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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NUMBER 2007-CA-02023

DANNY HOLLAND — APPELLANT

v.

RENASANT BANK f/k/a
THE PEOPLES BANK & TRUST COMPANY — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee, Renasant Bank f/k/a The Peoples Bank & Trust Company, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Danny R. Holland, Plaintiff and Appellant;
2. HDC, Cotton Co. Inc.; Danny R. Holland Cotton Co., Inc.; & DRH Farms; business entities of the Plaintiff and Appellant;
3. Mrs. Linda Holland; Spouse of Plaintiff and Appellant;
4. Robert Q. Whitwell, Attorney for Appellant;
5. David E. Flautt, Attorney for Appellant;
6. Farese, Farese & Farese, P.A., Attorneys for Appellant;
7. Renasant Bank, f/k/a The Peoples Bank & Trust Company;
8. Scott R. Hendrix, Attorney for Appellee;
9. L. Bradley Dillard, Attorney for Appellee;
10. Mitchell, McNutt & Sams, P.A., Attorneys for Appellee:
11. Hon. Andrew C. Baker, Circuit Judge, Recused from this Case;
12. Hon. Kenneth Coleman, Special Circuit Judge, Recused from this Case; and
13. Hon. L. Joseph Lee, Ms. Court of Appeals, Presiding Special Circuit Judge.

SCOTT R. HENDRIX, MSB [redacted]
MITCHELL, MCNUTT & SAMS, P.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

OTHER AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

Renasant Bank, f/k/a The Peoples Bank & Trust Company, Appellee, hereinafter "Renasant," concurs with the Appellant in requesting oral argument for this case. The legal issues raised herein, as opposed to factual matters as asserted by the Appellant, are important in nature and warrant the opportunity to be heard upon oral argument. Moreover, oral argument will assist the Court in interpreting a rather lengthy record and further in considering the legal issues addressed by the trial court in granting summary judgment unto Renasant Bank, particularly as the grant thereof relates to the doctrines of waiver and ratification, which mandate dismissal of all of the claims raised by Holland however stated.

STATEMENT OF THE ISSUES

The issues on this appeal should be limited to those originally asserted by the Appellant in his "Statement of Issues on Appeal," appearing in his designation of the record, filed on November 15, 2007, and which reads as follows: "1. The Successor Trial Judge erred in granting the Defendant's Motion for Reconsideration of an Earlier Trial Judge's Order Denying Summary Judgment; and 2. The Trial Court erred in granting Defendant's Motion for Summary Judgment." It would appear that the Appellant's newly stated Issues I and V elaborate on the second issue above and Issue III the first. However, Issues II and IV, relating to: a) the scope of the application of the waiver and ratification argument and b) the purported waiver of Renasant relating to reconsideration, were not raised initially in this regard and should not be properly considered on this appeal. Those issues were not considered in compiling the appeal record. Moreover, Issue II is improper and can not be considered on appeal as it was not previously raised in any manner to the trial court, and is instead being raised for the first time on appeal.[1]

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Danny Holland, hereinafter "Holland," commenced this action on or about November 20, 1998, in the Circuit Court of Panola County, Mississippi, Second Judicial District. (R.V. 1-2 pp. 1-184; RE 1-184). Holland initially based his claims solely on allegations of fraudulent misrepresentation and breach of fiduciary duty. (R.V. 1 pp. 3-4; RE 3-4). In 1999, Holland amended his complaint to assert additional claims of negligence and breach of covenants of good faith and fair dealing. (R.V. 2 pp. 231-32; RE 214-15). In response, Renasant timely filed

[1] New issues not properly raised in the lower court may not for the first time be raised on appeal. Estate of Haynes v. Dick et al, 699 So. 2d 918, 926 (Miss. 1997) (citing, Crowe v. Smith, 603 So. 2d 301, 305 (Miss. 1992)(for proposition that appellant may not raise new issue on appeal)); Parker v. Game & Fish Comm'n, 555 So. 2d 725, 730 (Miss. 1989)(for proposition that "trial judge will not be put in error on a matter which has not been presented to him"); Mills v. Nichols, 467 So. 2d 924, 931 (Miss. 1985)("trial court will not be put in error on appeal for matter not presented to it for decision").

responsive pleadings and answered the complaint and amended complaint. (R.V. 2 pp. 185, 233; RE 185, 216). Renasant raised multiple defenses, including the following: 1) Holland's claims of promises of future conduct could not form a basis for a claim for negligent misrepresentation; 2) that the parol evidence rule prohibits Holland from attempting to modify the clear and unambiguous terms of his written loan agreements, particularly where said claims are based upon the alleged oral promises of a loan officer known to Holland to have no apparent or actual authority; 3) that the execution of certain written workout agreements and amendments to promissory notes barred all of Holland's claims of any kind pursuant to the doctrines of waiver and/or ratification; and 4) that Holland could not establish the necessary element of causation to support his claims. The nature of such claims and defenses, the number of witnesses involved, the amount in controversy and the complexity of the loans in question, necessitated the parties conducting a significant amount of discovery.

Accordingly, discovery was undertaken by the parties, whereby a majority of the numerous fact witnesses identified by the parties were deposed, and Renasant deposed Holland's designated expert witnesses. Upon the conclusion thereof, Renasant filed its Motion for Summary Judgment on June 13, 2005. (R.V. 2 p. 237; RE 220). Subsequently, Judge Andrew Baker, the original trial judge, chose to recuse himself due to his overcrowded docket. (R.V. 3 pp. 402; RE 365). Thereafter, Judge Kenneth Coleman was appointed by this Court as Special Circuit Judge. (R.V. 3 p. 404; RE 367). On October 4, 2005, Holland filed his response to Renasant's Motion for Summary Judgment. (R.V. 3 pp. 405, 448; RE 368, 411). Judge Coleman heard oral argument on said motion on December 13, 2005, and took the same under advisement on said date. (R. Transcript; RE 578). On February 24, 2006, Judge Coleman entered an order, without making any findings of fact or conclusions of law of record, denying Renasant's summary judgment motion. (R.V. 7 p. 964; RE 527). Renasant responded to said

order by seeking permission to file an interlocutory appeal from this Court. (R.V. 7 pp. 965-67; RE 528-29), see also, Renasant Bank v. Holland, 2006-M-00436 (Miss. 2006). Judge Coleman filed a statement supporting said appeal, stating that legal rather than factual issues existed that could be dispositive of the entire case. (R.V. 7 p. 984; RE 546).[2] This Court denied Renasant's Petition seeking permission to file an interlocutory appeal on June 16, 2006. (R.V. 7 p. 967; RE 529). Thereafter, both parties attempted to contact Judge Coleman to move the matter forward. However, during this period, Judge Coleman, due to personal reasons, was generally unavailable and ultimately chose to recuse himself in October 2006. (R.V. 7 p. 968; RE 530). Accordingly, from June 2006, until January 2007, the trial court, due to extenuating circumstances, was essentially unavailable. (R.V. 7 pp. 1007-08; RE 569-70). Subsequently, on January 8, 2007, this Court appointed Judge L. Joseph Lee as the then Special Circuit Judge for this matter. (R.V. 7 p. 969; RE 531).

Following Judge Lee's appointment, two conference telephone calls were held between Judge Lee and counsel for the parties, the first of which occurred in January of 2007. During each conference, Renasant's Motion for Summary Judgment, and reconsideration of its denial, were both contemplated and/or discussed. (R.V. 7 pp. 1007-08; RE 569-70). As a result of these conferences, on or about January 23, 2007, with the consent and expectation of Judge Lee and the knowledge of counsel opposite, the undersigned forwarded a complete set of all prior pleadings from either party relating to summary judgment to Judge Lee. (R.V. 7 pp. 1007-08; RE 569-70). It is undisputed that Judge Lee was aware of Renasant's desire for reconsideration of the issues surrounding the denial of summary judgment from his initial contact with the

[2]Specifically, Judge Coleman stated that: "at least two (2) arguments asserted by Renasant are legal rather than factual, in nature. . . . Renasant contends that Holland's claims are barred by the doctrines of waiver/ratification, and/or that Holland has failed to demonstrate any causal connection between Renasant's alleged actions . . . and Holland's alleged damages. If Renasant is correct, either argument would be dispositive of all claims asserted in this cause." (R.V. 7 pp. 984; RE 546).

parties. However, no formal motion had yet been made part of the record until July 19, 2007, at which time Renasant filed its Motion for Reconsideration. (R.V. 7 pp. 978-86; RE 540-48). Holland responded to the same in August. (R.V. 7 pp. 987-93; RE 549-55). In kind, Renasant filed its rebuttal to the response of Holland, filed supplemental exhibits in support of its motion and sought hearing dates in relation thereto. (R.V. 7 pp. 994-1011; RE 556-73). Judge Lee informed the parties that he would not require a hearing and would take the matter under advisement. On October 9, 2007, Judge Lee entered his order granting the summary judgment motion of Renasant. (R.V. 7 p. 1017-20; RE 574-77). Thereafter, Holland initiated this appeal.

STATEMENT OF FACTS

Renasant's relationship with Holland began in February 1996 in the form of loans made to Holland secured by cattle. (R.V. 1 pp. 6-9, 25-27; RE 6-9, 25-27). Renasant was interested in doing further business with Holland and he readily agreed.[3] On April 29, 1996, Renasant

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[3]Unbeknownst to Renasant, Holland's principal banks at that time, Mechanics Bank and First Security Bank, had reported him to federal authorities for a potential check kite in excess of $100,000.00 and had denied further extensions of credit to him and his business, and his yet un-filed 1995 tax returns would have shown a loss in excess of $500,000.00. (R.V. 3 pp. 331-32, 398-400; v. 6 pp. 842-43; v. 7 p. 901; RE 309-10, 362-64, 456-57, 465). Mr. Holland's own banking "expert," Mr. Floyde McGehee, a former banker who had worked for Holland's prior bank, Mechanics Bank, testified that he did not tell Renasant about Holland's check kiting, the suspicious activity report filed against him, his cash flow problems, overdrafts or of Mechanic's Bank's joy in Holland's moving his accounts from their bank. However, Mr. McGehee testified as follows:

Q. Okay. The other problems with cash flow, overdrafts, being out of credit at the bank, would those have not been things that would have been important to discuss with The Peoples Bank [Renasant]?
A. If they inquired about them, yes, sir.
Q. So only if they asked you?
A. That's Correct. Well, I would only have – excuse me. I would have only answered what he asked me.
Q. So you wouldn't have given him the complete picture?
A. I wouldn't have volunteered, you know, information. I would have answered his questions.
Q. Wouldn't you, as a banker, would have liked to have known those situations prior to making the loans in April of '96?
A. Yes, sir.
Q. Well, if you knew all of those facts, you probably wouldn't make that loan, would you?
A. Well, I wouldn't have had the authority to make it. . . . I would have presented it to the loan committee. Along with the other facts.

