of the apartment complex; (3) an order compelling the defendants to account for rents collected after January 9, 2004; (4) an order restraining the defendants from collecting rents from the tenants living in the complex; (5) an order compelling the defendants to hold, for the City, any rents which they have already collected; (6) an order enjoining the defendants from using or disposing of any part of the City's property; and (7) the appointment of a receiver to take possession and control of the complex and to collect the rents. City's Exhibit H.

On April 22, 2005, the City filed a Motion for Temporary Restraining Order, Preliminary Injunction and Appointment of Receiver in the state court case. City's Exhibit I.

A hearing on the Motion for Temporary Restraining Order, Preliminary Injunction and Appointment of Receiver was held on May 4, 2005. After the hearing, the state court issued a temporary restraining order which: (1) awarded possession and control of the property to the City pending an evidentiary hearing; (2) appointed Alvin Johnson of Johnson Realty Company as receiver of the property and directed him to take immediate possession and control of the property; (3) restrained Woodlawn Gardens, LLC, and Prayer Tower, LLC from possessing or controlling the property, and from collecting any rents or otherwise engaging in any active property management; (4) and ordered Woodlawn Gardens, LLC, and Prayer Tower, LLC to provide an accounting to the court of all financial transactions relating to their management of the property, including rents collected. City's Exhibit J.

In the same order, a hearing on a preliminary injunction was scheduled for 1:00 p.m. on May 13, 2005. That hearing was not held because, as discussed below,

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[9]There is no evidence to contradict the evidence that the debtor did not give up the property after the City's demand for possession.

Woodlawn Gardens, LLC, filed the pending Chapter 11 bankruptcy petition prior to the hearing.[10]

F. Chapter 11 Bankruptcy Petition

At 9:36 a.m. on May 13, 2005, Woodlawn Gardens, LLC, filed a handwritten, skeletal, pro se petition for relief under Chapter 11 of the Bankruptcy Code. The petition is signed by "Phillip Randall Agee." Under his signature, in the space provided for specifying the title of the authorized person signing for a corporation, the abbreviation "CEO" is written.

The petition was not accompanied by any schedules, or statement of affairs, or list of creditors, as required by section 521(1) of the Bankruptcy Code. 11 U.S.C. § 521(1). The petition did not include a corporate ownership statement, as required by Bankruptcy Rule 1007(a)(1). Fed.R.Bankr.P. 1007(a)(1). And it did not include a list of 20 largest creditors, as required by Bankruptcy Rule 1007(d). Fed.R.Bankr.P. 1007(d). Woodlawn Gardens, LLC, has since filed some of that material.

As mentioned above, in its filing, Woodlawn Gardens, LLC, purported to include Prayer Tower, LLC, as a joint debtor. The words "Prayer Tower, LLC" are handwritten in the space provided on Official Form B1 entitled "Name of Joint Debtor (Spouse) (Last, First, Middle)," and Rev. Hosea Agee's signature appears on the line provided on the second page of the form for the signature of a joint debtor. Again, no schedules, or statement of affairs, or list of creditors, corporate ownership statement, or list of 20 largest creditors, were filed for the "joint debtor." Prayer Tower, LLC, has yet to file any of those documents.[11]

IV. Conclusions of Law

The City seeks: (A) a declaration that the apartment complex and associated property, such as leases and rents, are not property of any bankruptcy estate; (B) relief from the stay to continue the prosecution of its state court action; and (C) an order dismissing the pending case.

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[10]At the hearing before this Court, the debtor took the interesting position that the state court's temporary restraining order expired by operation of law and that there were no continuing restraints on the debtor. If that order did expire as a matter of law, as the debtor contends, it did so only because the state court was prohibited by the automatic stay from reaching a different resolution before the order expired.

[11]Unrelated to these failures, as discussed below, this Court finds that Prayer Tower, LLC, is not a debtor.

A. Property of the Estate

Property of a bankruptcy estate is defined by section 541 of the Bankruptcy Code. That section explains that the property of an estate includes, "all legal and equitable interests of the debtor in the property **as of the commencement of the case**." 11 U.S.C. § 541(a)(1) (emphasis added). As discussed below, the apartment complex and all things associated with it, such as leases and rents, were not property of the bankruptcy estate of either Woodlawn Gardens LLC, or Prayer Tower LLC, at the commencement of the case and therefore that property was not then, and is not now, property of either estate. The Court first considers the estate of Woodlawn Gardens, LLC.

1. Woodlawn Gardens LLC

As discussed below, there are at least three reasons why the apartment complex and all things associated with it, such as leases and rents, are not property of the bankruptcy estate of Woodlawn Gardens, LLC. Those are: (a) Woodlawn Gardens, LLC, transferred whatever interests it had in the property to Prayer Tower LLC; (b) even if all interests were not transferred, Woodlawn Gardens lost its statutory right to redeem the property after the City's foreclosure when it did not vacate the property after possession was demanded; and (c) even if Woodlawn Gardens did not lose its right to redeem, it did not exercise its right within the one-year period for redemption in Alabama. Each reason is discussed below.

a. All of Woodlawn Gardens' Interests Were Transferred to Prayer Tower

By its own admission, Woodlawn Gardens, LLC, transferred whatever interest it had in the property to Prayer Tower, LLC, by quitclaim deed on September 4, 2003. As such, when it filed its bankruptcy petition February 13, 2005, it did not have any legal or equitable interest in the property. Consequently, that property could not have, as a matter of law, become property of the bankruptcy estate of Woodlawn Gardens, LLC.

b. Woodlawn Gardens Had Already Lost Its Right of Redemption When it Filed Bankruptcy

The Court of Appeals for the Eleventh Circuit instructs that, "The property rights of a debtor in a bankruptcy estate are defined by state law." Commercial Fed. Mortgage Corp. v. Smith (In re Smith), 85 F.3d 1555, 1558 (11th Cir.1996). Writing for the Court, Circuit Judge Stanley F. Birch, Jr. explained the applicable Alabama law. He wrote:

> In Alabama, a mortgagee holds legal title to the real property subject to the mortgagor's equitable right of redemption. Ala. Code § 35-10-26

> (1993). Alabama foreclosure law provides that, upon a foreclosure sale, a mortgagor's equitable right of redemption ends. FDIC v. Morrison, 747 F.2d 610, 613 (11th Cir.1984), cert. denied, 474 U.S. 1019, 106 S.Ct. 568, 88 L.Ed.2d 553 (1985). "[F]oreclosure of a mortgage extinguishes the debt to the amount of the purchase price, if that amount is less than the debt, or extinguishes the entire debt if the purchase price is more than that amount." Davis v. Huntsville Prod. Credit Ass'n, 481 So.2d 1103, 1105 (Ala.1985). **The purchaser at the foreclosure sale then holds legal title to the property, subject to the mortgagor's one year statutory right of redemption**. Ala. Code § 6-5-248(a) & (b).

Id. at 1558-59 (emphasis added).

Section 6-5-251 of the Alabama Code explains what requirements a mortgagor must meet in order to retain that right of redemption. Section 6-5-251 reads in pertinent part:

> (a) The possession of the land must be delivered to the purchaser or purchaser's transferees by the debtor or mortgagor if in their possession or in the possession of anyone holding under them by privity of title, within 10 days after written demand for the possession has been made by, or on behalf of, the purchasers or purchaser's transferees.
>
> *********
>
> (c) Failure of the debtor or mortgagor or anyone holding possession under him or her to comply with the provisions of this section forfeits the right of redemption of the debtor or one holding possession under the debtor.

Code of Ala. 1975, § 6-5-251.

Based on the above, this Court must find that under Alabama law, even if Woodlawn Gardens, LLC, had not transferred its interest in the property to Prayer Tower, LLC, when the foreclosure sale was completed on February 11, 2004, the only interest Woodlawn retained was bare statutory right of redemption.[12] And when it failed to vacate the property within 10 days after being served with written demand to vacate by the City, under section 6-5-251, it lost even that right.

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[12]A right of redemption may become property of a bankruptcy estate if that right existed at the time the bankruptcy was filed. In re Smith at 1558. However, If the right has expired before the bankruptcy is filed, as it did in this case, there is no longer a right to become part of the estate.

Consequently, even if Woodlawn Gardens LLC, did not transfer all of its interests to Prayer Tower LLC, at the time it filed bankruptcy it did not have any remaining interest in the property.

c. Woodlawn Gardens, LLC, Never Redeemed the Property

And finally, even if Woodlawn Gardens, LLC, had not transferred its interest in the property to Prayer Tower, LLC, and had not lost its right of redemption because it failed to vacate, its right to redeem expired on February 11, 2005, one year after the foreclosure sale. Under Alabama law, redemption from a mortgage foreclosure sale must occur within one year from the date that the sale was completed. Section 6-5-248(b) of the Alabama Code reads, "All persons... [who are eligible to redeem property] may exercise the right of redemption granted by this article within one year from the date of the sale." Code of Ala., 1975, § 6-5-248(b) (parenthetical added). Woodlawn Gardens did not redeem the property within its one year period.

Consequently, even if Woodlawn Gardens LLC, did not transfer its interest in the property or did not lose its right of redemption, because it had not redeemed its right of redemption within a year from the date of the foreclosure, it did not have any interest in the property when it filed its bankruptcy on May 13, 2005.

The Court next considers the "estate" of Prayer Tower, LLC.

2. Prayer Tower LLC

Like Woodlawn Gardens, LLC, the apartment complex and all things associated with it, such as leases and rents, are not property of Prayer Tower, LLC's bankruptcy estate. Again, there are at least two reasons.

a. Prayer Tower, LLC, is Not a Debtor

First of all, Prayer Tower, LLC, does not have a bankruptcy estate because it does not have a bankruptcy case. The explanation is simple and straightforward. The instant case was filed by Woodlawn Gardens, LLC, not Prayer Tower, LLC. Prayer Tower, LLC, is designated on the petition only as a **"joint debtor"** of Woodlawn Gardens, LLC.

Section 302(a) of the Bankruptcy Code reads, "A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse." 11 U.S.C. § 302(a). That section was interpreted in In re Korangy, 1989 WL 34317, Adversary Proceeding No. 87-0377 (Bkrtcy. D. Md. March 30, 1989) as permitting, "only an individual and their spouse to be joint debtors. Individuals and a partnership or a corporation cannot be joint debtors." Id. at *4. This Court agrees.

Consequently, Woodlawn Gardens, LLC's attempt to include Prayer Tower, LLC, in a joint case was void. It did not have any legal effect. And since Prayer Tower, LLC, has not filed its own case, there is no Prayer Tower, LLC, bankruptcy, and there is no Prayer Tower, LLC, estate in which the property involved in the present motions might be included.[13]

b. The Foreclosure Sale

Whether Prayer Tower, LLC, files its own bankruptcy case or not, its situation is the same as Woodlawn Gardens, LLC in regard to the foreclosure. The foreclosure sale of the property conducted on February 11, 2004, and the failure of Prayer Tower, LLC, to move from the property, or its failure to redeem any statutory right of redemption it might have had, eliminated any interest Prayer Tower, LLC, may have otherwise had in the property.

Consequently, as in the case with Woodlawn Gardens, LLC, the property subject to the pending motions is not, and cannot be, part of any bankruptcy estate of Prayer Tower, LLC. estate.

B. The City Is Entitled to Relief from the Stay for Cause

The City's second request of this Court is for relief from the stay to continue with its state court litigation against the debtor. Section 362 of the Bankruptcy Code governs the resolution of that request.

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[13] The Court initially raised this issue through a Show Cause Why Woodlawn Gardens, LLC, and/or Prayer Tower, LLC, Should Not be Dismissed under Section 302(a) of the Bankruptcy Code Because Corporations Cannot be Joint Debtors which was scheduled for hearing with the trial of the main motions. In response, counsel for Woodlawn Gardens indicated that he had been instructed by Rev. Hosea Agee, who signed the petition as the representative of Prayer Tower, LLC, and who was present in the courtroom, to inform the Court that Woodlawn Gardens, LLC, is indeed the only debtor in this bankruptcy case, and that Prayer Towers, LLC, is not, and should not be considered, a debtor.

Based on that representation, the Court must conclude that the apartment complex and related property, cannot be part of a bankruptcy estate of Prayer Tower, LLC, because Prayer Tower, LLC, has not commenced a bankruptcy case. Prayer Tower, LLC, should not, however, take that conclusion as a cue to institute a separate bankruptcy estate with the intent of obtaining another stay of the City's efforts to regain possession of the property. As discussed above, the foreclosure of the Woodlawn Gardens' interest foreclosed any interest Prayer Tower, LLC, might have had.

1. General Rule

A party is entitled to relief from the automatic stay pursuant to section 362(d)(1) of the Bankruptcy Code, "for cause, including the lack of adequate protection of an interest in property of such party ...." 11 U.S.C. § 362(d)(1).[14]

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[14]Section 362(d) reads:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period)--

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

11 U.S.C. § 362(d). While subsection 362(d)(3) addresses a single asset estate, its provisions do not apply here. The debtor has neither filed a plan under subsection (d)(3)(A) nor made payments under subsection (d)(3)(B). And although the pending case is a “single asset” case, this Court is not, “precluded from granting relief under section 362(d)(1) or (2) where it is

2. Burdens of Proof

In a hearing of a motion for relief from an automatic stay, the party requesting relief has the burden of proof on the issue of the debtor's equity in the Property, while the debtor has the burden of proof on all other issues. 11 U.S.C. § 362(g).

3. Cause under Section 362(d)(1)

Relief from stay may be granted for "cause" under section 362(d)(1). Because the Code does not define that term, courts are left to determine whether cause exists for granting a relief from stay based on the totality of circumstances in each case. Baldino v. Wilson (In re Wilson), 116 F.3d 87, 90 (3rd Cir.1997); In re Brown, 290 B.R. 415, 423 (Bankr. M.D. Fla. 2003). Legislative history indicates that the "'facts of each request will determine whether relief is appropriate under the circumstances.'" In re Mazzeo, 167 F.3d 139, 142 (2nd Cir. 1999)(quoting H.R.Rep. No. 95-595, at 343-44 (1977), reprinted in 1978 U.S.C.C.A.N. 6300).

The Court should, "consider the policies underlying the Bankruptcy Code as well as the competing interests of the creditor, debtor, and other parties in interest" when exercising its discretion in granting a motion for relief for cause. In re Borbidge, 81 B.R. 332, 335 (Bankr. E.D. Pa. 1998). Thus, cause is an inherently broad and flexible concept, allowing the bankruptcy court to resolve matters based on the unique facts of each situation.

Based on the evidence, the Court finds that cause exists for allowing the City relief from the stay for the purpose of pursuing its state court action.

First, the property involved in the state court proceeding, that is the apartment complex which stood as collateral for the City's loans, does not belong to either Woodlawn Gardens, LLC, or Prayer Tower, LLC. It belongs to the City. Neither Woodlawn Gardens, LLC, nor Prayer Tower, LLC, have any lawful claim to it, or interest in it, whatsoever. Consequently, the bankruptcy stay has no application to it and their continued occupation and control of it, including the collection of rents, is wrongful.

Second, even if the property had not been lost to foreclosure and failure to timely vacate and redeem, neither Woodlawn Gardens, LLC, nor Prayer Tower, LLC, have made any payments on the property during the two and one-half years that have

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appropriate to do so even where the 90 days of section 362(d)(3) have not run. 2 Lawrence P. King, Collier on Bankruptcy ¶ 362.07 at 362-74 (15th ed. 1996)." In re Duvar Apt., Inc., 205 B.R. 196, 200 (9th Cir. BAP 1996). See also In re Pacific Rim Investments, LLP, 243 B.R. 768, 772 (D. Colo. 2000) and In re 234-6 West 22nd St. Corp., 214 B.R. 751, 755 (Bankr. S.D.N.Y. 1997).

passed since Woodlawn Gardens formerly acquired the property. In addition, both Woodlawn Gardens, LLC, and Prayer Tower, LLC, have failed to maintain casualty insurance on the property.

Third, Prayer Tower, LLC, is not a debtor in any bankruptcy case. Consequently, as to Prayer Tower, LLC, the state court action is not stayed. There is no bankruptcy stay in place which constrains the City from proceeding against Prayer Tower.

Fourth, there is no reason that Woodlawn Gardens, LLC, or Prayer Tower, LLC, should not be required to account for their stewardships of the property involved in this case. And Woodlawn Gardens, LLC, which is the only one of those entities that is in bankruptcy, has not suggested any reason that it should not be required to render an accounting. Similarly, it has not suggested how requiring it to account would tend to frustrate or impede its reorganization efforts, especially when those efforts apparently center strictly on the operation of the apartment complex, a complex that it does not own and should soon be required to relinquish. In fact, such an accounting should be a matter of simply opening its books and records to the state court receiver and the City's attorneys, which should not, relatively speaking, represent any significant burden.

Fifth, the state court has an expertise far beyond this Court's to resolve the issues between the parties, including any defenses that the defendants in that case may wish to present. All issues strictly involve state law. They can be addressed and be resolved in the state court more expeditiously than in this Court.

Based on the above, the Court finds that cause exists under section 362(d)(1) to lift the stay to allow the City to continue with its state court litigation.

C. There Is No Current Reason to Dismiss this Case

The City argues that Woodlawn Gardens, LLC, filed its reorganization case in bad faith and that the case should therefore be dismissed. While this Court recognizes that the operation of the apartment complex may be Woodlawn Gardens, LLC's only business function, and that this Order will effectively terminate that function, the Court cannot assume that the pending case may not serve another function.

In regard to the City, all of its objectives will be met. The City sought: (1) to obtain a declaration that the apartment complex is not property of the bankruptcy estate; (2) to obtain relief from the stay so that its state court action can continue; (3) to obtain control of the property and rents from Woodlawn Gardens, LLC, and Prayer Tower, LLC; and (4) to obtain an accounting of the LLC's activities. All of those objectives will be met upon entry of this Order.

Consequently, because the debtor may have other interests that would benefit from a reorganization, and because the City has received all that it requested, excluding dismissal, the Court finds that dismissal now is not warranted.[15]

V. ORDER

Based on the above, it is **ORDERED, ADJUDGED, and DECREED**:

1. The Motion of City of Birmingham to Dismiss, or in the Alternative, for Relief From the Automatic Stay is **GRANTED** as to the relief from stay but **DENIED** as to dismissal:

2. The Motion of City of Birmingham for Emergency Hearing on its Motion for an Order Deeming Certain Property to be Excluded From Debtor's Estate and Additionally or Alternatively, for Relief From the Automatic is **GRANTED** as to relief from the stay and **GRANTED** to the extent that the disputed property is deemed excluded from the estate;

3. The apartment complex generally known as the Woodlawn Gardens Project and its associated property, including leases, rents, personalty, and other common items, (which are the subject of the City's motions) belong to the City of Birmingham. Neither Woodlawn Gardens, LLC, nor Prayer Tower, LLC, has any right, title or interest whatsoever in that property. And that property is not part of any bankruptcy estate.

4. The automatic stay is not applicable to the apartment complex and associated property and does not act to constrain or prevent the City's acts to obtain possession and control of that property;

5. There is no stay applicable to, and none to impede, the continued prosecution of the City's state court action against Woodlawn Gardens, LLC, or any other act or action against that entity which may now be pending or may hereafter be commenced.

6. Prayer Tower, LLC, is not a debtor in any bankruptcy case and has not commenced a bankruptcy case. There is no stay applicable to, and none to impede, the continued prosecution of the City's state court action against Prayer Tower, LLC, or any other act or action against that entity which may now be pending or may hereafter be commenced.

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[15]The Court has not directly considered the City's argument that the current case was filed in bad faith.

7. Relief from the automatic stay is granted for the City to employ such lawful measures as may be necessary to obtain possession and control of the apartment complex generally known as the Woodlawn Gardens Project and associated property, and to employ such additional state court remedies or procedures as may be necessary to realize, accomplish, or obtain in full such relief as may be granted by the state court.

8. Eight additional matters were set before the Court on the morning of the trial. The dispositions of those matters is in accordance with the discussion in note 3 above. Those are:

   A. The Motion of City of Birmingham for Expedited Hearing on Its Motion to Dismiss, or in the Alternative, for Relief From the Automatic Stay filed May 13, 2005, is **GRANTED**;

   B. The Emergency Motion of City of Birmingham for an Order Deeming Certain Property to be Excluded From Debtor's Estate and Additionally or Alternatively, for Relief From the Automatic Stay filed May 17, 2005, is **GRANTED**;

   C. The Show Cause Why this Case Should Not be Dismissed because the Debtor/Corporation is not Represented by a Licensed Attorney is **MOOT**;

   D. The Show Cause Why Woodlawn Gardens, LLC, and/or Prayer Tower, LLC, Should Not be Dismissed under Section 302(a) of the Bankruptcy Code Because Corporations Cannot be Joint Debtors is **MOOT**;

   E. The Show Cause Why this Case Should Not be Dismissed for Failure to File Proper Schedules will be addressed by a separate order;

   F. The Motion for Delay was **GRANTED** by this Court's May 26, 2005 order;

   G. The Motion to Set Aside is **DENIED**;

   H. The debtor's Notice of Appearance and Debtor Objections to the Pending Motions as Filed by the City of Birmingham are **OVERRULED** as to the objections;

9. **This Court's order of May 26, 2005, Proceeding No. 32, shall remain in effect until the state court affirms it or rules otherwise;**

10. This order is a written opinion for purposes of the E-Government Act, Pub. L. No. 107-347.

Dated: June 13, 2005

/s/Benjamin Cohen
BENJAMIN COHEN
United States Bankruptcy Judge

BC:sm
cc: Mr. Matthew W. Grill
Mr. Brian Bugge
Clerk of the Circuit Court of Jefferson County, Alabama
in Case No. 2005-2291-HSL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
Susan King Kearney,	)	Case No.: 98-03967-BGC-7
	)	
Debtor.	)	

Susan King Kearney,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	AP No. 99-00239-BGC-7
	)	
Regions Bank,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

I. Background

The defendant Regions Bank conducted a foreclosure sale of the debtor's home at 11:04 a.m. on June 17, 1998. It purchased the property for $1,003,623.34. The debtor Mrs. Susan Kearney filed the pending case at 11:45 a.m. the same day. Shortly after the sale, Regions demanded possession of the property. When Mrs. Kearney failed to vacate, Regions filed a successful ejectment action in state court. After Mrs. Kearney and her family vacated, Regions sold the home. It was later razed by the buyers.

Mrs. Kearney filed the pending Complaint to Set Aside Foreclosure Action by Regions Bank, To Reinstate the Mortgage, To Account for All Funds in Account 304598695, To Determine the True Amount Owed on the Note on June 30, 1999. In it she contended that the foreclosure was wrongful, that the ejectment action was a violation of the automatic stay, and that because of the defendant's actions, certain personal property left in the home was lost, stolen, or destroyed. Mrs. Kearney seeks compensatory and punitive damages for the harm she contends the defendant caused.

A trial was held on October 9, 2001. Appearing were Mrs. Kearney; Mr. Stephen D. Heninger, her attorney; and Mr. Stephen A. Rowe, Regions' attorney.

Nine witnesses testified. They were: (1) Mrs. Kearney; (2) Mr. Maclin F. Smith, III, the president of Regions Bank and the bank's senior lending officer; (3) Mr. Stephen P. Leara, one of Regions' attorneys; (4) Mr. Michael A. Mitchell, a former loan officer at Regions Bank; (5) Mr. Stanley E. Ware, an employee of Regions Financial Corporation, (Regions' holding company); (6) Mr. J. Brooke Johnston, Mrs. Kearney's former partner; (7) Mr. Lee Benton, the attorney for the trustee in Mrs. Kearney's bankruptcy case; (8) Mr. Jerry Schoel, an attorney called as an expert witness by Regions Bank; and (9) Mr. J. Lester Alexander, a certified public accountant and certified fraud examiner called as an expert witness by Regions Bank.[1]

Additional testimony was offered through a transcript of a March 12, 2001, hearing before this Court.[2] Offered as Joint Exhibit 1, that transcript included the testimony of Mr. Irving Meisler and Mrs. Pam Meisler, the purchasers of Mrs. Kearney's home.

The Court held a hearing on September 24, 2001, to consider objections to the admissibility of documents identified by the parties. No objections were filed and none were made at the hearing. Accordingly, the Court entered an order on October 3, 2001, admitting all identified exhibits without objection. Order entered October 3, 2001, AP Proceeding No. 135. Additional exhibits were offered at trial.

All matters were submitted on the exhibits admitted pursuant to the Court's October 3, 2001, order; exhibits admitted at trial; the testimony of eight of the nine trial witnesses; the Meislers' testimony from the March 12, 2001, hearing; pleadings; the records in this proceeding and case number 98-03967-BGC-7; and oral and written arguments.

II. Summary of the Opinion

The cornerstone of this Court's opinion is: Mrs. Kearney and her husband Mr. William Kearney, Jr., not Regions Bank, caused Mrs. Kearney's financial harm.[3] And based on its opinion, the Court finds that judgment should be entered in favor of Regions and against Mrs. Kearney.

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[1] Mr. Schoel testified to ultimate legal conclusions. The Court found that testimony to be inadmissible and has not considered it. See U.S. v. Bilzerian, 926 F.2d 1285 (2nd Cir 1991), "As a general rule an expert's testimony on issues of law is inadmissable. See generally, Note, Expert Legal Testimony, 97 Harv.L.Rev. 797 (1984)." Id.

[2] Joint Exhibit No. 1, (Meisler Transcript.)

[3] While Mr. Kearney participated in most of the matters leading up to the trial of the pending complaint, he did not participate in the trial.

A. Summary of the Facts

Mrs. Kearney and Mr. J. Brooke Johnston were partners in Riverchase Office Partners (ROP.)[4] ROP was formed to construct an office building on a particular parcel of real property.

On April 5, 1995, the partnership obtained a construction loan of $3,100,000 from Regions Bank, the defendant. That loan was secured by the realty owned by the partnership and was personally guaranteed by both partners.

Around the same time, Mr. and Mrs. Kearney owned a home in Mountain Brook, Alabama, an affluent suburb in the Birmingham, Alabama, metropolitan area.[5] AmSouth Bank in Birmingham held first and second mortgages on that property.

In July 1995, the Kearneys borrowed about $500,000 from Regions. In conjunction, they executed two promissory notes, one for $340,000 and another for $160,000. To secure the notes, the Kearneys gave Regions a third mortgage on their Mountain Brook home and a second mortgage on a condominium they owned in Florida. Each then executed a personal guarantee of the other's obligations to pay the notes. Mr. Johnston, Mrs. Kearney's partner in ROP, also personally guaranteed the notes.

Under the partnership agreement, Mrs. Kearney's husband, Mr. William Kearney, managed the partnership's business, but he was not a partner. In contrast, all of the parties, including Regions and its employees, treated Mr. Kearney, rather than Mrs. Kearney, as Mr. Johnston's partner, and all interacted with Mr. Kearney as if he were Mr. Johnston's partner. Mr. Kearney responded by acting as if he were Mr. Johnston's partner, and on occasion, represented himself to be Mr. Johnston's partner. Similarly, in relation to the business of the partnership, Mr. Kearney spoke for Mrs. Kearney and acted in her place.

In deference to her husband, Mrs. Kearney assumed a passive role in the partnership business and abdicated her partnership responsibilities to him. She made few, if any, partnership decisions; did not have contact with contractors, subcontractors, or suppliers on the project; and allowed Mr. Kearney to speak for her and to make

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[4] Mr. Johnston filed a nondischargeability complaint in this Court against Mrs. Kearney on February 22, 1999. That complaint is pending. With the entry of the instant opinion and accompanying order, that complaint will be set for a status conference.

[5] Mountain Brook, Alabama, is a 12.2 square mile municipality bordering Birmingham, Alabama. According to the 2000 Census, the total population was 20,604. In 2000, the median home value was $336,300. The median family income was $122,647, about three time the national average. And the per capita income was $59,085, again about three times the national average. See, http://factfinder.census.gov.

decisions on her behalf. Her acquiescence to Mr. Kearney was especially evident in regard to communications with Mr. Johnston and Regions.

As ROP's manager, Mr. Kearney administered the partnership construction loan funds borrowed from Regions Bank. Over time, the loan amount increased from the original $3,100,000 to $4,500,000.

Under Mr. Kearney's management of the partnership funds, the Kearneys diverted $1,800,000 of those funds from ROP's account. They deposited the diverted funds into their personal bank account, into accounts of other business ventures they owned, or into the personal bank accounts of three of Mrs. Kearney's sons. ROP spent the balance.

By November 1996, ROP was broke. And while the office project was incomplete, and ROP had incurred huge cost overruns, Regions refused to lend ROP additional money. In turn, ROP was in default under the terms of the construction loan for other reasons.

In response, through its loan officer Mr. Mike Mitchell, Regions called on Mr. Johnston and Mr. Kearney personally to contribute funds to cover the project overruns. On Mrs. Kearney's behalf, Mr. Kearney told Mr. Mitchell that he expected to receive a substantial amount of cash from a real estate closing and promised he would inject those funds into ROP.

The two personal mortgage notes the Kearneys owed to Regions were also in default for failure to pay accrued interest. Mr. Kearney told Mr. Mitchell to use the funds from the anticipated real estate closing first to pay the accrued interest on the two personal mortgage notes and second to use the remainder to pay the ROP obligations.

As Mr. Kearney represented, in late November 1996, $500,000 was wired into the Kearneys' personal account at Regions. That money was wired from the account of the "George E. Mitchell Revocable Trust." The documents evidencing the transfers indicate that Mr. Kearney, and not Mrs. Kearney, was the beneficiary of that trust, and that the money, consequently, belonged to Mr. Kearney and not Mrs. Kearney.

With those finds, Mr. and Mrs. Kearney wrote $236,120.59 in checks from the account, mostly, it appears, to ROP subcontractors. In addition, Regions debited a net $256,301.06 from the account. That amount paid the accrued interest on ROP's construction loan, the claims of several ROP subcontractors, and the accrued interest on the notes secured by the mortgage on the Kearneys' home. The deposit also served to eliminate an overdraft in the Kearneys' personal account.

Mrs. Kearney's written guarantee of the ROP loan specifically authorized ROP to take money, unilaterally and without notice, from her account to satisfy the construction loan. The debits made by Regions from the Kearneys' account, as well as the manner

in which it expended the debited money, were also authorized under the personal guarantee that Mr. and Mrs. Kearney executed in connection with the two mortgage loans made to them by Regions. The debits were also authorized by general agreements governing Regions' relationship with its deposit account customers.

Less than a month after the $500,000 had been deposited into the Kearneys' account, all of those funds were spent.

In time, things became worse for both ROP and the Kearneys, primarily because Mr. and Mrs. Kearney's immediate source of income during the ROP years was the proceeds they diverted from ROP's construction loan account and deposited for their personal use. Consequently, when the ROP construction loan dried up, Mrs. Kearney's ability to pay her home mortgage loans did also. Similarly, when ROP's construction loan ran out, ROP lost its ability to pay its construction loan. Consequently most of its contractors, subcontractors, and suppliers disappeared.

Because the Kearneys could not then make payments due on the notes secured by mortgages on their homestead, they defaulted on those notes. AmSouth Bank noticed these two mortgages for foreclosure on February 13, 1998.

In order to save its mortgage interest in the property, Regions purchased AmSouth's two notes and obtained an assignment of the mortgages securing those notes. In response, the Kearneys executed a new note to Regions for $911,500. That note encompassed the debts they formerly owed to AmSouth and the larger of the mortgage notes they owed to Regions. The new note required regular monthly payments of interest only and, by its terms, became due and payable in full on June 1, 1998.

The Kearneys did not make the interest payments required by the two notes secured by the mortgage on their homestead. Consequently, Regions declared the notes in default and noticed a foreclosure sale for June 17, 1998. In addition, the larger note became due in full on June 1, 1998, as to both principal and accrued interest. But the Kearneys could not, and did not, pay it either.

Regions conducted a foreclosure sale of the Kearney's homestead on June 17, 1998, at 11:04 a.m. Regions was the successful bidder, purchasing the property for $1,003,623.34. At 11:45 a.m. on the same day, Mrs. Kearney filed a skeletal Chapter 13 petition. On August 10, 1998, on her own motion, Mrs. Kearney's Chapter 13 case was converted to Chapter 7.

Although Regions asked the Kearneys to move from the property, the Kearneys did not. Without seeking relief from the stay, on August 21, 1998, Regions filed a complaint in state court seeking to have the Kearneys ejected from their former homestead. On November 9, 1998, after concluding that the automatic stay in Mrs. Kearney's bankruptcy case did not apply to the proceeding before it, the state court

entered a judgment in favor of Regions and ordered the Kearneys removed from the property.

The Kearneys later reached an agreement with Regions that allowed them to remain in the property until after Thanksgiving 1998. After Thanksgiving, the Kearneys moved the bulk of their personalty into storage. Mrs. Kearney and her minor son moved out of the house. Mr. Kearney continued to live there.

The Kearneys left a few personal items in the house and in an old Chevrolet van parked on the property. They alleged they had no other place to store those items.

In accordance with the state court's ejectment order, a sheriff's deputy visited the property on January 6, 1999. He removed the remaining personalty from the house and put it outside by the garage. He did not move or otherwise disturb the van or its contents. After the deputy left, Mr. Kearney moved the personalty back into the house.

On May 14, 1999, Mrs. Kearney received her chapter 7 discharge. Her statutory right to redeem her former homestead expired no later than June 17, 1999.

On September 28, 1999, Regions sold Mrs. Kearney's former homestead to Mr. Irving D. Meisler and his wife, Pamela H. Meisler for $940,000. Through a mutual acquaintance, the Meislers attempted to persuade Mrs. Kearney to remove the remaining personalty from the property. Mrs. Kearney informed the mutual acquaintance that all she wanted from the house were some children's older clothing, which the Meislers subsequently delivered to the acquaintance for delivery to Mrs. Kearney.

The Chevrolet van, along with its contents, disappeared in late December, 1999. A day or two later, a big screen television and sofa which the Kearneys had left in the house also disappeared. Some old garden tools and similar items remained in the house. Mr. Meisler disposed of those, believing them to have been abandoned.

The Meislers demolished the house sometime between December 23 and December 28, 1999.

B. Summary of the Holdings

Mrs. Kearney amended her complaint several times during the course of this proceeding. But through it all, her contentions have consistently fallen within five general causes of action – three prepetition and two post-petition.[6] Those are: (1) a <u>prepetition</u> state law cause of action for conversion, constructive contract, and fraud

[6] Most of those causes of action accrued prepetition and of course therefore belonged to Mrs. Kearney's bankruptcy estate.

based on her contention that the debits made by Regions from her personal bank account were improper; (2) a prepetition state law cause of action for wrongful foreclosure; (3) a prepetition state law cause of action for an accounting from Regions for the funds it debited from her account; (4) a post-petition federal law cause of action for violation of the automatic stay; and (5) a post-petition state law cause of action for fraud or misrepresentation based on her allegations regarding allegedly false assurances made by Regions about the personalty left on the Old Leeds Ridge property.[7]

1. Prepetition Causes of Action

Prior to trial, the trustee and Regions announced a compromise of all prepetition causes of action.[8] Accordingly, the trustee did not participate in the trial. In contrast, and in disregard of the compromise, Mrs. Kearney tried her case as if those prepetition causes of action were under her control and had not been eliminated by the settlement reached between the trustee and Regions.

The question of whether Mrs. Kearney could have prosecuted those causes of action is discussed below; however, for now, this Court concludes that even if Mrs. Kearney could have prosecuted those causes of action, at trial she failed to prove any factual bases to support them.

2. Post-petition Causes of Action

As to the post-petition causes of action, the Court finds that Mrs. Kearney failed to prove a post-petition state law cause of action for fraud or misrepresentation and failed to prove an actionable violation of the automatic stay.

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[7] In summary, Mrs. Kearney's specific allegations are:

1. Regions wrongfully debited funds from her personal account.
2. Regions provided confidential banking information to a third party.
3. Regions wrongfully foreclosed mortgages on her home.
4. After foreclosure, Regions promised to "work with" her but did not.
5. Regions violated the automatic stay by filing an ejectment action against her after she filed the pending bankruptcy case.
6. Regions and a third party conspired against her.
7. She is entitled to an accounting.
8. The sum of the above constitutes "malice" sufficient to authorize an award of punitive damages under section 362(h) of the Bankruptcy Code.

[8] Notwithstanding Mrs. Kearney's trial of the prepetition causes of action, it is this Court's position that after the compromise, the only remaining causes of action were the alleged post-petition causes.

In regard to the alleged fraud, Mrs. Kearney failed to prove that any action taken by Regions resulted in the loss of her personalty. In regard to the automatic stay, Mrs. Kearney failed to prove that Regions, even if it did violate the stay, acted willfully or in bad faith. In addition, there are equitable considerations that compel annulment of the stay as to all actions taken by Regions in connection with its ejectment proceeding.

C. Ultimate Conclusions

The Court concludes that Mrs. Kearney failed to prove the essential elements of any cause of action and that judgment on all counts must be rendered in favor of Regions Bank and against Mrs. Kearney.

III. Basic Findings of Facts

(An Annotated Chronological Summary of these facts is attached as Appendix A)

A. 1989

Mr. William Kearney, Jr., the debtor's husband, and Mr. J. Brooke Johnston, the debtor's partner, had previously collaborated on many business ventures.[9] In the instant situation, they worked together to develop a plan to form a partnership for constructing an office building. Under that plan, Mr. Johnston and Mrs. Kearney were to be general partners and Mr. Kearney was to manage the project.[10]

On December 1, 1989, Mr. Johnston and Mrs. Kearney executed an agreement that created the planned partnership. The partnership was named "Riverchase Office Partners", and was referred to as "ROP". Under the agreement, Mr. Johnston and Mrs. Kearney were equal partners and Mr. Kearney was appointed the managing agent of the partnership.[11] The agreement contemplated that Mr. Kearney would not receive a salary or other present compensation, but would share in the profits Mrs. Kearney would receive from the sale or lease of the building.[12]

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[9] Mr. Johnston testified that in addition to his involvement with Mr. Kearney in ROP, he was also a partner with Mr. Kearney in several other partnerships including "East Hampton," "South Hampton," and "Pelican Beach Development." Transcript at 320-21.

[10] Transcript at 348.

[11] Defendant's Exhibit No. 6 ("Partnership Agreement of Riverchase Office Partners"). The document is also included in Plaintiff's Exhibit No. 41.

[12] Transcript at 321.

There is no evidence that Mrs. Kearney had any real business experience, or financial insight, or that she brought any such talents or attributes to the partnership. On the other hand, Mr. Johnston was an experienced businessman and attorney. Similarly, Mr. Kearney was an experienced businessman who had extensive experience in real estate development.[13]

B. 1990

On February 28, 1990, ROP borrowed $510,000 from the National Bank of Commerce of Birmingham, Alabama. The funds were ostensibly used to purchase the real property for the office building.[14] The note for that debt required repayment of the entire principal on March 1, 1991. It was secured by a purchase money mortgage on the property, as well as the personal guarantees of Mr. Johnston and Mrs. Kearney.[15]

C. 1992

On June 24, 1992, Mr. and Mrs. Kearney borrowed a total of $500,000 from AmSouth Bank in Birmingham, Alabama. Two separate notes were issued. The first note was for $380,000.[16] It required monthly installment payments until June 24, 2007, plus a final balloon payment on that date. The second note was for $120,000.[17] It required payment of the principal balance in one lump sum on June 24, 1993. To secure payment of both notes, the Kearneys gave AmSouth a mortgage on their homestead, which consisted of a house and appurtenant five and one-half acres of real estate located at 4005 Old Leeds Ridge, in the city of Mountain Brook, Alabama.[18]

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[13] Plaintiff's Exhibit 51 is a handwritten statement purported to have been prepared by Mr. Kearney. The document describes real estate developments and projects in New Hampshire, Massachusetts, and Florida in which he was involved.

[14] The evidence does not indicate who owned the property or how it came to be owned by ROP; however, the property is specifically referred to in the partnership agreement and was later mortgaged by ROP as collateral for its construction loan.

[15] Plaintiff's Exhibit 41 (documents entitled "Master Note-Commercial Loans" and "Mortgage").

[16] Plaintiff's Exhibit 36.

[17] Plaintiff's Exhibit 46.

[18] As noted above, Mountain Brook, Alabama is an affluent suburb in the Birmingham, Alabama metropolitan area.

On June 24, 1992, AmSouth loaned $263,018.73 to Supreme Distributors Finance Company (SDFC), a corporation owned by the Kearneys.[19] AmSouth loaned SDFC an additional $150,000 on August 31, 1992.[20]

On August 2, 1992, AmSouth filed suit against Mrs. Kearney for declaratory judgment and other relief with respect to certain claims made against AmSouth by Bessemer Industrial and General Steel Fabricators, Inc. (BIG Steel). The lawsuit involved approximately $300,000 in checks which allegedly had been made payable to BIG Steel, but which allegedly had been deposited into AmSouth accounts of several corporate entities owned in whole or part by Mrs. Kearney.[21]

D. 1993

Sometime in 1993, Mr. Kearney was indicted for allegedly embezzling $243,065 from BIG Steel.[22]

Also in 1993, Mr. Kearney first contacted Regions Bank (then named "First Alabama Bank") about obtaining a loan. On December 21, 1993, he and Mr. Johnston met with Mr. Michael Mitchell, a loan officer at Regions Bank, and Mr. Mac Smith, another bank officer, to discuss a short-term loan to cover expenses incurred in connection with a real estate venture in Destin, Florida.[23] On December 31, 1993, Regions loaned Mr. Kearney $100,000 for that purpose.[24] The loan was to be repaid in 90 days. Mr. Johnston personally guaranteed this debt which was also secured by $40,000 in municipal bonds owned by Mr. Kearney.

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[19] Plaintiff's Exhibit 37.

[20] Plaintiff' Exhibit 37.

[21] See Defendant's Exhibit 13 and Plaintiff's Exhibit 60, (the same document) and Motion for Relief from Automatic Stay to Enforce Settlement filed July 1, 1998, Proceeding No. 5. **A matter referred to with a "Proceeding No." is a matter filed in the debtor's main case. A matter referred to as an "AP Proceeding No." is a matter filed in the instant adversary proceeding.**

[22] Plaintiff's Exhibit 53 (photocopy of newspaper article, last page of exhibit).

[23] Plaintiff's Exhibit 53 ("Commercial Loans Contact Report" dated December 21, 1993).

[24] Plaintiff's Exhibit 53 ("Commercial Loans Contact Report" dated December 28, 1993); Plaintiff's Exhibit 42 ("Commercial Loan Activity Journal" for the period ending December 31, 1993); and Plaintiff's Exhibit 50 ("Loan Memo").

E. 1994

On January 3, 1994, Mr. and Mrs. Kearney opened a joint checking account at Regions with a $100,000 deposit.[25] When Mr. Kearney's December 31, 1993, loan for $100,000 loan became due and after Mr. Kearney paid the accrued interest, Regions extended the loan for another 90 days.[26] Each time that debt became due in 1994 and 1995, Regions renewed the note for additional 90-day periods after Mr. Kearney paid the accrued interest.[27]

On September 2, 1994, the Kearneys and SDFC (Supreme Distributors, the Kearneys' corporation) executed a note in favor of AmSouth for $169,779.36.[28] The note represented a consolidation of the unpaid portion of the $120,000 note executed by the Kearneys on June 24, 1992, (the note executed by SDFC that same date), and the note executed by SDFC on August 31, 1994. The consolidated note required the Kearneys and SDFC to pay 59 consecutive equal monthly installments and one final balloon payment on August 24, 1999. This note was secured by the home mortgage executed by the Kearneys in favor of AmSouth on June 24, 1992.

F. 1995

In January 1995, ROP secured a commitment from Community Bio-Resources, Inc. (CBR) to enter into a ten-year lease of the office building ROP was to construct.[29] Based on that commitment, on April 5, 1995, Regions and ROP entered into a written agreement in which Regions agreed to loan ROP $3,100,000 in periodic advances. The loan proceeds were to be used to construct the building and to satisfy the purchase money mortgage on the subject realty.[30] The agreement provided for the eventual conversion of the construction loan into a term loan. In return, ROP executed a note where it agreed: (1) to repay any amount advanced by Regions, on demand and in full, by December 15, 1995; and (2) to make monthly interest payments on any amounts

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[25] Defendant's Exhibit 114 (bank statement with closing date of January 5, 1994).

[26] Plaintiff's Exhibit 42 ("Commercial Loan Activity Journal" for the period ending December 31, 1994). The same document was also admitted as part of Defendant's Exhibit 108.

[27] Plaintiff's Exhibit 42 ("Commercial Loan Activity Journal" for the period ending December 31, 1994 and "Commercial Loan Activity Journal" for the period ending December 31, 1995).

[28] Plaintiff's Exhibit 37 and Plaintiff's Exhibit 35.

[29] Defendant's Exhibit 58.

[30] Plaintiff's Exhibit 41.

advanced.[31] The note was secured in part by a mortgage on the ROP property, a blanket security interest in everything ROP owned or which it might acquire, an assignment of the CBR lease, and the unlimited personal guarantees of Mr. Johnston and Mrs. Kearney.

Regions made an initial advance of $724,763.01. ROP used those funds to pay the closing costs in connection with the loan and to pay the purchase money mortgage debt it owed National Bank of Commerce.[32] By the end of the year, Regions had advanced $1,872,742.24 to ROP.[33]

In her personal guarantee agreement, Mrs. Kearney expressly granted Regions a security interest in any deposit account the bank held in which she had an interest. She also agreed that if ROP was in default, Regions could immediately apply any such deposit account toward the payment of any debt owed by ROP to Regions.[34] That agreement also authorized Regions, upon default by ROP, to proceed against Mrs. Kearney without first attempting to collect from ROP.

In July 1995, the Kearneys jointly executed two personal notes in favor of Regions. One note was for $340,000. Another was for $160,000.[35] These notes were secured by a mortgage on the Kearneys' homestead, a mortgage on a condominium they owned in Destin, Florida, and by a limited personal guarantee executed by Mr. Johnston.[36] Under the terms of Mr. Johnston's guarantee agreement, Regions was required first to liquidate its collateral before seeking payment from him.[37] Furthermore, his liability under the agreement was, in any event, limited to $170,000. In addition, Mr.

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[31] Defendant's Exhibit 8 ("Promissory Note (Master Construction Note)")(also admitted as an attachment to both Plaintiff's Exhibit 41 and Plaintiff's Exhibit 40) and Defendant's Exhibit 7 ("Mortgage and Security Agreement")(also admitted as an attachment to Plaintiff's Exhibit 41).

[32] Plaintiff's Exhibit 41 ("Closing Memorandum Statement").

[33] Plaintiff's Exhibit 43 ("Commercial Loan Activity Journal" for the period ending December 31, 1995).

[34] Defendant's Exhibit 16. The same document was also admitted as an attachment to Plaintiff's Exhibit 41.

[35] Defendant's Exhibit 1 (which is the same document as Plaintiff's Exhibit 38), and "Variable Rate Consumer Loan Agreement" attached as Exhibit A to Claim No. 15 filed by Regions Bank on January 29, 1999.

[36] Defendant's Exhibit 2 (which is the same document as Plaintiff's Exhibit 39), "Variable Rate Consumer Loan Agreement" attached as Exhibit A to Claim No. 15 filed by Regions Bank on January 29, 1999, and Defendant's Exhibit 4.

[37] Defendant's Exhibit 4.

and Mrs. Kearney were required to execute personal guarantees of one another's obligation to pay the two notes.[38]

The guarantee agreement Mr. and Mrs. Kearney executed in connection with the two personal loans: (1) granted Regions a security interest in any Regions deposit account where the Kearneys had an interest; (2) authorized Regions, upon default in payment of the notes, immediately to apply any such deposit account toward the payment of any debt which the Kearneys owed to Regions; and (3) authorized Regions, upon default of the Kearneys, to proceed against either of the Kearneys, without first attempting to collect from the other. And finally, in the loan agreement relating to the smaller note, the Kearneys specifically granted Regions a security interest in any deposit in which they had an interest and authorized Regions to apply or set off any such deposit toward the payment of that loan.[39]

The $340,000 note required the Kearneys to make monthly payments of interest only for a period of six months and then, after February 1996, for amortization of the principal balance, with interest, over a ten year period.[40] The $160,000 note matured on October 26, 1995.[41]

The Kearneys used the money they borrowed to satisfy: (1) the balance of Mr. Kearney's existing $100,000 Regions' note; (2) a $200,000 note owed by Mr. Kearney to NBC; and (3) a $133,000 note secured by a third mortgage on their homestead.[42]

ROP did not complete construction of the building in 1995 and did not pay the amounts advanced by Regions pursuant to the construction note. However, Regions did not, in 1995, demand payment of the amounts due under the note from ROP.[43]

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[38] Defendant's Exhibit 3.

[39] See the "Variable Rate Consumer Loan Agreement" attached as Exhibit A to Claim No. 15 filed by Regions Bank on January 29, 1999.

[40] Defendant's Exhibit 1 and Plaintiff's Exhibit 38, which are the same document.

[41] See the "Variable Rate Consumer Loan Agreement" attached as Exhibit A to Claim No. 15 filed by Regions Bank on January 29, 1999.

[42] Defendant's Exhibit 54 and Plaintiff's Exhibit 42 ("Commercial Loan Activity Journal" for the period ending December 31, 1995).

[43] The construction note was due December 15, 1995.

G. 1996

ROP's financial situation worsened in 1996. When ROP was unable to stay within its anticipated budget, it requested increases in its construction loan ceiling.[44] Regions agreed to the requests until the limit reached $4,500,000 on July 24, 1996.[45] And by September 10, 1996, Regions had advanced that amount to ROP.[46] Unfortunately, at that time, the project was still not completed and ROP was out of money.

By November 1996, ROP: (1) had become embroiled in litigation with its general contractor, Coston Construction Company (Coston); (2) had incurred several hundred thousand dollars in cost overruns; (3) had overdrawn its Regions' checking account by $92,879.33; and(4) had fallen $106,351 behind on the interest payments due on its construction loan. In response, through its attorney Mr. Stephen Leara, Regions sent written notice to Mrs. Kearney and Mr. Johnston as ROP's partners and guarantors. Mr. Leara informed Mrs. Kearney and Mr. Johnston that the construction loan was in default and that Regions demanded the default be cured.[47]

On November 7, 1996, Mr. Mitchell met with Mr. Johnston and Mr. Kearney and informed them that ROP had incurred cost overruns of approximately $650,000. He instructed them to provide the funds necessary to satisfy those overruns.[48] In response, Mr. Kearney informed Mr. Mitchell that he was involved in a real estate transaction in Florida and he expected to realize enough money to complete the office building project.[49] In a subsequent meeting, he told Mr. Mitchell that when funds from that transaction arrived, Mr. Mitchell could pay the accrued, but unpaid, interest on Mr. Kearney's two mortgage notes held by Regions, (which were also in default for failure to pay accrued interest), and could use the remainder to pay ROP debts.[50]

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[44] Plaintiff's Exhibit 40.

[45] Plaintiff's Exhibit 40 ("Fourth Amendment to Promissory Note ("Master Construction Note)[Amendment to increase principal amount of Master Construction Note]" dated July 24, 1996).

[46] Plaintiff's Exhibit 43 ("Commercial Loan Activity Journal for the Period 01/01/96 to 12/31/96").

[47] Defendant's Exhibit 20 (letter dated November 6, 1996) and Defendant's Exhibit 21 (letter dated November 6, 1996).

[48] Defendant's Exhibit 89.

[49] Defendant's Exhibit 89.

[50] Transcript at 183-84; 227.

On November 14, 1996, ROP received a letter from McCrory Building Company, Inc., one of the subcontractors on the office building project. In that letter, McCrory represented that it was owed $94,809.22 for work done on the project, plus $23,702.31 in legal fees. Based on those debts, McCrory informed ROP that it was claiming a statutory mechanics and materialmen's lien on the project.[51]

On November 21, 1996, Mr. Johnston wrote Mr. Kearney about their circumstances.[52] In his letter, Mr. Johnston referred to an earlier telephone conversation between the two. According to Mr. Johnston, Mr. Kearney represented that he had paid various ROP contractors and subcontractors from funds drawn from his personal account and from Mrs. Kearney's personal account because ROP's account was well overdrawn. The statements made by Mr. Johnston in the letter indicate that, during that conversation, Mr. Kearney told Mr. Johnston that he expected to receive "funds... either today or this week...." In the letter, Mr. Johnston suggested that when those "funds" were received, that they be wired to Regions to be applied first to bring the interest on the construction loan current and second to eliminate the overdraft in ROP's checking account.[53]

Mr. and Mrs. Kearney's financial condition was similar. They were $8,173.96 in arrears on the monthly interest payments due on the $340,000 Regions note. They were $4,887.39 in arrears on the monthly interest payments due on the $160,000 Regions note, a note which Regions had already extended several times past its original October 26, 1995, due date. Their Regions checking account was overdrawn by $16,056. And, the checking accounts of two of their related corporate entities, Pelican Real Estate and Magic City Landscape, were overdrawn by a total of $16,827.58.

On November 14, 1996, again through its attorney Mr. Leara, Regions sent the Kearneys a letter in which Regions: (1) notified them that their mortgage notes were in default; (2) demanded that those defaults be cured; and (3) threatened foreclosure if the defaults were not cured.[54] Mr. Leara also sent a letter to Mr. Johnston notifying him that the Kearneys personal notes, which Mr. Johnston had guaranteed, were in default.[55]

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[51] Defendant's Exhibit 31.

[52] Defendant's Exhibit 29.

[53] Defendant's Exhibit 29.

[54] Plaintiff's Exhibit 1. The same document was also admitted as part of Defendant's Exhibit 18.

[55] Defendant's Exhibit 19 (letter dated November 14, 1996).

As anticipated, Mr. Kearney received funds to pay some of the outstanding debts. Specifically, on November 25, 1996, $100,000 was wired into Mrs. Kearney's and his checking account at Regions.[56] An additional $400,000 was wired into the account the next day.[57] Both deposits were wired from the account of the "George E. Mitchell Revocable Trust." The documents evidencing those transfers indicate that Mr. Kearney, and not Mrs. Kearney, was the beneficiary of that trust. Consequently, the money, according to the evidence, belonged to Mr. Kearney and not Mrs. Kearney.

Clearly Mr. and Mrs. Kearney had anticipated receipt of those funds. Mr. Kearney had told both Mr. Michael Mitchell and Mr. Johnston that those funds would be forthcoming.[58] And on November 15, 1996, Mrs. Kearney wrote two checks totaling $60,000 from the account to an ROP subcontractor, (even though the account was overdrawn by $16,056).[59] And on November 20, 1996, prior to receipt of the wired funds, and despite the fact that the account was overdrawn, Mr. Kearney wrote a check to another ROP subcontractor for $32,000.[60]

In addition to the above, other checks and debits quickly consumed the remainder of the $500,000 deposit. A portion of the deposits, $16,056, was of course immediately eliminated because of the existing overdraft.[61] Over the next twenty days or so, Regions debited a total of $296,695.17 from the account.[62] It applied $65,296.02 of those debited funds to the interest due on ROP's construction loan.[63] It applied

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[56] Defendant's Exhibit 94 (first sheet).

[57] Defendant's Exhibit 94 (second sheet).

[58] Mr. Michael Mitchell was Regions' employee. The Court presumes that there is no relation between Michael Mitchell and the George E. Mitchell referred to above.

[59] Defendant's Exhibit 107 (checks to "Marathon Electric", each for $30,000, each dated November 15, 1996) and Plaintiff's Exhibit 19 (bank statement with closing date of December 4, 1996).

[60] Defendant's Exhibit 107 (check to "Brown Plumbing" for $32,000 dated November 20, 1996) and Plaintiff's Exhibit 19 (bank statement with closing date of December 4, 1996).

[61] Defendant's Exhibit 114 (bank statement with closing date of December 4, 1996).

[62] The debits are evidenced by Plaintiff's Exhibit Nos. 27, 28, 29, 30, 31 and by a number of documents entitled "Checking Debit Memo" that form part of Defendant's Exhibit 107. The debits are also individually itemized in the Kearneys' bank statements for November and December of 1996. Plaintiff's Exhibit 114 (bank statements with closing dates of December 4, 1996 and January 6, 1997).

[63] Plaintiff's Exhibit 27.

$13,453.55 to the interest due on the Kearneys' two mortgage notes.[64] It credited $8,957.83 to the checking account of Magic City Landscaping, one of the corporate entities owned by the Kearneys.[65] It paid $168,592.88 to various ROP subcontractors.[66] And it credited $40,394.89 back to the Kearneys' account.[67] In sum, Regions debited $256,300.28 from the $500,000 deposited into the Kearneys' account on November 25 and 26, 1996, and applied, or paid, that amount to satisfy certain delinquent obligations.

The Kearneys also spent a significant amount of the $500,000 deposit. In all, they wrote checks totaling $236,120.59 from those funds.[68] They wrote at least $21,125 in checks to "cash."[69] They wrote a $2,300 check to the "R.J.W. Hobbs estate."[70] And, including the $92,000 in checks they wrote in November just prior to the deposits, they wrote $212,695.59 in checks to various entities.[71] Many of those checks were apparently written to ROP subcontractors.[72]

So, between the $256,301.06 debited and spent by Regions, and the $236,120.59 spent by the Kearneys, the $500,000 deposited into the Kearneys'

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[64] Defendant's Exhibit 107 ("Checking Debit Memo" dated December 2, 1996).

[65] Defendant's Exhibit 107 ("Checking Debit Memo" dated December 5, 1996).

[66] Payments made to ROP creditors primarily out of the funds debited from the Kearneys' bank account are evidenced by Plaintiff's Exhibit 61 and by copies of cashier's checks and "Checking Debit Memos" that were admitted into evidence as part of Defendant's Exhibit 107.

[67] The credits are evidenced by several documents entitled "Checking Credit Memo" that form part of Defendant's Exhibit 107. The credits are also individually itemized in the Kearneys' bank statement for December of 1996. Defendant's Exhibit 114 (bank statement with closing date of January 6, 1997).

[68] Defendant's Exhibit 114 (bank statements with closing dates of December 4, 1996 and January 6, 1997).

[69] The checks written to "cash" are part of Defendant's Exhibit 107. They are checks numbered 951, 952, 950, 958, 942, 968, 963, 940, and 974.

[70] Defendant's Exhibit 107 (check number 960).

[71] Defendant's Exhibit 114 (bank statements with closing dates of December 4, 1996 and January 6, 1997).

[72] Defendant's Exhibit 107 (checks numbered 929, 930, 936, 938, 943, 947, 948, 959, 962, 969, 977, and 972).

account on November 25 and 26, 1996 had, by December 24, 1996, been exhausted. The account was once again, overdrawn, this time by $8,422.56.[73]

ROP also ended 1996 overdrawn. Its checking account had a negative balance of $63,837.16, despite the infusion of cash from Mr. Kearney in November, and from an additional deposit of $106,000 by wire transfer on December 12, 1996, the source of which was not revealed to the Court.[74]

Information supplied in early 1997 supports these factual conclusions. On January 10, 1997, Mr. Kearney sent Mr. Johnston a facsimile which included a list of checks and debits of the Kearneys' personal checking account for November 1996 and December 1996. That list included 30 checks Mr. and Mrs. Kearney wrote totaling $250,614.63. It also included a number of the debits Regions made totaling $294,153.27.[75] It is important to note that this list included two checks (numbers 956 and 975), which did not clear the Kearneys' account until January 1997.[76] In addition, the list included three checks, (numbers 937, 941, and 945), which do not seem to appear on any of the Kearneys' bank statements.

In addition, Mr. Kearney's January 10, 1997, list described the date and amount of each check and debit, the recipients of the funds debited by Regions, and with four exceptions, it included the recipients of the checks written by the Kearneys. Three of the four checks listed where the recipients were not identified, (numbers 963, 968, and 974), were written to "cash."[77] Again, it is ALSO important to note, the list did not reflect that Regions credited the account $40,394.89 of the funds debited.

H. 1997

ROP and the Kearneys continued to have financial problems in 1997. A dispute arose between ROP and its tenant CBR over: (1) the terms of the lease agreement; (2) the square footage; (3) work which had not been completed on the building; and (4) payment for tenant improvements.[78]

ROP's litigation with Coston continued.

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[73] Defendant's Exhibit 114 (bank statement with closing date of January 6, 1997).

[74] Plaintiff's Exhibit 62 (bank statement with closing date of December 31, 1996).

[75] Defendant's Exhibit 50.

[76] Defendant's Exhibit 114 (bank statement with closing date of February 5, 1997).

[77] Defendant's Exhibit 107.

[78] Defendant's Exhibit 101.

ROP's construction note was amended on February 26, 1997. The date for repayment in full was changed from November 15, 1996, (the date in the original note), to March 31, 1997.[79]

Acting on ROP's behalf, Mr. Johnston terminated Mr. Kearney's authority to act for the partnership through a letter dated July 25, 1997.[80] Several subcontractors had obtained judgments and had filed materialmen's liens against the project which had not been satisfied.[81] In addition, Marathon Electrical Contractors, Inc. (Marathon), obtained a judgment for approximately $149,000 against ROP, Mr. Kearney, Mrs. Kearney, and Mr. Johnston in a state court breach of contract suit.[82]

On October 20, 1997, Regions notified Mr. Johnston and Mrs. Kearney that ROP's construction loan was in default. This latest construction loan default was not unusual. ROP had defaulted on its construction loan five previous times.[83] While Regions did not accelerate the loan on any of those occasions, Regions required ROP to execute an amendment to extend the loan's maturity date. The latest amendment and extension was the one executed on February 26, 1997, ROP's sixth amended note. With this latest default, that amendment would be ROP's last extension of the original maturity date.

The Kearneys' personal financial situation was no better. Mrs. Kearney was liable for ROP's debts, both as a partner and through her personal guarantees. She and Mr. Kearney were saddled with the Marathon judgment. They defaulted on their mortgage loans to Regions and AmSouth. In November 1997, AmSouth's attorney sent Regions' attorney a notice that AmSouth was foreclosing its first and second mortgages on the Kearney's home.[84] And finally, the Kearneys' checking account at Regions was overdrawn by $9,824.27 at the end of 1997.[85]

Mr. Johnston had his own financial problems in 1997 because of the Kearneys and ROP. Mr. Johnston had personally guaranteed a substantial portion of the

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[79] Plaintiff's Exhibit 40 ("Sixth Amendment to Promissory Note (Master Construction Note) [Amendment to extend term of Master Construction Note]").

[80] Defendant's Exhibit 103.

[81] Defendant's Exhibits 20 and 21.

[82] Plaintiff's Exhibit 84.

[83] Plaintiff's Exhibit 40.

[84] Plaintiff's Exhibit 57.

[85] Defendant's Exhibit 114 (bank statement with closing date of January 6, 1997).

personal notes owed by the Kearneys to Regions. Mr. Johnston was also obligated for the ROP construction loan and the other debts owed by ROP, including the judgment obtained by Marathon.

To resolve some of these problems, Mr. Johnston and his attorney Mr. Mack Moncus, engaged in negotiations with Mr. Kearney through Mr. Walker, ROP's former accountant.[86] Mr. Johnston sought to reach a "global settlement" of all issues between Mr. Kearney and him, including issues relating to ROP and other common financial ventures.

Mr. Johnston had discussions with, and corresponded with, Mr. Richard Carmody, one of Regions' attorneys, and with Mr. Mitchell, the loan officer in charge of ROP's construction loan. The subject of those exchanges included: (1) ROP's debt to Regions; (2) ROP's and Regions' dispute with CBR, the prospective tenant; (3) outstanding debts owed to subcontractors by ROP; (4) the ROP debts which Mr. Kearney claimed to have paid from his personal bank account; (5) advances made by Mr. Mitchell on the construction loan which Mr. Johnston considered questionable; (6) certain payments made by Regions directly to ROP subcontractors with cashier's checks; (7) and other issues.[87]

Mr. Johnston also asked Mr. Carmody to send copies of any financial statements the Kearneys had supplied to Regions. Mr. Johnston contended that he was entitled to those documents because of his guaranties of the Kearneys' mortgage loan.[88]

I. 1998

The Kearneys' and ROP's financial problems continued into 1998.

ROP remained in default on its construction loan. Coston obtained a $363,724.05 judgment against ROP, Mr. Johnston, and Mrs. Kearney through its state court litigation.[89] Mr. Johnston intensified his efforts to reach a settlement of the issues

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[86] See generally Defendant's Exhibits 79 through 85 and 87.

[87] Plaintiff's Exhibits13, 15, 16, 17, 18, and 81 and Defendant's Exhibits. 51, 52, 53, 56, and 88.

[88] Plaintiff's Exhibit 81.

[89] Defendant's Exhibit 24 ("Circuit Court's Judgment on Arbitration Award", last two pages).

between ROP and Regions, between ROP and CBR, and between ROP and unpaid subcontractors and suppliers.[90]

On the positive side, in the Summer of 1998, Mr. Johnston found a buyer for the ROP property.[91] The details of the purchase are explained later.

Mr. Johnston continued to investigate several expenditures made by Mr. Kearney and Regions from the funds wired into the Kearneys' account in November 1996. Those funds were the funds Mr. Kearney promised to inject into the faltering ROP project.[92]

To avoid having Regions force his guarantee of the larger of the Kearneys' home mortgage loans against him, Mr. Johnston encouraged Regions to locate and pursue the Kearneys' assets. He also offered to assist. Similarly, Mr. Johnston acted to insure that Mrs. Kearney would be required to shoulder her fair share of ROP's debt.[93]

Mr. Johnston obtained copies of financial statements that Mrs. Kearney had provided to Regions.[94] He and his attorney Mr. Moncus communicated often with Mr. Mitchell and Mr. Carmody, Regions' primary counsel, about the related matters.

While not as active or effective as Mr. Mitchell, and not acting in concert with Mr. Mitchell, on one occasion Mrs. Kearney attempted to obtain separate long term financing for ROP. That would have rescued her home from foreclosure, at least temporarily.[95] That effort was not successful. The Court was not provided with the reasons why.

A little later in 1998 the Kearneys defaulted on the two mortgage notes held by AmSouth. Those defaults prompted AmSouth to institute foreclosure proceedings.[96] AmSouth scheduled a foreclosure sale of the Kearneys' homestead for February 13,

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[90] Plaintiff's Exhibit 15 (letter dated February 10, 1998) and Plaintiff's Exhibits 14, 16, and 26.

[91] Id.

[92] Plaintiff's Exhibit 18 (letter dated February 3, 1998) and Defendant's Exhibits 52 and 53.

[93] Plaintiff's Exhibit 16.

[94] Plaintiff's Exhibit 18 (letter dated February 3, 1998).

[95] Transcript at 354.

[96] Plaintiff's Exhibit 57.

1998.[97] In opposition to the foreclosure, Mr. and Mrs. Kearney argued to AmSouth, and attempted to persuade Regions, that the AmSouth notes were fully secured by liens on other assets including certain life insurance policies and accounts receivable. The Kearneys demanded an accounting from AmSouth for all payments made or applied to those notes.[98] In contrast, in a letter to Regions' attorney dated on January 16, 1998, AmSouth's attorney explained the history of the two loans in detail.[99] That history completely discredited the Kearneys' claims.[100]

Facing elimination of its mortgage by virtue of AmSouth's foreclosure, Regions proposed to AmSouth to buy the Kearneys' AmSouth notes and to obtain an assignment of AmSouth's first and second mortgages.[101] AmSouth accepted Regions' offer.[102] On February 13, 1998, (the date of the scheduled foreclosure), AmSouth, Regions, and the Kearneys entered into an agreement.[103] Pursuant to that agreement, Regions paid AmSouth $571,500 for the two notes and mortgages. In return AmSouth advanced an additional $100,000 on the first note to be held in escrow pending resolution of the BIG Steel litigation. It also assigned its two mortgages on the Kearney's homestead to Regions.

For their part, the Kearneys released any claims they might have had against AmSouth and acknowledged that the two AmSouth notes remained strictly enforceable, albeit now by Regions. The Kearneys also executed an amended promissory note where they agreed to pay Regions $911,500. That amount included their $340,000 mortgage note plus the $571,500 paid by Regions to AmSouth for the assignment of the two notes and mortgages.[104] The amended note provided for payment in full of the principal balance and accrued interest on June 1, 1998.

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[97] Plaintiff's Exhibit 60. The same document was also admitted as Defendant's Exhibit 13.

[98] Defendant's Exhibit 102.

[99] Plaintiff's Exhibit 58.

[100] Plaintiff's Exhibit 58.

[101] Plaintiff's Exhibit 59.

[102] Plaintiff's Exhibit 59.

[103] Plaintiff's Exhibit 60. The same document was also admitted as Defendant's Exhibit 13.

[104] Plaintiff's Exhibit 35. The same document was also admitted as Defendant's Exhibit 14.

At this point, it is important to recognize that the Kearneys had defaulted numerous times on the two Regions notes.[105] On each occasion, Regions did not accelerate the notes. Instead, Regions rolled over the $160,000 note and, as to the $340,000 note, required the Kearneys to execute an amended note which extended the maturity date of its predecessor. In addition, on several occasions Regions allowed the Kearneys to execute amendments to the $340,000 note, ostensibly for the sole purpose of extending the maturity date, even though they were at the time current on their monthly interest payments and had not otherwise defaulted.

The original $340,000 note, and each of the first five amendments to that note, required an initial period of "interest only" payments. They also allowed amortization of the principal balance of the note over a period of ten years.[106] The note executed by the Kearneys on February 13, 1998, was however, the last amendment allowed to the original $340,000 note. And, unlike the previous notes, it did not provide for eventual amortization of the principal balance over a ten year period. In contrast, it provided for payment in full of the principal balance and accrued interest on June 1, 1998.

The Kearneys defaulted on the new consolidated mortgage note and on their separate $160,000 note. Consequently, again through Mr. Leara, Regions sent the Kearneys a letter on March 30, 1998. That letter: (1) notified the Kearneys that the notes were in default; (2) demanded that the defaults be cured; and (3) threatened imminent foreclosure if the defaults were not cured.[107] On the same day, Mr. Leara sent a letter to Mr. Johnston that informed Mr. Johnston that the Kearneys' notes were in default and reminded Mr. Johnston that if the Kearneys failed to cure the defaults within 20 days, Regions' would, after liquidation of the collateral securing the notes, seek payment from him as allowed by his limited personal guarantee of those notes.[108]

The Kearneys did not cure the defaults in their mortgage notes. In response to those failures, Mr. Leara sent a letter to Mr. and Mrs. Kearney on May 14, 1998, informing them that Regions had accelerated the notes and was proceeding to foreclose its mortgage.[109] He included a copy of the foreclosure sale notice that would

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[105] Defendant's Exhibit 18.

[106] Defendant's Exhibit 5.

[107] Defendant's Exhibit 18 (letter dated March 30, 1998).

[108] Defendant's Exhibit 19 (letter dated March 30, 1998).

[109] Plaintiff's Exhibit 2. The same document was also admitted as Defendant's Exhibit 18 (letter dated may 14, 1998).

appear in the Alabama Messenger, a local, legal-notice, newspaper.[110]

In his letter, Mr. Leara told the Kearneys that the accelerated debt totaled $1,170,517.13 and that the foreclosure sale would occur on June 17, 1998. The foreclosure sale notice stated that the sale would be held at the main entrance of the Jefferson County, Alabama courthouse and that the property would be sold at public outcry to the highest bidder, for cash, on June 17, 1998, "during the legal hours of sale...."[111]

The Kearneys' $911,500 mortgage note matured in full between the time Mr. Leara sent the foreclosure notice to the Kearneys and the scheduled foreclosure date. They did not pay the note and, according to Mrs. Kearney's testimony, they did not have the ability to pay the note.

On June 17, 1998, Mr. Leara went to the Jefferson County Courthouse to conduct the foreclosure sale.[112] At about the same time, Mr. Carmody went to the Bankruptcy Court to determine if Mr. Kearney or Mrs. Kearney had filed a bankruptcy petition.[113]

Mrs. Kearney testified that she did not learn of Regions' impending foreclosure sale until about 9:00 a.m. on the morning of June 17, 1998, the day of the sale. She testified that Mr. Kearney, who had received the notice of the foreclosure sale by certified mail a month earlier, concealed that information from her and did not tell her about it until the morning of the sale.[114]

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[110] While the Alabama Messenger has a limited circulation, both state and federal courts have recognized that a foreclosure notice published in it is valid. See Constantine v. First Alabama Bank of Birmingham, 465 So.2d 419 (Ala. Civ. App. 1984) and Davis v. National Homes Acceptance Corp., 523 F.Supp. 477 (N.D. Ala., 1981).

[111] Plaintiff's Exhibit 2. Under Alabama law, a foreclosure notice must specify the "time... of the sale ...." Ala. Code 1975, § 35-10-8. All public sales are required to take place between 11:00 a.m. and 4:00 p.m. Ala. Code 1975, § 6-8-41. A foreclosure sale notice that provides that a sale will occur "during the legal hours of sale" complies with the time disclosure requirement of section 35-10-8. Helms v. First Alabama Bank of Gadsden, 386 So.2d 450, 454 (Ala. Civ. App. 1980), cert. denied, Ex parte Helms, 386 So. 2d 455 (Ala. 1980). See this Court's opinion in In re Brown, 221 B.R. 849 (Bankr. N.D. Ala. 1998).

[112] Transcript at 138.

[113] Transcript at 137-38.

[114] Transcript at 388-89.

After learning of the scheduled foreclosure sale, Mrs. Kearney went to a local attorney's office.[115] That attorney was not in. However, after about two hours, Mrs. Kearney eventually talked to Mr. Leara about the matter. She testified that the purpose of her call was to secure additional time to try to raise the money to pay the notes.[116]

Although Mrs. Kearney had attempted to call Mr. Leara earlier, their eventual conversation was initiated by Mr. Leara. After arriving at the courthouse to conduct the sale, Mr. Leara returned Mrs. Kearney's call from his cellular telephone at about 10:53 a.m.[117] Mrs. Kearney made her request, but Mr. Leara rejected it.[118]

At about 11:00 a.m., Mr. Leara put Mrs. Kearney on hold and accepted a call from Mr. Carmody. Mr. Carmody informed Mr. Leara that neither of the Kearneys had filed a bankruptcy petition.[119] After receiving that information, Mr. Leara concluded his conversation with Mr. Carmody. He then concluded his conversation with Mrs. Kearney.

Mr. Leara conducted the foreclosure sale at 11:04 a.m.[120] Regions was the successful bidder at the sale. It purchased the property for $1,003,623.34.[121]

After securing the assistance of another attorney, Mrs. Kearney filed a Chapter 13 bankruptcy petition at 11:45 a.m.[122] She did not file any schedules or propose a Chapter 13 plan.