extended loans to Holland that paid off his existing indebtedness to his other lenders and extended a $500,000.00 revolving line of credit which Holland could use as he saw fit. The loans, which totaled $2,024,120.00, were cross-collateralized by first liens on all of Holland's real estate (other than his personal residence) as well as his equipment, cattle and horses.[4] Of particular importance, the pledged real estate, which stood as collateral for the entire debt, included a parcel of land located in Lafayette County, Mississippi. (R.V. 1 pp. 76-94; RE 76-94). The loans were to be repaid primarily from Holland's farming and cotton brokerage business and secondarily from the authorized sale of collateral. (R.V. 1 pp. 12-24; RE 12-24). The loans were not "asset based" lending; in other words, the credit was based on the value of the permanent collateral and was not collateralized by receivables from Holland's cotton business. Holland represented to Renasant that his position in the commodities futures market was minimal, no more than a maximum of two to three hundred bales of cotton or $125,000.00

Q. And you would have presented all of those facts to the loan committee had you know them?
A. Had I know them, yes.
Q. Loan committees don't like facts like these do they?
A. Not usually, no, sir.
Q. Had The Peoples Bank been presented with the full facts, they might not have made that loan?
A. I can't answer that.
Q. Okay. Had this been within your lending limits and you been presented with the full facts, would you have made the loan?
A. I can't say – I can't say for sure.
Q. You are – you can say for sure that Mechanic's Bank was not going to loan him any more money?
A. I believe that's correct.
(R.V. 6, pp. 873-75; RE 458-60).

[4]Holland executed the following promissory notes: Note 8062 in the amount $926,000.00 secured by real estate; Note 8063 in the amount of $500,000.00 for a line of credit; Note 8064 in the amount of $89,060.00 secured by horses; and Note 8065 in the amount of $264,060.00 secured by equipment. These notes were in addition to two prior loans secured by cattle obtained by Holland in February 1996 in the total amount of $245,000.00. (R.V. 1 pp. 29-48; RE 29-48). All of said Notes were cross-collateralized.

exposure, assuming the cotton market dropped completely to zero, at any one time.[5] (R.V. 2-3 pp. p. 256, 330, 335, 371-72; RE 239, 308, 313, 341-42).

Within four weeks of the April 29, 1996, loan closing, several events occurred that came to be indicative of the true financial picture of Holland. First, Holland had proposed a tax free exchange prior to the April 29 closing that would involve the sale of certain Lafayette County property on which Renasant had a lien, and the acquisition by Holland of real estate in Yalobusha County (known as the Long Branch property) which he proposed to be funded with 1) the proceeds from the sale of the Lafayette County property and 2) with a proposed additional extension of credit from Renasant. Holland had not finalized the terms of his proposal as of the April 29 closing. Following said closing, Holland apparently had a proposed escrow and exchange agreement prepared as part of his proposal. (R.V. 4-5 pp. 570-77; 618-36; RE 417-24, 426-44). Holland incorrectly states that said document was prepared at Renasant's request or direction. The record simply does not support such allegation. Regardless, however, as to why the proposed document was prepared or at whose direction, Holland inappropriately bases much of his argument on appeal on such proposed exchange agreements. The proposed exchange agreement and the proposed escrow agreement were never agreed to, approved by or executed by Renasant. William Jeffreys, the Renasant branch manager with whom Holland had initially applied for his loans, was not aware of the proposed documentation being delivered to him and further understood that the proposed exchange needed, in any event, to be handled by a third party other than Renasant. (R.V. 3 p. 383; RE 353). Renasant never reviewed nor agreed to such documents. Nowhere in the record will this Court find any executed copies of them. Moreover, the proposed documents, prepared by Holland's attorney, required the participation of

[5]Unbeknownst to Renasant, Holland had significant speculative futures positions in the commodities market with market risk in excess of $5,000,000.00. (R.V. 2 p. 240; RE 223).

the buyers of the Lafayette County property, the Jacksons, who would need to execute said documents and take title to the Long Branch property. (R.V. 4-5 pp. 570-77; 618-36; RE 417-24, 426-44). However, the attorney for the Jacksons, Kay Cobb, had advised "that [it] couldn't work the way it was proposed, that the way the agreement was written wasn't – my people wouldn't sign it." (R.V. 6 p. 800; RE 452). Nevertheless, Holland did proceed, as he had contracted, to sell the Lafayette County property to the Jacksons.[6] Following the sale, which occurred on or about May 9, 1996, Attorney Cobb correctly delivered the proceeds, totaling $237,558.87, to Renasant in recognition of Renasant's duly recorded first deeds of trust on said property. The memo line of Cobb's check read: "Release of Deed of Trust (3) in Laf. Co. pay toward Danny Holland Loan." (R.V. 4 p. 578; RE 425).[7] What Holland fails to point out is that he did request a loan from Renasant to acquire the Yalobusha County property for $740,225.00, less a portion of the proceeds from the Lafayette County property, and less a $30,000.00 down payment, to which Renasant contingently agreed based upon certain conditions. (R.V. 3, p. 334;

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[6] Holland had contracted for the sale of the Lafayette County property in March 1996. The sales contract, at paragraph 15, contained a contingency for the Jacksons to have completed a tax free exchange of other property they were selling prior to closing with Holland. However, the contract contained no such contingency for Holland, and instead called for it to be a cash transaction to the seller. (R.V. 6 pp. 793-94; RE 446-47). Interestingly, Holland had contracted to buy the Long Branch Property in January 1996, by a written contract that did not mention a tax free exchange and which contained only a contingency for obtaining financing by Holland. (R.V. 6, pp. 795-97; RE 448-50).

[7] Holland bases much of his argument on Cobb's transmittal letter which reads, in part: "It is my understanding that this sum will go into a special escrow account there at your bank, to be applied toward the purchase of certain replacement property under a 1031 tax deferred exchange." (R.V. 4 p. 570; RE 417). However, Cobb in her deposition explained:

> I believe my letter to him [Jeffreys] – yes I talked to him about these deeds of trust and what needed to be done to get the release that I needed, and in my letter, it reflects that I understand. . . . that this money is to be escrowed, something to that effect, but that was between him and Danny [Holland] and McKenzie [Holland's attorney] . . . That I may have used that term [escrowed], . . . that understanding was based on my general – it wasn't that that had been specifically discussed, but that that was based on the general process of I've got to get a release, here is the money, I understand that y'all are working on an escrow agreement, but I didn't know the details, so I don't want to imply that I had more knowledge than that.

(R.V. 6 p. 801; RE 452A).

RE 312). Renasant conditioned its approval upon Holland keeping his loan to value ratio (loan amount divided by value of collateral) the same. In essence, Renasant rejected Holland's offer and made a counter offer whereby Holland would have to have paid additional funds or pledged additional collateral amounting to $120,000.00 for the transaction to be approved.[8] (R.V. 3 p. 374; RE 344). Holland took the offer and loan proposal under advisement. As such, no meeting of the minds occurred, and Renasant never advised Holland that the Lafayette County proceeds would be held in trust in the interim. Furthermore, it is undisputed that at all times Renasant held a perfected lien on the proceeds of the Lafayette County property by virtue of its recorded Deeds of Trust. (R.V. pp. 76-94; RE 76-89).

Rather than deliver those additional funds and move forward to finalize the Lafayette County land swap, and before responding to the above referenced loan proposal, Holland was back within a week asking Renasant for an additional loan of $100,000.00 over and above the $500,000.00 line of credit previously extended. Holland explained that the commodities futures market had moved against him and that he needed $100,000.00 in order to pay margin calls. Renasant again inquired as to what additional collateral Holland proposed to pledge for that loan. After Holland offered no further collateral, Renasant denied his loan request.[9]

On May 22, 1996, having heard nothing further regarding the proposed tax free exchange, or delivery or availability of additional funds or collateral or any acceptance of Renasant's counter offer and loan proposal, Renasant applied, as was required by the Deeds of Trust granting it a lien thereon, the Lafayette County proceeds to the real estate loan against which it was pledged, thereby benefiting Holland by reducing his principal debt and interest

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[8]In the course of these negotiations, Holland admitted to two Renasant officers, John Smith and Corky Springfield, that his branch loan officer, William Jeffreys, had made no commitment on the land swap loan prior to the sale of the Lafayette County property. (R.V. 3 pp. 374, 376; RE 344, 346).

[9]Holland had unencumbered property at the time, including crops and equity in his home.

accrual.[10] No agreement otherwise was ever reached by or documented between the parties. The application of the funds was not by way of set-off as alleged by Holland's brief, but instead, the application of proceeds derived from the sale of collateral which had been properly subject to the validly recorded Deeds of Trust of Renasant, which had been released in return therefore.[11] Holland now argues that the application of such funds was inappropriate because no default had occurred. However, such argument totally ignores the fact that the Lafayette County property stood as collateral for the Notes and was subject to the Deeds of Trust. In that circumstance, default is not required to apply sale proceeds from the sale of secured collateral to the underlying debt. Moreover, such sale of collateral and use of the proceeds for any purpose other than the payment of the debt secured by such real property without the consent of Renasant would in and of itself constitute an event of default under the loan documents. Similarly, Renasant would have been obligated under the loan documents to apply any funds received from Holland to reduce his indebtedness.

After failing to deliver additional collateral and therefore being denied further extensions of credit to pay margin calls, Holland next requested a meeting with Renasant in Tupelo, Mississippi, where he advised that he had illegally sold cattle on which Renasant had a lien and used the proceeds thereof, totaling $103,935.74, for other purposes. Holland attempts to claim now that he utilized said funds obtained from the unlawful sale of collateral to pay margin calls,

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[10]The proceeds were applied against the real estate debt on Note 8062 on May 22, 1996. (R.V. 5-6 p. 646, 811; RE 454-55).

[11] Holland, in his own words on May 23, 1996, stated that: "Payoff of Lafayette County property was originally just $150,000.00. When we started discussions trade and amount to be approved for Long Branch, William [Jeffreys] stated the $175,000.00 from proceeds of Lafayette County sale will have to be applied to note first, leaving us short on down payment needed for Long Branch." (R.V. 2 p. 259; RE 242). So clearly, he understood, contrary to his allegations and brief, that the Lafayette Property was subject to the Deeds of Trust and some amount of debt would have to be paid for the release thereof. Moreover, Holland knew that the Lafayette County property was encumbered even prior to moving his loans to Renasant. (R.V. 3 p. 331; RE 309). Clearly, Holland's unsupported allegation that Jeffreys agreed to release the proceeds to pay margin calls contradicts both his contemporaneous correspondence and the understandings and actions of Renasant.

but he has previously testified that he used said funds to pay a farmer customer. (R.V. 3, pp. 346-48; RE 319-21). Having admitted this crime,[12] Holland presented his list of "areas which I do not understand," wherein among other things, he made for the first time the following accusations:

> 1. In my first two meetings with William Jeffreys, while setting up operating loan, he asked if the $500,000.00 would be sufficient. I told him that it would unless the market dropped to around 80¢. If that happened I **could possibly need** $200,000.00 or more. He reviewed the collateral and cash flow statement and said he **saw no problem, if that became the case**. This was in March. . . .
> 3. Also, in our first meeting I told him that I had earnest money on the Long Branch property and ask if the trade would be possible between the Lafayette County property and it. He stated that by looking at the collateral he saw no reason why the trade would not take place. The Lafayette County property was sold, not closed, prior to our original loan review by the board. I ask William to change the application since he had me already have an appraisal done on Long Branch, and show the trade as taken place. I had already been told by Steve Utley [a realtor] that the closing could be done in 2 weeks due to the title work already being up to date and appraisal that was requested in Lafayette County by Peoples Bank. William Jeffreys stated that Corkey Springfield had stated that this would cause a great deal of new paper work, and he would **present** the trade immediately after closing the original application.

(R.V. 2 p. 259; RE 242)[sic](errors in original)(emphasis added). Interestingly, nowhere in this letter does Holland argue, as he now does, that the Lafayette County proceeds should have been made available to pay margin calls. Instead, Holland's correspondence sets forth what he claimed at that time to be his understanding related to a conversation regarding the future possible need for additional funds based on certain potential conditions and a proposed future "presentation" of the land swap proposal to Renasant's board.[13]

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[12]Selling mortgaged property is a felony including, without limitation, violation of Mississippi Code Annotated Section 97-19-51. Holland, a former banker who had experienced one of his customers selling collateral out-of-trust, knew the consequences of such a sale. (R.V. 3 pp. 327-29, 347; RE 305-07, 320). On that occasion, Holland or his bank even went so far as to consider prosecution of that individual. Id.

[13]Neither of these accusations had been brought up in either of the previous meetings to discuss the additional loans. It was only after the denial of the additional loan for $100,000.00 and the out-of-trust cattle sale by Holland, that Holland made these accusations.

By this time, having admitted to the out-of-trust sale, and his loans otherwise being in default, Holland was given a demand to pay or move a portion of his loans or it appeared that either foreclosure of the collateral or bankruptcy would be imminent. Holland proposed a workout where his loans would be extended and he would be given time to pay his indebtedness. (R.V. 1 pp. 127-28; RE 127-28). Holland retained counsel, and negotiations followed, and ultimately an agreement was reached, which extended the loans and allowed for the orderly liquidation of property as proposed by Holland. The agreement and an Amendment to Promissory Note were reduced to writing and signed by the parties. (R.V. 2 pp. 260-83; RE 243-66). The agreement and negotiations contemplated all payments received by Renasant, the application thereof to reduce Holland's debt and the resulting balance due, which necessarily included the application of the Lafayette County proceeds. Subsequently, at Holland's request to allow even more time to meet his obligations, a Second Amendment to Promissory Note was signed by Holland. (R.V. 2 pp. 279-81; RE 262-64). In executing these documents, Holland undisputedly ratified the amount of the indebtedness, which took into account the application of the Lafayette County proceeds as had been applied to his benefit to reduce his total indebtedness, and accepted the benefit of such application of proceeds and other loan amendments. Ultimately, the remaining indebtedness was paid off over several years. Despite having accepted the benefit of the workout extended by Renasant, and having avoided foreclosure, replevin, bankruptcy or even criminal prosecution, Holland eventually brought suit.

The complaint filed herein by Holland is essentially a restatement of the same accusations he made in May 1996 prior to entering into and accepting the benefit of the workout agreements. In essence, Holland claims that Renasant breached an oral promise to loan him an additional $200,000.00 to cover margin calls relating to his commodities trading and that it failed to honor a commitment to fund the land swap proposal and improperly applied the proceeds of

the sale of the Lafayette County property, held by Renasant as collateral, to Holland's debt.

Renasant, as outlined above, disputes Holland's allegations regarding the alleged oral promise to loan additional funds for margin calls as well as the alleged oral commitment to loan the additional funds for the land swap involving the Lafayette County and the Long Branch properties. These allegations, which came into existence after the out-of-trust cattle sale, are inconsistent with the clear documentation of Holland's loans, the lending policies of Renasant, the lending authority of the officers involved, and Holland's own contemporaneous correspondence. The senior officers of Renasant involved in the alleged oral commitments directly contradict these allegations.

Any factual dispute regarding the alleged oral promises, however, does not prevent summary judgment, for there are at least seven (7) legal hurdles which Holland can not overcome in order to create a factual issue for a jury. Each of these legal, rather than factual, hurdles is based upon well established legal principles. Holland attempts to artfully argue that certain facts are disputed to support his theory of the case. However, those facts are irrelevant in that they do not overcome the clear legal principles relied upon by Renasant and the lower court. Even taking facts in the light most favorable to Holland, any one of the legal principles relied upon by Renasant is sufficient to justify the granting of summary judgment in this cause. As such, Judge Lee had a sufficient basis to grant Renasant a judgment as a matter of law.

SUMMARY OF THE ARGUMENT

This case presents the legal, not factual, question of whether Holland can state a claim based on alleged undocumented oral promises of additional future loans, made without lending authority, and particularly whereby the parol evidence rule would be applicable as a matter of law to bar Holland from attempting to so modify his written loan commitments and documentation. Moreover, for a cause of action to be maintained on such oral promises, the

promises must be supported by consideration and definite as to all material terms, and in this case, it is undisputed that the alleged promises fail in this regard. Holland's claims further fail as a matter of law because he admits actual knowledge of the fact that the officer allegedly making such promises did not have the actual authority to extend such loans.

This case also presents the legal, not factual, question of whether Holland can accept the benefits derived from the alleged wrongful acts and, with full knowledge of those acts, enter into a workout agreement and amendments to his promissory notes, pay the debt in full on the extended terms offered by Renasant, and then maintain a cause of action on the alleged wrongful acts. The case law in this regard clearly holds that Holland can not maintain such action, as he has ratified and waived all claims, if any, which existed prior to his execution of the workout agreement and note amendments.

Further, this case presents the legal, not factual, question of whether Holland can claim that the failure of Renasant to extend additional loans resulted in his inability to pay margin calls and farmer payments in May and June 1996, which failure allegedly resulted in his losses, while at the same time admitting that he can not establish, by factual or expert proof, the number, amount or timing of the amounts due, both as to margin calls and farmer payments during the relevant time period. Holland can not offer factual or expert proof, supported by facts rather than mere speculation, to establish the causative link between his losses and the failure of Renasant to extend the additional credit. Therefore, Holland's claims fail as a matter of law.

Holland also argues that Renasant breached an alleged fiduciary duty owed him, purportedly arising from alleged escrow and exchange agreements discussed supra. Such argument fails as a matter of law in that the required elements to establish a fiduciary duty can not be met by Holland. This is particularly the case in that the proposed agreements were never signed or even reviewed by Renasant or its officers. Even if such duty existed, a breach thereof

would, in any event, have likewise occurred prior to, and would have been ratified and waived by the execution of the workout agreements.

Lastly, Holland argues incorrectly that Judge Coleman's denial of Renasant's summary judgment motion somehow prevented any future consideration of those legal points under either the law of the case doctrine or waiver. However, an order denying summary judgment is not final in nature and can not constitute the law of the case. Any argument otherwise would circumvent a trial court's ability to grant a judgment as a matter of law following a denial of summary judgment, or otherwise a judgment notwithstanding an incorrect verdict. As to waiver, Holland argues that the passage of time from either the entry of the order denying Renasant's petition for interlocutory appeal or from Judge Lee's appointment should constitute a waiver of the legal defenses of Renasant. Such argument ignores the clear facts that Renasant, on all opportunities, attempted to further such arguments by any means procedurally available.

STANDARD OF REVIEW

Appellate courts review a trial court's granting of a motion for summary judgment *de novo*, applying the same standards applicable in the trial court. The courts look at all evidentiary matters, including admissions in pleadings, answers to interrogatories, depositions, and affidavits. Lee v. Golden Triangle Planning & Dev. Dist., 797 So. 2d 845, 847 (Miss. 2001); Jacox v. Circus Circus Miss., 908 So. 2d 181, 183 (Miss. Ct. App. 2005). Summary judgment is proper "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 a judgment as a matter of law." Miss. R. Civ. P. 56(c); see also Anglado v. Leaf River Forest Prod., Inc., 716 So. 2d 543, 547 (Miss. 1998). Where a party responding to a motion for summary judgment fails to produce evidence sufficient to establish the existence of an essential element of his cause of action, summary judgment is mandated.

Wilbourn v. Stennett, Wilkinson & Ward, 687 So. 2d 1205, 1214 (Miss. 1996); Galloway v. Travelers Ins. Co., 515 So. 2d 678, 683 (Miss. 1987); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

ARGUMENT

I. HOLLAND'S NEGLIGENCE CLAIMS FAIL AS A MATTER OF LAW.

Holland attempts to assert against Renasant a general negligence action, a negligent misrepresentation action and an action based upon the allegation that Renasant breached a duty of good faith and fair dealing. As will be discussed below, Holland is attempting to veil his contract claims against Renasant as negligence claims. However, Holland has failed to state a negligence claim as a matter of law. In order to state a negligence action a "plaintiff must demonstrate duty and breach of duty before any other element. Duty and breach 'are essential' to a finding of negligence." Brown ex rel. Ford v. J.J. Ferguson Sand & Gravel Co., 858 So. 2d 129, 131 (Miss. 2003)(quoting, Strantz v. Pinion, 652 So. 2d 738, 742 (Miss. 1995)(citing, May v. VF.W. Post No. 2539, 577 So. 2d 372, 375 (Miss. 1991))). Likewise, "[w]hether a duty exists in a negligence case is a question of law to be determined by the court." Brown, 858 So. 2d at 131(quoting, Belmont Homes, Inc. v. Stewart, 792 So. 2d 229, 232 (Miss. 2001)(citations omitted)). In this case, Holland has wholly failed to set forth any duty on the part of Renasant or any breach thereof.