At an unspecified time that same day, Mr. Leara had a letter delivered to Mr. and Mrs. Kearney. In that letter he informed them that Regions had purchased their home at the foreclosure sale and demanded that they vacate the property within ten days.[123]

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[115] Transcript at 389.

[116] Transcript at 139-40, 163, 355, and 357.

[117] Transcript at 136-37 and Defendant's Exhibit 120.

[118] Transcript at 139-40 and 357.

[119] Transcript at 137-38 and 163.

[120] Plaintiff's Exhibit 5. The same document was also admitted as Defendant's Exhibit 22.

[121] Id.

[122] See Voluntary Petition filed June 17, 1998, at 11:45 a.m., Proceeding No. 1.

[123] Plaintiff's Exhibit 65 and Transcript at 358. By statute, under Alabama law a mortgagor who fails to vacate the foreclosed property within ten days after receiving notice to

In the meantime, Mr. Johnston continued to try and resolve his and ROP's financial problems. In that regard, he made Regions a proposal. The cornerstone of the proposal was a sale of the ROP property to his former law partner, Mr. Wyatt R. Haskell.

On June 3, 1998, Mr. Johnston's attorney Mr. Moncus, received a response from Mr. Carmody, Regions' attorney.[124] In a letter, Mr. Carmody explained that: (1) if Mr. Haskell provided an irrevocable offer to pay $4,400,000 for the property; and (2) if CBR provided an irrevocable commitment to enter into a lease that was acceptable to the bank and Mr. Haskell and CBR deposited $550,000 ("or an amount agreed upon by counsel") in trust, the bank would extend 20-year financing to Mr. Haskell and would extend a line of credit to ROP in the amount of the CBR deposit. Funds then would be available to satisfy the claims of ROP suppliers. In addition, Regions agreed to extend a $450,000 line of credit to Mr. Johnston for three years.

Mr. Carmody made it clear in his letter however, that Regions would not release any of the individual ROP partners or guarantors from liability for any deficiency that remained after the proposed sale. But he added that Regions was "willing to agree to pursue the Kearneys on their guarantees until it [Regions] exhausts all reasonable avenues of recovery before requiring Jay [referring to Mr. Johnston] to pay the final deficiency." Plaintiff's Exhibit 14 (parentheticals added). He explained, "The reason for such an agreement would be because of the funds already advanced or to be advanced by Jay and his willingness to assist the partnership in resolving these problems." Id.

J. 1998 Post-bankruptcy Filing

On June 30, 1998, Mr. Mitchell sent Mr. Haskell a letter proposing that Regions lend Mr. Haskell $4,486,000 for seven years at 7.25 percent per year. The terms included an option to renew for five more years.[125]

On August 3, 1998, Regions conducted a foreclosure sale of the ROP property. Regions purchased the property for $3,743,000.[126] On September 16, 1998, Regions: (1) loaned Mr. Haskell $4,486,000 to purchase the property; (2) sold the property to him

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vacate from the purchaser, forfeits his or her right of redemption. Ala. Code 1975, § 6-5-251(c).

[124] Plaintiff's Exhibit 14.

[125] Plaintiff's Exhibit 26.

[126] Defendant's Exhibit 32.

for that price; and (3) retained a mortgage on the property to secure repayment of the loan.[127]

While Mrs. Kearney has complained about the amount Mr. Haskell paid, there was no evidence to suggest that the price Mr. Haskell paid was less than the fair market value or that others had bid more. To the contrary, on March 20, 1995, three years before, Mr. Mitchell received an appraisal of $3,500,000 for the proposed office building, including the land and structure. On August 30, 1998, just after foreclosure, Birmingham Realty Company tentatively offered to purchase the ROP property from Regions for between $4,000,000 and $4,400,000. And during the course of Mrs. Kearney's bankruptcy case, Mr. Kearney submitted an offer to the trustee to purchase the property for $4,000,000.[128]

On September 17, 1998, Regions and Mr. Johnston entered into a "Mutual Release and Indemnification Agreement." They agreed to release one another from any liability arising out of the ROP construction loan.[129] The consideration recited for Regions' release of Mr. Johnston from liability for the deficiency remaining on ROP's construction loan was Mr. Johnston's efforts, "in effecting the sale of the Property and in negotiating a new lease and the release of various rights of redemption held by creditors of ROP, thus improving the marketability of the Property." Defendant's Exhibit 36.

Mrs. Kearney was not a party to the "Mutual Release and Indemnification Agreement." From the perspective of her liability for ROP's obligations to Regions, there was no need. Her bankruptcy case had been converted to Chapter 7. Regions did not object to her discharge and did not file a complaint to determine the dischargeability of her obligation to pay ROP's debts. Consequently, her Chapter 7 discharge would accomplish the same result as would any written release, that is, her obligations to Regions because of her partnership interest in ROP and her obligations because of her guarantee of ROP's construction loan, would be eliminated.

Mrs. Kearney would not, however, fair as well in 1998 in regard to her right to redeem following foreclosure. When the Kearneys did not move from the Old Leeds Ridge property after Regions' demand for that property, ostensibly under Alabama law, on June 28, 1998, ten days after Regions' demand letter, they forfeited their right to redeem the property.[130] Of course the argument could be made that Mrs. Kearney's bankruptcy filing would have affected that transformation; however, the facts do not

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[127] Defendant's Exhibit Nos. 35 and 37.

[128] Defendant's Exhibit 39.

[129] Defendant's Exhibit 36

[130] See Ala. Code 1975, § 6-5-251(c).

require the Court to consider that issue. Specifically in regard to Mr. Kearney, to the extent that he may or may not have had a right to redeem the property, when they did not move, he forfeited his right on June 28. And, in regard to Mrs. Kearney, regardless of any other argument or speculation about what right she may have possessed on June 28, 1998, on August 10, 1998, when her bankruptcy case was converted to Chapter 7, if she retained any statutory right to redeem the property, that right became property of her Chapter 7 bankruptcy estate.[131]

But, notwithstanding the Kearneys' loss of a right to redeem, on July 15, 1998, Regions offered to sell the Old Leeds Ridge property to Mr. Kearney for $1,003,623.34 and Regions agreed to finance the majority of the purchase price.[132] The proposed sale, transmitted in a letter from Mr. Leara to Mr. Kearney, was conditioned on: (1) payment of $150,000 to Regions by Mr. Kearney by 4:00 p.m. on July 17, 1998; and (2) payment of an additional $150,000 by Mr. Kearney at closing. If Mr. Kearney accepted Regions' offer, Regions would, according to the letter, loan him the remaining $753,623.34. That amount would then be repayable at the end of five years. Mr. Kearney either refused the offer or was unable to meet its terms.

On August 21, 1998, on the advice of its attorney Mr. Leara, Regions filed a complaint in state court against Mr. and Mrs. Kearney. That complaint sought to eject the Kearneys from the Old Leeds Ridge property.[133] The complaint also sought damages for rent, attorneys fees, and costs.

On September 28, 1998, Regions filed an application for entry of default against Mr. Kearney in the state court ejectment action.[134] On September 29, 1998, acting pro se, Mrs. Kearney, filed a suggestion of bankruptcy in that action.[135] On October 3, 1998, the state court entered a default judgment against Mr. Kearney.[136] On October 6, 1998, after learning of Mrs. Kearney's suggestion of bankruptcy, the state court placed

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[131] Similarly, it would be academic speculation to discuss what effect Mrs. Kearney's failure to vacate the property on June 28, 1998, may or may not have had on the trustee's right to transfer the statutory right to redeem the property.

[132] Plaintiff's Exhibit 69.

[133] Defendant's Exhibit 42 ("Complaint in Ejectment").

[134] Defendant's Exhibit 42 ("Alabama Judicial Data Center, Case Action Summary, Circuit Civil").

[135] Defendant's Exhibit 42 ("Suggestion of Bankruptcy").

[136] Defendant's Exhibit 42 ("Alabama Judicial Data Center, Case Action Summary, Circuit Civil").

the ejectment suit on its administrative docket for review in six months. Acting sua sponte, the state court also set aside the default judgment.[137]

On October 13, 1998, Regions filed a motion to return the case to the state court's active docket and to reinstate the default judgment.[138] Regions argued that the automatic stay that arose on Mrs. Kearney's bankruptcy filing: (1) did not apply to any actions against Mr. Kearney; and, (2) did not preclude ejectment of Mrs. Kearney because the property involved in the action was not property of the then Chapter 7 bankruptcy estate. Regions filed a motion for summary judgment with the same contentions.[139]

On October 23, 1998, the state court entered an order that: (1) granted Regions' motion to have the case restored to the active docket; and, (2) set Regions' remaining motions for hearing on November 6, 1998.[140]

On November 9, 1998, the state court granted Regions' summary judgment motion and the relief requested in the ejectment complaint. The court's order: (1) directed Mr. and Mrs. Kearney and their dependents to vacate the Old Leeds Ridge property by 3:00 p.m. on November 19, 1998; (2) directed the sheriff to remove Mr. and Mrs. Kearney and their dependents from the property along with their personal property if necessary; and, (3) awarded a judgment against Mr. and Mrs. Kearney and in favor of Regions Bank for post-foreclosure rent of $4,000.[141]

That same day, Mr. Joe Joseph, another of Regions' attorneys, had a letter hand delivered to Mr. and Mrs. Kearney at the Old Leeds Ridge address. That letter demanded possession of the property and included a copy of the state court's order of ejectment.[142]

On November 20, 1998, Mr. Leara sent a letter to the clerk of the Jefferson County, Alabama Circuit Court. He represented that the Kearneys had refused to

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[137] Defendant's Exhibit 42 ("Alabama Judicial Data Center, Case Action Summary, Circuit Civil").

[138] Defendant's Exhibit 42 ("Plaintiff's Motion to Reinstate Default Judgment & Set Case on Active Docket").

[139] Id.

[140] Defendant's Exhibit 42 ("Alabama Judicial Data Center, Case Action Summary, Circuit Civil").

[141] Defendant's Exhibit 42 ("Order on Regions Bank's Motion for Summary Judgment").

[142] Plaintiff's Exhibit 7.

vacate the property. Mr. Leara requested the clerk, to, "issue a set out order to the Sheriff of Jefferson County...." Defendant's Exhibit 47 (also Plaintiff's Exhibit 6). In response to Mr. Leara's request, and in compliance with the court's order, the state circuit court clerk issued an "Execution" to, "Any Lawful Officer of the State of Alabama" to restore possession of the Old Leeds Ridge property to Regions. Defendant's Exhibit 49. The execution also authorized the enforcing officer to, "Collect $4,135.00 for detention of said property." Id.

Sometime later, the Kearneys and Mr. Mitchell, (on behalf of Regions), agreed that the Kearneys could remain on the property through Thanksgiving.[143] In return, the Kearneys promised Mr. Mitchell that they would leave immediately after Thanksgiving and would remove their belongings.

On the weekend after Thanksgiving, Mr. and Mrs. Kearney loaded the majority of their personalty, including household goods, furniture, "nicer" items, and anything else of material value, into a moving van and their personal automobiles, and moved that personalty to a storage facility.[144]

The Kearneys left some items in the house. Mrs. Kearney did not describe all of those items but explained that some belonged to her children and some belonged to her husband.[145] The evidence demonstrates that the total monetary value of all items left in the house did not exceed $5,000.[146]

In addition to placing items in a storage facility and leaving a few items in the house, the Kearneys stored some items, including some papers and linens, in an old passenger van they left parked on the property.[147]

After Mrs. Kearney and a minor son vacated the property, she and the son lived with friends.[148] Mr. Kearney did not vacate the property and continued to reside in the house.[149]

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[143] Transcript at 108-09, 148, 250, and 359-60.

[144] Transcript at 410-12.

[145] Transcript at 419.

[146] Transcript at 418.

[147] Transcript at 363.

[148] Transcript at 410-11.

[149] Transcript at 148, 152, 166-67, 213-14, 238, 279, 282, 287, and 411-13; and Meisler Transcript at 51, 53-54, and 67.

At some unspecified point, but prior to December 22, 1998, a sheriff's deputy attempted to enforce the state court's ejectment order. Mr. Kearney greeted him when he arrived at the property. Mr. Kearney informed the deputy that he had an arrangement with Regions that would allow his family and him to continue to occupy the property.[150] Based on that representation, the deputy did not execute the state circuit court clerk's directive.

In reaction to Mr. Kearney's representation of an agreement, Mr. Leara sent a letter on December 22, 1998, to a "Ms. Jones" with the sheriff's department. He told informed "Ms. Jones" that Regions had not made an agreement with the Kearneys and asked for the deputy to return to the house and remove the Kearneys.[151]

As discussed below, on January 6, 1999, the deputy returned to the Old Leeds Ridge property and removed the remaining personalty, which he placed by the garage.[152] After the deputy left, Mr. Kearney put the personalty back in the house.[153]

On August 26, 1998, this Court granted a motion to withdraw by Mrs. Kearney's attorney. Her attorney contended that he had not been paid and there were no prospects that he would be paid.[154] Mrs. Kearney did not oppose the motion. Her attorney did, however, file her Chapter 7 schedules and statement of affairs for her on August 26, 1998.[155]

In the Summary of Schedules filed on August 26, 1998, Mrs. Kearney represented that on the date her bankruptcy case was filed: (1) she owned real property worth $693,000 and personal property worth $19,350; (2) she owed $291,000 in secured debts, $751,738.18 in unsecured debts entitled to priority payment, and $2,862,825.23 in unsecured nonpriority debts; (3) she was receiving no personal income; and (4) her monthly living expenditures were $2,097.[156]

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[150] Transcript at 149, 202-03, 206, and 235.

[151] Plaintiff's Exhibit 8.

[152] Transcript at 361.

[153] Transcript at 281-82 and 415.

[154] A disclosure of compensation filed on August 26, 1998, indicated that her attorney was not paid for the work he performed for Mrs. Kearney. See Statement Pursuant to Rule 2016(B) filed August 26, 1998, Proceeding No. 24.

[155] Order entered August 10, 1998, Proceeding No. 17 and Schedule and Statement of Affairs filed August 26, 1998, Proceeding No. 23.

[156] Summary of Schedules filed August 26, 1998, Proceeding No. 23.

In her Schedule A-Real Property, she represented that she owned: (1) a condominium in Destin, Florida worth $325,000, but encumbered by $291,000 in secured claims; and (2) a lot on Lake Mitchell in Alabama worth $43,000.[157] She did not list the Old Leeds Ridge property.

In her Schedule B-Personal Property, she represented that she owned personal property worth $19,350.[158] On that schedule, she described interests in 17 or so business entities. She also listed eight other entities in which Mr. Kearney was involved, but she indicated that she did not know whether she had interests in those. She also listed notes or other obligations purportedly owed to her from 12 entities. She had previously listed many of these as entities in which she had, or might have had, an ownership interest.

Also in her Schedule B-Personal Property, Mrs. Kearney listed: (1) contingent or unliquidated claims against Regions for violation of the stay and wrongful foreclosure; (2) claims for contribution against Mr. Johnston relating to ROP; (3) "cross claims" against "Larry Speed" and "Jeffrey Lee;" (4) claims against CBR for non-payment of rent and leasehold improvements; and (5) a cash bond or deposit with the City of Hoover. Of particular interest is a statement on the page attached to Mrs. Kearney's schedule B, in response to question number 13 which appears on that schedule. It reads, "Mr. William Kearney, Jr., husband of the Debtor, managed all the finances of the debtor." Schedule B-Personal Property filed August 26, 1998, Proceeding No. 23.

Mrs. Kearney did not claim any real property exemption on her Schedule C-Property Claimed Exempt.[159] She claimed exempt personal property valued at $7,250. That amount exceeded the $3,000 permitted under Alabama law and prompted an objection by the trustee.[160] That objection was settled on December 9, 1998.[161] Under the terms of the settlement, clothing, a wedding ring, a life insurance policy, and the jewelry listed by Mrs. Kearney in Schedule C would be exempt as would $3,000 in household goods and furnishings. Otherwise, Mrs. Kearney was directed to identify $3,000 worth of items of personalty which appeared on a list she had previously submitted to the trustee. Under the settlement, she would be permitted to keep those

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[157] Schedule A-Real Property filed August 26, 1998, Proceeding No. 23.

[158] Schedule B-Personal Property filed August 26, 1998, Proceeding No. 23.

[159] Schedule C-Property Claimed Exempt, filed August 26, 1998, Proceeding No. 23.

[160] Trustee's Objection to Property Claimed as Exempt and to Values of Property Claimed as Exempt filed September 14, 1998, Proceeding No. 27.

[161] Order on Trustee's Objection to Exemption Claims entered December 9, 1998, Proceeding No. 55.

items and they would be exempt from administration; however, she would be required to surrender the remaining items on the list.

In her Schedule D-Creditors Holding Secured Claims, Mrs. Kearney listed: (1) Peoples First Bank which held a $115,000 claim secured by a first mortgage on her Florida condominium; and (2) Regions which held a $325,000 claim secured by a second mortgage on the same property.[162] She did not list the $911,500 debt secured by a mortgage on the Old Leeds Ridge property in favor of Regions. That debt was of course the one foreclosed immediately prior to bankruptcy.

On her Statement of Intention, Mrs. Kearney declared that she intended to surrender the Florida condominium to Peoples First Bank and Regions.[163]

In her Schedule E-Creditors Holding Unsecured Priority Claims, Mrs. Kearney listed: (1) $750,000 in taxes owed to the Internal Revenue Service; and (2) $1,738.18 in taxes owed to the Alabama Department of Revenue.[164]

In her Schedule F-Creditors Holding Unsecured Nonpriority Claims, Mrs. Kearney listed 124 creditors holding unsecured nonpriority claims totaling $2,862,825.23.[165] However, of the 124, twenty-seven were listed for $1.00 each.

In her Schedule I-Current Income of Individual Debtor(s), Mrs. Kearney represented that: (1) she was married to Mr. Kearney; (2) she was a house wife and was not otherwise employed outside of the home; (3) she had five dependents, which included one minor son and four adult sons and daughters; (4) Mr. Kearney was self employed; (5) she did not know the amount of Mr. Kearney's income; (6) she had no current monthly income; and (7) her combined family monthly income was "0.00."[166]

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[162] Schedule D-Creditors Holding Secured Claims filed August 26, 1998, Proceeding No. 23.

[163] Chapter 7 Individual Debtor's Statement of Intention filed August 26, 1998, Proceeding No. 23.

[164] Schedule E-Creditors Holding Unsecured Priority Claims filed August 26, 1998, Proceeding No. 23.

[165] Schedule F-Creditors Holding Unsecured Nonpriority Claims) filed August 26, 1998, Proceeding No. 23.

[166] Schedule I-Current Income of Individual Debtor(s) filed August 26, 1998, Proceeding No. 23.

In her Schedule I-Current Income of Individual Debtor(s), Mrs. Kearney described average monthly expenses totaling $2,097.[167] The schedule did not list any rental or mortgage payments.

In response to question 2 on her Statement of Financial Affairs, Mrs. Kearney represented that during the two years preceding bankruptcy she received dividend and interest income and rents from the Florida property. She did not provide any amounts.

She did not answer question 3b on her Statement of Affairs, which asked her to list all payments she made to or for the benefit of an insider. She stated, "Transfers reflected in records at Richard Walker's office."[168] In response to question 4a, she listed 32 lawsuits in which she was a party at the time she filed her case.

On October 21, 1998, a federal grand jury in the United States District Court for the Northern District of Florida returned an indictment against Mr. Kearney. That indictment accused Mr. Kearney of fraudulently inducing AmSouth Bank to issue a cashier's check on October 10, 1997, in the amount of $20,000 against the account of Dr. Lewis J. Fowlkes. Mr. Kearney was accused of falsely representing himself to be Dr. Fowlkes.[169]

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Mrs. Kearney alleged that because she was not allowed to occupy her home, several of the items that she and her family left in the house after Thanksgiving of 1998 were stolen, or otherwise became missing. Mrs. Kearney contends that the loss of those items was very upsetting. She contends Regions is liable for both the loss of the personalty and her anguish.

Acting pro se, on January 4, 1999, Mr. Kearney offered to purchase certain enumerated personalty owned by Mrs. Kearney from the trustee for $10,000.[170] He also offered to purchase any rights or interest the bankruptcy estate may have had in the Old Leeds Ridge property for $31,500.[171] Mr. Kearney specifically represented to the

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[167] Schedule J-Current Expenditures of Individual Debtor filed August 26, 1998, Proceeding No. 23.

[168] Statement of Financial Affairs filed August 26, 1998, Proceeding No. 23.

[169] Defendant's Exhibit 75.

[170] "Exhibit 1" to Motion to Authorize Trustee to Sell Property filed January 5, 1999, Proceeding No. 57.

[171] "Exhibit 2" to Motion to Authorize Trustee to Sell Property filed January 5, 1999, Proceeding No. 57.

trustee that: (1) Regions had agreed to sell him the property for $1,000,300 plus reimbursement of $9,800; (2) he would pay the funds promised to the trustee and the amount quoted by Regions with loan proceeds from "Chase Mortgage"; and (3) he would close the sale, "immediately after documented court order approving the sale of those rights..." if Chase Mortgage funded the purchase or "within thirty days of said order if Chase does not fund."[172]

On January 5, 1999, the trustee filed a motion for authorization to sell the identified personal property and the estate's interest in the Old Leeds Ridge property to Mr. Kearney in accordance with the terms of Mr. Kearney's offers. In his motion, the trustee represented, "upon information and belief," that "Regions Bank consents to this sale" and asserted that the sale of the "real property would be free and clear of any interests of Regions Bank and/or the Internal Revenue Service...."[173]

As discussed above, on January 6, 1999, a deputy sheriff removed the personalty left by the Kearneys in the house on the Old Leeds Ridge property and placed it outside by the garage.[174] Mr. Kearney, who was surreptitiously living in the house, moved the personalty back inside.[175]

On January 8, 1999, Regions objected to the trustee's proposed sale of the Old Leeds Ridge property. Its objection however related only to the extent of interest the trustee might purport to sell to Mr. Kearney, not the actual sale.[176] Regions expressed opposition to the sale only to the extent that the trustee claimed to hold, and intended to sell, anything more than the right to redeem the property from Regions' foreclosure sale.

The Court heard the trustee's motion and Regions objection on January 19, 1999.[177] Mr. Benton, the trustee's attorney, and Mr. Leara, Regions' attorney, appeared. Neither of the Kearneys attended. Mr. Benton announced a settlement. Regions agreed to sell the property to either Mrs. Kearney or LAH Realtors for

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[172] "Exhibit 2" to Motion to Authorize Trustee to Sell Property filed January 5, 1999 Proceeding No. 57.

[173] Motion to Authorize Trustee to Sell Property filed January 5, 1999, Proceeding No. 57.

[174] Transcript at 361.

[175] Transcript at 281-82 and 415.

[176] Objection to Trustee's Motion to Sell Property filed January 8, 1999, Proceeding No. 61.

[177] Minute Entry filed January 22, 1999, Proceeding No. 69.

$1,003,000 plus reimbursement of about $9,000 for property taxes Regions had been required to pay. The trustee agreed to sell the estate's interest, whatever that might be, to either Mrs. Kearney or LAH for $31,500. Because of the settlement, the Court did not need to decide the extent of the estate's interest in the property.

As part of their agreement, LAH and Regions agreed to cancel the outstanding LAH contract to purchase the property from Regions. The agreement provided that Mrs. Kearney would have the first right to purchase the property, but if she was unable to close the sale within 30 days, the right to purchase would revert to LAH.[178]

Mr. Benton indicated that he would draft an order with the terms of the settlement and deliver it to the Court. The portion of the motion pertaining to the sale of the personalty to Mr. Kearney was not mentioned at the hearing.

The court did not receive an order within the 30 days Mrs. Kearney was supposed to have closed the sale.

On March 1, 1999, acting pro se, Mrs. Kearney filed a document with this Court entitled "Motion to Compel." In that document she alleged that Regions had obstructed her attempt to purchase the property by failing or refusing to provide her "loan processing agent" or the closing attorney with the documents they needed to close the loan.[179] Other than a reference to a "statutory warranty deed," Mrs. Kearney did not describe the documents she contended Regions should have provided. Notwithstanding her allegations, Mrs. Kearney asked the Court for ten days (after Regions provided the otherwise unspecified documents to her "loan processing agent" and the closing attorney) to close the sale.

Two days later on March 3, 1999, the Court received a letter from Mr. Benton.[180] Enclosed with the letter was a draft order authorizing the sale of the Old Leeds Ridge property to Mrs. Kearney, or her designee, (identified therein as "Mr. James Vojtech"), if the sale could be closed by March 1, 1999. In his letter Mr. Benton stated that the February 19, 1999, deadline identified at the hearing on his sale motion had been extended until March 1 at the Kearneys' request and by agreement of the parties.

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[178]Oddly, the parties spoke in terms of Mrs. Kearney as the person with the first right to buy the property, rather than Mr. Kearney, who was the one who offered to purchase the property from the trustee.

[179] Motion to Compel filed March 1, 1999, Proceeding No. 79.

[180] The letter from Mr. Benton to this Court is dated March 3, 1999. It bears the stamp "Received Mar. 3, 1999 Clerk, U.S. Bankruptcy Court Northern District of Alabama" and appears in Mrs. Kearney's bankruptcy case file between Proceedings Nos. 85 and 86 but is not included on the case docket sheet.

Because both the original February 19, 1999, and the March 1, 1999, deadlines had expired, the Court did not execute the proposed order.

On March 16, 1999, Mr. Stan Ware, a representative of Regions Bank, called the Mountain Brook, Alabama, police to report that someone was trespassing on the Old Leeds Ridge property.[181] The officer responding to the report observed evidence of someone occupying the house. As stated above, Regions had boarded the back door and posted no trespassing signs on the property.[182]

On March 22, 1999, at 1:09 p.m., Mrs. Kearney filed a handwritten motion that was the forerunner to the pending complaint. In her motion Mrs. Kearney asked the Court: (1) to set aside Region's prepetition foreclosure of its mortgage on the Old Leeds Ridge property; (2) to reinstate her mortgage; (3) to restore possession of the property to her; (4) to require Regions to account for and to return money it had allegedly removed from her personal bank account without authorization; and (5) to compel Regions to honor a prepetition commitment it had purportedly made to her to "help [her] with her house...." Motion to set aside Regions Foreclosure - To reinstate the Mortgage - to compel Regions to account for money taken from the debtors checking account filed March 22, 1999, Proceeding No. 87 (parenthetical added).

The factual allegations in Mrs. Kearney's motion were conclusory and lacked relevant detail. The motion did not describe: (1) when Regions made the purportedly unauthorized debits from her account; (2) that Mr. Kearney was also a signatory on the account; (3) that Mr. Kearney could have, or may have, authorized the debits made by Regions; or, (4) that Mr. Kearney, rather than Mrs. Kearney was principally involved in managing ROP, dealing with ROP's finances, and dealing with Regions in connection with ROP's construction loan. The motion was important however, because it represented the first instance that either Mrs. Kearney or Mr. Kearney mentioned to the Court that they had been dispossessed from the Old Leeds Ridge property by Regions.

A hearing was held on Mrs. Kearney's "Motion to Compel" on March 22, 1999. Mr. and Mrs. Kearney, Mr. Benton, Mr. Leara, and Mr. James Henderson, the attorney for LAH, attended. At the hearing, Mrs. Kearney demanded that the documents necessary to close a sale of the property to her be supplied by Regions to her loan processing agent and the closing attorney. Unfortunately, she was unable to describe the specific documents she wanted or what was needed to close the sale. In contrast, she did produce a letter dated March 18, 1999, which purported to be from Ms. Debbie Anderson, an assistant branch manager of Dylan Mortgage, Inc. That letter was addressed to Mrs. Kearney. In the letter, Ms. Anderson explained that if a $1,003,000 mortgage loan was to be funded for "James Vojtech", Chase Mortgage would first need

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[181] Transcript at 282 and 287.

[182] Defendant's Exhibit 117.

a copy of the contract: (1) where Mr. Vojtech had agreed to purchase the Old Leeds Ridge property from Regions, and (2) where Regions had, in turn, agreed to sell the property to him. The letter read, "Specifically, we need the bank contract with Mr. Vojtech to complete our closing documents."[183] According to Mrs. Kearney, Mr. Vojtech was her benefactor.

The Kearneys were unable to produce, and have never produced, a real estate contract signed by Mr. Vojtech. No testimony was offered at the trial that suggested that there was ever a contract or that Mr. Vojtech ever agreed in writing to purchase the Old Leeds Ridge property.[184]

Of course, without a contract executed by Mr. Vojtech, there could be no sale. And if there was no contract, which apparently there was not, Regions could not have been, as alleged by Mrs. Kearney, guilty of any bad faith or other misconduct in failing to provide Mrs. Kearney with the information she requested. Similarly, Regions could not have been guilty of thwarting Mrs. Kearney's attempt to buy her former homestead from Regions and the trustee.

Notwithstanding the above, Mrs. Kearney's "Motion to Compel" was settled pursuant to an agreement reached between Mr. Benton, Mr. Leara, and Mrs. Kearney. The agreement provided for the extension of her deadline to purchase the property to April 2, 1999. Mr. Benton, who was to prepare the order embodying the agreement, agreed further to allow Mr. Vojtech's loan underwriter, (as identified by Mr. Kearney), to review a draft of the order before it was submitted to this Court.

The hearing adjourned in contemplation that the new proposed order would be submitted to the Court the next day. The Court's minute entry describes the disposition of Mrs. Kearney's motion as, "The debtor is to contact Mr. Benton by noon on March 23, 1999 with a new date to be put in the order approving the sale. Mr. Benton is to submit the order." Minute Entry filed March 24, 1999, Proceeding No. 88.

On the next day, March 23, 1999, the Court received a letter from Mr. Benton.[185]

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[183] Plaintiff's Exhibit 76A (Exhibit to Mr. Kearney's discovery deposition marked "Defendant's Exhibit 80").

[184] Mrs. Kearney refers to Plaintiff's Exhibits 70 and 71 in her post-trial brief as proof of the contract. While those documents are contracts, neither bears any signature. Neither were authenticated or identified at trial by any witness. And there is no evidence that either document was ever submitted to Regions or the trustee during the course of, or in connection with, Mrs. Kearney's bankruptcy case.

[185] The letter from Mr. Benton to this Court is dated March 23, 1999. It appears in Mrs. Kearney's bankruptcy case file between Proceedings Nos. 86 and 87 but is not included on the case docket sheet.

Enclosed with the letter were drafts of two orders. One authorized the sale of the Old Leeds Ridge property in accordance with the agreement of the parties announced in open court the day before. The other authorized the sale of the personalty listed in the trustee's motion. Even though Mr. Kearney originally offered to purchase the personalty and was listed as the prospective purchaser in the trustee's notice of proposed sale, the order relating to the personalty authorized the sale of that property to, "Susan King Kearney or, her designee, Julie Breland...."[186] Similarly, the order relating to the sale of the realty referred to Mrs. Kearney as the proposed purchaser of the property, when in fact it was Mr. Kearney who originally submitted the offer to purchase the estate's interest in the property and who was listed as the prospective purchaser in the trustee's motion to sell.[187]

Mr. Benton indicated in the letter that the draft order authorizing the sale of the realty had been approved by the loan underwriter structuring the loan for Mrs. Kearney (or Mr. Vojtech). The Court adopted and signed both orders on March 24, 1999.[188]

A hearing was held on April 12, 1999, on Mrs. Kearney's motion to set aside Regions' prepetition foreclosure sale. Mrs. Kearney, Mr. Kearney, and Mr. Leara, attended. At the hearing, the Court asked those present for a report on the status of the sale of property. All indicated that the sale had been scheduled for closing on April 2, 1999, but that the sale of the realty did not occur. The Kearneys represented that the closing did not occur because neither Mr. Benton nor his associate, Mr. Centeno, were available. Mr. Leara represented that the closing did not occur because the closing attorney never received any loan documents from the loan company. Mr. Kearney asked for ten more days to complete the sale. The Court denied that request.

In regards to Mrs. Kearney's motion, the Court concluded as a procedural matter that the issues raised in the motion should be prosecuted through an adversary proceeding rather than the motion. By order entered April 20, 1999, the Court allowed Mrs. Kearney until April 26, 1999, to correct that procedural deficiency.[189] Mrs. Kearney formerly withdrew her motion on April 26, 1999.[190]

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[186] Order Approving Sale of Interests in Personal Property filed March 24, 1999, Proceeding No. 90.

[187] Order Approving Sale of Interests in Real Property filed March 24, 1999, Proceeding No. 91.

[188] Order Approving Sale of Interests in Personal Property filed March 24, 1999, Proceeding No. 90 and Order Approving Sale of Interests in Real Property filed March 24, 1999, Proceeding No. 91.

[189] Order entered April 20, 1999, Proceeding No. 95.

[190] Withdrawal of Motion filed April 26, 1999, Proceeding No. 96.

On May 5, 1999, the trustee filed a Motion for Order Authorizing Auction of Real Property.[191] The subject of the motion was once again the Old Leeds Ridge property. According to the motion, LAH "failed" to purchase the property upon such terms and conditions specified in the order of sale entered March 24, 1999, and was no longer interested in purchasing the property.

The trustee's motion was framed in terms of a motion to sell free and clear of liens. The liens were to attach to the proceeds of the sale. The motion indicated that there were two prospective purchasers. Those were Mr. and Mrs. Kearney and Mr. Irving Meisler. The trustee proposed a sale by public auction to the highest bidder, regardless of price, and if the amount bid was less than the amount owed to Regions, Regions would suffer the loss.

The trustee's motion did not suggest that there was any bona fide dispute regarding Regions' mortgage interest in the property. The trustee contended that Regions did not acquire "legal title" to the property at its foreclosure sale because its foreclosure deed had not been filed in the appropriate probate office before Mrs. Kearney filed her petition. Regions objected to the trustee's motion.[192]

On May 14, 1999, this Court entered an order granting a discharge to Mrs. Kearney pursuant section 727(a) of the Bankruptcy Code. 11 U.S.C. § 727(a).[193]

A hearing was held on the trustee's motion to auction the Old Leeds Ridge property on June 7, 1999.[194] At that hearing, Mr. Benton announced that he wished to avoid litigation regarding Regions' title and intended to offer whatever interest the estate might have for sale, without a determination of what that interest might be. He said that he wished the sale to be free and clear of liens, but he did not contend that Regions' mortgage interest was in bona fide dispute. He added that he did not anticipate a bid for the property in an amount sufficient to pay Regions' debt.

The Court indicated that an order authorizing the sale could not, and would not, be issued because, in essence, Mr. Benton's proposal did not meet any of the requirements of section 363(f) of the Bankruptcy Code. 11 U.S.C. § 363(f).

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[191] Objection to Trustee's Motion to Sell Property filed May 14, 1999, Proceeding No. 102.

[192] Objection to Trustee's Motion to Sell Property filed May 14, 1999, Proceeding No. 102.

[193] Discharge of Debtor entered May 14, 1999, Proceeding No. 101.

[194] Minute Entry filed June 8, 1999, Proceeding No. 115.

Mr. Benton indicated that he would proceed with his auction of the estate's interest in the property at 5:00 p.m. the following afternoon. He acknowledged: (1) that the sale was proceeding under section 363(b) of the Code, 11 U.S.C. § 363(b); (2) that the sale was not free and clear of liens; and, (3) that the Court would not enter either an order authorizing the sale or an order approving the sale after the fact. Mr. Leara indicated that Regions had no objection to the sale under those conditions. The matter was continued pending the auction.

On June 8, 1999, Mr. Benton attempted to auction the estate's interest in the Old Leeds Ridge property. He was not successful.

Ten days later, on June 18, 1999, Mrs. Kearney's right – and hence the bankruptcy estate's right – to redeem the Old Leeds Ridge property, expired.[195]

The continued hearing on the trustee's motion to auction the Old Leeds Ridge property and on Regions' objection to that motion, was held on June 22, 1999.[196] Mr. Kearney, Mr. Leara, and Mr. Douglas Centeno, an associate of Mr. Benton, appeared.

Mr. Leara and Mr. Centeno insisted that the trustee's second motion for sale retained validity despite this Court's refusal to grant the motion at the June 2nd hearing and despite Mr. Benton's election to treat the motion as a notice of sale under 363(b), rather than a motion to sell free and clear of liens under 363(f). They urged the Court to decide the issue of the effect on the foreclosure, if any, caused by Regions' failure to record the foreclosure deed until after Mrs. Kearney's automatic stay arose. Rather than requiring the trustee to file a new motion, the Court agreed to decide the issue. Neither party requested an evidentiary hearing. And counsel agreed for the Court to decide the matter on the pleadings.

On August 25, 1999, the Court decided the legal issue in Regions' favor and entered an order sustaining Regions' objection to the trustee's proposal to sell the property. After that order, the trustee's efforts to sell any stake in the Old Leeds Ridge property ceased.[197]

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[195] Under Alabama law, redemption from a mortgage foreclosure sale must occur within one year from the date that the sale was completed. Ala. Code 1975, § 6-5-248(b). The Court is aware that there may be an issue of whether Mrs. Kearney still possessed such a right after her failure to vacate the property after demand was made for the property.

[196] Minute Entry filed June 25, 1999, Proceeding No. 120.

[197] Order Sustaining Objection to Trustee's Motion to Sell Property (Filed by Regions Bank) entered August 25, 1999, Proceeding No. 129.

Mrs. Kearney filed the instant adversary proceeding on June 30, 1999, pro se.[198] Her complaint contained essentially the same allegations as her previously withdrawn motion, but in greater detail. But, like the motion, the complaint did not: (1) indicate when the purportedly unauthorized debits occurred; (2) mention Mr. Kearney's connections with the account and ROP; or, (3) mention the consolidated note which Mrs. Kearney executed in favor of Regions subsequent to the debits.

On August 9, 1999, after answering the complaint, Regions moved for summary judgment.[199] That motion did not address the factual allegations of the complaint but questioned Mrs. Kearney's standing and instituted a res judicata defense.

Mrs. Kearney responded on September 29, 1999, and filed an affidavit in support of her response. In both documents, Mrs. Kearney sought to clarify the facts on which her complaint was based. She did not, however, address the legal basis of Regions' motion.[200] Again, Mrs. Kearney did not indicate: (1) when the purportedly unauthorized debits occurred; (2) mention Mr. Kearney's connections with the account and ROP; or, (3) mention the consolidated note she executed in favor of Regions subsequent to the debits.

On September 28, 1999, Regions sold the Old Leeds Ridge property to Mr. Irving D. Meisler and his wife, Pamela H. Meisler, for $940,000.[201] The Meislers did not move into the house located on the property because they intended to demolish it and build another on the same location.[202]

After the sale, through a mutual acquaintance, the Meislers attempted to have Mrs. Kearney retrieve the personal items that remained on the property. According to the Meislers, those items did not have a high monetary value.[203] Mrs. Kearney sent

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[198] Complaint to Set Aside Foreclosure Action by Regions Bank - To Reinstate the Mortgage - To Account for All Funds in Account 304598695 - To Determine the True Amount Owed on the Note filed June 30, 1999, AP Proceeding No. 1.

[199] Defendant's Motion for Summary Judgment filed August 9, 1999, AP Proceeding No. 6).

[200] Plaintiff's Opposition to Defendant's Motion for Summary Judgment filed September 29, 1999, AP Proceeding No. 9.

[201] Defendant's Exhibit 34.

[202] Meisler Transcript at 39 and 49.

[203] Meisler Transcript at 42-43, 48-49, 61-62, 64-65, 68-69 and 70-71.

word to Mrs. Meisler that she wanted only a few particular items of her children's old clothing.[204]

The hearing on Regions' summary judgment motion was held on October 4, 1999.[205] The Court took the matter under advisement.

Later in 1999, the Chevrolet van that had been parked at the home disappeared along with its contents.[206] On December 23, 1999, Mrs. Kearney reported the van stolen.[207] A day or two later, a big screen television and sofa the Kearneys had left in the house also disappeared.[208]

The Meislers disposed of what little of the Kearneys' personalty remained in the house, believing the personalty abandoned.[209] Thereafter, sometime between December 23, 1999, and December 28, 1999, the Meislers had the house demolished.[210]

On December 28, 1999, Mrs. Kearney filed a motion to amend her complaint.[211] Mrs. Kearney represented: (1) she left personalty in the house when she moved; (2) the house was subsequently razed; (3) that she did not know what happened to the personalty or its location; and, (4) demanded that Regions be required to account for the personalty.[212] Regions objected to the proposed amendment and, after a hearing on the matter, the Court took that matter under advisement along with the summary judgment motion.[213]

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[204] Id.

[205] Minute Entry filed October 8, 1999, AP Proceeding No. 10.

[206] Meisler Transcript at 41.

[207] Defendant's Exhibit 116.

[208] Meisler Transcript at 48.

[209] Meisler Transcript at 41-44 and 49-51.

[210] Meisler Transcript at 40.

[211] Plaintiff's Motion to Amend Complaint filed December 28, 1999, AP Proceeding No. 11).

[212] See the handwritten, untitled document attached to Plaintiff's Motion to Amend Complaint filed December 28, 1999, AP Proceeding No. 11.

[213] Objection by Regions to Plaintiff's Motion to Amend Complaint filed January 18, 2000, AP Proceeding No. 13 and Minute Entry filed January 31, 2000, AP Proceeding No. 14.

While the trustee's efforts to sell the estate's interest in the Old Leeds Ridge property was the focal point of 1999, other significant events occurred:

1. As discussed above, the Court authorized the trustee to sell Mrs. Kearney's nonexempt personal property to either her or her designee. The Court has no knowledge of whether that sale occurred.

2. The Court also authorized the trustee to sell the Kearneys' Florida condominium to a Mr. and Mrs. Beckemeier for $310,000.[214] The sale was to be free and clear of Regions' second mortgage, and the first mortgage held by People's First Community Bank, both of which were to be satisfied from the proceeds of the sale. Mr. Kearney submitted an offer to purchase the condominium.[215] That offer was contingent on his ability to obtain the financing necessary to pay the purchase price. He failed to obtain that financing.

3. In addition to his offers to purchase the Old Leeds Ridge property, Mrs. Kearney's nonexempt personalty, and the Florida condominium, Mr. Kearney offered to purchase the former ROP property from the trustee for $4,100,000 and to reimburse legal fees. The trustee had not maintained a right to sell that property, since the property had never belonged to Mrs. Kearney and did not even belong to ROP when Mr. Kearney made his offer. But, Mr. Kearney made the offer, notwithstanding that the trustee did not offer to sell that property to him.

4. Mr. Kearney also offered to buy certain otherwise undescribed "bonds" from the trustee for $55,000. Those bonds were being held in an investment account by Regions Investment Company.[216] The trustee was not aware of the bonds until Mr. Kearney made his offer but afterwards attempted to sell the bonds to Mr. Kearney on February 22, 2001.[217] The Court does not know whether that sale occurred.

5. And finally, in 1999, the Internal Revenue Service filed a proof of claim in Mrs. Kearney's bankruptcy case for $2,178,139.55.[218] It later amended its claim to

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[214] Order Approving Sale of Condominium entered June 8, 1999, Proceeding No. 117.

[215] Offer to Purchase filed June 4, 1999, Proceeding No. 112.

[216] Offer to Purchase filed June 4, 1999, Proceeding No. 111.

[217] Order entered February 22, 2001, Proceeding No. 222.

[218] Proof of Claim filed January 15, 1999 (Claim No. 6)(also admitted into evidence as part of Defendant's Exhibit 74).

$2,020,550.75.[219] The amount the IRS claims is substantially greater than the amount Mrs. Kearney acknowledged in her bankruptcy schedules.

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In 2000, Mr. Kearney attempted to purchase a lake house and lot, situated on Lake Mitchell, Alabama.[220] Alabama Power Company (APC) owned the property and had previously leased it to Mrs. Kearney. When the issue arose, APC took the position that the lease terminated in 1998, well before Mrs. Kearney filed for bankruptcy.[221]

On February 14, 2001, the trustee filed a notice to sell to Mr. Kearney whatever interest the estate might have in the lake property for $20,000, subject to any Alabama Power Company interest. The sale was to be made without warranty or representation to Mr. Kearney that the estate, in fact, had any interest.[222] Again, the Court does not know whether that sale occurred.

On July 10, 2000, Mr. Kearney pleaded guilty to bank fraud in case number CR-00-J-0244-S, in the United States District Court for the Northern District of Florida, at Pensacola.[223] He was sentenced to prison for 10 months beginning on July 29, 2000, required to pay a $20,000 fine, and required to make restitution of $10,000.[224]

On August 24, 2000, this Court issued a memorandum opinion and order on Regions' summary judgment motion and on Mrs. Kearney's motion to amend her complaint.[225] This Court concluded that Mrs. Kearney alleged five separate causes of action in her adversary complaint. Those included: (1) a prepetition state law cause of action for conversion, constructive contract and fraud based on her allegations regarding the debits made by Regions from her personal bank account; (2) a prepetition

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[219] Proof of Claim filed June 1, 1999 (Amendment to Claim No. 6)(also admitted into evidence as part of Defendant's Exhibit 74).

[220] Motion to Approve Sale of Assets and Property Interest filed June 23, 2000, Proceeding No. 156.

[221] Objection to Motion to Approve Sale of Assets and Property Interest filed June 29, 2000, Proceeding No. 158 and Alabama Power Company's Objection to Motion of Trustee to Sell Interest in Lake Lot filed December 1, 2000, Proceeding No. 202.

[222] Notice of Intent to Sell Claims Related to Lake Lot filed February 14, 2001, Proceeding No. 219,

[223] Defendant's Exhibit 75.

[224] Id.

[225] Order entered August 24, 2000, AP Proceeding No. 16.

state law cause of action for wrongful foreclosure; (3) a prepetition state law cause of action for an accounting from Regions for the funds which it debited from her account; (4) a post-petition federal law cause of action for violation of the automatic stay; and (5) a post-petition state law cause of action for fraud or misrepresentation based on her allegations regarding allegedly false assurances made by Regions about the personalty left on the Old Leeds Ridge property.

Except as to Regions' argument regarding Mrs. Kearney's lack of standing to pursue her prepetition causes of action, the Court denied Regions' motion. In regard to standing, the Court set September 25, 2000, as a deadline for the trustee: (1) to ratify Mrs. Kearney's filing and prosecution; (2) to join the adversary proceeding as a co-plaintiff; (3) to file a motion to be substituted as the proper party plaintiff; or, (4) to abandon the prepetition causes of action. The Court also set October 23, 2000, as a deadline for Mrs. Kearney to file a motion, if she desired, to have the trustee involuntarily joined as a party plaintiff with respect to those causes of action or to compel the trustee to abandon the estate's interest in them.

On September 21, 2000, the trustee filed a motion in Mrs. Kearney's adversary proceeding to be substituted as plaintiff with respect to prepetition causes of action and to intervene as a co-plaintiff to assert his own claim on behalf of the estate for violation of the stay.[226] The Court granted that motion on October 25, 2000.[227]

On September 29, 2000, Mrs. Kearney retained Mr. Heninger as her attorney. After making an appearance, Mr. Heninger filed a motion to amend Mrs. Kearney's complaint.[228] The amendment clarified the causes of action Mrs. Kearney described in her original complaint. In addition, the amendment alleged causes of action based on civil conspiracy and Regions' alleged failure, both prepetition and post-petition, to "work with" Mrs. Kearney in her efforts to avoid foreclosure and to redeem her homestead subsequent to the foreclosure sale.[229]

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[226] Motion of Trustee to Intervene and for Substitution as Real Party in Interest filed September 21, 2000, AP Proceeding No. 17.

[227] Order entered October 25, 2000, AP Proceeding No. 26.

[228] Notice of Appearance and Plaintiff's Motion to Amend filed September 29, 2000, AP Proceeding Nos. 18 and 19.

[229] Amendment to Complaint attached to Plaintiff's Motion to Amend filed September 29, 2000, AP Proceeding No. 19).

On October 26, 2000, the trustee filed an amendment to Mrs. Kearney's original complaint.[230] The trustee: (1) restated Mrs. Kearney's prepetition causes of action; (2) added Mr. Meisler as a defendant; (3) asserted causes of action against Regions and Meisler for trespass and violation of the stay in relation to the Old Leeds Ridge realty; and, (4) asserted a cause of action against Regions for alleged interference with the trustee's attempt to sell the statutory right to redeem the realty to Mr. Kearney.

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In January 2001, the trustee and Mr. Meisler entered into an agreement to settle for $20,000 the claims the trustee asserted against Mr. Meisler.[231] Mrs. Kearney objected to the proposed settlement. She also moved to amend her complaint to name Mr. Meisler as a defendant and to state claims against him relating to his destruction of the house on the Old Leeds Ridge property and his disposition of the personalty she left in that house.[232] At the hearing on the proposed compromise between the trustee and Mr. Meisler, counsel for Mrs. Kearney orally withdrew Mrs. Kearney's objection to the compromise and withdrew her motion to amend her complaint to add Mr. Meisler as a defendant.[233] On March 16, 2001, the Court entered an order approving the compromise between the trustee and Mr. Meisler and dismissed Mr. Meisler from the adversary proceeding.[234]

On May 16, 2001, the trustee amended his complaint to include a count pertaining to the Florida condominium.[235] In that amendment, the trustee alleged that the debt owed to Regions, which was secured by a mortgage on the Florida condominium, was satisfied in full as a result of Regions' foreclosure sale of the Old Leeds Ridge property; however, the trustee complained that Regions and its attorneys falsely represented to him that the debt secured by the condominium remained unpaid after the foreclosure sale occurred. Based on that allegation, the trustee demanded return of that portion of the proceeds he paid to Regions from the sale of the Florida condominium.

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[230] Trustee's Amended and Restated Complaint and Complaint in Intervention filed October 26, 2000, AP Proceeding No. 27.

[231] Joint Motion for Approval of Compromise filed January 19, 2001, Proceeding No. 53.

[232] Objection to Trustee's Proposed Settlement with Defendant Meisler, and Plaintiff's Motion to Amend Complaint, and Plaintiff's Amended Complaint filed February 2, 2001, Proceeding Nos. 59, 60, and 61.

[233] Memorandum Opinion entered March 16, 2001, AP Proceeding No. 69.

[234] Id.

[235] Trustee's Second Amended Complaint in Intervention filed May 16, 2001, AP Proceeding No. 93.

On July 23, 2001, Mrs. Kearney amended her complaint again.[236] In that amendment, she alleged:

1. Regions, "engaged in a scheme, plan and course of conduct to oppress and injure..." her by, "improperly prefer[ring]..." her partner in ROP, Mr. Johnston;

2. Regions improperly provided Mr. Johnston with information regarding Mrs. Kearney's bank accounts and other personal financial she had provided to Regions;

3. Through its counsel, Regions fraudulently led Mrs. Kearney to believe that the foreclosure sale of the Old Leeds Ridge property would not occur until the afternoon of the scheduled day, and that Regions then conducted the sale earlier to prevent Mrs. Kearney from stopping the sale through a bankruptcy filing;

4. Regions told Mrs. Kearney that if she vacated the Old Leeds Ridge property she would be allowed to return and retrieve her personal items, but Regions had the personal items, "put out on the street, ruined, stolen and destroyed;"

5. Regions, "sold the ROP building to Johnston's former law partner to the exclusion of other potential bidders at a higher price in a continued effort to prefer Johnston and accede to all his demands, so that Plaintiff would be ruined and oppressed while Johnston was kept in a position of financial safety....";

6. As part of a conspiracy with Mr. Johnston, through the use of inappropriate debits, Regions misappropriated funds from Mrs. Kearney's personal account in November 1996 and December 1996, and on one occasion, used the funds to pay a $90,000 check Mr. Johnston signed for an ROP obligation;

7. Regions foreclosed on Mrs. Kearney's Florida condominium in furtherance of its deceitful arrangement with Mr. Johnston; and

8 All of Regions' alleged misconduct was in, "furtherance and conformity with the agreement made with Johnston to assure that the Plaintiff was oppressed, injured and ruined while Johnston was kept in a safe position on his obligations."

Plaintiff's Amendment to Complaint, attached to Motion to Amend Complaint filed July 23, 2001, AP Proceeding No. 108.

In a separate pleading, the trustee joined in Mrs. Kearney's amendment and the causes of action relating to prepetition events and circumstances.

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[236] Plaintiff' Amendment to Complaint attached to Motion to Amend Complaint filed July 23, 2001, AP Proceeding No. 108.

On August 30, 2001, the trustee and Regions filed a joint motion for approval of a compromise. In that compromise they reached a settlement on all issues, contentions, disputes and causes of action between them, belonging to them, and relating to one another.[237] In summary, the trustee agreed to dismiss all claims of the estate against Regions, including those involved in the adversary proceeding and the trustee's contest of Regions' claim number 15 filed in the main case, a claim for $176,615.89. In return, Regions agreed to pay the trustee $110,000 and to withdraw its proof of claim. Upon approval by the Court, the agreement required the parties to execute a Mutual General Release. A copy of that release was attached to the motion. It provided in part:

> In consideration of the payment of One Hundred Ten Thousand and No / 100 Dollars ($110,000.00), as outlined above, the withdrawal of Claim No. 15, as outlined, and for other good and valuable considerations received, Trustee releases and forever discharges Regions, together with its past and present officers, employees, agents, attorneys, parents, affiliates, and assigns of any and all of the Trustee or Estate's claims, actions, causes of actions, demands, rights, damages, costs, losses, expenses, and compensation whatever, whether now known or unknown, whether accrued or unaccrued, whether contingent or certain, whether asserted or unasserted, which arise out of the bankruptcy of Susan King Kearney and the Adversary Proceeding referenced above, including, without limitation, all prepetition claims of Debtor Susan King Kearney and all prepetition and post-petition claims of the Trustee against Regions Bank and those named above in whose favor this Release is executed. After payment of the consideration described above, the Trustee further agrees to take appropriate action to dismiss with prejudice all adversary proceedings, contests of claims and counterclaims, which it has asserted against Regions, with prejudice, with each party to bear its own costs of Court.

Mutual General Release, attached to Joint Motion for Approval of Compromise filed August 30, 2001, AP Proceeding No. 120.

Mrs. Kearney filed her Pretrial Statement for the instant adversary proceeding on September 7, 2001. Under the heading "Plaintiff's Position" the statement reads:

> Plaintiff contends that the action of Region's Bank on June 17, 1998, caused her to file this Petition of Bankruptcy. Regions represented that the foreclosure sale on her house would take place in the afternoon. Had it not been for her desire to avoid and stop this sale she would have had

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[237] Joint Motion for Approval of Compromise filed August 30, 2001, AP Proceeding No. 120).

no reason to file for bankruptcy especially if she had known the sale had already purportedly taken place.

Plaintiff contends that Regions Bank willfully violated the Automatic entry [sic] subject to the prohibition of 11 U.S.C. § 362(h) by filing an ejectment action in State Court on August 21, 1998, after an acknowledgment of this Court's automatic entry [sic] when the defendant entered and appearance in this action on July 7, 1998. Plaintiff contends that Regions Bank further engaged in a willful violation of this entry [sic] through its eviction and ejectment action to throw her personal property out of the house in January 1999.

Plaintiff further contends that Regions Bank engaged in fraud, misrepresentation and deceit by telling her that if she vacated the house she could come back later to get her personal property and belongings. In violation of this representation her belongings and those of her children were thrown out of the house and onto the street and allowed to be stolen or damaged.

Plaintiff further avers that Regions Bank negligently, wantonly and/or intentionally violated her right to privacy of nature by both common law and contract with that bank by releasing private and confidential financial information about her and her accounts to Jay Johnston and others without permission or authority in an effort to assist another customer and to harm plaintiff.

Plaintiff further contends that Regions Bank misappropriated funds from her account in November and December 1996 to aid another customer of the bank and to harm her. These actions amounted to conversion of special purpose funds, constructive contract and fraud.

Plaintiff further contends that Regions Bank engaged in outrageous conduct through a scheme concocted and carried out at points prepetition and post-petition to inflict severe emotional distress upon plaintiff and in a conspiracy to assist another customer over her to carry out this intentional conduct. Defendant bank purposefully and intentionally placed obstacles and financial pressure on plaintiff to cause foreseeable emotional distress and to favor another customer. This scheme had been committed both prepetition and post-petition.

The conspiracy to accomplish this scheme was begun prepetition but was carried out continuously post-petition. Each of the claims made of the plaintiff are parts of this conspiracy and scheme to harm the plaintiff.

Pretrial Statement, pages 2-3, filed September 7, 2001, AP Proceeding No. 125.

In her trial brief, filed on September 24, 2001, Mrs. Kearney offered explanations for her position that prepetition events were still relevant to her post-petition causes of actions, even if the proposed compromise between the trustee and Regions was approved by the Court. She stated:

> The entire series of events from prepetition to post-petition are linked by an animus towards Plaintiff to do her harm and help her R.O.P. partner. All of this is relevant on the issue of punitive damages for willful violation of the stay even if the Court concludes that some of these causes of action belonged to the Trustee.

Plaintiff's Trial Brief, at 7, filed September 24, 2001, AP Proceeding No. 129.

A hearing on the motion for approval of compromise between the trustee and Regions was held on October 1, 2001. At the conclusion of the hearing, the Court announced that the motion would be granted.[238]

The trial of the adversary proceeding was held on October 9, 2001. At the conclusion of the trial, the Court took that matter under advisement.[239]

On October 15, 2001, the Court entered an order approving the compromise between the trustee and Regions.[240] The order authorized the trustee to execute the Mutual General Release attached to the parties' joint motion to compromise. Through the order and the Release, all claims made by the trustee in the pending adversary proceeding including, of course, the claims brought by Mrs. Kearney relating to prepetition events and circumstances, (which the order permitted the trustee to usurp on behalf of the estate), were dismissed.

IV. Additional Findings of Fact

In addition to the above, there are six factual situations that warrant special discussion.

A. Mrs. Kearney's Background

Mrs. Kearney testified about her personal background. She is married to Mr. William Kearney, Jr. They have been married for 17 years. She has 4 adult children

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[238] Minute Entry filed October 1, 2001, AP Proceeding No. 136).

[239] Minute Entry filed November 29, 2001, AP Proceeding No. 143.

[240] Order Approving Compromise entered October 15, 2001, Proceeding No. 265.

and 1 minor child. Four of the children are from a prior marriage. One of the children, a son, who was 16 years old at the time of trial, is from her marriage to Mr. Kearney.

When she filed her bankruptcy petition, Mrs. Kearney was unemployed. After filing her bankruptcy petition, Mrs. Kearney earned a masters degree in library science from the University of Alabama. At the time of trial, she was employed full-time as a librarian at Hayden Middle School in Blount County, Alabama. She also worked weekends and three nights a week at the Emmett O'Neal Library in Mountain Brook, Alabama.

Mrs. Kearney's uncle built the house that is the home referred to in this opinion. Mrs. Kearney purchased the property around 1992. The property includes five and a half acres on Old Leeds Ridge Road in the city limits of Mountain Brook, Alabama, a small, but very affluent municipality in the Birmingham, Alabama, metropolitan area.[241]

B. Mr. Kearney Has Twice Been Convicted of a Felony

Mrs. Kearney testified that Mr. Kearney had twice been convicted of a felony. He was convicted once for embezzlement and once for bank fraud. He served prison terms for both convictions. Mrs. Kearney testified:

Q. On the subject of your husband, is it true that he has gone to prison on two occasions?
A. Yes.
Q. One for embezzlement and one for bank fraud?
A. Yes.
Q. And he spent some time in jail both times; correct?
A. Yes, sir.
Q. In fact one of those times was in 1999?
A. Yes.

Transcript at 419.

C. Mr. Kearney Managed Mrs. Kearney's Financial Affairs

The following statement appears in "Schedule B" of Mrs. Kearney's bankruptcy petition. It reads, "Mr. William Kearney, Jr., husband of the Debtor, managed all the finances of the debtor." Schedule B-Personal Property filed August 26, 1998, Proceeding No. 23.

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[241]As noted earlier, Mountain Brook, Alabama, is a 12.2 square mile municipality bordering Birmingham, Alabama. According to the 2000 Census, the total population was 20,604. In 2000, the median home value was $336,300. The median family income was $122,647, about three time the national average. And the per capita income was $59,085, again about three times the national average. See, http://factfinder.census.gov.

At trial Mrs. Kearney admitted that Mr. Kearney managed all of her financial affairs during the 1990s. She testified:

> Q. Turning over two pages from where you were on Schedule "B," where it says section number thirteen of Schedule "B" and it lists fourteen different entities that you had some ownership interest in. Down at the bottom there is a statement made that Mr. William Kearney, husband of the debtor, managed all the finances of the debtor. Is that true?
> A. I don't know where you are.
> Q. I am sorry. It is on — at the bottom of the page it says FAB-0246.
> A. Okay.
> Q. Down at the bottom there is a sentence:
> "Mr. William Kearney, husband of the debtor, managed all the finances of the debtor."
> Is that true?
> A. Yes.
> Q. And that was true throughout the 1990s, wasn't it?
> A. Yes.

Transcript at 419-20.

D. Mr. Kearney Acted in Mrs. Kearney's Stead in Regard to the Affairs of ROP

Mrs. Kearney's personal participation in ROP was nominal. The evidence demonstrates that she did not have any skills or experience that would have qualified her to participate actively in ROP or to make decisions on its behalf. There is no evidence that she had the skills or experience to make responsible decisions effecting the financing, construction, or management of a multi-million dollar office building. Furthermore, nothing in her testimony suggests that she had any general business experience or specific experience in financing, constructing, or managing office buildings.[242]

Because she lacked such skills or experience, it is unreasonable to presume that someone of Mr. Johnston's apparent business acumen and experience, (who had a relatively long standing and active business relationship with Mr. Kearney), would have relied on Mrs. Kearney's advice in making any decision relating to the partnership business. Indeed, by Mrs. Kearney's own admission, she became a partner in ROP with Mr. Johnston only because he and Mr. Kearney thought that it would be a good

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[242] In other testimony, Mrs. Kearney's description of her participation in ROP indicates that she was limited to performing, along with her children, manual labor at the ROP job site. That labor included picking up trash, cleaning up the site, and hanging ceiling tiles.

idea. She testified, "Jay contacted or talked to Bill and they decided that it was a good deal to be in this partnership." Transcript at 348.

Aside from executing documents necessary to obtaining financing for the project, Mrs. Kearney did not describe any particular instance when she made, or participated in making, any decision, major or minor, relating to ROP, or when she arranged, executed or participated in any transaction on behalf of ROP. She did not describe any particular instance, prior to ROP's demise, when she met, communicated, or corresponded with anyone other than Mr. Kearney in relation to the business of ROP, and that included Regions Bank, Mr. Johnston, ROP suppliers, or ROP subcontractors.

In contrast, all of the evidence, (except for some of Mrs. Kearney's testimony), demonstrates that Mr. Kearney acted in Mrs. Kearney's stead in regard to the affairs of ROP.[243]

Mr. Mitchell's testimony indicates that Mr. Kearney made decisions for Mrs. Kearney relating to ROP. Mr. Mitchell testified that he dealt with Mr. Kearney rather than Mrs. Kearney on ROP business. He said, based on his experience, that Mr. Kearney consistently managed Mrs. Kearney's affairs including those relating to ROP.[244] Mrs. Kearney was, according to Mr. Mitchell, physically present on occasions when Mr. Kearney gave directions to Mr. Mitchell regarding the conduct of their joint financial affairs, but Mrs. Kearney never told Mr. Mitchell that Mr. Kearney could not, or should not, manage her financial affairs.[245] And according to Mr. Mitchell, Mr. Kearney often spoke for Mrs. Kearney in regard to business transactions, even in her

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[243] Despite her admission that Mr. Kearney managed <u>all</u> of her financial affairs, on direct examination, Mrs. Kearney implied that she was more than just a conduit for Mr. Kearney in ROP. She testified:

> Q. Did you ever tell the bank, Regions Bank, anything Bill Kearney says or does is the same as if I do it?
> A. No.
> ....
> Q. And who was the partner with Jay, was it you or Bill?
> A. I was the partner.
> Q. Did you look to Bill as a partner to do certain things to help the partnership?
> A. I looked to Bill for advice when they were building the building, you know, what we should do.

Transcript at 384. That implication is in conflict with the other evidence.

[244] Transcript at 239, 243, and 245.

[245] Transcript at 239.

presence.[246]

Mr. Johnston's testimony also supports the conclusion that Mr. Kearney made decisions for Mrs. Kearney relating to ROP, and that on matters relating to ROP business, Mr. Johnston dealt with Mr. Kearney rather than Mrs. Kearney. He testified that Mr. Kearney acted as Mrs. Kearney's agent and managed her affairs with respect to the partnership and was also the project manager for the partnership.[247] According to Mr. Johnston, Mr. Kearney spoke for Mrs. Kearney in relation to the partnership's business and that Mrs. Kearney never told Mr. Johnston that Mr. Kearney was not authorized to speak for her.[248]

Two items of correspondence authored by Mr. Kearney also support these conclusions. On April 3, 1996, Mr. Kearney sent a letter on ROP letterhead to Mr. Brian Atkins of R.B. Atkins and Associates, Inc.[249] The letter refers to a copy of a standard form AIA subcontract and addresses Mr. Atkins' desire to be paid for material at the time of delivery. The letter contains the following statement. It reads, "I want to introduce you <u>to my partner J. Brooke Johnston, Jr.</u> the next time you are both on site." Defendant's Exhibit 62 (emphasis added). A notation at the bottom of the letter indicates that copies of the letter were sent to Mr. Johnston and Mr. Mitchell. No reference was made in the letter to Mrs. Kearney, and it is apparent from the notation at the bottom of the letter that a copy was not provided to her. When Mr. Kearney signed the letter, he did not indicate that he was merely the project manager of the partnership, rather than a partner.

Similarly, on March 6, 1997, Mr. Kearney sent a letter on ROP letterhead to Fidelity & Deposit Insurance, the bonding company on Coston Construction Company's performance bond.[250] The letter informed Fidelity & Deposit that ROP was making a claim against Coston's performance bond and was in the process of compiling the information necessary to substantiate the claim. The letter contains the statement, "If you have any questions or need any additional information, or if anything I have said is not clear, please call me. Shortly, Mr. J. Brooke Johnston, Jr., <u>another general partner in Riverchase Office Partners</u>, will take over managing this claim." Defendant's Exhibit 65 (emphasis added). A notation at the bottom left hand corner of the letter indicates that a copy of the letter was sent to Mr. Mitchell and Mr. Johnston. No reference was made in the letter to Mrs. Kearney, and it is apparent from the notation at the bottom of

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[246] Transcript at 239.

[247] Transcript at 299-300.

[248] Transcript at 300.

[249] Defendant's Exhibit 62.

[250] Defendant's Exhibit 65.

the letter, that a copy was not provided to her. When Mr. Kearney signed the letter, he did not indicate that he was merely the project manager of the partnership rather than a partner.

The weight of the evidence demonstrates that Mrs. Kearney was a nominal partner in ROP. She did not participate in any meaningful manner in the partnership business. On the other hand, in addition to being ROP's project manager, Mr. Kearney was a de facto partner in ROP. He actively participated in the partnership's business.[251]

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[251] Other evidence supports the conclusion that Mr. Kearney managed both Mrs. Kearney's personal and business finances. That evidence comes in the form of many of the documents filed in this case and the pending proceeding. And based on those documents, the Court must conclude that the handwriting on Mrs. Kearney's complaint looks the same as that on several handwritten documents prepared by Mr. Kearney and admitted into evidence. See, Plaintiff's Exhibit 51; Defendant's Exhibit 39; Defendant's Exhibit 42 ("Motion to Continue Hearing Scheduled November 6, 1998"); Defendant's Exhibit 52; Defendant's Exhibit 85 (hand printed notes on typed letter); and Defendant's Exhibit 102 (handwritten letters dated "3/27" and "4/2").

The handwriting furthermore seems to be identical to that on numerous other handwritten documents filed by Mr. Kearney in this adversary proceeding and in Mrs. Kearney's bankruptcy case. Objection to Compromise filed in Adversary Proceeding No. 99-00239 on February 7, 2001 (Proceeding No. 62); Notice of Appeal filed in Adversary Proceeding No. 99-00239 on March 26, 2001 (Proceeding No. 74); Notice of Appeal filed in Adversary Proceeding No. 99-00239 on March 26, 2001 (Proceeding No. 75); Withdrawal of Appeal filed in Adversary Proceeding No. 99-00239 on April 11, 2001 (Proceeding No. 82); Exhibits 1 and 2 to Motion to Authorize Trustee to Sell Property in Bankruptcy Case No. 98-03967-BGC-7 filed on January 5, 1999 (Proceeding No. 57); Offer to Purchase filed in Bankruptcy Case No. 98-03967-BGC-7 on June 4, 1999 (Proceeding No. 111); Offer to Purchase filed in Bankruptcy Case No. 98-03967-BGC-7 on June 4, 1999 (Proceeding No. 112); Offer to Purchase - Objection filed in Bankruptcy Case No. 98-03967-BGC-7 on June 4, 1999 (Proceeding No. 113); Offer to Purchase - Objection filed in Bankruptcy Case No. 98-03967-BGC-7 on June 4, 1999 (Proceeding No. 114); Motion to Approve Sale of Assets and Property Interest filed in Bankruptcy Case No. 98-03967-BGC-7 on June 23, 2000 (Proceeding No. 156); and Motion to Approve Sale of Investment Account filed in Bankruptcy Case No. 98-03967-BGC-7 on June 23, 2000 (Proceeding No. 157).

Those handwritten documents prepared by Mr. Kearney were printed. The other handwritten documents, submitted by Mrs. Kearney in this proceeding, and in her bankruptcy case, were written in cursive. See the proposed amendment attached to Plaintiff's Motion to Amend Complaint, filed in Adversary Proceeding No. 99-00239 on December 28, 1999 (Proceeding No. 11); "Exhibit A" to Plaintiff's Opposition to Defendant's Motion for Summary Judgment filed in Adversary Proceeding No. 99-00239 on September 29, 1999 (Proceeding No. 9); Motion to Compel filed in Bankruptcy Case No. 98-03967-BGC-7 on March 1, 1999 (Proceeding No. 79); Motion to set aside Region's foreclosure, to reinstate the mortgage, to compel Regions to account for money taken from the debtor's checking account filed in Bankruptcy Case No. 98-03967-BGC-7 on March 22, 1999 (Proceeding No. 87); Withdrawal of

E. Mrs. Kearney's Petitions, Schedules, Income, and Creditors

Mrs. Kearney testified that after her telephone conversation with Mr. Leara at 11:00 a.m. on June 17, 1998, she concluded that Regions was, "probably going to foreclose on the house and that I needed to do something." Transcript at 357. Based in part on that conclusion, Mrs. Kearney decided to file a bankruptcy petition before 1:00 p.m., the time she believed was the scheduled time of the foreclosure.

The evidence demonstrates that Mrs. Kearney believed the sale would not occur before 1:00 p.m. Accompanied by Mr. Kearney, she consulted an attorney, and filed a Chapter 13 petition at 11:45 a.m. on the day of the foreclosure. Mrs. Kearney testified that she hurried to prepare and file her petition before Regions could conduct its foreclosure sale and admitted at trial that her sole purpose in filing the bankruptcy petition was to stop the foreclosure sale.

Mrs. Kearney also admitted that she did not have sufficient funds to pay her mortgage debt. Her original and amended petition and schedules and her trial testimony support that admission. According to her schedules, when Mrs. Kearney filed her bankruptcy petition she was unemployed and had no income.[252] Her trial testimony indicated that her only hope of obtaining the money to pay her mortgage debt through her Chapter 13 plan was to borrow it from, or have it given to her by, "friends."[253] As the facts demonstrate, neither occurred.

Motion filed in Bankruptcy Case No. 98-03967-BGC-7 on April 26, 1999 (Proceeding No. 96). All of the above indicates that Mrs. Kearney's complaint in this adversary proceeding was, contrary to her testimony, prepared by Mr. Kearney.

While this Court would not qualify as a handwriting expert, as trier of fact, this Court may reach its own conclusion regarding who wrote a particular document based on comparison of the handwriting on a document with that which appears on other documents in evidence. Stokes v. United States, 157 U.S. 187, 194-195 (1895); Moore v. United States, 91 U.S. 270, 274 (1875); High v. Head, 209 F.3d 1257, 1272 n.22 (11th Cir. 2000), cert. denied, 532 U.S. 909 (2001); United States v. Paul, 175 F.3d 906, 911 (11th Cir. 1999), cert. denied, 528 U.S. 1023 (1999); United States v. Cashio, 420 F.2d 1132, 1135 (5th Cir. 1969), cert. denied, 397 U.S. 1007 (1970); Clark v. United States, 293 F. 301, 305 (5th Cir. 1923).

Based on the documents, this Court must find, as much of the other evidence has already shown, Mr. Kearney had a substantial part in directing Mrs. Kearney's financial affairs.

[252] Schedule I-Current Income of Individual Debtor(s) filed August 26, 1998, Proceeding No. 23.

[253] Transcript at 394-96.

Regarding her creditors, the first page of Mrs. Kearney's petition, (filed without schedules or a proposed Chapter 13 plan), indicated that she owed from one to fifteen creditors and owed between $0 and $50,000. Mrs. Kearney admitted in her testimony that those figures were incorrect.

She filed an amended Chapter 13 petition the next day, again without either schedules or a proposed plan. The amended petition represented that Mrs. Kearney owed between sixteen and nineteen creditors and owed between $501,000 and $1,000,000. She admitted in her testimony that those figures were also incorrect.

In contrast, in the bankruptcy schedules she filed on August 26, 1998, after her case had been converted to chapter 7, Mrs. Kearney admitted that she actually owed in excess of $3,500,000 in unsecured claims to over 124 creditors.[254] That amount included over $700,000 in unpaid taxes owed to the IRS and the State of Alabama.

Based on the evidence, the Court must find that when Mrs. Kearney filed her petition she was technically ineligible for relief under Chapter 13. Section 109(e) of the Bankruptcy Code reads in part, "only an individual with regular income that owes, on the date of the filing of the petition, non-contingent, liquidated, unsecured debts of less than $269,250 and non-contingent, liquidated, secured debts of less than $807,750...", 11 U.S.C. § 109(e), may be a debtor under Chapter 13.[255] However, on the date she filed her Chapter 13 petition, Mrs. Kearney owed several million dollars in unsecured debts, owed at least $1,071,500 in secured debts to Regions, (given her contention that the foreclosure sale was wrongful and ineffective), and owed the mortgage on her Florida condominium. In addition, Mrs. Kearney did not have sufficient, regular income to fund a Chapter 13 plan.

F. The Kearneys Diverted Over $1,800,000 from ROP's Construction Loan

Of all of the facts before the Court, those relating to the Kearney's diversion of over $1,800,000 from ROP's construction loan may be the most important. When the Kearneys diverted those funds, they set a series of events in motion that would lead to their financial ruin.