Holland has not shown any duty on the part of Renasant upon which he might base a general negligence action. "[I]n order to recover for an injury to a person or property, by reason of negligence or want of due care, there must be shown to exist some obligation or duty toward the plaintiff which the defendant has left undischarged or unfulfilled." Foster by Foster v. Bass, 575 So. 2d 967, 972-75 (Miss. 1991). Stated differently, "negligence is the result of the failure to perform a duty; therefore, actionable negligence can not exist in the absence of a legal duty to

an injured plaintiff." Foster, 575 So. 2d at 973 (quoting, Stanley v. Morgan & Lindsey, Inc., 203 So. 2d 473, 475 (Miss. 1967); accord, Robinson v. Estate of Williams, 721 F. Supp. 806, 807 (S.D. Miss. 1989)). Moreover, "[t]he existence vel non of a duty of care is a question of law to be decided by the Court." Foster, 575 So. 2d at 973; (citations omitted). "A decision by the court that there is no duty must necessarily result in judgment for the defendant." Id. (citing, W. Keeton, Prosser and Keeton on Torts, 236 (5th Ed. 1984)).[14]

Likewise, Holland has not stated a claim for negligent misrepresentation as a matter of law. In essence, Holland claims that Jeffreys promised him a future extension of credit. Such a promise of future action is not actionable as a claim for negligent misrepresentation. Bank of Shaw v. Posey, 573 So. 2d 1355, 1360 (Miss. 1990). Shaw holds that "where a defendant misrepresents his commitment to loan money at particular terms, such a representation is insufficient to find that defendant liable for negligent misrepresentation because that misrepresentation does not concern a past or present existing fact." Moran v. Fairley, 919 So. 2d 969, 974 (Miss. Ct. App. 2005)(citing, Shaw, 573 So. 2d at 1360-61). "Also where a defendant allegedly misrepresents to a plaintiff that a defendant bank would lend money to the plaintiff should a third party deny the plaintiff's loan application, such a representation does not concern a past or present fact and is, therefore, insufficient to convey liability for negligent misrepresentation." Id. It is clear from Holland's own correspondence of May 23, 1996, that his allegations against Mr. Jeffreys related to alleged promises of future conduct, i.e., alleged promises of future loans. Said correspondence reads, in part, as follows: "1. In my first two meetings with William Jeffreys, while setting up operating loan, he asked if the $500,000.00 would be sufficient. I told him that it would unless the market dropped . . . . If that happened I

[14]Holland has also failed to establish damages with any specificity beyond speculation and has further failed to establish causation as will be discussed below.

could possibly need $200,000.00 or more. He . . . said he saw no problem, **if that became the case.**" (R.V. 2 p. 259; RE 242)(emphasis added).[15] Accordingly, Holland's allegations that Jeffreys promised to loan him additional funds in the future is insufficient to convey liability for negligent misrepresentation. Spragins v. Sunburst Bank, 605 So. 2d 777, 780 (Miss. 1992)(holding both promise of future action and expression of opinion were not actionable under theory of negligent misrepresentation).

Lastly, Holland can not state a claim for breach of any alleged duty of good faith and fair dealing. Such a tort does not exist as it relates to the negotiation of a contract. "Under Mississippi law, the duty of good faith and fair dealing applies to the performance of a contract, not its negotiation." Rosemont Gardens Funeral Chapel-Cemetery, Inc. v. Trustmark Nat. Bank, 330 F. Supp. 2d 801, 807 (S.D. Miss. 2004)(citing, Cenac v. Murry, 609 So. 2d 1257, 1272 (Miss. 1992)(holding that implied duty of good faith and fair dealing is only applicable to performance or enforcement of contract, not to negotiation of contract terms)). Here, as will be more fully set forth below, Holland can not show that any contract was formed to oblige Renasant to loan him additional funds or to act on his behalf as an escrow agent. Therefore, to the extent that such discussions were undertaken, a fact which is disputed, they would merely relate to negotiating potential future contract terms. Accordingly, Holland can not state a claim for any alleged breach of a duty of good faith and fair dealing.

The court below properly determined that Renasant was entitled to a judgment as a matter of law as to Holland's negligence claims. There are no issues of fact which preclude summary judgment in this regard. Accordingly, the lower court's ruling should be upheld.

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[15] This allegation is certainly disputed, in that Mr. Jeffreys testified that any discussions of additional cash needs were always in the context of the $500,000.00 line of credit, which in and of itself was $200,000.00 more than Holland previously had in place with prior lenders. (R.V. 3 p. 379; RE 349).

II. HOLLAND'S ALLEGATIONS OF ORAL PROMISES FAIL AS A MATTER OF LAW.

A. Holland's claims are barred by the parol evidence rule.

Holland has attempted to artfully plead his claims against Renasant in this cause as claims for negligence. However, upon thorough review of his claims, it is apparent that Holland is only asserting two causes of action against Renasant with each sounding in contract. In any event, said claims, whether sounding in negligence or contract, would be barred by the parol evidence rule. It is well settled that the unequivocal terms of the written loan agreements and deeds of trust may not be modified by prior alleged oral promises.

Holland claims Renasant breached an alleged contract by failing to loan him additional funds and by failing to finance a land swap. Neither of these alleged contracts were written and there is no documentation to support such allegations. Holland bases his claims upon alleged oral promises of a loan officer, Jeffreys. However, such promises, if made, a fact which is strenuously denied, would not constitute enforceable contracts.

Holland can not produce any written loan request, written loan commitment, loan approval minutes, or any other documentation which supports the fact that he ever requested or received approval for the additional loans which he was allegedly promised. The loan proposal that ultimately was presented to the board of directors of Renasant in regard to the final financing of April 29, 1996, made no mention of such requests. (R.V. 2-3 pp. 256, 370; RE 239, 340). Additionally, the applications, Notes, Deeds of Trust and other loan documentation as signed by Holland at the loan closing of April 29, 1996, did not include or mention such requests or promises of additional credit. It is clear, that on April 29, 1996, the additional credit extended by Renasant on the collateral offered by Holland was limited to the $500,000.00 line of credit evidenced by Note 8063. Such line of credit by far exceeded the amounts he had available to

him at his prior lenders of First Security Bank and Mechanics Bank. (R.V. 3 pp. 328, 370, 372, 379, 381; RE 306, 340, 342, 349, 351).[16]

At best, Holland is attempting to argue that his loan agreements should be modified by a pre-existing oral agreement to loan additional funds. However, such agreement is clearly inadmissible based upon the parol evidence rule. Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., 584 So. 2d 1254, 1257 (Miss. 1991). Written contracts simply may not be varied by prior oral agreements. Godfrey, 584 So. 2d at 1257 (citing, Fortune Furn. Man., Inc. v. Pate's Elec. Co., 356 So. 2d 1176, 1178 (Miss. 1978), Commercial Credit Corp. v. Long, 82 So. 2d 847, 848 (Miss. 1955)). The parol evidence rule not only bars evidence of such oral modifications but renders such claims, including claims of negligence, unenforceable as a matter of law. See, Kehr Packages, Inc. v. Fidelity Bank, NA, 710 A.2d 1169, 1174 (Pa. 1997)(reversing judgment for debtor, who made claims very similar to those of Holland, based upon an oral promise in light of the parol evidence rule). In rendering its decision, the Kehr court reasoned that:

> it is clear that by its very terms, this alleged oral promise to advance an additional Line Loan of $185,000.00 for working capital is precisely the type of thing that would naturally and normally have been contained in the written Credit Agreement. . . . Indeed it is difficult to fathom why, despite ample opportunity before the conclusion of the settlement to incorporate this additional $185,000 loan into the Credit Agreement, Appellees, who were . . . sophisticated business people, failed to do so. It is all too clear that Appellees "should have protected themselves by incorporating in the written agreement the promise or representations upon which they now rely. . . ." As a result, we conclude that evidence of the alleged contemporaneous oral agreement is barred by the parol evidence rule since it is offered solely to modify or add to the terms of the integrated written Credit Agreement.

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[16]In fact, he had been cut off from any additional credit from those institutions from mid-1995. (R.V. 3 pp. 331-32, 398-400; RE 309-10, 362-64). Only after the market moved against Holland and Renasant denied his loan request, did Holland ever claim that Jeffreys had made an oral promise to loan him additional funds, which at the time of his loan "request" was in the amount of $100,000.00 but which claim was changed to a "promise" of $200,000.00 after Holland illegally sold over $103,000.00 of cattle out-of-trust.

Kehr, 710 A.2d at 1174-75. Like the borrower in Kehr, it is undisputed that Holland was a sophisticated borrower, having formerly been a lending officer for a bank, having set up loan committees and operated a cotton company. (R.V. 3 pp. 326-29; RE 304-07). Accordingly, the parol evidence rule prevents Holland either from now seeking to increase his $500,000.00 line of credit, evidenced by Note 8063, by an alleged oral promise of additional credit or otherwise to create new obligations on the part of Renasant to loan additional funds to fund a proposed land swap. Said allegations are inconsistent with the loan documentation, and any attempt to modify the same based upon oral promises or representations is inappropriate and barred by the parol evidence rule.

B. Holland has failed to establish the material terms of his alleged contracts.

In order for a contract to be enforceable or binding, there must be a meeting of the minds and the terms of said contract must be ascertainable. Rotenberry v. Hooker, 864 So. 2d 266, 270 (Miss. 2004). "The elements of a valid contract are: '(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation.'" Rotenberry, 864 So. 2d at 270 (quoting, Lanier v. State, 635 So. 2d 813, 826 (Miss. 1994)). Holland can not establish these required elements either as to his alleged oral promises to loan money or otherwise to act as an escrow agent in relation to the proposed land swap. As will be discussed in the following sections, Renasant received no additional consideration for Holland's alleged requests for added financing or to act as an escrow agent. Moreover, Jeffreys had no authority to lend the funds requested on behalf of Renasant and hence no legal capacity to make such contract. From the very first cattle loans made, Jeffreys was beyond his lending authority. (R.V. 3 pp. 333, 337, 377-78, 380, 396; RE 311, 315, 347-48, 350, 360). Ultimately, due the size of the April 29, 1996 loans, Renasant's Board of Directors was required to approve

Holland's loans. (R.V. 3 pp. 371, 380, 396; RE 341, 350, 360). Holland, a former banker himself, understood this fact and was very aware of the approval process. (R.V. 3 pp. 327-28, 333, 337; RE 305-06, 311, 315). Moreover, there was no mutual assent or meeting of the minds as to the alleged promise to loan additional funds or to act as an escrow agent. (R.V. 3 pp. 379-82, 387, 389-93; RE 349-52, 354-59).

As to the allegation that there was an agreement to serve as an escrow agent relating to the proposed Lafayette County land swap, Holland can only argue that a proposed contract was presented. He can not show that the terms thereof were ever discussed with Renasant, by either him or his attorney, McKenzie. This is confirmed by McKenzie's affidavit, which states that "I was never contacted by Mr. Jeffreys or anyone else from [Renasant]. . . ." (R.V. 5, p. 626; RE 434). The mere fact that a borrower prepares a draft document does not prove that a legally binding agreement exists. It can only mean that such an agreement has been proposed, i.e., a contractual offer, which in this case was not accepted. Moreover, the other parties to the contract, by and through their counsel, Kay Cobb, rejected said contracts. No edits were ever made to the proposed contracts, and no executed version exists.[17] Clearly, no contract was formed. While discussions may have taken place, and even an offer made, it can not be said that an acceptance occurred or that consideration was received by Renasant.

Likewise, as to the alleged promise to loan additional funds, Holland has not alleged and can not establish what the terms of such contracts were to have been. He has not shown what the term of the loan(s) was to be; what collateral was to be pledged; what repayment schedules were to be established; what interest rate was to be charged; or even how or when the loans were to be funded. Clearly, Holland's alleged agreement must fail for lack of any definiteness. "A contract

[17] The proposed escrow agreement did not even accurately set forth Renasant's lien on the property that was sold or any terms as to the lien that was contemplated by all parties to be granted to Renasant on the property to be acquired.

is unenforceable if the material terms are not sufficiently definite." Rotenberry, 864 So. 2d at 270 (quoting, Leach v. Tingle, 586 So. 2d 799, 802 (Miss. 1991) for the proposition that "[p]rice is an essential term that must be stated with specificity [without which] [t]he contract fails."). Likewise, Holland by failing to establish an agreed upon interest rate, financing term, or repayment schedule has not established any of the material terms necessary to support his allegations that a contract existed. Much more than the "price" is missing from Holland's alleged contract. Therefore, his claim relating to such alleged promise for an additional loan fails as a matter of law for lack of definiteness and other material elements.[18]

The existence of a contract is a matter of law which is to be decided by this Court. "Questions concerning the construction of contracts are questions of law that are committed to the court rather than questions of fact committed to the fact finder." Mississippi St. Hwy. Com'n v. Patterson Ent. Ltd. 627 So. 2d 261, 263 (Miss. 1993)(citing, Leach, 586 So. 2d at 801)). The absence of any of the material terms of the proposed contract make it abundantly clear that Holland's claims fail as a matter of law. Therefore, the court below was justified in its grant of summary judgment in favor of Renasant.

C. Holland's contract claims also fail for a lack of consideration.

Holland can not establish that he delivered any consideration to Renasant in return for his alleged oral promises or proposed escrow agreement. Absent such consideration, an oral promise to loan additional funds, over and above the amount of a written note, is not enforceable. FDIC v. Patel, 46 F.3d 482, 486-87 (5th Cir. 1995)(holding alleged oral promise unenforceable

[18] If the claims were for specific performance rather than damages, this Court could not grant Holland a judgment based on the lack of any definite, material terms. "The Mississippi Supreme Court has held that before a court may order specific performance of a contract, the contract must be sufficiently definite on material terms." Hunt v. Coker, 741 So. 2d 1011, 1014 (Miss. 1999)(citing, Leach v. Tingle, 586 So. 2d 799, 802 (Miss. 1991); Duke v. Whatley, 580 So. 2d 1267, 1272-1274 (Miss. 1991)). "If the contract is not sufficiently definite or specific, the court must find it unenforceable and deny specific performance." Hunt, 741 So. 2d at 1014. By analogy, Holland likewise should not be entitled to maintain an action for damages arising from an oral contract that is indefinite as to all material terms.

for lack of consideration). Simply put, a contract can not be formed without consideration.[19] Additionally, the same may be said for an oral modification of a contract. Hensley v. Carpenter, 633 F.2d 1106, 1109 (5th Cir. 1980)(citing, Mississippi law for proposition that "an oral modification of contract must be supported by additional consideration"). In order for Holland to claim that the alleged oral promises are enforceable he must establish consideration. "It is well recognized in Mississippi contract law that past consideration can not form the basis of a valid contract. . . ." Iuka Guar. Bank v. Beard, 658 So. 2d 1367, 1376 (Miss. 1995). Likewise, an agreement to amend a contract must be supported by new consideration. Iuka Guar. Bank, 658 So. 2d at 1376 (citing, Singing River Mall v. Mark Fields, Inc., 599 So. 2d 938, 947 (Miss. 1992)("holding that contract modifications must 'meet the requirements for a valid contract,' presumably including new consideration"). Even if, "[f]or argument's sake, . . . if the "promise" made . . . is to be considered a contract. . . . in order to be binding, [it]must be supported by sufficient consideration." Collums v. Union Planters Bank, N.A., 832 So. 2d 572, 576 (Miss. Ct. App. 2002)(citing, Hattiesburg Prod. Credit Ass'n v. Smith, 1 So. 2d 768, 769 (Miss. 1941)(stating in order for agreement to extend payment terms, the bank must have received something of benefit). Here, Holland has not shown any consideration to Renasant which would "benefit" it in return for the alleged oral promise either to loan money for margin calls or in relation to funding the proposed land swap. Accordingly, an action for breach may not lie based upon such alleged oral promises. Patel, 46 F.3d at 486-87.

D. Holland can not base his claims on an alleged promise from a loan officer, who he knew lacked actual or apparent authority.

Holland's claims derive entirely from his assertions that William Jeffreys allegedly made oral promises to loan Holland an additional $200,000.00 to cover margin calls and to finance his

[19]In the present case, consideration for the additional credit would have been in the form of promissory notes, containing Holland's promise to repay, with interest, the additional loans. Clearly, no such notes exist, and Holland's claims must fail as a matter of law.

acquisition of the Long Branch property.[20] (R.V. 1-2 pp. 1-5, 231-32; RE 1-5, 214-15). Holland admits that no one else from Renasant made such commitments. (R.V. 2-3 p. 293, 338; 276, 316). Holland also admits that he knew from the outset that Jeffreys did not have authority to loan him funds in such amounts. (R.V. 3 pp. 333, 337, 371, 375, 377-78, 380, 396; 311, 315, 341, 345, 347-48, 350, 360). When questioned in regard to his initial cattle loans of February 1996, concerning Jeffreys' requirement to obtain approval, Holland responded as follows:

Q. But at the time he took the application now, you understood that he would have to go to Tupelo and get approval for the loan?
A. No, I did not. . . .
Q. He did not tell you he had to go to Tupelo to get approval for the loan?
A. No, he didn't tell me that.
Q. Never made that statement to you?
A. Not on this one, no, sir.
Q. He took the application and you had no idea of what type of process he had to go through to get approval?
A. No, sir. . . . The only thing he mentioned, he would let me know as soon as possible whether we had a loan or not.
Q. So he took the application and told you he would get back with you?
A. Yes, sir.
Q. And being in the banking industry, you knew more than likely he had to get some sort of approval for that?
A. I felt like he would, yes.

(R.V. 3 p. 333; RE 311). Holland likewise testified that he knew at least as early as the time of his informal applications for the April 29, 1996, loans that they would take approval of the board of directors of Renasant.

Q. Okay. Well, let's go back to this discussion with William. The best of your recollection, this is when you were actually going through the process of preparing the applications, correct, that you were preparing the applications for these loans in his office, I think you said you were in there at least an hour or so?
A. When William was filling out the applications? . . .
Q. And he was taking these applications, and you knew you were going to have to take these applications, take them to Tupelo and present them to the board of directors to get approval on these loans?
A. That's correct.

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[20]Jeffreys denies ever making such commitments. (R.V. 3 pp. 379-81, 387, 389-93; RE 348-52, 354-59). However, if for the sole purposes of this brief it were to be presumed that such commitments were made, a fact which is disputed, Holland knew that Jeffreys was without authority to make such commitment.

(R.V. 3 p. 337; RE 315).[21]

The above testimony makes clear that Holland knew Jeffreys' lending limits were exceeded from the outset based upon the fact that Jeffreys had to obtain approval from his superiors to make the initial cattle loans in February 1996. Holland admits that he is a sophisticated borrower, having served as a lending officer in a bank in Arkansas with responsibility for establishing a loan committee at said bank. (R.V. 3 pp. 326-29; RE 304-07). Accordingly, it can not be disputed that Holland knew Jeffreys had no authority, either apparent or implied, to commit to any level of financing. As such, Holland may not maintain a cause of action based upon such alleged loan commitment. Williams v. Lafayette Ins. Co., 640 F. Supp. 686, 688 (N.D. Miss. 1986)(holding principal not bound by unauthorized acts of agent).

Moreover, Holland can not even testify that Jeffreys actually committed to loan him $200,000.00. Upon questioning, Holland testified, at best, that Jeffreys had indicated that an additional funding of $200,000.00 would be "no problem," and he admits to knowledge that either a $500,000.00 line of credit (which he got) or a $700,000.00 line of credit (which he alleges) would have to be presented to the board of directors for approval. (R.V. 3 p. 337; RE 315). Holland can not meet his burden of establishing that Jeffreys' alleged statement (in Holland's words) that the $200,000.00 would be "no problem" bound Renasant to loan him additional funds when he also admits knowledge that board approval of the additional loans was necessary. Moreover, absent proof from Holland that Jeffreys had authority to commit to such financing, the alleged oral promise fails as a matter of law. See, Ciba-Geicy Corp. v. Murphree, 653 So. 2d 857, 872 (Miss. 1994)(holding burden of proving agency is on party asserting it). "Under Mississippi agency law, a principal is [only] bound by the actions of its agent [which are]

[21]In his May 23, 1996, memo, Holland also evidences his awareness of the requirement of board approval. (R.V. 2 p. 259; RE 242).

within the scope of the agent's real or apparent authority." Murphree, 653 So. 2d at 872 (citations omitted).[22] Accordingly, for the reasons set forth above, the trial court was correct in finding that Holland could not establish any authority on the part of Jeffreys to make the alleged oral commitments.