1. J. Lester Alexander's Testimony

Mr. J. Lester Alexander, III, a certified public accountant and a certified fraud examiner with 22 years of experience, testified at the trial. Regions employed him to

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[254] Schedule E-Creditors Holding Unsecured Priority Claims and Schedule F-Creditors Holding Unsecured Nonpriority Claims) filed August 26, 1998, Proceeding No. 23.

[255] Those were the applicable numbers when Mrs. Kearney filed her chapter 13 petition. They have since been increased to $290.525 and $871,550, respectively. 11 U.S.C. § 109(e).

examine the Kearneys' financial affairs and ROP's financial affairs, and to offer an opinion on the correlation, if any, between the two.[256] Mr. Alexander prepared a report for Regions. That report was admitted into evidence as Defendant's Exhibit 92A.

In connection with his examination, Mr. Alexander reviewed: the Kearneys' bank statements; ROP's bank statements; checks written on ROP's accounts; the depositions of Mr. Kearney, Mrs. Kearney, and Mr. Mitchell; the pleadings filed in this adversary proceeding; and items of correspondence concerning the Kearneys' loans, the ROP building, ROP contractors and disputes involving ROP.[257]

Based on his examination, Mr. Alexander concluded that the Kearneys diverted at least $1,800,000 from the construction loan advances Regions made to ROP.[258] Mr. Alexander testified in part:

Q. All right. And after studying this financial information, did you make some conclusions?
A. Yes, I did.
Q. Could you tell us what those are?
A. As of November 23rd, which is prior to the receipt of the Mitchell trust fund deposit, Mrs. Kearney was unable to repay her debts. Mrs. Kearney had no significant source of income. 1.8 million dollars, and I have rounded down, in loan proceeds had been diverted from the ROP loan to the Kearneys' household, as well as the ventures of the Kearneys. Their records show that only six hundred thousand of that had been repaid as of that time, leaving 1.2 million dollars owed to ROP.

ROP's cash was depleted. ROP was unable to repay its construction loan and its bank account was overdrawn by ninety-two thousand dollars.

ROP's construction loan was depleted and the construction on the building was not complete.

ROP was unable to pay contractors and suppliers which ultimately resulted in a three hundred and sixty thousand dollar judgment against Mrs. Kearney.

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[256] Mr. Alexander's extensive resume was admitted into evidence as Defendant's Exhibit 93.

[257] Defendant's Exhibit 92A.

[258] Transcript at 471. See also Defendant's Exhibit 92A. Mr. Alexander defined "diverted" to mean, "Taken from one account and placed in another account without apparent authority." Transcript at 480.

Mrs. Kearney was a general partner in ROP and was a guarantor of the ROP loan.

Mrs. Kearney had significantly under reported prior taxable income and the IRS was at that time conducting an examination which ultimately resulted in a two million dollar assessment.

Mrs. Kearney had been unable to keep her home mortgages current and they were past-due and in default. She was unable to keep her condo mortgage current and it was past-due and in default.

Mrs. Kearney's current and past-due obligations far exceeded the Mitchell trust fund deposits. And, Your Honor, this is one of the items that was not in the presentation.

THE COURT: I discovered that.
MR. ROWE: I did, too, as I was following along.

Q. Did you have any other conclusions?
A. Mrs. Kearney was in severe financial distress at the time she received the money from the Mitchell trust fund. The cash diversions and related consequences from ROP is what caused Mrs. Kearney's demise. Use of part of the five hundred thousand dollars to replenish the ROP account served to delay the consequences of the ROP diversions but it did not prevent, would not have prevented her financial demise. And repossession of the Kearney residence was inevitable in spite of the five hundred thousand dollar Mitchell trust fund deposit.
Q. Now when you say that the cash diversions caused the demise, that seems kind of counterintuitive to me. It would seem like the cash diversions would have helped, they add money to the account. So can you explain that for me?
A. Yes. Let me step forward and I will explain it and show it. The Kearney joint account remained positive prior to receipt of the Mitchell trust fund money almost exclusively because of funds, loan proceeds diverted from the ROP bank account and ROP loan. ROP received its final draw on 9-4-96. On 11-6-96 and 11-14-96, Regions notified or declared the ROP loan and the Kearney mortgages in default. On 11-23 and 11-24 the deposits arrived from the George Mitchell Trust. Two hundred and forty-nine thousand of the George Mitchell Trust was transferred back to the ROP account to replenish the ROP account.

It is important to realize at this time there were bills being presented for payment at ROP and there was need for money to be in that account but the loan was already maxed out and the account was overdrawn.

Compounding the problem with cash flow, the tenant, although occupying the building on January 1st, delayed payment of the first rent until February of 1997.

And then we have Mrs. Kearney's bankruptcy filing, as well as the repossession of the Kearney home seventeen or eighteen months later, June 17, 1998.

The problem that Mrs. Kearney had was in this time frame, which is the time frame of prior to the Mitchell trust fund money, she was essentially living off of a substantial amount of money, 1.1 million, that had been diverted from ROP. Around the time of the Mitchell trust fund deposit, contractors' bills were coming due, final payments were coming due, and the money had to be replenished, had to be put back in to ROP, but the money had been spent and there was no money there other than the two hundred and forty-nine thousand that went back in.

I have just placed the red line on the graph of her bank balance to illustrate the effect of the ROP transfers, as well as to show Mrs. Kearney's true financial position as of the time of the Mitchell trust fund deposit. So to clarify what I was trying to say, I don't know why the money was diverted and I don't know what it was spent on or even if it's — it still could be somewhere available. What I do know is when the money had to be paid back, Mrs. Kearney was unable to do that and that caused her demise.

Q. All right. Do you have some final conclusions?

A. Yes, I do. As of November 23, 1996, Mrs. Kearney was unable to pay her current and past-due obligations. Cash diversions from the ROP account prior to November 23rd and the associated consequences of those cash diversions caused Mrs. Kearney's financial demise. Use of part of the five hundred thousand dollars to replenish the ROP account served only to delay the consequences of those cash diversions but it did not cause her demise. And repossession of Mrs. Kearney's residence could not be prevented by five hundred thousand dollars because of the magnitude of moneys that were due to other parties, including ROP, the IRS and others.

Transcript at 470-74.

Specifically, Mr. Alexander's report explained that the majority of the $1,800,000 was diverted through checks written from ROP's account to five individuals. Those individuals, and the total amounts each received, were: (1) Mr. Kearney for $601,000; (2) Mrs. Kearney for $32,000; (3) one of Mrs. Kearney's sons for $478,400; (3) a second son for $17,100; and (4) a third son for $11,200.[259]

Mrs. Kearney did not offer an explanation why she and her family members received $1,139,700 from ROP's account, and none is apparent from the evidence. In fact, the evidence demonstrates why they should <u>not</u> have received those funds.

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[259] Defendant's Exhibit 92A.

Under Mr. Kearney's arrangement with ROP, he was not entitled to any salary or other present remuneration.[260] Mrs. Kearney was not an employee of ROP and, under the partnership agreement, was entitled to share only in net profits, of which there were none.[261] And certainly, because Mrs. Kearney three sons performed only manual labor, and did so only occasionally, they were not entitled to the amounts they received.[262]

On this point, it was Mr. Alexander's expert opinion that, "It is highly irregular for construction draws to be taken and run through individual's accounts, particularly college students, regardless of the circumstances claimed or the reasons or rationalizations given for it." Transcript at 483.

In regard to other funds, other evidence demonstrates that the Kearneys diverted an additional $860,000 of ROP's loan proceeds by transferring that amount from ROP's account to nine entities or business ventures formed, owned, and controlled by the Kearneys.[263]

Two of those entities purportedly performed work for ROP and were paid for that work. One was Davis Drywall, an entity owned by Mrs. Kearney, which received $225,000 from ROP.[264] The other was Magic City Landscaping, another Kearney related entity, which received $144,000.[265]

The seven other Kearney related entities paid from ROP's account allegedly did not perform any work for ROP or did not provide any service relative to the ROP project. Those entities, and the amounts each received, included Supreme Distributors Finance Company ($104,800); Windmatic Partners ($86,100); Specialty Distributors ($76,300); the Feldstein Company ($50,200); North Charleston Development Corporation ($49,200); South Hampton Venture I ($37,700); and East Hampton Venture I ($32,900).[266]

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[260] Transcript at 321.

[261] Defendant's Exhibit 6 ("Partnership Agreement of Riverchase Office Partners"). The document is also included in Plaintiff's Exhibit 41.

[262] See Exhibits C and D to Defendant's Exhibit 115. Transcript at 349-50.

[263] Defendant's Exhibit 92A.

[264] Id.

[265] Id.

[266] Mrs. Kearney did not deny that she owned, in whole or part, these entities. She listed all but two in her bankruptcy schedules. See document entitled "#13 of Schedule B" Schedule B-Personal Property filed August 26, 1998, Proceeding No. 23.

Based on his review, Mr. Alexander concluded that Mr. and Mrs. Kearney had no authority to take funds from ROP's account or to pay those funds to themselves, Mrs. Kearney's sons, or to their related corporate entities or personal business ventures.[267]

2. J. Brooke Johnston's Testimony

Mr. Johnston testified that the Kearneys "stole" over a million dollars from the partnership's bank account.[268] He clarified that statement by explaining that the Kearneys removed funds from ROP's bank account, deposited them into their personal accounts, and used the funds to pay their personal bills.[269]

In regard to the transfer of those funds, Mr. Johnston testified that the Kearneys were neither authorized to pay their personal bills from the proceeds of ROP's construction loan nor authorized to make payments from those funds to East Hampton Venture I, South Hampton Venture I, North Charleston Development Company, Feldstein Company, Specialty Distributors, Windmatic Partners, or Supreme Distributors Finance Company.[270] And in regard to those specific entities, Mr. Johnston testified that none did business with, or had any other connection to, ROP.[271]

Mr. Johnston testified that he does not know what happened to the $478,400 of ROP's construction loan deposited into one of Mrs. Kearney's son's checking account.[272] He testified that he was told the money went to pay debts and expenses of ROP.[273] He represented however, that he had not been provided any documentation that such debts and expenses were actually paid from those funds.[274]

Mr. Johnston testified further that ROP debts and expenses were to be paid from the $600,000 transferred from ROP's account to Mr. Kearney.[275] He said that ROP's check book bears notations for each transfer regarding what bills or expenses Mr.

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[267] Transcript at 480.

[268] Transcript at 319.

[269] Id.

[270] Transcript at 312-14.

[271] Transcript at 313.

[272] Id.

[273] Transcript at 313-14.

[274] Transcript at 314.

[275] Id.

Kearney was to pay from the ROP funds.[276] But, according to Mr. Johnston, the "check records" clearly reflect that rather than paying ROP bills and expenses, Mr. Kearney deposited the funds into the Kearneys checking account and then used the money to pay hundreds of thousands of dollars in personal expenses, including utility bills and country club dues.[277]

3. Michael A. Mitchell's Testimony

Mr. Mitchell testified that he believed that Mr. Kearney engaged in "inappropriate activity" in his dealings with Regions and in regard to the ROP loan and that Mrs. Kearney was aware of those activities.[278] He offered one example in support of those allegations. He testified that Mr. Kearney set up the Davis Drywall corporation but did not disclose his ownership and control of that company. Mr. Kearney then paid Davis with ROP loan proceeds.[279]

4. Conclusion to Diversion of Funds

The Kearneys' diversion of funds from ROP's construction loan set a series of events into motion that caused both the Kearneys and ROP severe financial problems.

Because the diverted funds were the Kearneys primary source of income, when Regions stopped loaning money to ROP, the Kearneys did not have sufficient income to pay their personal obligations, including their mortgage debts. When Regions stopped loaning money to ROP, and $1,800,000 had been diverted from its account, ROP could not complete its project or pay its construction loan. When ROP failed to pay its debts, Mrs. Kearney and Mr. Johnston, as general partners of ROP, became personally liable for millions of dollars of debts. When Mrs. Kearney could not pay either those business debts or her personal debts, she was destined to lose her home, her condominium, and whatever other non-exempt property which she owned, either to foreclosure or the collection efforts of creditors.

V. Mrs. Kearney's Allegations

As explained earlier, while Mrs. Kearney has amended her complaint several times during the course of this proceeding, her contentions consistently fall within five

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[276] Id.

[277] Id.

[278] Transcript at 221.

[279] Id.

general causes of action – three prepetition and two post-petition.[280] Those are: (1) a prepetition state law cause of action for conversion, constructive contract, and fraud based on her contention that the debits made by Regions from her personal bank account were improper; (2) a prepetition state law cause of action for wrongful foreclosure; (3) a prepetition state law cause of action for an accounting from Regions for the funds it debited from her account; (4) a post-petition federal law cause of action for violation of the automatic stay; and (5) a post-petition state law cause of action for fraud or misrepresentation based on her allegations regarding allegedly false assurances made by Regions about the personalty left on the Old Leeds Ridge property.

Within those five general causes of action, the Court has identified eight specific allegations.[281] Those are:

1. **Unauthorized Debits and Distribution** - The debits Regions made in November 1996 and December 1996 from Mrs. and Mr. Kearney's personal account were unauthorized, and that even if authorized, Regions was required to apply all of the debited funds to the payment of the two mortgage notes the Kearneys owed Regions, rather than to ROP's debts.

2. **Confidential Banking Information** - Regions provided confidential banking information to Mr. Johnston.

3. **Wrongful Foreclosure** - Regions' foreclosure sale was motivated by malice or ill feelings toward Mrs. and Mr. Kearney and did not represent a legitimate good faith exercise of the power of sale contained in the mortgage or for the appropriate purpose of collecting the debt secured by the mortgage. The foreclosure sale on June 17, 1998, was conducted by Regions' attorneys in a manner calculated to mislead her and prevent Mrs. Kearney from stopping it by filing a bankruptcy petition.

4. **Promise to Work With Mrs. Kearney** - Before Regions instituted foreclosure proceedings, it promised it would "work with" Mrs. Kearney in an effort to avoid foreclosure and the loss of her home, but did not abide by that promise. After foreclosure, Regions intentionally hampered Mrs. Kearney's efforts to regain her former homestead.

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[280] Most of those causes of action accrued prepetition and of course therefore belonged to Mrs. Kearney's bankruptcy estate.

[281] These are complied from Mrs. Kearney's original pro se complaint, her pro se amendment filed December 28, 1999, the amendment filed by her attorney on September 29, 2000, the amendment filed by her attorney on July 23, 2001, and her pretrial statement filed on September 7, 2001

5. **Civil Conspiracy** - Regions and Mr. Johnston conspired to cause Mrs. Kearney's financial ruin.

6. **An Accounting** - Mrs. Kearney is entitled to an accounting.

7. **Automatic Stay Violation** - Regions' post-petition ejectment action constituted a violation of the automatic stay and caused Mrs. Kearney to lose certain personal property of primarily sentimental value. Her loss of that personal property also resulted from Regions' failure to honor an alleged promise that she would be allowed to leave the personalty in the house and that the personalty would not be removed from the house without her first being warned and given an opportunity to remove it herself.[282]

8. **Punitive Damages** - The total of the above contentions indicate sufficient "malice" to authorize an award of punitive damages under section 362(h) of the Bankruptcy Code.

VI. Findings of Fact and Conclusions of Law Regarding Mrs. Kearney's Allegations

Before addressing Mrs. Kearney's eight specific allegations, it is important to identify which are based on prepetition events and which are based on post-petition events. The reason for this distinction is important. When Mrs. Kearney's case was converted from Chapter 13 to Chapter 7, the allegations that were based on prepetition events belonged to the Chapter 7 trustee, not Mrs. Kearney.

A. Mrs. Kearney's Prepetition Causes of Action

The allegations based on prepetition events are: Allegation 1 - Unauthorized Debits and Distribution; Allegation 2 - Confidential Banking Information; Allegation 3 - Wrongful Foreclosure; Allegation 4 - Promise to Work With Mrs. Kearney; Allegation 5 - Civil Conspiracy; and Allegation 6 - Accounting.

After Mrs. Kearney's case was converted from Chapter 13 to Chapter 7, and when the trustee interceded in this adversary proceeding, the causes of action based on these "prepetition" allegations no longer belonged to Mrs. Kearney and she no longer had the power or the authority to pursue or settle them. The reason is simple.

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[282] Mrs. Kearney's alleged loss of personalty gives rise to two independent, but related causes of action. One is her contention that Regions violated the automatic stay when it had her ejected from her home and that the ejection resulted in a loss of personalty. Related, Mrs. Kearney contends that after she filed bankruptcy, Regions promised her that she would be allowed to leave some personalty in the house but Regions violated that promise.

The causes of action belonged to the bankruptcy estate by virtue of section 541(a)(1) of the Bankruptcy Code. 11 U.S.C. § 541(a)(1). As such, the power and authority to prosecute them belonged to the trustee by virtue of section 363(b)(1) of the Bankruptcy Code. 11 U.S.C. § 363(b)(1). Therefore, when the Chapter 7 trustee entered into a compromise with Regions, and this Court approved that settlement, all allegations, contentions, and causes of action were compromised.[283]

Specifically, the joint motion filed by the trustee and Regions on August 30, 2001, sought to compromise all issues, contentions, disputes, and causes of action between them, belonging to them, and relating to one another. In summary, the trustee agreed to release all claims which the estate had against Regions, including but not limited to those involved in this adversary proceeding and those involved in the trustee's contest of the claim filed by Regions in Mrs. Kearney's bankruptcy case.[284] In return, Regions agreed to pay the trustee $110,000 and to withdraw its proof of claim. When the Court entered an order on October 15, 2001, that approved the compromise, all of the causes of action based on the prepetition events which formerly belonged to Mrs. Kearney and were described by her in her numerous pleadings, were extinguished.

Consequently, the causes of action represented by the above six allegations, namely: a prepetition state law cause of action for conversion, constructive contract, and fraud based on her contention that the debits made by Regions from her personal bank account were improper; a prepetition state law cause of action for wrongful foreclosure; and a prepetition state law cause of action for an accounting from Regions for the funds which it debited from her account, cannot now support judgments against Regions in this adversary proceeding.

If the above is true, the question that must be asked then is: Why is the excruciating detail of the next 100 or so pages necessary? The answer is relatively simple. At trial, Mrs. Kearney continued to contend that the prepetition events remained relevant to her post-petition causes of action to show that Regions' post-petition activities were motivated by malice towards her.

Even though the Court has found that all of the causes of action based on the prepetition events were compromised by the trustee, the Court agrees with Mrs. Kearney that a review of those causes of action is necessary. In fact, it is the Court's opinion that a thorough analysis of all of the points raised by Mrs. Kearney must be conducted. Without that analysis, it would not be possible for anyone unfamiliar with all of those details to understand this Court's ultimate conclusions.

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[283] Joint Motion for Approval of Compromise filed August 30, 2001, AP Proceeding No. 120) and Order Approving Compromise entered October 15, 2001, Proceeding No. 265.

[284] Proof of Claim filed January 29, 1999 (Claim No. 15).

With that background, each of Mrs. Kearney's eight allegations is discussed below.

B. Specific Findings of Fact and Conclusions of Law Regarding Mrs. Kearney's Eight Allegations

1. Unauthorized Debits and Distributions

Mrs. Kearney's first allegation is that the debits Regions made in November 1996 and December 1996 from the Kearneys' personal account were unauthorized. In the alternative, Mrs. Kearney alleges that even if they were authorized, Regions was required to apply all of the debited funds to the payment of the two mortgage notes the Kearneys owed Regions, rather than to ROP's debts.

First it is important to identify the amount of the debits paid to someone other than the Kearneys or which were applied to debts other than the two mortgage notes. According to Mrs. Kearney's initial complaint, the offending debits totaled $296,695.17. This amount however, must be reduced. Although Mrs. Kearney failed to mention in her complaint, in any subsequent amendment, or in her testimony, Regions credited $40,394.89 of the amount debited to her account. Similarly, although Mrs. Kearney did not admit it until trial, Regions applied $13,453.55 of the debited funds to the interest due on her two mortgage notes.[285] Consequently, the amount in question is $242,846.73, not $296,695.17.

What remains then is to determine why and under what authority the remaining debits were made. In summary, as the discussion below explains, the evidence proves that the debits made by Regions, and their application to ROP's obligations, were authorized by: (1) two Regions' customer agreements, (the agreements that governed its relationship with its deposit account customers); (2) by the guarantee agreements executed by the Kearneys; and (3) by Mr. Kearney. Also, as the discussion below explains, according to the evidence and Mrs. Kearney's own admission, Regions never agreed to apply the funds debited completely to Mr. and Mrs. Kearney's mortgage obligations. Instead, Regions' agreed to apply only such portion of the debits to the mortgage notes as was necessary to catch up accrued interest. And, the evidence proves that is exactly what occurred.

a. The debits, and the manner they were applied, were authorized by four written agreements applicable to the Kearneys' account

The four written agreements applicable to the Kearneys' account which allowed Regions to debit the contested funds and apply those funds to ROP debts are: (1) the

[285] Interestingly, that action cured the default in those notes and averted foreclosure at that point.

Customer Agreement for Deposit Account dated May 1993; the Customer Agreement - Agreement for Deposit Accounts dated November 1996; (3) the Continuing Guarantee Agreement dated April 4, 1995; and (4) the Continuing Guarantee Agreement dated July 24, 1995.

1. Paragraph 11 of the Customer Agreement for Deposit Accounts dated May 1993 reads:

> Depositor(s) agrees that the bank may at any time and in its discretion, with or without notice to Depositor(s), assert a lien on the balance in any other Account(s) of the Depositor(s), whether joint, partnership, or otherwise, and apply all or any part thereof upon any indebtedness, matured or unmatured, that then may be owing to Bank by Depositor(s).

Defendant's Exhibit 118. Clearly that provision authorized the debits Regions made in November and December 1996. It also allowed Regions to apply the debited funds to the interest due on the Kearneys' two mortgage notes and the debts owed by Mrs. Kearney in her capacity as a partner in ROP and guarantor of ROP's debts.

2. Paragraph 32 of the Customer Agreement - Agreement for Deposit Accounts dated November 1996 reads:

> **Right of Setoff**. You agree that we shall have the right to setoff against any and all funds in your accounts with us (including any multi-party accounts), and to apply such funds to satisfy all indebtedness that you owe us (excluding debt incurred through the use of your credit card) without any further notice to or demand on you (unless otherwise required by applicable law) and whether the indebtedness to us is now existing or hereafter arising. For any multi-party account, we may set off against the account the full amount of any claim that we have against any one or more of the depositors without regard to the joint or several ownership of the funds on deposit to the account or the original source of those funds and without requirement that the claim be owed to us by all of the depositors rather than only some of them.

Defendant's Exhibit 119. Again, like the other agreement, this agreement authorized the debits Regions made in November and December 1996. It also allowed Regions to apply the debited funds to the interest due on the Kearneys' two mortgage notes and the debts owed by Mrs. Kearney in her capacity as a partner in ROP and guarantor of ROP's debts.

3. The Continuing Guarantee Agreement Mrs. Kearney executed on April 4, 1995, in conjunction with the construction loan made by Regions to ROP, impacts this

issue in three areas.[286]

One, for the purpose of securing her guarantee obligation, Mrs. Kearney specifically granted Regions a security interest in any Regions' deposit account in which she had an interest. In this connection, the agreement read, "In order to secure your obligations to us under this Agreement, you give us a security interest in any deposit account held by us in which you have an interest...." Defendant's Exhibit 16.

Two, Mrs. Kearney agreed that if either she or ROP were in default, Regions could immediately apply any such deposit account toward the payment of her guarantee obligations. Again, the agreement read, "If you are in default, we may immediately apply or set off any deposits or other security we hold toward the payment of your obligation under this Agreement." Id.

Three, Mrs. Kearney unconditionally agreed to pay on demand any and all present and future debts or liabilities owed by ROP to Regions, including, without limitation, direct and indirect obligations, lease obligations, present and future debts, liquidated and unliquidated amounts, absolute and contingent obligations, voluntary and involuntary debts. She also agreed to pay any losses sustained or costs incurred by Regions, including attorneys fees and court costs, as a result of default or any other act by ROP. Under that guarantee, Mrs. Kearney's liability was unlimited.

Consequently, the Court must find that Mrs. Kearney's Continuing Guarantee Agreement, not only authorized the debits made by Regions in November 1996 and December 1996, but also allowed Regions to apply those debits to the debts owed by Mrs. Kearney in her capacity as a partner in ROP and guarantor of ROP's debts. Furthermore, the Court finds the agreement did not place Regions under any obligation to seek collection first from ROP before exercising its rights under the guaranty agreement. The agreement read, "The creditor can collect this debt from you without first trying to collect from the Borrower." Id.[287]

4. The Continuing Guarantee Agreement Mr. and Mrs Kearney executed on July 24, 1995, in conjunction with making two personal loans from Regions, has the

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[286] Defendant's Exhibit 16.

[287] By its terms the agreement could not be cancelled, terminated, or amended except in a writing signed by someone on Regions' behalf. It read:

> This Agreement cannot be cancelled, terminated, or amended except in a writing duly signed on our behalf. You agree that any purported oral cancellation, termination, or amendment is void and of no effect. None of our officers has the authority to orally cancel, terminate, or amend this Agreement.

Defendant's Exhibit 16.

same impact.[288]

One, in their agreement, Mr. and Mrs. Kearney specifically granted Regions a security interest in any deposit account held by Regions in which either or both of them had an interest. That document read, as did the other, "In order to secure your obligations to us under this Agreement, you give us a security interest in any deposit account held by us in which you have an interest...." Defendant's Exhibit 3.

Two, as did Mrs. Kearney earlier, Mr. and Mrs. Kearney agreed that if either or both of them were in default, Regions could immediately apply any such deposit account to the payment of either or both of their guarantee obligations. Their guarantee also read, "If you are in default, we may immediately apply or set off any deposits or other security we hold toward the payment of your obligation under this Agreement." Id.

Three, like Mrs. Kearney, in their agreement, each agreed unconditionally to pay on demand any and all present and future debts or liabilities owed by either or both of them to Regions. Again, the amount of the liability was unlimited as to amount.

The Court's conclusions in regard to the Kearneys' agreement are the same as those in regard to Mrs. Kearney's individual agreement. Mr. and Mrs. Kearneys' Continuing Guarantee Agreement: (1) authorized Regions to make the November 1996 and the December 1996 debits; (2) allowed Regions to apply those debits to the debts owed; and (3) allowed Regions to apply those debits both to the interest due on the Kearneys' two mortgage notes and to the debts owed by Mrs. Kearney in her capacity as a partner in ROP and guarantor of ROP's debts.

Furthermore, the Court finds again that the Kearneys' agreement did not place Regions under any obligation to seek collection from ROP before exercising its rights under the guaranty agreement. Like the other agreement, this agreement read, "The creditor can collect this debt from you without first trying to collect from the Borrower." Id.[289]

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[288] Defendant's Exhibit 3

[289] This agreement, like the other, could not be cancelled, terminated, or amended except in a writing signed by someone on Regions' behalf. It also read:

> This Agreement cannot be cancelled, terminated, or amended except in a writing duly signed on our behalf. You agree that any purported oral cancellation, termination, or amendment is void and of no effect. None of our officers has the authority to orally cancel, terminate, or amend this Agreement.

Defendant's Exhibit 3. There was no evidence that either agreement had been modified in writing.

b. Mr. Kearney also Authorized the Debits and the Manner They Were to be Applied

(1) Mr. Mitchell's Understandings

Mr. Mitchell testified that on November 7, 1996, he had a telephone conference with Mr. Johnston and Mr. Kearney regarding ROP's progress on the construction project. During that conference, Mr. Mitchell told Mr. Johnston and Mr. Kearney that ROP had incurred cost overruns of approximately $650,000. Mr. Mitchell instructed the others to contribute that amount into the project. Mr. Kearney assured Mr. Mitchell that an impending real estate closing in Florida would provide sufficient funds to complete ROP's construction project and the those funds would be injected into the project. Mr. Mitchell memorialized their discussions in a "Commercial Loans Contact Report" dated November 7, 1996.[290]

In an attempt to verify Mr. Kearney's November 7 promises, Mr. Mitchell met with Mr. Kearney on the ROP job site on November 21, 1996. From Mr. Mitchell's perspective, the purpose of the meeting was to obtain independent information as to whether Mr. Kearney could and would produce the money promised. Mr. Mitchell memorialized that meeting in a "Commercial Loans Contact Report" dated November 21, 1996.[291] In his memorandum, Mr. Mitchell indicated that Mr. Kearney was not able to offer any verification and that he was not convinced that Mr. Kearney would produce the funds necessary to finish the ROP project.[292]

But, in regard to the specific issue now under consideration, Mr. Mitchell reported that after their several conversations, (regardless of whether Mr. Kearney produced the funds or not), there was a specific understanding and agreement that when the funds arrived that Mr. Mitchell was to use them to pay the accrued but unpaid interest on the Kearneys' two mortgage loans, and **to use the remainder of the funds to pay ROP debts**.[293] Mr. Kearney did not ask however, or direct Mr. Mitchell to apply any portion of the anticipated funds to the principal of the two mortgage loans or to segregate any portion of those funds for the purpose of applying them to those loans in the future.[294]

Because Mr. Mitchell remained unable to verify Mr. Kearney's intentions, he and Mr. Maclin Smith met with Mr. Johnston regarding the ROP loan. Mr. Mitchell informed

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[290] Defendant's Exhibit 89.

[291] Defendant's Exhibit 90.

[292] Id.

[293] Transcript at 183-84; 227.

[294] Transcript at 184.

Mr. Johnston that because Mr. Kearney had not produced the funds promised, Mr. Johnston would be required to provide the funds necessary to finish the ROP project; otherwise, the bank would foreclose and complete the project. Mr. Mitchell reported that Mr. Johnston agreed to, "take the necessary actions to finish the project." Plaintiff's Exhibit 9. Mr. Mitchell explained his understanding of Mr. Johnston's agreement to mean that Mr. Johnston intended to work, "something out between the partners to get the funds available to complete the project." Transcript at 185. Mr. Mitchell memorialized this conversation in a "Commercial Loans Contact Report" dated November 21, 1996.[295]

(2) Mr. Johnston's Understandings

On cross examination Mr. Johnston described his understanding of how the anticipated $500,000 deposit would be applied.[296] He testified that in November 1996, ROP was out of money.[297] He also testified that Mr. Kearney, who was running the project, was unable to explain why.[298] But it was Mr. Johnston's understanding that the Kearneys agreed to pay all of the unpaid contractors, and the $500,000 was to be the initial payment toward the fulfillment of that obligation.[299] The agreement was that the entire $500,000 would be used to pay unpaid ROP subcontractors.[300] He was later informed by Mr. Mitchell that approximately $40,000 of the money would be needed for the Kearneys' personal obligations to Regions, including their mortgage debt.[301]

Mr. Johnston testified that Mr. Mitchell asked him to write a letter agreeing that $40,000 of the $500,000 could be applied to the Kearneys' personal obligations to Regions. Mr. Johnston testified that Mr. Mitchell wanted that letter because, "the agreement was that . . . [the $500,000] was to be applied to Riverchase Office Partners and . . . [Mr. Mitchell] wanted something to indicate quite clearly that I had agreed with the bank that that forty some odd thousand dollars would go someplace else." Transcript at 318 (parentheticals added).

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[295] Plaintiff's Exhibit 9.

[296] Transcript at 316-18.

[297] Transcript at 316.

[298] Id.

[299] Transcript at 316-17.

[300] Transcript at 317.

[301] Id.

On November 21, 1996, Mr. Johnston sent a letter to Mr. Kearney in which he referred to a recent telephone conversation between them regarding the funds Mr. Kearney promised for the ROP project.[302] The letter indicates that in the conversation Mr. Kearney told Mr. Johnston that he had paid various ROP contractors and subcontractors out of his (and Mrs. Kearney's) personal account because Regions had not allowed him to use the overdrawn partnership account.[303] Mr. Johnston's statements in the letter indicate clearly that, during their telephone conversation, Mr. Kearney told him that he expected to receive, "funds... either today or this week ...." Defendant's Exhibit 29. Mr. Johnston's letter also read, "I indicated to you that I feel, and I still believe, that when the funds which are supposed to arrive either today or this week are obtained, they should be wired to... [Regions]." Id. (parenthetical added). Mr. Johnston also wrote, "Then, the first thing that should happen is to pay interest to... [Regions] and then to bring the account current so that all funds that are delivered will either be paid directly to... [Regions] and/or through the checking account of the Partnership." Id. (parentheticals added).[304]

c. The Deposits

On November 25, 1996, $100,000 was wired into Mr. and Mrs. Kearney's personal checking account at Regions Bank. Those funds originated from the account of the George E. Mitchell Revocable Trust at the First Union Bank in Panama City Beach, Florida.[305] On November 26, 1996, the next day, an additional $400,000 was wired from the same source into the same Kearney account.[306] The documentation of the funds transfer reflect that Mr. Kearney, and not Mrs. Kearney, was the beneficiary of the trust from whose bank account the funds were sent. Therefore, the money wired into the account ostensibly belonged to him, not to her. And it was he who told Mr. Mitchell how the money was to be spent.

In hindsight, there is no question that both Mr. and Mrs. Kearney anticipated receipt of the funds and knew that the funds would be used in part to pay ROP obligations. As discussed above, Mr. Kearney told Mr. Mitchell that the funds were coming and directed him to apply them to the interest due on his and Mrs. Kearney's two mortgage notes and to use the remainder to pay ROP obligations. But as is also

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[302] Defendant's Exhibit 29.

[303] Id.

[304] Regions was formally known as First Alabama Bank and was referred to as such in the letter.

[305] Defendant's Exhibit 94 (front).

[306] Id. (back).

discussed above, Mr. Kearney told Mr. Johnston that the funds were coming and that they would be used to pay ROP obligations.

Similarly, in apparent anticipation of the receipt of the funds, on November 15, 1996, Mrs. Kearney wrote two checks totaling $60,000 to an ROP subcontractor, even though the account used was then overdrawn by $16,056.[307] And on November 20, 1996, Mr. Kearney wrote a $32,000 check to another ROP subcontractor from the same account despite the fact that the account was overdrawn.[308] Clearly those checks were written in anticipation of the deposits made later that month. Who would write $92,000 in checks on an overdrawn account unless an influx of sufficient money to cover those checks was expected?

As it turned out, the timing of the deposits was not fortuitous. Regions had committed to foreclose its mortgage on the ROP property and take control of the project if funds were not supplied by November 25, 1996. That was evident from a letter sent by Mr. Mitchell on November 21, 1996, to CBR, the company that had committed to lease the building ROP was constructing.[309] In that letter, Mr. Mitchell informed CBR that Regions would commence foreclosure proceedings and assume control of the ROP project if ROP did not produce proof, by November 25, 1996, that it had acquired sufficient funding to complete the project.

d. The Debits and Their Application

After the deposits were made, Regions debited a net $256,301.06 from the account. It then disbursed that amount in accordance with Mr. Kearney's instructions.[310] In doing so, Regions first paid the **accrued interest** on the Kearneys' two mortgage notes and second paid the remainder to ROP creditors. Mr. Mitchell testified that, in addition to the directions given by Mr. Kearney regarding the disposition of the funds prior to the deposits being made, his best recollection was that he and Mr. Kearney had specific conversations regarding the debits as they occurred.[311]

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[307] Defendant's Exhibit 107 (checks to "Marathon Electric", each for $30,000, each dated November 15, 1996) and Plaintiff's Exhibit 19 (bank statement with closing date of December 4, 1996).

[308] Defendant's Exhibit 107 (check to "Brown Plumbing" for $32,000 dated November 20, 1996) and Plaintiff's Exhibit 19 (bank statement with closing date of December 4, 1996).

[309] Defendant's Exhibit 70.

[310] Transcript at 227.

[311] Transcript at 184.

Mrs. Kearney contends of course first that the debits were unauthorized. In the alternative, she contends that Regions was required to apply all of the funds it debited from her, and Mr. Kearney's, personal account in November 1996 and December 1996, to the payment of the two mortgage notes they owed to Regions. The evidence is directly contrary to Mrs. Kearney's position.

First, as explained above, Mr. Kearney instructed, and authorized, Regions to apply the funds first to the unpaid interests on their mortgage loans, not the principal. And second, there is no evidence that either Mr. Kearney or Mrs. Kearney, whether before or after the deposits were made, told, asked, or instructed Mr. Mitchell to retain or segregate any of the funds for future application to any portion of the mortgage debts, or to apply any portion of the funds to the principal of the mortgage debts.[312] Similarly, there was no agreement or understanding between Regions and the Kearney's that the funds deposited by the wire transfers in November 1996 would be used to pay any part of the principal of the mortgage debts or would be retained or segregated for future application to any portion of the mortgage debts.

In his testimony, Mr. Mitchell explained:

Q. And did Mr. Kearney ever give to you or Mrs. Kearney ever give to you specific authorization on those debit memos?
A. As far as to the amounts or a specific amount, I don't recall but as far as to using this money to take care of interest on their debt or amounts due on ROP, an overdrawn check on ROP to McCrory's, for instance, yes, through Mr. Kearney but I did not talk to Mrs. Kearney, no.
Q. What I understand you to be saying is that there was some predetermined or agreed upon concept that when the money came in, you could debit it for overdue or bounced checks, things of that nature?
A. There was an understanding and agreement, yes, between us and Mr. Kearney but also I believe we talked with him at times during the day, as well.
Q. Was there, as there was required to be, a specific authorization by him on each and every debit memo as it came up?
A. On the one where I took the phone call, yes, but there were some that were made outside of that that I can't — I feel certain that it was, yes.
Q. Some of the money, as I understand it, was supposed to be used to pay down the mortgage on the residence?
A. To pay the interest. I am not aware of anything to pay down on the mortgage or reduce the principal, no.

[312] Transcript at 184.

Q. Well, who was wanting the interest paid, the Kearneys or the bank or both?
A. Both. Pay the interest, yes.
Q. Well, had the bank said to them, "Susie, we want part of this five hundred thousand dollars for the principal," would you have expected her to say, "You got it. Debit it."
A. Well, if we had said that, certainly, but I don't believe we did say that.
Q. You don't think you ever demanded that?
A. The principal, no.
Q. You only demanded that the interest be brought current?
A. Right.
Q. And was it your expectation, Mr. Mitchell, that the rest would be used for ROP debts?
A. Per conversations prior to this, yes, that Mr. Kearney was getting funds to inject into this. He and Mr. Johnston were attempting to put something together, and you have made reference to a conversation where Jay agreed to finish the project, but I believe he was referring to, you know, working something out between the partners to get the funds available to complete the project.

Transcript at 183-85.

Mr. Mitchell added:

Q. With regard to the debit memos that were issued after the money came in in November of '96, the five hundred thousand dollars, first off, did you know the money was coming in?
A. It had been promised for a while from Mr. Kearney that it was coming in, yes.
Q. And what was the purpose for the money coming in according to Mr. Kearney?
A. To finish the project at ROP, to cover expenses and to pay the interest on their personal debt or to bring it current.
Q. And when the money came in, was it wired in in Mr. Kearney's name? I will get to the records in a minute —
A. I believe it was, yes.
Q. Now with regard to the debit memos that came after the money was wired in, were you following Mr. Kearney's instructions in issuing those debit memos?
A. Yes. In other words, he didn't talk about specific amounts but specific actions.
Q. Like what?
A. Pay the interest or bring the debt current or something along those lines, yes.

Q. And did he direct you on the debit memos that went for the benefit of ROP, were those at the direction of Bill Kearney?
A. Yes, sir, I believe they were.

Transcript at 227-28.[313]

There is more evidence that Mr. Kearney authorized the debits and the manner in which they were disbursed. In a facsimile sent by Mr. Kearney to Mr. Johnston on January 10, 1997, Mr. Kearney listed the checks written on the Kearneys' personal checking account during November 1996 and December 1996, and listed the debits made by Regions from that account during that same period.[314] Mr. Kearney was at that time sharing an office with Mr. Walker. The list was prepared on one of Mr. Walker's facsimile cover sheets.[315]

The Court concludes that the apparent use of Mr. Kearney's document was for Mr. Kearney to provide proof or verification to Mr. Johnston that he had indeed done what he had promised Mr. Johnston. He had received the money discussed in the conversation referred to in Mr. Johnston's November 21 letter and had applied those funds to toward ROP's obligations.

e. Mrs. Kearney's Testimony

As discussed above, Mrs. Kearney contended in her complaint, and its amendments, that Regions should have used the November 25 and 26 wire-deposited funds to pay her mortgage. Mrs. Kearney's trial testimony contradicted that contention.

On direct examination, Mrs. Kearney testified that in November 1996 she knew that she needed money to bring her mortgage loans current, that ROP was in financial trouble, and that the bank was not going to advance any more money to ROP.[316] Accordingly, when asked what her understanding was of the intended disposition of the funds deposited into her personal checking account on November 25 and 26, 1996, she responded, "Well, my understanding would be that it would pay the house down so that we wouldn't have any more problems with the house for a while and then pay off Riverchase or whatever else needed to be paid." Transcript at 350.

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[313] In his testimony, Mr. Maclin Smith, Regions' president, verified that there was no special account set up at Regions by either of the Kearneys or Regions for the deposit of funds that would be used to pay the Kearneys' mortgage notes. Transcript at 81.

[314] Defendant's Exhibit 50.

[315] Transcript at 311. According to Mr. Johnston, it was common for Mr. Kearney to make use of Mr. Walker's fax machine. Id.

[316] Transcript at 351.

On cross examination, Mrs. Kearney confirmed that she knew that part of the deposits would be used to pay ROP debts. To the question, "And you knew that at least a portion of the money was going to go toward payment of Riverchase Office Partners' bills; didn't you, " she answered, "Yes, sir." Transcript at 401.

In fact, she admitted that she had personally written checks from those funds to pay ROP debts. The testimony reads:

> Q. In fact, you wrote some checks yourself paying Riverchase Office Partners' debts out of that amount; didn't you?
> A. I believe so. Probably, yes.

Transcript at 401.

In addition, she admitted there was a common practice, even before the deposits were made, for Mr. Kearney and her to pay ROP bills from their personal checking account. Again the testimony reads:

> Q. Now back to the five hundred thousand dollar deposit, at the time the five hundred thousand dollar deposit came into your joint checking account, had that account been used by you and your husband not only to pay personal bills but also as an account that was used to pay Riverchase Office Partner bills?
> A. Yes, I think so.

Transcript at 402.

Also on cross examination, Mrs. Kearney confirmed her understanding that only part of the funds would be applied to her mortgage debt. She admitted further that part of the money had, in accordance with that understanding, been applied to her mortgage debt. That testimony reads:

> Q. And you say that you thought part of it was going to go toward payment of your mortgage?
> A. Yes, sir.
> Q. And indeed part of it did go toward payment of your mortgage. Are you aware of that?
> A. Yes, sir.

Transcript at 401. She added:

> Q. And you do know that your mortgage was caught up-to-date with that money as of November of '96? You have seen the records; correct?
> A. I believe you.

Transcript at 405.

Anomalously, Mrs. Kearney denied that she knew that the bank was going to debit her account and apply the November 25 and 26, 1996, deposits to her mortgage debt and to ROP debits. She indicated her surprise when she discovered that those deposits had been completely dissipated. She testified:

> It was my understanding that that was what was going to happen and I didn't realize that there were going to be all of these debit memos or anything else taking place in my account. As a matter of fact, I thought that I had a lot of money in my account and the only way I knew that something was happening was that I went to write a check or something and this company they told me that my check had bounced. I said, "Well, that couldn't have happened. I have got tons of money in my account." And Regions had frozen my account.

Transcript at 351-52.

The implication that Mrs. Kearney did not know the disposition of the money deposited into her account on November 25 and 26, 1996, and the implication that she was surprised to find out that the money was gone when she tried to write a check on the account, is difficult to accept. She and Mr. Kearney wrote over $236,120.59 in checks that were paid from those deposits.[317] And, Mrs. Kearney wrote at least $60,000 of those checks.[318]

Surely Mrs. Kearney was alerted to overdrafts in her personal account as well as the accounts of other corporate entities in which she had an interest, based on her previous months' bank statements. Each of the checks and debit memos used to disburse the money from her account between November 25 and 26, 1996, and December 24, 1996, when the deposits had been completely dissipated, were clearly itemized on her monthly account statements.[319] The corresponding credits to ROP's account from amounts debited from her account are reflected on ROP's statements.[320]

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[317] Defendant's Exhibit 114 (bank statements with closing dates of December 4, 1996 and January 6, 1997).

[318] Defendant's Exhibit 107 (checks to "Marathon Electric", each for $30,000, each dated November 15, 1996) and Plaintiff's Exhibit 19 (bank statement with closing date of December 4, 1996).

[319] Defendant's Exhibit 114 (bank statements with closing dates of December 4, 1996 and January 6, 1997).

[320] Plaintiff's Exhibit 22 (account statement with closing date November 29, 1996 for account no. 03-0089-8368) and Plaintiff's Exhibit 62 (account statement with closing date

And she must have known then that a portion of the November 25 and 26 deposits would initially be consumed by the overdraft in her account, and that a portion of the deposits might be applied by Regions to eliminate the overdrafts in the accounts of those other corporate entities.

The Court must presume that Mrs. Kearney received and reviewed those statements, or at least her personal account statements, and was aware of their contents and could have easily determined the specific disposition of the funds disbursed by obtaining the debit memos or by asking Mr. Kearney. Any excuse that she did not receive those statements, or that Mr. Kearney did not show them to her, (as she contended in regard to Regions' foreclosure notice - the beginning point in this case), or that she did not ask Mr. Kearney for them, are of course, excuses that would not would relate to Regions. Any such lack of knowledge must be attributed to Mrs. Kearney's own irresponsibility or indifference, not to Regions.

There is further evidence to support Regions' positions. When the November 25 and 26 deposits were made, Mrs. Kearney personally owed $13,453.55 in interest on her mortgage loans, plus an overdraft in her account of $16,056. She had written $60,000 in checks she knew would have to be paid from the deposits. At the same time, ROP owed hundreds of thousands of dollars in cost overruns, plus the $4,500,000 principal of its construction loan, plus $106,351 in interest on that loan, plus $92,879.33 in bank overdrafts. Given those amounts, it would be improbable for anyone to believe that Mrs. Kearney would still have money in her account after the satisfaction of all of those debts, cumulative debts which far exceeded the November deposits. Consequently, it is improbable that Mrs. Kearney believed that after the satisfaction of all of those debts, she would still have money in her account.

Mrs. Kearney suggests that she did not know that Regions would debit her account, or that Region's had in fact debited her account. That suggestion is also not believable. Before she gave that testimony, she testified that she understood that a portion of the November 25 and 26 deposits would be credited to her mortgage debts and that the remainder would be used to pay ROP obligations. But, after those deposits were made, neither she nor Mr. Kearney wrote a check to Regions <u>for the interest due on their mortgage loans</u>. And, the checks that they did write from the ROP account to subcontractors, represented only a small part of ROP's outstanding obligations. Consequently, Mrs. Kearney knew, or certainly should have known, that Regions would have to debit her account to obtain the funds to cure the default in her mortgage notes and satisfy other debts owed by ROP. Regions had to get the money someway, and the only way it could get it, absent a check from the Kearneys, was by debit.

December 31, 1996 for account no. 03-0089-8368).

Generally, Mrs. Kearney's bank accounts reflected her situation clearly, and she does not contend that they did not. Her November 1996 bank statement reflects an ending balance as of December 4, 1996, of $73,787.79. The fact that over three-quarters of the $500,000 which had been deposited into her account two weeks earlier had been disbursed and was no longer in the account, is something clearly reflected on that statement. Surely if Mrs. Kearney believed the debits which allowed distribution of much of those funds were unauthorized or illegal, she would have complained then instead of waiting two and a half years.

Specifically, for the period ending January 6, 1997, Mrs. Kearney's statement reflects an ending balance of negative $8,422.56. The fact that the $500,000 which had been deposited into her account the previous month had been completely disbursed and was no longer in the account, is once more clearly reflected on that statement. Again, if Mrs. Kearney believed the debits which accomplished the distribution of those funds were unauthorized or illegal, she would have complained then instead of waiting two and a half years. From her bank statements, it is clear Mrs. Kearney knew, or should have known, following receipt of the statement for December 1996, that the money was gone. Thereafter, she should not have written checks based on the assumption that the money was there. Consequently, even if she did believe that she had "a lot of money" in the account, and wrote a insufficient check, it is her fault, not Regions.

Mrs. Kearney stated that she understood that part of the November 25 and 26, 1996, deposits, "would pay the house down so that we wouldn't have any more problems with the house for a while ...." Transcript at 350. Without explanation, that statement is ambiguous. It does not indicate her understanding of how much of the deposits was to be applied to the mortgage debts or that she had any understanding that any particular amount from the deposits would be applied to the mortgage debts. Therefore, her testimony does not support the implication that any particular amount of the deposits was supposed to be applied to the mortgage debts.

Obviously, the November 1996 deposits were insufficient to pay all of either the mortgage debts or ROP's debts. And by her own admission, Mrs. Kearney knew that only part of the money would be applied to the mortgage debt and the rest would be applied to ROP debts. Consequently, the Court must conclude that Mrs. Kearney's understanding regarding what would happen to the November 1996 deposits agrees with what occurred. That is, Regions' application of part of the deposits to the mortgage debts sufficient to pay the due, but unpaid interest, (which was all that was due on the debts at the time and which would bring the debts current), falls well within, and is not contrary to, Mrs. Kearney's understanding of how the deposits were to be applied.

But Mrs. Kearney argues that she did not personally authorize any of the debits from her personal checking account in November and December of 1996. On cross

examination, she admitted that Mr. Kearney could have authorized the debits, although she may not have known if he did. She testified:

> Q. Now you will admit that while you say you did not authorize the debit memos that you complain of there in that pleading that your husband could have authorized those?
> A. He could have.
> Q. And you don't know whether he did or not; correct? That is what you told me at your deposition.
> A. Yes, I don't know.

Transcript at 404-05.

Based on the above, it is clear that Mrs. Kearney's belief that the debits were unauthorized (that is they were not authorized because she did not authorize them), is misleading. By her own admission, she does not know whether they were authorized.

The weight of the evidence supports the above conclusions. Mrs. Kearney was not likely to have ever been in a position to have any first hand knowledge about any authorization. She did not have any significant contact with either Mr. Mitchell, Mr. Johnston, or anyone else associated with the ROP project and, from her perspective, all of the decisions relating to ROP, including the funding of the project, the dealings with Regions, contractors, subcontractors, and suppliers, and the disposition of partnership funds, were handled by Mr. Kearney. According to the evidence, Mr. Mitchell and Mr. Johnston communicated with Mr. Kearney and sought authority from him to make the debits, not Mrs. Kearney.

In contrast, Mrs. Kearney made a specific allegation in one of the amendments to her complaint. It reads:

> Plaintiff avers that the defendant, Regions Bank, engaged in fraud, misrepresentation and deceit in its efforts to misapply, misappropriate and improperly withdraw funds and monies from plaintiffs accounts in that institution which had been deposited and held for a <u>special purpose</u> known to the defendant but were applied towards the satisfaction of other debts in an effort and with the result of interfering with the mortgage held by defendant on her home and residence.

<u>Amendment to Complaint</u> attached to <u>Plaintiff's Motion to Amend</u>, filed September 29, 2000, AP Proceeding No. 19 (emphasis added). She alleged further, "the defendant, Regions Bank, engaged in conversion of her funds in accounts held by defendant for a <u>special purpose</u> as set forth above and converted the funds and monies to its own use and benefit for inappropriate purposes to the harm of plaintiff and the benefit of the defendant." <u>Id</u>. (emphasis added).

Again, Mrs. Kearney's testimony does not agree with her allegations. On cross examination, she testified that there was no agreement by Regions that the funds deposited on November 25 and 26, 1996, would be maintained in a special account or segregated to be used solely to service or to pay her mortgage debt. She testified that there was merely an understanding among Mr. Kearney, Mr. Mitchell, and her that part of the money would be paid toward her mortgage obligation. She admitted further that part of the money was used to bring her mortgage obligation current. She testified:

> Q. Now you didn't have any agreement with Regions Bank that any of that money was going to be held in any kind of special account; it just went into your regular account, didn't it?
> A. Yes.
> Q. And you didn't have any agreement with Regions as to where that money was going to go; did you?
> A. I didn't think I needed one.
> Q. Well, you didn't have an agreement; did you?
> A. No.
> Q. You said you had an understanding that some of the money was going to be paid toward your mortgage. Was that understanding you had with your husband?
> A. And with Mike Mitchell.
> Q. But you had no agreement with Mr. Mitchell?
> A. No.
> Q. And you do know that your mortgage was caught up-to-date with that money as of November of '96? You have seen the records; correct?
> A. I believe you.

Transcript at 405.

Once again, Mrs. Kearney's testimony indicates that Regions applied the November 1996 deposits in accordance with her understanding. Consequently, her testimony does not support her contention that Regions applied the deposits in an unauthorized manner.

In addition, Mrs. Kearney admitted that when she executed the consolidated mortgage note to Regions on February 13, 1998, she owed Regions the entire amount shown on the note. That amount was $911,500 and included the same principal amount that she owed to Regions on the larger of her mortgage notes in November 1996. She testified:

> Q. Did you see any mention of the five hundred thousand dollar deposit in the note of February 13, 1998?
> A. No.

Q. Did you see any mention of the five hundred thousand dollar deposit in the agreement of February 13, 1998, between you, and Regions and AmSouth?
A. No.
Q. Did you believe that as of February 13, 1998, you owed Regions Bank nine hundred and eleven thousand, five hundred dollars as this sets out?
A. Yes.

Transcript at 401-02.

That admission of course contradicts Mrs. Kearney's contention that Regions agreed to apply the deposits made on November 25 and 26, 1996, to her mortgage debt in total, or at least that portion of those deposits not consumed by the checks written by Mr. Kearney and her. Those deposits, other than a small portion used to pay interest and bring the mortgage debts current in November 1996, and the portion consumed by checks written by Mr. and Mrs. Kearney, were in fact not applied in total to the reduction of Mrs. Kearney's mortgage debt and had been completely expended well before February 13, 1998.[321]

Based on the above, this Court must reject Mrs. Kearney's contention that the foreclosure occurred simply because the money deposited was not applied to the mortgage debt. Similarly, this Court rejects the implication that funds were available to apply to the mortgage debt at the time of the foreclosure or that those funds would have been sufficient to bring the debt current on that occasion. Neither is true.

In the handwritten complaint Mrs. Kearney filed in this adversary proceeding, she did not indicate when the November 25 and 26, 1996, deposits were made or when

[321] The implication is that Regions was supposed to have applied the money deposited on November 25 and 26,1996, to the reduction of her mortgage debts, $340,000 of which was included in the amount shown on the consolidated note. The Court must presume, had Mrs. Kearney believed on February 13, 1998, that she owed less than the amount shown on the consolidated note executed by her on that date, she would not have executed the note, or would have insisted on changing the principal amount shown on the face of the note, or would have insisted on resolving the matter of the application of the November 1996 deposits before signing the note. But she took none of those actions. Therefore, her execution of the note as it was drafted, for the full $911,500, which included the same principal amount that she owed to Regions on the larger of her mortgage debts in November 1996, constitutes an admission that the November 1996 funds had been properly applied by Regions and that she had no complaint regarding the manner in which those deposits had been applied.

Regions made the allegedly unauthorized debits.[322] That omission serves to foster the erroneous impression that the deposits were made in close proximity to the date of the foreclosure sale in June 1998. They were not. Mrs. Kearney testified:

> Q. Do you recall filing a pleading with this court wherein you raised this five hundred thousand dollar deposit with the court as a reason why perhaps the foreclosure was not proper?
> A. Yes, sir, I think so.
>
> ....
>
> Q. If you will turn to page — well, it is on the first or on the second page you state that five hundred thousand dollars — this is the second page of Exhibit 28 — that five hundred thousand dollars was deposited into my account, and then you go on to say that two hundred and ninety-six thousand dollars was taken out of the account and you are asking why. Do you see that?
> A. (No response.)
> Q. Are you on that page?
> A. Yes.
> Q. There are no dates stated here in your affidavit as to when you put the five hundred thousand dollars, when you deposited it in the account. Why is that?
> A. I don't know. I was just writing.
> Q. Well, did your husband help you with this?
> A. I don't believe so.
> Q. Who supplied you with the information?
> A. Well, I mean he helped me like with these numbers but he didn't tell me what to say.
> Q. Well, did you intentionally omit the date in an attempt to confuse the court into thinking that there was some connection between this deposit and November of '96 and the foreclosure on your house in June of '98?
> A. Absolutely not.
> Q. So you just didn't feel like it was important to put the date in there?
> A. I didn't think about it.
> Q. Well, did you see Judge Cohen's order later in the proceeding where he sets out your affidavit and he makes some assumptions about when the money went in the bank. Did you see that?

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[322] In fact, it was not until July 23, 2001, in an amendment to the complaint, that Mrs. Kearney disclosed the fact that the debits were made in November 1996 and December 1996. Plaintiff's Amendment to Complaint, attached to Motion to Amend Complaint filed July 23, 2001, AP Proceeding No. 108.

A. No, I did not.
Q. Well when you filed that pleading did you know that the deposit was made in 1996?
A. Yes.

Transcript at 402-04.

The document discussed is misleading. It asserts that the foreclosure occurred because the money deposited was not applied to the mortgage debt as agreed. Similarly, the document implies that funds were available to apply to the mortgage debt at the time of the foreclosure and that those funds would have brought the debt current.[323] Those assertions would obviously have carried weight with one armed with the knowledge, as the evidence substantiates, that **the deposits had been spent a year and a half before the foreclosure and that the foreclosure resulted from defaults which occurred long after those deposits had been expended**.

f. Summary of Conclusions About the November 1996 and December 1996 Debits and Distribution

As explained above, any cause of action described by Mrs. Kearney in her original complaint, and the amendments filed later, relating to the debits made by Regions from Mrs. Kearney's personal account, and the manner in which Regions distributed the debited funds, was extinguished by the compromise approved by the Court between Regions and the trustee.

But even if it were not, based on the evidence, the Court concludes that Mrs. Kearney failed to prove her allegations. The evidence proves that the debits made by Regions from the Kearneys' personal account were authorized: (1) generally by the

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[323] Mrs. Kearney admitted on cross examination that even if the money that was debited from her account by Regions in November 1996 and December 1996 had not been debited from her account, and had been available to her on the date of the foreclosure sale on June 17, 1998, it would have still been insufficient to bring her mortgage debt current and to avert foreclosure. She admitted that on the date of the foreclosure, the principal balances in her mortgage debts were due in full and far exceeded the amounts which had been debited by Regions from her account in November and December of 1996. She testified:

Q. You know, even if the entire two hundred and ninety-six thousand dollars mentioned in your affidavit and the debit memos that you are complaining about, even if that entire amount of money was available to you on June 17th, 1998, it would not have been sufficient to pay the debt that you owed that day to Regions Bank; would it?
A. No, sir.

Transcript at 410.

customer agreements governing the relationship between Regions and its depositors; (2) by the guarantee agreement Mrs. Kearney executed; (3) by the guarantee agreements the Kearneys executed; and (4) specifically through instructions from Mr. Kearney to Mr. Mitchell. Consequently, even if a cause of action based on the debits and application of the debited funds had survived the settlement reached between the trustee and Regions, it would not support a judgment against Regions.[324]

2. Confidential Banking Information

Mrs. Kearney's second contention is that Regions supplied confidential information to Mr. Johnston, her partner in ROP. Mrs. Kearney contends that as a result, she was harmed. From that alleged harm, Mrs. Kearney seeks damages and argues that the alleged harm illustrates Regions' malicious attitude towards her and purported favoritism of Mr. Johnston.

Again, like many of Mrs. Kearney's other allegations, the incidences she cites in support of the above-conclusion all occurred prepetition. Consequently, again, this cause of action, like the first, was extinguished by the compromise between the trustee and Regions. It therefore cannot form any independent basis for awarding damages to Mrs. Kearney. But again, it is necessary for the Court to discuss Mrs. Kearney's contentions in detail. Only through these discussions is it possible to understand the cumulative impact of Mr. and Mrs. Kearneys' mismanagement of their financial affairs and why this Court must find that their mismanagement was the cause of their financial ruin rather than anything Regions did or did not do.

In regard to this second allegation, Mrs. Kearney's contentions center around three exhibits, the only evidence submitted in support of that allegation. Those are: (a) Plaintiff's Exhibit 22 (a composite exhibit of a November 29, 1996, ROP bank statement and a December 4, 1996, Kearney personal account bank statement); (b) Plaintiff's Exhibit 18 (a three page facsimile from J. Brooke Johnston, Jr. to Mike Mitchell including two February 3, 1998, letters from Johnston to Mitchell); and (c) Plaintiff's Exhibit 12 (an April 9, 1998, letter from J. Brooke Johnston, Jr. to Richard P. Carmody, Esq.)

a. Plaintiff's Exhibit 22 - Regions Did Not Provide a Copy of Mrs. Kearney's Bank Statement to Mr. Johnston

First, the Court finds that there is no evidence that Regions provided a copy of Mrs. Kearney's bank statement to Mr. Johnston. But even if it had, under the circumstances, there would have been no breach of any duty of confidentiality.

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[324] And there is no basis for attributing bad faith or malice to Regions or any of its agents or attorneys, or to any acts performed by those entities in regard to the debtor.

Mr. Mitchell was questioned at trial about Plaintiff's Exhibit 22. He testified that the document appeared to him to be a facsimile transmission on January 16, 1997, at 2:26 p.m. and it included a copy of the Kearneys' December 4, 1996, bank statement. He testified that the document originated from Regions' research department.[325]

The document itself is not helpful. There is no information on the document indicating who requested it or to whom it was sent. There is nothing on the document that suggests that it was provided to Mr. Johnston. And there is nothing about the document that indicates that it was provided to any other third party or that it was provided without Mr. Kearney's or Mrs. Kearney's authorization.

According to his testimony, Mr. Mitchell did not have any personal knowledge about the document.[326] He testified that he did not participate in producing it or transmitting it.[327] He testified that he did not know who requested the information or the document, who authorized it to be sent, to whom it was sent, or who received it.[328] And, according to Mr. Mitchell, the bank's research department, where the document ostensibly originated, was, at the time, located in a building across town from his office.[329]

In addition, the evidence reveals that on January 10, 1997, before Plaintiff's Exhibit 22 was created, Mr. Kearney faxed Mr. Johnston a list of the debits Regions made in November 1996 and December 1996 from the Kearneys' personal account and a list of the checks the Kearneys wrote on that account. The list included every debit and check included on the Kearneys' December 4, 1996, bank statement. Therefore, the Court must find that because Mr. Kearney had already provided the information contained in Plaintiff's Exhibit 22 to Mr. Johnston, that information, subsequent to its revelation to Mr. Johnston on January 10, 1997, could no longer be considered confidential or private, (even if it ever were), at least as between the Kearneys and Mr. Johnston. Consequently, even if Regions had provided Plaintiff's Exhibit 22 to Mr. Johnston on January 16, it would not be guilty of providing confidential or private information to Mr. Johnston.

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[325] Transcript at 187.

[326] Transcript at 233-34.

[327] Id.

[328] Id.

[329] Id. At trial, Mr. Johnston was not asked whether he received the facsimile or whether Regions actually faxed a copy of the bank statement to him.

In short, the court must find, based on the evidence, that Regions did not provide a copy of Mrs. Kearney's bank statement to Mr. Johnston, but if it did, no confidentiality was breached.

b. Plaintiff's Exhibit 18

Mr. Mitchell was questioned about Plaintiff's Exhibit 18, a letter dated February 3, 1998, from Mr. Johnston to him. In the letter, Mr. Johnston thanked Mr. Mitchell for sending him a copy of Mrs. Kearney's financial statement. The letter read, "Thank you for giving me Susie Kearney's financial statement." Plaintiff's Exhibit 18. In contrast, Mr. Johnston expressed disappointment that Mr. Mitchell would not provide Mr. Kearney's financial statements and that certain schedules listing Mrs. Kearney's assets were not attached to the copy of Mrs. Kearney's financial statement. Mr. Johnston indicated that without those schedules the statement was not very useful. He asked Mr. Mitchell to send him a copy of the schedules. He wanted to begin searching for Mrs. Kearney's assets in connection with the lawsuits he had filed against her.

Mr. Mitchell acknowledged sending Mr. Johnston a copy of the financial statement Mrs. Kearney provided to the bank in accordance with the requirements of her guarantee of the ROP loan.[330] He justified that action because of Mr. Johnston's status as Mrs. Kearney's partner in ROP.

At trial it was suggested that Mr. Mitchell's opinion regarding the confidentiality of the financial statement differed from the one he offered at his discovery deposition.[331] At trial, Mr. Mitchell explained that his understanding was that the subject of the particular line of questions in the deposition concerned general financial information, which, in his consideration, did not include the financial statement Mrs. Kearney provided to Regions in accordance with her ROP guarantee agreement. He insisted that the financial statement was not required to be kept confidential whereas financial information in general, which, in his estimation, included the Kearneys' checking account statements, was.[332]

Mrs. Kearney did not provide any legal authority for the proposition that a financial statement given by a debtor to a creditor constitutes confidential or private information that may not be shared or communicated to others by the creditor. In fact, there is contrary authority.[333]

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[330] Transcript at 190.

[331] Transcript at 195-96.

[332] Transcript at 196.

[333] See Stern v. Great Western Bank, 959 F.Supp. 478, 487 (N.D. Ill. 1997); Sharma v. Skaarup Ship Management Corp., 699 F. Supp. 440, 449 (S.D. N.Y. 1988), aff'd, 916 F.2d 820

Moreover, Mrs. Kearney did not provide any legal authority to support her contention that providing Mrs. Kearney's financial statement to Mr. Johnston was, under the particular circumstances, wrong. She did not provide any authority for the proposition that a co-guarantor on a loan is not entitled to obtain a copy of the financial statement provided by the other guarantor to the bank from which the loan was secured. And she did not provide any authority that a bank may not provide to one partner a copy of a financial statement that another partner provided to the bank in connection with, or following the provision of, a loan to the partnership.

In this connection, it is not apparent to this Court that there is any legal basis to determine that providing Mrs. Kearney's financial statement to Mr. Johnston violated her right of privacy, or breached any duty of confidentiality on Regions, or was otherwise wrongful. In fact, because of Mrs. Kearney's status as a debtor on the ROP loan and her status as a debtor on two personal loans, Regions did not owe her a fiduciary duty. Atkins v. GE Capital Mortgage Services, Inc., 993 F. Supp. 1406, 1419 (M.D. Ala. 1998).

Factually, there is no evidence that Mrs. Kearney ever told Mr. Mitchell or anyone else at the bank that she expected the information in the financial statement she provided to the bank in accordance with her guarantee agreement, to be kept confidential. To the contrary, the financial statement was required by the bank for a reason, that is, to facilitate its collection of sums due from Mrs. Kearney under her ROP guarantee. Therefore, Mrs. Kearney had no reason or right to expect that Regions, to facilitate collection of the ROP debt, would not share that information with others such as Mr. Johnston.

Mrs. Kearney's suggestion that the guarantee agreement included an implied privacy requirement would limit the utility of that requirement in a manner not expressed in the agreement. And since the agreement by its terms does not limit Regions' use of Mrs. Kearney's financial statements, the Court must conclude that no such limitation was contemplated or intended by Mrs. Kearney when she entered into that agreement. Regions was, therefore, under no duty to keep Mrs. Kearney's financial statements confidential. Providing that information to Mr. Johnston therefore did not breach any such duty.

And finally, it is clear that neither Regions nor Mr. Johnston obtained any advantage over Mrs. Kearney because the statement was provided. There simply was

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(2d Cir. 1990), cert. denied, 499 U.S. 907 (1991); Hall v. Nationsbank, 26 S.W.3d 295, 297-98 (Mo. Ct. App. 2000); Milan v. Bank of Cabot, 937 S.W.2d 653, 658 (Ark. 1997); Boccardo v. Citibank, N.A., 152 Misc.2d 1012, 579 N.Y.S.2d 836, 837-39 (N.Y. Sup. Ct. 1991); Hopewell Enterprises, Inc. v. Trustmark National Bank, 680 So.2d 812, 817- 18 (Miss. 1996); Schoneweis v. Dando, 435 N.W.2d 666, 673 (Neb. 1989). See, e.g., United States v. Sahley, 526 F.2d 913, 916-917 (5th Cir. 1976)((borrower had no cognizable privacy interest in financial statement which he voluntarily furnished to enable the bank to evaluate his qualifications for a loan).

no evidence to indicate or suggest that Regions benefitted or gained any advantage over Mrs. Kearney by providing the information to Mr. Johnston. Mrs. Kearney did not offer any testimony about any injury or damage she suffered as a result of the disclosure. And in his letter, Mr. Johnston indicated that the statement did not contain any real substance and was, therefore, of little use to him. He wrote:

> In any event, the financial statement provided is not of great help to me without the Schedules which were attached to it, which detail the various assets listed. Will you please arrange to have a copy of the Schedules sent to me so that I can commence my search for Mrs. Kearney's assets in connection with the actions which I have brought against her.

Defendant's Exhibit 88.

In summary, Regions did not violate any confidentiality when Mr. Mitchell provided Mrs. Kearney's financial statement to Mr. Johnston. Similarly, Mrs. Kearney did not have any reasonable expectation that the statement would not be shared with Mr. Johnston. Mr. Johnston did not benefit from the information. And apparently, Mrs. Kearney was not harmed. Consequently, there is no support for the allegation that Regions intended to injure Mrs. Kearney or acted maliciously in its dealings with her in regard to providing her financial statement to Mr. Johnston.

In short, Plaintiff's Exhibit 18, the financial statement Mr. Mitchell supplied to Mr. Johnston, was not confidential and providing it to Mr. Johnston was not a breach of confidentiality.

c. Plaintiff's Exhibit 12

Plaintiff's Exhibit 12 is a letter dated April 9, 1998. In the letter Mr. Johnston wrote Mr. Carmody to discuss settlement options and to encourage the bank to pursue Mrs. Kearney for the ROP's debts. Mr. Johnston explained he was aware that Regions had commenced foreclosure on the Kearneys' homestead. He wrote, "I understand that the bank is commencing foreclosure on the Kearneys' home and I assume the Florida condominium and the sale of the securities which were pledged as security for that loan." Plaintiff's Exhibit 12.

Mrs. Kearney contends that Mr. Johnston's knowledge of the foreclosure on April 9, 1998, a date before the foreclosure notice, is evidence of Region's conspiracy with him. In her closing argument, Mrs. Kearney wrote:

> He [Mr. Johnston] also found out about the plans for foreclosure more than one month before the Plaintiff. This was <u>before</u> Regions' attorney even knew about it. The President of the bank could not explain why Johnston had this information before the bank's attorney. (Transcript at p. 43). The President further stated:

> Q. Should he (Johnston) find out before the homeowner and the mortgagor finds out there is going to be a foreclosure?
> A. No, he should not. (Transcript at p. 44).
>
> The entire scenario helps explain why the bank was moving as aggressively and maliciously as it was on this foreclosure. Johnston was pushing and he was clearly allowed inside the loop where he did not belong.

Plaintiff's Argument at the Conclusion of the Trial and Submission of Evidence filed November 26, 2001, AP Proceeding No. 142 (parenthetical added).[334] Mrs. Kearney's argument about Plaintiff's Exhibit 12 ignores Defendant's Exhibits 18 and 19.

Defendant's Exhibit 18 is a letter dated March 30, 1998, from Stephen Leara, Regions' attorney, to Mr. and Mrs. Kearney. In the letter, Mr. Leara informed the Kearneys: (1) that their mortgage loans were in default; and (2) that unless they took the steps specified in the letter for curing the default within 20 days, Regions would commence foreclosure. Mr. Leara wrote:

> Therefore, this letter will serve as the Lender's official notice to the Borrowers that the Lender deems the Borrowers to be in default of the loan agreements, mortgages and security agreements, and the promissory notes and hereby declares that foreclosure proceedings shall commence within twenty (20) days of today's date.

Defendant's Exhibit 18. A notation at the end of the letter indicates that copies of this letter were sent to Mr. Mitchell, Mr. Johnston, and Mr. Carmody.

Defendant's Exhibit 19 is another letter. This one is dated March 30, 1998. It is a letter from Mr. Leara to Mr. Johnston in which Mr. Leara informed Mr. Johnston that the Kearneys' mortgage loans were in default and Mr. Leara reminded Mr. Johnston that if the Kearneys failed to cure the default within 20 days, Regions' would first commence foreclosure, and second, if after liquidating the collateral the loans remained unsatisfied, Regions would seek payment from him according to his limited personal guarantee of those loans. Mr. Leara wrote, "The Lender has also declared that it will commence foreclosure proceedings within twenty (20) days of today's date." Defendant's Exhibit 19 (emphasis added).

These letters informed both Mr. Johnston and the Kearneys at the same time and in the same manner of Regions' intent to foreclose on the Kearneys' homestead.

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[334] At trial, Mrs. Kearney did not ask Mr. Johnston how he learned of Regions' intended foreclosure.

These letters were written well before the April 9, 1998, letter.[335] Consequently, Mr. Johnston did not, as contended by Mrs. Kearney, find out about the impending foreclosure before the Kearneys or before Regions' attorney. Consequently, there is no evidence to determine that Mr. Johnston received any information through an illicit relationship with Regions, or, as characterized by Mrs. Kearney, because he was "inside the loop."

In short, through Plaintiff's Exhibit 12, Mr. Johnston did not learn of the impending foreclosure through inside information, the foreclosure information was not confidential, and Regions did not breach any confidentiality by providing that information to Mr. Johnston.

d. Conclusions on Breach of Confidentiality

Regions did not supply a copy of Mrs. Kearneys' bank account statement to Mr. Johnston. The financial statement Mr. Mitchell supplied to Mr. Johnston was not confidential. Mr. Johnston learned of the intended foreclosure at the same time and in the same manner as the Kearneys. That information was provided through an open communication from Regions' attorney and it was information Mr. Johnston was entitled to receive because of his guarantee of the mortgage debt.

Consequently, there is no support for Mrs. Kearney's contention that Regions provided confidential banking information to Mr. Johnston. Therefore, there is no basis to find that Regions' treatment of Mrs. Kearney was malicious or that Regions showed favoritism to Mr. Johnston.

3. Wrongful Foreclosure

Mrs. Kearney's third contention is that Regions' June 17, 1998, foreclosure sale was wrongful and motivated by malice or ill feelings toward Mr. Kearney and her. She contends that the sale did not represent a legitimate good faith exercise of the power of sale contained in the mortgage or was not conducted for the appropriate purpose of collecting the debt secured by the mortgage. Mrs. Kearney concludes that the sale was conducted by Regions' attorneys in a manner calculated to mislead her and prevent her from stopping it by filing a bankruptcy petition.