III. HOLLAND'S CLAIMS ARE BARRED BY THE DOCTRINES OF RATIFICATION AND/OR WAIVER.

On October 21, 1996, Holland signed an Agreement and an Amendment to Promissory Notes, having full knowledge of the allegations he had made as early as May 23, 1996, when he presented his "areas I do not understand" containing the very same accusations he now makes against Renasant. It is clear from a review of such pre-workout correspondence that Holland felt aggrieved at that time by a failure of Renasant: 1) to loan him an additional $200,000.00; and 2) to fund the loans and conclude the Lafayette County land swap. Those issues are still the crux of Holland's claims today regardless of what legal theory he chooses to state them under. At the time of the execution of the agreement and amendment, Holland had the benefit of counsel, being H. Scot Spragins and Duke Goza of Oxford, Mississippi. At that time, Holland understood that he possessed a potential lender liability claim. In fact, he was even advised by his counsel, Scot Spragins, as early as September 12, 1996, that: "[t]he longer you do business with them [Renasant], you will be damaging the possibility of filing a prospective lender liability suit, in my opinion." (R.V. 7 pp. 1001-02; RE 563-64). As such, all of Holland's claims, including without limitation those of breach of fiduciary duty, are barred as a matter of law, as such claims were waived and/or ratified by the execution of the workout agreements.

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[22] Apparent authority need not be discussed where the party making the claim has actual knowledge as to the lack of authority. "Apparent authority [only] exists when a reasonably prudent person, having knowledge of the nature and usages of the business involved, would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have." Ford v. Lamar Life Ins. Co., 513 So. 2d 880, 888 (Miss. 1987). No justification can exist for assuming the existence of authority where it is known that none exists.

The terms of the October 1996 agreement set forth in great detail the lending arrangements and terms as they existed between Holland and Renasant prior to that date. (R.V. 2 pp. 260-83; RE 243-66). More importantly, the amounts due as of that time, reflecting the payment and application of the Lafayette County land proceeds, are set forth fully therein. The agreement further set out that Holland had sold various collateral of Renasant out-of-trust, consisting of horses and cattle, and that Holland was otherwise in default in his obligations to Renasant. Holland pledged additional collateral, and Renasant agreed to forego foreclosure and replevin and to allow Holland additional time in which to repay his indebtedness, allowing the debt to be amortized over fifteen years without any increase in interest rates. Renasant further agreed to advance expenses for the care of the cattle and horses which represented its collateral during the interim until sold by Holland. The agreement allowed Holland to elect between monthly and quarterly payments in regard to certain indebtedness. The agreement also set forth that "[t]his agreement, and all of the promissory notes, deeds of trust and security agreements referred to herein or delivered in connection herewith, shall constitute the entire agreement between the parties relating to the subject matter hereof, and shall not be changed or terminated orally." (R.V. 2 pp. 260, 267; RE 243, 250).

Additionally, on October 21, 1996, Holland signed an Amendment to Promissory Notes, which set forth the payment terms as elected by Holland. (R.V. 2 p. 277; RE 260). The Amendment allowed Holland to extend the terms of his two largest notes, relating to real estate, with Renasant over a five year period and with a fifteen-year amortization schedule, allowing for more manageable payments. But for the Amendment, Note 8063 would have otherwise been due and payable in full, absent default, on April 29, 1997. The Amendment also clearly set out that as of that date, Holland had sold real estate, which included the Lafayette County property, which stood as collateral for Notes 8062 and 8063 and that $422,527.00 had been credited to the

indebtedness thereunder leaving a balance due thereon of $615,199.06. Holland clearly has no basis to now claim that he was not aware of or did not benefit from the application of the proceeds from the sale of his real estate, including the sale of the Lafayette County property of which he now complains. Furthermore, Holland can not in good conscience argue that the scope of these agreements did not encompass the sale and application of the proceeds of the Lafayette County property. Simply, these agreements encompassed and reworked the entire relationship of Holland and Renasant.[23]

The above agreement and amendments do not contain any mention of any preservation of Holland's claims against Renasant. Conversely, said documents do contain specific language preserving any claims by Renasant against Holland as follows:

> THE PEOPLES BANK, by entering into this Agreement, shall not be considered to have waived any of its right or remedies arising out of the alleged defaults by Borrower under the aforementioned promissory notes, deeds of trust and security agreements. Specifically, in the event of a further default by Borrower under the terms and conditions of this Agreement, THE PEOPLES BANK reserves the right to seek recovery from the auction company that sold cattle on which THE PEOPLES BANK has a lien and failed to remit proceeds to THE PEOPLES BANK, the right to seek recovery against purchasers of the various cattle and horses on which THE PEOPLES BANK has a lien, and the right to object to discharge of Borrower's indebtedness to THE PEOPLES BANK in the event Borrower goes into bankruptcy, either by voluntary or involuntary petition.

(R.V. 2 p. 260, 267-68; RE 243, 250-51). No effort was made to specifically preserve any of Holland's claims, even though both Holland and Spragins were given the opportunity to review said documents and make changes to them. (R.V. 6 pp. 883-85; RE 462-64). It is true that said documents do not contain an explicit waiver or release provision. However, it is the legal effect of those documents, and the taking the benefit thereof, that operate as a waiver and/or ratification

[23] In April of 1997, Holland was again unable to meet his obligations due to Renasant under his original equipment note, Note 8065, and the Amended Notes 8062 and 8063. At that time, Holland requested and was granted additional deferments of payments and new payment terms. To accomplish these additional payment terms, Holland delivered to Renasant a Second Amendment to Promissory Note and an Amendment to Equipment Promissory Note dated June 26, 1997. (R.V. 2 p. 279, 282; RE 262, 265).

of Holland's claims. Clearly, Renasant avoided such legal effect by the inclusion of the above language for which Holland or his counsel had an opportunity but failed to do likewise. The legal effect of executing such workout agreements and amendments to promissory notes, is that in so doing, Holland waived or ratified any causes of action which he might have had against Renasant. See, Austin Dev. Co. v. Bank of Meridian, 569 So. 2d 1209, 1212-13 (Miss. 1990)(upholding summary judgment holding debtor waived any claims against bank by executing renewal notes); Citizens Nat'l Bank v. Waltman, 344 So. 2d 725, 728 (Miss. 1977)(holding execution of renewal note waives any known factual defenses available under prior note); accord, Tallahatchie Home Bank v. Aldridge, 153 So. 818, 820 (Miss. 1934). This is even true where fraud has been asserted as a defense to the original note. Turner v. Wakefield, 481 So. 2d 846, 848-49 (Miss. 1985).[24]

Waiver and ratification are particularly justified with respect to Holland's claims arising out of the Lafayette County property, since it is undisputed that Holland took the benefit of the sale proceeds (which were credited to his indebtedness) and executed an amendment to the note to extend the terms of payment of the remaining debt; and ultimately paid the debt and received a release of his collateral with full knowledge of the benefit he received from the application of the proceeds. The application of such proceeds ultimately reduced his debt, which otherwise would have been outstanding when he voluntarily liquidated his property during the workout term.[25] The law simply does not allow a person who has full knowledge of the application of funds and

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[24] "Thus, stated in general terms, . . . assuming the fact of fraud, a contract obligation obtained by fraudulent representation is not void, but voidable. Upon discovery thereof, the one defrauded must act promptly and finally to repudiate the agreement; however, a continuance to ratify the contract terms constitutes a waiver." Turner, 481 So. 2d at 848-49.

[25] If the funds at issue were now to be recoverable, what becomes of the benefit Holland received from the application of the proceeds, would he not have to repay those recovered funds to Renasant to replace the benefit that he has previously taken? The rules of ratification, waiver and estoppel prevent such an illogical result by holding Holland to the workout terms and loan amendments he bargained for, accepted and benefited from.

other alleged wrongful acts to accept the benefit of the wrongful acts and to enter into agreements reworking or renewing the remaining indebtedness and later complain about the acts that predated the renewal or reworking of the debt. To counter this, Holland merely argues that the application of the Lafayette County proceeds "are not included in the work-out agreement, because the . . . property had been sold to a third party and was not subject to further financing by the Bank." (Appellant Brief, p. 33). However, such argument totally ignores the undisputed facts. Moreover, it is not the sale of the property for which Holland complains, it is the application of the proceeds thereof. Such application is reflected in the agreements and Notes in setting forth that property had been sold and that the proceeds had been applied to the debt. Holland can not legitimately argue that such application is not covered by the documents either directly or logically. Holland can not claim that the application of said proceeds was wrongful, which at the time would have been an affirmative defense to the Notes and the obligations thereunder, and at the same time enjoy the benefit of working out the payment of the debt pursuant to the agreements and amendments.

Simply put, "if a reasonably prudent person, judged by normal standards, would or should have made inquiry, which inquiry, if reasonably pursued and with ordinary diligence, would have led to foreknowledge of his defenses, then it becomes the duty of the party or parties, to make such inquiry or investigation before executing the renewal note, and if he fails to do so, he is as much bound as if he had actual knowledge of all the facts." Turner, 481 So. 2d at 848 (citing, Gay, et al. v. Nat'l Bank, 160 So. 904, 905 (1935); Citizens, 344 So. 2d at 728). Holland is charged with much more than such a duty to inquire. He can not dispute that upon signing the workout agreements, he had actual knowledge of the actions upon which he now bases his claims and the possible existence of the claims themselves as shown by both his correspondence and that of his counsel. (R.V. 2, 3 & 7 pp. 212, 259, 284-304, 1001-2; RE 195, 242, 267-87, 563-

64). Holland, in an effort to cure his defaults, accepted the benefit of the workout offered by Renasant and continued to make the payments on said amended Notes without asserting any defense in relation thereto, ultimately paying said Notes off in full. Only thereafter, did Holland file his Complaint and assert the claims which should have been asserted as defenses to his indebtedness to Renasant. By executing the agreements at issue, Holland ratified and/or waived any claims arising out of the actions of Renasant of which he now complains. As such, his claims are now barred as a matter of law. In support of his position, Holland offers little authority other than the cases relied upon by Renasant.[26] Instead, he merely argues that the scope of the documents is not sufficiently broad to cover his claims. Such argument is without merit upon a review of the facts and of the face of the documents themselves. Moreover, this argument has been raised for the first time on appeal and is not proper.[27]

The law simply will not allow a party to take two polar opposite positions, such as accepting the benefit of the application of the Lafayette County property sale proceeds to the real estate indebtedness only to later sue claiming wrongful application of said proceeds as Holland is now seeking to do. The legal effect of the workout agreements and note renewals and amendments preclude the same as a matter of law, as was found by the trial court. The law merely requires that Holland know or that he should have known of such claims at the time of the renewal note, or workout agreement. In this case, it is undisputed that Holland had actual knowledge thereof based upon his correspondence, his allegations and even the testimony of his

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[26] Plaintiff cites one additional case relating to waiver. However, the case relied upon is clearly distinguishable in that the fraud for which redress was being sought occurred during and after the note extension, and to some extent was alleged to be fraud in the inducement. First Nat'l Bank v. Mitchell, 359 So. 2d 1376, 1377-79 (Miss. 1978). In the instant case, the alleged wrongdoing of Renasant occurred well before the multiple note extensions, interest rate concessions and new or additional payment terms were agreed to over approximately a year and one half time frame.