Once again, these allegations are based on prepetition facts and circumstances. Consequently, the causes of action based on those contentions were extinguished by the compromise and settlement reached between Regions and the trustee.

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[335] Plaintiff's Exhibit 12.

Nevertheless, as explained above, the Court must address the allegations.[336] In doing so, the Court finds the allegations are without merit.

a. Regions' Foreclosure Was a Legitimate Good Faith Exercise of the Power of Sale Provision of the Mortgage and an Attempt to Collect the Debt Secured by the Mortgage

On February 13, 1998, AmSouth Bank, Regions, and the Kearneys entered into an agreement that: (1) allowed Regions to pay off the debts owed by the Kearneys to AmSouth; (2) permitted Regions to purchase the two notes owed by the Kearneys to AmSouth and the first and second mortgages held by AmSouth on the Old Leeds Ridge property, (which stood as security for those notes); and (3) permitted the Kearneys' to consolidate the debt resulting from Regions' purchase of the two AmSouth notes with the existing $340,000 mortgage debt owed by them to Regions. In the agreement, the Kearneys acknowledged:

(1) they executed a note to AmSouth on June 24, 1992, in the principal amount of $380,000; the outstanding principal balance on the note was $308,229.08; and that they also owed accrued interest of $22,115.40, and late charges of $1,084.39 under the note;

(2) they executed a note to AmSouth on September 2, 1994, in the principal amount of $169,779.36; that the outstanding principal balance on the note was $149,082.50; and that they also owed accrued interest of $9,940.22, and late charges of $469.63 under the note;

(3) that in a state court lawsuit involving AmSouth and BIG Steel, AmSouth had asserted that the Kearney's were liable for any amount that AmSouth might have to pay as a result of that litigation;

(4) that they owed AmSouth costs of collection, including attorneys' fees, totaling $54,318.93 through January 31, 1998;

(5) that the indebtedness they owed to AmSouth, including the two notes, the contingent BIG litigation liability, and the costs of collection, was secured by a first and second mortgage on their residence;

[336] Discussion of the pre-petition-based causes of action are also important to support this Court's conclusions regarding Mrs. Kearney's two post-petition causes of action.

(6) that they defaulted on their AmSouth note, that AmSouth had instituted foreclosure proceedings, and that a foreclosure sale was set for February 13, 1998;

(7) that they had authorized AmSouth to advance $100,000 on the June 24, 1992, note to fund a mediated settlement of the BIG Steel litigation but that the settlement had not been completed; and

(8) that Regions held a third mortgage on the residence, a mortgage subordinate to AmSouth mortgages.

Defendant's Exhibit 13.

Pursuant to the agreement, Regions paid AmSouth $571,500 for the two notes and mortgages. AmSouth advanced an additional $100,000 on the first note to be held in escrow pending resolution of the BIG Steel litigation and assigned its two mortgages on the Kearney residence to Regions. Mr. and Mrs. Kearney executed a promissory note in which they agreed to pay Regions $911,500. That note represented a consolidation of the original $340,000 mortgage debt owed by them to Regions, with the $571,500 paid by Regions to AmSouth for the assignment of its two notes and mortgages. Under the terms of the note, beginning March 1, 1998, the Kearneys were required to make monthly payments of interest only. The principal balance was due in full on June 1, 1998.[337]

Mr. Smith testified that when Regions purchased the Kearneys' AmSouth notes and obtained the assignment of AmSouth's mortgage on the Old Leeds Ridge property on February 13, 1998, Regions did not have any present intent to foreclose on the property.[338] According to Mr. Smith, Regions intended to give the Kearneys time to work out their financial problems.[339] He stated that his policy favored "win-win situations" which would protect the bank's interests and help a distressed homeowner retain a home.[340]

It appears that Mrs. Kearney left the closing with the same feelings. At trial, she was asked whether or not she had any discussions with anyone from Regions about the status of her mortgage debt after she executed the new consolidated $911,500 note on February 13, 1998. She testified, "While we were at the closing, it just seemed like to

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[337] Defendant's Exhibit 14. The same document was also admitted as Plaintiff's Exhibit 35.

[338] Transcript at 42.

[339] Id.

[340] Transcript at 42.

me that everything was taken care of then. I mean that was the way I felt." Transcript at 353.

It was clear that at the time Mrs. Kearney believed, "everything was taken care of," she understood her situation. On cross examination, she admitted that: (1) on February 13, 1998, when the consolidation note was executed, her AmSouth mortgage loans were in default; (2) AmSouth was then in the process of foreclosing its mortgages on her homestead; and (3) the agreement she executed contemporaneously with the note contained an express admissions by her and Mr. Kearney that the AmSouth mortgage debt was in default for nonpayment. She testified:

Q. Now taking you back to June of 1997 or 1998, and even back a little further, in the fall of 1997 it is true, is it not, that AmSouth Bank was in the process of foreclosing on your home mortgage?
A. Yes, sir.
Q. And AmSouth Bank held the first mortgage on your home at Old Leeds Ridge; correct?
A. Right.
Q. Their mortgage was even superior to Regions' mortgage; right?
A. Right.
Q. They even went so far as to set a foreclosure sale in the fall of 1997; do you recall that?
A. Yes.
Q. Were you worried that you might lose your home in the fall of 1997 when AmSouth notified you that they were setting a foreclosure sale?
A. Yes, sir.
Q. Now Regions purchased your debt from AmSouth and stopped your house from being foreclosed on; didn't they?
A. Yes, sir.
Q. And you were a party to that; correct?
A. Yes, sir.
Q. And in the spring of 1998 you and your husband agreed with Regions on February 13, 1998, which was the day that AmSouth was again about to foreclose on your home that Regions could buy AmSouth's mortgages. Do you recall that?
A. Yes, sir.
Q. And those agreements, I believe the agreement is Exhibit 13 and the note is Exhibit 14 that are before the court. Now, Mrs. Kearney, when you signed that agreement and that note, you agreed that you were in default on your AmSouth mortgages as of that day; correct?
A. Yes.
Q. You agree that Regions could buy AmSouth's mortgages; correct?
A. Yes.

Q. And you agree with Regions that you would have a new note with them in the sum of nine hundred and eleven thousand dollars and — nine hundred and eleven thousand, five hundred dollars. Do you recall that?
A. Yes.

Transcript at 397-98.

Mrs. Kearney also acknowledged that after executing the consolidated note neither she nor Mr. Kearney made the March 1998, April 1998, or May 1998 interest payments that became due under the note. She also admitted that they did not pay the principal balance of the note when it became due on June 1, 1998. She testified:

Q. And that is Exhibit 13. Actually the agreement is 13 and the note is 14. Now that note obligated you and your husband to pay interest only for a period of a hundred and five days on a monthly basis. Do you recall that?
A. Yes, sir.
Q. And then you had a balloon payment on June 1st of 1998 of the entire nine hundred and eleven thousand dollars. Do you recall that?
A. I am not sure I realized that but I am sure it was, yes.
Q. All right. Well, let me make sure. Would you reach behind you and look at Exhibit 14? It is in the box. There in the first paragraph, it says number one, interest only payments for one hundred and five days beginning on the first day of March, 1998, and on the first day of each month thereafter until May 31st, 1998, and then all principal and accrued interest shall become due and payable to the lender on June 1st, 1998, unless previously paid in full. Does that refresh your recollection?
A. Yes.
Q. The second page of Exhibit 14, that's your signature there?
A. Yes, it is.
Q. And that is also your husband's signature?
A. Yes.
Q. Now did you and your husband make the interest payment in March of 1998?
A. Obviously not.
Q. Did you make the interest payment in April of '98?
A. No.
Q. Did you make the interest payment in May of '98?
A. No.
Q. Did you pay the balloon payment on June 1st, 1998?
A. No.

Transcript at 398-400.

Mr. Smith confirmed that the Kearneys did not make the interest or principal payments required by the February 13, 1998, note.[341] He also testified that the Kearneys' had not made payments since May 1, 1997, on the $340,000 note which became part of the consolidated note.[342] Mrs. Kearney was unable to refute that testimony. She testified:

> Q. Mrs. Kearney, we have had evidence here and you have been in court that there were no payments made on your home mortgage between May of '97 and the time of the foreclosure. You have heard that testimony?
> A. Yes, sir.
> Q. And you don't have any evidence that there were any payments made between that time; do you?
> A. No, sir.

Transcript at 420.

So when Regions foreclosed its mortgage on the Kearneys' home on June 17, 1998, Mrs. Kearney was, by her own admission, woefully in default and, furthermore, lacked the means of paying the debts secured by that mortgage. She testified:

> Q. And you were not prepared that day to pay the money you owed to Regions Bank; were you?
> A. Since I knew nothing about it until that day, I had asked Steve Leara for a couple of hours to see what I could do but —
> Q. Were you prepared that day to pay the money you owed to Regions Bank?
> A. I don't think so.
> Q. You know you weren't; don't you? Is there any doubt? Did you have a million dollars available to you that day to pay the bank?
> A. I wouldn't know unless I called some of my friends to ask.
> Q. Did you have a million dollars available to you on June 17th to pay the bank?
> A. I will answer again. In my possession, no, but if I could have called some of my friends, I may have.
> Q. Well, did you have it on June 18th?
> A. I didn't try anymore.
> .....

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[341] Transcript at 88-89.

[342] Transcript at 82-83.

Q. And certainly we can agree that on June 17th you had no ability that day to bid in any amount of money for your house at a foreclosure sale whenever it was held that day?
A. No, sir, you are right.

Transcript at 393-94; 396.

As the above demonstrates, the foreclosure of the mortgages on the Kearneys' homestead was inevitable. Mr. Alexander, the fraud examiner, explained at trial that the Kearneys were essentially living on the loan proceeds that they were diverting from ROP and had no other significant source of income. When ROP's loan dried up, the Kearneys' ability to make the payments on their mortgage debts did also. In addition to their mortgage debts that exceeded a million dollars, the Kearneys were buried under other debts including: (1) ROP's construction loan; (2) overdrafts in ROP's checking account; (3) almost two million dollars owed to ROP for the money diverted from its account: (4) hundreds of thousands of dollars owed to the IRS and the State of Alabama in income taxes, and (5) the judgments obtained against Mrs. Kearney personally by ROP contractors.[343]

In summary, Regions was owed money secured by its mortgage on the Old Leeds Ridge property, and Mrs. Kearney had long since defaulted on the payments due under the note secured by that mortgage. Consequently, Regions was entirely within its rights to foreclose its mortgage and to sell the property for the purpose of collecting the sums due under the secured notes. There is no evidence that suggests that Regions had anything to gain by foreclosure, other than the collection of the sums due under its notes, or that it or any other entity in fact profited in any other fashion from the foreclosure.

Therefore, based on the evidence, the Court must conclude that the foreclosure sale was not conducted for an improper purpose and was in fact conducted solely for the purpose of collecting the debt secured by the mortgage. Consequently, Mrs. Kearney's contention that the mortgage foreclosure was in any sense "wrongful" is without merit as the foreclosure sale was not malicious.

b. Mrs. Kearney Received Fair and Lawful Notice of Regions' Foreclosure Sale and the Sale was Conducted in a Lawful Manner

(1) Prior to Foreclosure

On May 14, 1998, Mr. Leara sent letters to Mr. and Mrs. Kearney by both regular

[343] Transcript at 470-74. Defendant's Exhibit 92A.

and certified mail.[344] Those letters informed Mr. and Mrs. Kearney that, because of their default on the notes secured by the mortgage on their homestead, Regions had accelerated the notes and determined to foreclose the mortgages. A copy of the foreclosure sale notice that would appear in the Alabama Messenger, a local legal notice publication, was included with the letter. In the letter, Mr. Leara informed the Kearneys that the accelerated debt was $1,170,517.13 and that the foreclosure sale would occur on June 17, 1998. The foreclosure sale notice indicated that the property would be sold at public auction to the highest bidder, for cash, during the legal hours of sale, at the main entrance of the Jefferson County, Alabama courthouse on June 17, 1998.[345]

Mrs. Kearney testified that she did not learn about Regions' impending foreclosure sale until around 9:00 a.m. on June 17, 1998, the day of the scheduled sale. She testified that Mr. Kearney, who had received the notice of the sale, hid it from her and did tell her about it. She testified:

Q. Mrs. Kearney, the first time, as I understand it, that you learned that your house was going to be foreclosed upon by Regions Bank from what you have said today was on the day of the foreclosure?
A. Yes, sir.
Q. So your husband had not told you about the foreclosure before that time?
A. No.
Q. Now you have seen the letter that the bank wrote to you in May notifying you of the foreclosure, you have seen it since this case —
A. Here, yes, sir.
Q. And you have seen the certified receipt signed for by your husband; haven't you?
A. Yes, sir, here.
Q. He just didn't tell you about it?
A. Exactly.
Q. So he had notice of it apparently for about a month before the sale?
A. Yes, sir.
Q. Did he explain to you why he hadn't told you about it?
A. His reason was that he thought he could work it out without worrying me.
Q. And he apparently hadn't been able to do that?
A. Right.

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[344] Plaintiff's Exhibit 2. The same document was also admitted as Defendant's Exhibit 18 (letter dated may 14, 1998).

[345] A notice that specifies a sale time as "during the legal hours of sale" is sufficient. See this Court's opinion in In re Brown, 221 B.R. 849 (Bankr. N.D. Ala. 1998).

Q. So the first time you knew about it was on the 17th and you found out about it about nine o'clock that morning and you said you went to David Maxey's office and was there about eleven o'clock when you spoke to Mr. Leara; correct?
A. Yes, sir.

Transcript at 388-89.

Mrs. Kearney testified later:

Q. And that is Exhibit 13. Actually the agreement is 13 and the note is 14. Now that note obligated you and your husband to pay interest only for a period of a hundred and five days on a monthly basis. Do you recall that?
A. Yes, sir.
Q. And then you had a balloon payment on June 1st of 1998 of the entire nine hundred and eleven thousand dollars. Do you recall that?
A. I am not sure I realized that but I am sure it was, yes.
Q. All right. Well, let me make sure. Would you reach behind you and look at Exhibit 14? It is in the box. There in the first paragraph, it says number one, interest only payments for one hundred and five days beginning on the first day of March, 1998, and on the first day of each month thereafter until May 31st, 1998, and then all principal and accrued interest shall become due and payable to the lender on June 1st, 1998, unless previously paid in full. Does that refresh your recollection?
A. Yes.
....

Q. The second page of Exhibit 14, that's your signature there?
A. Yes, it is.
Q. And that is also your husband's signature?
A. Yes.
Q. Now did you and your husband make the interest payment in March of 1998?
A. Obviously not.
Q. Did you make the interest payment in April of '98?
A. No.
Q. Did you make the interest payment in May of '98?
A. No.
Q. Did you pay the balloon payment on June 1st, 1998?
A. No.
Q. And yet you say that you had no idea that your home was in any danger of foreclosure?

A. I did not know these notes weren't paid.
Q. You do now?
A. I do now but I did not know then.
Q. Well, who was responsible for seeing that the notes were paid?
A. Bill was going to.
Q. He often handled your business; didn't he?
A. At times, yes.

Transcript at 398-400.

In contrast to Mrs. Kearney's contentions, the Court must conclude that Mrs. Kearney's failure to act in regard to Regions' foreclosure sale was the result of Mr. Kearney's failure to tell her: (1) that the loan interest payments had not been paid; (2) that the loan had matured; or (3) that he had received notice of the foreclosure sale. Consequently, the Court must conclude that her failure was therefore not from anything Regions did or did not do.

Based on the evidence then, in contrast to the accusations in Mrs. Kearney's complaint, the Court must find that the circumstances surrounding the weeks immediately preceding June 17, 1998, (the day of the foreclosure), and Mrs. Kearney failure to undertake measures during that time to delay Regions' foreclosure, cannot in any sense be characterized as "suspicious" because of anything that Regions did or did not do, or give rise to an inference of "bad faith" or malicious intent by Regions. Just the opposite, those circumstances demonstrate that Mr. Kearney's actions and Mrs. Kearney's reliance on Mr. Kearney, prevented Mrs. Kearney from acting prior to June 17, 1998.

(2) The Day of the Foreclosure Sale

Mrs. Kearney contends that Regions intentionally mislead her in order to prevent her from filing a bankruptcy petition in time to stop the impending foreclosure. In summary, the facts are relatively simple.

When Mrs. Kearney learned of Regions' impending foreclosure sale, she visited a local attorney.[346] Although the attorney was not present, while at the attorney's office, Mrs. Kearney attempted to call one of Regions' representatives for over two hours.[347] First, she attempted to call Mr. Mitchell but could not reach him.[348] Next, she tried to

[346] Transcript at 355.

[347] Id.

[348] Id.

reach Mr. Maclin Smith but could not reach him.[349] Eventually, she spoke with Mr. Carmody. Mr. Carmody told her that he would need to talk with Mr. Leara, who was "in charge of" her loan.[350]

Shortly before 11:00 a.m., Mr. Leara called Mrs. Kearney. She asked him if the foreclosure could be avoided. In describing his response, Mrs. Kearney testified, "He just said, you know, time is running out, I don't know, and just left me hanging." Transcript at 357. Mrs. Kearney testified, "And I kept saying to him one o'clock and he never said it was any different than one o'clock." Id. Mr. Leara did not tell Mrs. Kearney he was on his way to conduct the foreclosure sale.

On direct examination, Mrs. Kearney testified that she was "under the impression" that the foreclosure sale was scheduled for 1:00 p.m. She did not explain how she got that impression. She did not testify that anyone had told her that the sale would take place at that time.[351] According to Mrs. Kearney, Mr. Leara never denied or confirmed whether or not the foreclosure sale was scheduled for 1:00 p.m. She testified, "He never addressed the time." Id. But she did not testify that she asked him what time the foreclosure sale was scheduled.

On cross examination, Mrs. Kearney admitted that her "impression" that the foreclosure sale was scheduled for 1:00 p.m. resulted from information supplied to her by Mr. Kearney and not from any information that she received from Regions or any of its representatives. She testified:

> Q. Now you had said that you were under the impression that the foreclosure sale would be in the afternoon?
> A. Yes, sir.
> Q. Now you got that impression from your husband; correct?
> A. Right.
> Q. You did not get that impression from anyone at Regions Bank; correct?
> A. Correct.

Transcript at 396.

But, Mrs. Kearney's main concern was to identify a time before which she must file her bankruptcy petition; however, aside from Mrs. Kearney's misconception about the time of the foreclosure sale, it was clear that Mrs. Kearney did not have the money

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[349] Id.

[350] Transcript at 355.

[351] Transcript at 357

to pay the mortgage debt, whether the sale was to be conducted at 11:00 a.m. or 1:00 p.m. She testified:

> Q. And you were rushing to get that petition filed?
> A. Yes, sir.
> Q. You were rushing to beat Regions Bank's foreclosure that you knew was going to happen that day; correct?
> A. Yes.
> Q. And that's the only reason you said you were filing bankruptcy; right?
> A. Yes.
> Q. And the only reason you filed the bankruptcy is to stop or to try to stop from being thrown out of your house; correct?
> A. Yes.
> Q. And you were not prepared that day to pay the money you owed to Regions Bank; were you?
> A. Since I knew nothing about it until that day, I had asked Steve Leara for a couple of hours to see what I could do but —
> Q. Were you prepared that day to pay the money you owed to Regions Bank?
> A. I don't think so.
> Q. You know you weren't; don't you? Is there any doubt? Did you have a million dollars available to you that day to pay the bank?
>
> ....
>
> A. I wouldn't know unless I called some of my friends to ask.
> Q. Did you have a million dollars available to you on June 17th to pay the bank?
> A. I will answer again. In my possession, no, but if I could have called some of my friends, I may have.
> Q. Well, did you have it on June 18th?
> A. I didn't try anymore.
>
> ....
>
> Q. And certainly we can agree that on June 17th you had no ability that day to bid in any amount of money for your house at a foreclosure sale whenever it was held that day?
> A. No, sir, you are right.

Transcript at 393-94; 396.

Mr. Leara testified that while he waited on the courthouse steps during his telephone conversation with Mrs. Kearney, Mrs. Kearney did not suggest to him that she: (1) was prepared to pay the debt secured by the mortgage on her homestead; (2) desired to bid on the property at the foreclosure sale; or (3) had the ability to bid on the property.[352]

What is clear is that Mrs. Kearney wanted Mr. Leara to delay the foreclosure sale.[353] She makes two arguments to support her contention that she should have been able to do so. First, Mrs. Kearney argues that Regions was guilty of bad faith because Mr. Leara did not offer to tell her that he intended to conduct the foreclosure immediately after their telephone conversation. This argument is faulty for two reasons. One, the evidence is clear that Mrs. Kearney did not ask Mr. Leara what time he intended to conduct the foreclosure sale. And two, even if she had and Mr. Leara had told her that the sale was imminent, how could Mrs. Kearney have filed a bankruptcy petition between 11:00 (the time she and Mr. Leara talked), and 11:04, the time the foreclosure occurred? Mrs. Kearney was not standing in the bankruptcy clerk's office with a petition in her hand.[354]

Second, Mrs. Kearney also argues that Mr. Leara should have told her during their telephone conversation that he intended to conduct the foreclosure sale the moment after they completed their conversation. This argument also fails for two reasons.

One, Mrs. Kearney assumes that Mr. Leara's election not to offer the information was motivated by his desire to gain some advantage for Regions over Mrs. Kearney, and that he gained some advantage for Regions as a result of that non-disclosure. This is unreasonable. Mr. Leara knew that the information was of no use to Mrs. Kearney. He knew at 11:00 a.m., while he was speaking with Mrs. Kearney on the telephone, that she had not filed bankruptcy. And he knew that it would be impossible for her to file a bankruptcy petition before he conducted the foreclosure sale. And he knew that she lacked the ability to purchase the property at the foreclosure sale. The Court cannot find that Mr. Leara's actions were calculated to place Mrs. Kearney at a disadvantage.

Two, Mrs. Kearney's predicate, that Mr. Leara should have offered to tell her that he intended to conduct the foreclosure sale the moment after their conversation, is also based on the erroneous assumption that Mr. Leara had a legal duty to disclose the information to Mrs. Kearney. This Court does not know of any statute or Alabama case

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[352] Transcript at 162-63.

[353] Id.

[354] These events occurred before this Court instituted electronic case filing. Current circumstances would allow a petition to be filed from a location outside the court not only within four minutes but also within seconds.

which imposes such a duty on a mortgagee, other than the statutorily required legal notice. And that notice was given.[355]

Based on the above, the Court finds that Mrs. Kearney's failure to file bankruptcy before Mr. Leara conducted the foreclosure sale was not the result of his failure to correct her misconception about the time of the sale. As the weight of the evidence demonstrates, Mrs. Kearney's failure to take any action to forestall the foreclosure, such as filing a bankruptcy petition before the foreclosure, was a combination of: (1) Mr. Kearney's failure to tell her about the foreclosure sale until 9:00 a.m. on the morning of the scheduled day; (2) Mrs. Kearney's misconception, engendered by Mr. Kearney, about the time of the sale; and (3) Mrs. Kearney's inability to contact Mr. Leara until four minutes before the sale. Again, fault lies with the Kearneys, not Regions.[356]

c. Conclusions Regarding Mrs. Kearney's Wrongful Foreclosure Cause of Action.

Mrs. Kearney's prepetition causes of action, including this action based on her contention that Regions' foreclosure sale was wrongful and conducted in an

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[355] As explained above, the foreclosure sale notice indicated that the property would be sold, "during the legal hours of sale...." Plaintiff's Exhibit 2. The case law in Alabama is clear that a notice specifying the time of a foreclosure sale as "during the legal hours of sale," complies with Alabama statutory time disclosure requirements. Helms v. First Alabama Bank of Gadsden, 386 So.2d 450, 454 (Ala. Civ. App. 1980), cert. denied, Ex parte Helms, 386 So. 2d 455 (Ala. 1980). See also this Court's opinion in In re Brown, 221 B.R. 849 (Bankr. N.D. Ala. 1998).

[356] In support of her arguments, Mrs. Kearney emphasizes Plaintiff's Exhibit 3, a letter dated May 14, 1998, from Mr. Leara to the Internal Revenue Service. That letter was notice to the IRS, under sections 7425(b) and (c) of title 26 of the United States Code, of the impending foreclosure sale of the Kearneys' homestead. According to the letter, the notice was required because the IRS held a tax lien on the property. In the letter, Mr. Leara informed the IRS that the foreclosure sale was, " to be held on June 17, 1998, at 2:00 p.m., during the legal hours of sale...." Plaintiff's Exhibit 3. Mr. Leara testified that his custom was to conduct foreclosure sales at 11:00 a.m. and that the time on the IRS notice was wrong and was a typographical error. His testimony was not controverted. A copy of the letter was not sent to either Mr. or Mrs. Kearney. There is no evidence that either of the Kearneys had any knowledge of it. Mrs. Kearney made no mention of the letter in her testimony. To the contrary, she specifically testified that her only knowledge about the time of the foreclosure sale came from Mr. Kearney, who told her that it was scheduled to take place at 1:00 p.m. Consequently, Mrs. Kearney could not possibly have been misled by the letter that Mr. Leara sent to the IRS. Mrs. Kearney argues that the letter indicates that Mr. Leara originally planned to conduct the sale at 2:00 p.m. but later decided to conduct it at 11:00 a.m. Mr. Leara denies that implication and his testimony is uncontradicted. But even if Mr. Leara had changed his mind about when he wanted to conduct the sale, that fact could not possibly have misled Mrs. Kearney, or have been expected to mislead Mrs. Kearney, since the time specified in the IRS letter was not communicated to her. And finally, the IRS has not objected.

underhanded manner, were extinguished by the compromise and settlement reached between Regions and the trustee. But, if they were not, the Court finds that Regions' foreclosure sale was not wrongful. Mrs. Kearney was in default and lacked the ability to pay the debts secured by the mortgage on her homestead. Regions was, therefore, entirely within the rights provided under the parties' mortgage to foreclose the mortgage and sell the property for the purpose of collecting the sums due under the secured notes.

Mrs. Kearney failure to file bankruptcy, or for that matter to take any action to forestall Regions' foreclosure sale, before June 17, 1998, was the result of Mr. Kearney's failure to tell her: (1) that the interest payments on their loans had not been paid; (2) that the loans had matured; or (3) that he had received notice of the foreclosure sale. It was not from anything Regions did or did not do.

Similarly, Mrs. Kearney's failure to file bankruptcy before Mr. Leara conducted the foreclosure sale was not the result of his failure to correct her misconception about the time of the sale. Again, her failure was the result of: (1) Mr. Kearney's failure to tell her about the foreclosure sale until the morning of the day of the foreclosure; (2) her misconception, engendered by representations made to her by Mr. Kearney, that the sale would take place at 1:00 p.m.; and (3) her inability to contact Mr. Leara until four minutes before the sale was to be conducted.

In addition, Mrs. Kearney did not have the money to bid at the sale and she could not have filed a bankruptcy petition between the end of her telephone with Mr. Leara and the time the foreclosure sale occurred.

And finally, based on the choices the Kearneys made and the actions they took, the foreclosure of the Kearneys' homestead was an inevitable. It was not as a result of anything Regions did or did not do.

4. Regions' Promise to Work With Mrs. Kearney

Mrs. Kearney's fourth contention is that before Regions instituted foreclosure proceedings it promised to work with her to avoid foreclosure and the loss of her home. She argues that Regions did not abide by that promise. In conjunction, Mrs. Kearney contends that after foreclosure, Regions intentionally hampered her efforts to regain her former homestead.[357]

Specifically, Mrs. Kearney contends that Regions breached an alleged agreement to help her avoid foreclosure. Her complaint reads:

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[357] This related argument is based on post-petition events and is discussed below in conjunction with Mrs. Kearney's contention that Regions violated the automatic stay.

> Plaintiff further avers that prior to the actions described above, the defendant had agreed and contracted with the plaintiff that it would work with the plaintiff to arrange a financial plan whereby the plaintiffs home and residence would not be placed in jeopardy of foreclosure. Defendant breached this agreement and contract and, instead, engaged in a bad faith and fraudulent scheme to distract plaintiff by these promises and agreements to enable the defendant to foreclose on the plaintiffs home and residence.

Amendment to Complaint, paragraph 3, attached to Plaintiff's Motion to Amend filed September 29, 2000, AP Proceeding No. 19.

Again, like the other prepetition causes of action, this cause of action was extinguished by the settlement reached between the trustee and Regions. But again, to illustrate the cavernous differences between the debtor's allegations and the evidence, the Court discusses both below. And again, based on the evidence, the Court finds that the allegation is without merit.

Mrs. Kearney did not testify that Regions agreed to help her avoid foreclosure, or to "work with" her to avoid foreclosure, or to arrange a financial plan to avoid foreclosure. To the contrary, she specifically testified that until June 17, 1998, when Mr. Kearney told her about the impending foreclosure sale, she earnestly believed that her mortgage was being paid and that her mortgage loans were not in default. In that frame of mind, she had no reason to seek or obtain any agreement from Regions to "work with" her to avoid foreclosure. According to her, she had no idea that Regions meant to foreclose its mortgage or had instituted foreclosure proceedings, and no reason to suspect that foreclosure was imminent.

Mrs. Kearney's allegation that Regions, "had agreed and contracted with the plaintiff that it would work with the plaintiff to arrange a financial plan whereby the plaintiffs home and residence would not be placed in jeopardy of foreclosure," is therefore refuted by her own testimony.

Mrs. Kearney testified that she met with Mr. Leara, Mr. Mitchell, and a gentleman named Ken Burns on St. Patrick's Day 1998. She said that Mr. Burns worked for PaineWebber. She described the purpose of the meeting as, "The meeting was about buying Riverchase and also in that whole deal it would clean up the house and everything would be, you know, normal. It would be good." Transcript at 354. Mrs. Kearney testified:

> John Hamilton had sent him [Mr. Burns] to talk to the bank because we have been communicating with John Hamilton about bailing out Riverchase so that we could make the bank whole and make everybody else whole, and they had a plan to do that. So we went to the bank and Steve Leara and Mike Mitchell were all excited about it and they thought it

> was great. Then after that it just kind of fizzled. I mean, I don't know, we kept trying to see what the bank wanted to do and they didn't take the idea.

Transcript at 354 (parenthetical added).

If Mrs. Kearney's testimony was offered to show that Regions arbitrarily rejected a good faith effort by Mrs. Kearney to satisfy her mortgage debt, it does not. Mrs. Kearney did not explain what she meant by "clean up the house." She did not describe Mr. Burns' proposal or explain the details of the proposal. She did not suggest that the proposal should have been acceptable to Regions or attempt to explain why it should have been acceptable to Regions. There is nothing in Mrs. Kearney's testimony that suggests that: (1) Mr. Burns' proposal constituted a concrete, non-contingent offer; (2) the offer was reasonable; (3) the meeting was any more than a preliminary exploratory process; (4) the proposal was practical or workable from either Regions' or PaineWebber's perspective; or (5) PaineWebber would have made a concrete offer based on what it learned or what was discussed at the meeting. Mrs. Kearney's testimony is proof only that she and Mr. Burns met with Mr. Mitchell and Mr. Leara to discuss a financial proposal relating to ROP and her house. It proves nothing else and does not offer a hint or suggestion of malice or bad faith by Regions.

Additional evidence supports these conclusions. According to Mr. Johnston, Mrs. Kearney's proposal was not feasible for several reasons. He testified:

> Q. Now you said Mrs. Kearney had brought a proposal to you that you felt was not feasible. Was that a proposal for additional financing on the building that you and she would enter into financing to essentially buy out Regions Bank's mortgage interest in the building?
>
> A. Yes, it was a new mortgage on the building, a new loan that would then be sold into the public market. It was very complicated. It would have involved increasing the rent that the tenant had to pay very, very substantially which it was not going to agree to. It just didn't work and, on top of that, I was not interested in continuing as a partner of Mrs. Kearney in any way, shape or form.
>
> Q. So when you said that you did not consider that proposal to be feasible, you were talking about the financial feasibility of the proposal; you did not feel that it would work?
>
> A. There were four or five different things. It definitely would not work financially. The tenant had made it clear that it would not stay in a building in which the Kearneys owned and, on top of that, I was not going to continue with the Kearneys personally.

Transcript at 341-42.

Again, in regard to this fourth allegation, the Court must find that Regions was not responsible for Mrs. Kearney's damages. There was no enforceable promise and Regions did not intentionally hamper her efforts to regain her former homestead.

5. Civil Conspiracy

Mrs. Kearney's fifth contention is that Regions and Mr. Johnston engaged in a civil conspiracy to cause her financial ruin. Her theory is that Regions gave Mr. Johnston preferential treatment because Mr. Johnston threatened to sue Regions. According to Mrs. Kearney, in exchange for Mr. Johnston's leniency, Regions: (1) agreed to collect Mrs. Kearney's mortgage notes and the ROP loan from her instead of Mr. Johnston, (although Mr. Johnston was partly liable because of his personal guarantee); and (2) took actions to collect those notes and the ROP loan from her instead of Mr. Johnston.

a. Federal and State Law

Writing for the Court of Appeals for the Eleventh Circuit in Nance v. Maxwell Fed. Credit Union, 186 F.3d 1338 (11th Cir. 1999), Circuit Judge Gerald B. Tjoflat explained, "Civil conspiracy is not an independent cause of action; there must be an underlying wrong on which the conspiracy claim is based. See Allied Supply Co. V. Brown, 585 So.2d 33, 36 (Ala. 1991). The allegation of a conspiracy serves merely to expand liability for the underlying wrong to persons who were not directly involved in the wrongful actions." Id. at 1342.

Writing for the Supreme Court of Alabama in O'Dell v. State ex rel. Patterson, 270 Ala. 236, 240, 117 So.2d 164 (1959), Justice Thomas S. Lawson explained, "Where civil liability for a conspiracy is sought to be enforced, the conspiracy itself furnishes no cause of action." Id. at 168. The essence of the action is the wrongful activity alleged to have been accomplished by the conspirators. Justice Lawson adds, "The gist of the action is not the conspiracy alleged but the wrong committed." Id.

Regions is the only defendant in this proceeding. Because Regions is the party claimed to have committed the act, based on the law in this Circuit and in Alabama, Mrs. Kearney would not be entitled to any recovery against Regions even if she proved her allegations. She would be entitled only to whatever recovery she might have against Regions had she proved the substantive torts. In other words, the viability of a conspiracy claim hinges completely on the viability of the underlying tort claim.

Writing for the court in Stuart Constr. Co. v. Vulcan Life Ins. Co., 291 Ala. 650, 645, 285 So.2d 920 (1973), Justice James H. Faulkner explains that there is no, "civil liability for a conspiracy unless there is an actionable wrong." Id. at 923. Justice Faulkner adds that, where the complaint does not allege an actionable wrong, and no

actionable wrong appears to have been committed, "an action for civil conspiracy standing alone will not lie." Id.[358]

Based on Mrs. Kearney's complaint and her allegation she has neither alleged nor proved such an underlying wrong. The following proves that conclusion.

b. Mrs. Kearney's Allegations and the Evidence She Contends Supports a Conspiracy

(1) The Allegations

The wrongs Mrs. Kearney contends Regions committed through the alleged conspiracy with Mr. Johnston include: (1) making wrongful debits in November and December of 1996 from Mr. Kearney's and her personal account; (2) misapplying those debited funds; (3) providing confidential banking information to Mr. Johnston; (4) foreclosing the mortgage on her home; (5) failing to honor its promise to "work" with her in an effort to keep her from losing her home; (6) keeping her from regaining her home; (7) filing a post-petition ejectment action; and (8) failing to honor its alleged promise to allow her to keep certain personalty stored in her former homestead.

(2) Mrs. Kearney's Evidence

Mrs. Kearney cites 11 separate evidentiary items which she contends, when considered cumulatively, prove a conspiracy between Regions and Mr. Johnston. But whether considered separately or cumulatively, none prove an underlying wrong or support Mrs. Kearney's conspiracy allegation. All are discussed in detail above. Summarized here they are:

1. The November 1996 debits made by Regions.

   The debits were not unlawful or tortuous. They were authorized by Mr. Kearney. They were authorized by the guarantee agreements executed by the Kearneys. And, they were authorized by Regions' general agreement governing customer deposit accounts. In addition, there is no evidence that Mr. Johnston and Regions had any communications about those debits before the debits were made.

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[358] See also Allied Supply Co., Inc. v. Brown, 585 So.2d 33, 36 (Ala.1991) ("If the underlying cause of action is not viable, the conspiracy claim must also fail."); Griese-Traylor Corp. v. First Nat'l Bank of Birmingham, 572 F.2d 1039, 1045 (5th Cir. 1078)(quoting Stuart Constr. Co. v. Vulcan Life Ins. Co., 291 Ala. at 645, 285 So.2d at 923) ("In order for there to be liability for conspiracy, there must be an 'actionable wrong.'"); and Keller v. Security Fed. Sav. & Loan Ass'n, 555 So.2d 151, 155 (Ala. 1989) ("The conspiracy is not actionable if the plaintiff cannot prove a wrong committed through the conspiracy.").

2. A facsimile of the Kearneys' November 1996 checking account statement Regions sent to Mr. Johnston on January 16, 1997.[359]

   There is no evidence that Regions sent the account statement to Mr. Johnston or that Mr. Johnston received a facsimile of any of the Kearneys' bank statements from Regions.

3. The November 19, 1997, letter from Mr. Moncus, (Mr. Johnston's attorney), to Mr. Walker, (Mr. Kearney's accountant), regarding settlement of the issues between Mr. Johnston and the Kearneys.[360]

   This letter was not a communication between the alleged co-conspirators. The letter does not reflect or describe any agreement between the alleged co-conspirators. And the letter does not reflect or suggest any intent by the alleged co-conspirators to do anything tortuous or unlawful to Mrs. Kearney.

4. The December 2, 1997, letter from Mr. Johnston to Mr. Mitchell which refers to a meeting between Mr. Johnston and Mr. Mitchell, (where the latter indicated that Mr. Mitchell was compiling figures and information requested by Mr. Johnston).[361]

   This letter does not reflect or describe any agreement between the alleged co-conspirators. The letter does not reflect or suggest any intent on either of the alleged co-conspirators' part to do anything tortuous or unlawful to Mrs. Kearney.

   Mr. Johnston knew about the Kearneys' default on the mortgage debt because of a notice of default sent to him on October 3, 1997, by Mr. Leara.[362] Mr. Johnston received that information because of his limited guarantee of the Kearneys' personal debts. It was not "inside" information illicitly shared with him by Regions.

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[359] Plaintiff's Exhibit 22.

[360] Defendant's Exhibit 87.

[361] Plaintiff's Exhibit 13.

[362] Defendant's Exhibit 19.

5. The February 3, 1998, letter from Mr. Johnston to Mr. Mitchell, in which Mr. Johnston thanked Mr. Mitchell for sending him a copy of Mrs. Kearney's financial statement.[363]

This letter does not reflect or describe any agreement between the alleged co-conspirators. The letter does not reflect or suggest any intent by the alleged co-conspirators to do anything tortuous or unlawful to Mrs. Kearney. The letter merely reflects: (1) Mrs. Kearney owed a great deal of money to Regions; (2) Mr. Johnston was also liable for that debt; (3) Mr. Johnston suspected that Mrs. Kearney owned valuable assets other than her homestead which she could contribute to the satisfaction of the ROP debt; (4) Mr. Johnston wanted to determine if his suspicion was true; and (5) if that suspension were true, Mr. Johnston wanted to minimize his personal exposure on the ROP debt by requiring Mrs. Kearney to liquidate those assets.

Rather than indicating an illicit conspiracy to accomplish an unlawful objective, providing the statement to Mr. Johnston was a good faith attempt to cooperate and communicate with Mr. Johnston. Regions had a lawful right to collect payment of the ROP debt from Mrs. Kearney. Mr. Johnston had a lawful right to attempt to require Mrs. Kearney to pay her share of the ROP debt. And Regions and Mr. Johnston had the lawful right to communicate and to share information to accomplish their goals.

6. The February 10, 1998, letter from Mr. Johnston to Mr. Carmody, containing a proposal to settle certain controversies between ROP and CBR.[364]

The proposal was for CBR to reimburse ROP for tenant improvements by making one partial lump sum cash payment sufficient to cover unpaid contractors and to amortize the remainder of its liability for the improvements over the life of the lease. The proposal would have required Regions to make a ten year loan for the amount of tenant improvements.

Mrs. Kearney directs the Court to the part of the letter that reads, "I hope it does not escape you that it is based on the assumption that the Kearneys will not participate in any way and that I may need some accommodation

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[363] Plaintiff's Exhibit 18 and Defendant's Exhibit 88. Mrs. Kearney contends that it was wrong for Regions to send a copy of the their financial statement to Mr. Mitchell. As discussed above, this Court finds that it was not wrong for Regions to send that statement.

[364] Plaintiff's Exhibit 15

from the Bank personally." Plaintiff's Exhibit 15. The Court cannot find that a conspiracy may be inferred from that passage. The letter does not reflect or describe any agreement between the alleged co-conspirators. It does not reflect or suggest any intent by the alleged co-conspirators to do anything tortuous or unlawful to Mrs. Kearney. And, as discussed before above, the word "accommodation" is not the equivalent of a collusive effort to harm Mrs. Kearney. To the contrary, "accommodation" specifically expresses the possible conditions of a good faith offer in compromise extended by Mr. Johnston to Regions.

7. Regions' purchase of the AmSouth notes on February 13, 1998.

AmSouth's foreclosure sale was set on the day Regions purchased the property. For their part, the Kearneys consented, in writing, to the transaction. In addition, Regions had the lawful right to purchase the AmSouth notes to protect its interests in the property. And interestingly, the purchase of the notes and mortgages first did not cause any harm to the Kearneys and second was a substantial benefit to them by allowing them to keep their home. Had Regions not purchased the notes, its subordinate mortgage would have been lost through AmSouth's foreclosure sale.

8. The April 9, 1998, letter from Mr. Johnston to Mr. Carmody, and the June 3, 1998, letter from Mr. Carmody to Mr. Johnston's attorney.[365]

Each letter is discussed above. Neither supports a claim of malice or conspiracy.

9. The June 25, 1998, letter from Mr. Leara to Mr. Moncus, Mr. Johnston's attorney.[366]

In this letter, Mr. Leara: (1) thanked Mr. Moncus for the information he had provided to Mr. Leara about the Kearney's condominium in Florida; (2) explained the extent of Mr. Johnston's liability on his limited personal guarantee of the Kearneys' mortgage notes; (3) informed Mr. Moncus that judicial proceedings for foreclosure of the mortgage on the condominium were pending in Florida, (but that Mrs. Kearney's bankruptcy filing had stayed those proceedings); and (4) informed Mr. Moncus that it was unlikely that Regions would have to seek payment from Mr. Johnston

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[365] Plaintiff's Exhibit 12 and Plaintiff's Exhibit 14.

[366] Plaintiff's Exhibit 17. The document was also admitted into evidence as Defendant's Exhibit 56.

pursuant to his guarantee if the eventual sale of the condominium produced an amount equal to the fair market value of $300,000.

Like other letters discussed above, this letter does not reflect or describe any agreement between the alleged co-conspirators, and it does not reflect or suggest any intent by the alleged co-conspirators to do anything tortuous or unlawful to Mrs. Kearney. Regions had the right to communicate with Mr. Johnston about his possible personal liability under his limited guarantee of the Kearneys' mortgage notes and the efforts being made to comply with the conditions of that guarantee. As discussed above, one condition of Mr. Johnston's guarantee was that Regions first liquidate all collateral, (which included the Old Leeds Ridge property and the Florida condominium), before demanding payment from Mr. Johnston. Mr. Leara's reference in the letter to the prospective sale of the condominium, and the possible elimination of Mr. Johnston's liability under the guaranty agreement as a consequence of the sale, cannot, therefore, be construed as indicative of any illicit favor, preference, or accommodation to Mr. Johnston. Regions' actions were required by the guaranty agreement.

10. Regions' sale of the ROP property on September 16, 1998, to Wyatt R. Haskell, Mr. Johnston's former law partner, for $4,486,000.

Mrs. Kearney alleges that the sales price was less than the market value of the property and that the purpose of the sale was to, "prefer Johnston and accede to all his demands, so that Plaintiff would be ruined and oppressed while Johnston was kept in a position of financial safety, and able to direct how the bank pursued the Plaintiff and the satisfaction of her personal and ROP debts of the partnership." Plaintiff's Amendment to Complaint, para. 6, attached to Motion to Amend Complaint filed July 23, 2001 (Proceeding 108).

Mrs. Kearney does not explain how the sale resulted in a "preference" to Mr. Johnston. The evidence demonstrates that the sale was a benefit to both Mr. Johnston and Mrs. Kearney. The sale satisfied both Mrs. Kearney's and Mr. Johnston's personal liability for the ROP construction loan in equal parts. And since Mrs. Kearney was in bankruptcy, she would obtain a discharge of her liability for the loan anyway. Consequently, under those circumstances, the Court finds that the sale of the property was not a greater benefit to Mr. Johnston than it was for Mrs. Kearney.

Furthermore, the Court finds that Mrs. Kearney was not, and could not have been, "ruined and oppressed" by the sale. The sale eliminated the

largest of the partnership debts, in turn Mrs. Kearney's personal liability on that debt was eliminated.

Mrs. Kearney also contends that the property was sold for less than the value of the property. The evidence is contrary. The pre-construction appraisal obtained by Regions on March 20, 1995, indicated that the fair market value of the proposed office building, including the land and structure, would be $3,500,000.[367] Regions purchased the property at its foreclosure sale on August 3, 1998, for $3,743,000.[368] Following foreclosure, Regions received a tentative proposal from ACME Realty Group, Inc. to purchase the property for somewhere between "$4,000,000 and $4,400,000." Plaintiff's Exhibit 11. And, on January 25, 1999, Mr. Kearney offered to purchase the former ROP property from the trustee for $4,100,000.[369]

Mr. Johnston testified that the price Mr. Haskell agreed to pay represented the fair market value of the property and was by far the highest offer received for the property. The above figures and Mr. Johnston's testimony represent all that is before the Court on the issue of the value of the ROP property. That evidence does not suggest or prove that Mr. Haskell paid less than what the property was worth.

11. The "Mutual Release and Indemnification Agreement" executed by Regions and Mr. Johnston on September 17, 1998.[370]

Mrs. Kearney argues: (1) that the release and indemnification identifies a deficiency owed to Regions by ROP and its individual partners to Regions after the foreclosure sale of the ROP property and application of the sale proceeds to the amount owed on ROP's construction loan; (2) that Mr. Johnston was, "instrumental in effecting the sale of the Property and in negotiating a new lease and the release of various rights of redemption held by creditors of ROP, thus improving the marketability of the Property," id.; and that (3) "In consideration of Johnston's contributions to the sale of the Property and the Bank's willingness to make available certain funds for the payment of creditors with rights of redemption, Johnston and the Bank have agreed to mutually release each other." Id.

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[367] Plaintiff's Exhibit 25.

[368] Defendant's Exhibit 32.

[369] Defendant's Exhibit 39.

[370] Defendant's Exhibit 36.

While Mr. Johnston and Regions agreed to release one another from any liability arising out of the ROP construction loan, the agreement expressly provides that Regions was not releasing Mr. Johnston from his liability as personal guarantor of the Kearneys' individual loans. Mrs. Kearney argues that Regions' failure to offer her the same benefits is evidence of the conspiracy. The fact is that Regions did not have any reason to offer a release to Mrs. Kearney because she did not need one. Her liability for the partnership loan would be discharged in her bankruptcy case. Furthermore, Mr. Johnston did not receive any greater benefit from his release than Mrs. Kearney has through her bankruptcy filing. Both were absolved from personal liability for the deficiency on the ROP loan. Consequently, the Court cannot find an illicit conspiracy between Regions and Mr. Johnston and one cannot be inferred from Region's post-petition release of Mr. Johnston or from the Regions' failure to offer such a release to Mrs. Kearney.

c. Specific Findings Regarding Mrs. Kearney's "Cumulative" Evidence of a Conspiracy

Based on the above, whether the evidence is considered cumulatively or not, the Court specifically finds:

1. Mrs. Kearney owed the money and was admittedly in default. Regions had a lawful right to collect the debts she owed, therefore Regions' actions cannot be considered wrongful. Similarly, that same lawful act cannot support an inference or implication of malice, even if taken pursuant to an agreement with Mr. Johnston to collect Mrs. Kearney's debts first. The law in Alabama is quite clear on this point. Writing for the court in Bellsouth Mobility, Inc. v. Cellulink, Inc., 814 So.2d 203, 215 (Ala. 2001), Justice Thomas A. Woodall explained, "Whatever a man has a legal right to do, he may do with impunity, regardless of motive, and if in exercising his legal right in a legal way damage results to another, no cause of action arises against him because of a bad motive in exercising the right." Id. at 215 (quoting Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 211 (Tex. 1996).

2. Mrs. Kearney's mortgage notes were fully secured by her residence and the Florida condominium. Those mortgage instruments gave Regions full authority to foreclose its mortgages in the event of default. Nothing in those instruments required Regions to seek collection personally from Mr. Johnston, or any guarantor, before foreclosing its mortgages.

   By her own admission, when Regions foreclosed on the residence and instituted foreclosure proceedings against the condominium, Mrs. Kearney was in default. Regions was completely within its lawful rights to liquidate

that security before seeking recovery from Mr. Johnston on his guarantee. Nothing in the law requires otherwise.

Again, because Regions was acting within its lawful rights when it foreclosed its mortgage on the residence, and when it instituted its foreclosure action against the condominium, those acts cannot be considered wrongful. And again, the lawful acts of foreclosing those mortgages also cannot support an inference or implication of malice, even if taken pursuant to an agreement between Regions and Mr. Johnston to seek from Mrs. Kearney first.

3. Mrs. Kearney's debts were not interconnected or related. The mortgage notes were fully secured. The ROP debt was unsecured. Mrs. Kearney's home was pledged as security for the mortgage notes but not the ROP debt. The residence was not available to Regions as a resource from which the ROP loan might be paid. The foreclosure of the residence, which accomplished the collection of the amounts owed on the mortgage note, does not, therefore, provide a basis for any implication of malice in regards to the ROP debt. The foreclosure was not instituted to collect the ROP debt and could not possibly have resulted in the reduction or elimination of any portion of the ROP debt or of Mr. Johnston's liability for that debt.

4. Regions was required by contract first to foreclose on Mrs. Kearney's residence and the Florida condominium before seeking collection of any portion of the Kearney's personal notes from Mr. Johnston. The only basis for Mr. Johnston's limited personal liability on the Kearneys' personal notes arose out of the guarantee agreement he executed on July 24, 1995. Under that agreement, Regions was, as a condition precedent to demanding payment from Mr. Johnston, required first to "exhaust and realize on all security...." Defendant's Exhibit 4. Therefore, no malice can be inferred from Regions' alleged preference to Mr. Johnston by foreclosing on Mrs. Kearney's homestead before seeking collection from him under the guarantee agreement. That was what was required of Regions under the contract.

5. Mrs. Kearney equates negotiation for purposes of settlement with conspiracy. Her case for a conspiracy in connection with the ROP loan hinges primarily on settlement discussions in 1998, (prior to Mrs. Kearney's bankruptcy filing), between Mr. Johnston and his attorney, and Regions and its attorneys. Those discussion were initiated by Mr. Johnston in an effort to accomplish a settlement of the ROP quagmire including his liability for ROP's loan and other debts.

Mr. Johnston was within his rights to encourage Regions to collect the ROP debt from Mrs. Kearney and it was proper for him to assist Regions in any way he could in assuring that Mrs. Kearney shouldered her fair share of the ROP debt. He was also within his rights to seek accommodation from Regions in order to effect a settlement. In fact, accommodation is the cornerstone of all settlements and without it there could be no settlements.

Regions was within its rights to communicate and negotiate with Mr. Johnston in an effort to collect its money, and to seek collection of the ROP debt from Mrs. Kearney, and to grant "accommodation" to Mr. Johnston to effect a settlement.

There was nothing unlawful or tortuous about these parties working toward these goals. And there was nothing illegal, immoral, or tortuous about the concept of Regions providing "accommodation" to Mr. Johnston for the purpose of effecting a settlement.

6. The only proof Mrs. Kearney offers of an explicit agreement by Regions with Mr. Johnson to seek collection of the ROP debt from her before attempting to collect it from Mr. Johnston, is contained in a letter dated June 3, 1998, from Mr. Carmody to Mr. Johnston's attorney.[371] In that letter, Mr. Carmody expressed Regions' position regarding a settlement offer previously submitted to Mr. Johnston.

As discussed earlier in this opinion, Mr. Johnston proposed that Regions would lend Mr. Johnston's former law partner, Mr. Haskell, funds for Mr. Haskell to purchase the ROP project. Mr. Carmody responded to that proposal in a June 3 letter. In that letter, Mr. Carmody informed Mr. Moncus that if: (1) Mr. Haskell provided an irrevocable offer to pay $4,400,000 for the property; (2) CBR, (the tenant), provided an irrevocable commitment to enter into a lease that was acceptable to the bank and to Mr. Haskell; and (3) CBR deposited $550,000 in trust, the bank would not only extend 20 year financing to Mr. Haskell, but would also establish a line of credit for ROP equal to the CBR deposit. That line of credit could then be used to satisfy the claims of ROP suppliers. In addition, the bank would extend a $450,000 line of credit to Mr. Johnston for three years.

Mr. Carmody also indicated in the letter that the bank would not release any of the individual ROP partners or guarantors on any deficiency claim but was, "willing to agree to pursue the Kearneys on their guarantees until it exhausts all reasonable avenues of recovery before requiring Jay [Mr.

[371] Plaintiff's Exhibit 14.

Johnston] to pay the final deficiency." Plaintiff's Exhibit 14 (parenthetical added). Mr. Carmody added, "The reason for such an agreement would be because of the funds already advanced or to be advanced by Jay and his willingness to assist the partnership in resolving these problems." Id.

Mrs. Kearney contends that the actions described are evidence of a conspiracy between Regions and Mr. Johnston. The Court disagrees. There is nothing in the June 3 letter that supports the alleged conspiracy. To the contrary, Mr. Johnston saved Regions' considerable time and expense by developing a solution that resulted in the sale of the ROP property, payment of most of the ROP loan, payment of the ROP subcontractors, and resolution of the dispute between CBR, Regions and ROP. Regions did not have to find a buyer for the property and another tenant if CBR had to be ousted after foreclosure. Regions' "accommodation" to Mr. Johnston was entirely deserved and a recognition of Mr. Johnston's substantial contribution to the settlement. The possibility that it might have some adverse impact on Mrs. Kearney does not support an implication of malice towards her. It merely reflects the fact that she did not substantially contribute to the settlement and was not therefore entitled, in Regions' consideration, to be treated the same as Mr. Johnston.[372]

7. There is no proof that Mr. Johnston ever threatened suit against Regions or ever expressed an intention or desire to institute such a suit. Mr. Johnston testified that, although he was extremely unhappy with the way Mr. Mitchell and Regions handled the ROP and Kearney matters, he never threatened to sue Regions.[373] Mr. Leara testified that Mr. Johnston never told him that he intended to sue the bank, and that he never heard

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[372] In addition, the letter is not probative of a civil conspiracy between Regions and Mr. Johnston because it does not reflect an agreement to do anything tortuous or illegal. The only acts it advocates against Mrs. Kearney is the collection of any deficiency on the ROP debt. That agreed course of action is not wrongful. On its face, it reflects Regions agreement to do that which it already had a lawful right to do anyway. See, Bellsouth Mobility, Inc. v. Cellulink, Inc., 814 So.2d 203 (Ala. 2001) ("Whatever a man has a legal right to do, he may do with impunity, regardless of motive, and if in exercising his legal right in a legal way damage results to another, no cause of action arises against him because of a bad motive in exercising the right.") Id. at 215 (quoting Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 211 (Tex. 1996); Twine v. Liberty Nat'l Life Ins. Co., 294 Ala. 43, 47, 311 So.2d 299, 302 (1975) ("[W]hatever damage results from doing that which is lawful does not lay the foundation of an action."). Government Street Lumber Co. v. AmSouth Bank, 553 So.2d 68, 74 (Ala. 1989) (borrower could not recover from bank on the basis of bank's actions which were specifically permitted or not prohibited under financing agreement with the borrower).

[373] Transcript at 315 and 328.

anyone else say that Mr. Johnston threatened to sue the bank.[374] Mr. Mitchell testified that Mr. Johnston did not, either to him or in his presence, threaten litigation against Regions, and that no accommodations were extended to Mr. Johnston because of any such threat.[375] Mr. Smith testified that he did not have any knowledge of any threat ever having been made by Mr. Johnston to sue Regions.[376] And none of the many documents admitted in this matter contains or expresses any threat by Mr. Johnston to file suit against Regions.

d. General Conclusions About an Alleged Conspiracy between Regions and Mr. Johnston.

There is no evidence of a conspiracy between Regions and Mr. Johnston. And even if there were, as to any wrongful acts allegedly committed by Regions prior to the filing of the bankruptcy petition, such a claim would have belonged to trustee. And as discussed in detailed above in relation to all of the other prepetition causes Mrs. Kearney claims, this cause would have been extinguished by the settlement between the trustee and Regions.

As to any post-petition wrongful acts alleged by Mrs. Kearney, involving such items as the ejectment action, the personalty remaining in the house, or Regions' alleged failure to "work" with her, as discussed below, there is no evidence that Mr. Johnston: (1) was consulted by Regions about any of those events; (2) was consulted by Regions while any of those events were taking place; (3) had any communication or conversation with Regions about any of those events; (4) had any communication or conversation with Regions while any of those events were taking place; or (5) had any personal knowledge regarding any of those events. There was of course, no reason for Regions to communicate or consult with Mr. Johnston regarding any of those events.

Mr. Johnston's obligation on the guarantee on Mrs. Kearney's mortgage obligation was essentially extinguished by Regions' prepetition foreclosure sale of Mrs. Kearney's homestead and his responsibility for the ROP loan ended on September 17, 1998, when his settlement with Regions was finalized. There was no benefit or detriment to him from either the ejectment action or Mr. Mitchell's alleged representation about the personalty remaining in the house or Regions' alleged failure to "work" with Mrs. Kearney.

There is no direct evidence of any conspiracy in relation to the post-petition activities complained of by Mrs. Kearney. There is no indirect evidence which

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[374] Transcript at 128-29.

[375] Transcript at 214-15.

[376] Transcript at 23-24.

circumstantially suggests such a conspiracy or from which such a conspiracy might be rationally implied.

And even if there were a "civil conspiracy," it is not an independent tort and there are no defendants in this case other than Regions who could be held liable. No "actionable wrongs" upon which a claimed conspiracy may be based were proved.

Mrs. Kearney's conspiracy theory is legally deficient because it is not based on any act done by Regions which was conceptually illegal or tortuous or based on any agreement between Regions and Mr. Johnston to do anything illegal or tortuous. Neither Regions nor Mr. Johnston acted illegally or wrongful or tortuous to Mrs. Kearney. They did not agree to do anything illegal or wrongful or tortuous to Mrs. Kearney.

6. An Accounting

Mrs. Kearney's sixth contention is that she is entitled to an accounting. This contention is her final contention based on prepetition events. And like all of the others, it was extinguished through the trustee's compromise approved by this Court. But, if it were not, if the above is not the accounting Mrs. Kearney seeks, the Court cannot find that she is entitled to another.

7. Automatic Stay Violation

Mrs. Kearney's seventh contention is the heart of her complaint. It accounts for two of her five plead causes of action, both based on post-petition events or circumstances.[377] First, Mrs. Kearney contends that Regions' post-petition ejectment action constituted a violation of the automatic stay and caused her to lose certain personal property of primarily sentimental value. Second she contends that her loss of personal property was a result of Regions' failure to honor an alleged promise that she would be allowed to leave the personalty in the house and that the personalty would not be removed from the house without her first being warned and given an opportunity to remove it herself.

In summary, first and foremost, even if Regions violated the stay, Mrs. Kearney failed to prove damages. And even if she had compensatory damages, she failed to

[377] Those are the post-petition federal law cause of action for violation of the automatic stay and the post-petition state law cause of action for fraud or misrepresentation based on her allegations regarding allegedly false assurances made by Regions about the personalty left on the Old Leeds Ridge property.

prove the willfulness necessary for punitive damages.[378] Second, Mrs. Kearney's stay violation action involves only her allegations that Regions' actions caused her loss of some personal property. She does not contend that she suffered damages in regard to the loss of her home because of a stay violation. The loss of her home relates to other allegations and causes of action, all of which are, as explained above, not actionable.

a. Section 362(h)

The automatic stay provisions of the Bankruptcy Code prohibit creditors from taking actions against a debtor once that debtor has filed a bankruptcy petition. The actions generally prohibited are enumerated in section 362(a) of the Bankruptcy Code.[379] If any of those prohibitions are violated, section 362(h) of the Code gives the

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[378] This Court entered an order in an earlier stage of this case in which the Court found that Mrs. Kearney could maintain a cause of action for Regions' alleged violation of the stay. At that time however, the Court questioned whether Mrs. Kearney could prove that violation, and even if she could, whether she could prove damages as a result of that violation. In the earlier order this Court found, "when Regions filed its ejectment action after Mrs. Kearney filed her bankruptcy and without relief from the automatic stay, Regions violated the automatic stay provisions of section 362." Memorandum Opinion In Adversary Proceeding No. 99-00239 On The Defendant's Motion For Summary Judgment And The Plaintiff's Motion To Amend Complaint, entered August 24, 2000, at page 41. That conclusion was of course reached in the context of a summary judgment motion and was reached before a trial on the merits. But even in that situation, this Court recognized, "Whether Mrs. Kearney may recover for Regions' violation of the automatic stay is of course another issue. That issue is: Was the violation willful?" Id. As is evident from the discussion that follows, the Court finds that even if there were a violation it was not willful, and Mrs. Kearney did not suffer any resulting damages.

[379] Section 362(a) reads:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--
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> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
> (4) any act to create, perfect, or enforce any lien against property

offended debtor a cause of action against the offending creditor. Specifically, section 362(h) of the Bankruptcy Code provides, "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h). Those provisions have been defined over the years through case law. The general consensus includes the explanations offered below.

Actual damages may be awarded to an individual debtor for a stay violation, if there is proof that the debtor was injured by the stay violation and that the violation of the stay by the defendant was willful.

A violation of the automatic stay is a willful violation if, "the violator (1) knew of the automatic stay and (2) intentionally committed the violative act, regardless whether the violator specifically intended to violate the stay." Jove Eng'g, Inc. v. Internal Revenue Serv., 92 F.3d 1539, 1555 (11th Cir. 1996).

Punitive damages may be awarded in appropriate circumstances. Descriptions of those circumstances include: (1) "[E]gregious, intentional misconduct on the violator's part is necessary to support a punitive damages award." United States v. Ketelson (In re Ketelson), 880 F.2d 990, 993 (8th Cir. 1989); (2) "An additional finding of maliciousness or bad faith on the part of the offending creditor warrants the further imposition of punitive damages pursuant to 11 U.S.C. § 362(h)." Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.), 902 F.2d 1098, 1105 (2nd Cir. 1990); and (3) "[O]nly egregious or vindictive misconduct warrants punitive damages for willful violations of the automatic stay of 11 U.S.C. § 362." Davis v. Internal Revenue Serv., 136 B.R. 414, 424 (E.D. Va. 1992).

> of the estate;
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

11 U.S.C. § 362(a).

b. Mrs. Kearney's Contentions

In general, Mrs. Kearney contends that Regions' post-petition ejectment action constituted a violation of the automatic stay as provided in 362(a) of the Bankruptcy Code; however, she does not, in her multitude of pleadings and appearance, identify any particular subsection of section 362 that was violated.

Mrs. Kearney does however, specifically contend that Regions' post-petition ejectment action constituted a violation of the automatic stay and caused her to lose certain personal property of primarily sentimental value. She also contends that the loss of that personal property resulted from Regions' failure to honor an alleged promise that she would be allowed to leave the personalty in the house and that the personalty would not be removed from the house without her first being warned and given an opportunity to remove it herself.

c. General Considerations Regarding Mrs. Kearney's Automatic Stay Contentions

As the discussion below demonstrates, generally speaking, when Regions concluded its foreclosure sale, Mr. and Mrs. Kearney lost their rights to occupy and possess their property. And after the Kearneys lost those rights, Regions was entitled to eject the Kearneys in an attempt to obtain possession of that property. Resolutions of all of the issues associated with these simplified conclusions begins with a discussion of the appropriate law to apply.

(1) Former Mortgagor's Right of Redemption

Writing for the Court of Appeals for the Eleventh Circuit in Commercial Federal Mortgage Corp. v. Smith (In re Smith), 85 F.3d 1555, 1557 (11th Cir. 1996), Circuit Judge Stanley F. Birch, Jr. explained, "The property rights of a debtor in a bankruptcy estate are defined by state law." Under Alabama law, the purchaser at a foreclosure sale obtains the immediate right to possession of the same. Jones v. Butler, 286 Ala. 69, 71, 237 So.2d 460, 463 (1970). The former mortgagor, on the other hand, following foreclosure, has only a statutory right of redemption, which is a mere personal privilege and not a property right or interest in the property foreclosed. Ala. Code 1975, § 6-5-250.

(2) Former Mortgagor's Right to Possession

In Alabama, the former mortgagor has no right to possession of the property, or right to remain in possession of the property, and upon demand for possession being made by the purchaser, continued possession of the property is considered tortuous, rendering the former mortgagor liable for mesne profits measured by the fair rental value of the property during his wrongful possession of the same. Pridgen v. Elson, 242 Ala. 230, 232, 5 So.2d 477, 478 (1942).

(3) Former Mortgagor Duty to Deliver

In Alabama, the former mortgagor is required to deliver possession of foreclosed land to the purchaser at the foreclosure sale within ten days after written demand for possession has been made by, or on behalf of, the purchaser. Ala. Code 1975, § 6-5-251(a). Failure to surrender possession of the land results in a forfeiture of his statutory right of redemption. Ala. Code 1975, § 6-5-251(c).

In the context of this case, on June 17, 1998, after conducting the foreclosure sale of the Kearneys former homestead, Mr. Leara had a letter delivered to Mr. and Mrs. Kearney informing them that Regions had purchased their homestead at the foreclosure sale. The letter also demanded that the Kearneys vacate the property within ten days.[380] There is no dispute that this letter was delivered as Mrs. Kearney acknowledged that someone came to her house and delivered, "an eviction letter, a ten-day letter..." to her on the afternoon of the day that the foreclosure took place. It was through this letter that Mrs. Kearney first learned that Regions' foreclosure sale had been completed before she filed her Chapter 13 petition.[381] But, in contrast to the duty required by Alabama law, Mrs. Kearney did not, as the letter demanded, vacate the property or otherwise deliver possession of the property to Regions, the purchaser at the foreclosure sale.[382]

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[380] Plaintiff's Exhibit 65.

[381] Transcript at 358.

[382]This Court has not addressed two difficult legal issues, neither of which Mrs. Kearney raised. One is what is the relationship of the automatic stay to section 6-5-251 of the Code of Alabama. The other is was Regions' act of sending a 10-day demand letter a violation of the stay. As explained throughout this opinion, even if the stay was violated, there were no damages. And even if Mrs. Kearney retained a redemption right, whatever right she retained passed to the Chapter 7 Trustee when the case was converted. And even if Mrs. Kearney or the Trustee held a redemption right, that right expired after one year.

As Judge Birch explained in In re Smith:

> We are persuaded by the reasoning of In re McKinney and In re Glenn and hold that, when a debtor files for Chapter 13 bankruptcy following the foreclosure sale of his property, he can cure the default through an exercise of his Alabama statutory right of redemption. This right cannot be modified under a Chapter 13 plan, and it must be exercised as dictated under Alabama law by making a lump sum payment within one year of the foreclosure sale that includes the principal, interest and other charges under the mortgage.

85 F.3d at 1561.

Consequently, pursuant to state law, Mr. and Mrs. Kearney lost their rights to occupy and possess the property when Mr. Leara conducted the foreclosure sale. Because ejectment is the process or action which may be employed by a mortgagee to obtain possession of real property from an erstwhile mortgagor, Jordan v. Sumners, 222 Ala. 314, 132 So. 427, 428 (1930), and since Regions foreclosed its mortgage before Mrs. Kearney filed her petition, Regions became entitled, before the petition was filed, to file an action for ejectment against Mrs. Kearney.

On the other hand, Regions' right to file an ejectment action may have become restricted when Mrs. Kearney filed her bankruptcy petition. Pursuant to section 362(a)(1) the filing of the bankruptcy petition operated as a stay, "of the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before..." the filing of the petition. 11 U.S.C. § 362(a)(1).

In that light, it appears then that section 362(a)(1) would have prohibited Regions from filing such an action without relief from the stay. If that is true, then it appears as a general conclusion that the filing of the ejectment action by Regions, following the commencement of Mrs. Kearney's bankruptcy case, without relief from the stay, violated section 362(a)(1).[383]

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[383] As noted above, Mrs. Kearney did not plead what specific part of section 362 was violated. From this Court's analysis, it appears that no subsection of section 362(a) other than 362(a)(1) could have been violated by Regions' ejectment action. Subsection (a)(2) was not violated because Regions did not seek enforcement against Mrs. Kearney or against property of the estate, or of a judgment obtained before the commencement of Mrs. Kearney's bankruptcy case.

Subsection (a)(3) was not violated. Since Mrs. Kearney did not own the property that Regions' foreclosed, or have title to it, or have the right to occupy or possess it, neither the property nor the right to possession of the same became property of her bankruptcy estate. Regions' ejectment action, which was intended to obtain possession of that property, therefore, did not violate subsection (a)(3) because it did not represent an effort to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

Subsection (a)(4) was not violated. Following foreclosure, the property belonged to Regions. It was not property of the estate and Regions did not have a lien on it. The only thing that became property of the estate was Mrs. Kearney's statutory right of redemption. And Regions' did not have a lien on that. Regions' ejectment action did not, therefore, represent an "act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4).

Subsection (a)(5) was not violated. Following foreclosure, Mrs. Kearney had no interest in the property. And her statutory right of redemption not was subject to a lien. Regions' ejectment action did not, therefore, represent an "act to create, perfect, or enforce against

If the above is true, THEN what are the consequences? As the discussion below demonstrates, there are few, if any. In contrast to her contentions, the evidence associated with Mrs. Kearney's stay violation allegation demonstrates more than any other why the Court must find that the Kearneys's own actions, not Regions', caused the Kearneys' damages.

d. Specific Considerations

As the discussions below explains, with all of the evidence now before the Court, the Court must find, even if Regions violated the stay, Mrs. Kearney neither proved, nor is she entitled to, damages because of Regions' actions. The evidence is cumulative. It includes the following ten items:

1. The state court determined that Regions' ejectment action did not constitute a violation of the stay;

2. While Mrs. Kearney left some personalty on the property (and Mr. Kearney continued to reside in the house), Mrs. Kearney vacated the property and removed the vast majority of her personalty from the house during the weekend after Thanksgiving in 1998;

3. Regions alleged stay violation was complete on January 6, 1999, when the deputy sheriff removed the Kearneys' personalty from the house, even though Mr. Kearney immediately moved it back;

4. Mr. Mitchell did not tell Mrs. Kearney that she could leave personalty on the property after Thanksgiving 1998, or that the deputy sheriff would not remove the personalty from the property on January 6, 1999, or that Mrs. Kearney could store the personalty on the property indefinitely;

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property of the debtor any lien ...." 11 U.S.C. § 362(a)(5).

Subsection (a)(6) was not violated. Regions' ejectment action sought the possession of the property plus mesne profits for the Kearneys' tortuous occupation of the property after bankruptcy. Section 101(5) defines a "claim" as a "right to payment." The possession sought by Regions in its ejectment action cannot be characterized as a "right to payment." And Regions' right to mesne profits arose after the filing of the bankruptcy case. Therefore, neither Regions effort to obtain possession of the property nor its efforts to obtain a personal judgment against Mrs. Kearney for mesne profits constituted an "act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6).

Of course, subsections (a)(7) and (a)(8) are not applicable to Regions' ejectment action. Regions' action did not involve a setoff or proceeding before the United States Tax Court.

5. Mrs. Kearney had ample opportunity to purchase her former homestead from the trustee and Regions;

6. Regions did not cause Mrs. Kearney to lose any of the personalty she left on the property;

7. Mrs. Kearney intentionally abandoned the personalty left on the property;

8. Mrs. Kearney did not request damages for the demolition of the house based on a stay violation, and none would be warranted; she is not entitled to recovery for the demolition of the house based on a theory of wrongful foreclosure; and demolition of the house does not raise an inference of bad faith;

9. Regions actions were not egregious, vindictive, malicious, or in bad faith, and if there was a stay violation, there are no appropriate circumstances to support punitive damages; and

10. Equitable considerations warrant annulment of the stay as to Regions.

(1) The state court determined that Regions' ejectment action did not constitute a violation of the stay.

On September 29, 1998, acting pro se, Mrs. Kearney filed a pleading in Regions' state court ejectment action styled Suggestion of Bankruptcy. The purpose of the pleading was of course to alert the state court to her pending bankruptcy case and to argue that continuation of the ejectment action was stayed by section 362. Mrs. Kearney wrote:

> Come now the Defendant, Susan K. Kearney, by and through his attorney, and suggests the Chapter 7 bankruptcy of Susan K. Kearney filed in the Northern District of Alabama, Southern Division, having case number 98-03967-BGC-7, filed on June 17, 1998. Any further action in the above-styled proceeding is stayed pursuant to Title 11 United States Code Section 362.

Defendant's Exhibit 42 ("Suggestion of Bankruptcy").

Without knowledge of Mrs. Kearney's Suggestion of Bankruptcy, on October 3, 1998, the state court entered a default judgment against Mr. Kearney in Regions' ejectment suit.[384] On October 6, 1998, after learning of Mrs. Kearney's Suggestion of

[384] Defendant's Exhibit 42 ("Alabama Judicial Data Center Case Action Summary Circuit Civil").

Bankruptcy, the state court set aside the default judgment and placed the case on its administrative docket to be reviewed in six months.

The state court's docket reads in part:

> A Suggestion of Bankruptcy was filed by the defendant Susan K. Kearney on September 29, 1998. This Court did not have knowledge of the filing of the Suggestion of Bankruptcy when it entered a default judgment against defendant William J. Kearney, Jr. on October 1, 1998. Therefore, said judgment is set aside and this case is placed on the Administrative Docket for six (6) months. Plaintiff's counsel shall advise the Court of the status of the bankruptcy prior to the expiration of six months or the case will be subject to dismissal.

Defendant's Exhibit 42 ("Alabama Judicial Data Center Case Action Summary Circuit Civil").

Regions filed a motion for summary judgment after the case was placed on the state court administrative docket. Regions alleged that the automatic stay that arose when Mrs. Kearney filed her bankruptcy did not apply to the ejectment suit.[385] And on

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[385] A copy of the summary judgment motion was not admitted into evidence in the bankruptcy case. And no particular entry for it appears on the state court docket sheet that was admitted into evidence. Defendant's Exhibit 42 ("Alabama Judicial Data Center Case Action Summary Circuit Civil"). But Regions' motion to reinstate the default judgment makes reference to a summary judgment motion. That motion read, "On October 9, 1998, the Bank filed its Motion for Summary Judgment against Defendant Susan K. Kearney (the "Motion"), seeking to resolve this case and obtain an order for the ejectment of the defendants from the subject property." Defendant's Exhibit 42 ("Plaintiff's Motion to Reinstate Default Judgment & Set Case on Active Docket", paragraph 4). In paragraph 5 of the motion to reinstate default judgment, Regions also indicated that, in its summary judgment motion, it contended that the automatic stay in Mrs. Kearney's bankruptcy case did not apply to the ejectment proceeding. Regions argued, "As more fully set out in the Bank's Motion, neither the Suggestion of Bankruptcy, nor the actual bankruptcy case, are sufficient to stay the Bank's case against the defendants."

Another entry on the state court's docket sheet reflects that Regions' summary judgment motion had been set for hearing. That portion read, "This case is restored to the Active Docket and plaintiff's Motion for Summary Judgment is set for hearing at 8:00 a.m., on November 6, 1998." Defendant's Exhibit 42 ("Alabama Judicial Data Center Case Action Summary Circuit Civil", entry dated 10/23/98). The state court labeled its final order "Order on Regions Bank's Motion for Summary Judgment" and, in addition, indicated that the subject of the order was the summary judgment motion filed by Regions. That portion of its docket reads, "This matter came before the Court on the motion of Plaintiff, Regions Bank ("Regions"), for summary judgment...." Defendant's Exhibit 42 ("Order on Regions Bank's Motion for Summary Judgment"). Moreover, the order, by its terms, purports to grant the summary judgment motion filed by Regions. It reads, "Regions' Motion for summary judgment is due to be, and hereby is,

October 13, 1998, Regions filed a motion to have the default judgment reinstated against Mr. Kearney.[386] In the second motion, Regions repeated its contention that the automatic stay did not apply. The second motion read in part:

> As is more fully set Forth in the Bank's Motion [for summary judgment], neither the Suggestion of Bankruptcy, nor the actual bankruptcy case, are sufficient to stay the Bank's case against the defendants. Specifically: 1) the case had been converted to a case under chapter 7 of the Code, and there is no "co-debtor" stay (as exists under Chapter 13 of the Code) that would prevent the Bank's actions against Defendant William J. Kearney, Jr.; and 2) the Bank's efforts against the debtor, Defendant Susan K. Kearney, to recover possession of the real property are not barred by the automatic stay provisions of the Code, because the moment the Bank foreclosed on its mortgage, the residence became the bank's property and cannot be considered property of the debtor's bankruptcy estate.

Defendant's Exhibit 42 (Plaintiff's Motion to Reinstate Default Judgment & Set Case on Active Docket).

The state court heard Regions' motion to reinstate on October 23, 1998, and granted that motion. The state court held, "Motion hearing held on this date. This case is restored to the Active Docket and plaintiff's Motion for Summary Judgment is set for hearing at 8:00 a.m., on November 6, 1998." Defendant's Exhibit 42 ("Alabama Judicial Data Center Case Action Summary Circuit Civil").

On November 9, 1998, the state court entered an order granting Regions' motion for summary judgment. The state court: (1) directed Mr. and Mrs. Kearney and their dependents to vacate their former homestead by a date and time certain; (2) directed the sheriff to remove them from the property along with their personal property if they refused or failed to voluntarily vacate the property; and (3) awarded a $4,000 judgment as damages against Mr. and Mrs. Kearney for their tortuous post-foreclosure occupation of the property. The state court ruled:

> C. Defendants, William J. Kearney, Jr. and Susan King Kearney, and any of their dependents, are hereby ordered to vacate the property located at 4005 Old Leeds Ridge in Mountain Brook, Jefferson County, Alabama (the "Property") more fully described at Lot 10, according to the survey of Hobbs Addition to Mountain Brook, as recorded in Map Book 70,

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GRANTED." Id. (Paragraph B).

[386] Defendant's Exhibit 42 ("Plaintiff's Motion to Reinstate Default Judgment & Set Case on Active Docket").

> page 74, and amended by Real Volume 4273, Page 181, in the Probate Office of Jefferson County, Alabama, within ten (10) days of the date of this Order, but in no event later than 3:30 p.m., Thursday, November 19, 1998;
>
> D. Upon written notification from Regions' counsel to the Sheriff of Jefferson County, Alabama, that Defendants have failed or refused to vacate the Property by the aforestated date and time, said Sheriff is hereby ordered to physically remove Defendants, William J. Kearney, Jr. and Susan King Kearney, and any of their dependents, and any of their personal property, forthwith, and deliver the Property to Regions or its agent.
>
> ....
>
> F. In addition to the above relief, Regions is hereby awarded a monetary judgment against the Defendants, William J. Kearney, Jr. and Susan King Kearney, in the amount of $4,000 representing the rental value of the Property from June 17, 1998 through the date of this Order plus costs of this action.

Defendant's Exhibit 42 (Order on Regions Bank's Motion for Summary Judgment).

The issue of whether the automatic stay applied to Regions' ejectment action was squarely before the state court. And the state court determined that the stay did not prevent it from ordering Mrs. Kearney ejected from the property or from awarding damages to Regions.

Other federal courts have reviewed similar situations. The majority of the reported decisions have held that a non-bankruptcy court has jurisdiction to determine the applicability of the automatic stay to a proceeding before it. Writing for the Court of Appeals for the Sixth Circuit in Chao v. Hospital Staffing Services, Inc., 270 F.3d 374 (6th Cir. 2001), Circuit Judge Danny J. Boggs explained:

> Not surprisingly, courts have uniformly held that when a party seeks to commence or continue proceedings in one court against a debtor or property that is protected by the stay automatically imposed upon the filing of a bankruptcy petition, the non-bankruptcy court properly responds to the filing by determining whether the automatic stay applies to (i.e., stays) the proceedings.

Id. At 384.

A minority of courts disagree. Writing for the Court of Appeals for the Ninth Circuit in Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1083-1084 (9th

Cir. 2000), Circuit Judge Sidney R. Thomas explained, "Because of the bankruptcy court's plenary power over core proceedings, the County's argument that states have concurrent jurisdiction over the automatic stay under 28 U.S.C. § 1334(b) is unavailing."

Of course, a problem arises under the majority view, as here, when the non-bankruptcy court determines that the stay is inapplicable and proceeds to judgment, but the bankruptcy court is later asked to revisit the issue. When faced with that dilemma, most courts reporting decisions have concluded that the determination made by the non-bankruptcy court is binding on the bankruptcy court.[387]

(2) While Mrs. Kearney Left Some Personalty on the Property (and Mr. Kearney Continued to Reside in the House), Mrs. Kearney Vacated the Property and Removed the Vast Majority of Her Personalty from the House During the Weekend after Thanksgiving in 1998

On the day following the entry of the state court's order of ejectment on November 9, 1998, Regions delivered a letter to Mr. and Mrs. Kearney at the Old Leeds Ridge address demanding possession of the property.[388] Included with the letter was a copy of the state court's order of ejectment.[389]

On November 20, 1998, eleven days later, Mr. Leara sent a letter to the clerk of the Jefferson County, Alabama Circuit Court, asking her to, "issue a set out order to the

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[387] Covanta Onondaga Ltd. v. Onondaga County Resource Recovery Agency, 283 B.R. 651 (N.D.N.Y. 2002), vacated on other grounds, 318 F.3d 392 (2nd Cir. 2003); In re Bona, 124 B.R. 11 (S.D.N.Y. 1991); Singleton v. First Third Bank of Western Ohio v. Singleton (In re Singleton), 230 B.R. 533 (6th Cir. BAP 1999); Siskin v. Complete Aircraft Services, Inc. (In re Siskin), 258 B.R. 554 (Bankr. E.D.N.Y. 2001); In re Glass, 240 B.R. 782 (Bankr. M.D. Fla. 1999); Pope v. Wagner (In re Pope), 209 B.R. 1015 (Bankr. N.D. Ga. 1997); In re Cummings, 201 B.R. 586 (Bankr. S.D. Fla. 1996); Jeffries v. Bar J. Forest Products, Inc. (In re Jeffries), 191 B.R. 861 (Bankr. D. Or. 1995); State v. Weller (In re Weller), 189 B.R. 467 (Bankr. E.D. Wis. 1995); In re Bona, 110 B.R. 1012 (Bankr. S.D.N.Y. 1990), aff'd, 124 B.R. 11 (S.D.N.Y. 1991); In re Mann, 88 B.R. 427 (Bankr. S.D. Fla. 1988). Others have given deference to the decision of the non-bankruptcy forum. In re Montana, 185 B.R. 650 (Bankr. S.D. Fla. 1995); Mother African Union Methodist Church v. Conference of AUFCMP Church (In re The Conference of African Union First Colored Methodist Protestant Church), 184 B.R. 207 (Bankr. D. Del. 1995).

[388] Plaintiff's Exhibit 7.

[389] It is important to remember that Mrs. Kearney's stay violation argument is based **solely** on her contention that Regions' post-petition ejectment action constituted a violation of the automatic stay and caused her to lose certain personal property of primarily sentimental value. As discussed below, Mrs. Kearney did not request damages for the demolition of the house based on a stay violation. Consequently, the vast majority of the stay violation discussion will center on Mrs. Kearney's "missing" personalty.

Sheriff of Jefferson County on [Mr. and Mrs. Kearney] who have refused to vacate the residence at 4005 Old Leeds Ridge in Mountain Brook, Alabama." Defendant's Exhibit 47 (parenthetical added).[390] In accordance with Mr. Leara's request, the state circuit court clerk issued a directive to the county sheriff, instructing him to restore possession of the Old Leeds Ridge property to Regions and to collect $4,135 from the Kearneys for detention of said property.[391]

In response, Mr. and Mrs. Kearney reached an agreement with Regions in which Regions agreed to allow them to reside in the house through the Thanksgiving holiday and they would vacate after the Thanksgiving holiday.

On the weekend after Thanksgiving, Mr. and Mrs. Kearney loaded the majority of their personalty, including household goods, furniture, their nicer items, and anything else of material value, into a moving van and their personal automobiles, and removed that personalty to a storage facility. Mrs. Kearney testified:

Q. Let me ask you some questions about the eviction from your house. Maybe I was a little confused by your answers. You had already moved out of the house before January 6, 1999, hadn't you?
A. Yes, sir.
Q. You were not living in the home on the day the sheriff came and set the property out?
A. No.
Q. But your husband was; is that correct?
A. Probably, yes.
Q. Where had you moved?
A. I had moved to a friend's house out 280.
Q. And when did you move out of the home?
A. After Thanksgiving.
Q. In fact, your husband had told me in his deposition he thought you moved the weekend after Thanksgiving which might have been maybe right at the first of December. Does that sound right?
A. Something like that because the kids were home and helped move.
Q. And did you move some of the things with your personal car?
A. Yes, sir.
Q. And did you move some things with a moving van?
A. We stored some things with a moving van, yes, sir.
Q. And what was that company that you used?

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[390] The same document was also admitted into evidence as Plaintiff's Exhibit 6.

[391] Defendant's Exhibit 49.

A. It could have been Garrison and I think they are out of business now.
Q. So you had one of those eighteen wheeler kind of moving van trucks that came and picked up your furniture?
A. Yes, sir.
Q. And did you move the nicer things out?
A. Yes, sir.
Q. And those went to storage?
A. Yes, sir.
Q. So as of the day the sheriff came, you weren't living in the home and the moving van had already come; correct?
A. Right.
Q. But your husband continued to live in the house both after you moved out and after the sheriff did the eviction; correct?
A. Some, I think, yes.

Transcript at 410-12.

They also placed a number of items in a old passenger van, which they left parked on the property outside the house. The contents of the van included papers and linens. Mrs. Kearney testified:

> There were a lot of things that I had put in there just to get them out of the house. Like there was a lot of papers. There was a lot of papers in the van. I emptied out my linen closet in there because I didn't know where we were going.

Transcript at 363.

The items Mr. and Mrs. Kearney removed from the house included those items listed by Mrs. Kearney in schedule B of her amended bankruptcy petition filed on August 26, 1998, such as a large oriental rug worth $5,000 and crystal, china, silver, paintings, art work, books, and jewelry. She testified:

Q. Let me ask you about — I want to ask you a couple more questions about Exhibit 27 which is the summary of schedules. You told me, I believe, at your deposition that your husband assisted you and Mr. Pope in the preparation of this document?
A. Yes, sir.
Q. And that you all worked hard to try to make it accurate?
A. Yes, sir.
Q. And it is accurate to the best of your knowledge; correct?
A. Yes, sir.
Q. If I could direct your attention first to schedule "B," personal property, which is, I think, on this exhibit it is the third page in.

A. Yes, sir.
Q. You have got listed there household goods and furnishings, five thousand dollars; correct? That is what you listed?
A. Yes.
Q. That is accurate as far as you knew?
A. As far as I knew, yes.
Q. You have got large oriental rug, five thousand dollars; correct?
A. Yes.
Q. Now you actually sold that rug; didn't you?
A. Yes, sir.
Q. And you sold it without the permission of the court; didn't you?
A. Yes, sir.
Q. And you sent the money to the College of Wooster to pay tuition for one of your children?
A. Yes, sir.
Q. Crystal, china and silver, you still have that; don't you?
A. Yes, sir.
Q. Paintings and art work, you still have that?
A. Yes.
Q. Books, you had that but I believe you told me that it was damaged when you put it over at Redmont Gardens in the basement?
A. Yes, sir.
Q. Clothing, you moved your clothing out; didn't you?
A. Yes.
Q. So most of that you have; correct?
A. Yes.
Q. Wedding ring; Rolex watch, not working properly; bamboo ring; diamond and emerald rings; gold bracelet; diamond earrings. You have all of that?
A. Yes.
Q. And I think that covers the — that's all the actual personal property that's listed there. Now you said that you moved out with the moving van and your personal effort with your car and so forth the more valuable parts of your household goods and furnishings; correct?
A. The larger, more valuable pieces of furniture, yes.

Transcript at 416-18.

Mrs. Kearney and the other members of her family decided which items they would remove and which they would leave. Mrs. Kearney explained:

Q. And who was it that made the decision when the moving guy was in the house saying, "Okay, what do I box up next, what do I take next?" Who made the decision on what was to go and what was to stay?

A. It was a joint decision by everybody because everybody had stuff in the house and we just kept filling it up until the van was full.
Q. No one was over there from the bank; were they?
A. I don't think so.
Q. I mean it was someone in your family that made the decision what to get?
A. Oh, yes.

Transcript at 418.

Mrs. Kearney did not describe all of the items that she and her family members left in the house. But she admitted that not all of the items left in the house belonged to her. Some of the items left behind belonged to her children and some belonged to her husband. None of those individuals are of course parties to this action. Mrs. Kearney testified:

Q. Now were some of the things that were left items that were owned by your children?
A. Yes.
Q. And some of the things left were items owned by your husband?
A. Yes.

Transcript at 419.

The Kearneys did not remove all of their personalty from the house because they did not believe they had adequate space to store it. But, they did move most of it. What they could not take, they left in the house and in the van parked in the yard.

Mrs. Kearney testified that the total value of the items left in the house did not exceed $5,000. When asked, "So what would have been left there in the house must have had a value, according to the valuation, of less than five thousand dollars; correct..., she explained, "Materially, yes." Transcript at 418.

After moving the bulk of their personalty from the house, Mrs. Kearney and her minor son moved in with a friend. Mr. Kearney continued to live in the house. Mrs. Kearney testified:

Q. Let me ask you some questions about the eviction from your house. Maybe I was a little confused by your answers. You had already moved out of the house before January 6, 1999, hadn't you?
A. Yes, sir.
Q. You were not living in the home on the day the sheriff came and set the property out?
A. No.

Q. But your husband was; is that correct?
A. Probably, yes.
Q. Where had you moved?
A. I had moved to a friend's house out 280.
Q. And when did you move out of the home?
A. After Thanksgiving.

Transcript at 410-11.

Q. But your husband continued to live in the house both after you moved out and after the sheriff did the eviction; correct?
A. Some, I think, yes.

Transcript at 412.

(3) Regions Alleged Stay Violation Was Complete on January 6, 1999, When the Deputy Sheriff Removed the Kearneys' Personalty from the House, Even Though Mr. Kearney Immediately Moved It Back

At some unspecified point, either before or after Mrs. Kearney removed herself, her minor son, and the bulk of the family's belongings from the property, but prior to December 22, 1998, a deputy sheriff attempted to dispossess whomever and whatever remained on the property. When he arrived at the property he was greeted by Mr. Kearney. Mr. Kearney informed him that an agreement had been reached with Regions which would allow them to remain on the property.[392] Based on that representation, the deputy did not execute the instructions contained in the circuit court clerk's directive. Consequently, Mr. Kearney, and the personalty left behind, remained in the property.

On December 22, 1998, Mr. Leara sent a letter to a "Ms. Jones" with the sheriff's department, in which he informed her that Regions had not agreed to allow the Kearneys to remain in the house. Mr. Leara requested that the deputy return to the house and remove the Kearneys.[393]

On January 6, 1999, the deputy returned to the Old Leeds Ridge property, removed the personalty left in the house, and placed it outside by the garage. Mrs. Kearney testified that late in the afternoon of January 6, 1999, she received a telephone call from Mr. Kearney who told her that the deputy had removed the personalty from the house. She proceeded to the property and there observed, "a bunch of stuff outside the garage..." including her "washing machine ...." Transcript at 361. She did not itemize or describe the other items. She said that the "stuff" was not

[392] Transcript at 149, 202-03, 206, and 235.

[393] Plaintiff's Exhibit 8.

in the street. Id. She testified further that there had been rain that afternoon and that the "stuff" was wet, but, "It wasn't ruined." Id.

In later testimony, Mrs. Kearney stated that Mr. Kearney moved the "stuff" that had been removed from the house back into the house. She stated:

> Q. And you said that you know that your husband and your boys moved things back in the house that the sheriff had set out; correct?
> A. I never said my boys did.
> Q. Oh, just your husband?
> A. Right.

Transcript at 415.

The van which contained items that she had placed in there for storage in November 1998 was still parked on the property. The van's tires were not flat at that time.

(4) Mr. Mitchell Did Not Tell Mrs. Kearney that She Could Leave Personalty on the Property After Thanksgiving 1998, or that the Deputy Sheriff Would Not Remove the Personalty from the Property on January 6, 1999, or that Mrs. Kearney Could Store the Personalty on the Property Indefinitely

Mrs. Kearney contends that Mr. Mitchell told her that the property would not be removed from the house. She testified that she was not only upset because some of her personalty was removed from the house but she was also upset that some of the items had been "stolen."[394] She said that if she had known the personalty was going to be removed from the house, she could have prevented those things from being stolen. She testified, "Had I been there when they were putting the stuff out, then maybe stuff wouldn't have been stolen or, you know — because there was stuff stolen on that day, too." Transcript at 361-62.

Mrs. Kearney testified that, after she discovered that the deputy had purportedly removed her personalty from the house, she called Mr. Mitchell, spoke to him in an irate manner, told him that she was upset, and accused him of lying to her. Mrs. Kearney testified, "Because I told him that he had lied to me and that he had put my stuff out and it was awful... I mean it was not right." Transcript at 362. She added, "It was like the next day he called me and told me, you know, and I told him that I was really upset with him." Transcript at 363.

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[394] Transcript at 361-62 and 373.

According to Mrs. Kearney, Mr. Mitchell apologized to her and told her that he did not intend for what had happened, to happen. Mrs. Kearney testified, "And he called and he apologized and said that he didn't mean for that to happen and that he was sorry." Id. Oddly, Mrs. Kearney did not say that she complained or otherwise said anything to Mr. Mitchell about any of her personalty having been stolen.

Mr. Mitchell admitted he had a conversation with Mrs. Kearney relating to her vacating the premises, but indicated that it took place more than a month before the deputy purportedly removed Mrs. Kearney's belongings from the house.[395] According to Mr. Mitchell, the conversation took place in November 1998, subsequent to the entry of the ejectment judgment but prior to Mrs. Kearney's move and prior to the first time the deputy went to the property.[396] He said that the assurances he gave Mrs. Kearney on that occasion were intended for that occasion only. They were not intended to operate in perpetuity or to apply to future occasions or events.[397] Mr. Mitchell testified:

> I remember talking with her and telling her that we would work with her and that she needed to vacate the property, she needed to get her belongings out of there and I don't recall saying that we would never take anything away or never harm anything, but I can remember telling her that we didn't, you know, we had no intention of putting things out on the street that day or anything along those lines, just to be vacant, to be away from the property.

Transcript at 201.

Mr. Mitchell said that he never told Mrs. Kearney that Regions would not evict her from her house or would not have her personalty removed.[398] To the contrary, he specifically asked her to leave the house and to remove her personal property from the house.[399] And according to Mr. Mitchell, Regions never took any measures to prevent Mrs. Kearney from returning to the house and recovering any of the items left behind.[400]

Mrs. Kearney testified that Mr. Mitchell told her, "that everything would be okay." Based on that comment, Mrs. Kearney assume that it would be alright for her to leave items in the house. She testified:

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[395] Transcript at 235.

[396] Transcript at 202-03, 205-07, 235 and 238.

[397] Transcript at 206.

[398] Transcript at 236.

[399] Transcript at 237.

[400] Id.

Q. Susie, why didn't you take everything out of the house either before January 6, 1999, or on that day before you walked out?

A. Initially when Mike told me that everything would be okay, I walked out and left that. I had not taken everything out yet because I thought that we were going to get to move back in, and I had no place — we didn't have a house or anything to put all of the things that were in the basement and in the garage. And then as time went on, I just thought that everything would be fine until they sold the house or we bought the house and I got everything back.

Q. Did you think it was safe in the house, being left in the house, after the assurance from Mr. Mitchell?

A. I thought it was, yes.

Transcript at 377.

As explained above, the Kearneys had agreed with Regions to remove themselves and all of their property from the house immediately after Thanksgiving.[401] On that basis alone, this Court cannot infer that "everything would be okay," meant that the Kearneys could leave personalty in the house indefinitely even if they had previously agreed to remove it. Consequently, the Court finds that Mrs. Kearney was unjustified in assuming that "everything would be okay" or that it was alright for her to leave her personalty in the house indefinitely even though she had previously agreed to remove it. Circumstantial evidence supports this conclusion.

Mrs. Kearney emptied her linen closet into a van parked outside the house and filled the remainder of a van with her personal papers. Those are not the actions of one who thought that it was alright to leave personalty in the house. Instead, it suggests that Mrs. Kearney did not believe that she had Regions' permission to leave things in the house.

On direct examination, Mrs. Kearney was asked when she thought the bank was going to "evict" her and assure she was "out" of the house. In response, she stated:

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[401] Transcript at 108-09. The agreement the Kearneys had with Regions was that they would remove themselves and their personalty from the house immediately after the Thanksgiving 1998 weekend, if Regions would allow them to celebrate the holiday in the house. Mr. Smith testified:

> In fact, Mike Mitchell came to me — we had asked them to leave several times and he came to me the week before Thanksgiving and said that they had agreed to leave the house if we would let them have Thanksgiving in the house and we agreed to do that and then they did not move out.

Transcript at 108-09.

Q. When did you get any information that the bank was going to come in and evict you and make sure you were out of the residence?

A. It seemed like that after Thanksgiving, Mike Mitchell would say in another week because we were still trying to buy the house. And he would say, well, another week or — I mean it just kept being delayed. And I was talking to him pretty regularly then.

Transcript at 360.

The meaning of the question and Mrs. Kearney's answer is completely unclear. Mrs. Kearney had already vacated the property and moved the majority of her personal items out of the house, and was not living in the house. She was "out of the residence." Further efforts to "evict" her were unnecessary.

Mrs. Kearney testified that she had a conversation with Mr. Mitchell on the morning of January 6, 1999. (It would be later that day the deputy sheriff would serve the writ of ejectment.) Mrs. Kearney recounted her conversation with Mr. Mitchell. She testified:

> "Yes, because I had called Mike and he said, "Well, the sheriff is going to come today." And I said, "Well, I have got almost everything out but I have some things that are still here." And I was trying to work with Mike and he was trying to work with me. And he said, "Well, the main thing is for you to be away from the house, nobody there, when the sheriff comes." And I said, "Okay, but I have got some stuff here." And I said, "Are they going to put it out or whatever?" And he said, "No, they are not going to do anything with it, just you be away."

Transcript at 360-61.

Mrs. Kearney's rendition of the conversation in part contradicts her contention that the conversation occurred on the same day that the deputy served the writ of ejectment. Mrs. Kearney testified that she moved out of the house in November 1998. If she was not personally residing in the house when she spoke with Mr. Mitchell, as she previously testified, then why would Mr. Mitchell have told her not to be in the house when the deputy arrived. The implication is, he told her to leave the house because she was still living there. That agrees with Mr. Mitchell's testimony that the conversation occurred before the deputy's first visit to the property in November 1998.

On cross examination Mrs. Kearney testified:

Q. You testified about a conversation you had with Mike Mitchell. Now was that conversation you had with Mike Mitchell at the time you moved out of the house or before?

A. That was probably — if you are talking about the conversation about the stuff putting out in the yard, that was after I moved out.
Q. The conversation you had with Mike Mitchell about you needing to get out of the house, you are saying that happened after you got out of the house?
A. No.
Q. So it happened before you got out of the house; didn't it?
A. I don't know if I was still living — I am confused because I may not have been sleeping there but I was there that morning when the sheriff was supposed to come and that's when I talked to Mike but, I mean, there weren't — no, I wasn't living there because there were no beds or anything in that house.

Transcript at 413-14.

Mrs. Kearney admits that Mr. Mitchell's recollection of the conversation, whenever the conversation occurred, is accurate. She also admits that Mr. Mitchell did not assure her that the property would never be removed from the house or that Regions would never insist that the property be removed from the house. Mrs. Kearney testified:

Q. Well, Mike Mitchell has testified and, of course, you were here but just so we won't have any mistake, that he told you that, as he said on page 111 of his deposition, I remember talking with her and telling her that we would work with her and she needed to vacate the property, she needed to get her belongings out of there and that I don't recall saying we would never take anything away or never harm anything, but I remember telling her that we didn't, you know, we had no intention of putting things out on the street that day or anything along those lines, just to be vacant, be away from the property.
Is that essentially what he told you?
A. Yes.
Q. He never said that your property would never be removed from the house; did he?
A. No.

Transcript at 414.

Mr. Mitchell testified that the conversation occurred in November 1998, not on January 6, 1999. That is significant as November 1998 was before the deputy's first visit to the property and before Mrs. Kearney moved out of the house. That recollection agrees with the evidence rather than Mrs. Kearney's recollection.

Mrs. Kearney's testimony about the time of the conversation is also contradicted by other testimony. Mr. Leara testified that he personally visited the Old Leeds Ridge property a couple of times after Mrs. Kearney moved out of the house but before the deputy arrived on January 6, 1999.[402] When he visited the property he observed that most of the furniture was gone and that the remaining personalty was of little intrinsic value.[403] He said that Mr. Kearney was still occupying the house.[404] Mr. Leara also testified that on more than one occasion he asked the Kearneys to remove the remaining personalty from the house.[405] And on several occasions he asked Mr. Kearney to move himself and his belongings from the house.[406]

According to Mr. Leara, Mr. Kearney assured him each time that he would.[407] But the Kearneys did not. That failure required the deputy to return on January 6, 1999.[408]

Mr. Ware, who worked for Regions Financial Corporation, (Regions' holding company), testified that just after Thanksgiving 1998, he was directed to recover the Old Leeds Ridge property for the bank and sell it.[409] At that time, he went to the property where he met Mr. Mitchell and Mr. Kearney.[410] He said that at that time there was very little, if any, furniture remaining in the house.[411] In fact, he could not recall seeing any furniture.[412] On that visit, he asked Mr. Kearney to remove the personalty remaining in the house.[413] Mr. Kearney told him that he would, but that he did not know

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[402] Transcript at 166.

[403] Transcript at 166-67.

[404] Transcript at 167.

[405] Transcript at 152 and 167.

[406] Transcript at 152.

[407] Id.

[408] Transcript at 167.

[409] Transcript at 278.

[410] Transcript at 279.

[411] Id.

[412] Id.

[413] Id.

where he was going to put it.[414]

Also on that visit, Mr. Ware noticed a spot on the ceiling in the dining room where it appeared a large chandelier once hung.[415] Mr. Kearney told him that he had removed the chandelier because it was a "family piece." Transcript at 280.

Mr. Ware said that he was present on several other occasions when Mr. Leara, asked Mr. Kearney to make arrangements with Mr. Ware to remove the remaining personalty from the house.[416] According to Mr. Ware, Mr. Kearney did not remove the personalty from the house and did not contact him about retrieving that personalty.[417]

Mr. Ware also testified that he visited the property in the afternoon of January 6, 1999.[418] After the deputy executed the state court's ejectment order, the sheriff's department contacted Mr. Ware and informed that he should have the lock changed.[419] Mr. Ware testified that he arranged to meet a locksmith at the house.[420] When Mr. Ware arrived at the house there was no personalty in the yard or in the street in front of the house.[421] And it was not raining.[422] Mr. Ware testified that there were a few items in the house and some boxes in the basement. In his opinion there was nothing of any real value.[423]

The locksmith changed the locks.[424] Because the lock on the back sliding door could not be changed, the door was boarded.[425] The locksmith gave the keys to Mr.

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[414] Transcript at 280.

[415] Id.

[416] Transcript at 280.

[417] Transcript at 280-81.

[418] Transcript at 273 and 281.

[419] Transcript at 273-74.

[420] Transcript at 273.

[421] Transcript at 274 and 281.

[422] Transcript at 274.

[423] Id.

[424] Transcript at 274-75

[425]Transcript at 275.

Ware who then left.[426] All of the doors were locked or boarded when Mr. Ware left.[427]

In contrast to the picture painted above, the Kearneys were not penniless. Throughout the conduct of this bankruptcy case, the Kearneys offered to purchase many items from the trustee including their former homestead, their former condominium, their non-exempt personalty, certain stocks and bonds, the ROP property, and a leased lake lot. Those were not the acts of impecunious people. They could have stored the small amount of remaining personalty. The fact that they elected not to suggests that they did not remove the personalty from the house because they wanted it to stay there.

Mr. Kearney's actions confirm that conclusion. Mr. Kearney continued to reside in the house after Mrs. Kearney moved out, even after the deputy moved the personalty out of the house on January 6, 1999. It is apparent that many of the items remaining in the house on that day were items left specifically to accommodate Mr. Kearney's continued occupancy. The items were such things as a big screen television, clothing, toiletries, tables, chairs, washer, dryer and a sofa. That of course explains why Mr. Kearney moved those items back to the house after the deputy departed. And it is further evidence why he and Mrs. Kearney did not later remove the items.

In conclusion, Mrs. Kearney did not submit any evidence that Mr. Mitchell's alleged misrepresentation was intentional. Neither Mr. Mitchell nor Regions had anything to gain or lose by telling Mrs. Kearney that the deputy would not set her personalty out on January 6, 1999. According to Mrs. Kearney's testimony, she was not in a position to stop the deputy. So the purported misrepresentation could not have aided, assisted, or otherwise facilitated Regions' effort to get the personalty out of the house.

At the time, Mr. Mitchell was in the process of leaving the bank to accept other employment. Therefore, the purported misrepresentation could not have accomplished anything in connection with his job at Regions or could not have been expected to endear him to his superiors at Regions. Absent any apparent selfish motive, it is more likely than not that Mr. Mitchell's alleged misrepresentation, if it occurred, was an innocent product of mistake rather than intent. Consequently, there is no evidence of malice, bad faith, or vindictiveness that may be inferred from the alleged misrepresentation.[428]

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[426]Transcript at 274-75.

[427]Id.

[428] As discussed in great detail below, the evidence demonstrates that Mrs. Kearney did not "lose" her personalty and did not suffer injury or damage as a consequence of Mr. Mitchell's alleged misrepresentation.

(5) Mrs. Kearney Had Ample Opportunity to Purchase Her Former Homestead from the Trustee and Regions.

Mrs. Kearney contends that after the foreclosure Regions intentionally blocked her efforts to recover her home. Her complaint reads:

> Plaintiff further avers that defendant interfered with the agreed proposals for purchase of her purportedly foreclosed property in furtherance of the scheme, plan and design set forth above in an effort to negligently, wantonly or intentionally thwart plaintiff at all times in her efforts to get her home back for her family.

Amendment to Complaint, paragraph 14, attached to Plaintiff's Motion to Amend filed September 29, 2000, AP Proceeding No. 19.

The evidence does not support this claim. In summary, the evidence demonstrates that Mrs. Kearney could have recovered her home by purchasing the statutory right of redemption from the trustee and then exercising that right by paying Regions the amount owed on its debt, plus additional lawful charges. See Ala. Code 1975, § 6-5-253. Similarly, Mrs. Kearney's testimony does not support her claim.

Mrs. Kearney did not did not testify that Regions thwarted her efforts to purchase her former residence. Similarly, she did not explain or describe how Regions thwarted any effort she made to recover her home. In addition, she did not describe anything in particular that Regions did or did not do that thwarted any effort she made to recover her home. Instead, she earnestly attempted to create the impression that Regions, through Mr. Mitchell, encouraged her to believe she would have an opportunity to recover the Old Leeds Ridge property.

She testified that: (1) she emphasized to the bank that she wanted the property; (2) that she entertained "hopes" and "expectations" that she might recover the property; and (3) that it "appeared" to her from "meetings" that the bank was going to "work" with her. Transcript at 370.

In addition, Mrs. Kearney testified that she "always thought" that she would be able to work things out with Regions and recover the house, and that Mr. Mitchell "contributed" to that belief because he told her that he would "work" with Mr. Kearney and with her. She testified:

> Q. Were you under the impression or was it ever stated to you that you were going to work things out and get the house back?
> A. I always thought I was.

Q. Did Mr. Mitchell contribute to those hopes?
A. Yes, because he said he would work with us.

Transcript at 360.

But, unfortunately for this Court's consideration, Mrs. Kearney did not say what Mr. Mitchell told her. She did not explain what she thought Mr. Mitchell meant when he said, "he would work with" her. And, she did not say what she thought the bank was supposed to do for her. The question then becomes: What then is a reasonable construction of Mr. Mitchell's representation?

Certainly, Mr. Mitchell's words cannot be construed as an offer by Regions to allow the Kearneys to recover the Old Leeds Ridge property without paying their debt. And given the numerous times that the Kearneys had defaulted on their financial commitments to Regions, and their lack of funds to pay that debt, it would have been unreasonable to believe that Regions would extend advantageous financing terms.

Similarly, it would have been unreasonable to believe that Regions did not intend to entertain other offers for the house, especially since the trustee, not Mrs. Kearney, owned the right to redeem the property. And certainly it would be equally unreasonable to believe that the trustee would have allowed Mrs. Kearney to exercise that right without paying a premium to the estate and without seeking to sell it first for an amount greater than that required to redeem it from Regions.[429]

In contrast to her contention that Region's did not "work with her," on cross examination Mrs. Kearney explicitly admitted that Regions gave her an opportunity to purchase the house during the bankruptcy case. She did not however have the funds to do so. She testified:

Q. You had plenty of opportunities to buy this house back even after the foreclosure; didn't you?
A. Yes, sir.
Q. The bank offered to sell it to you for the same price they bid it in. They wrote a letter to your husband. You knew about that; didn't you?
A. Yes, sir.
Q. Did you call your friends and ask them to give you a million dollars?
A. Yes, sir.
Q. Did they give it to you?
A. They were trying to work out a deal with the bank.
Q. Did they give it to you? Did they give you the million dollars, Mrs. Kearney?

[429] And in fact, that is what he attempted to do.

A. Had the bank —
Q. Mrs. Kearney, did they give you the million dollars to buy your house back?
A. No.
Q. And even if they had given you a million dollars, which they didn't, you had no ability to repay them; did you?
A. I don't know.
Q. Well, you swore to this court in August that your liabilities were three million, nine hundred and five thousand dollars. Is that true?
A. If I said so in that, yes.
Q. And I will ask you again if your friends had given you a million dollars in June, July, August, September, any time of the year of 1998, you did not have the ability to pay it back; did you?
A. I can't answer that.
Q. Well, and I get back to this petition you have filed with this court and sworn to where you have said you had liabilities of nearly four million dollars that you couldn't pay. Is that true?
A. That's true.
Q. So you couldn't pay these liabilities, what is it that makes it difficult for you to answer whether you could pay a million dollars to somebody else? If you are not able to pay three million, nine hundred thousand dollars to creditors such as the IRS that you have listed here, what makes you think that you could pay a million dollars to somebody that might have given it to you during that time period?
A. Well, I would hope that I would be able to pay all of it off with some kind of deal or something like that.
Q. To this day you haven't paid these creditors; have you?
A. No, sir.

Transcript at 394-96.

It is evident from Mrs. Kearney's testimony that despite the implication from her direct testimony, Regions and the Chapter 7 trustee provided Mrs. Kearney a fair and reasonable opportunity to purchase her home.[430] That conclusion dispels any inference that Regions intentionally thwarted her effort to regain her former homestead as well as any possible inference that Regions is guilty of bad faith.

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[430] As a practical matter, the trustee held the right of redemption and it was his decision, not Regions, to determine the price he would accept. In that sense, Regions was not involved. The Kearneys could have purchased the right of redemption directly from the trustee, just like anyone else. There was nothing that Regions could have done to stop them.

Mrs. Kearney's failure to recover her former home was because of her inability to raise the money necessary to purchase the right of redemption from the trustee and to redeem the property from Regions. That failure was the result of her inability to convince her friends to provide her with that money. There is no evidence to indicate otherwise.

Mrs. Kearney has yet to produce a contract of sale or similar document signed by any of her friends, much less a document in which any of her friends expressly agreed in writing either to purchase her home or to loan her the money to purchase the home.

Mr. Leara testified that in the time between foreclosure and the time Mrs. Kearney's former homestead was sold to the Meislers, neither Mr. Kearney nor Mrs. Kearney ever submitted a written purchase offer for the property signed by anyone ready and able to purchase the property. And no earnest money was ever delivered.[431]

Mr. Mitchell testified that the Kearneys did not ever make a concrete offer, execute a contract to purchase, or deliver any earnest money. He testified further that he did not receive anything else from them that indicated that they had the ability to redeem their former homestead.[432]

Mr. Smith testified that the Kearneys approached Regions with several proposals to purchase their former homestead but none were viable.[433]

In summary, Regions provided Mrs. Kearney a fair opportunity to regain her former homestead. Her failure to take advantage of that opportunity did not result from anything Regions did or did not do. Those facts dispel any possible inference that Regions dealt unfairly or in bad faith or that it did not honor its purported commitment to "work with" her. Consequently, based on the evidence, the Court must conclude that Regions did work with Mrs. Kearney and did not thwart her efforts to regain her former homestead. Consequently, Regions was not guilty of bad faith.

(6) Regions did not Cause Mrs. Kearney to Lose any of the Personalty She Left on the Property

Mrs. Kearney's claim for "actual damages" for Regions' alleged stay violation rests mainly on her contention that certain items of personalty described as having primarily sentimental value, were either "damaged," or "stolen" or otherwise became

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[431] Transcript at 169.

[432] Transcript at 253.

[433] Transcript at 64.

"missing" because Regions forced her to vacate her former homestead in November 1998. While Mrs. Kearney did not offer any evidence to prove that Regions caused such damage even if such damage existed, there is evidence that it did not.

(a) Who Removed the Property?

If Regions did not cause the property to be removed, the question then becomes: Who removed the property?

i) General Considerations

The evidence reflects that if Mrs. Kearney lost any of the personalty she left on the property, Regions did not cause that loss. If there was a loss, it was caused by Mr. Kearney, other members of Mrs. Kearney's family, the Meislers, or other unidentified persons who removed items from the house. Consequently, Mrs. Kearney cannot prove that even if she suffered damages, Regions caused those damages.

In contrast, the evidence demonstrates that: (1) Mr. Kearney was secretly occupying the house when most of the items disappeared; and (2) Mrs. Kearney failed to retrieve her personalty from the property even though she had ample time and opportunity to do so.

On direct examination, Mrs. Kearney testified that after January 6, 1999, she, Mr. Kearney, and a minor son, lived in a small, uncomfortable basement of a friend's house. According to her testimony, she did not return to the Old Leeds Ridge property. On the other hand, the evidence demonstrates that Mr. Kearney continued to occupy the property.

While Mrs. Kearney's testimony contained some inconsistencies, she did testify that Mr. Kearney was living on the property. She testified first:

> Q. Were there times between when you and Sean Patrick were sleeping on the futon that Bill would go to the house?
> A. No.

Transcript at 383. She later testified:

> Q. Do you know if Bill was sleeping or staying at the house? I am trying to remember — it was Exhibit 117, I think, when Mr. Ware was here this morning and said he swore out a complaint about Bill being there. That is Defendant's Exhibit 117, which was reported March 16th of 1999. Was Bill going up there and sleeping?
> A. I am not sure if he was sleeping up there. I don't think he was because at the time we were still — I mean I know he wasn't sleeping up there because, at that time, he was staying with us at

the friend's house because we were still there. I think he would go up there some to feed the dog that was still up there.

Transcript at 383.

On cross examination, Mrs. Kearney admitted that Mr. Kearney lived in the house, but she could not recall how long he lived there or how often he spent the night there. She testified:

Q. You were not living in the home on the day the sheriff came and set the property out?
A. No.
Q. But your husband was; is that correct?
A. Probably, yes.

....

Q. But your husband continued to live in the house both after you moved out and after the sheriff did the eviction; correct?
A. Some, I think, yes.
Q. And in fact he continued to move things out of the house on a piece of piece basis?
A. I don't really believe he did because we had no place to put it.
Q. Well, maybe I just asked the question a little differently than the way I asked it at the deposition. I suppose what I asked then was as he lived there, he could have gotten things that he wanted if he wanted to get them during the time he was living there?
A. Yes.
Q. And you know that he continued to live there for sometime after the sheriff came. Can you tell us more definitely how long he lived there after the sheriff performed the eviction?
A. I really can't because by that time we had moved to — it wasn't very long because then he was with us in the basement, it seems like from day one, so I don't think it was — if he stayed, it wasn't that long. I mean I know he stayed some nights afterwards.
Q. How was he getting in the house after the sheriff came and the locks were changed, how would he get in the house?
A. I can't answer that. I don't know.

Transcript at 411; 412-13.

ii) Stolen or Missing Items

Mrs. Kearney claims that many of the items in the house at the time when the deputy executed the writ of possession on January 6, 1999, were either "stolen" or are "missing." She blames their removal on the deputy.

Over a year and nine months after January 6, 1999, Mrs. Kearney prepared a list of the items she contends were in the house when the deputy executed the writ of possession. She testified:

> Q. I have asked — or, excuse me, I think the bank had asked that we try to list as best we could the personal property that was in the house. And if you will turn with me to Exhibit 83 for the plaintiff. Is this a list that you helped me compile?
> A. Yes.
> Q. By looking back and trying to recreate what had been left there?
> A. Yes, it is.

Transcript at 372-73.

Mrs. Kearney's list reads:

1. Baby dresses - smocked.
2. Baby gowns with tacking made by Great Aunt.
3. Linens embroidered as wedding presents by Great Aunt.
4. Linens embroidered by Nuns as gifts for free medical services by my Uncle.
5. Oil painting by woman as payment to my Uncle for bread during depression
6. War chest with W.W. II Memorabilia.
7. Gifts to my mother from Japan.
8. High School and Grade School memorabilia.
9. Clippings and articles about my sister's murder.
10. Mother's wedding album.
11. Documents about family bakery - McGough. Stationary - emblems - calendars, ads with my picture, toy trucks with emblems.
12. Clippings on my Aunt's career with the bakery - very unusual in 1950's for woman.
13. Handmade baptismal gown used for all of my children.
14. Bicycle $500.
15. 2 chain saws.
16. Lawn mower
17. Washer/Dryer
18. Van
19. Grandfather's antique rocker.
20. 2 wooden cabinets.
21. Rose Garden - 25 bushes.
22. Rose garden equipment
23. 3 filing cabinets.
24. 2 chandelier.
25. Pots, pans, & silverware.

26. Big screen TV for children.
27. War chest with WWI memorabilia.
28. 2 boxes of photos.
29. Stereo for children.
30. 2 walkman for children.
31. Nintendo and games for children.
32. Camera for children.
33. Children's art work.
34. First communion veil - mine.
35. Box of baby clothes and blanket bought my mother and aunt.
36. Sofa.
37. Items listed in complaint to court.

Plaintiff's Exhibit 83.

Mrs. Kearney used the term "stolen" to refer to items that were in the house when she moved in November 1998 but which were not in the house when she returned on January 6, 1999. She testified:

> Q. You mentioned earlier some things stolen. What in your mind helps you discriminate between what was stolen or missing and what was damaged?
> A. The things that I know were stolen at the outset when the sheriff put the stuff out, I mean I know those were stolen. Whether the rest of these things were stolen or not, I don't know. I mean because I knew that they were there in the house and I knew that the cameras were gone, the thing of change was gone, and some foreign coins and the kids' stereos and things like that. So I knew they were stolen.

Transcript at 373.

Mrs. Kearney testified that, according to her definition of stolen, the camera, the stereo equipment, and some foreign coins, which are not on the list, were stolen between the time the deputy purportedly put them outside the house and the time she arrived at the house. But, as indicated before, Mrs. Kearney moved out of the house in November 1998 and did not live in the house thereafter. So, although she could testify that a camera, some stereo equipment, and foreign coins were in the house when she left in November 1998, she could not have had any personal knowledge of whether those items were in the house on January 6, 1999. And because she was not at the house when the deputy arrived, she did not witness anything being stolen and does not have any personal knowledge that the items were stolen.

Moreover, Mrs. Kearney did not suggest or offer any proof as to who may have stolen those items. Similarly, Mrs. Kearney did not testify that she told Mr. Mitchell

about the purportedly stolen items, she did not contact the police, and, she did not file an insurance claim.

Mrs. Kearney's use of the term "missing" is a little more complicated. She seems to use the term to refer to things which were in the house before the deputy came but which disappeared the moment he left. She testified:

> Q. Are all of these things that are listed on Plaintiff's Exhibit 83 still missing?
> A. Yes.
> Q. And have they been missing since the sheriff evicted you on January the 6th, '99?
> A. Yes.
> Q. Were they there on that day prior to the eviction?
> A. Yes.

Transcript at 373-74.

The question then is: Who removed the items?

iii) The Deputy Sheriff?

Mrs. Kearney contends that the deputy removed the personalty from the house and placed it in the yard. In contrast, she does not contend that the deputy removed the personalty **from the Old Leeds Ridge property**.[434] And, Mrs. Kearney does not contend that the deputy, on any occasion after January 6, 1999, removed personalty from the house or the van, or otherwise disposed of the van or personalty.[435] And the evidence demonstrates that after the deputy moved out of the house on January 6, 1999, Mr. Kearney immediately moved back in. Consequently, at the end of the day on January 6, 1999, Mrs. Kearney's personal items, which she now contends are "missing," were in the same location she left them and in the same condition she left them when she moved out of the house in November 1998. And they were where Mr. Kearney, not the deputy, put them.

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[434] Defendant's Exhibit 116 and Meisler Transcript at 48.

[435] Some of the items listed above, such as the van filled with linens and papers, a sofa, and the big screen television, remained on the property for almost a year after the deputy executed the ejectment order. For example, the van the Kearney's loaded and left parked on the property in November 1998 was not moved or disturbed by the deputy. Since the deputy took no action in relation to the van on January 6, 1999, his actions cannot possibly have caused or contributed to the later disappearance of the van.

Similarly, this Court cannot find that Regions is responsible for Mrs. Kearney's subsequent loss of the items. By her own admission, Mrs. Kearney never returned to the house after January 6, 1999. Therefore, she has no way of knowing, and does not profess to know, of her own personal knowledge, what happened to the personalty. She testified:

> Q. After you left physically and the property was put outside by the sheriff, did you ever spend another night in that house?
> A. No.
>
> ....
>
> Q. Did anyone tell you that they were changing the locks on the house? Do you remember knowing about that on the day of the eviction?
> A. I don't know but it didn't matter to me because I didn't go back up there. I mean I assumed that they had changed the locks.

Transcript at 371; page 377.

Based on Mrs. Kearney's testimony, the Court must conclude that there is no evidence that any actions taken by the deputy, either on January 6, 1999, or thereafter, caused, contributed to, effected, produced, or facilitated, in whole or in part, directly or indirectly, the removal and disposition of the van and personalty from the Old Leeds Ridge property. Consequently, there is no evidence that the deputy removed personalty from the house on January 6, 1999, and he did not cause, and had no role in causing, any loss of personalty.

iv) The Meislers?

The only substantial evidence before the Court regarding the disposition of the personalty left by Mrs. Kearney in the house after January 6, 1999, is from the testimony of Mr. and Mrs. Meisler. Mr. Meisler testified that when he purchased the Old Leeds Ridge property on September 28, 1999, he observed an old Chevrolet van parked on the property in the grass to the right of the driveway.[436] The doors were locked and the tires were flat.[437]

He also testified that there were some items of value in the house including a big screen television and a sofa. There were also some photograph albums and other personal effects that the Meislers thought might be of sentimental value to the

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[436] Meisler Transcript at 40.

[437] Meisler Transcript at 40-41.

Kearneys including some children's dresses.[438] And there was a "bunch of stuff in the garage" such as old garden tools and similar items. Meisler Transcript at 39. As explained above, Mr. Meisler testified that Mrs. Meisler delivered some children's dresses to Mrs. Kearney through a mutual acquaintance.[439]

Mr. Meisler testified further that after he purchased the property, but before the house was demolished, he observed that the van was gone.[440] A couple of days later, he discovered that the sofa, big screen television and everything else of any material value had been removed from the house.[441] He said that all that remained in the house were some garden tools and similar items of insignificant value.[442] Mr. Meisler testified that he discarded the remaining items by placing them in a dumpster just prior to the day that the house was razed.[443] In his estimation, the total value of the items that he put in the dumpster was less than $1,000.[444] He said that nothing he discarded had any significant monetary value.[445]

Mrs. Meisler testified that the personal items in the house when they purchased the property included the television, the sofa, clothes, toys, shoes, toothpaste, toothbrushes, shaving cream, photographs, papers, documents, food, tables and chairs.[446] She said that everything looked old and moldy.[447] She recalled the van parked on the property and said that it appeared to contain boxes full of papers.[448] She said that there were also boxes of papers in the garage.[449] She agreed with Mr. Meisler

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[438] Meisler Transcript at 42.

[439] Id.

[440] Meisler Transcript at 41.

[441] Meisler Transcript at 48.

[442] Meisler Transcript at 50-51.

[443] Meisler Transcript at 49-50.

[444] Meisler Transcript at 51.

[445] Id.

[446] Meisler Transcript at 66.

[447] Id.

[448] Meisler Transcript at 62-63.

[449] Meisler Transcript at 63.

that the total value of the property remaining in the house after the removal of the van, sofa, and television did not exceed $1,000.[450]

Mrs. Meisler also testified that she asked a friend named Cathy Duggan, who knew Mrs. Kearney, to tell Mrs. Kearney that the house was to be razed and that Mrs. Kearney was welcome to retrieve the items left in the house.[451] Ms. Duggan conveyed the message to Mrs. Kearney. Mrs. Kearney told Ms. Duggan to tell Mrs. Meisler that she did want some "smocked dresses" that were in the house.[452] Mrs. Meisler found those in an upstairs room.[453] Mrs. Meisler later saw another neighbor, someone named "Emily," at a social event.[454] Emily asked her if she had found the dresses Mrs. Kearney requested.[455] Mrs. Meisler told her she had.[456] Emily asked Mrs. Meisler to bring the dresses to her.[457] Mrs. Meisler delivered the dresses to Emily's home.[458]

Mrs. Kearney admitted that Mrs. Meisler returned some "smocked dresses" to her but her rendition of the circumstances involving the return of those dresses differs slightly from Mrs. Meisler's. Mrs. Kearney testified:

> Q. Now let me go back to the Meislers. We have been told earlier by Mr. and Mrs. Meisler in testimony that there were some items that she sent back to you. Is that true?
> A. Yes.
> Q. Now how did that happen?
> A. I was working in the library and a neighbor, a friend of mine, came in the library and she said, you know, I kind of remember somebody has got something that they wanted me to get for you but I can't remember what it is now. And she went around the library and then she came back and she said, "I remember." She said, "I met the people who bought your house and the lady asked

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[450] Meisler Transcript at 66.

[451] Meisler Transcript at 61.

[452] Id.

[453] Meisler Transcript at 61-62.

[454] Meisler Transcript at 68.

[455] Id.

[456] Id.

[457] Id.

[458] Meisler Transcript at 68-69.

me if I knew you." And my friend said, "Yes." And the lady said, "Well, I have got some things that I would like to get to her." And so then Emily, the friend that I was talking about, I said, "Well, call her and tell her you know where I am and tell her I would like to have them back." So about two weeks later Emily came in with a sack of a few smocked dresses that Mrs. Meisler had found at the house.

Q. What kind of sack?
A. It was a plastic garment bag.
Q. And these were items that you knew had been left in the house?
A. Yes.
Q. Are those items listed on what we created to show the court was lost?
A. No.
Q. Have they been excluded from there?
A. Yes.
Q. Do you have a judgment about how many smocked dresses or items were returned in that sack?
A. Probably about four dresses.
Q. You were glad to get them back?
A. Oh, yes, because I had made them for Julie.

Transcript at 379-81.

From their observations at the property, the Meislers believed that someone was living there. A blue car was parked in the drive.[459] Dogs were living in the house, and it appeared that they were being fed.[460] The house contained necessary living items such as clothing, toiletries, food, tables and chairs, a sofa, and a television.[461]

In regard to the disappearance of the van, Mrs. Kearney filed a report with the Mountain Brook police on December 23, 1999, claiming that someone had stolen her 1984 Chevrolet van from the 4005 Old Leeds Ridge property. That report corroborates the Meislers' testimony.[462] Mrs. Kearney told the police that the van was left in the yard after Regions took possession of the real property, and that "most likely" one of Regions' representatives had removed it.[463] She told the officer taking the report that

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[459] Meisler Transcript at 51 and 67-68.

[460] Meisler Transcript at 51 and 66-67.

[461] Meisler Transcript at 48 and 66.

[462] Defendant's Exhibit 116.

[463] Defendant's Exhibit 116.

she had not been able to locate the van, and that the van contained important documents.

The Court does not have any reason to doubt the Meislers' testimony. Neither has a personal interest in the matters before this Court. And other than a slight disagreement about the return of the dresses, Mrs. Kearney did not controvert the Meislers' testimony or suggest that it was not credible. Consequently, the Court must conclude that the items described on the list prepared by Mrs. Kearney were all either removed from the house by someone other than the Meislers or were disposed of by Mr. Meisler. In the case of the "smocked dresses," they were returned to Mrs. Kearney.

The Court's conclusions are supported by a preponderance of the evidence, at least as to what happened to the personalty left by the Kearneys on the Old Leeds Ridge property in November 1998. However the question of who removed the personalty (other than the dresses returned to Mrs. Kearney and the few items disposed of by Mr. Meisler), or who directed or facilitated its removal, remains unanswered.

v) Mr. Kearney?

The only substantive evidence about the removal of the van and other personalty from the Old Leeds Ridge property after January 6, 1999, suggests that Mr. Kearney removed the personalty. According to Mrs. Kearney's testimony, Mr. Kearney frequented the house and often resided in the house after she had moved and after January 6, 1999. She testified:

Q. But your husband continued to live in the house both after you moved out and after the sheriff did the eviction; correct?
A. Some, I think, yes.
Q. And in fact he continued to move things out of the house on a piece of piece basis?
A. I don't really believe he did because we had no place to put it.
Q. Well, maybe I just asked the question a little differently than the way I asked it at the deposition. I suppose what I asked then was as he lived there, he could have gotten things that he wanted if he wanted to get them during the time he was living there?
A. Yes.
Q. And you know that he continued to live there for sometime after the sheriff came. Can you tell us more definitely how long he lived there after the sheriff performed the eviction?
A. I really can't because by that time we had moved to — it wasn't very long because then he was with us in the basement, it seems like from day one, so I don't think it was — if he stayed, it wasn't that long. I mean I know he stayed some nights afterwards.

Q. How was he getting in the house after the sheriff came and the locks were changed, how would he get in the house?
A. I can't answer that. I don't know.

Transcript at 412-13.

Mr. Meisler testified that: (1) when he first went in the house in May 1999 three dogs were living in the house; (2) every time he went to the house thereafter, the dogs were still there; (3) someone was apparently feeding the dogs; and (4) there was always a blue car parked in the driveway. Mr. Meisler concluded that someone was living in the house.[464]

Mrs. Meisler testified also that based on her observation of the dogs, the blue car, and the furnishings and personal toiletries and other items in the house, she also believed that someone was living in the house.[465]

Mr. Mitchell, Mr. Leara, and Mr. Ware each testified that Mr. Kearney continued to live in the house after Mrs. Kearney moved.[466] Mr. Ware testified that someone continued to occupy the house even after the locks had been changed and after the back sliding door had been boarded. He testified that he visited the house on March 16, 1999, and observed that the house was locked, but a bay window in front had been broken.[467] A dog, which appeared to be well nourished, was living in the house.[468] And, Mr. Kearney was at the house.[469]

Mr. Ware had the suspicion that Mr. Kearney was trespassing on the property.[470] Based on that suspicion, he called the Mountain Brook police and reported a trespass.[471] He told the officer taking the report that he believed Mr. Kearney was the trespasser.[472] The officer observed that someone was in fact occupying the house

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[464] Meisler Transcript at 51, and 53-54.

[465] Meisler Transcript at 67.

[466] Transcript at 148, 152, 166-67, 213-14, 238, 279, 282, 287, and 411-13.

[467] Transcript at 281 and 287.

[468] Id.

[469] Id.

[470] Id.

[471] Defendant's Exhibit 117.

[472] Id.

despite the fact that Regions had boarded the back door and posted no trespassing signs on the property.[473] The officer noted that a window at the front of the house had been broken and concluded that the house may have been accessed through that window.[474]

But the question remains, who removed the personalty?

vi) Other Family Members?

Other members of the family had access to the property. Mrs. Kearney testified that she and family members visited the house occasionally to retrieve items. She testified:

> Q. Now you have told me that before the moving van came, you had moved some things out with the station wagon; correct?
> A. Right.
> Q. After you and the kids moved out of the house, you kept moving things out with the stationwagon, too; didn't you?
> A. We might have made like one more trip but I didn't have any place to put the rest of the stuff that was in there.
> Q. And your kids and your daughter-in-law continued to go over to the house to get miscellaneous things that they wanted to get?
> A. No, my children didn't. My daughter-in-law went over there and got some outside furniture.
> Q. And there was nothing to stop you from getting the things at the house; was there?
> A. No.

Transcript at 415-16.

vii) Conclusion to Who Removed the Property

Mrs. Kearney's testimony indicates that: (1) she and other members of her family, especially Mr. Kearney, had access to the house after January 6, 1999; (2) they entered the house after January 6, 1999; and (3) on occasion they removed items from the house after January 6, 1999. That evidence raises the possibility that either Mr. Kearney, or other members of Mrs. Kearney's family, removed and disposed of all or some of the items Mrs. Kearney contends are missing. That possibility is entirely plausible. According to her testimony, Mrs. Kearney does not know what became of the "missing" items. Anyone with access to the property could have taken any item on her

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[473] Id.

[474] Id.

list. In fact, Mrs. Kearney admitted that: (1) she took a station wagon to the house and retrieved some items on one occasion; (2) one daughter-in-law went to the house and retrieved some items on another occasion; (3) Mr. Kearney occupied the house much of the time and had ample opportunity to remove whatever he wanted; and (4) there was nothing to keep any of them from retrieving items from the house.

The preponderance of the evidence supports the inference that Mr. Kearney removed the bulk of the items Mrs. Kearney now contends were stolen or are missing.[475] But even if he did not, there is no evidence that any employee or representative or agent of Regions had any part in the removal of the van or removal of the personalty from the property or the van.

(b) Regions Was Not Responsible for Protecting the Items through a Bailment Arrangement

Mrs. Kearney contends that because Regions was in "possession" of the realty, as a matter of negligence law, Regions was responsible for safeguarding the personalty on the realty and for assuring its safe return. Her closing argument included:

> This was not their property. They knew it, but washed their hands of their legal obligations and the assurances they had made to Plaintiff. Now they claim that their destruction is the purchaser's problem. No. It was her property. It was in their custody and possession after the eviction. They authorized its removal or allowed it to be stolen by leaving the house open while it should have been secure.

Plaintiff's Argument at the Conclusion of the Trial and Submission of Evidence filed November 26, 2001, AP Proceeding No. 142.

In the absence of a legally imposed duty on Regions to safeguard or secure that personalty, as a matter of law Mrs. Kearney cannot prevail on a negligence theory. Farmer v. Machine Craft, Inc., 406 So.2d 981, 983 (Ala. Civ. App. 1981). And absent

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[475] Mrs. Kearney represented that she did not know when her personalty was removed from the Old Leeds Ridge property. Mr. Meisler's testimony, which was the only direct evidence presented from any source on the subject, indicates that the van, big screen television, sofa and other personal items left behind by the Kearneys were on the property when he purchased the house on September 28, 1999. He testified that those items disappeared some time after that date. That conclusion is supported by the evidence that on December 23, 1999, Mrs. Kearney reported to the Mountain Brook police that the van, which she and Mr. Kearney had left sitting in the front yard for over a year, had been stolen. Furthermore, according to Mr. Meisler's testimony, the van was the first item to disappear. The evidence before the Court, therefore, proves that the personalty which Mr. and Mrs. Kearney left on the property was not removed from the property until late December 1999.

the existence of a bailment, Regions did not owe any duty to Mrs. Kearney to protect the personalty. Id. Writing for the court in Farmer v. Machine Craft, Inc. Judge Robert P. Bradley explained:

> A bailment is defined as:
>
> (T)he delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed, and the property returned or duly accounted for when the special purpose is accomplished, or kept until the bailor reclaims it. (Footnotes omitted.) 8 Am.Jur.2d Bailments s 2 (1980).
>
> In order to constitute a bailment, there must be a change of possession, actual or constructive, and the bailee must have voluntarily assumed the custody and possession of the property for another. Lewis v. Ebersole, 244 Ala. 200, 12 So.2d 543 (1943). Change of possession necessarily requires a change of actual or constructive control over the item of property, and there must be an intention on the part of the bailee to exercise that control. 8 Am.Jur.2d Bailments s. 66 (1980).

Id. at 982-83.[476]

The evidence demonstrates that there was not a bailment between Mrs. Kearney and Regions. Mrs. Kearney did not deliver her personalty to Regions. Regions did not agree to store it, to safeguard it, to protect it, to return it, or to account for it. Regions did not voluntarily assume custody or possession of the personalty and did not desire or intend to exercise control over the personalty. Mrs. Kearney never relinquished control of it to Regions, and Mrs. Kearney was free to retrieve the personalty at anytime.

In concert, Regions: (1) never asserted any control over the personalty to the exclusion of Mrs. Kearney; (2) did not require her to leave the personalty on the property; and (3) did not derive any direct benefit from the fact that the personalty was on the property. Because there was no bailment, Regions did not have any duty to safeguard or to protect the personalty, or to account to Mrs. Kearney for it.

In addition, Mrs. Kearney did not prove that Regions was negligent. Regions changed the locks. It locked the doors that could be locked. It boarded the door that

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[476] An employee who leaves tools at his workplace may not recover from his employer for the theft of those tools from the workplace during a burglary. Farmer v. Machine Craft, Inc., 406 So.2d 981, 983 (Ala. Civ. App. 1981). Likewise, the owner of an automobile may not recover from a parking lot owner for the theft of the automobile from the lot after the keys to the vehicle had been returned by the parking lot owner to the owner of the automobile. Mobile Parking Stations, Inc. v. Lawson, 298 So.2d 266 (Ala. Civ. App. 1974).

could not be locked. And it closed and locked the windows. There is no testimony or other evidence before the Court that suggests Regions was required to do more. And the evidence indicates even if there were, Mr. Kearney countered the measures taken by Regions to secure the property. There is simply no evidence that Regions failed to secure the house.

(c) Regardless of Who Removed the Items, The Stay Would Not Have Applied because of Mrs. Kearney's Discharge

Mrs. Kearney's Chapter 7 discharge was entered on May 14, 1999. Section 362(c)(2)(C) of the Bankruptcy Code reads, "The stay of any other act... continues until... the time a discharge is granted or denied. " 11 U.S.C. § 362(c)(2)(C). The items Mrs. Kearney contends are missing did not become missing until December 1999, well after the discharge was entered. Consequently, the automatic stay would not have applied and therefore could not have been violated.

(d) Summary of Conclusions Regarding Loss of Mrs. Kearney's Personalty

First, Mrs. Kearney failed to prove that she is lawfully entitled to an award against Regions for either conversion or willful violation of the automatic stay. She offered no proof that after January 6, 1999, either Regions or any of its agents or employees, moved or disposed of any of the items she contends were stolen or are missing. In fact, the deputy's removal of items from the house formerly occupied by Mrs. Kearney on January 6, 1999, represents the only occasion on which any personalty owned by Mrs. Kearney was moved at Regions' request or based on some action initiated by Regions. And the deputy's actions on that occasion did not cause any injury because Mr. Kearney immediately moved the items back into the house. Similarly, the evidence does not reflect, as Mrs. Kearney contends, that any of her items were stolen on January 6, 1999.

Second, Mrs. Kearney cannot recover for the missing items under state negligence law. No bailment existed between Regions and Mrs. Kearney. The personalty did not disappear from realty owned by Regions, Regions was not negligent, and the loss of the personalty was not caused by negligence attributable to Regions.

Third, Mrs. Kearney cannot recover for the missing personalty based on a stay violation. The stay was not in effect when the personalty allegedly disappeared. The stay was dissolved in May 1999 when Mrs. Kearney's discharge was entered. The personalty disappeared in December 1999.

(7) Mrs. Kearney in Effect Abandoned the Personalty Left on the Property

The evidence demonstrates that Mrs. Kearney in effect abandoned the personalty because neither she, nor Mr. Kearney or other family members, removed the personalty from the real property after repeated requests to do so.

Mr. Mitchell did not tell Mrs. Kearney that she could store the personalty in the house indefinitely. Mr. Leara repeatedly asked her to remove the personalty from the real property. Mr. Ware asked her to remove the personalty from the real property.

Similarly, Mrs. Kearney's assumption that Regions permitted her to store the personalty in the house and in the van after she moved in November 1998 was unjustified. If the deputy's removal of the personalty from the house on January 6, 1999, was not a clear message that Regions wanted the Kearneys and their personalty removed from the property, the Court cannot conceive of one that would be. But, Mrs. Kearney ignored that message for a year, even after her discharge had been entered and the stay lifted, even after she knew that the realty had been sold to the Meislers, even after the bulk of personalty had "disappeared," and even after what little personalty remained had been discarded by Mr. Meisler.

Mrs. Kearney had complete access to the house. She was free to retrieve her personalty at any time. She testified:

> Q. And there was nothing to stop you from getting the things at the house; was there?
> A. No.

Transcript at 416.

She admitted that on one occasion after January 6, 1999, she retrieved some items from the property in her station wagon. She testified:

> Q. After you and the kids moved out of the house, you kept moving things out with the stationwagon, too; didn't you?
> A. We might have made like one more trip but I didn't have any place to put the rest of the stuff that was in there.

Transcript at 415.

She also testified, "My daughter-in-law went over there and got some outside furniture." Transcript at 415. And that was after January 6, 1999.

Mr. Kearney also had complete access to the house. Mrs. Kearney testified:

Q. Well, maybe I just asked the question a little differently than the way I asked it at the deposition. I suppose what I asked then was as he lived there, he could have gotten things that he wanted if he wanted to get them during the time he was living there?
A. Yes.

Transcript at 412.

But, after the Meislers purchased the property on September 28, 1999, Mrs. Meisler invited Mrs. Kearney to retrieve her personalty. Other than to request a few "smocked" dresses, Mrs. Kearney declined that invitation. Mrs. Meisler testified:

Q. What do you recall about this sentimental property that was returned to Mrs. Kearney; what were the circumstances?
A. Well, it was the same that Irving said. I had talked to Cathy because Cathy and I are friends. We play tennis together. And I had said many times to her, "Is there anything that they want because they need to get it out?" That we were moving the house. And she said she was going to talk to her and she did and this is what they came back with, was they wanted these smocked dresses. I said, "Okay. If that is all they want, then I will be happy to look for them," and I did and I found them. It wasn't easy.
Q. Where were they?
A. I recall them being up in a room upstairs but I don't remember if it was a closet or if it was an attic but they were just — I don't even know if they were hanging or if they were folded or, you know, stuffed in a corner. I mean I had to search for them.
....

Q. Between that time that you bought the house and it was torn down, did you do anything to stop the Kearneys from coming and getting anything they wanted from the house?
A. No.
Q. In fact you got with the neighbor and had the neighbor call Mrs. Kearney?
A. Well, yes. Well, I assume she called her. I don't know if they were friends or — I knew she had contact with her if she needed to. She knew how to contact her.
Q. And she confirmed that she had spoken to her?
A. Yes.
Q. And what she wanted?
A. That's correct.
Q. And you endeavored to get it and give it to her?
A. That's correct.
....

Q. When you went back and sought to get the items, the smocked dresses, did you look through and make a search and do your best to get the smocked dresses that you could find?
A. Yes, because if that was all they felt was of value, I wanted to get that for them. I wanted it out for them. I wanted them to have it.
Q. And who did you give those to?
A. I gave them to, her first name is Emily. She is a neighbor. She actually lives on Old Leeds Lane and she is the one that actually found me — I think we may have run into each other, I don't know, at some social event and she said, "Did you get those things for Mrs. Kearney?" And I said that I had, and she said, "Well, why don't you get them to me?" And I said, "Well, good, because I was just going to get them to Cathy. I will be happy to give them to you." And I did.
Q. Okay. So you didn't give them to Ms. Duggan, you gave them to someone else?
A. Cathy was the one that requested them. I gave them to Emily and I don't know her very well. I mean I don't even know her and I don't know her last name.
Q. All right. Did she come to your house and get them?
A. No. I drove to her house.

....

Q. When you had this message given to you by Cathy Duggan about some, was it smocks?
A. Smocked dresses.
Q. Smocked dresses?
A. Uh-huh.
Q. Did I understand you to say that you initially told her that if she knew Mrs. Kearney, could she find out what she wanted from the house?
A. I did that. I said that, yes.
Q. Did you ever tell her that she could tell Mrs. Kearney she could come over and have full access to the whole house?
A. Yes.
Q. Do you know if that message was ever conveyed?
A. Oh, yeah, I know Cathy talked to her.

Meisler Transcript at 61-62; 65; 68-69; 70-71.

Almost a year passed between January 1999, the month when the bulk of the personalty was removed from the property, and December 1999, the month when the Meislers disposed of the rest. Mrs. Kearney and her family had complete access to the property for the purpose of retrieving anything they wanted. It is clear to the Court that Mrs. Kearney had both sufficient time, and access, to retrieve her personalty.

It is equally clear that Mrs. Kearney must have known in November 1998, and without a doubt knew in January 6, 1999, that Regions wanted her to remove her personalty from the real property. And certainly Mrs. Kearney should have been alerted a final time to the real possibility that she needed to retrieve her property after the Meislers purchased the realty. But Mrs. Kearney did not. In fact, even after receiving the Meisler's offer to retrieve her property, Mrs. Kearney asked only for the children's clothing, not the remaining property.

The Court must assume that Mrs. Kearney intended to abandon whatever personal property remained on the real estate. She had been unable to raise the money to purchase the property from the trustee or redeem it from Regions. The redemption period had expired. Her right to purchase the redemption rights from the trustee was gone. The property had been sold to the Meislers.

Similarly, the evidence demonstrates that Mrs. Kearney did not possess any colorable grounds to set aside the foreclosure sale. And even if she had, she had no basis for believing that the reversal of the foreclosure would have resulted in the return of the property to her under any circumstance. Even if the foreclosure had been set aside, in order to regain the property Mrs. Kearney would still have had to pay for it, which she admittedly was unable to do.

For whatever reasons this Court cannot know, whether Mrs. Kearney was just simply exhausted with the whole situation, or something more concrete, the Court must find that while Mrs. Kearney had access to the house, she did not retrieve the items she wanted. Thus, after having in effect abandoning those items, she cannot now complain that they were discarded or that they are "missing," and she certainly does not have a right to recover for their loss.

(8) Mrs. Kearney Did Not Request Damages for the Demolition of the House Based on a Stay Violation, and None Would Be Warranted, and She Is Not Entitled to Recovery for the Demolition of the House Based on a Theory of Wrongful Foreclosure, and Demolition of the House Does Not Raise An Inference of "Bad Faith."

(a) Demolition and the Automatic Stay

Mrs. Kearney's stay violation contentions center mostly on her contention that Regions' post-petition ejectment action constituted a violation of the automatic stay and caused her to lose certain personal property. <u>But while the demolition of her home was certainly more dramatic, Mrs. Kearney did not make similar stay violation arguments</u>.

First, Mrs. Kearney <u>has not</u>, in any of her pleadings, or in her pre-trial statement, or in either her post-trial brief or argument, contended that she is entitled to damages for the demolition of the house based on Regions' alleged violation of the stay.

Second, she has not argued that Regions' alleged stay violation resulted in the loss or destruction of her house.

And third, she has not contended that the issue was tried by express or implied consent of the parties.

After hearing all of the evidence, it is apparent to the Court why Mrs. Kearney did not make a stay violation in relation to the demolition of her former house. The demolition of the house occurred in December 1999, at least seven months after Mrs. Kearney was granted a Chapter 7 discharge on May 14, 1999, and at least six months after the statutory right to redeem the property from the foreclosure sale expired on June 17, 1999.