[27] See supra, Fn. 1.

prior attorney, Mr. Spragins. The matters of which he complains in this suit are identical to those raised prior to the workout agreements.

In Citizens Nat'l Bank v. Waltman, a wife who executed renewal notes, with the knowledge of a defense to the underlying indebtedness, was held to have waived such defense in its entirety, even where fraud was involved. 344 So. 2d at 725 (Miss. 1977). "Our law is clear that the execution of a renewal note with full knowledge of the facts constituting a defense as to the original note waives that defense as to the renewal." Citizens, 344 So. 2d at 725 (citing, Gay v. First Nat'l Bank, 160 So. 904 (Miss. 1935)). "That being the case, it follows as a matter of law that [the Plaintiff] waived any right of action she might have had against the Bank." Id.[28] Following this logic, there can only be one conclusion, that in executing the agreements and the amendments, Holland waived his claims in their entirety which he now seeks to assert.

Furthermore, allegations very similar to those raised in this case were held barred by waiver, among other doctrines, in relation to a renewal note, in the case of Little v. Eastover Bank, 126 B.R. 861, 862 (U.S. Bankr. N.D. Miss. 1991). In that matter, a debtor who had obtained funds to pay off another lender in addition to a line of credit for farm expenses, sought to assert claims against a bank alleging that the "terms of the aforesaid promissory note did not comply with the terms of a verbal loan agreement negotiated with [a loan officer]." Little, 125 B.R. at 862. However, like Holland, the debtor, subsequent to entering into the original loan, to which defenses were allegedly available, had executed a renewal note. The Little court held that by so doing the debtor waived all claims or defenses which he might have had, and that summary

[28] In dissent, Justice Lee seems to suggest that he would have upheld waiver if the plaintiff had gained something in addition to what she had before. Id. at 729. In the instant case, Holland gained added time to pay his indebtedness in addition to further extensions of credit for farm expenses, and forbearance of Renasant's rights to foreclose or replevin the property, among other benefits, without an increase in interest rates, even though he had knowingly committed the criminal act of selling collateral out of trust.

judgment was warranted in favor of the bank.[29]

Accordingly, based upon the doctrines of waiver and ratification, Holland's claims are barred as a matter of law. Therefore, the lower court's grant of summary judgment was mandated in favor of Renasant as to all of Holland's claims, however stated.

IV. HOLLAND CAN NOT ESTABLISH THAT ANY ACTIONS ON THE PART OF RENASANT CAUSED HIS ALLEGED LOSSES.

Holland alleges that the failure of Renasant to make loans resulted in an inability to make margin calls, that said inability to pay margin calls resulted in his failure to timely pay farmers, and that, in turn, his inability to timely pay farmers resulted in losses to his cotton and farming business. However, Holland bears the ultimate burden of proving his damages. Patterson v. Liberty Assoc., L.P., 910 So. 2d 1014, 1019-20 (Miss. 2004)(citing, Adams v. U.S. Homecrafters, Inc., 744 So. 2d 736, 740 (Miss. 1999)). "Damages must be established with sufficient certainty as to remove them from the realm of mere speculation or conjecture." Evans v. Clemons, 872 So. 2d 23, 29 (Miss. Ct. App. 2004)(citing, Adams, 744 So. 2d at 740). "Damages can not be based on mere speculation but must be proved to a reasonable certainty." Courtney v. Glenn, 782 So. 2d 162, 166 (Miss. Ct. App. 2001)(citing, Wall v. Swilley, 562 So. 2d 1252, 1256 (Miss. 1990)); accord, Webb v. Braswell, 930 So. 2d 387, 398 (Miss. 2006)(excluding expert testimony regarding speculative damages); Kaiser Invs., Inc. v. Linn Agriprises, 538 So. 2d 409, 415 (Miss. 1989)(stating damages "must be proven with reasonable certainty and not based merely on speculation and conjecture")(citing, Leard v. Breland, 514 So. 2d 778 (Miss. 1987); Lovett v. E.L. Garner, Inc., 511 So. 2d 1346 (Miss. 1987)).

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[29] In addition to waiver, the Little court also applied the doctrines of res judicata and judicial and equitable estoppel to bar the debtor from pursuing his claims due to failure to raise such defenses in a prior bankruptcy. Likewise, Holland in this case failed to raise his current claims as defenses to a replevin matter in which he agreed to the entry of a final judgment as part of the workout agreement. (R.V. 2 pp. 266-67, ¶ 12; 298, ¶ 62; RE 249-50, 281). Accordingly, under those theories as well, Holland's claims should be barred.

To meet his burden, Holland, at a minimum, must establish the number and amount of any and all margin calls, and when the calls came due or would have come due. Also, Holland would have to show the amounts he owed farmers and when those amounts were to come due. The loan requests that are the subject of this action were presented to Renasant in May 1996. In summary, Holland must be able to establish all of his cash flow needs in the time frame of May and June 1996 in order to meet his burden of establishing a factual basis that his failure to receive the additional funds caused his losses. Both Holland and his accountant, Richard Devoe, have been asked to detail these needs;[30] however, neither has been able to do so. Holland was examined at length and in great detail regarding his cash flow needs in 1996. He could not identify the margin calls that Renasant allegedly failed to fund in May 1996 by either date, amount, or to whom they were due. He testified that he could have had more than $206,482.00 in margin calls in May 1996, but stated he did not know the amount. After a fourteen month recess of the deposition to allow Mr. Holland time to examine his records, as well as newly produced records from his brokerage houses, he still could not state the number or amount of margin calls his company faced in April, May and June 1996 from any brokerage house. When asked specifically about May 1996, he again stated that he could not identify the number or amount of margin calls his company faced in 1996. He also could not identify the amount and timing of the payments that were due to his various farm customers in April, May and June 1996. He also could not identify the number of occasions he needed to purchase hedge positions in April, May and June 1996. When pressed further for detail as to the number, amount and timing

[30]Holland was deposed on June 14th and 16th, July 18th and 19th, August 1, 2000 and October 10, 2001. Devoe was deposed on February 26, 2001 and October 9, 2001. Said depositions as are quoted in the Testimony Appendix attached hereto at length were recessed on several occasions to give Holland and/or Devoe ample opportunity to provide all pertinent information relative to margin or cash needs. A true and correct Testimony Appendix, setting forth at length the testimony of both Holland and Devoe appears in the record at pages 934 to 942. For the sake of clarity and brevity, a copy of the same is appended hereto as an Appendix. (R.V. 3 & 7 pp. 349, 352-57; 360-68; 934-42; RE 322, 323-28, 330-38, 498-06).

of the amounts due for margin calls, farmer payments, and hedge positions in April, May and June 1996, Holland testified as follows:

> Q. But in terms of being able to give me any detail in terms of the amounts due by date, amount, to farmers, margin calls, buying position on the board during that period of time, April, May, and June 1996, you can not give me that information this morning?
> A. No, I can not.
> Q. In order to get that information, what would you have to do?
> A. Steve, we can't find the files, so I don't know what we're going to do.

(R.V. 3 pp. 349, 352-57; RE 322-28).[31] Previously in his deposition, Holland had suggested that his accountant, Richard Devoe, might be able to provide details regarding amounts due for margin calls, hedge positions, and farmer payments in April, May and June 1996; all of which are necessary to establish a causative link between Renasant's failure to provide $200,000.00 of additional funding and his alleged losses. Devoe was also deposed in detail on this issue. He could not identify by date or amount the margin calls faced by Holland's company from January to May 31, 1996. He did not know the number or amount of margin calls Holland intended to pay with the $200,000.00 of additional funding he was requesting from Renasant. He testified that he had made no detailed analysis whether $200,000.00 of additional funds would have satisfied Holland's cash flow needs in May 1996 and could not state what Holland's cash flow needs actually were in May 1996. Devoe stated that he looked at the year end numbers, or "big picture," but admits that there is nothing in the year end numbers telling him or anyone else about Holland's cash flow needs in May and June 1996. He testified that he did not know the amount of Holland's cash flow shortfall, whether it was $200,000.00 or any other number. When pressed further, Devoe frankly admitted that his opinion was predicated on Holland's statement that he incurred $200,000.00 worth of margin calls in May 1996, and that Devoe made no independent verification of the actual number and amount of margin calls, and made no effort to

[31]Relevant excerpts from Holland's and Devoe's depositions are fully set forth in the Testimony Appendix attached hereto and incorporated herein by reference.

get into detail about what his specific cash flow needs were in the two month period of May and June 1996. (R.V. 3 pp. 360-68; RE 330-38). Clearly, Devoe's opinion, in relying solely on Holland's unsupported assertion that $200,000.00 would have allowed him to meet his margin needs and somehow to prevent business losses, is speculative and not of a sufficient nature as needed to establish causation. See, Glenn v. Overhead Door Corp., 935 So. 2d 1074, 1079-80 (Miss. Ct. App. 2006)(upholding refusal of expert and stating "an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."); Webb, 930 So. 2d at 398 (finding speculative opinion unreliable and properly excluded pursuant to Daubert test).

Absent proof of the amount and timing of the amounts due by Holland for margin calls, farmer payments, or futures contracts in the relevant time frame, April, May and June 1996, it is rank, unsupported speculation for anyone to state that a loan of $200,000.00 in May 1996 would have enabled Holland to pay all of the margin calls that came due in that period, pay amounts due farmers in that period, and have funds left over to meet the obligations of his business. Holland and Devoe have each conceded that they are unable to provide the facts to support Holland's claims, and Holland admits that the information can not now be completely recovered due to missing files.

Summary judgment is appropriate and should be awarded where the party bearing the burden of proof can not establish causation. McIntosh v. Victoria Corp., 877 So. 2d 519, 523 (Miss. 2004). The mere fact that Holland claims he suffered losses is insufficient. He must establish that those losses were somehow proximately caused by the actions of Renasant. Simply put, the "breach of a duty must be the proximate cause of the injury suffered." Sample v. Haga, 824 So. 2d 627, 632 (Miss. 2002)(citing, Baggett v. Kornegay, 781 So. 2d 139, 140 (Miss. Ct. App. 2000)). Otherwise, summary judgment must be affirmed.