In addition, because the foreclosure sale was not set aside, the property itself never was property of the estate. Commercial Federal Mortgage Corp. v. Smith (In re Smith), 85 F.3d 1555 (1996). Therefore, the automatic stay never applied to the property. Furthermore, although Mrs. Kearney's statutory right of redemption became property of the estate, it was not protected by the stay after June 17, 1999. It expired and was no longer property of the estate.[477]

Similarly, even if the demolition of the house could be characterized as "an act against property of the estate," Regions' actions would not have violated the stay after May 14, 1999, since the stay, on that date, (as to acts other than acts against estate property), was dissolved automatically upon the entry of the order granting Mrs. Kearney's Chapter 7 discharge.[478]

Based on the above, the Court finds that Regions could not have and did not violate the automatic stay in relation to the demolition of Mrs. Kearney's former residence. No portion of, or interest in, the Old Leeds Ridge property, including the house, was protected by the automatic stay. There was, in short, no stay to be violated in December 1999.

(b) Wrongful Foreclosure

In her complaint as amended, Mrs. Kearney claimed that Regions' wrongful foreclosure caused her to lose her house because it led to, or resulted in, the Meislers'

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[477] Section 362(c)(1) of the Bankruptcy Code reads, "The stay of an act against property of the estate... continues until such property is no longer property of the estate...." 11 U.S.C. § 362(c)(1).

[478] Section 362(c)(2)(C) of the Bankruptcy Code reads, "The stay of any other act... continues until... the time a discharge is granted or denied". 11 U.S.C. § 362(c)(2)(C).

destruction of the house. Plaintiff's Amendment to Complaint, paragraph 4, attached to Motion to Amend Complaint filed July 23, 2001, AP Proceeding No. 108. At trial, Mrs. Kearney testified how much she and her family "loved" the house on the Old Leeds Ridge property and the "anguish" she and her children suffered as a result of its being demolished.[479]

As unfortunate as this situation must have been for Mrs. Kearney and her family, this Court cannot find that damages for the demolition of the house may be awarded on the basis of wrongful foreclosure. The reason is simple – Mrs. Kearney no longer possessed a cause of action for wrongful foreclosure. That prepetition cause of action was lawfully assumed by the trustee and settled and released by him along with all of Mrs. Kearney's other prepetition causes of action. Furthermore, as discussed above, the evidence clearly reflects that the foreclosure sale was not wrongful because it was conducted solely for the purpose of collecting the debt secured by the mortgage.

(c) Bad Faith

There is no evidence to support Mrs. Kearney's contention that the sale of the property by Regions to the Meislers, and the Meislers' subsequent demolition of the house, constituted "bad faith" by Regions toward Mrs. Kearney.

Regions did not have any duty to subordinate its financial interests to Mrs. Kearney's or to delay the exercise of its legal rights for Mrs. Kearney's benefit. To the contrary, Regions had the right to take the position that Mrs. Kearney's lawsuit was without merit, that it had done nothing wrong, that the foreclosure sale had been conducted in good faith in complete accordance with state law, and that it was entitled to proceed accordingly without permission from this Court. The automatic stay was at that time no longer in effect.

Even though Regions decided to proceed with the sale, even in the face of Mrs. Kearney's lawsuit, its action cannot be construed as bad faith. The foreclosure sale had not been set aside. After Mrs. Kearney's statutory right of redemption expired, Regions became entitled to sell the property to whomever it wished. Neither the trustee nor the Kearneys had any right to it and neither had any interest in it. And after the Meislers purchased the property, they could do with it as they pleased, even if that meant tearing down the old house and building a new one.

Whether or not, and to what extent, Regions or the Meislers would have been liable to Mrs. Kearney if the foreclosure had been set aside are matters for pure academic conjecture. It is sufficient to acknowledge that the foreclosure sale was not voided, it is valid, and it must be accorded the same dignity under state law as any other foreclosure sale.

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[479] Transcript at 370 and 382-83.

Consequently, based on the evidence the Court finds that both Regions and the Meislers acted in good faith, acted in accordance with state law and the Bankruptcy Code, and acted pursuant to a valid prepetition foreclosure sale on which both were entitled to rely. Neither Regions nor the Meislers had any reason to believe that Mrs. Kearney had any legitimate claim to the property or that the foreclosure sale would be invalidated.

(9) Regions Actions Were Not Egregious, Vindictive, Malicious, or in Bad Faith, and if There Was a Stay Violation, There are no "Appropriate Circumstances" to Support Punitive Damages

As discussed before, section 362(h) authorizes an award of punitive damages for stay violations only in "appropriate circumstances." That term has been interpreted to require that the violator's acts be egregious, vindictive, malicious, or accompanied by bad faith.

Mrs. Kearney's theory is that through a series of largely unconnected events, Regions committed a vindictive and malicious violation of the automatic stay. Plaintiff's Post-trial Reply Brief, filed December 14, 2001, AP Proceeding No. 145.

The events Mrs. Kearney identifies include: (1) the allegedly unauthorized debits in November 1996; (2) the "wrongful" foreclosure sale; (3) Mr. Mitchell's alleged "promise" that she could leave personalty in the house; (4) Regions' alleged publication of "confidential" information to Mr. Johnston; (5) the alleged loss or theft of her personalty from the house; and (6) the alleged conspiracy between Regions and Mr. Johnston to cause her "financial ruin." As the above discussions demonstrate, Mrs. Kearney did not prove any of these allegations.

To summarize: (1) the November 1996 debits were authorized; (2) Regions conducted the foreclosure sale in a straightforward manner, for the legitimate purpose of collecting the mortgage debt owed it by the Kearneys; (3) Mr. Mitchell did not tell Mrs. Kearney that the sheriff would not remove her personalty from the house on January 6, 1999, or that she could leave the personalty in the house indefinitely; (4) Regions did not provide Mr. Johnston with confidential or inside information; (5) Mrs. Kearney abandoned the personalty she left in her former homestead and her alleged loss of personalty resulted from actions taken by Mr. Kearney, other of her family members, the Meislers, or persons whose identities are unknown; (6) Mrs. Kearney's financial ruin stemmed directly from the diversion of funds from ROP and her lack of income following ROP's collapse, not from anything that either Regions or Mr. Johnston did or did not do; and (7) Regions and Mr. Johnston did not engage in a conspiracy but instead engaged in extensive negotiations in an effort to extricate themselves from the financial problems surrounding the Kearneys and ROP.

In addition, the uncontroverted evidence is that Regions filed and prosecuted its ejectment action in good faith based solely on advice of counsel. Mr. Smith testified

that the bank filed the ejectment action against Mrs. Kearney without first seeking relief from the stay based on the advice of its attorneys. He stated:

> "[W]e were acting on the advice of our attorneys and I am not going to make that call. We leave that up to them and, if they tell us that's the avenue to follow, that's the one we will follow. We were dealing with people that hadn't even made a house payment in over a year. I listen to my lawyers."

Transcript at 54.

Mr. Smith represented that Regions' attorneys advised it that relief from the stay was unnecessary because, as a result of the prepetition foreclosure, the Old Leeds Ridge property was not part of the bankruptcy estate and therefore not subject to the automatic stay.[480] He indicated that he believed at the time, and still believes, that the advice given to Regions by its attorneys in regard to filing the ejectment action and having the Kearneys ejected was correct, and that the actions taken by those attorneys on Regions' behalf was proper.[481]

Mr. Leara testified that he believed that Regions did not require relief from the stay before filing the ejectment action in state court and did not violate the stay by filing or pursuing the ejectment action.[482] He stated that before filing the ejectment action, he had a discussion with the bank regarding the proper course of action, and advised the bank that relief from the stay was unnecessary.[483] He reached that opinion, "Based upon the fact that the property was not property of the estate at the time that Mrs. Kearney filed her bankruptcy petition and we weren't taking an action against property of the estate since it was Regions' property." Transcript at 145. Mr. Leara testified that before he filed the ejectment action for Regions he researched the appropriate law and determined that relief from the stay was, from a legal standpoint, not required.[484]

The undisputed facts are that Regions relied upon the advice of counsel in filing and prosecuting its ejectment action. That reliance indicates that Regions acted in good faith. It believed that its actions were lawful and not violative of the stay. Consequently, there is no basis to find that Regions acted maliciously or without lawful justification in this regard. United States v. Ketelsen (In re Ketelsen), 880 F.2d 990,

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[480] Transcript at 53-54.

[481] Id.

[482] Transcript at 144.

[483] Transcript at 144-45.

[484] Transcript at 154-55.

993 (8th Cir. 1989); In re Steenstra, 280 B.R. 560, 569 (Bankr. D. Mass. 2002); Cherry v. Arendall (In re Cherry), 247 B.R. 176, 190 (Bankr. E.D. Va. 2000); Nigro v. Oxford Dev. Co. (In re M.J. Shoearama, Inc.), 137 B.R. 182, 191 (Bankr. W.D. Pa. 1992); Loethen Oil Co. v. Hen House Interstate, Inc. (In re Hen House Interstate, Inc.), 136 B.R. 220, 224 (Bankr. E.D. Mo. 1992).

This conclusion is supported by the state court's determination that Regions' ejectment action was not precluded by the stay. The state court agreed with Regions' attorneys' advice. And as discussed earlier in this opinion, there is substantial case law that holds that a non-bankruptcy court in which an action is pending or instituted may rule on the question of the applicability of the stay to that action and that the ruling by that non-bankruptcy court on the issue is binding on the bankruptcy court. Whether courts so holding are correct or not is not the issue here. Regions had a good faith reason to rely on the state court's ruling and to conclude that its continued prosecution of the ejectment action did not violate the stay.

In summary, Regions filed and prosecuted the action based on its good faith reliance on the advice given by counsel. That advice was confirmed by the state court. Consequently, Regions would have had no reason to believe that its actions to have Mrs. Kearney ejected from the property would later be construed as a violation of the stay. Therefore, based on the above, this Court cannot find that Regions actions were egregious, vindictive, malicious, or accompanied by bad faith. Consequently, even if Regions violated the stay, the Court finds that Mrs. Kearney is not entitled to recovery under section 362(h).

(10) Equitable Considerations Warrant Annulment of the Stay as to Regions

Notwithstanding all of the above, there are equitable considerations that warrant annulment of the stay as to Regions efforts in ejecting Mrs. Kearney from her former homestead post-petition.

The general rule is that although acts taken in violation of the automatic stay are generally deemed void and without effect, section 362(d) expressly grants bankruptcy courts the option to annul the stay. The effect of annulling the stay is to grant retroactive relief that validates acts which would otherwise be void because they were taken while the stay was in effect. Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.), 749 F.2d 670, 675 (11th Cir. 1984) (annulment of the stay authorized to validate post-petition foreclosure where debtor's petition was filed in bad faith with no realistic possibility of effective reorganization and for the improper purpose of delaying and frustrating the legitimate efforts of secured creditors to enforce their rights).[485]

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[485] See this Court's discussion in In re Steeley, 243 B.R. 421, 444 n.42 (Bkrtcy. N.D. Ala.1999).

Under this rule, courts have annulled the stay, or declared it inapplicable, as to acts taken in violation of it, or declared those acts otherwise valid, where the result of a determination that the acts violated of the stay would be inequitable. Id.[486]

In this case, there are at least four considerations, individually and cumulatively, that warrant annulment of the stay as to Regions efforts in ejecting Mrs. Kearney from her former homestead post-petition.

(a) Mrs. Kearney's Chapter 13 Petition

Mrs. Kearney did not qualify as a Chapter 13 debtor.

Under section 109(e) of the Bankruptcy Code, "only an individual with regular income that owes, on the date of the filing of the petition, non-contingent, liquidated,

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[486] See Job v. Calder (In re Calder), 907 F.2d 953 (10th Cir. 1990)(equitable considerations precluded debtor from claiming that state court judgment obtained post-petition against him was violation of the stay where debtor actively litigated the state court action and did not tell the state court that he had filed a Chapter 13 case until just before the state court was set to enter its judgment); Kolberg v. Agricredit Acceptance Corp. (In re Kolberg), 199 B.R. 929 (W.D. Mich. 1996)(secured creditors post-petition collection activities would be excepted from the operation of the stay because of debtor's malfeasance in actively attempting to circumvent creditor's crop lien); Bronson v. United States, 28 Fed. Cl. 756 (U.S.F.C. 1993)(IRS's assessment of 100 percent penalty made against debtor post-petition, while it would ordinarily be considered void, would be considered valid, despite stay violation, where debtor signed waiver that gave IRS additional time to collect the assessments, debtor asked IRS to place lien on his retirement account so that he could make tax payments without early withdrawal penalty, debtor willfully delayed in objecting to assessment until statutory period had run, and debtor never asserted that he did not owe the amounts assessed), aff'd, 46 F.3d 1573 (Fed. Cir. 1995); Blaylock v. Philadelphia Housing Authority (In re Blaylock), 301 B.R. 443 (Bankr. E.D. 2003)(bankruptcy court annulled stay retroactively in order to validate eviction proceedings completed while stay was in effect and denied claim of Chapter 7 debtor where invalidating public housing authority's eviction and requiring it to reinstate debtor into premises to which she had no claim of entitlement, only to evict her again, would only reward debtor for her conduct in moving into vacant housing that she had no right to occupy and then filing for bankruptcy solely to obstruct housing authority in exercise of its rights). See, e.g., Bronson v. United States, 46 F.3d 1573 (Fed. Cir. 1995)(debtor's claim for refund of amount paid with respect to 100 percent penalty assessment accomplished against him post-petition based on premise that assessment was void as violation of stay was refused where the penalty assessment did not frustrate the purpose, policies or objectives, of the automatic stay; the debtor did not make any attempt to invalidate the assessment or contest his liability for the penalty in the bankruptcy proceeding; the debtor did not contest the proof of claim filed by the IRS in the bankruptcy case; and the debtor requested the IRS to perfect a lien upon his property to satisfy the penalty).

unsecured debts of less than $269,250 and non-contingent, liquidated, secured debts of less than $807,750..." may be a debtor under Chapter 13. 11 U.S.C. § 109(e).[487]

Regarding her income, when Mrs. Kearney filed her Chapter 13 petition, she did not have sufficient, regular income to fund a Chapter 13 plan. When she filed her petition, she did not have any source of income or other means for effectuating an individual debt adjustment plan. By her own admission, her purpose for filing the Chapter 13 case was to delay Regions' efforts to enforce its rights. And while she was successful in that effort, technically, she was not qualified for Chapter 13 relief.

Regarding her debts, in addition to having no regular income, Mrs. Kearney owed more debt than she could pay. On the date Mrs. Kearney filed her Chapter 13 petition, she owed several million dollars in unsecured debts, owed at least $1,071,500 in secured debts to Regions, (given her contention that the foreclosure sale was wrongful and ineffective), and owed the mortgage on a Florida condominium.

(b) Regions Ejectment Action and Mrs. Kearney's Rights

A second consideration is that even after Mrs. Kearney filed her petition, when Regions instituted its ejectment action, it was entitled to relief from the stay. Regions owned the property. It had title to the property. It was entitled to immediate possession of the property. In contrast, Mrs. Kearney did not have any claim to, or interest in, the property. She did not own it. And because her statutory right to redeem the property was forfeited, or passed to the Chapter 7 trustee, at conversion, Mrs. Kearney did not have any right to possess the property.[488]

The situation was similar for the Chapter 7 trustee. Holding a statutory right to redeem the property only, the Chapter 7 trustee did not have a right to possess the property. Consequently, the Chapter 7 trustee had no right or reason to complain or resist the ejectment action, or to resist relief from the stay in favor of Regions' possession. That conclusion is supported by the stated position of the Chapter 7 trustee. Mr. Benton, the trustee's attorney testified, "I became aware of what we call a set-out suit and it was my understanding that it was merely removing the two Kearneys from the property, the debtor and her husband, and we had no interest in that at all." Transcript at 425.

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[487] Those were the limits when Mrs. Kearney filed her chapter 13 petition.

[488] This Court is, as are all bankruptcy courts, acutely aware of the automatic stay, and is offended by any violation of it; however, certain situations such as this one, do not warrant punishment of the alleged violating party.

Between August 21, 1998, the day the ejectment suit was filed, and the time the sheriff removed what remained of Mrs. Kearney's personalty from the house on January 6, 1999, Mrs. Kearney did not mention to this Court that she was being ejected from the property. And, she did not otherwise seek relief from this Court, or the state court which had ordered the ejectment in the first instance. To the contrary, she and Mr. Kearney actively engaged in discussions with Regions. Those discussions led to an agreement where the Kearneys were permitted to occupy the property until the weekend following Thanksgiving 1998.

In addition, there was an agreement between Regions and the trustee that the trustee would sell the property to Mrs. Kearney. In fact, the first time that Mrs. Kearney mentioned ejectment to this Court was on March 22, 1999, when she filed the motion that was the precursor to the pending adversary proceeding. That motion coincided with her last effort to purchase the property from the trustee and Regions.

But even after considering the above, the fact remains that Mrs. Kearney was provided ample opportunity to purchase her former homestead from the trustee and was not thwarted from doing so by Regions. In fact, her failure to redeem her former homestead resulted solely from her inability to raise the money necessary to do it.

(c) Mrs. Kearney's Personal Property

A third consideration is that Mr. Mitchell did not tell Mrs. Kearney that she could leave personalty on the property after Thanksgiving of 1998 or that the sheriff's deputy would not remove her personalty from the house on January 6, 1999, or that she could store her personalty on the property indefinitely.

Mrs. Kearney did not lose any of the personalty which she left behind on the property as a result of anything Regions did or Regions' failure to do anything it was legally obligated to do.

Mr. Kearney, other members of Mrs. Kearney's family, the Meislers, or possibly other unidentified persons, removed items from the property. Regions did not. Mrs. Kearney intentionally abandoned whatever personalty remained on the property after she, Mr. Kearney, or others, removed what they wanted.

(d) The Demolition of Mrs. Kearney's Home

A fourth consideration is that Mrs. Kearney may not recover for the demolition of her former house based on Regions' alleged wrongful foreclosure. That cause of action was compromised by the trustee. Furthermore, the evidence indicates that the foreclosure was not wrongful. Mrs. Kearney did not request damages for the demolition of her former house based on Regions' alleged stay violation and none would otherwise be warranted. Furthermore, the demolition of the residence raises no inference of bad faith. Even if Regions violated the stay, no "appropriate circumstances" for an award of

punitive damages have been proved. Regions actions were not in any sense egregious, vindictive, malicious, or accompanied by bad faith. Regions filed its ejectment action based on the advice of counsel and numerous other circumstances that led it to believe that the stay was inapplicable to that action.

(e) Conclusions to Equitable Considerations

The stay in Mrs. Kearney's bankruptcy case should be annulled, as to Regions' ejectment suit and any actions in regard to that suit, effective as of June 17, 1998, the date Mrs. Kearney filed her Chapter 13 petition.

e. Conclusions to Automatic Stay Violation

Even if there were a stay in place when Regions attempted to eject Mrs. Kearney from her home, and even if Regions violated that stay, there is no evidence that Mrs. Kearney is entitled to damages for the violation.

8. Punitive Damages

Mrs. Kearney's eighth, and final, contention is that the all of the above is sufficient to establish "malice" and therefore she is entitled to punitive damages under section 362(h).

As discussed above, section 362(h) of the Bankruptcy Code provides, "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h). That section requires that for an award of damages to be made to an individual debtor for a stay violation, the proof must show that the debtor was injured by the stay violation and that the violation of the stay by the defendant was willful. A violation of the automatic stay is a "willful violation" if, "the violator (1) knew of the automatic stay and (2) intentionally committed the violative act, regardless whether the violator specifically intended to violate the stay." Jove Eng'g, Inc. v. Internal Revenue Serv., 92 F.3d 1539, 1555 (11th Cir. 1996).

Section 362(h) authorizes an award of punitive damages for stay violations only in "appropriate circumstances." "Appropriate circumstances" has been interpreted to require that the violator's acts be egregious, vindictive, malicious, or accompanied by bad faith. "[E]gregious, intentional misconduct on the violator's part is necessary to support a punitive damages award." United States v. Ketelson (In re Ketelson), 880 F.2d 990, 993 (8th Cir. 1989). "An additional finding of maliciousness or bad faith on the part of the offending creditor warrants the further imposition of punitive damages pursuant to 11 U.S.C. § 362(h)." Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.), 902 F.2d 1098, 1105 (2nd Cir. 1990). "[O]nly egregious or vindictive misconduct warrants punitive damages for willful violations of the automatic stay of 11 U.S.C. § 362." Davis v. Internal Revenue Serv., 136 B.R. 414, 424 (E.D. Va. 1992).

Based on the total of the above, the Court finds that Mrs. Kearney did not meet these standards and therefore she is not entitled to punitive damages.

VII. Conclusion

Mrs. Kearney and Her Husband Mr. William Kearney, not Regions Bank, Caused Mrs. Kearney's Financial Harm

Mrs. Kearney argued frequently that Regions' allegedly wrongful acts caused her financial demise. In contrast to her arguments, Mrs. Kearney did not prove any wrongful acts against her by Regions, and the evidence reflects that Regions did nothing that harmed Mrs. Kearney. The evidence did however, demonstrate that the Kearneys caused their own financial demise.

The Kearneys used funds diverted from ROP to pay personal obligations including the debts secured by mortgages on their home. When they diverted those funds they set a series of events in place that could not be stopped. The first was when Regions stopped loaning money to ROP, the Kearneys did not have sufficient income to pay their mortgage debts.[489]

Second, after the partnership funds were diverted, ROP could not complete its project, pay its contractors, subcontractors and suppliers, or pay its construction loan.[490]

Third, when ROP failed to pay its debts, Mrs. Kearney and Mr. Johnston, as general partners of ROP, became personally liable for millions of dollars of debts. That consequence guaranteed that the Kearneys would not realize any profit from ROP which they might have used to salvaged their home and condominium.[491]

Fourth, in the meantime, in addition to being responsible for the now unpaid ROP debts, Mrs. Kearney had become indebted to the IRS for several hundred thousand dollars in income taxes.[492]

Fifth, saddled with ROP debts, and the IRS debt, and her personal mortgage debts, and lacking the ability to pay any of them, Mrs. Kearney was destined to lose her

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[489] Id.

[490] Id.

[491] Id.

[492] Id.

home, and her condominium, and whatever other non-exempt property which she owned, to either foreclosure or the collection efforts of unsecured creditors.[493]

Therefore, based on **all** the above, the Court must conclude that Mrs. Kearney's financial demise or ruin, including the loss of her former home and condominium, were solely attributable to, and was caused exclusively by, the choices made and actions taken by Mr. and Mrs. Kearney.

As to Mrs. Kearney's formal complaint, the Court finds:

1. The Complaint to Set Aside Foreclosure Action by Regions Bank is due to be denied;

2. The Complaint To Reinstate the Mortgage is due to be denied;

3. The Complaint To Account for All Funds in Account 304598695 is due to be denied;

4. The Complaint To Determine the True Amount Owed on the Note is due to be denied;

As to Mrs. Kearney's causes of action, the Court finds:

1. The plaintiff's prepetition state law cause of action for conversion, constructive contract, and fraud based on her allegations regarding debits made by Regions from her personal bank account is due to be denied;

2. The plaintiff's prepetition state law cause of action for wrongful foreclosure is due to be denied;

3. The plaintiff's prepetition state law cause of action for an accounting from Regions for the funds which it debited from her account is due to be denied;

4. The plaintiff's post-petition federal law cause of action for violation of the automatic stay is due to be denied; and

5. The plaintiff's post-petition state law cause of action for fraud or misrepresentation based on her allegations regarding allegedly false assurances made by Regions about the personalty left on the Old Leeds Ridge property is due to be denied.

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[493] Id.

As to Mrs. Kearney's specific allegations, the Court finds:

1. The debits made by Regions in November and December of 1996 from Mrs. Kearney's personal account were authorized;

2. Regions did not provide confidential banking information to Mr. Johnston, and even if it did, Mrs. Kearney was not wronged;

3. Regions' foreclosure sale was not motivated by malice or ill feelings toward Mrs. Kearney and Mr. Kearney;

4. Regions did not promise to "work with" Mrs. Kearney to avoid foreclosure and did not intentionally hamper her efforts to regain her former homestead;

5. Regions' post-petition ejectment action did not constitute a violation of the automatic stay but if it did, it did not cause Mrs. Kearney to lose certain personal property and the stay should be annulled as to any such actions;

6. Regions and Mr. Johnston did not engage in a civil conspiracy to cause Mrs. Kearney financial ruin;

7. Mrs. Kearney is not entitled to an accounting beyond the one provided in this opinion;

8. The total of the above does not demonstrate sufficient "malice" to authorize an award of punitive damages under section 362(h) of the Bankruptcy Code.

9. This order is a written opinion for purposes of the E-Government Act, Pub. L. No. 107-347.

A separate order will be entered in accordance with the findings and conclusions expressed in this memorandum opinion.

Done this the 14th day of September, 2005.

/s/Benjamin Cohen
BENJAMIN COHEN
United States Bankruptcy Judge

BC:sm

cc: Mr. Stephen D. Heninger, attorney for Mrs. Kearney
Mr. Richard Carmody, attorney for Regions Bank
Mr. Stephen A. Rowe, attorney for Regions Bank
Mr. Marty Franklin, attorney for J. Brooke Johnston
Mr. James Ward, attorney for J. Brooke Johnston
Mr. Lee Benton, attorney for the Trustee
Mr. Andre Toffel, Trustee
Mr. Robert H. Adams, attorney for Mr. and Mrs. Meisler
Mr. Max Pope, Jr.
Mr. James Henderson, attorney for LAH
Mr. Stephen Leara

APPENDIX A
To Memorandum Opinion Entered September 14, 2005

December 1, 1989	Mrs. Kearney and Mr. Johnston formed the general partnership Riverchase Office Partners (ROP).[494]
February 28, 1990	ROP borrowed $510,000 from National Bank of Commerce and, in return, gave the bank a promissory note executed by Mrs. Kearney and Mr. Johnston. The note was secured by a mortgage on the real estate owned by the partnership. Both Mrs. Kearney and Mr. Johnston executed personal guarantees of the note.[495]
June 24, 1992	Mr. and Mrs. Kearney borrowed $500,000 from AmSouth Bank and gave AmSouth a mortgage on their homestead to secure the repayment of the loan. The loan was represented by two separate notes, one for $380,000 and another for $120,000.[496]
June 24, 1992	Supreme Distributors Finance Company, a corporation owned by the Kearneys, borrowed $263,018.73 from AmSouth Bank.[497]
August 2, 1992	AmSouth Bank filed suit in state court against the Kearneys regarding approximately $300,000 in checks that were allegedly made payable to BIG Steel Fabricators, Inc. but which were allegedly deposited into AmSouth accounts of several corporate entities in which Mrs. Kearney had an interest.[498]

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[494] Defendant's Exhibit 6 ("Partnership Agreement of Riverchase Office Partners"). Also Plaintiff's Exhibit 41.

[495] Plaintiff's Exhibit 41 (documents entitled "Master Note-Commercial Loans" and "Mortgage").

[496] Plaintiff's Exhibit 36 and Plaintiff's Exhibit 46.

[497] See Plaintiff' Exhibit 37.

[498] Defendant's Exhibit 13 and Plaintiff's Exhibit 60, which are the same document, and Motion for Relief from Automatic Stay to Enforce Settlement filed July 1, 1998, Proceeding No. 5.

August 31, 1992	Supreme Distributors Finance Company borrowed an additional $150,000 from AmSouth Bank.[499]
1993	Mr. Kearney was indicted for embezzling $243,065 from BIG Steel by depositing proceeds from an SBA loan into Mrs. Kearney's bank account.[500]
December 21, 1993	Mr. Michael Mitchell and Mr. Mac Smith, officers at Regions Bank, met with Mr. Kearney and Mr. Johnston to discuss a loan for a real estate venture in Destin, Florida.[501]
December 31, 1993	Regions loaned $100,000 to Mr. Kearney for fund development expenses for the condominium project in Destin. Mr. Kearney pledged $40,000 in municipal bonds as collateral. The loan was personally guaranteed by Mr. Johnston.[502]
September 2, 1994	Mr. and Mrs. Kearney and Supreme Distributors Finance Company borrowed $169,779.36 from AmSouth Bank. The loan represented a consolidation of amounts remaining unpaid on three previous loans made by AmSouth to Supreme and the Kearneys. The note was secured by the home mortgage executed by the Kearneys in favor of AmSouth on June 24, 1992.[503]
April 4, 1995	Mr. Johnston executed a"Continuing Guarantee Agreement" in which he agreed unconditionally to pay on demand any and all present and future debts or liabilities owed by ROP to Regions. [504]

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[499] See Plaintiff' Exhibit 37.

[500] Plaintiff's Exhibit 53 (photocopy of newspaper article).

[501] Plaintiff's Exhibit 53 ("Commercial Loans Contact Report" dated December 21, 1993).

[502] Plaintiff's Exhibit 53 ("Commercial Loans Contact Report" dated December 28, 1993); Plaintiff's Exhibit 42 ("Commercial Loan Activity Journal"); and Plaintiff's Exhibit 50 ("Loan Memo").

[503] Plaintiff's Exhibit 37 and Plaintiff's Exhibit 47.

[504] Defendant's Exhibit 17. The same document was also admitted as an attachment to Plaintiff's Exhibit 41.

April 4, 1995	Mrs. Kearney executed an unlimited "Continuing Guarantee Agreement" in which she agreed unconditionally to pay on demand any and all present and future debts or liabilities owed by ROP to Regions. In the agreement, Mrs. Kearney specifically granted Regions a security interest in her deposit account at Regions and agreed that Regions, if ROP was in default, could immediately apply the deposit account toward the payment of her guarantee obligation.[505]
April 5, 1995	Regions and ROP entered into a "Construction and Term Loan Agreement" where Regions agreed to loan $3,100,000 to ROP over time and in periodic advances to: (1) build an office building; and (2) pay the existing mortgage debt held by National Bank of Commerce.[506] ROP executed a promissory note for the amounts advanced and to be advanced by Regions and gave a mortgage on the building and property to secure payment of that note.[507] The agreement required the project to be completed by December 15, 1995, and for the note to convert on that date into a term loan to be amortized over a period of years, provided ROP was not then in default. Otherwise, the note, by its terms, became due and payable in full on December 15, 1995.
July 21, 1995	The Kearneys executed a mortgage to Regions on their Florida condominium.[508]
July 24, 1995	Regions loaned $340,000 to the Kearneys. The promissory note which they executed in return for that loan required them to make interest only payments for six months, beginning September 1, 1995, and then for conversion of the note into a 10-year term loan beginning February 1,

[505] Defendant's Exhibit 16. The same document was also admitted as an attachment to Plaintiff's Exhibit 41.

[506] Plaintiff's Exhibit 41.

[507] Defendant's Exhibit 8 ("Promissory Note (Master Construction Note)")(also admitted as an attachment to both Plaintiff's Exhibit 41 and Plaintiff's Exhibit 40) and Defendant's Exhibit 7 ("Mortgage and Security Agreement")(also admitted as an attachment to Plaintiff's Exhibit 41)

[508] See "Mortgage" attached as Exhibit B to Claim No. 15 filed by Regions Bank, January 29, 1999.

	1996.[509] They executed a mortgage on their homestead as security for the note.[510]
July 24, 1995	Mr. and Mrs. Kearney executed an unlimited personal guarantee of "all debts and liabilities" owed by them to Regions.[511] In that agreement, they specifically granted Regions a security interest in their deposit account, and agreed that if any such obligation was in default, Regions could immediately apply the funds in that deposit account toward the payment of the obligation.
July 24, 1995	Mr. Johnston executed a limited personal guarantee of all debts and liabilities owed by the Kearneys to Regions.[512] Mr. Johnston's maximum liability under the agreement was $170,000. Under that agreement, as a condition precedent to demanding payment from Mr. Johnston, Regions was required first to liquidate any collateral provided as security for those debts and liabilities and to apply funds obtained to those debts and liabilities.
July 27, 1995	The Kearneys received an additional $160,000 loan from Regions. They executed a loan agreement that required them to pay that amount, plus interest, to Regions on October 26, 1995.[513] In that agreement, they granted Regions a security interest in any property where Regions already held a security interest. In addition, they explicitly granted Regions a security interest in any deposit held by Regions and authorized Regions to apply, or set off, any such deposits toward the payment of the loan. This note was renewed or "rolled-over" a number of times in the next three years, that is until May 14, 1998, when it was finally accelerated by Regions.

[509] Defendant's Exhibit 1 and Plaintiff's Exhibit 38, which are the same document.

[510] Defendant's Exhibit 2 and Plaintiff's Exhibit 39, which are the same document.

[511] Defendant's Exhibit 3.

[512] Defendant's Exhibit 4.

[513] See "Variable Rate Consumer Loan Agreement" attached as Exhibit A to Claim No. 15 filed by Regions Bank, January 29, 1999.

December 15, 1995	The initial deadline for ROP to complete its project and to repay its construction loan passed. On that date, the project was incomplete and the construction note was not paid.
January 1996	A dispute arose between ROP and its general contractor, Coston Construction Company. Coston later abandoned the job and filed suit in state court against ROP, its partners individually, and Regions.[514]
February 16, 1996	The Kearneys executed an amendment to the $340,000 mortgage note held by Regions.[515] The amendment changed the date that the note would transform into a term loan from February 1, 1996, to May 16, 1996, and required the Kearneys to continue making monthly interest payments.
March 31, 1996	ROP's construction note was amended to reflect a change in its due date to May 31, 1996.[516]
May 31, 1996	ROP's construction note was amended a second time. The amendment increased the principal amount of the note to $3,350,000 and changed the note's due date to August 31, 1996.[517]
June 12, 1996	The amount borrowed by ROP from Regions reached $3,100,000, the maximum loan amount allowed under the original agreement; however, Regions continued to advance money to ROP pursuant to Regions' agreement to pay the increased amount reflected in the second amendment to the construction note.[518]

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[514] Defendant's Exhibit 59; Defendant's Exhibit 63; Defendant's Exhibit 65.

[515] Defendant's Exhibit 5 ("Promissory Note" dated February 16, 1996, one of seven promissory notes in Defendant's Exhibit 5).

[516] Plaintiff's Exhibit 40 ("Amendment to Promissory Note ("Master Construction Note)[Amendment to extend term of Master Construction Note]" dated March 31, 1996).

[517] Plaintiff's Exhibit 40 ("Second Amendment to Promissory Note ("Master Construction Note)[Amendment to increase principal amount and term of Master Construction Note]" dated May 31, 1996).

[518] Plaintiff's Exhibit 43 ("Commercial Loan Activity Journal for the Period 01/01/96 to 12/31/96").

July 17, 1996	ROP's construction note was amended a third time to increase the principal amount to $3,475,000.[519]
July 24, 1996	ROP's construction note was amended a fourth time to increase the principal amount to $4,500,000.[520]
August 16, 1996	The Kearneys executed a second amendment to the $340,000 mortgage note held by Regions.[521] The amendment changed the target date for transforming the note into a term loan from the first amended date of May 16, 1996, to November 16, 1996. This amendment required the Kearneys to continue making monthly interest payments until that date.
August 31, 1996	The extended deadline for ROP to complete its project and pay its construction note passed; however, the project remained incomplete and the note remained unpaid.
September 10, 1996	Regions made its final advance to ROP. With that advance, Regions had loaned ROP $4,500,000, the principal amount shown on the fourth amendment to the construction note.[522]
September 30, 1996	ROP's construction note was amended a fifth time.[523] The amendment changed ROP's deadline for paying the construction note to November 15, 1996.

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[519] Plaintiff's Exhibit 40 ("Third Amendment to Promissory Note ("Master Construction Note)[Amendment to increase principal amount of Master Construction Note]" dated July 17, 1996).

[520] Plaintiff's Exhibit 40 ("Fourth Amendment to Promissory Note ("Master Construction Note)[Amendment to increase principal amount of Master Construction Note]" dated July 24, 1996).

[521] Defendant's Exhibit 5 ("Promissory Note" dated August 16, 1996).

[522] Plaintiff's Exhibit 43 ("Commercial Loan Activity Journal for the Period 01/01/96 to 12/31/96").

[523] Plaintiff's Exhibit 40 ("Fifth Amendment to Promissory Note ("Master Construction Note)[Amendment to extend term of Master Construction Note]" dated September 30, 1996).

November 6, 1996	Regions' attorney sent letters to Mr. Johnston and Mrs. Kearney notifying them that ROP's construction note was in default.[524]
November 7, 1996	Mr. Mitchell informed Mr. Johnston and Mr. Kearney that Regions had incurred cost overruns of $650,000. He demanded that they contribute the money necessary to eliminate those overruns. In response, Mr. Kearney informed Mr. Mitchell that he was involved in a real estate transaction in Florida and he expected to realize enough money to complete the ROP project.[525]
November 14, 1996	Regions' attorney sent a letter to the Kearneys notifying them that their mortgage notes were in default, specifying the nature and amounts of those defaults, demanding that those defaults be cured, and threatening foreclosure if they were not.[526]
November 14, 1996	Regions' attorney sent Mr. Johnston a letter notifying him that the Kearneys' personal notes which Mr. Johnson had guaranteed were in default.[527]
November 15, 1996	The Kearneys executed a third amendment to the $340,000 mortgage note held by Regions.[528] The amendment changed the target date for transforming the note into a term loan from the second amended date of November 16, 1996, to December 16, 1996. The amended note required the Kearneys to continue making monthly interest payments until that date.

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[524] Defendant's Exhibit 20 (letter dated November 6, 1996) and Defendant's Exhibit 21 (letter dated November 6, 1996).

[525] Defendant's Exhibit 89.

[526] Plaintiff's Exhibit 1. The same document was also admitted as part of Defendant's Exhibit 18.

[527] Defendant's Exhibit 19 (letter dated November 14, 1996).

[528] Defendant's Exhibit 5 ("Promissory Note" dated November 15, 1996).

November 15, 1996	Mrs. Kearney wrote two checks to an ROP subcontractor totaling $60,000. Those checks were drawn on the Kearneys' personal checking account at Regions, even though the account was overdrawn by $16,056.[529]
November 20, 1996	Mr. Kearney wrote a check for $32,000 to another ROP subcontractor from the same account, even though the account was overdrawn by $16,056.[530]
November 21, 1996	Mr. Mitchell informed Mr. Johnston that Mr. Johnston would be required to contribute the funds necessary to complete the ROP project because Mr. Kearney had not produced the funds he promised on November 7, 1996, to produce. Mr. Johnson assured Mr. Mitchell that he would take the necessary actions to finish the project.[531]
November 25, 1996	$100,000 was deposited by wire transfer into Mr. and Mrs. Kearney's personal checking account at Regions Bank.[532]
November 26, 1996	$400,000 was deposited by wire transfer into Mr. and Mrs. Kearney's personal checking account at Regions Bank.[533]
December 24, 1996	Including the checks written by the Kearneys on November 15 and November 20, 1996, between November 26 and December 24, 1996, the Kearneys wrote checks totaling $236,120.59 from their personal checking account at Regions. Some were written to "cash," but most were written to ROP subcontractors.[534]

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[529] Defendant's Exhibit 107 (checks to "Marathon Electric", each for $30,000, each dated November 15, 1996) and Plaintiff's Exhibit 19 (bank statement with closing date of December 4, 1996).

[530] Defendant's Exhibit 107 (check to "Brown Plumbing" for $32,000 dated November 20, 1996) and Plaintiff's Exhibit 19 (bank statement with closing date of December 4, 1996).

[531] Plaintiff's Exhibit 9 ("Commercial Loans Contact Report").

[532] Defendant's Exhibit 94 (first sheet).

[533] Defendant's Exhibit 94 (second sheet).

[534] Defendant's Exhibit 107 and Plaintiff's Exhibit 19 (bank statement with closing date of December 4, 1996 and bank statement with closing date of January 6, 1997).

December 24, 1996	Between November 26 and December 24, 1996, Regions debited a net $256,301.06 from the Kearneys' personal checking account. It used the money to pay: (1) $69,565.07 of the interest which had accrued on ROP's construction loan; (2) the claims of several ROP subcontractors; and (3) to pay the unpaid accrued interest on the Kearneys' two personal loans.[535]
December 24, 1996	The Kearneys' personal checking account was overdrawn by $8,422.56.[536]
January 10, 1997	Mr. Kearney faxed a document to Mr. Johnston that contained a list of the checks that he and Mrs. Kearney had written out of their personal checking account at Regions in November and December 1996, and a list of the debits made by Regions from that account during the same period. The list reflects the amount of each check and debit, describes the disposition of the debited funds, and, with a few exceptions, names the recipient of each check.[537]
February 7, 1997	A dispute arose between ROP and its tenant, CBR, over the terms of the lease agreement, square footage, work which had not been completed on the building by ROP (including the striping in the parking lot), and payment for tenant improvements.[538]
February 16, 1997	The Kearneys executed a fourth amendment to the $340,000 mortgage note held by Regions.[539] The amendment changed the target date for transforming the note into a term loan from the third amended date of December 16, 1996, to April 30, 1997, and required the Kearneys to continue making monthly interest payments until that date.

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[535] Defendant's Exhibit 107 and Plaintiff's Exhibit 19 (bank statement with closing date of December 4, 1996 and bank statement with closing date of January 6, 1997).

[536] Plaintiff's Exhibit 19 (bank statement with closing date of January 6, 1997).

[537] Defendant's Exhibit 50.

[538] Defendant's Exhibit 101.

[539] Defendant's Exhibit 5 ("Promissory Note" dated February 16, 1997).

February 26, 1997	ROP's construction note was amended a sixth and final time.[540] The amendment changed ROP's deadline for paying the construction note to March 31, 1997.
March 27, 1997	Regions' attorney sent the Kearneys a letter: (1) notifying them that their mortgage notes were both in default; (2) specifying the nature and amount of those defaults; (3) demanding the defaults be cured; and (4) threatening imminent foreclosure if the defaults were not cured .[541]
April 8, 1997	Regions' attorney sent the Kearneys another letter: (1) notifying them that their mortgage notes were both in default; (2) specifying the nature and amount of those defaults; (3) demanding the defaults be cured; and (4) threatening imminent foreclosure if the defaults were not cured.[542]
April 8, 1997	Regions' attorney sent another letter to Mr. Johnston notifying him that the Kearneys' personal notes, which he had guaranteed, were in default.[543]
April 30, 1997	The Kearneys executed a fifth amendment to the $340,000 mortgage note held by Regions.[544] The amendment changed the target date for transforming the note into a term loan from the fourth amended date of April 30, 1997, to June 30, 1997, and required the Kearneys to continue making monthly interest payments until that date.
May 1, 1997	Regions' attorney sent the Kearneys a letter informing them that Regions had extended the deadline for them to cure the defaults in their mortgage notes to May 31, 1997.[545]

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[540] Plaintiff's Exhibit 40 ("Sixth Amendment to Promissory Note (Master Construction Note) [Amendment to extend term of Master Construction Note]").

[541] Defendant's Exhibit 18 (letter dated March 27, 1997).

[542] Defendant's Exhibit 18 (letter dated April 8, 1997).

[543] Defendant's Exhibit 19 (letter dated April 8, 1997)

[544] Defendant's Exhibit 5 ("Promissory Note" dated April 30, 1997).

[545] Defendant's Exhibit 18 (letter dated May 1, 1997).

July 25, 1997	Mr. Johnston terminated Mr. Kearney's authority to act for or on behalf of ROP.[546]
July 31, 1997	The Kearneys executed a sixth amendment to the $340,000 mortgage note held by Regions.[547] The amendment changed the target date for transforming the note into a term loan from the fifth amended date of June 30, 1997, to August 30, 1997, and required the Kearneys to continue making monthly interest payments until that date.
August 22, 1997	Marathon Electrical Contractors, Inc., one of ROP's subcontractors, filed a breach of contract suit against ROP, Mr. and Mrs. Kearney, and Mr. Johnston in state circuit court.[548]
September 1997	Mr. Johnston and Mr. Kearney began negotiating a comprehensive settlement of all financial and legal issues between them, including matters other than ROP. The negotiations were conducted for the most part by Mr. Johnston or his attorney, Mr. Moncus, with Mr. Walker, ROP's accountant. Mr. Walker was also Mr. Kearney's personal accountant and purported to act as a conduit between Mr. Kearney and Mr. Johnston.[549]
October 3, 1997	Regions' attorney sent the Kearneys another letter: (1) notifying them that their mortgage notes were both in default; (2) specifying the nature and amount of those defaults; (3) demanding the defaults be cured; and (4) threatening imminent foreclosure if the defaults were not cured.[550]

[546] Defendant's Exhibit 103.

[547] Defendant's Exhibit 5 ("Promissory Note" dated July 31, 1997).

[548] Plaintiff's Exhibit 75.

[549] Defendant's Exhibit Nos. 79-85 and 87.

[550] Defendant's Exhibit 18 (letter dated October 3, 1997).

October 3, 1997	Regions' attorney sent another letter to Mr. Johnston notifying him that the Kearneys' personal notes, which he had guaranteed, were in default.[551]
October 20, 1997	Regions' attorney sent letters to Mr. Johnston and Mrs. Kearney notifying them that ROP's construction note was in default.[552]
October 31, 1997	Marathon Electrical Contractors, Inc. obtained a default judgment against ROP, Mr. Kearney and Mrs. Kearney in its state court lawsuit for $148,252.23.[553]
November 3, 1997	The Kearneys defaulted on the notes owed by them to AmSouth. Those notes were secured by first and second mortgages on their homestead. AmSouth accelerated the notes and began foreclosure proceedings.[554] The foreclosure sale was ultimately scheduled for February 13, 1997.
November 13, 1997	Mr. Johnston engaged in negotiations with Regions, through Mr. Mitchell and Mr. Carmody, to obtain solutions: (1) to issues regarding ROP's debt to Regions; (2) to ROP's problems with its tenant; (3) to debts owed by ROP to subcontractors and suppliers; and (4) to the Kearneys' personal notes, which he had guaranteed in part.[555]
December 5, 1997	Marathon Electrical Contractors, Inc. obtained a non-cumulative summary judgment against Mr. Johnston for $149,239.58 in its state court lawsuit.[556]

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[551] Defendant's Exhibit 19 (letter dated October 3, 1997).

[552] Defendant's Exhibits No. 20 and 21.

[553] Plaintiff's Exhibit 84.

[554] Plaintiff's Exhibit 57.

[555] Plaintiff's Exhibit Nos. 13, 15, 16, 17, 18, 81 and Defendant's Exhibit Nos. 51, 52, 53, 56, and 88.

[556] Plaintiff's Exhibit 84.

January 27, 1998	Regions tendered an offer to AmSouth to purchase the notes owed by the Kearneys to AmSouth and the mortgages which secured those notes.[557]
January 29, 1998	AmSouth accepted Regions' offer to purchase the Kearney notes and mortgages.[558]
February 13, 1998	AmSouth's foreclosure sale of the Kearneys' homestead (pursuant to the powers granted in its first and second mortgages) was scheduled to occur on this date.[559]
February 13, 1998	AmSouth, Regions, and the Kearneys entered into an agreement. Regions paid $571,500 to AmSouth. AmSouth advanced an additional $100,000 on its first note to be held in escrow pending resolution of the BIG Steel litigation and assigned its two mortgages on the Kearney residence to Regions. The Kearneys executed a consolidated promissory note in which they agreed to pay Regions $911,500, which sum included the $340,000 mortgage note they owed to Regions plus the $571,500 paid by Regions to AmSouth.[560] The consolidated note was required by its terms to be paid in full on June 1, 1998. It also required the Kearneys to make monthly interest payments until that date.[561] The note did not contain a provision for conversion into a term loan.
March 30, 1998	Regions' attorney sent the Kearneys another letter: (1) notifying them that their mortgage notes were both in default; (2) specifying the nature and amount of those defaults; (3) demanding the defaults be cured; and (4)

[557] Plaintiff's Exhibit 59.

[558] Plaintiff's Exhibit 59.

[559] Plaintiff's Exhibit 60. The same document was also admitted as Defendant's Exhibit 13.

[560] Plaintiff's Exhibit 60. The same document was also admitted as Defendant's Exhibit 13.

[561] Plaintiff's Exhibit 35. The same document was also admitted as Defendant's Exhibit 14.

	threatening imminent foreclosure if the defaults were not cured.[562]
March 30, 1998	Regions' attorney sent another letter to Mr. Johnston notifying him that the Kearneys' personal notes, which he had guaranteed, were in default.[563]
April 9, 1998	Mr. Johnston sent a letter to Mr. Carmody suggesting a comprehensive settlement where: (1) Regions would foreclose its mortgage on the ROP property; (2) Mr. Wyatt Haskell, Mr. Johnston's former law partner, would purchase the property; (3) ROP's tenant would enter into a new 15 year lease; and (4) he would pay $600,000 in cash to defray the costs of accomplishing the proposal.[564] He also encouraged Regions to aggressively seek to collect as much as it could from the Kearneys and offered to assist Regions in that effort.
May 4, 1998	Coston Construction Co. obtained a $363,724.05 judgment against ROP, Mr. Johnston, and Mrs. Kearney in its state court lawsuit.[565]
May 14, 1998	Regions' attorney sent the Kearneys a letter notifying them that Regions had accelerated their mortgage notes and that a foreclosure sale of property which secured those notes would be conducted on June 17, 1998, during the legal hours of sale.[566]
June 3, 1998	Mr. Carmody, Regions' attorney, sent a letter to Mr. Moncus, Mr. Johnston's attorney, transmitting terms and conditions of a possible settlement between Regions, ROP, Mr. Johnston, and ROP's tenant. The proposal was similar to the proposal

[562] Defendant's Exhibit 18 (letter dated March 30, 1998).

[563] Defendant's Exhibit 19 (letter dated March 30, 1998).

[564] Plaintiff's Exhibit 16.

[565] Defendant's Exhibit 24 ("Circuit Court's Judgment on Arbitration Award").

[566] Plaintiff's Exhibit 2. The same document was also admitted as Defendant's Exhibit 18 (letter dated May 14, 1998).

	suggested by Mr. Johnston.[567] Mr. Carmody's proposal involved a sale of the ROP property to Mr. Haskell, financed by the bank. The bank, as part of the settlement, would not agree to release the individual partners, but would agree to pursue collection against the Kearneys before requiring Mr. Johnston to pay the final deficiency. The proposal noted funds already advanced by Mr. Johnston, funds Mr. Johnston would advance, and Mr. Johnston's efforts in assisting ROP in resolving its debt and the dispute with ROP's tenant.
June 17, 1998	Mr. Leara, another of Region's attorneys, had a telephone conversation on his cellular telephone with Mrs. Kearney at 10:53 A.M.[568] Mrs. Kearney was at the office of a local attorney.[569] Mr. Leara was on the steps of the county courthouse.[570]
June 17, 1998	Mr. Leara had a telephone conversation on his cellular telephone at 11:00 A.M. with Mr. Carmody.[571] Mr. Carmody was at this bankruptcy court.[572] Mr. Leara again was on the steps of the county courthouse.[573]
June 17, 1998	**At 11:04 A.M., Mr. Leara conducted a foreclosure sale of the Kearney's homestead to Regions Bank for $1,003,623.34.**[574]
June17, 1998	Sometime that same day, Mr. Leara sent a letter to Mr. and Mrs. Kearney informing them that Regions had purchased

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[567] Plaintiff's Exhibit 14.

[568] Transcript at 136-37. Defendant's Exhibit 120.

[569] Transcript at 136.

[570] Transcript at 138.

[571] Transcript at 137. Defendant's Exhibit 120.

[572] Transcript at 137-38.

[573] Transcript at 138.

[574] Plaintiff's Exhibit 5. The same document was also admitted as Defendant's Exhibit 22.

	their homestead at the foreclosure sale and that the bank demanded that they vacate the property within ten days.[575]
June 17, 1998	**At 11:45 A.M., Mrs. Kearney filed an abbreviated Chapter 13 petition.**[576]
June 27, 1998	Mr. and Mrs. Kearney continued to reside in their former homestead despite Regions' demand that they vacate.[577]
July 15, 1998	Regions sent a letter by way of Mr. Leara to Mr. Kearney offering to sell the Kearneys' former homestead to Mr. Kearney for $1,003,623.3. In that offer Regions offered to finance $753,623.34 of the purchase price for a period of five years.[578]
August 3, 1998	Regions conducted a foreclosure sale of the ROP property and purchased the property for $3,743,000.[579]
August 10, 1998	**Based on her oral motion to convert, Mrs. Kearney's case was converted to Chapter 7.**[580]
August 21, 1998	Mr. Leara filed a complaint on behalf of Regions in state court against Mr. and Mrs. Kearney seeking to have them ejected from their former homestead.[581]
August 26, 1998	Three months after filing her petition, Mrs. Kearney filed her schedules and statement of affairs.[582]

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[575] Plaintiff's Exhibit 65.

[576] Voluntary Petition filed June 17, 1998, at 11:45 a.m. as Bankruptcy Case No. 98-03967-BGC-7, Proceeding No. 1.

[577] Transcript at 358-59.

[578] Plaintiff's Exhibit 69.

[579] Defendant's Exhibit 32.

[580] Order entered August 10, 1998, Proceeding No. 17.

[581] Defendant's Exhibit 42 ("Complaint in Ejectment").

[582] Schedule and Statement of Affairs filed August 26, 1998, Proceeding No. 23.

August 26, 1998	The Court allowed Mrs. Kearney's bankruptcy attorney to withdraw.[583] His statement of compensation reflected that he did not receive any compensation from Mrs. Kearney.[584]
September 14, 1998	The Chapter 7 trustee objected to the personal property exemptions claimed by Mrs. Kearney.[585]
September 16, 1998	Regions sold the ROP property to Wyatt R. Haskell for $4,486,000.[586] The entire purchase price was financed by Regions.[587]
September 17, 1998	Regions and Mr. Johnston entered into a "Mutual Release and Indemnification Agreement," in which they agreed to release one another from any liability arising out of the ROP construction loan.[588]
September 28, 1998	Regions filed an application for entry of default against Mr. Kearney in its state court ejectment action.[589]
September 29, 1998	Acting pro se, Mrs. Kearney filed a pleading in Regions' state court ejectment action styled, "Suggestion of Bankruptcy".[590]

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[583] Order entered August 10, 1998, Proceeding No. 17.

[584] Statement Pursuant to Rule 2016(B) filed August 26, 1998, Proceeding No. 24.

[585] Trustee's Objection to Property Claimed as Exempt and to Values of Property Claimed as Exempt filed September 14, 1998, Proceeding No. 27.

[586] Defendant's Exhibit 35.

[587] Defendant's Exhibit 37.

[588] Defendant's Exhibit 36.

[589] Defendant's Exhibit 42 ("Alabama Judicial Data Center, Case Action Summary, Circuit Civil").

[590] Defendant's Exhibit 42 ("Suggestion of Bankruptcy").

October 3, 1998	Without knowledge of Mrs. Kearney's Suggestion of Bankruptcy, the state court entered a default judgment against Mr. Kearney in Regions' ejectment suit.[591]
October 6, 1998	After being informed of Mrs. Kearney's Suggestion of Bankruptcy, on its own volition, the state court set aside the default judgment.[592]
October 9, 1998	Regions filed a motion for summary judgment in its state court ejectment suit. In that motion Regions alleged that the automatic stay did not apply to the suit.[593]
October 13, 1998	Regions filed a motion in its state court ejectment suit to have the default judgment against Mr. Kearney reinstated.[594] Regions alleged that the automatic stay did not apply to the suit.
October 21, 1998	Mr. Kearney was indicted for fraudulently inducing AmSouth Bank to issue a $20,000 cashier's check against the account of another person.[595]
October 21, 1998	The standing Chapter 13 trustee filed his final report. That report represented that Mrs. Kearney did not make any payments in her Chapter 13 case.[596]

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[591] Defendant's Exhibit 42 ("Alabama Judicial Data Center, Case Action Summary, Circuit Civil").

[592] Defendant's Exhibit 42 ("Alabama Judicial Data Center, Case Action Summary, Circuit Civil").

[593] Defendant's Exhibit 42 ("Alabama Judicial Data Center, Case Action Summary, Circuit Civil" and "Plaintiff's Motion to Reinstate Default Judgment & Set Case on Active Docket").

[594] Defendant's Exhibit 42 ("Plaintiff's Motion to Reinstate Default Judgment & Set Case on Active Docket").

[595] Defendant's Exhibit 75.

[596] Final Report of Trustee filed October 21, 1998, Proceeding No. 50.

October 23, 1998	The state court entered an order in Regions' ejectment suit setting Regions' motion for summary judgment for hearing on November 6, 1998.[597]
November 9, 1998	The state court entered an order granting Regions' motion for summary judgment. That order: (1) directed Mr. and Mrs. Kearney and their dependents to vacate their former homestead by 3:00 p.m. on November 19, 1998; (2) directed the sheriff to, if necessary, physically remove them from the property along with their personal property; and (3) awarded a $4,000 judgment against Mr. and Mrs. Kearney for their post-foreclosure occupation of the property.[598]
November 20, 1998	The clerk of the state circuit court issued an "Execution" that directed the sheriff to place Regions in possession of the Kearneys' former homestead.[599]
November 28-29, 1998	Mrs. Kearney moved out of her homestead along with her minor son. She moved the bulk of her belongings and placed them in storage. Mr. Kearney continued to reside in the house. The Kearneys left some personalty in the house and left a van filled with items of personalty parked in the yard.[600]
December 9, 1998	This Court entered an order submitted by the trustee's attorney which reflected a settlement he reached with Mrs. Kearney regarding his objection to her exemption claims.[601] Under the terms of that order, Mrs. Kearney was directed to identify $3,000 worth of the items of personalty from the list she previously submitted to the trustee. She would be permitted to keep that personalty but would be required to surrender the remaining items on the list to the trustee within 30 days.

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[597] Defendant's Exhibit 42 ("Alabama Judicial Data Center, Case Action Summary, Circuit Civil").

[598] Defendant's Exhibit 42 ("Order on Regions Bank's Motion for Summary Judgment").

[599] Defendant's Exhibit 49.

[600] Transcript at 363; 410-12.

[601] Order on Trustee's Objection to Exemption Claims entered December 9, 1998, Proceeding No. 55.

December 22, 1998	Sometime between November 20 and December 22, 1998, a sheriff's deputy went to the Kearneys' former homestead to dispossess the Kearneys and their personalty from the property. He met Mr. Kearney who dissuaded him. Mr. Kearney told the deputy that an agreement had been reached with Regions which would permit him and his family to remain in possession of the property.[602]
December 22, 1998	Mr. Leara sent the state circuit court clerk a follow-up letter to inform her that Regions had not agreed to allow the Kearneys to remain in their former homestead. He requested her to instruct the deputy to return to the property and dispossess the Kearneys.[603]
January 5, 1999	The trustee filed a motion in which he proposed to sell certain of Mrs. Kearney's nonexempt personalty to Mr. Kearney for $10,000 and to sell the estate's interest in the Kearneys' former homestead to Mr. Kearney for $31,000.[604] Regions objected to that proposed sale.[605]
January 6, 1999	A sheriff's deputy returned to the Kearneys' former homestead, removed the remaining personalty, and placed it outside.[606]
January 6, 1999	Mr. Kearney moved the personalty back into the house.[607]
January 19, 1999	A hearing on the trustee's proposal to sell the estate's interest in the Kearneys' former homestead and certain personalty to Mr. Kearney was held.[608] Regions withdrew its

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[602] Transcript at 149, 202-03, 206, and 235.

[603] Plaintiff's Exhibit 8.

[604] Motion to Authorize Trustee to Sell Property filed January 5, 1999, Proceeding No. 57.

[605] Objection to Trustee's Motion to Sell Property filed January 8, 1999, Proceeding No. 61.

[606] Transcript at 361.

[607] Transcript at 415.

[608] Minute Entry filed January 22, 1999, Proceeding No. 69.

	objection based on representations that it was to receive the entire sum necessary to redeem the Kearneys' former homestead as part of the sale. The trustee was to submit an order allowing the sale to Mr. Kearney, if Mr. Kearney could close within 30 days, otherwise the order would allow the sale of the property to LAH Real Estate, Inc. The sale was not consummated.
March 1, 1999	Acting pro se, Mrs. Kearney filed a document entitled "Motion to Compel" in which she alleged that Regions had obstructed her attempt to purchase the property by failing or refusing to provide her "loan processing agent" or the closing attorney with the documents they needed to close the loan.[609]
March 16, 1999	Mr. Stan Ware, the representative of Regions charged with the responsibility of selling the Kearneys' former homestead, complained to the police that a trespasser was residing in the house.[610]
March 22, 1999	Mrs. Kearney filed a motion with the Court which was the precursor to the present adversary proceeding.[611] That motion was the first mention to this Court by either Mrs. or Mr. Kearney that Regions had taken actions to dispossess them from their former homestead.
March 22, 1999	A hearing was held on Mrs. Kearney's "Motion to Compel."[612] The parties settled the matter. The trustee was to prepare an order authorizing a sale of the Kearneys' former homestead to either Mrs. Kearney or her designee, identified by her as a "Mr. James Vojtech." The sale was contingent on either Mrs. Kearney or her designee closing the sale by April 2, 1999. That order was to be reviewed by Mrs. Kearney's and Mr. Vojtech's loan underwriter.

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[609] Motion to Compel filed March 1, 1999, Proceeding No. 79.

[610] Defendant's Exhibit 117.

[611] Motion to set aside Region's foreclosure, to reinstate the mortgage, to compel Regions to account for money taken from the debtor's checking account filed March 22, 1999, Proceeding No. 87.

[612] Minute Entry filed March 24, 1999, Proceeding No. 88.

March 24, 1999	The Court executed an order authorizing the sale of certain nonexempt personalty to Mr. Kearney and executed a separate order, drafted in accordance with an agreement reached between the parties, (including Mr. and Mrs. Kearney), in open court, extending Mrs. Kearney's right (and that of her designee) to purchase the Kearneys' former homestead from the trustee and Regions until April 2, 1999. The Court also allowed the sale of the property to LAH if Mrs. Kearney (or her designee) was unable to close the sale by that time.[613]
April 2, 1999	The trustee's proposed sale of the Kearneys' former homestead to Mrs. Kearney or her designee did not occur. Furthermore, LAH failed to purchase the property.
April 26, 1999	Mrs. Kearney formally withdrew her Motion to set aside Region's foreclosure, to reinstate the mortgage, to compel Regions to account for money taken from the debtor's checking account filed on March 22, 1999.[614]
May 5, 1999	The trustee filed a motion for authority to auction the Kearneys' former homestead to the highest bidder free and clear of Regions' interest in the property.[615] He indicated in that motion that two prospective purchasers had expressed interest in purchasing the property. Those were Mr. Kearney, and the eventual purchasers, Mr. and Mrs. Irving Meisler. He contended that Regions' foreclosure sale prior to bankruptcy was invalid. Regions objected to the motion.[616]

[613] Order Approving Sale of Interests in Personal Property entered March 24, 1999, Proceeding No. 90 and Order Approving Sale of Interests in Real Property entered March 24, 1999, Proceeding No. 91.

[614] Withdrawal of Motion filed April 26, 1999, Proceeding No. 96.

[615] Motion for Order Authorizing Auction of Real Property filed May 5, 1999, Proceeding No. 98.

[616] Objection to Trustee's Motion to Sell Property filed May 14, 1999, Proceeding No. 102.

May 14, 1999	**The Court entered Mrs. Kearney's Chapter 7 discharge.**[617]
May 26, 1999	The trustee filed a motion for authority to sell the Kearneys' Florida condominium to Mr. and Mrs. Beckemeier at a private sale, and free and clear of liens, including Regions' lien.[618]
June 4, 1999	Mr. Kearney filed an offer to purchase bonds in an investment account at Regions Investment Company from the trustee for $55,000.[619]
June 4, 1999	Mr. Kearney filed an offer to purchase the Florida condominium from the trustee.[620]
June 7, 1999	A hearing was held on the trustee's motion to auction the Kearneys' former homestead.[621] The Court indicated that an order authorizing the sale could not, and would not, be issued because the trustee's proposal did not meet any of the requirements of section 363(f). The trustee's attorney indicated that he would attempt to auction the property the following day subject to Regions' interest. With that change, Regions withdrew its objection.
June 7, 1999	A hearing was held on the trustee's motion to sell the Florida condominium.[622]
June 8, 1999	The trustee attempted to auction the estate's interest in the Kearneys' former homestead but was unsuccessful.
June 8, 1999	An order was entered authorizing the trustee to sell the Florida condominium to Mr. Kearney if he could prove by

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[617] Discharge of Debtor entered May 14, 1999, Proceeding No. 101.

[618] Trustee's Motion to Sell Property of the Estate by Private Sale Free and Clear of Liens and to Approve Payment of Certain Interests filed May 26, 1999, Proceeding No. 104.

[619] Offer to Purchase filed June 4, 1999, Proceeding No. 111.

[620] Offer to Purchase filed June 4, 1999, Proceeding No. 112.

[621] Minute Entry filed June 8, 1999, Proceeding No. 115.

[622] Minute Entry filed June 8, 1999, Proceeding No. 116.

	5:00 p.m. that date that he had secured the financing necessary to complete the purchase. The order also provided that if Mr. Kearney was unable to prove his ability to purchase the property by the appointed time, the trustee was authorized to sell the property to the Beckemeiers.[623]
June 18, 1999	**Mrs. Kearney's statutory right to redeem her former homestead, if that right still existed, expired.**
June 22, 1999	Another hearing was held on the trustee's motion to auction the Kearneys' former homestead.[624] The trustee and Regions insisted that the trustee's motion to sell free and clear, and Regions' objection to the motion were valid. The Court agreed to consider the trustee's argument that the prepetition foreclosure sale was invalid, but would consider that issue in light of the specific issues raised by the trustee in his motion.
June 30, 1999	Mrs. Kearney instituted the present adversary proceeding pro se.[625]
August 9, 1999	Regions filed a motion for summary judgment in the instant proceeding.[626]
August 25, 1999	The Court issued an order sustaining Regions' objection to the trustee's motion to auction the Kearneys' former homestead free and clear of Regions' interest.[627]
September 28, 1999	Regions sold the Kearneys' former homestead to Mr. Irving D. Meisler and Mrs. Pamela H. Meisler for $940,000.[628]

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[623] Order Approving Sale of Condominium filed June 8, 1999, Proceeding No. 117.

[624] Minute Entry filed June 25, 1999, Proceeding No. 120.

[625] Complaint to Set Aside Foreclosure Action by Regions Bank, To Reinstate the Mortgage, To Account for All Funds in Account 304598695, To Determine the True Amount Owed on the Note filed June 30, 199 as AP Proceeding No. 1.

[626] Defendant's Motion for Summary Judgment filed August 9, 1999, Proceeding No. 6.

[627] Order Sustaining Objection to Trustee's Motion to Sell Property (Filed by Regions Bank) entered August 25, 1999, Proceeding No. 129.

[628] Defendant's Exhibit 34.

December 23, 1999	Mrs. Kearney filed a report with the Mountain Brook police alleging that someone had stolen her 1984 Chevrolet van from her former homestead.[629] A day or two later, a big screen television and sofa that the Kearneys had left in the house also disappeared.[630] Mr. Meisler then disposed of the Kearneys' personalty that remained in the house. He believed it had been abandoned.[631]
December 1999	Around the end of December 1999, the Meislers razed the house located on the Kearneys' former homestead.[632]
July 10, 2000	Mr. Kearney pled guilty to federal bank fraud charges and was sentenced to 10 months in prison.[633]
August 24, 2000	The Court entered an order on Regions' motion for summary judgment. The Court denied the motion as to Mrs. Kearney's post-petition causes of action but, as to her prepetition causes of action, the Court invited the trustee to intervene and be substituted as the proper party plaintiff.[634]
September 29, 2000	Mrs. Kearney's present attorney, Mr. Stephen D. Heninger, entered his representation of Mrs. Kearney.[635]
October 25, 2000	The trustee filed a motion to sell stocks and bonds being held by Regions Investment Company, to Mr. Kearney, free and clear of the security interest claimed by Regions.[636]

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[629] Defendant's Exhibit 116.

[630] Meisler Transcript at 48.

[631] Meisler Transcript at 41-44 and 49-51.

[632] Meisler Transcript at 40.

[633] Defendant's Exhibit 75.

[634] Order entered August 24, 2000, AP Proceeding No. 16.

[635] Notice of Appearance filed September 29, 2000, AP Proceeding No. 18.

[636] Trustee's Motion for Authority to Sell Property of the Estate by Private Sale Free and Clear of Liens and Other Interests filed October 25, 2000, Proceeding No. 179.

October 25, 2000	The Court entered an order allowing the trustee to be substituted as the proper party in interest as to Mrs. Kearney's prepetition causes of action.[637]
October 26, 2000	The trustee filed a pleading in which he restated, on behalf of the estate, the prepetition causes of action originally described by Mrs. Kearney, and added Mr. Meisler as a defendant.[638]
February 14, 2001	The trustee filed a notice to sell all of the estates' interest, if any existed, in a leased lake lot. The sale was to be to Mr. Kearney and subject to all existing claims, including the rights of the lessor, Alabama Power Company. The price was $20,000, as is, without warranty or representation regarding the estate's right to or interest in said property.[639]
February 22, 2001	The Court entered an order authorizing the trustee to sell the investment items in his brokerage account. Those items had been transferred by Regions Investment Company, in accordance with a previous consent order, to Mr. Kearney for $54,728.33.[640]
March 16, 2001	The Court entered an order approving a compromise between the trustee and Mr. Meisler and dismissed the trustee's causes of action against Mr. Meisler.[641]
August 30, 2001	The trustee and Regions filed a joint motion to approve a compromise and settlement of their issues in the instant adversary proceeding.[642]

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[637] Order entered October 25, 2000, AP Proceeding No. 26.

[638] Trustee's Amended and Restated Complaint and Complaint in Intervention filed October 26, 2000, AP Proceeding No. 27.

[639] Notice of Intent to Sell Claims Related to Lake Lot filed February 14, 2001, Proceeding No. 219.

[640] Order entered February 22, 2001, Proceeding No. 222.

[641] Order entered March 16, 2001, AP Proceeding No. 70.

[642] Joint Motion for Approval of Compromise filed August 30, 2001, AP Proceeding No. 120.

October 1, 2001	A hearing was held on that joint motion.[643] At the conclusion of the hearing, the Court announced that the motion would be granted.
October 9, 2001	The trial of the adversary proceeding occurred.[644]
October 15, 2001	The Court entered an order approving the compromise between the trustee and Regions and dismissed all claims by the trustee in the instant adversary proceeding, including the prepetition claims originally brought by Mrs. Kearney.[645]

[643] Minute Entry filed October 1, 2001, AP Proceeding No. 136.

[644] Minute Entry filed November 29, 2001, AP Proceeding No. 143.

[645] Order Approving Compromise entered October 15, 2001, Proceeding No. 265.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

In re:	)	
	)	
Billy Joe Jemison, Jr.	)	Case No.: 03-43564-BGC-13
	)	
Debtor.	)	

ORDER

I. Background

The matter before the Court is the Motion for Instructions as to the Court's Order of March 15, 2005 filed on June 16, 2005, by GreenTree - AL, LLC.[1] After notice, a hearing was held on July 20, 2005. Appearing were John Caraway for the debtor; Paul Spina for GreenTree; and Linda Gore, the Chapter 13 Standing Trustee.

II. Findings of Fact

The facts are not disputed. According to a Motion for Relief from Stay filed by GreenTree, AL-LLC, the debtor purchased a Fleetwood Mobile Home on February 13, 1999. That purchase was financed by GreenTree. The debtor granted GreenTree a security interest in the property in exchange for the financing.

According to the Court's records, the debtor filed the current Chapter 13 case on September 19, 2003. The debtor's proposed plan was confirmed on April 9, 2004. Proceeding No. 30

GreenTree filed its Motion for Relief from Stay on January 27, 2005. Proceeding No. 37. In that motion, GreenTree alleged that between October 2003 and January 2005 the debtor failed to make all payments under the parties' security agreement. GreenTree sought relief from the stay to repossess the home.

The parties resolved their differences by entering into an agreement containing a future relief provision that provided if the debtor did not make all future mortgage payments timely and after notice from GreenTree the default was not cured, the stay would lift without further order of this Court.

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[1] The Court did not enter an order on March 15, 2005, in this case. As discussed below, the order referred to in the pending motion is an Agreed Order Conditionally Denying Motion for Relief from Stay **filed** by the parties on March 15, 2005. For whatever reason, the agreement was not approved by the Court until April 13, 2005.

At the hearing on this matter, the parties agreed that the debtor did not make all required mortgage payments after the parties entered into their agreement, and that specifically the March 2005 and April 2005 payments were the missed payments that may have activated the parties' agreed future relief provision.

The Court's records reflect that the debtor filed a Motion to Modify Plan on February 11, 2005. Proceeding No. 40. The Court allowed that motion on March 11, 2005. Proceeding No. 44. The Parties' filed an Agreed Order Conditionally Denying Motion for Relief from Stay on March 15, 2005. Proceeding No. 46. The Court approved that agreement on April 13, 2005. Proceeding No. 50.

The parties agree that they entered into their agreement regarding the lifting of the stay before the debtor's plan was modified. But while they may have entered into that agreement then, the Court did not approve that agreement until after the Court allowed the debtor's modification.

III. Contentions

Greentree contends there is a conflict between the debtor's modification and the parties' agreement on relief from the stay. But GreenTree contends that regardless of the modification, the agreement required the debtor to make his March 2005 and April 2005 mortgage payments timely or the stay would lift automatically without further order of the Court. GreenTree contends that not all post-agreement payments were made and the stay therefore lifted.

The debtor contends that the modification of his plan changed the parties' agreement in regard to relief from the stay. The debtor contends that the modification for the mortgage payments to be made through the trustee rather than directly to GreenTree, as confirmed in the debtor's original plan, eliminated the future relief provision of the parties' stay agreement. While the debtor agrees that the March 2005 and the April 2005 were not made timely, the debtor contends, and the trustee confirms, that the debtor is current in his payments to GreenTree.

IV. Issue

The issue the parties have placed before the Court is: Did the modification change the future relief provision of the parties' relief from stay agreement?

V. Conclusions of Law

The motion before the Court is one for "instructions." Based on the above, the Court offers these three instructions.

One, factually, the failure of GreenTree to receive the March 2005 and April 2005 payments did not trigger the future relief provision of the parties' relief from stay

agreement. The Court's order approving the parties' Agreed Order Conditionally Denying Motion for Relief from Stay was not entered until April 13, 2005, after the debtor's mortgage payments for March 2005 and April 2005 were due.[2] Consequently, while the parties may have entered into their agreement regarding the stay before the modification, the Court's order would not have been in effect to be violated until after the two missed payments were due. Therefore, the Court cannot find that the stay lifted as to the March 2005 and April 2005 payments. And as the trustee represents, the two missed payments have been made and all subsequent mortgage payments have been made through the trustee and the debtor is current in his plan and mortgage payments, both of which are being paid through a wage deduction request to his employer and those payments are also current.

Two, legally, there is no conflict between the debtor's modification and the parties' Agreed Order Conditionally Denying Motion for Relief from Stay. The parties' agreement was not official until approved by the Court on April 13, 2005, over a month after the Court allowed the modification of the debtor's plan.[3] Consequently, the facts do not allow the Court to decide the specific issue brought by the parties. Even if the parties entered into an agreement regarding the automatic stay before the modification was allowed by the Court, the facts are that the Motion to Modify Plan was allowed on March 11, 2005, well before the Court approved the Parties' Agreed Order Conditionally Denying Motion for Relief from Stay on April 13, 2005. Where does that leave the parties then?[4]

---

[2] According to the parties contract, an exhibit to GreenTree's motion for relief from stay, each monthly payment was due on the 14th. The Court's order approving the future relief provision was entered on April 13. As a practical matter both March 2005 and April 2005 payments were already due. The Court is not bothered by the one day overlap between the date of its order and the due date on the April 2005 payment.

[3] Even if the Court had approved the parties' proposed order in regard to their stay agreement on the date that proposed order was filed, that is March 15, 2005, that date would still have been after the Court allowed the debtor's modification on March 11, 2005.

[4] If modification had occurred after an order including a future relief provision in a relief from stay order, under section 1329 of the Bankruptcy Code, it does not appear that modification, without **affirmative** acceptance by the secured creditor, would change that provision. Section 1329 which allows modification of confirmed plans, reads in part:

> (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to--
>
> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
> (2) extend or reduce the time for such payments; or

Three, it is this Court's opinion that the parties' March 15, 2005, agreement approved by this Court on April 13, 2005, remains in effect. That agreement includes an enforceable provision that if the debtor fails to make a future mortgage payment that after certain notice and a failure to cure the default, the stay lifts automatically without further order of this Court.

This order is a written opinion for purposes of the E-Government Act, Pub. L. No. 107-347.

Dated: September 14, 2005

/s/Benjamin Cohen
BENJAMIN COHEN
United States Bankruptcy Judge

BC:pb

> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.
>
> (b)(1) Sections 1322(a), 1322(b), and **1323(c)** of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

11 U.S.C. § 1329 (emphasis added).

Section 1323(c) made applicable to post-confirmation modifications reads in part:

> Any holder of a secured claim that has accepted or rejected the plan **is deemed to have accepted or rejected, as the case may be, the plan as modified, unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification**, and such holder changes such holder's previous acceptance or rejection.

11 U.S.C. § 1323(c) (emphasis added). But as the Court stated earlier, as to this specific matter, it cannot answer that specific issue, and certainly, the Court cannot address any appropriate defenses.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
Roger Dale Steadman,	)	Case No.: 04-00004-BGC-7
	)	
Debtor.	)	
	)	
Beverly Barr,	)	
	)	
Plaintiff,	)	
	)	
v.	)	AP No.: 04-00032-BGC-7
	)	
Roger Dale Steadman,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION ON COMPLAINT
OBJECTING TO DISCHARGE

The matter before the Court is the Complaint Objecting to Discharge filed by the plaintiff, Beverly Barr, on March 9, 2004. After notice, a trial was held on November 18, 2004. Appearing were: Mr. Roger Dale Steadman, the debtor-defendant; his daughter, Ms. Casey Ware, a witness; Mr. Danny Lockhart, Mr. Steadman's attorney; Mrs. Beverly Barr, the plaintiff; Mr. Frank G. Alfano, her attorney; and Mr. Charles Barr, the plaintiff's husband and a witness.

The matter was submitted on the testimony of the parties, Mr. Charles Barr, the plaintiff's husband, and Ms. Casey Ware, the debtor's daughter; exhibits; the record; and arguments and briefs.

I. LIABILITY AND DISCHARGEABILITY

A. FACTS

1. Essentially undisputed facts

On July 2, 2001, the defendant's minor daughter, Casey Ware, then age 16, ran over Mrs. Barr in the debtor's pick-up truck. Mrs. Barr suffered serious bodily injuries. Mrs. Barr contends that Ms. Ware intentionally ran over her because Mr. Steadman told his daughter to do so.

The event occurred in the street in front of Mrs. Barr's residence at 3025 Cathy Lane in Fultondale, Alabama, where she was residing with her husband, Charles, then age 64; her daughter, Jennifer, then age 20; her daughter, Jordan, then age 3; her son, Jackson, then age 8; and her son, John, then age 17, who is now deceased.[1] At about 5:00 p.m. on the day that the event occurred, Mr. Steadman, then age 41, parked his pick-up truck in the street in front of the Barrs' residence. Mr. Steadman had been drinking alcoholic beverages. Ms. Ware, his 16 year old daughter, was with him. Ms. Ware had been, or still was, either a friend or acquaintance of John Barr, the Barrs' 17 year old son. Mr. Steadman did not know any of the Barrs. But, by his own admission, he went to their residence on that occasion for the express purpose of having a confrontation with John Barr over something that John had purportedly said to Ms. Ware.

John was standing in the front yard when Mr. Steadman arrived at the Barrs' home.[2] Mr. Steadman got out of his truck and yelled at John. He said something to the effect of, "I hear that you want to kill me," or "Why do you want to kill me?" Mr. Barr came outside. He and Mr. Steadman engaged in a verbal altercation which ended in or near the road. Mrs. Barr called the police and then went outside and announced that she had called the police. She eventually arrived in the road or near the edge of the road and the front left corner of Mr. Steadman's truck. How she arrived there is a point of contention.

At that point, Mr. Steadman specifically directed Ms. Ware to move the truck. The manner in which he formulated his command is disputed. In any event, with the intention of proceeding in accordance with her father's command, Ms. Ware pressed the truck's accelerator causing the truck to move suddenly forward and strike Mrs. Barr.

The truck hit Mrs. Barr and knocked her to the ground. Her left leg was dragged under the truck's left front tire. The truck came to rest on her left foot and ankle. At Mr. Barr's behest, Ms. Ware backed the truck off of Mrs. Barr's foot and ankle.

After the incident, Mr. Barr and John began a physical altercation with Mr. Steadman. After that altercation, Mr. Steadman got into the driver's side of the front seat of his truck and drove away from the Barrs'. Ms. Ware was either already sitting in the passenger's side of the truck's seat when Mr. Steadman entered the truck, or got in the truck before Mr. Steadman began driving it away, or jumped in the truck through the passenger's side window as he was driving away.

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[1] John Barr's death is unrelated to the incident before the Court.

[2] The Court is never inclined to address individuals by their first names, but in this case it is better to refer to John Barr as John rather than Mr. Barr, the term the Court has chosen to refer to the plaintiff's husband.

After a short distance, Mr. Steadman met two police cars proceeding toward the Barrs' house. The police stopped Mr. Steadman and placed him under arrest. He was charged with attempted murder and driving while under the influence of alcohol. Eventually, he pled guilty to, and was convicted of, reckless endangerment and driving under the influence.

2. Contentions

Mrs. Barr contends: (a) Mr. Steadman is liable for the damages that she suffered as a result of the injuries she received from the incident; and (b) the unliquidated debt now owed by Mr. Steadman, which encompasses those damages, is nondischargeable, by virtue of section 523(a)(6) of the Bankruptcy Code. Mrs. Barr contends that the debt is a "debt for ... a willful and malicious injury by the debtor...." 11 U.S.C. § 523(a)(6).

Mr. Steadman contends that he is not liable for the injuries and resulting damages because he did not tell his daughter to run over Mrs. Barr with his truck and did not intend for his daughter to run over Mrs. Barr.

3. The Evidence

a. Mrs. Beverly Barr's Testimony

Mrs. Barr was employed as a truck driver for Georgia-Pacific where she had been working for almost three years. At the time of the incident she was 40 years old.

On July 2, 2001, the day of the incident, Mrs. Barr left work around 4:30. She was home by 5:00 p.m. Her husband, Charles; her son, John; and her three year old daughter, Jordan, were there. She was in the process of making a telephone call when she heard the sound of vehicle tires squealing from the direction of her front yard. Mr. Barr was in the room with her. Jordan was outside. Mr. Barr went outside to look. Jordan then came in. Mrs. Barr went outside through the front door, where she saw Mr. Steadman and Mr. Barr standing in the driveway. She also saw a red Chevrolet pickup truck parked in the street in front of her house.

Mrs. Barr testified that she had never seen Mr. Steadman before, so she did not know him at that time. She did know his daughter, Ms. Ware, who was an acquaintance of her son John. But she did not know Ms. Ware well as she had talked with her only once in a grocery store parking lot. At the time, John was 17 and Ms. Ware was 16.

Mrs. Barr testified that when she observed Mr. Steadman in the driveway, his right hand was behind his back where she could not see it. He did not have anything in his left hand. She saw and heard Mr. Steadman tell Mr. Barr that he was going to kill their son, John. She testified, "I observed Roger Steadman threatening my son."

Transcript at 14. And she testified that she heard Mr. Steadman say he had come there to kill her son. In response to the question, "What did you hear Mr. Steadman say?" Mrs. Barr testified, "He had come there to kill my son." Transcript at 14.

At the time, John was inside the house. According to her testimony, Mrs. Barr went back inside the house and called the police. While she was on the phone, John went outside. She was inside the house for about a minute. After speaking with the police, she returned outside. Mr. Barr and Mr. Steadman were in the front yard. She walked out to the edge of the street in front of her house. Mr. Barr had their daughter's softball bat in his hands. Mr. Steadman was holding a long pole. At that point, no physical altercation occurred between Mr. Barr and John and Mr. Steadman.

Mrs. Barr said that as she positioned herself at the edge of the street in front of her house, Mr. Barr retrieved Jordan, who had followed her. He took Jordan to the front door and put her inside the house. The truck was parked near the center of the street, almost directly in front of the house. The street is no more than 20 feet wide. Mrs. Barr was standing on the edge of the street near her front yard, precisely where she had positioned herself after coming out of the house. She was to the left of the front corner of the truck. Mr. Steadman was in the edge of the front yard, standing in the grass between the house and her. He was swinging the long pole at her and John. She testified, "He had a long pole, stick, and he was swatching at it – switching at me like that." Transcript at 16-17. John was standing behind her, more in front of the truck, but farther away from the truck than she. Mr. Steadman was using the pole to force John and her back away from the house and toward the area in front of the truck.

Mrs. Barr testified that she told Mr. Steadman that he needed to leave because she had called the police. He responded by saying, "No, I am not leaving until I kill every damn one of you." Transcript at 15. By that time, Mr. Steadman had forced John and her close to the area in front of the truck. Mrs. Barr testified that Mr. Steadman then told Ms. Ware, "to scoot over, crank the truck and stomp it." Transcript at 19.

According to her testimony, Mrs. Barr turned and faced the truck. She saw that Ms. Ware had moved from the passenger's seat to the driver's seat. Mr. Steadman was standing to her right, about three or four feet from her, in the gutter of the street in front of her house. Mrs. Barr testified that immediately after she turned toward the truck, Mr. Steadman told Ms. Ware again, "to stomp it....," and, simultaneously, struck Mrs. Barr across the shoulders with the pole. Transcript at 20. Ms. Ware then accelerated the truck and turned its wheels toward Mrs. Barr. The truck struck her first in the abdomen. Mrs. Barr's left foot and ankle became trapped under the left front wheel when the truck continued forward. When Ms. Ware eventually stopped the truck, it was resting on Mrs. Barr's left foot and ankle.

According to Mrs. Barr, Mr. Barr told Ms. Ware to get the truck off of her. To that, Ms. Ware replied, "Oh, am I on top of her?" Transcript at 22. Ms. Ware then started the truck and moved it in reverse off of Mrs. Barr's foot and ankle. Mrs. Barr

testified, “I was bleeding really, really bad and I thought I was dying.” Transcript at 22. At that point, Mr. Barr bent down to attend to Mrs. Barr. When he did Mr. Steadman attacked him from behind and hit him with the pole. Mr. Barr then stood up, caught the pole in his hands, and pushed Mr. Steadman away.

The fight continued. After repelling Mr. Steadman’s attack, Mr. Barr returned to render assistance to Mrs. Barr, at which point, Mr. Steadman would renew his attack on Mr. Barr with the pole. Once, Mr. Barr grabbed the pole and tried to pull it away from Mr. Steadman. He was unsuccessful so he let the pole go. That caused Mr. Steadman to fall into the road. Several times, Mr. Barr successfully disarmed Mr. Steadman and threw the pole into the yard, but each time, Mr. Steadman retrieved the pole and renewed his attack on Mr. Barr.

Mrs. Barr said that once, when Mr. Steadman was attempting to attack Mr. Barr from behind, John struck Mr. Steadman, who fell into the front yard. Ms. Ware then jumped out of the truck and attempted to strike John, but missed and went tumbling into the yard. Mrs. Barr testified, “My husband was trying to help me, to keep me calm or whatever and, when [Mr. Steadman] come the last time to hit my husband, John come and hit him and knocked him back in the yard and Ms. Ware come out of the truck with her arm in the air and swung at my son and he just ducked and she nosedived into the yard herself.” Transcript at 70 (parenthetical added).

Mrs. Barr testified that Mr. Barr finally grabbed the softball bat and struck Mr. Steadman with it. At the time, Mr. Steadman was in the gutter of the road in front of the house by the driver’s side front wheel of the truck. After Mr. Barr struck him, Mr. Steadman fell to the ground. He then got up and got into the truck with Ms. Ware and they left. Mrs. Barr saw the truck leave but did not see who was driving it.

Mrs. Barr was taken to the hospital where she was admitted. According to her testimony, she remained there for the next 13 days.[3] Mrs. Barr testified that in her judgment Mr. Steadman was heavily intoxicated during the time he was at her residence. She said she could smell alcohol on him and that his language, manner of speaking, demeanor, and actions were characteristic of an intoxicated person and comparable to the language, manner of speaking, demeanor, and actions of other intoxicated persons that she has observed in the past.

Mr. Steadman attempted to illustrate that Mrs. Barr’s trial testimony was, in one minor respect, different from the testimony that she gave in her deposition. As indicated above, Mrs. Barr testified at trial that she heard Mr. Steadman say to Ms.

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[3] Mrs. Barr’s medical records reflect that she was actually discharged 11 days after she was admitted to the hospital. Her testimony regarding the nature and extent of her injuries, medical treatment, rehabilitation and recovery are discussed below in the section entitled “Damages.”

Ware, “scoot over, crank the truck and stomp it.” Transcript at 19. In her deposition, she testified that she could not remember hearing anyone tell Ms. Ware to crank the truck. Her deposition reads in part:

> Q. Question on line number five, “Did you hear anybody tell her to crank it?” What was your answer on line number seven?
> A. On the same page?
> Q. The same page. Would you read the answer?
> A. I don’t think so. I don’t remember.

Transcript at 62-63.

The Court finds that whether Mrs. Barr heard Mr. Steadman tell Ms. Ware to crank the truck is insignificant. The undenied fact is that Ms. Ware did crank the truck. What is significant is that Mrs. Barr heard Mr. Steadman say, “scoot over... and stomp it.” And there is apparently no inconsistency there or the Court would have been told.

b. Mr. Charles Barr’s Testimony

Mr. Barr has worked for Royal Cup Coffee as a transport truck driver. At the time of the incident, he was about 64 years old.

Mr. Barr testified that on July 2, 2001, the day of the incident, he arrived home from work around noon and was home in the evening at around 5:00 p.m. when the events occurred.

He testified that Mrs. Barr had just arrived home with their three year old daughter, Jordan, who Mrs. Barr had picked up from day care. Mr. Barr testified that while Mrs. Barr was making a telephone call, he heard the sound of, “tires squeaking and gravel, dirt flying.” Transcript at 102. He could hear the sound of debris hitting the house. After a few minutes, he heard the front door open. He then jumped up and ran out the front door, having remembered that Jordan was outside on the swings. Before going out, he met John coming in the front door. He asked John, “John, what is going on?” Transcript at 103. John pointed to the driveway where Mr. Steadman was standing.

Mr. Barr had met Mr. Steadman once before, when Mr. Steadman picked up Ms. Ware from the Barrs’ residence after she visited John.

At this time, Mr. Barr told John to remain in the house, and that he would take care of the situation. Mr. Barr then walked down to the driveway to about a foot and a half from Mr. Steadman. Mr. Steadman had one of his hands in his back pocket. He saw Mr. Steadman’s vehicle sitting in the middle of the road in front of his house.

Mr. Barr testified that Mr. Steadman told him, “I came here to kill your son.” Transcript at 109. Mr. Barr responded, “No, you didn’t.” Transcript at 109. Mr. Steadman then said, “Yes, I did. I’m going to kill you, too.” Transcript at 109. All the time, Mr. Steadman had one of his hands in his back pocket, as if he was holding something. Mr. Barr said that he could not see what Mr. Steadman was holding in his back pocket, if anything. Mr. Barr’s hands were empty.

According to Mr. Barr, at that point John ran up and handed him one of his daughter’s softball bats. Mr. Barr testified that he told John to, “Go back in the house and tell your mama to call the law right now.” Transcript at 109. Mr. Steadman then pulled a paint scraper out of his pocket and threw it into the back of his pickup truck. He then ran over to the truck and retrieved a yellow extendable paint pole handle from the back of the truck and returned to Mr. Barr with the handle resting over his shoulder. The paint pole was about four and a half to five feet long. Mr. Steadman’s actions prompted Mr. Barr to raise the bat that he was holding and say, to Mr. Steadman, “You’re going to make me mad if you hit me with that stick. You better get in the truck and go while you can because this bat is not going to make you mad, it is going to hurt you.” Transcript at 111.

Mr. Barr testified that at that point John and Mrs. Barr were standing right behind him. Mrs. Barr told him that she had called the police. He testified that his three year old daughter Jordan was in the middle of the yard, “looking at us, just having a fit, jumping up and down and crying.” Transcript at 111. He ran over and picked Jordan up, and headed toward the front door. At the time, Mr. Steadman was standing between John and Mrs. Barr and the house, swinging the paint handle at them. According to Mr. Barr, Mr. Steadman was forcing John and Mrs. Barr into the road directly in front of his truck and making it impossible for them to retreat back to the house. Mr. Barr testified, “He was running around there like a shepherd dog herding cattle with that stick. He was just going around and around the upper side of them, keeping them back toward the truck as hard as he could.” Transcript at 143.

Mr. Barr testified that as he was carrying Jordan toward the front door, he heard Mr. Steadman shout, “Scoot over and crank it up and stomp it,” and “I am going to kill every one of them before I leave.” Transcript at 112. When he heard that Mr. Barr pushed Jordan inside the house and ran toward the truck. While in route, he saw Mr. Steadman’s daughter Ms. Ware in the driver’s seat of Mr. Steadman’s truck. At that time she cranked the truck. Mr. Barr testified that he heard Mr. Steadman repeat his command to Ms. Ware, “I said stomp it.” Transcript at 113. Ms. Ware complied, driving the truck at Mrs. Barr, who appeared to attempt to avoid the oncoming vehicle by moving in the direction of the house. According to Mr. Barr, Ms. Ware turned the wheels of the truck as hard as she could toward Mrs. Barr. At the same time, according to Mr. Barr, Mr. Steadman stopped Mrs. Barr’s attempted escape by striking her across the back of the shoulder with the paint pole. Mrs. Barr then lost her balance, and as she fell sideways her foot became caught under the truck’s front tire.

According to Mr. Barr's testimony, after Mrs. Barr was hit by the truck, he ran to her aid. He explained that the truck's front tire was sitting on her foot. He told Ms. Ware to take the truck out of gear so that he could push it off of Mrs. Barr. Instead, Ms. Ware cranked the truck, put it in reverse and jerked it backwards. Transcript at 115.

Mr. Barr testified that Mrs. Barr's foot was, "tore all to pieces...." Transcript at 115. He held Mrs. Barr and talked to her. Mrs. Barr was hysterical. He testified that she said, "'I am dying. I am dying.'" Transcript at 115.

According to Mr. Barr, he then heard John shout, "Daddy, watch it. He is fixing to hit you." Transcript at 115. He then saw Mr. Steadman swinging the paint pole at him. He grabbed the pole, wrenched it from Mr. Steadman's hands, threw it as far as he could into the yard. He then returned to his wife.

John warned Mr. Barr again of an impending attack from Mr. Steadman, shouting, "Daddy, he is fixing to hit you again." Transcript at 115. When he did, Mr. Barr threw himself sideways. Mr. Steadman hit him across the leg with the paint pole. Mr. Barr grabbed the pole, but Mr. Steadman held the other end. Mr. Barr struck Mr. Steadman lightly on the shoulder with the softball bat, but Mr. Steadman refused to release the pole. The two men continued to tug on the paint pole. Finally, Mr. Barr pushed Mr. Steadman and Mr. Steadman fell to the ground on his back in the gutter along the street in front of the Barr's house. He attempted to kick Mr. Barr. But Mr. Barr avoided Mr. Steadman's kick and, "bumped [Mr. Steadman] a time or two with the bat on his forehead and on his chest with the end of the bat, not hitting him." Transcript at 116 (parenthetical added). Mr. Barr said that at that moment Mrs. Barr screamed, "Don't hit him no more." Transcript at 116. Mr. Barr left Mr. Steadman and returned to assist Mrs. Barr.

According to Mr. Barr, Mr. Steadman got up and attempted to hit John with the pole but John knocked Mr. Steadman back to the ground. Mr. Steadman got up and ran to the steps leading to the front door of the Barrs' residence. Mr. Barr testified that he warned Ms. Ware, "You better go and get him because he is fixing to get hurt if he goes in my house. He is fixing to get bad hurt." Transcript at 117.

According to Mr. Barr, Ms. Ware went to Mr. Steadman, led him back to the truck and opened the door. Mr. Steadman got into the driver's seat of the truck and cranked it. Before Ms. Ware could get around to the passenger's side, Mr. Steadman turned the truck's wheels toward Mrs. Barr, who was laying three or four feet to the left front of the truck, and began moving it in her direction. Mr. Barr then swung the softball bat at Mr. Steadman and told him to get it away from Mrs. Barr. In response, Mr. Steadman straightened the wheels of the truck and began driving it down the road. Ms. Ware, according to Mr. Barr's testimony, dove into the truck through the passenger side window as the truck was moving.

Mr. Steadman drove about two hundred and fifty feet before he was stopped by the police, who arrested him.

Mr. Barr testified that in his opinion Mr. Steadman was under the influence of alcohol. He said that Mr. Steadman was slurring his words, and grinning and walking in a manner characteristic of an intoxicated person and that his manner of speaking, demeanor, and actions were consistent with the manner of speaking, demeanor, and actions of other intoxicated persons that he has observed in the past.

In the morning after the incident, Mr. Barr took a photograph of the part of the street where Mrs. Barr had been run over. The photograph, which was admitted into evidence as Plaintiff's Exhibit 4(c), depicts a streak in the road. Mr. Barr testified that the streak was eleven and a half feet long. It was made up of Mrs. Barr's blood and fragments of her flesh and sock.

c. Mr. Roger Steadman's Testimony

Mr. Steadman testified that on July 2, 2001, the day of the incident, he and his daughter Ms. Ware went for an outing at Smith Lake Park. At the time he was about 41 years old and Ms. Ware was 16.

1. Mr. Steadman's Insobriety

Mr. Steadman admitted that he consumed alcoholic beverages before going to the Barrs' residence. He said that his consumption of alcoholic beverages is not unusual; that he consumes alcoholic beverages on a regular basis; that he enjoys consuming alcoholic beverages; and that he enjoys how alcoholic beverages make him feel when he consumes them. In his deposition, he testified that he was under the influence of alcohol when the events at the Barrs' occurred and after he drove his truck away from the Barrs' he was stopped by the police and was charged with driving while intoxicated. He later pled guilty to that offense.

Mr. Steadman's testimony about the specifics of what he drank prior to arriving at the Barrs' residence was inconsistent and contradictory, but at the least established that he had consumed a substantial amount of alcohol before reaching the Barrs'.

At trial, Mr Steadman first insisted that he had consumed four beers and two or three ounces of whiskey at some point during the day of the incident, but that his consumption of those beverages had no adverse effect on his ability to drive his truck, or on his ability to speak, or on his ability to make rational decisions, or on his ability to walk. He said that the only reason that he testified in his deposition that he was "under the influence of alcohol" when the incident occurred, was because he believed, "any consumption of alcohol is under the influence." Transcript at 176. Mr. Steadman then agreed that even if he had only consumed one beer, that would also be, "under the influence of alcohol." Transcript at 176.

On cross examination at trial Mr. Steadman acknowledged that at his deposition he admitted that he was under the influence of alcohol when he went to the Barrs' residence and that prior to going to the Barrs' he had purchased a six-pack of beer at a convenience store and consumed all six of those beers, and that, at some point earlier in the day, he had consumed an entire half-pint of liquor. He testified:

Q. Mr. Steadman, you testified in your deposition – have you got it right there before you? It is marked as number seven. Do you see it there, page thirty-three?
A. Okay.
Q. Do you see that?
A. Okay. What are we looking for?
Q. Page thirty-three.
A. Okay.
Q. Do you see there where it says, "Do they sell beer at Smith Lake Park?" on line three?
A. On page thirty-three?
Q. Yes, sir.
A. Yes, I see that.
Q. "Do they sell beer at Smith Lake Park?" And do you see your answer. It says answer, "I don't know."
A. Right.
Q. Okay. Do you see down below the next question: "Well, where did you get it from?" Do you see that?
A. Yes.
Q. Do you see your answer: "At the convenience store." Do you see that?
A. Yes, I see that.
Q. And the next question, "How much beer did you buy?" Do you see that?
A. Yes.
Q. And you see your answer?
A. Right.
Q. And what did you say? Answer, "How much did you buy?"
A. Right.
Q. What did you say?
A. Six.
Q. You said "six," right?
A. Right.
Q. And the next question you see, "How much did you drink?"
A. Yes.
Q. Do you see the answer there?
A. Okay.
Q. What did you say, how much you drank?
A. Six.

Q. You said you bought six, you drank six, right?
A. Yeah, that is what I said.
Q. Okay. Then if you go on down there a little bit, do you see the question below there on line twenty. It says, "Do you remember Ms. Ware testifying that you had a bottle of hard liquor." Do you see that?
A. Yes.
Q. And you said, "Yeah."
A. Right.
Q. And I said, "Well, was she lying or telling the truth?" Right?
A. Right.
Q. And then your answer is what? Can you see your answer?
A. Oh, I drank some liquor.
Q. And you said that was earlier in the day?
A. Yes.
Q. "And how much liquor did you drink?" And what is your answer?
A. "A half pint."
Q. Okay. It says you drank a half a pint. It didn't say you drank two or three ounces and it didn't say you drank four beers. You drank six and you drank a half a pint. Isn't that what you testified to?
A. I drank out of the half a pint.
Q. Well, that is not what you said, though, is it? The question is how much liquor had you had to drink, and your answer was a half pint.
A. Yeah, that is what I said.

Transcript at 181-84.

On redirect examination, Mr. Steadman attempted to explain the conflicts between his trial testimony and his deposition testimony by complaining that he did not understand the questions asked. He said that he did not understand the question, "how much liquor did you drink?" And he explained that when he answered at his deposition that he drank a half-pint of liquor, he really meant, or meant to say, that he had been drinking from a half-pint bottle of liquor but did not drink all of it. And he complained that he did not understand the question, "How much did you drink?", a question asked in reference to his consumption of the beers that he bought at the convenience store. He explained that when he said that he had consumed all six beers, he meant by that, or meant to say, "I drank six during the day but I would stop. I drank two, stopped; went into the park and when I come out from the park, I drank the other four." Transcript at 186.

The questions Mr. Steadman claims to have misunderstood were clear. And he did not explain how they were not. Therefore, in order to conclude that Mr. Steadman did not in fact drink an entire half-pint of liquor and six beers sometime during the day preceding his arrival at the Barrs', the Court would have to conclude that Mr. Steadman was not capable of understanding those clear questions, which the Court cannot do.

After hearing and viewing Mr. Steadman's trial testimony, it is clear to the Court that Mr. Steadman was quite capable of understanding them and responding to them.

Consequently, in accordance with his deposition testimony, and other evidence relevant to the issue, including Mr. Steadman's admitted consumption of alcoholic beverages of some quantity, the observations made by both Mr. and Mrs. Barr regarding his, as well as his guilty plea to the charge of driving while intoxicated, the Court must conclude that Mr. Steadman was indeed inebriated to some extent before, during, and immediately after the incident at the Barrs'.

2. Mr. Steadman's Version of the Incident

Neither Mr. Steadman nor his daughter testified about when they arrived at Smith Lake Park or how long they stayed there. But Mr. Steadman testified that when they left the park in his pick-up truck that he went to the Barrs' residence for the express purpose of confronting John Barr about something he had supposedly said to Ms. Ware. He testified that Ms. Ware told him that John told her that he was going to kill him. John was 17 years old at the time.

Mr. Steadman said that upon his arrival at Cathy Lane, the location of the Barrs' residence, he drove past their residence, which was on the right hand side of the street. Mr. Steadman denied that he caused his truck tires to spin or skid, or that it threw any gravel or debris from its tires.

As he drove past, referring to John, Ms. Ware said, "Oh, there he is." Transcript at 205. Mr. Steadman then proceeded to end of the street, where he turned around and went back to the Barrs' residence. The house then was on the left hand side of the street in relation to the direction his truck was facing. When the truck was in front of the Barrs' residence, Mr. Steadman stopped the truck and got out, leaving the truck parked in the street.

As stated above, Mr. Steadman admitted that his purpose in going to the Barrs' residence was to initiate a confrontation with John Barr, age 17. When he arrived at the Barrs', Mr. Steadman verbally engaged John in an aggressive and accusatory manner:

Q. Well, in your deposition didn't you testify that Ms. Ware had told you that he had made a threat on you and that you wanted to confront him about it?
A. Yes.
Q. Okay. And so you made the decision to go see this seventeen year-old John Barr?
A. Yeah, to ride by the house.
Q. And you got his attention and he came outside, which is what you wanted; right?
A. Yes.

Q. Okay. And when he came outside, you confronted him?
A. Yes.
Q. You said, "I hear you want to kill me," right?
A. That's right.
Q. And you began the confrontation that occurred on this day; did you not?
A. Yes.
....

Q. And on this particular occasion you had decided that you would confront this young man and have it out with him?
A. Yes.

Transcript at 154-55.

In regard to his actions, Mr. Steadman said that, upon leaving the truck, he took a position, "standing at the back of my truck," which "was in the middle of the street." Transcript at 207. Those statements were inconsistent with other testimony. At one point in his testimony, he said that the truck was in the middle of the road and that he essentially stood within a couple of feet of the truck the entire time he was at the Barrs' residence. In another part of his testimony, he said that the truck was parked on the, "opposite side of the road," and that upon getting out of his truck he proceeded to a point in the street next to the Barrs' driveway. He testified:

Q. When you got out of the truck, did you go into the Barr's yard?
A. No.
Q. Where did you go?
A. To the edge of the street – to the edge of the yard, not in the driveway but right at the end of the driveway, but I was still in the street.

Transcript at 178.

Mr. Steadman said that John was in the driveway, somewhere near the front door. He said to John, "Hey, I heard you wanted to kill me." Transcript at 207. John did not respond, but instead went into the house. According to Mr. Steadman, Mr. Barr then came out of the house, went to his garage where he got a baseball bat, walked up the driveway to the street, and approached Mr. Steadman.[4]

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[4] As will be discussed in detail below, Mr. Steadman's testimony about his initial contact and the circumstances of that confrontation significantly conflicts with his daughter's testimony on the same subject. She testified that it was John, and not Mr. Barr, who came out of the house with a baseball bat in hand, and walked up the driveway to the street to confront her father.

At first Mr. Steadman characterized himself as being unarmed before he was approached by Mr. Barr. But he later admitted that he was holding a paint scraper in his hand. When Mr. Barr approached him with the bat, he threw the paint scraper into the back of his truck and picked up a paint roller pole from the same place. He said that he only retrieved the paint pole from the truck because he needed to defend himself against Mr. Barr who was swinging the bat in his direction.

Mr. Steadman said that, as Mr. Barr approached, he just stood there holding the paint pole stationary in front of him. Mr. Barr was waiving the bat at him. John, in the meantime, had come outside and joined his father. They were all three standing in the middle of the road. Mrs. Barr had, at the time, not yet exited the house.

According to Mr. Steadman, he and Mr. Barr were having a conversation as they faced one another. At one point in his testimony, Mr. Steadman said that he does not recall either what Mr. Barr said to him or what he said to Mr. Barr during that conversation. At another point in his testimony, however, he said that Mr. Barr told him that he was going to beat him up, or hit him with the bat, or words to that effect.

Mr. Steadman denied telling Mr. Barr that he was going to kill John; denied saying that he was not going to leave until he had killed everyone of the Barrs; denied that he otherwise threatened to kill anyone; and denied that he ever intended to kill anyone.

Additionally, Mr. Steadman denied that he ever approached the Barrs' front door or even went into the Barrs' front yard.

Mr. Steadman said that while he and Mr. Barr were standing in the street, locked in stalemate, Mrs. Barr came out of the house and announced that the police were on their way. At that point in time, Mr. Steadman, according to his testimony, was standing a couple of feet from the truck, near the driver's door. He denied that Mr. Barr attended to his daughter Jordan at any point in time while he was at the Barrs' residence.

Mr. Steadman testified that he decided to leave when he heard that the police were coming. He admitted that his decision to leave was prompted by his belief that the police, upon their arrival, would arrest him. He testified:

> Q. Mr. Steadman, why were you leaving because the police were coming?
> A. Well, I figured out the police would try to arrest me.

Transcript at 171.

Mr. Steadman's admission that he wanted to leave the Barrs' residence because he believed that, if he stayed, the police would arrest him is significant. It represents an acknowledgment on his part that he was in the wrong and that his actions at the Barrs'

residence were illegal. Because if his actions were not illegal, he would have had no reason to fear that they would probably lead to his arrest.

Mr. Steadman, however, attempted to ameliorate his indirect acknowledgment of guilt by explaining that his decision to leave was also motivated by Mr. Barrs' aggressive actions. He said he was standing in the street by his truck when Mr. Barr retrieved the bat from his basement. The evidence is that at that point he had ample opportunity to get in his truck and leave. Instead, he armed himself with the paint pole and proceeded to wait for Mr. Barr to walk up the driveway into the street. It is apparent from those actions that Mr. Steadman intended to engage Mr. Barr, a 64 year old man, in some sort of physical altercation, and that he had in fact come to the Barrs' residence for the very purpose of engaging in such an altercation with either John or Mr. Barr. He was dissuaded from that objective only by his fear of arrest, prosecution, and confinement by the authorities. After learning that the police were coming, according to his testimony Mr. Steadman proceeded around to the front of the truck.

The Court does not accept Mr. Steadman's assertion that he was afraid of being assaulted by Mr. Barr and that he did not run away from Mr. Barr for fear of being struck from behind by the bat. According to his own testimony, Mr. Steadman distanced himself from Mr. Barr by going to the front of the truck, before he told Ms. Ware to move it. If he could do that, then he could have, at any point, run far away from Mr. Barr. He could have gone to either end of the street and beyond had he desired to do so. Or he could have simply gotten into the truck through the driver's side door and drove away.

Mr. Steadman testified that when he had positioned himself in front of the truck, about three feet from it, and was standing in the center of the truck's hood, he told Ms. Ware, "to crank the truck up and ease down the street." Transcript at 211. That testimony is hardly plausible. It requires one to believe that Mr. Steadman intentionally placed himself in a position to be struck by the truck as it moved forward, which would have almost inevitably resulted in him being seriously injured.

Mr. Steadman denied that he told Ms. Ware more than once to move the truck. That denial directly conflicts with Ms. Ware's testimony. <u>She testified that he told her twice to move the truck, which agrees with the Barrs' rendition of the events</u>.[5]

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[5] The fact that Ms. Ware and the Barrs' testimony agree on this point is probably the most important fact in resolving the pending matter. Mr. Steadman admits that he asked Ms. Ware to move the truck, but he disagrees that he told her that <u>twice</u>. If he had told her only once, or even <u>ordered</u> her to move it once, he could have mounted a stronger defense. But, both Mr. and Mrs. Barr <u>and</u> Ms. Ware, the debtor's daughter, testified that Mr. Steadman told or ordered Ms. Ware <u>twice</u> to drive the truck. Because the debtor's <u>intent</u> is so important in a willful and malicious non-dischargeability proceeding, the clear evidence that he told his daughter, not once, but twice, to drive the truck is significant. And in fact, Ms. Ware testified that after the first command, she did not want to drive the truck because someone could have been hurt. But that after her father told her again she complied.

Mr. Steadman also denied that he told Ms. Ware, when referring to the truck's accelerator, to "stomp it."

Mr. Steadman said that when he told Ms. Ware to move the truck, Mrs. Barr who had since moved from her front door to the street, stepped in front of the truck and said, "No, you are not going anywhere." Transcript at 211. According to Mr. Steadman, at that point, Ms. Ware proceeded to comply with his command. She cranked the truck and pressed the accelerator. The truck moved forward and struck both Mrs. Barr and him.

Mr. Steadman said that when the truck started moving he was standing about three feet in front of it and that after it hit him he was pulled along for about a foot or two. He said that the impact from the truck knocked him down. When the truck stopped he was on the ground up to his chest under the truck.[6]

Mr. Steadman was not asked, and did not say, how fast the truck was going when it purportedly hit him. He did, however, testify that, other than a few superficial scratches and bruises, he received no injury from being run over by the truck. That is improbable. If Mr. Steadman was hit by the truck when Ms. Ware "floored" the accelerator, it is more likely than not that he would have been seriously injured like Mrs. Barr. That conclusion is also supported, if not compelled, by Ms. Ware's testimony. As will be discussed later, Ms. Ware said that she did not know where her father was when she floored the accelerator. Since she was ostensibly looking out the front window of the truck at that time, if her father had been in front of the truck, as he contends, when she "floored" the accelerator, certainly she would have seen him. To reiterate, Ms. Ware testified that she did not know where he was.

Mr. Steadman said that when the truck stopped, he pulled himself out from under it and stood up, at which time he saw the truck's front tire sitting on Mrs. Barr's leg. He had dropped the paint pole when he was purportedly hit by the truck. So he was not holding it as he observed Mrs. Barr. While he was standing there in front of the truck looking down at Mrs. Barr, Mr. Barr hit him in the jaw with the bat. He testified:

> Q. And what happened next?
> A. My daughter cranked the truck up and all of a sudden she ran over me and Ms. Barr at the same time.
> Q. Did you actually see her run over Ms. Barr?
> A. Yes.
> Q. And were you at that time still in front of the truck or had you been hit at that time, or just what was the events that were occurring at that time?

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[6] As discussed in detail below, Ms. Ware testified that she "floored" the accelerator, which is also consistent with the Barrs' renditions of the events.

A. Well, I pulled myself out from under the truck and I had seen the tire was on Ms. Barr's leg, and I was standing there looking, saying, "Oh, no."
Q. After that time where was the stick, the paint stick?
A. I have no idea. I let it go.
Q. All right. At that time had anybody hit you with a baseball bat or hit you with a fist?
A. At that time when I was looking at her leg is when I got hit with a ball bat.
Q. Who hit you with a ball bat?
A. Mr. Barr.

Transcript at 212-13.

Mr. Steadman did not testify that Ms. Ware immediately backed the truck off of Mrs. Barr's leg, that Mr. Barr attacked him after the truck was backed off of Mrs. Barr's leg, or that he was lying on the ground attempting to extricate himself from beneath the truck when he was purportedly attacked. To the contrary, Mr. Steadman's testimony, literally taken, is that Mr. Barr attacked him while Mrs. Barr was still trapped under the truck and prior to making any attempt to rescue his wife. In addition, his testimony is that he was standing when he was purportedly attacked, having already extricated himself from beneath the truck. That assertion is completely contrary to Ms. Ware's rendition of the events. She said, as discussed in detail below, that Mr. Barr and John did not attack her father until after she backed the truck off of Mrs. Barr and that, when they began attacking him, he was not standing, but instead was still lying on the ground in front of the truck, attempting to get up.

In contrast to Mr. Steadman's testimony, common sense dictates that when Mr. Barr saw his wife struck by the truck, thrown to the ground, trapped under a wheel of the truck and, dragged along the pavement, he would have abandoned any immediate thoughts of hitting Mr. Steadman. It is more probable that his first impulse would have been to offer immediate assistance to Mrs. Barr. And according to Mr. Barr's testimony, that is precisely what he did. That action is imminently more reasonable than believing that he abandoned his wife in favor of immediately attacking Mr. Steadman.

Continuing, Mr. Steadman testified that Mr. Barr hit him at least three or four times with the bat in the back, left arm, and forearm. John then hit him with his fists two or three times. As a result of being hit by Mr. Barr and John, he ended up on the ground.

According to Mr. Steadman, Ms. Ware was still in the truck when Mr. Barr first hit him, but he thinks that she later got out of the truck. Again, as discussed below, that testimony conflicts with Ms. Ware's testimony who stated that she was not in the truck when Mr. Barr first hit her father.

Finally, according to Mr. Steadman, after Mr. Barr and John stopped hitting him, he got up and got into the truck on the driver's side. Ms. Ware was already sitting in the truck, on the passenger side. He started the truck and drove off. After about seventy-five yards, he was stopped by two police cars. The policemen directed him to get out of the vehicle, which he did. They then placed him under arrest. He was transported to the police station in one of the cars. The police placed Ms. Ware in the other car.

Mr. Steadman was charged with attempted murder and assault. As part of a plea agreement, the charge was ultimately reduced to reckless endangerment, a misdemeanor, to which he pled guilty.

Mr. Steadman identified several photographs that were admitted into evidence at his request. He said that his mother took the photographs the day after the incident. The photographs depict bruises, scrapes, and scratches on Mr. Steadman. Defendant's Exhibit No. 1 and Exhibit No. 2 are photographs of his buttocks, back, and the rear half of his left arm. Large purple bruises cover almost his entire left buttock and the lower portion of the back of his left forearm. A cut or gash, approximately 2 inches long, appears on his lower back, near the base of his spine. He said that the gash was caused by Mr. Barr hitting him with the bat and that the bruises on his forearm and buttocks resulted from his being run over by Ms. Ware.

Mr. Steadman identified Defendant's Exhibit No. 3, another photograph. He was unsure about the details of that exhibit.

Defendant's Exhibit No. 4 is a photograph of Mr. Steadman's face. In the photograph, his right eye is blackened and there are two purple bruises on the right side of his face. He said that the black eye and bruises were caused by Mr. Barr hitting him in the jaw with the bat.

Defendant's Exhibit No. 6 is a photograph of the front side of Mr. Steadman's left forearm, which bears a gash about two inches long and a scrape by his elbow. He said that the gash was caused by Mr. Barr hitting him with the bat and that the scrape resulted from his being run over by Ms. Ware.

Mr. Steadman did not say that he either sought or required any medical attention or treatment for the injuries he purportedly received while at the Barrs'.

d. Ms. Ware's Testimony

Ms. Casey Michelle Ware is Mr. Steadman's daughter. Ms. Ware testified that on July 2, 2001, the day of the incident, she and her father visited Smith Lake Park. She was 16 years old at the time.

Ms. Ware said that her father stopped sometime during that day at a convenience store and bought beer. She thinks that during the course of the day her

father consumed all of the beer he purchased at the convenience store. But she said that she did not actually see him drink any alcohol that day.[7]

Ms. Ware testified that they left the park abound 5:00 p.m. and her father drove to the Barrs'. It was not her idea to go there; it was his.

Ms. Ware testified that her father did not drive in an improper or erratic manner. When he arrived at the street in front of the Barrs' house, her father drove past the house looking for John, but did not see him. So he drove the truck to the end of the road, turned around, and drove back by the Barrs' house. On the second pass they saw John standing outside the front door of the Barrs'. When her father saw John he stopped the truck, got out, and hollered, "Hey, I heard you want to kill me," or something like that. Transcript at 74. John then went into the house.

According to Ms. Ware, the truck was parked on the right hand side of the road, in the lane opposite the front edge of the Barrs' yard. Her father was standing in the street. She said that John came back outside with a bat and walked to a point a little past the middle of the yard. John and Mr. Steadman were arguing. Mr. and Mrs. Barr were still inside the house.

As explained earlier, that testimony directly conflicts Mr. Steadman's testimony on the point. Mr. Steadman said that John went inside, where he remained for a period of time while Mr. Barr came out alone, got the bat from the garage and approached him, and that it was Mr. Barr, not John, with whom he argued.

Ms. Ware said that Mr. Barr came out next, but she does not remember where he went afterwards.

Mr. Steadman testified to the opposite. He said that Mr. Barr came out well before John, that he and Mr. Barr thereafter remained engaged virtually the entire time he was at the Barrs' residence, and that John, "eventually come back out." Transcript at 209.

According to Ms. Ware, Mrs. Barr eventually came out of the house, announced that she had called the police and began yelling derogatory things at her. Ms. Ware was still seated in the passenger's seat of the truck. She testified that Mrs. Barr was insulting her and called her a "whore." Transcript at 88.

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[7] Ms. Ware must be mistaken in her testimony on that point. Mr. Steadman specifically admitted that he drank four beers after he and Ms. Ware left the park, and that he proceeded directly from the park to the Barrs' residence. He drove while Ms. Ware sat in the passenger's seat of the truck.

Again, Mr. Steadman's testimony differs from Ms. Ware's. When asked what Mrs. Barr said when she exited the house, he replied, "That the police were on their way." Transcript at 211. Then, according to him, he immediately told Ms. Ware, "to crank the truck up and ease down the street." Transcript at 211. He made no mention of any other words being spoken by Mrs. Barr until she purportedly stepped in front of the truck and said, "No, you are not going anywhere." Transcript at 211. Indeed, the sequence of events as related by Mr. Steadman left no interval during which Mrs. Barr could have berated or insulted Ms. Ware.

But according to Ms. Ware, Mrs. Barr gradually made her way into the road, stopping on occasion to talk, "like stop, talk, walk, stop, talk, walk." Transcript at 88. In the meantime, Mr. Steadman had moved in front of the truck. Once there, he said to Ms. Ware, "Get over, crank the truck and let's go." Transcript at 89. She did not, however, comply with his command because "[e]verybody was in front of the truck," including her father and Mr. Barr, but not, at that time, Mrs. Barr. Transcript at 89.

Ms. Ware testified that Mr. Steadman then repeated his command for her to move the truck. She denies that he told her to "stomp it." But he undisputably told her to move the truck. She testified:

Q. Nevertheless he directed you to move the vehicle, correct?
A. Yes, sir.
Q. There is no dispute about that, is there?
A. No, sir.

Transcript at 76.

Ms. Ware said that, when Mr. Steadman told her to move the truck the second time, he and Mr. Barr were still in front of the truck, John was to the left of the truck, and Mrs. Barr, "was diagonal in front of the truck." Transcript at 90.

Again, Ms. Ware's testimony is at odds with her father's. Mr. Steadman said that he and Mrs. Barr were standing in front of the truck when Ms. Ware moved it forward. He did not say that Mr. Barr was in front of the truck. He also flatly denied telling Ms. Ware twice to move the truck, and testified that Ms. Ware moved the truck the first and only time that he told her to move it.

Ms. Ware testified that she complied with her father's second command for her to move the truck, albeit against her wishes. She said that she did not want to move the truck because people were standing in front of it, and only moved it because her father expressly commanded her to do so. She testified:

Q. Okay. You didn't want to move this automobile when your father told you to, did you?
A. Not at the time, no.

Q. All right. And you only moved it because he told you to; isn't that correct?
A. Yes, sir.
Q. But for him telling you to, this vehicle would not have moved; am I right?
A. Yes.

Transcript at 78-79.

Ms. Ware said that, in compliance with her father's second command, she cranked the truck, put it in drive, and pressed the truck's accelerator. As the truck began to move forward, Mrs. Barr, "ran out in front of the truck and told [Ms. Ware that she] wasn't going anywhere." Transcript at 90 (parenthetical added).

Ms. Ware said that, at that moment in time, she had no idea where her father was and did not know where Mr. Barr was. She testified:

Q. Where was your father at that time?
A. I have no idea.
Q. Do you know where Mr. Barr was?
A. No, sir.

Transcript at 90.

Again, there is a conflict between Ms. Ware's testimony and Mr. Steadman's. He said that he was standing directly in front of the truck when Ms. Ware floored the accelerator and that he ended up under the front of the truck after he was hit. Ms. Ware, however, said that she did not know where her father was when she "floored" the accelerator and Mrs. Barr purportedly ran in front of the truck. And since she must have been staring out the front window of the truck at that moment, it stands to reason that her father could not have been standing in front of the truck when she floored the accelerator because if he had been, she would have seen him. And if Mr. Steadman was not standing in front of the truck when Ms. Ware floored the accelerator, he could not have been hit by the truck.

Ms. Ware said that she had no intention of "flooring" or "stomping" the accelerator, but that, as a matter of pure coincidence, when Mrs. Barr ran in front of the truck, the strap between the toes on her right flip-flop broke causing her foot to slip and depress the accelerator all the way to the floorboard of the truck. In other words, although she "floored" the accelerator, it was unintentional. She testified:

Q. What occurred after you say that she came out – describe exactly what she did when she came out and told you that you weren't going anywhere?

A. I cranked the truck up, I put it in drive and, when I started to go off, you're not going anywhere and ran out in front of the truck.
Q. All right. And what did you do at that time?
A. That is when I floored it with my shoe when it broke.
Q. What kind of shoes did you have on?
A. I had these pink flip-flops about that thick and a little ribbon that goes between your toes.
Q. And what part broke?
A. The one that goes between your toes and it broke and my foot went sideways.
Q. All right. When it went sideways, did it come off of the shoe?
A. I don't remember.
Q. Well, what actually pushed the accelerator down? Was that your shoe or your foot?
A. I think it was my foot.
Q. Is that when you say the shoe turned over on the side and your foot slipped off of it?
A. My foot slipped off and hit the gas pedal.
Q. Was there ever any time that your father told you to stomp it?
A. No, sir.
Q. Were the words that he used anything other than what you have testified, move over and let's get out of here?
A. That is all he said, yes, sir.
Q. When your foot slipped off of the shoe and hit the accelerator, is that when you hit Ms. Barr?
A. Yes, sir.
Q. And where was your father at that time?
A. I have no idea.
....
Q. But you did floor it, though, didn't you?
A. By accident, yes.
Q. By accident you are saying you floored it, okay, but you floored it nevertheless, right?
A. Sure, yeah.
Q. You put the pedal to the metal, had the accelerator all of the way down?
A. No, the accelerator did not – I didn't floor it on purpose. My shoe broke. I had on big shoes that broke. I didn't floor it all of the way to the floor; it just floored it for a couple of seconds.
Q. Well, in your deposition you said you floored it, right?
A. I don't think I said that.
Q. Well, do you want me to show it to you?
A. I may have told you that my shoe broke and it caused me to floor it but I didn't floor it intentionally.

Q. Okay. You are saying that you did floor it, you did hit the accelerator and you hit it hard, all of the way down, but you didn't do so intentionally?
A. No.
Q. Am I saying that wrong?
A. No, that is fine.
Q. Are we in agreement?
A. Yes.
Q. I mean you used the words in your deposition that you floored it and, if I am wrong about that, I will get it out for you?
A. Well, I was going and then it got floored. It was not like I floored it all immediately.

Transcript at 90-92; 77-78.

Ms. Ware's implication is that the truck was not moving nearly fast enough to injure Mrs. Barr before the strap on her flip-flop broke, and after the strap broke causing her to press the accelerator to the floorboard, the truck was moving fast enough to injure Mrs. Barr. Ergo, Mrs. Barr's injury resulted not from Ms. Ware's movement of the truck per se, or even from Mrs. Barr's running in front of the truck, but instead from the breaking of the strap, which caused the depression of the accelerator, which caused the truck to move forward in a rapid and unexpected manner and strike Mrs. Barr.

Common sense dictates that if Ms. Ware pressed the accelerator with sufficient force to break the strap on her shoe then that same amount of force would have been sufficient to depress the accelerator far enough to generate the speed required for the truck to cause the injuries suffered by Mrs. Barr. Conversely, if Ms. Ware was gently applying pressure to the accelerator, sufficient only to "ease" the truck down the road, as she implied that she was doing, the force would have been insufficient to break the strap on her flip-flop. It likewise would have been insufficient to cause her foot to slip even if the strap actually broke. And it would also, even if the strap actually broke, have been insufficient to force the accelerator to the floor.

Moreover, it is improbable that Ms. Ware's flip-flop strap could have broken as a result of her gently pressing her foot downward, flat against the sole of the flip-flop. It is furthermore improbable that her foot could have slipped off the flip-flop to one side or the other or that, even if her foot had slipped, it would have depressed the accelerator with greater force than that which Ms. Ware was already applying. All this leads to one probable conclusion , a conclusion that is more probable than that offered by Ms. Ware. That conclusion is, in order for the accelerator to have been pressed to the floor, Ms. Ware intentionally pressed it with the force necessary.

And, as indicated before, Ms. Ware testified that she saw Mrs. Barr standing, "diagonal in front of the truck," when she placed it in motion, and that she saw Mrs. Barr run to a point that was a little closer to the front of the truck just before she floored the

accelerator. Consequently, the conclusion is unavoidable that Ms. Ware intended to run over Mrs. Barr because she undoubtedly knew that was exactly what the consequences of her intentional action of flooring the accelerator would be while Mrs. Barr was in front of the truck.

Ms. Ware said that she stopped the truck after it hit Mrs. Barr. She did not say how far the truck traveled after Mrs. Barr was hit. When she stopped the truck, it was sitting on top of Mrs. Barr's left leg. Mr. Barr and John ran up to the truck and told her to back it up and get it off of Mrs. Barr.

Ms. Ware testified that she complied with that command. She put the truck in reverse, moved it backwards off of Mrs. Barr's leg, put it in park, and got out. She did not say how far she backed the truck before she parked it.

She said that when she got out of the truck, she observed her father attempting to remove himself from beneath the truck. She testified:

> Q. All right. When you got out, did you see your father?
> A. Yeah, that is when he was getting out from under the truck and that was when they started hitting him.

Transcript at 93.

Ms. Ware's testimony that she saw Mr. Steadman "getting out from under the truck," and from that observation concluded that she had run over him, is entirely inconsistent with her testimony that she did not see him standing in front of the truck the moment before she floored the accelerator. Also, as discussed before, the fact that Mr. Steadman received no injuries to speak of as a result of allegedly being hit by the truck totally precludes the conclusion that he was in fact struck by the truck. It also refutes Ms. Ware's testimony that she saw him getting out from under the truck and her conclusion that she had struck him in addition to Mrs. Barr.

Moreover, Ms. Ware's testimony, that, after backing the truck off of Mrs. Barr and getting out, she saw Mr. Steadman coming from under the truck, is incongruous. When she backed the truck off of Mrs. Barr, if Mr. Steadman were under the truck, she necessarily backed it off of him at the same time. Consequently, it would have been impossible for her to have actually seen him coming out from under the truck as he would not have been under the truck when she got out of the truck.

Furthermore, Ms. Ware's testimony, that, after backing the truck off of Mrs. Barr and getting out, she saw Mr. Steadman coming from under the truck conflicts with her father's testimony. He testified that she was still in the truck when he came from beneath it and stood up. And that conflicts with Ms. Ware's testimony that while Mr. Steadman was attempting to stand up, Mr. Barr and John, "started hitting him." Transcript at 93.

Regarding the events which occurred after Ms. Ware backed up the truck, Ms. Ware's testimony again diverges from Mr. Steadman's. Ms. Ware specifically testified that when Mr. Barr and John began hitting her father she had already backed the truck off of Mrs. Barr and was standing outside of the truck. Her father was still on the ground. Mr. Steadman, however, testified that when Mr. Barr and John began hitting him, he had already moved from beneath the truck, stood up, and was looking down at Mrs. Barr. Mrs. Barr was still trapped under the truck's front wheel. Ms. Ware was still sitting in the truck. Mr. Steadman testified:

Q. Where were you when you were hit the first time?
A. I was standing in front of the truck looking down at Ms. Barr's leg.
Q. And is that the time that you were hit on the cheek in that exhibit?
A. Yes.
Q. And when you were hit there, did that knock you down to the ground or did you remain standing?
A. I think it – I don't really remember if it knocked me down or not. I remember ending up on the ground.
Q. Now where was Ms. Ware at that time? Was she still in the truck?
A. Yes.

Transcript at 218-19.

Ms. Ware said that Mr. Steadman eventually got back into the driver's seat of the truck. She got in the passenger seat and Mr. Steadman drove the truck from the Barrs' residence. A short while later, they were stopped by the police who were traveling from the opposite direction. The police arrested Mr. Steadman and put him, and Ms. Ware as well, in the police car and took them both to the police station.

Ms. Ware testified that her father never went into the Barrs' yard or driveway. She said that he never walked toward the Barrs' front door and that Mr. Barr never told her that she should stop her father from going toward the front door. She said that while he was at the Barrs' residence her father did not walk, talk, or act in a manner that might suggest that he was under the influence of alcohol.

Ms. Ware said that she never heard her father say that he was going to kill anyone. She admitted, however, that, during the time she and her father were at the Barrs' residence, she could not hear what he or anyone else was saying. She testified:

Q. Okay. Did you hear threats out there, going back prior to Ms. Barr being run over; did you hear threats, verbal threats coming from any of the people out there, Mr. Steadman, Mr. Barr, Charles?
A. You couldn't really tell what anybody was saying.

Transcript at 82.

B. Applicable Law

1. Section 523(a)(6)

Section 523(a)(6) of the Bankruptcy Code makes nondischargeable a debt for any "willful and malicious" injury caused by a debtor to another person. The definitions of those two particular terms of art have long been established and recognized in this Circuit. An early explanation is:

> In order that a provable liability come within this exception the injuries must have been both willful and malicious. An injury to person or property may be a malicious injury within this provision if it was wrongful and without just cause or excuse, even in the absence of personal hate, spite or ill will. The word "willful" means nothing more than intentionally doing an act which necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury.

In re Vickers, 546 F.2d 1149, 1150 (5th Cir. 1977).[8]

Moreover, the Supreme Court of the United States has clarified those accepted definitions by reiterating and reemphasizing that nondischargeability under section 523(a)(6) requires, "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998). Reckless, wanton, or negligent acts will not suffice. The debtor must have actually intended, "'the consequences of an act,' [i.e., the injury] not simply 'the act itself.'" Id. at 61-62 (quoting Restatement (Second) of Torts § 8A, comment a, p. 15 (1964)).

2. Burden of Proof

The burden on Mrs. Barr in this proceeding was to prove by a preponderance of the evidence that she was willfully and maliciously injured by Mr. Steadman. Grogan v. Garner, 498 U.S. 279, 291 (1991). By definition, "The burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, 'simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence."'" Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal., 508 U.S. 602, 622 (1993)(quoting In re Winship, 397 U.S. 358, 371-372 (1970)(brackets in original)(citation omitted)). In addition,

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[8] See also In re Walker, 48 F.2d 1161, 1164 (11th Cir. 1995); In re Ikner, 883 F.2d 986, 991 (11th Cir. 1989); In re Latch, 820 F.2d 1163, 1166 n.4 (11th Cir. 1987); In re Dardar, 620 F.2d 39, 40 (5th Cir. 1980).

"Before any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." Id. at 622.

3. Principal

It is of no consequence that Mr. Steadman was not operating the vehicle when it hit Mrs. Barr. If he instructed Ms. Ware to drive the truck into Mrs. Barr, and Ms. Ware complied with that instruction by intentionally hitting Mrs. Barr with the truck, then he is equally as guilty of the misdeed as Ms. Ware. And Mrs. Barr is entitled to recover against him for the resulting injuries and damages, and, furthermore, to a determination that the debt which encompasses said injuries and damages is nondischargeable. "[T]he law looks upon such a conspirator, or one who is ready to aid, as an actual participant in the completed offense. That is, he is considered a principal (as the statute states)." Ex parte Williams, 383 So.2d 564, 565 (Ala. 1980). "'There can be no such thing as an innocent agency in the commission of a tort; and doing an illegal or tortious act by another, is doing it by one's self.'" Stapler v. Parler, 212 Ala. 644, 103 So. 573 (1925)(quoting Ala. Mid. R.R. Co. v. Coskry, 92 Ala. 254, 9 So. 202 (1891)).

"[O]ne who is present, encouraging, aiding, abetting, or assisting, or who is ready to aid, abet, or assist, the active perpetrator in the commission of the offense, is a guilty participant, and in the eye of the law is equally guilty with the one who does the act." Tanner v. State, 92 Ala. 1, 9 So. 613, 615 (1891)(in a separate trial of one jointly indicted with others for assault with intent to murder, where there was evidence that all of the assailants acted with a common purpose to commit the assault, instructions were properly refused which were based upon the theory that the defendant on trial could not be convicted unless he actually did the acts constituting the assault). "[A]s a general rule, the act of one becomes the act of all, and the one who encourages, or stands ready to assist, is alike guilty with the one who perpetrates the violence." Id. Mangino v. Todd, 19 Ala. App. 486, 491, 98 So. 323, 328 (1923)(in civil suit for assault and battery against three deputy sheriffs who made an unauthorized effort to stop a buggy during which one of the occupants of the buggy was shot by one of the officers, all three officers were equally responsible because "[t]hey were all engaged upon a common enterprise or adventure which contemplated the halting of the buggy and its occupants," and, "were present, encouraging, aiding, and abetting each other in this enterprise.").

C. Conclusions on Liability and Dischargeability

The testimony from Mr. Barr and Mrs. Barr establishes that:

1. Using the paint pole, Mr. Steadman intentionally herded Mrs. Barr in front of his truck, and, at that point, told Ms. Ware to "stomp it," which she did, causing the truck to hit Mrs. Barr and run over her leg;

2. Mr. Steadman blocked Mrs. Barr's escape by striking her with the pole as she attempted to turn away from and flee the oncoming vehicle; and,

3. Mr. Steadman assaulted Mr. Barr several consecutive times with the pole as Mr. Barr attempted to rescue Mrs. Barr.

Mr. Steadman's malicious intent is amply demonstrated by those facts, as well as these:

1. He went to the Barrs' residence uninvited, unannounced, and inebriated, for the sole purpose of having a "confrontation" with Mr. and Mrs. Barrs' minor son;

2. He instigated the difficulties by saying to John, "Hey, I heard you wanted to kill me;" he armed himself with a paint scraper when he got out of his truck; he told Mr. Barr that he had come there to kill John and that he would kill Mr. Barr also; he swung the pole back and forth at John and Mrs. Barr in a manner that forced them into the street in the area in front of his truck; he told the Barrs that he was not leaving until he had killed them all; once John and Mrs. Barr were in front of the truck, he commanded his minor daughter to "floor" the accelerator; and when Ms. Ware refused to obey his first command, he repeated it.

The Court finds no reason to doubt the accuracy of either of the Barrs' testimony. The facts testified to by Mrs. Barr are in all salient respects consistent with the facts testified to by Mr. Barr, and vice versa. Neither's testimony contains any salient internal inconsistencies or incongruencies, and neither testified to anything that seems implausible or impossible on its face, from a common sense perspective or from general knowledge.

By contrast, there is ample reason to doubt the accuracy of the testimony from Mr. Steadman and Ms. Ware. The facts testified to by Mr. Steadman are in many salient respects inconsistent with the facts testified to by Ms. Ware, and vice versa. Those are:

1. Ms. Ware testified that she did not actually see her father consume any alcoholic beverages that day. Mr. Steadman, however, specifically admitted that he drank four beers after he and Ms. Ware left the park. During that time, he was driving the truck and Ms. Ware was sitting in the passenger's seat. It would, therefore, have been virtually impossible for Ms. Ware not to have seen her father consume those four beers. Consequently, either Ms. Ware or Mr. Steadman is mistaken. Either Ms. Ware saw her father drink the beers or Mr. Steadman did not drink any beer after leaving the park.

2. Mr. Steadman testified that after he first called to John, John went inside; that when John went in, Mr. Barr came out, retrieved the bat from the garage and approached him; that he and Mr. Barr, not John, began to argue; and that John did not come out of the house until later. Ms. Ware, however, testified that after John went inside, he quickly came back with the bat in his hands and approached her father; that it was John, and not Mr. Barr, with whom her father argued; and that Mr. Barr did not come out of the house until after John.

3. Ms. Ware testified that when Mrs. Barr eventually came out of the house, she announced that she had called the police and began yelling derogatory things at Ms. Ware, and calling her insulting names. However, Mr. Steadman testified that the only thing Mrs. Barr said when she exited the house was that the police were on their way. He did not mention any other words being spoken by Mrs. Barr until she purportedly stepped in front of the truck and said, "No, you are not going anywhere." Transcript at 211.

4. Mr. Steadman testified that he and Mrs. Barr were standing in front of the truck when Ms. Ware caused it to move forward. He did not say that Mr. Barr was in front of the truck. And he said that he told Ms. Ware only once to move the truck, and that Ms. Ware moved the truck in response to the first and only command he gave her to move it. Ms. Ware, however, testified that her father told her twice to move the truck; that she did not comply with his initial directive to move the truck because her father and Mr. Barr were standing directly in front of it at the time; that when he told her to move the truck the second time she complied; and that when she started the truck forward in response to her father's second directive she did not know where he or Mr. Barr were standing.

5. Mr. Steadman testified that he was standing directly in front of the truck when Ms. Ware "floored" the accelerator and that he ended up under the front of the truck after it hit him. Ms. Ware, however, said that she did not know where her father was when she "floored" the accelerator. Since she was staring out the front window of the truck at that moment, it stands to reason that her father could not have been standing in front of the truck when she "floored" the accelerator because if he had been she would have seen him. And if Mr. Steadman was not standing in front of the truck when Ms. Ware "floored" the accelerator, he could not have been hit by the truck.

6. Mr. Steadman <u>did not testify</u> that Ms. Ware immediately backed the truck off Mrs. Barr's leg, or that Mr. Barr attacked him after the truck was moved. To the contrary, he testified that, when Mr. Barr and John began hitting him, he had already removed himself from beneath the truck and stood up; that he was standing and looking down at Mrs. Barr, who was still trapped under the truck's front wheel; and that Ms. Ware was still sitting in the truck. Ms. Ware, on the other hand, testified that when she stopped the truck, Mr. Barr and John told her to back it up and get it off of Mrs. Barr; that, in response to that command, she put the truck in reverse, moved it backwards off Mrs. Barr's leg, put it in park, and got out; that Mr. Barr and John did not begin hitting

her father until after they had asked her to back the truck up, and after she had backed the truck off of Mrs. Barr, and after she had exited the truck; and that her father was still on the ground when he was allegedly attacked by Mr. Barr and John.

Furthermore, both Mr. Steadman's testimony and Ms. Ware's testimony contain salient internal inconsistencies and are fraught with incongruence. Those are:

1. In his deposition, Mr. Steadman testified that he was under the influence of alcohol when the events occurred. However, at trial he insisted that he was not influenced by the alcoholic beverages he consumed prior to going to the Barrs' residence. Not only is Mr. Steadman's trial testimony inconsistent with his deposition testimony, it also is incongruent with his guilty plea to driving under the influence.

2. At trial, Mr. Steadman first insisted that he had consumed only four beers and two or three ounces of whiskey at some point during the day prior to arriving at the Barrs'. In his deposition, however, he testified that, prior to going to the Barrs', he had actually consumed six beers and an entire half-pint of liquor. And later in his trial testimony, he admitted to consuming six beers, two before going into the park and four after leaving the park.

3. At one point Mr. Steadman testified that his truck was parked in the middle of the road and that he essentially stood within a couple of feet of the truck the entire time he was at the Barrs' residence. In another part of his testimony, he testified that the truck was parked on the, "opposite side of the road," and that upon getting out of his truck he proceeded to a point in the street next to the Barrs' driveway.

4. Mr. Steadman first testified that he was unarmed when Mr. Barr approached him. But he later admitted that he was holding a paint scraper in his hand.

5. At one point Mr. Steadman testified that he could not recall either what Mr. Barr said to him or what he said to Mr. Barr during their conversation. At another point in his testimony, he said that Mr. Barr told him that he was going to beat him up, or hit him with the bat, or words to that effect.

6. Ms. Ware testified that when she got out of the truck she saw her father attempting to remove himself from under the truck, which was the time she purportedly first realized that she had run over her father in addition to Mrs. Barr. That testimony is entirely inconsistent with her testimony that she did not see Mr. Steadman standing in front of the truck the moment before she floored the accelerator. It is furthermore incongruous. When she backed the truck off Mrs. Barr, if Mr. Steadman had been under the truck, she necessarily backed it off him as well. Consequently, it would have been impossible for her to have seen him getting out from under the truck as he would not have been under the truck at that time.

7. Mr. Steadman testified that he was attempting to leave the Barrs' from the moment he was confronted by Mr. Barr, and that his decision to leave was motivated in part by Mr. Barr's aggressive actions. That explanation is, of course, completely incongruous. He testified that he saw Mr. Barr retrieve the bat from his basement when he was standing in the street by the truck. At that point in time, he had ample opportunity to leave. Instead, he armed himself with the paint pole and proceeded to wait for Mr. Barr to walk down the driveway into the street. It is apparent from those actions that Mr. Steadman was not afraid of Mr. Barr and had no intention of leaving. Furthermore, the fact that Mr. Steadman proceeded to the front of the truck, instead of entering the truck through the driver's side door, which would have been the quickest route, also belies his suggestion that he was attempting to escape from Mr. Barr and demonstrates a desire to continue the confrontation he initiated.

8. Mr. Steadman testified that while standing at the center of the truck's hood, three feet from its front, he told Ms. Ware to move the truck down the street. That testimony is not believable. He most certainly would have been hit. Why would he tell Ms. Ware to move the truck when he knew that he would have been hit?

9. Mr. Steadman's testimony is that Mr. Barr attacked him while Mrs. Barr's leg was still trapped under the truck and before Mr. Barr attempted to rescue his wife. While Mr. Steadman's transgression against Mrs. Barr may have caused an angry response from Mr. Barr, the Court cannot believe that Mr. Barr would have taken that action before he attended to his wife.

Both Mr. Steadman and Ms. Ware testified to things which appear implausible or impossible in light of common sense and general knowledge. Those are:

1. Mr. Steadman testified that the only reason he testified in his deposition that he drank all six of the beers he purchased at the convenience store on the day of the instance was because he misunderstood the question, "'How much did you drink?'" Transcript at 182. He testified that the only reason he testified in his deposition that he drank an entire half-pint bottle of liquor was because he misunderstood the question, "'And how much liquor did you drink?'" Transcript at 183. And he testified that the only reason that he testified in his deposition that he was under the influence of alcohol during the time that he was at the Barrs' residence was because, in his opinion, "any consumption of alcohol is under the influence," even if it has no discernable effect on him, so that, even if he had only consumed one beer, he would have still said that he was "under the influence of alcohol." Transcript at 176. The three questions placed to Mr. Steadman at his deposition relating to his alcohol consumption prior to going to the Barrs' residence were simple and straightforward and could not have been posed to him in a more direct and elementary manner. The Court must conclude that Mr. Steadman understood them and that his answers were responsive.

2. Mr. Steadman testified that, other than a few superficial scratches and bruises, he was not injured from being run over by the truck. Common sense and

general experience dictates that had Mr. Steadman actually been hit by the truck, at such short range, with the truck's accelerator pressed to the floorboard, he would, more probably than not, have been seriously injured. He would at least have incurred more than superficial scratches and bruises. Based on the improbability of Mr. Steadman's testimony, the Court must conclude that he was not hit by the truck. That conclusion agrees with the Barrs' testimony, and with Ms. Ware's statement that, when she "floored" the accelerator, she did not know her father's location.

3. Ms. Ware testified that she had no intention of "flooring" or "stomping" the accelerator, but that, as a matter of pure coincidence, when Mrs. Barr ran in front of the truck, the strap between her toes on her right flip-flop broke causing her foot to slip and to depress the accelerator all the way to the floor board of the truck. As discussed above, as a matter of general experience and common sense, the Court cannot imagine how Ms. Ware's application of gentle pressure to the accelerator could have possibly resulted in the strap on her shoe breaking, or how the strap breaking could have resulted in her application of greater force to the accelerator than what she was already applying. And Ms. Ware did not explain why she simply did not remove her foot from the accelerator when the strap broke, that is raise her foot and place it on the brake or apply the brake with her other foot when she allegedly saw Mrs. Barr rush in front of the truck. Based on the improbability of Ms. Ware's testimony, the Court must conclude that she intentionally pressed the accelerator to the floor in accordance with her father's instructions. That conclusion agrees with the Barrs' rendition of the events.

In evaluating the reliability of Mr. Steadman's testimony, the Court must recognize that more probably than not, Mr. Steadman's abilities to accurately perceive and retain the events that occurred at the Barrs' residence were impaired by the effects of the alcohol he consumed. He admitted in his deposition to having consumed a six-pack of beer and a half-pint of liquor. He admitted in his deposition that he was under the influence of alcohol while he was at the Barrs' residence. He pled guilty to driving under the influence of alcohol when he left the Barrs' residence. And both of the Barrs said that, in their opinions, Mr. Steadman was intoxicated. Based on those ample facts, the Court must conclude that Mr. Barr was inebriated to some degree while he was at the Barrs' residence. Therefore, more likely than not, Mr. Steadman's rendition of what transpired at the Barrs' residence is inaccurate and, consequently, unreliable.

Similarly, in evaluating the reliability of Ms. Ware's testimony, it cannot be forgotten that she was only 16 years old. Given her youth and inexperience, the Court must consider the real possibility that the accuracy of Ms. Ware's perception of the disturbing and traumatic events which occurred on that occasion may have been clouded by the overwhelming emotions, including fear, anger, nervousness, and excitement, that those events naturally must have inspired in her.

In any event, Ms. Ware's testimony does not absolve Mr. Steadman. To the contrary, she testified he told her once to move the truck while people were standing in front of it and that she refused to obey his command because those people would have

been hit by the truck had she complied. When she did not comply with his first command, Mr. Steadman apparently sensed Ms. Ware's reason for apprehension, and, in spite of that, commanded her to move the truck a second time. And Ms. Ware said that when her father commanded her to move the truck the second time, she again was reluctant to comply because people were still standing in front of it, including Mrs. Barr, who, she testified, "was diagonal in front of the truck." Transcript at 90. By telling Ms. Ware a second time to floor the accelerator while Mrs. Barr was standing "diagonal in front of" it, Mr. Steadman once again clearly made his desires know, that is for Mrs. Barr to be struck by the truck.

And finally, the Court must conclude that the Barrs' rendition of the incident is, more probably than not, what actually happened. And that is consistent with Mr. Steadman's overall conduct. Mr. Steadman went to the Barrs' residence uninvited, unannounced, and for the express purpose of causing trouble or engaging in behavior that was certain to result in an altercation. Once he arrived, Mr. Steadman did not calmly walk to the front door and ring the doorbell. He did not ask for John's parents for the purpose of gaining permission to speak with their minor son or allowing them the opportunity to be present during that conversation. Instead, he shouted at John directly from the street, his words in the form of a challenge, specifically using the word "kill," which was certain, as he well knew or should have known, to raise the ire and apprehension of John and his parents once they became aware of his presence. He had been drinking, and was probably inebriated, which was likely to arouse an even greater level of apprehension in the minds of the Barrs. When he got out of the truck, he armed himself with a paint scraper, a metal device with pointed edges which can readily be used to cause bodily harm to another person, thus evincing his intent to engage in a physical altercation.

Mr. Steadman did not leave the Barrs' residence despite having ample opportunity to do so. His apparent intent was to remain until his goal was accomplished. He told Ms. Ware to move the truck while people were standing in front of it, thus evincing his intention that one of the Barrs be hit by the truck, exactly what happened. Thus, he did not leave the Barrs' residence until he had accomplished what was apparently his purpose.

These facts are fully consistent with the Barrs' characterization of how the events transpired, furthermore, entirely consonant with the conclusion that Mr. Steadman willfully and maliciously injured Mrs. Barr.

In summary, the testimonies by Mr. and Mrs. Barr are eminently more credible, reliable, believable, and plausible than the competing testimonies given by Mr. Steadman and Ms. Ware. It is, therefore, more probable than not that the testimonies given by Mr. and Mrs. Barr accurately depict the events that occurred on July 2, 2001, when Mr. Steadman came unannounced and uninvited to their residence. Furthermore, the Barrs' depiction of those events are generally consistent with what actually happened that day according to all of the witnesses. It is also consistent with Ms.

Ware's admission that her father told her twice to move the truck while people were in front of it and that she indeed "floored" the accelerator, albeit, according to her, accidentally, just like, according to the Barrs, her father had told her twice to do. Based on the Barrs' depiction of those events, the Court must conclude that, more probably than not, Mr. Steadman willfully and maliciously injured Mrs. Barr. Specifically, the Court finds:

(1) Mr. Steadman intentionally herded Mrs. Barr in front of the truck with the pole.

(2) Once he forced Mrs. Barr to a position in front of the truck, he told Ms. Ware to move over into the driver's seat, crank the truck, and "floor" or "stomp" the accelerator with knowledge and intention that when she did it would result in Mrs. Barr being struck and injured by the truck.

(3) When Ms. Ware refused to obey his first command, Mr. Steadman told her again to "floor" or "stomp" the accelerator with knowledge and intention that when she did it would result in Mrs. Barr being struck and injured by the truck.

(4) Ms. Ware obeyed the second command by intentionally pressing the accelerator to the floor while Mrs. Barr was standing in front of the truck, with full knowledge and realization that Mrs. Barr was standing in front of the truck and would be hit and injured by the truck.

(5) Mr. Steadman thwarted Mrs. Barr's attempted escape from the truck by striking her with the pole.

(6) Mrs. Barr was struck and injured by the truck.

Mrs. Barr has established by a preponderance of the evidence that she was willfully and maliciously injured by Mr. Steadman. Therefore, the resulting debt owed by Mr. Steadman to her is nondischargeable by virtue of section 523(a)(6). The remaining question is what is the amount of that debt.[9]

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[9] Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1018 (9th Cir. 1997); Longo v. McLaren (In re McLaren), 3 F.3d 958, 965-966 (6th Cir. 1993); Atassi v. Mclaren (In re McLaren), 990 F.2d 850, 853-854(6th Cir. 1993); N.I.S. Corp. v. Hallahan (In re Hallahan), 936 F.2d 1496, 1507-1508 (7th Cir. 1991); Vickers v. Home Indem. Co., Inc. (In re Vickers), 546 F.2d 1149, 1151 (5th Cir. 1977).

II. DAMAGES

A. Evidence Regarding Mrs. Barr's Injuries and Damages

The determination of the appropriate amount to award Mrs. Barr for the injuries she suffered because of Mr. Steadman's malfeasance is problematic. She did not present the Court with any breakdown or itemization of what, in her opinion, she is entitled to receive. She did not suggest what amount, if any, she should receive for lost wages, either past or future; what amount she should be awarded for her pain and suffering; or what amount she should be awarded for her permanent, partial disability; or what amount she should be awarded for prospective medical expenses. Nor did she offer any guidance to the Court to make those calculations. Consequently, the Court is left on its own to fashion an appropriate monetary award.

1. Mrs. Barr's Testimony

a. Injuries and Treatment

Mrs. Barr's left ankle and foot were trapped under the front left tire of the truck when she was hit. Essentially, the flesh and skin on the outside of her left ankle, and the skin on the outside of her left leg,"disintegrated" through the action of the wheel grinding them against the asphalt. Transcript at 25. Needless to say, Mrs. Barr experienced excruciating pain during the time she was being dragged by the truck, as well as when the truck was sitting on her ankle and foot after it had stopped. She described her feelings while she was trapped and while she waited for the ambulance after the truck had been backed off of her. She testified, "[I] thought I was dying. I mean it was awful ...." Transcript at 22.

Mrs. Barr's principal injury was to her left ankle and foot. However, she also received, "injuries to [her] arm, both thighs and [she] had a possible tail bone fracture." Transcript at 31 (parentheticals added).

Mrs. Barr was taken to the hospital by an ambulance. She said that the ambulance technicians wrapped the open wound and administered an IV. They had to slap her face in order to keep her from passing out.

Mrs. Barr remained in the hospital for 11 days.[10] At the hospital, she underwent debridement surgery which involved cleaning the debris out of the open wound, a large hole in her ankle. After the surgery, she had to go undergo a process twice a day for around four days which involved sitting in a vat of hot water soaking the open wound.

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[10] Mrs. Barr testified that she was in the hospital 13 days. As indicated before, however, her medical records reflect that she was in the hospital 11 days.

According to Mrs. Barr, the process was extremely painful. "That was very, very excruciating for that open wound to be put in that hot water." Transcript at 31.

On her fifth day in the hospital, she underwent more surgery, this time for a skin graft. The surgeon took the graft from the upper part of Mrs. Barr's left thigh and grafted the skin to her left ankle and foot.

After she was discharged from the hospital, according to her testimony, Mrs. Barr was completely bedridden for a month, during which time she could not walk or bathe. She periodically had to return to the doctor for him to dress the wound. She was required to use a walker after she was able to get out of bed. But she was not allowed to place any pressure on the skin graft. Consequently, she remained confined to the downstairs area of her house for around three months, because climbing the stairs would have required her to place pressure on the graft.

Mrs. Barr testified that although she eventually was able to negotiate the stairs, she had to continue using the walker for another month. After that, she was allowed to switch to crutches, which she used for about three weeks.

Mrs. Barr said that she was required to undergo physical therapy for her injuries on twenty to thirty occasions. The therapy often involved the application of electrical stimulation around her foot and ankle, which was designed to treat the extensive damage to the nerves. It also involved the therapist teaching her to use her foot again.

In September, 2001, Mrs. Barr came under the care of Dr. Dewey Jones, IV, an orthopedist, who became, and still remains, her primary provider of care for the injury to her ankle and foot. She said that she continues to require medical attention for the injury because she has, "permanent nerve damage and ... swelling and ... constant falls because [she] can't feel [her] foot." Transcript at 34 (parentheticals added). According to Mrs. Barr, she feels nothing in the top of her foot, and in side of her foot, and in four of her toes, during her waking hours. At night, however, the nerves in her left foot generate unpleasant sensations which prevent her from sleeping soundly. Transcript at 36-37.

Mrs. Barr testified that she has very limited range of motion in her left foot. She can move it only a little to the left and hardly any to the right. She has twice fallen and injured her right leg as a result of not being able to feel or to move her left foot.

Mrs. Barr has had a number of "MRI's" and other tests done on her left knee and foot. She suffers considerable swelling and a great deal of pain in her left knee.

According to her testimony, Mrs. Barr has incurred, and paid, $3,500 for related medical treatment not covered by insurance.

Mrs. Barr identified Plaintiff's Exhibits 4(a)(1), 4(a)(2), 4(a)(3), 4(a)(4) and 4(a)(5) as photographs of her injuries during various stages of her recovery. Exhibit 4(a)(1) depicts Mrs. Barr in the hospital with her left leg extensively bandaged. Exhibit 4(a)(2) shows the scarring and the skin graft. Exhibit 4(a)(3) shows the skin graft immediately after it was completed. Exhibit 4(a)(4) is a photograph of Mrs. Barr's left leg after "extensive healing." Transcript at 25. Exhibit 4(a)(5) is another photograph of Mrs. Barr's left leg, taken during one of the many visits that she made to the surgeon.

b. Disability and impairment

Mrs. Barr testified that she worked as a truck driver from 1984 until she was injured by Mr. Steadman, except for a short break in 1993 when she took several personal enrichment type courses at a community college.

She said that she worked for National Computer Print as a truck driver for a number of years until 1998. Her annual salary at NCP was $21,000.00. In 1999 she went to work for Georgia Pacific as a truck driver. She earned $25,600.00 in 1999 and $27,957.00 in 2000 from Georgia Pacific.

Mrs. Barr testified that in November 2002, her doctor advised her that she could perform "light duty" work. On that basis, she returned to work at Georgia Pacific. But when there was no longer light duty to perform, her employer was forced to terminate her employment.

Ultimately, she found a job as a driver for Keebler Company. But she was, according to her testimony, unable to perform the physical activities required to perform her job. She could not climb, or sit for long periods of time, or lift very much, or walk very well, and had difficulty manipulating the clutch on her truck, all of which are essential activities required of a truck driver. So she had to abandon the job at Keebler in September 2003.

In Mrs. Barr's judgment, her injuries will preclude her from ever being able to work as a truck driver again, the profession she enjoys and her preferred occupation.

Since leaving Keebler in September 2003, Mrs. Barr has not sought other employment. She testified that she has not sought other employment because she cannot drive a truck, which is the only thing that she believes she is really qualified to do where she could earn enough to pay for day care and make a living. She testified, "Well, the other type of work that is out there without a college degree, I can't make the amount of money to pay for child care. I mean I can't make thirty thousand dollars at a convenience store." Transcript at 195.

2. Mr. Barr's testimony

Mr. Barr and Mrs. Barr have been married for 20 years. Mr. Barr testified that since Mrs. Barr was injured she has been unable to do much lifting or walking. She has constant trouble with her back and her legs hurt and swell all of the time. She cannot walk around or do any exercise, which she was able to do, and was in the habit of doing, before she was injured. She has gained around 30 pounds. She is in pain all of the time and worries a lot. Sometime she cannot go to sleep for hours because her leg and foot are bothering her. Mrs. Barr's constant suffering has adversely effected their relationship:

> We get along. I am not saying that, but she has a lot of pain and a lot of suffering all of the time and a lot of worry, you know, and it is not the same as it was. I will have to say that, although I have looked over everything that I possibly can and will continue to because I love my wife, but there is a difference in our marriage since this happened.

Transcript at 151.

3. The Deposition of Dr. Dewey Jones, IV, and Mrs. Barr's Medical Records

Dr. Dewey Jones, IV, is a licensed physician and board certified in orthopedic surgery. His deposition was admitted into evidence without objection as Plaintiff's Exhibit 5. Dr. Jones has been treating Mrs. Barr for the injuries she received in the incident since September 14, 2001. Mrs. Barr was a patient of his for several months prior to receiving those injuries.

Attached to the deposition, and admitted into evidence, are medical records pertaining to Mrs. Barr's treatment. Those records include Dr. Jones' records; records from Carraway Methodist Medical Center, the hospital where Mrs. Barr was initially treated; records from Physiotherapy Associates, where she received her physical therapy; records from Brookwood Medical Center, where MRIs were conducted; records from Norwood Clinic, where she received follow up treatment after being released from Carraway; records from HealthSouth Sports Medicine and Rehabilitation Center, where she received a disability evaluation; and miscellaneous other records.

Mrs. Barr's medical records reflect that, on July 2, 2001, at around 4:52 p.m., she was transported by ambulance to Carraway Methodist Medical Center. The ambulance attendants noted that she had an abrasion on her left forearm and several abrasions along her left leg, from her knee to her ankle; that the flesh had been torn from the outside of her left ankle; and that the bone of her left ankle was exposed. Hospital emergency room records reflect that the flesh had been torn from Mrs. Barr's left ankle; there was road rash on the lower outside of her left leg, in the area from her knee to her ankle, and her left forearm; and that part of the bone of her left fibula was abraded.

Mrs. Barr underwent surgery on July 3, 2001. The surgeon who conducted the procedure was Dr. Edward Bromberg. Dr. Bromberg observed an open area on the outside of Mrs. Barr's left ankle where the flesh had been torn away. The lateral side of the ankle bone, the part that protrudes, or malleolus, was exposed, and the outside of the malleolus was missing, leaving the inside, cancellous part of the bone visible. A long linear break in the surface of Mrs. Barr's skin extended from her heel, through the malleolus, to her knee. Dr. Bromberg washed Mrs. Barr's wound with saline, removed the dead tissue and foreign matter from it, dressed it, and applied a splint.

Mrs. Barr underwent another surgery on July 10, 2001. It was conducted by Dr. Robert Howe, a plastic surgeon. Dr. Howe closed Mrs. Barr's left ankle wound by grafting skin, which he obtained from her upper left thigh.

Mrs. Barr was discharged from the hospital on July 13, 2001. During her stay, she was required to undergo, in addition to the two surgeries, constant medication, daily examinations, a number of whirlpool baths intended to make and keep her wounds clean, physical therapy, multiple applications of dressings to her wounds, and x-rays. Upon discharge, she was issued a walker to assist her in moving about until she regained full use of her left leg.

Dr. Howe monitored Mrs. Barr's progress following her discharge from the hospital. He examined her skin graft on approximately 10 occasions. He redressed the area, until November 12, 2001, when, according to his records, he determined that it had healed completely.

Mrs. Barr first consulted Dr. Dewey Jones, IV, with respect to the injury to her left ankle on September 14, 2001. On that occasion, Mrs. Barr reported that she was still experiencing pain in the area of her left ankle. Dr. Jones examined her left foot and determined that the nerves in the area of her injury were not functioning completely; that there was numbness in the area and the nerves, "could only tell things sort of light touch, but could not really discriminate completely." Dr. Jones' deposition, page 17. Mrs. Barr could, at the time, walk on the foot. Dr. Jones prescribed physical therapy for Mrs. Barr and determined that she was not yet able to return to work.

Mrs. Barr began physical therapy on September 18, 2001. From that date until October 24, 2001, she underwent physical therapy on approximately 8 occasions. The sessions included therapeutic procedures, electrical stimulus, and massage. It appears from the records of her physical therapist that Mrs. Barr made extraordinary progress during the course of her treatment and that her condition was promising. She reported walking up to two miles a day and riding a bike a similar distance and was apparently reporting no pain.

Mrs. Barr returned to Dr. Jones on October 26, 2001. At that time, Dr. Jones' impression was that she was doing excellent. She reported to him that she was cutting the grass at home and riding a bicycle at physical therapy. Although Dr. Jones' records

indicate that Mrs. Barr reported to him that she was experiencing numbness over the area of her skin graft and along the top of her left foot, the records do not indicate that she reported any pain. Dr. Jones determined that Mrs. Barr was ready to go back to regular work and noted on a form that she provided to him on that occasion that she was cleared to return to work on October 29, 2001, and to perform the regular duties required of her job, with no restrictions.

Dr. Jones' prognosis proved overly optimistic. Mrs. Barr returned to him on December 10, 2001. At that time, she reported aches and pain in her left leg, which radiated up and down her shin or tibia and into her knee. She said that her leg would generally get sore at night after she had been on it all day and often became sore after she had been sitting for awhile. During the examination, Dr. Jones could not, by manipulating Mrs. Barr's left ankle, elicit the pain that she complained of. His impression was that she may have had tendinitis and started her on anti-inflammatory medication.

Mrs. Barr returned to Dr. Jones on January 25, 2002. At that time, she again reported pain and burning sensations radiating from her left ankle to the back of her knee. She told him that the pain was especially bad at the end of the work day and in the evening. His examination revealed that Mrs. Barr appeared to have full functional range of motion in her left knee. But she experienced pain when the knee was rotated and was still experiencing decreased sensation on the top of her left foot. His impression was that the pain was probably a residue of the injury to her left ankle and that it was going to be very difficult to discern the precise source of the pain. Nonetheless, he directed that a MRI be performed on her knee, in order to rule out any other possible causes.

The MRI uncovered no other possible sources of Mrs. Barr's discomfort. Dr. Jones examined Mrs. Barr again on February 22, 2002. Once again she reported the pain in her left leg and that her activities were being curtailed as a result of the pain. At that point, it is apparent that Dr. Jones was at a loss concerning the precise source of the pain, and, consequently, referred Mrs. Barr to one of his associates, Dr. Dewey Jones, III, for a second opinion.

Dr. Jones, III, examined Mrs. Barr on June 13, 2002. At that time, she reported to him that her left knee had given out while she was walking to the mailbox. An x-ray on her left ankle and leg revealed a slight bowing in her fibula. He recommended that a MRI be performed on her left ankle, to make certain that no other injuries had been overlooked because she was continuing to have chronic pain in her left leg and knee. The MRI was performed, but revealed no problems in the bones, ligaments or tendons of Mrs. Barr's left ankle. Dr. Jones, IV, and Dr. Jones, III, at that time, determined that there was nothing that could surgically be done to alleviate Mrs. Barr's pain and that the only course available would be to continue to treat her symptoms, and shared that conclusion with her when she returned to their office on June 19, 2002.

Mrs. Barr returned to Dr. Jones, III, on March 6, 2003. She reported that she had changed jobs and was, at that point in time, working for Keebler Company. She told him that she was experiencing a great deal of pain in her left leg anytime she negotiated stairs and was still experiencing burning and stinging in her left foot. Dr. Jones, III, prescribed medication in an effort to alleviate Mrs. Barr's pain.

Mrs. Barr returned to Dr. Jones, III, on May 15, 2003, still complaining of pain. He again prescribed pain medication for her. At that point in time, he and Dr. Jones, IV, reached the conclusion that Mrs. Barr, because of her condition, should seek employment in some job other than truck driving.

Dr. Jones, IV, testified that, during the entire time he has treated Mrs. Barr, she has reported persistent pain in her left leg, "a burning type of pain and achiness that runs from her ankle all the way up to her knee...," and "an inability to feel very accurately on the top her foot due to the injury...," that she suffered on July 2, 2001. Dr. Jones' deposition, page 23. For that reason, he referred her to Dr. Roland Rivard, who is, "a specialist in determining permanent restrictions and limitations and disabilities...," in an effort to quantify the extent of her physical limitations. Dr. Jones' deposition, page 23.

Dr. Rivard conducted a thorough evaluation of Mrs. Barr and reported the results of that evaluation to Dr. Jones, IV, on July 10th, 2003. That report, which, of course, is based on Dr. Rivard's opinions, indicates that Mrs. Barr has a 24% permanent partial impairment of her left lower leg, which equates to a 10% permanent partial impairment of her body as a whole. He determined that Mrs. Barr's abilities to sit, even for long periods of time, stoop, kneel, crouch and reach, are not impaired and that she should be able to perform those activities in connection with any work she may obtain without restriction. But he determined that her abilities to stand, walk, lift, climb, balance and squat were impaired, to some extent, and recommended that any employment she might undertake be subject to the following limitations:

1. Her standing and walking should be limited to 2/3 of a normal 8 hour shift.

2. Her lifting should be limited to a maximum of 50 pounds and any frequent lifting and carrying should be limited to 40 pounds.

3. She should only climb stairs and ladders occasionally.

4. She should only be required to balance (i.e., to prevent falling on a narrow, slippery or erratically moving surface) occasionally.

5. She is unable to perform a full squat.

Dr. Jones, IV, testified that he has thoroughly reviewed Dr. Rivards' conclusions, opinions, and recommendations and is in complete agreement with them.

Dr. Jones, IV, examined Mrs. Barr again on July 21, 2003. She again reported to him that she was having a great deal of difficulty with her left leg and continued decreased sensation in the area of her left foot. At that point, she was still working for Keebler's Company driving a truck.

Mrs. Barr returned to Dr. Jones, IV, on December 5, 2003. She again reported pain in her left leg and foot. She told him that she was probably going to have to give up her work as a truck driver; that her left leg was giving her difficulty anytime she walked on uneven surfaces and sometimes gave out on her; that her left leg was numb on the lateral side and felt clumsy. Dr. Jones' impression was that Mrs. Barr should quit her job driving, loading and unloading trucks and obtain training for some other employment.

Dr. Jones, IV, last examined Mrs. Barr, prior to his deposition, on October 18, 2004. On that occasion, she reported continued numbness and tingling, and a burning sensation in her left foot, and pain radiating from her left ankle to her left knee. She told him that she was having difficulty leading with her left foot when negotiating stairs.

Dr. Jones testified that, in his opinion, Mrs. Barr's current physical condition has not improved from what it was when she was evaluated by Dr. Rivard. Consequently, in his opinion, Dr. Rivard's evaluation still accurately represents the present state of Mrs. Barr's limitations and disability. She still would have difficulty standing for any significant amount of time or walking for any significant distance. She would have difficulty squatting or kneeling down. Also, any activities that might involve positioning or manipulation of her left ankle, such as operating an instrument or machine that requires use her left foot, would be difficult for her. In his opinion, it is probable that her left leg will require future medical care. The loss of sensation in her left ankle is probably stable. The pain in her left ankle may be aggravated as a result of the normal aging process.

Dr. Jones testified that Mrs. Barr has been a cooperative patient. He does not believe that she has been faking any of her complaints. In his opinion, her reports of pain in her left leg and ankle, and numbness in her ankle and foot, are "consistent" with the injuries that she suffered on July 2, 2001. Dr. Jones' deposition, page 52.

The records pertaining to and reflecting the medical services and supplies provided to Mrs. Barr for treatment of the injuries that she received on July 2, 2001, and the charges incurred by her for those services and supplies, are attached to Dr. Jones' deposition. Mrs. Barr's incurred total charges for those services and supplies of $34,655.54. Dr. Jones was presented with those records and medical bills. He testified that, in his opinion, all of the services and supplies provided to Mrs. Barr, which are reflected in those records, were necessary for the treatment of those injuries and all of the charges billed for those services and supplies are reasonable, and customary, and in line with the cost of similar services and supplies ordinarily provided in the same, relevant medical community.

B. Calculation of Damage Award

1. Lost Past Wages: $9,333.33

Mrs. Barr was totally disabled from the day that she was injured, until October 26, 2001, a period of approximately 4 months. Her annual salary at the time was around $28,000.00, or $2,333.33 a month. So, as an initial matter, she lost $9,333.33 before she was able to return to work.

2. Lost Future Wages: $40,632.32

Mrs. Barr has suffered a 10% disability to her body as a whole. Furthermore, she has been rendered unable to work in her chosen profession. She tried to return to work as a truck driver, but was not able to perform the physical tasks which that job requires.

Mrs. Barr is not, however, untrainable, or unemployable. And she presented essentially no evidence regarding what jobs she is or is not qualified to do, other than drive a truck, or what she can earn or might be able to earn from other types of work, or the availability vel non to her of other forms of employment. Consequently, as far as the loss of future wages, the only basis the Court has for determining her anticipated lost future wages is the 10% disability figure, as applied to the wages that she was earning when she suffered her injuries.

Mrs. Barr's final retirement age, for social security purposes, is 67, according to the Social Security Administration.[11] Her birth date is February 28, 1961. She will be 67 years old on February 28, 2028. She was, after suffering her injuries, cleared to return to work on October 26, 2001. According to her testimony, she worked until September of 2003. There are 24 years and five months between the first of October 2003 and Mrs. Barr's final retirement age. Assuming that Mrs. Barr, had she not been injured, would have continued to earn $2,333.33 a month during that period, she would have, during that period, earned at least $683,665.69. Given a 10% reduction in her earning capacity, corresponding to the 10% disability to her body as a whole, she is now, capable of earning only 90% of what she could have otherwise earned. Accordingly, instead of earning $683,665.69 over her remaining working years, Mrs. Barr is now capable of earning only $615,299.12. Consequently, it must be concluded that Mrs. Barr will, as a result of her injuries, have lost $68,366.56, or, in other words, 10% of the amount that she could have otherwise earned.

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[11] Social Security Administration, Full Retirement Age, available at http://www.ssa.gov/retire2/retirechart.htm#chart (June 12, 2005).

Under Alabama law, damages awarded for lost future wages must be reduced to present value.[12] However, the appropriate discount rate to be used to accomplish that result is not specified and is apparently left to the discretion of the fact finder. Because the plaintiff did not prove what discount factor should be employed to compute the present value of her lost future wages, the Court will employ, as the appropriate discount factor, 4.80%, which is the rate of return being earned on "I Bonds" purchased from the United States Department of the Treasury from May through October 2005.[13] Also, the amount to be discounted will be expressed as a stream of payments in the amount of $233.33, or 10% of Mrs. Barr's monthly income, for 293 months, which is the number of times that she would, but for her injuries, have received a payment of that amount as part of her regular paycheck. Application of the 4.80% factor to the future wages which will have been lost by Mrs. Barr as a result of her injuries produces an award for discounted lost future earnings in the amount of $40,632.32.

3. Medical Expenses: $3,500

The collateral source rule has been abrogated in Alabama. Code of Ala., 1975, § 12-21-45. Mrs. Barr testified that she is out-of-pocket $3,500 for expenses which she has incurred for the treatment of her injuries. She presented no evidence regarding what, if anything, she may have to pay to obtain future treatment for those injuries. Consequently, for medical expenses relating to the past treatment of her injuries, she is

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[12] Alabama Pattern Jury Instruction-Civil § 11.11 provides as follows

> In arriving at the amount of your award for any loss of [future earnings] [earnings capacity], you should consider what the plaintiff's health, physical ability and earning power or capacity were before the accident and what they are now; the nature and extent of his injuries, and whether or not they are reasonably certain to be permanent; or if not permanent, the extent of their duration; all to the end of determining, first, the effect, if any, of his injury upon his [future earnings] [earning capacity], and second, the present cash value of any loss of [future earnings] [earning capacity) which you are reasonably satisfied from the evidence in the case that plaintiff is reasonably certain to suffer in the future, as a proximate result of the injury in question.
>
> "Present cash value" means the sum of money needed now, which, when added to what that sum may reasonably be expected to earn in the future, will equal such earnings at the time in the future when these earnings would have been received.

Alabama Pattern Jury Instructions Committee-Civil, Alabama Pattern Jury Instructions Civil § 11.11 (Second Edition 2004) (parentheticals added).

[13] Bureau of the Public Debt, United States Savings Bonds Earning Report (May 2005 thru Apr 2006), available at http://www.publicdebt.treas.gov/sav/sber1105.pdf (June 12, 2005).

entitled to an award of $3,500. And she is entitled to no award for prospective medical expenses.

4. Pain, Mental Anguish, and Impaired Physical Functions: $296,000

Mrs. Barr is entitled to compensation for her pain, mental anguish, and impaired physical functions. For that the Court finds that an award for $296,000 should be made. That amount is comprised of $50,000 for Mrs. Barr's initial injury and pain and $246,000 for her future pain and physical impairment.

A. Initial Injury and Associated Recovery

Mrs. Barr suffered extreme physical pain and mental anguish when she was hit by the truck; while she lay on the ground with the truck on her foot; while she was waiting for the ambulance to arrive; while she was being transported to the hospital by the ambulance; and during her stay at the hospital, which involved two surgeries and a number of painful whirlpool baths designed to clean out her wounds and keep them clean. And she also suffered significant physical pain and mental suffering during her post-hospital period of rehabilitation. For that intense pain and mental suffering, the Court will award Mrs. Barr $50,000.

B. Diminished Physical Ability and Future Pain and Mental Anguish

Mrs. Barr continued to suffer a moderate yet tolerable level of pain and mental anguish on a daily basis after her initial period of recuperation and rehabilitation. Furthermore, to this day, she is in constant pain and discomfort, which she is able to function with and tolerate, but which, of course, she would never have chosen to deal with at any cost.

Moreover, in addition to restricting her ability to earn a living, Mrs. Barr's 10% total disability naturally impairs her ability to function and perform normally during the time she is not at work. For example, the daily pain from her injuries prevents her from sleeping soundly. And the numbness in her left ankle and foot sometimes causes her to stumble and fall.

According to the mortality tables adopted by the Alabama Commissioner of Insurance, Mrs. Barr's life expectancy, computed from the date she was first cleared to return to work in October 2001, is approximately 41 years, which equates to 492 months.[14] During each of those months, Mrs. Barr will cope with physical impairment,

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[14] Alabama Department of Insurance, Commissioners 2001 Standard Ordinary Mortality Table, available at http://www.aldoi.org/PDF/Consumers/MortalityTable2001.pdf (June 12,

inconvenience, discomfort, and aggravation, all because of the injuries caused by Mr. Steadman.

For that physical pain and mental anguish, and diminished physical ability that Mrs. Barr suffered from the day that she was cleared to return to work in October 2001 through the day the trial of this matter took place; and for the physical pain and mental anguish, and diminished physical ability that she, according to the evidence, will continue to suffer in the future, the Court will award Mrs. Barr the sum of $246,000. That amount represents the small amount of $500.00 for each month Mrs. Barr can be expected to suffer from the injuries caused to her by Mr. Steadman. That amount is eminently reasonable. To put it in perspective, it would be difficult to find someone who would be willing to bear Mrs. Barr's pain, mental anguish and physical debility for that amount, 24 hours a day, 365 days a year, for the rest of his or her life.

5. Pro Tanto Reduction: $100,000

Prior to the filing by Mr. Steadman of his bankruptcy petition, Mrs. Barr sued Ms. Ware and him in state court. Mr. Steadman's bankruptcy filing interrupted Mrs. Barr's suit against him. But Mrs. Barr reached a pro tanto settlement with Ms. Ware which resulted in the payment by the latter to the former of $100,000. Because Mrs. Barr is entitled to only one recovery, regardless of how many joint tortfeasors she has sued, the $100,000 she received from her settlement with Ms. Ware must be deducted from the damages that will be awarded to her in this case.[15]

6. Total Damage Award: $249,465.65

Having proved that her injuries were caused by the willful and malicious malfeasance of Mr. Steadman, Mrs. Barr is entitled to recover damages against him in

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2005).

[15] Alabama Pattern Jury Instructions Committee-Civil, Alabama Pattern Jury Instructions Civil § 11.30 (Second Edition 2004) read:

> The plaintiff originally made claim against (party released) and (_____) the defendant(s) in this case for damages growing out of the (the occurrence made the basis of this suit). The plaintiff in consideration of the sum of $_____ released (party released) and reserved (his) (her) right to proceed against the present defendant(s)_____. If you are reasonably satisfied from the evidence that the plaintiff is entitled to recover in this case then in arriving at the amount of damages to be awarded to the plaintiff you will determine from the evidence the total amount of damages suffered by the plaintiff and then give credit for the amount of $_____ which the plaintiff has already been paid by (party released) and render a verdict for the plaintiff for the balance remaining.

an amount that will fairly and reasonably compensate her for those injuries.[16] As indicated above, the Court has concluded that Mrs. Barr should be awarded damages against Mr. Steadman in the total amount of $249,465.65. That includes $9,333.33 for wages lost before she was able to return to work; $40,632.32 in additional wages that she will lose as a result of those injuries by the time she reaches retirement age, reduced to their present value; $3,500 in out-of-pocket medical expenses; $296,000 for pain, mental anguish, and non-work related physical impairment, less the $100,000 settlement Mrs. Barr received from Ms. Ware in the state court lawsuit.

III. CONCLUSION

Mrs. Barr proved by a preponderance of the evidence that she was willfully and maliciously injured by Mr. Steadman. Consequently, the debt owed by Mr. Steadman to Mrs. Barr, that is the amount necessary to compensate Mrs. Barr fairly and reasonably for her injuries, is, by virtue of 11 U.S.C. § 523(a)(6), not dischargeable. That amount is, as determined by the Court in this proceeding, $249,465.65. A separate order will, therefore, be entered in accordance with this Memorandum Opinion, awarding a judgment of $249,465.65 against Mr. Steadman and declaring that judgment to be nondischargeable by him in his pending Chapter 7 bankruptcy case.

This order is a written opinion for purposes of the E-Government Act, Pub. L. No. 107-347.

Done this the 28th day of September, 2005.

/s/Benjamin Cohen
BENJAMIN COHEN
United States Bankruptcy Judge

BC:sm
cc: Mr. Danny Lockhart, attorney for Mr. Steadman
Mr. Frank G. Alfano, attorney for Mrs. Barr
Trustee

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[16] Alabama Pattern Jury Instructions Committee-Civil, Alabama Pattern Jury Instructions Civil § 11.02 (Second Edition 2004) read:

> The purpose of awarding compensatory damages is to fairly and reasonably compensate the injured party for the loss or injury sustained. Compensatory damages are intended as money compensation to the party wronged, to compensate him for his injury and other damages which have been inflicted upon him as a proximate result of the wrong complained of.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
ParkNorth Group, LLC,	)	Case No.: 05-00035-BGC-7
	)	
Debtor.	)	

ParkNorth Group, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	A. P. No.: 05-00004
	)	
Nettles Hart Hess & Hughes, P.C.,	)	
	)	
Defendant.	)	

PARKNORTH 1

ORDER DISMISSING COMPLAINT

I. Background

There are two related adversary proceedings before the Court. The first is ParkNorth Group, LLC v. Nettles, Hart, Hess & Hughes, P.C., AP No. 05-00004, which this Court will refer to as ParkNorth 1. ParkNorth 1 involves a complaint for sanctions filed directly in this Court. The second is Nettles Hart Hess & Hughes, P.C. v. ParkNorth Group, LLC , AP No. 05-00005, which this Court will refer to as ParkNorth 2. ParkNorth 2 involves a state court lawsuit removed by the debtor from the Circuit Court of Jefferson County, Alabama, to this Court.

The specific matters before the Court in the instant proceeding (ParkNorth 1) are the Complaint for sanctions filed on January 6, 2005, by the debtor and a Motion to Dismiss Complaint for Sanctions filed on January 20, 2005, by the defendant. After notice, a hearing was held on February 2, 2005. Appearing were Lee Benton for the Plaintiff-Debtor ParkNorth Group, LLC; Scott Williams for the defendant Nettles Hart Hess & Hughes, P.C. (Nettles Hart); and Dennis Schilling for the Trustee. The matters were continued to March 9, 2005.

The March 9, 2005, hearing was held. Appearing were Mr. Benton; Mr. Williams; James Henderson, the Trustee; Thomas Corbett and Jon Dudeck for the Bankruptcy

Administrator; and Robert Rubin and Derek Meek for Mark White (who represents Nettles Hart in the state court action). By consent of the parties, the matters were submitted on the pleadings.

In addition to the above, a Motion for Protective Order to Quash Subpoena of Mark White was filed on March 7, 2005; and a second Motion to Dismiss was filed on March 8, 2005, by Nettles Hart.

II. Findings of Fact

A. Background

The debtor filed the pending Chapter 7 case on January 3, 2005, and then filed the pending adversary proceeding on January 6, 2005. In its adversary proceeding, the debtor alleged that Nettles Hart violated the automatic stay when Nettles Hart filed a pleading entitled Motion for Order to Show Cause against "the debtor" in a pending state court action.

Nettles Hart had instituted that state court action to resolve a dispute between the parties over attorneys' fees. An arbitration award had been entered in the state court action against London & Yancey, LLC, the debtor's predecessor, before ParkNorth filed its bankruptcy. Nettles Hart's continuation of the state court action after the bankruptcy was filed was an attempt to collect that arbitration award.

At about the same time the debtor filed the instant adversary proceeding, it removed the state court litigation to this Court. That litigation is pending before this Court as ParkNorth 2 and is the subject of this Court's Order Remanding Case to State Court entered contemporaneously with this instant order.

At the time the state court action was removed to this Court, the record in that case became a part of this Court's record in ParkNorth 2. This Court has taken judicial notice of that record in deciding the issues in both ParkNorth 1 and ParkNorth 2.[1]

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[1] Andrews v. Daw, 201 F.3d 521, 524 (4th Cir. 2000)(in deciding motion to dismiss, district court could, without converting motion into motion for summary judgment, take judicial notice of facts from a prior judicial proceeding); Henson v. CSC Credit Services, 29 F.3d 280, 284 (7th Cir. 1994)(district court properly took judicial notice of documents filed in prior state court case between the parties when dismissing plaintiff's complaint for failure to state a claim); Day v. Moscow, 955 F.2d 807, 811 (2nd Cir. 1992)(district court properly granted motion to dismiss for failure to state a claim where court's own records, which it could take judicial notice of, showed that claim was barred by res judicata), cert. denied, 506 U.S. 821 (1992); Scott v. Kuhlman, 746 F.2d 1377, 1378 (9th Cir. 1984)(court of appeals, in deciding that district court appropriately granted motion to dismiss, properly took judicial notice of pleadings on record from appeal in prior case involving same parties); Rhodes v. Meyer, 334 F.2d 709, 715 (8th Cir. 1964)(district court, in civil rights action arising out of contempt conviction in state court,

properly took judicial notice of affidavits filed by deputy sheriff in state court contempt proceedings), cert. denied, 379 U.S. 915 (1964); Total Control, Inc. v. Danaher Corp., 359 F. Supp. 2d 380, 383 (E.D. Pa. 2005)(when entertaining motion to dismiss, district court may, without converting motion to motion for summary judgment, take judicial notice of record in prior lawsuit in same court involving the same parties); Mangiafico v. Blumenthal, 358 F. Supp. 2d 6, 9-10 (D. Conn. 2005)(district court, in deciding motion to dismiss civil rights damages suit filed by correctional officer against state attorney general arising from attorney general's decision not to defend officer in prisoner's underlying civil action, could take judicial notice of docket and pleadings in underlying prisoner's civil rights litigation); Ashton v. City of Concord, 337 F. Supp. 2d 735,743 n.7 (M.D.N.C. 2004)(when considering motion to dismiss, district court may take judicial notice of facts from a prior state court lawsuit involving the same parties); Coyle v. Coyle, 334 F. Supp. 2d 284, 286 (E.D.N.Y. 2004)(when deciding a motion to dismiss, district court may take judicial notice of matters of public record, including pleadings and court orders from previous state court litigation between the parties), vacated in part on other grounds, Coyle v. Olsen, 2004 WL 2370685 (E.D.N.Y. 2004); Dolan v. Roth, 325 F. Supp. 2d 122, 129 (N.D.N.Y. 2004)(when deciding motion to dismiss, district court may, without converting motion to motion for summary judgment, take judicial notice of record in state court proceedings involving the same parties); Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1214-1215 (W.D. Wash. 2003)(in whistle blower retaliation action brought by employees, district court, in deciding motion to dismiss, could take judicial notice of administrative complaint filed with OSHA and factual findings by Secretary of Department of Labor, which formed the basis of the employees' claims and were matters of public record); Harris v. New York State Dept. of Health, 202 F. Supp. 2d 143, 173 (S.D.N.Y. 2002)(in considering motion to dismiss for failure to state claim, district court may take judicial notice of pleadings and other documents filed in state court proceedings); Mitchell v. Henderson, 128 F. Supp. 2d 298, 301 (D. Md. 2001)(district court could, in deciding motion to dismiss, take judicial notice of record in prior lawsuit involving the same parties in the same court); Northgate Motors, Inc. v. General Motors Corp., 111 F. Supp. 2d 1071, 1077 (E.D. Wis. 2000)(when deciding motion to dismiss, district court may, without converting motion to motion for summary judgment, judicially notice facts from prior proceedings before administrative law judge involving the same parties, which were matter of public record); Nuno v. County of San Bernardino, 58 F. Supp. 2d 1127, 1129 n.1 (C.D. Cal. 1999)(district court could, when deciding motion to dismiss based on collateral estoppel in prisoner's action against peace officer for alleged use of excessive force, take judicial notice of court documents in plaintiff's criminal case, which culminated in plaintiff being convicted of obstructing a peace officer in performing an arrest); Crossroads Cogeneration Corp. v. Orange and Rockland Utilities, Inc., 969 F. Supp. 907, 915-916 (D.N.J. 1997), rev'd on other grounds, 159 F.3d 129 (3rd Cir. 1998)(when deciding motion to dismiss, district court could take judicial notice of prior decision of public service commission rendered in administrative proceeding involving the same parties); Steinmetz v. Toyota Motor Credit Corp., 963 F. Supp. 1294, 1298 (E.D.N.Y. 1997)(when entertaining motion to dismiss, district court may, without converting motion to motion for summary judgment, judicially notice orders entered in prior state court proceedings involving the same parties); Locicero v. Leslie, 948 F. Supp. 10, 12 (D. Mass. 1996)(district court, in determining motion by conservators' former attorneys to dismiss complaint alleging malpractice and other claims based on attorneys' alleged failure to inform conservator of the need to file an accounting, could, without converting motion to motion for summary judgment, take judicial notice of transcript from settlement hearing, at which judge informed conservator of conservator's duty to file accounting of medical malpractice settlement

The primary documents from that record are: (1) the complaint filed by Nettles Hart in the state court; (2) the state court's Order Granting Preliminary Injunction; (3) the arbitrator's written decision issued on December 20, 2004, and entitled "Arbitration Award;" (4) the Motion to Enforce Arbitration Award, for Sanctions, and for Injunctive Relief filed by Nettles Hart on December 30, 2004; (5) the state court's order of January 3, 2005, in regard to Nettles Hart's motion to enforce the arbitration award; and, (5) the Motion for Order to Show Cause filed by Nettles Hart on January 4, 2005, the document complained of by the debtor in the pending adversary proceeding.

B. The Parties and Their Relationships

The defendant Nettles Hart (the plaintiff in ParkNorth 2, the removed action), is a professional corporation whose members are attorneys who were once members of the debtor's predecessor London & Yancey, LLC. The debtor changed its name to "ParkNorth Group, LLC" on December 30, 2004.

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with probate court); Citizens for a Better Environment-California v. Union Oil Co. of California, 861 F. Supp. 889, 897 (N.D. Cal. 1994)(district court may, when deciding motion to dismiss, take judicial notice of matters of public record, including court and agency orders and agency regulations), aff'd, 83 F.3d 1111 (9th Cir. 1996); Briggs v. Newberry County School Dist., 838 F. Supp. 232, 234 (D.S.C. 1992)(when entertaining motion to dismiss, district court may, without converting motion to motion for summary judgment, judicially notice facts from prior administrative and state court proceedings involving the same parties), aff'd, 989 F.2d 491 (4th Cir. 1993); Scarso v. Cuyahoga County Dept. of Human Services, 747 F. Supp. 381, 382 (N.D. Ohio. 1989)(in action brought by father against state court judge and employees, state social services agency and its employees, mother of child and her attorney, alleging conspiracy to deprive him of physical possession of child, district court, in deciding motion to dismiss, could take judicial notice of events and facts which appeared of record in the state court custody proceedings), aff'd in part and remanded, 917 F.2d 1305 (6th Cir. 1990); International Molders and Allied Workers, AFL-CIO v. Buchanan Lumber Birmingham, 459 F. Supp. 950, 953 (N.D. Ala. 1978)(district court may, when deciding motion to dismiss, take judicial notice of relevant opinion of state supreme court on appeal of case involving plaintiff), aff'd, 618 F.2d 782 (5th Cir. 1980).

See also Hoffman-Pugh v. Ramsey, 312 F.3d 1222, 1224 (11th Cir. 2002)(district court, and court of appeals, on consideration of defendant's motion to dismiss libel complaint, appropriately considered entire book that plaintiff considered libelous, because she referred to it in her complaint and it was central to her claims); Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1276 (11th Cir. 1999)(district court, in ruling on defendant's motion to dismiss, appropriately took judicial notice of relevant documents legally required by and publicly filed with the Securities and Exchange Commission without converting motion to dismiss into motion for summary judgment); ITT Rayonier, Inc. v. United States, 651 F.2d 343, 345 n.2 (5th Cir. (Unit B) 1981)(in deciding whether to dismiss plaintiff's complaint, court may take judicial notice of its own records or of those of inferior courts).

ParkNorth Group, LLC., the debtor-plaintiff, (the defendant in ParkNorth 2), is a limited liability company. Mr. Thomas Elliott, one of the defendants in the state court action, is, according to the debtor's bankruptcy petition, the managing member of the debtor.

The parties' relationship is unusual. According to the Nettles Hart state court complaint removed to this Court as ParkNorth 2, Nettles Hart's members worked at London & Yancey, but they operated almost autonomously from the other members of the firm. They were referred to as the "Nettles group." The remaining members of the firm worked under the designation "Elliot group."

With two exceptions, London & Yancey was two law firms in one. Each group had its own staff and associates. Each was entirely responsible for its own distinct expenses, salaries, benefits, and insurance plans. Each had its own distinct compensation plan. Each had its own clients for which it provided services and billed. And each operated independently of the another.

The two exceptions were that the groups shared common overhead expenses based on a proration of actual cash receipts, and the Nettles group paid five per cent of its actual cash receipts to an entity owned by London & Yancey's majority stockholder, which owned certain assets used by London & Yancey.

Nettles Hart's members were separated from London & Yancey on October 21, 2003.

C. The State Court Litigation

1. Preliminary Matters

On October 30, 2003, Nettles Hart sued London & Yancey, LLC, and Mr. Elliott in the Circuit Court of Jefferson County, Alabama. The case was assigned Case No. CV 2003-006897. The purpose of the lawsuit was to force London & Yancey to turn over to Nettles Hart any fees it had collected, or might collect, from the Nettles group's clients.

On London & Yancey's motion, and with the consent of Nettles Hart, the issues regarding the fees collected by London & Yancey from Nettles Hart's clients were ultimately submitted to arbitration.

The arbitrator issued his decision on December 20, 2004. He concluded that London & Yancey had collected $601,929.50 in fees from Nettles Hart's clients for work done by the former Nettles group members. But he determined that the former Nettles Group members owed substantial expenses to London & Yancey, which would be offset against the fees collected from the Nettles group's clients. The balance was $148,151.63.

In his order, the arbitrator directed London & Yancey to turn over the remaining $148,151.63 in collected fees, "from that London and Yancey Special Account held in the nature of escrow to the individual plaintiffs as their interest may appear in The Nettles Group Agreement or as otherwise directed by the plaintiffs individually." Arbitration Award entered December 20, 2004, at 6.

The arbitrator then dismissed all other claims of any sort by either party against the other, other than those specifically described and disposed of in the arbitration award.

On December 30, 2004, Nettles Hart filed a motion in the state court litigation styled Motion to Enforce Arbitration Award, for Sanctions, and for Injunctive Relief. That motion alleged that London & Yancey and Mr. Elliott had failed to, or refused to, turn over the fees which, according to the arbitrator, belonged to Nettles Hart. The motion sought injunctive relief directing London & Yancey and Mr. Elliott to turn over the fees. It also asked for attorneys fees and costs involved in obtaining enforcement of the arbitration award. Id. filed December 30, 2004.

On January 3, 2005, the state court entered an order on Nettles Hart's motion to enforce the arbitration award. In that order, the court found that there existed "a serious concern," and "real and present danger," that London & Yancey and Mr. Elliott were, in essence, not inclined to turn over the fees belonging to the defendant, as ordered by the arbitrator, and were inclined to "divert" those fees. Order entered January 3, 2005. Based on that conclusion, the court directed London & Yancey and Mr. Elliott to turn over the fees to the state circuit court clerk and to desist from diverting or paying those funds to anyone other than the state circuit court clerk. The court required the turnover by 5:00 p.m. on the date the order was issued.

2. The Alleged Stay Violation

ParkNorth Group, LLC., filed the present Chapter 7 case on January 3, 2005, the same day the state court entered its order directing London & Yancey and Mr. Elliott to turn over the fees to the state circuit court clerk. The petition was filed at 3:51 p.m.[2]

On January 4, 2005, Nettles Hart filed a pleading styled Motion for Order to Show Cause in the state court case. In that pleading, which is the focus of the debtor's complaint in the instant adversary proceeding, Nettles Hart alleged that during the course of the state court litigation, Mr. Elliott represented to the state court and the

[2] The debtor's complaint in this Court does not state what time the state court order was entered. The debtor merely contends that the state court judge was provided notice of the bankruptcy filing at 3:55 p.m., that the judge entered his order prior to receiving notice of the bankruptcy filing, and that the judge's order may "possibly" have been executed subsequent to the moment the bankruptcy petition was filed.

arbitrator that a special bank account had been established to preserve the fees belonging to the defendants. Nettles Hart provided documents to the state court and the arbitrator that reflected that such an account did exist.

Based on that information, Nettles Hart requested the state court to hold an evidentiary hearing to determine whether the special bank account existed. It also requested the state court to order Mr. Elliott, "to refrain from either destroying or modifying any documents, records, e-mails, recordings or information of any type relating to the finances of London & Yancey, L.L.C.; ParkNorth Group, L.L.C.; Thomas R. Elliott, individually; TRE, L.L.C.; or any other entity or individual with information related to London & Yancey, L.L.C.." Motion for Order to Show Cause filed January 4, 2005, at 5. And finally, Nettles Hart requested the state court to order:

> Thomas R. Elliott, his agents, representatives and counsel, to show cause ... why Thomas R. Elliott or others acting on his behalf, are not in contempt of this Court's previous orders concerning keeping and safeguarding property that has been determined to be property of the Plaintiffs and whether, as officers of the Court, Thomas R. Elliott, or others acting in his direction and behalf have made misrepresentations to this Court or failed to exhibit candor to this Court in breach of legal and/or ethical duties.

Id.

On January 6, 2005, the debtor removed the state court action (ParkNorth 2) to this Court and filed the present adversary proceeding (ParkNorth 1) in this Court. In its complaint in ParkNorth 1 the debtor contended that Nettles Hart's Motion for Order to Show Cause filed on January 4, 2005, in the state court case, (a copy of which is attached to the debtor's complaint), constituted a veiled attempt to reach property of its bankruptcy estate and as such was a violation of the automatic stay. Furthermore, the debtor asked, ostensibly pursuant to section 105 of the Bankruptcy Code, 11 U.S.C. § 105(a), that Nettles Hart be held in contempt for that stay violation and that appropriate sanctions be awarded, including attorneys fees.[3]

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[3] A corporate debtor may not maintain a cause of action pursuant to section 362(h). Jove Eng'g v. IRS (In re Jove Eng'g), 92 F.3d 1539, 1546 (11th Cir.1996). But a corporate debtor may seek relief for stay violations pursuant to section 105(a). Id. at 1554. The pertinent part of section 105 reads:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

III. Conclusions of Law

A. The Standard for Granting a Motion to Dismiss

A complaint may be dismissed for failure to state a claim only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations contained therein. Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994). The per curiam opinion of the Court of Appeals for the Eleventh Circuit in Kirby v. Siegelman, 195 F.3d 1285, 1289 (11th Cir. 1999), states, "When considering a Rule 12(b)(6) motion to dismiss, a court must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiffs." Id. at 1289. And writing for the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41, 45-46 (1957), Justice Hugo Black explained that such motions should be granted only if the defendants demonstrate, "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). As this opinion explains, the Court finds that Nettles Hart has met these burdens and that the complaint is due to be dismissed.

B. Res Judicata, Collateral Estoppel, and the Arbitration Award

The arbitration award entered in the state court action is conclusive between these parties. Code of Ala., 1975, § 6-6-14. It is in the nature of a judgment, which, by application of the principles of res judicata, bars relitigation of the claims submitted to arbitration in this or any other proceeding. Old Republic Ins. Co. v. Lanier, 790 So.2d 922, 928 (Ala. 2001), cert. denied, 534 U.S. 893 (2001). See Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985)(federal courts must give preclusive effect to judgments rendered by state courts and utilize state law to determine the preclusive effect of said judgments); Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984)("[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.").

In addition, collateral estoppel precludes the parties to the state court proceeding from relitigating, in this or any other proceeding, the issues embraced in and concluded by the arbitration award. Old Republic Ins. Co. v. Lanier, 790 So.2d at 928; Rhodes v. Folmar, 208 Ala. 595, 94 So. 745, 748 (1922).

C. The Automatic Stay

The debtor contends that Nettles Hart's Motion for Order to Show Cause, filed on January 4, 2005, in the state court case, violated the stay because it constituted an

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11 U.S.C. § 105(a)

"end run" to obtain possession of assets which are property of the debtor's bankruptcy estate. However, the only assets involved in the state court case are the fees being held by the debtor, or more appropriately identified, the fund of money holding those fees. And because the state court arbitrator specifically ruled that those fees, and that fund, belong to Nettles Hart, those fees, and that fund, consequently, could not have been part of the bankruptcy estate that was created when the debtor filed its bankruptcy petition. Therefore, Nettles Hart's effort to obtain possession of those fees and that fund could not have violated the automatic stay. For that sole reason, the debtor's complaint must be dismissed. But there are additional reasons which require dismissal of the debtor's complaint.

D. Standing

The complaint must be dismissed because the debtor lacks standing to prosecute a contempt action against Nettles Hart for the alleged violation of the stay.

The party invoking federal jurisdiction bears the burden of establishing standing. Writing for the Supreme Court of the United States in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), Justice Antonin Scalia explained, "the irreducible constitutional minimum of standing contains three elements." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). Justice Scalia added:

> First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, see id., at 756, 104 S.Ct., at 3327; Warth v. Seldin, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975); Sierra Club v. Morton, 405 U.S. 727, 740-741, n. 16, 92 S.Ct. 1361, 1368-1369, n. 16, 31 L.Ed.2d 636 (1972); and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Whitmore, supra, 495 U.S., at 155, 110 S.Ct., at 1723 (quoting Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)). Second, there must be a causal connection between the injury and the conduct complained of-- the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." Id., at 38, 43, 96 S.Ct., at 1924, 1926.

Id. at 561 (footnote omitted). The debtor has not met these elements, therefore, the complaint should be dismissed.

E. Property of the Estate and the Chapter 7 Trustee

Even if the funds did not belong to Nettles Hart, they would have become part of the bankruptcy estate when the debtor filed its Chapter 7 petition. That property belongs to the Chapter 7 trustee, who has the exclusive right and power to possess, use, and dispose of that property as long as he does so according to the Bankruptcy Code. So even if the funds had become part of the bankruptcy estate, the debtor would not have had any right to possess them, or use or dispose of them, or have any say in how they were used or disposed of by the trustee. Consequently, Nettles Hart's act to obtain possession of those funds could not have injured the debtor. The debtor would have had no right to those funds even if they did not belong to Nettles Hart. For this additional reason, the complaint should be dismissed.

F. No Action Against the Debtor

Nettles Hart's Motion for Order to Show Cause sought an evidentiary hearing to determine the existence of the special bank account which contained Nettles Hart's money. It sought to prevent Mr. Elliott from destroying financial information. And it sought to have Mr. Elliott provide the court with an explanation of his actions.

The motion did not, on its face, ask that the debtor be required to do anything. It did not ask that anything be taken from the debtor. It was strictly directed at Mr. Elliott and his conduct, both past and prospective. The filing and prosecution of the motion did not therefore, constitute the continuation of an action against the debtor, and did not, from that standpoint, violate the automatic stay. See United States v. Huckabee, 783 F.2d 1546 (11th Cir. 1986)(bankruptcy court lacked jurisdiction to enjoin IRS from imposing liability on debtor's officers).[4]

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[4] As an agent, manager, or other associated individual, Mr. Elliott is not entitled to the protection that the stay affords the debtor. The court in Gray v. Hirsch, 230 B.R. 239 (S.D.N.Y.1999) explains the law in this area. The opinion there reads in part:

> It is well-established that stays pursuant to § 362(a) are limited to debtors and do not encompass non-bankrupt co-defendants." Teachers Ins. & Annuity Ass'n v. Butler, et al., 803 F.2d 61 (2d Cir.1986) (declining to extend stay of action against debtor partnership to its co-defendants, non-debtor individual partners). Applying Teachers Ins. & Annuity Ass'n, courts in this circuit regularly refuse to extend a debtor corporation's § 362 stay to its non-debtor officers and principals. See, e.g., Variable-Parameter Fixture Dev. Corp. v. Morpheus Lights, Inc., et al., 945 F.Supp. 603 (S.D.N.Y.1996) (non-debtor principal who, under state law, was debtor corporation's "alter ego"); E.I. Du Pont De Nemours & Co. v. Fine Arts Reprod. Co., et al., No. 93 Civ. 2462(KMW), 1995 WL 312505, *5 (S.D.N.Y. May 22, 1995) (non-debtor who was debtor corporation's president and guarantor); Levesque v. Kelly Communication, Inc., et al., 164 B.R. 29, 30 (S.D.N.Y.1994)

Furthermore, the relief the motion sought, even if granted, would not have required the debtor to do anything, and it would not have taken anything from the debtor. Similarly it would not have required Mr. Elliott to take anything of the debtor's and give it to Nettles Hart.

Therefore, the motion does not represent an attempt to acquire the debtor's assets, whatever those may be. Consequently, the filing and prosecution of the motion does not constitute an attempt to collect a debt either from assets of the estate or assets of the debtor, and did not, from that standpoint, violate the automatic stay. For this additional reason, the complaint should be dismissed.[5]

IV. Conclusion

Based on the above, the Court concludes, even if the allegations in the debtor's complaint are accepted as true, and they are construed in the light most favorable to the debtor, Nettles Hart has demonstrated beyond doubt that the debtor can prove no set of facts in support of its claim which would entitle it to relief. Consequently, dismissal of the debtor's complaint is mandated.

V. Order

It is therefore ORDERED, ADJUDGED and DECREED that:

1. The Motion to Dismiss Complaint for Sanctions is **GRANTED**;

2. The Motion to Dismiss is **GRANTED**;

(non-debtor whose two debtor corporations bore his name); CAE Indus. Ltd., et al. v. Aerospace Holdings Co., et al., 116 B.R. 31, 32 (S.D.N.Y.1990) (non-debtor former Chairman, CEO, and Director of debtor corporation); In re Crazy Eddie Sec. Litig., 104 B.R. 582, 584 (E.D.N.Y.1989) (all non-debtor co-defendants affiliated with debtor corporation); Ripley v. Mulroy, et al., 80 B.R. 17, 18 (E.D.N.Y.1987) (non-debtor "president, sole common-stock shareholder, and controlling person" of debtor corporation).

Id. at 242.

[5] Notwithstanding the above, to avoid any misunderstanding regarding this point, it is this Court's finding that – the property involved in the state court case does not belong to either the debtor or the bankruptcy estate. Therefore, even if the motion filed by the defendant in the state court case does, as alleged by the debtor, constitute an attempt to gain possession of that property, it did not violate the stay. And even assuming for argument that the filing of the motion constituted a violation of the stay, the debtor would not, under any circumstances, have the requisite standing to bring a contempt action based on that stay violation.

3. The defendant's Motion for Protective Order to Quash Subpoena of Mark White is **MOOT**; and

4. This order is a written opinion for purposes of the E-Government Act, Pub. L. No. 107-347.

DONE this the 29th day of September 2005.

/s/Benjamin Cohen
BENJAMIN COHEN
United States Bankruptcy Judge

BC:sm

Mr. Lee Benton, attorney
Mr. Scott Williams, attorney
Mr. Dennis Schilling, attorney
Mr. James Henderson, trustee
Bankruptcy Administrator
Mr. Robert Rubin, attorney
Mr. Derek Meek, attorney
State Court Clerk for Case No. CV 2003-006897

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
ParkNorth Group, LLC,	)	Case No.: 05-00035-BGC-7
	)	
Debtor.	)	
Nettles Hart Hess & Hughes, P.C.	)	
	)	
Plaintiff,	)	
	)	
vs.	)	A. P. No.: 05-00005
	)	
ParkNorth Group, LLC,	)	
	)	
Defendant.	)	

PARKNORTH 2

ORDER REMANDING CASE TO STATE COURT

I. Background

There are two related adversary proceedings before the Court. The first is ParkNorth Group, LLC v. Nettles, Hart, Hess & Hughes, P.C., AP No. 05-00004, which this Court will refer to as ParkNorth 1. ParkNorth 1 involves a complaint for sanctions filed directly in this Court. The second is Nettles Hart Hess & Hughes, P.C. v. ParkNorth Group, LLC , AP No. 05-00005, which this Court will refer to as ParkNorth 2. ParkNorth 2 involves a state court lawsuit removed by the debtor from the Circuit Court of Jefferson County, Alabama, to this Court.

The matters before the Court in the instant proceeding (ParkNorth 2) are a Notice of Removal filed on January 6, 2005, and amended on January 10, 2005; an Emergency Motion for Remand and/or For Abstention filed on January 17, 2005; and a Response to Emergency Motion for Remand and/or for Abstention filed by the Defendant on January 24, 2005. After notice, a hearing was held on February 2, 2005. Appearing were Lee Benton for the Plaintiff-Debtor ParkNorth Group, LLC; Scott Williams for the defendant Nettles Hart Hess & Hughes, P.C. (Nettles Hart); and Dennis Schilling for the Trustee. The matters were continued to March 9, 2005.

The March 9, 2005, hearing was held. Appearing were Mr. Benton; Mr. Williams; James Henderson, the Trustee; Thomas Corbett and Jon Dudeck for the Bankruptcy

Administrator; and Robert Rubin and Derek Meek for Mark White (who represents Nettles Hart in the state court action). By consent of the parties, the matters were submitted on the pleadings.

II. Findings of Fact

A. The Parties and Their Relationships

The plaintiff Nettles Hart, (the defendant in ParkNorth 1), is a professional corporation whose members are attorneys who were once members of the debtor's predecessor London & Yancey, LLC. The debtor changed its name to "ParkNorth Group, LLC" on December 30, 2004.

ParkNorth Group, LLC., the debtor-defendant, (the plaintiff in ParkNorth 1), is a limited liability company. Mr. Thomas Elliott, a defendant in a state court action between the parties, is, according to the debtor's bankruptcy petition, the managing member of the debtor.

The parties' relationship is unusual. According to the Nettles Hart state court complaint removed to this Court as ParkNorth 2, Nettles Hart's members worked at London & Yancey, but they operated almost autonomously from the other members of the firm. They were referred to as the "Nettles group." The remaining members of the firm worked under the designation "Elliot group."

With two exceptions, London & Yancey was two law firms in one. Each group had a separate staff and associates. Each was entirely responsible for its own distinct expenses, salaries, benefits, and insurance plans. Each had its own distinct compensation plan. Each had its own clients for which it provided services and billed. And each operated independently of the another.

The two exceptions were that the groups shared common overhead expenses based on a proration of actual cash receipts, and the Nettles group paid five per cent of its actual cash receipts to an entity owned by London & Yancey's majority stockholder, which owned certain assets used by London & Yancey.

Nettles Hart's members were separated from London & Yancey on October 21, 2003.

B. The State Court Litigation

On October 30, 2003, Nettles Hart sued London & Yancey and Mr. Elliott in the Circuit Court of Jefferson County, Alabama. The case was assigned Case No. CV 2003-006897. The essential purpose of the lawsuit was to force London & Yancey to turn over to Nettles Hart any fees it had collected, or might collect, from Nettles group's clients.

On London & Yancey's motion, and with the consent of Nettles Hart, the issues regarding the fees collected by London & Yancey from Nettles Hart's clients were ultimately submitted to arbitration.

The arbitrator issued his decision on December 20, 2004. He concluded that London & Yancey had collected $601,929.50 in fees from Nettles Hart's clients for work done by the former Nettles group members. But he determined that the former Nettles Group members owed substantial expenses to London & Yancey, which would be offset against the fees collected from the Nettles group's clients. The balance was $148,151.63.

In his order, the arbitrator directed London & Yancey to turn over the remaining $148,151.63 in collected fees, "from that London and Yancey Special Account held in the nature of escrow to the individual plaintiffs as their interest may appear in The Nettles Group Agreement or as otherwise directed by the plaintiffs individually." Arbitration Award entered December 20, 2004, at 6.

The arbitrator then dismissed all other claims of any sort by either party against the other, other than those specifically described and disposed of in the arbitration award.

On December 30, 2004, Nettles Hart filed a motion in the state court litigation styled Motion to Enforce Arbitration Award, for Sanctions, and for Injunctive Relief. That motion alleged that London & Yancey and Mr. Elliott had failed to, or refused to, turn over the fees which, according to the arbitrator, belonged to Nettles Hart. The motion sought injunctive relief in the form of an order directing London & Yancey and Mr. Elliott to turn over the fees, plus attorneys fees and costs involved in obtaining enforcement of the arbitration award. Id. filed December 30, 2004.

On January 3, 2005, the state court entered an order on Nettles Hart's motion to enforce the arbitration award. In that order, the court found that there existed "a serious concern," and "real and present danger," that London & Yancey and Mr. Elliott were, in essence, not inclined to turn over the fees belonging to the defendant, as ordered by the arbitrator, and were inclined to "divert" those fees. Order entered January 3, 2005. Based on that conclusion, the court directed London & Yancey and Mr. Elliott to turn over the fees to the state circuit court clerk and to desist from diverting or paying those funds to anyone other than the state circuit court clerk. The court required the turnover by 5:00 p.m. on the date the order was issued.

ParkNorth Group, LLC., filed the present Chapter 7 case on January 3, 2005, the same day that the state court entered its order directing London & Yancey and Mr.

Elliott to turn over the fees to the state circuit court clerk. The petition was filed at 3:51 p.m.[1]

On January 4, 2005, Nettles Hart filed a pleading styled Motion for Order to Show Cause in the state court case. In that pleading, which is the focus of the debtor's complaint before this Court in ParkNorth 1, Nettles Hart alleged that during the course of the state court litigation, Mr. Elliott represented to the state court and the arbitrator that a special bank account had been established to preserve the fees belonging to the defendants. Nettles Hart provided documents to the state court and the arbitrator that reflected that such an account did exist.

Based on that information, Nettles Hart requested the state court to hold an evidentiary hearing to determine whether the special bank account existed. In its motion it also requested the state court to order Mr. Elliott, "to refrain from either destroying or modifying any documents, records, e-mails, recordings or information of any type relating to the finances of London & Yancey, L.L.C.; ParkNorth Group, L.L.C.; Thomas R. Elliott, individually; TRE, L.L.C.; or any other entity or individual with information related to London & Yancey, L.L.C.." Motion for Order to Show Cause filed January 4, 2005, at 5. And, finally, Nettles Hart requested the state court to order:

> Thomas R. Elliott, his agents, representatives and counsel, to show cause ... why Thomas R. Elliott or others acting on his behalf, are not in contempt of this Court's previous orders concerning keeping and safeguarding property that has been determined to be property of the Plaintiffs and whether, as officers of the Court, Thomas R. Elliott, or others acting in his direction and behalf have made misrepresentations to this Court or failed to exhibit candor to this Court in breach of legal and/or ethical duties.

Id.

On January 6, 2005, the ParkNorth removed the state court action to this Court. Nettles Hart filed the pending motion to remand the case to the state court on January 17, 2005.

On February 18, 2005, Nettles Hart filed a document entitled Stipulation and Consent in which it stipulated that the amount in issue between it and the debtor is $148,151.63, the balance the arbitrator recognized as belonging to Nettles Hart.

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[1] The debtor's complaint in this Court does not state what time the state court order was entered. The debtor merely contends that the state court judge was provided notice of the bankruptcy filing at 3:55 p.m., that the judge entered his order prior to receiving notice of the bankruptcy filing, and that the judge's order may "possibly" have been executed subsequent to the moment the bankruptcy petition was filed.

Stipulation and Consent filed February 18, 2005 in Adversary Proceeding No. 05-00005. Nettles Hart also stipulated in that it seeks remand of this proceeding to state court, "solely for the purpose of pursuing [Nettles Hart's] claims against the non-debtor Defendant, Thomas R. Elliott, Jr." Id. (parenthetical added).[2]

III. Conclusions of Law

A. Res Judicata and Collateral Estoppel

The arbitration award entered in the state court action is conclusive between these parties. Code of Ala., 1975, § 6-6-14. It is in the nature of a judgment, which by application of the principles of res judicata, bars relitigation of the claims submitted to arbitration in this or any other proceeding. Old Republic Ins. Co. v. Lanier, 790 So.2d 922, 928 (Ala. 2001), cert. denied, 534 U.S. 893 (2001). See Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985)(federal courts must give preclusive effect to judgments rendered by state courts and utilize state law to determine the preclusive effect of said judgments); Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984)("[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.").

In addition, collateral estoppel precludes the parties to the state court proceeding from relitigating, in this or any other proceeding, the issues embraced in and concluded by the arbitration award. Old Republic Ins. Co. v. Lanier, 790 So.2d at 928; Rhodes v. Folmar, 208 Ala. 595, 94 So. 745, 748 (1922).

B. Property of the Estate

The only assets involved in the state court case are the fees being held by the debtor, or more appropriately identified, the fund of money holding those fees. And because the state court arbitrator specifically ruled that those fees, and that fund, belong to Nettles Hart, those fees, and that fund, could not have been part of the bankruptcy estate created when the debtor filed its pending bankruptcy petition. Moreover, the only purpose of the state court lawsuit, and now the present adversary proceeding, is to secure the fees for Nettles Hart, fees Nettles Hart earned and which the debtor collected.

Consequently, since those fees are not property of the bankruptcy estate, the continuation of that lawsuit will neither detract from nor add to the bankruptcy estate. It will not reduce or increase what creditors will receive from the bankruptcy case. And, it

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[2] When the state court litigation was removed, the state court record was removed to this Court. That record makes up the bulk of this Court's record in the instant proceeding. The Court has considered that record carefully along with the pleadings filed in this Court.

will not effect the trustee's ability to administer the estate for the benefit of those creditors.[3] In short, the continuation of the present lawsuit will have no conceivable effect on either the bankruptcy estate, or property of the bankruptcy estate, or the administration of the bankruptcy estate, or the Chapter 7 trustee, particularly since Nettles Hart stipulated, that if the case is remanded it will only pursue claims and remedies against Mr. Elliott, and not against the debtor.

C. Jurisdiction, Remand, and Abstention

For the above reasons, the lawsuit is not "related" to the debtor's bankruptcy case as is required by 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a) for the exercise of jurisdiction over it by this Court.[4] Writing for the Court of Appeals for the Eleventh Circuit in Gallucci v. Grant (In re Gallucci), 931 F.2d 738, 741 (11th Cir. 1991), Judge Gerald B. Tjoflat stated, "Although bankruptcy courts by statute may hear 'any or all cases under title 11 and any or all core proceedings arising under title 11 or arising in or related to a case under title 11,' 28 U.S.C. § 157(a)(1988), they may not entertain cases involving noncore, unrelated matters." Id. at 741. Judge Tjoflat added, "If the action does not involve property of the estate, then not only is it a noncore proceeding, it is an unrelated matter completely beyond the bankruptcy court's subject-matter jurisdiction." Id. at 742. And added, "if the resolution of litigation cannot affect the administration of the estate, the bankruptcy court does not have jurisdiction to decide it." Id.

And the per curiam opinion from the same court in Community Bank of Homestead v. Boone (In re Boone), 52 F.3d 958, 960 (11th Cir. 1995), explained, "Title 28, section 1334(b) creates federal jurisdiction over 'civil proceedings arising under title 11 or arising in or related to a case under title 11.' Thus, for federal bankruptcy jurisdiction to exist, a case must at minimum 'relate to' a case under title 11." Id. at 960. That opinion added, "Hence, [t]o fall within the court's jurisdiction, the plaintiffs' claims must affect the estate, not just the debtor." Id. at 961 (citation and internal quotation marks omitted). And added, "The lack of effect on the estate is thus fatal to bankruptcy jurisdiction over the claim." Id.

---

[3] Interestingly, despite his knowledge of this proceeding, the trustee has not asserted any claim to, and has not expressed any interest in, these fees. This Court must presume the reason is because the trustee agrees that the fees are not part of this bankruptcy estate.

[4] Section 1334(b) reads, "[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). Section 1334(d) reads, "The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(d). Section 157(a) reads, "Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a).

And finally writing for the same court in Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.), 910 F.2d 784, 788 (11th Cir. 1990), Judge Edward S. Smith, Senior Circuit Judge, sitting by designation, explained, "the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy." Id. at 788 (citation and internal quotation marks omitted).

Consequently, because this Court does not have jurisdiction over the lawsuit involved in this adversary proceeding, the removal of that action to this Court was improvident and unauthorized. See 28 U.S.C. § 1452(a)("A party may remove any claim or cause of action ... if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.") (emphasis added). Therefore, the lawsuit must, for that reason, be remanded to the state court.

In addition, even if the removed lawsuit were "related" to the debtor's bankruptcy case, remand would be mandated by 28 U.S.C. § 1334(c)(2). That statute provides:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

Id.

All of the criteria of section 1334(c)(2) have been met. Nettles Hart timely filed a motion for abstention after the lawsuit was removed. The lawsuit is based on a state law cause of action. It could not, absent bankruptcy, have been commenced in federal court. It has been commenced and was timely adjudicated in the state court. Furthermore, what remains of it can be timely adjudicated in state court, and was in fact in the process of being timely adjudicated in state court when it was removed.

Since this removed lawsuit meets all of the prerequisites for mandatory abstention pursuant to section 1334(c), the Court must abstain from hearing it and, in addition, remand it to the state court. See 28 U.S.C. § 1452(b)("The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground.").

IV. Conclusion

Based on the above, the Court finds that the lawsuit removed by the debtor, specifically Civil Action CV 2003-006897, from the Circuit Court of Jefferson County, Alabama, must be remanded to that court. This Court lacks the jurisdiction to hear it

and, moreover, would be compelled by statute to abstain from hearing it even if it had jurisdiction.

V. Order

It is therefore **ORDERED, ADJUDGED and DECREED** that:

1. The Emergency Motion for Remand and/or For Abstention is **GRANTED**;

2. This matter is **REMANDED** to the state court; and

3. This order is a written opinion for purposes of the E-Government Act, Pub. L. No. 107-347.

DONE this the 29th day of September 2005.

/s/Benjamin Cohen
BENJAMIN COHEN
United States Bankruptcy Judge

BC:sm

Mr. Lee Benton, attorney
Mr. Scott Williams, attorney
Mr. Dennis Schilling, attorney
Mr. James Henderson, trustee
Bankruptcy Administrator
Mr. Robert Rubin, attorney
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Mr. Mark White, attorney
State Court Clerk for Case No. CV 2003-006897