Holland is essentially alleging that although he does not know the number, amount, and timing of the margin calls due from his company in May 1996, and does not know the number, amount, and timing of the farmer payments due in May 1996, that a $200,000.00 loan from Renasant would have satisfied his needs and prevented the losses he claims. Such a claim is patently unenforceable as a matter of law. Absent the facts regarding his cash flow needs, which neither Holland nor his accountant can supply, Holland can not establish that the alleged failure of Renasant to fund his request for an additional $200,000.00 would have had any impact upon his business. Holland has not and can not demonstrate that $200,000.00 would have allowed him to stay in the futures market, and if so, for what length of time and to what end result. Holland has not done so because the fact is that he faced $200,000.00 in daily market risk. (R.V. 2 pp. 240-55; RE 223-38). Moreover, had Holland been able to pay a single margin call in the amount of $200,000.00, he would only have been able to stay in the market for an additional day. Holland can not show how he would have stayed in the market after that date. In fact, based upon actual market data, had Holland been able to stay in the market in May 1996, until its close in the following month, he would have incurred additional losses, potentially in excess of Five Million Dollars. Id. Thus, Holland's claim that he was damaged by the denial of the alleged promise to loan him additional funds is not only incorrect, but is contradicted by his actual market risk avoided. Id. Holland's damages simply were not caused by any failure to provide a loan or the use of the proceeds of collateral as alleged by Holland, but instead were caused by the following factors as outlined by the un-contradicted affidavit of Professor Emeritus O.A. Cleveland, of Mississippi State University, expert witness:

9. Holland did not meet any of the necessary and sufficient conditions to hedge cotton according to the United States Government's definition of hedging.
10. Holland's cotton futures transactions were pure speculative positions . . .
11. Holland's speculation on behalf of the farmer, coupled with the extra speculative positions Holland purchased for himself, exposed himself and the cotton company to significant risk.

12. Holland managed said funds, as an unlicensed commodities broker, for speculative purposes.
13. Holland's business practices were such that he was operating as an unregistered commodities agent, unregistered commodities broker, unregistered futures commission merchant, and as an unregistered commodities pool operator, in contravention of both Commodities Futures Trading Commission laws and regulations and National Futures Association rules. . . .
14. Holland's actions exposed both himself and his farmers to significant market risk.
18. Holland's unnecessary speculative positions created substantial exposure to large financial losses. More specifically, Holland's willingness to accept massive risk in hope of financial gain was the direct cause of his financial losses.
19. Based on a review of statements from commodity brokers, Holland would have faced margin calls in May-June 1996 and thereafter well in excess of $200,000.00. . . .
25. Available records do show that Holland faced a multi-million dollar risk and that an influx of $200,000.00 would not have eliminated the risk he faced.
26. The risk Holland faced in May and June of 1996, each and every day, was in excess of $200,000.00. . .
29. Holland did not act as a reasonably prudent commission cotton broker or spot broker and the lack of due diligence on his part was the proximate cause of any losses he sustained.

(R.V. 2 pp. 240-55; RE 223-38).[32] Holland simply has not and can not demonstrate that during the relevant time period, his losses could have been avoided or even lessened by such additional financing or use of collateral proceeds.[33] As such, Holland can not establish the element of causation or the element of damages to support any of his claims.

At the same time, the record is clear that Holland did, in fact, obtain $227,835.70 in additional funds (without resorting to bank loans) in May and June 1996, consisting of the

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[32] The risk Holland faced was well in excess of the 200 to 300 bale maximum which he admits that he informed Renasant was his risk when applying for the loans. (R.V. 3 p. 330; RE 308). Such material misrepresentation made during the loan application process coupled with Holland's illegal trading practices should absolve Renasant from any liability in this cause. Price v. Purdue Pharma. Co., 920 So. 2d 479, 484-86 (Miss. 2006)(upholding "wrongful conduct rule" whereby based on public policy no court will lend its aid to a party who grounds his action upon an immoral or illegal act).

[33] Holland, when specifically asked, admitted that "under existing commitments before [he] ever came to Peoples, [now Renasant,] he would not have sufficient monies to cover even an extra $200,000.00 if the market moved against [him]." (R.V. 3 p. 336; RE 314). Stated differently, Holland would not have had funds sufficient to have met his alleged margin needs when the market moved against him had he not moved his loans to Renasant.

proceeds of the out-of-trust cattle sale, refund of earnest money on the Long Branch Property, overdrafts at Renasant, liquidation of a speculative brokerage account and out-of-trust sale of horses. Holland has not and can not demonstrate why these funds were insufficient to pay the $200,000.00 in margin calls he now claims were due or why an additional $200,000.00 was needed from Renasant.[34]

In regard to the land swap allegations, Holland can not show where he was in fact harmed. He did not pay any capital gain taxes on the property sold. He reduced his debt by the purchase price, which reduction benefited him in ultimately paying off Renasant. He did not incur additional debt by purchasing the Long Branch property. He did not lose his earnest money. (R.V. 3 p. 348; RE 321). Holland can not establish that Renasant's alleged failure to follow through with the land swap caused him any harm. In fact, by not entering into such swap, Holland avoided in excess of $500,000.00 more debt as part of the proposed Long Branch purchase. Moreover, for Holland to now claim that he wanted to use the proceeds from the Lafayette County property to pay margins calls is without merit or basis in fact. His correspondence in May 1996, well before suit was brought, did not make such assertion, and instead acknowledged that a portion of the money was to be applied to the debt. (R.V. 2 p. 259; RE 242). Said land stood as collateral for Holland's loans, as is shown by the Deeds of Trust and the testimony of Kay Cobb. Accordingly, the proceeds thereof were not available to be spent at Holland's discretion, as he would now allege. Moreover, Holland's argument that he could have used the funds to pay margin calls ignores the fact that had the swap actually occurred, that he

[34]Holland, on May 29, 1996, sold four hundred and thirteen cattle, upon which Renasant had a lien, out-of-trust, for $103,935.74. (R.V. 3 pp. 344-48; RE 317-21). On May 23, 1996, Holland obtained a refund of $30,000.00 from the earnest money on the Long Branch property. (R.V. 3 p. 348; RE 321). Holland also overdrew his two checking accounts with Renasant in the month of May by $26,371.99 and $3,882.04, sold horses out-of-trust for approximately $39,000.00 and liquidated his speculative Refco account on June 6, 1996 for $24,645.93. (R.V. 3 pp. 305, 311; RE 288, 289). Even with all of said funds, Holland apparently could not meet his margin requirements.

would not have had such funds. The proposed escrow agreement does not reserve any right to use said funds in such a time frame or manner. Holland's argument is simply an after-the-fact contrivance that is in direct contradiction to the benefit he received from the application of the proceeds to his debt which he subsequently ratified by executing the workout agreement and loan amendments.

Holland has failed to offer any proof supported by facts rather than speculation to establish the requisite causative link between his losses and the failure of Renasant to extend the additional credit allegedly requested. Accordingly, Holland can not establish that Renasant should be liable to him in any amount whatsoever and can not establish causation regardless of whether his claims sound in tort or contract. As such, Holland's claims fail as a matter of law. Again, this Court should uphold the grant of summary judgment in favor of Renasant issued by the lower court.

V. HOLLAND'S BREACH OF FIDUCIARY DUTY CLAIM LIKEWISE FAILS AS A MATTER OF LAW.

Holland spends much of his brief arguing that a fiduciary relationship existed between him and Renasant. However, Holland's brief admits that absent extraordinary circumstances no such relationship exists between a bank and a loan customer. On the contrary, Holland attempts to argue that somehow Renasant became a fiduciary merely by having a proposed and unexecuted escrow agreement delivered to it. Clearly, receipt of such document or unconsummated discussions regarding a desire to conduct a land swap can not, as a matter of law, create a fiduciary duty.[35] Moreover, even if such document constituted the agreement of the parties, it did not reserve any right for Holland to use the funds to pay margin calls in the

[35] Holland argues that Judge Lee ignored the fiduciary claims in granting Renasant's motion for summary judgment. However, such is not the case, rather Holland simply did not address the same during the briefing process. (R.V. 3 pp. 405-50; RE 368-413).

timeframe or manner now alleged.[36] Even if a fiduciary duty could be found, it could not be found to create an obligation beyond that which was contractually proposed. Had the escrow agreement been agreed to and signed, it simply did not provide for the use of such funds to pay margin calls as now alleged by Holland, but rather limited the use of such funds to purchase real estate or otherwise to be held for a length of time beyond the period within which Holland was allegedly requesting the funds to be used otherwise.

A commercial loan transaction does not create a presumption of a fiduciary relationship between a lender and borrower. AmSouth Bank v. Gupta, 838 So. 2d 205, 216 (Miss. 2002). A borrower must prove that a fiduciary relationship exists, and must do so by clear and convincing evidence. AmSouth, 838 So. 2d at 216. If a borrower fails to prove by clear and convincing evidence that the loan transaction has created a fiduciary relationship, the borrower and lender only share a standard business relationship. The Peoples Bank & Trust Co. v. Cermack, 658 So. 2d 1352, 1358 (Miss. 1995). In such a standard business relationship, a lender simply does not owe a borrower any fiduciary duty. Cermack, 658 So. 2d at 1359. This Court has stated that "fiduciary relationship is a very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one person trusts in or relies upon another." Lowery v. Guaranty Bank & Trust Co., 592 So. 2d 79, 83 (Miss. 1991). However, trust alone is not sufficient to establish a fiduciary responsibility. Three requirements must be found in order for a fiduciary relationship to exist in a commercial setting. A fiduciary relationship may only arise where:

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[36] (R.V. 5 pp. 620-25; RE 428-33). All facts and circumstances for which Holland attempts to base his fiduciary duty claim occurred and were known to him prior to October 1996, at which time he voluntarily entered into the workout agreements and loan amendments and accepted the benefit of the sale proceeds which he now alleges were wrongfully applied. As such, his claims of breach of fiduciary duty, even if assumed to exist, would likewise be barred based upon the doctrines of waiver and ratification set out above. See, Turner, 481 So. 2d at 848-49 (holding even a fraud claim to have been waived by the act of entering into later agreements by the doctrine of waiver and ratification).

(1) the parties have shared goals in each other's commercial activities,
(2) one of the parties places justifiable confidence or trust in the other party's fidelity, **and**
(3) the trusted party exercises effective control over the other party.

AmSouth, 838 So. 2d at 216; (citing, Cermack, 658 So. 2d at 1359); see also, Hopewell Enters., Inc. v. Trustmark Nat'l Bank, 680 So. 2d 812, 816-17 (Miss. 1996)(stating that "every contractual relationship does not give rise to a fiduciary relationship")(citing, Carter Equip. Co. v. John Deere Indus. & Equip. Co., 681 F.2d 386, 389-91 (5th Cir. 1982)). All three elements set forth above must be satisfied for a fiduciary relationship to arise. AmSouth, 838 So. 2d at 216. These elements presume a contractual relationship between the parties. In this case the only contract related to the Lafayette County proceeds is that of a debtor-creditor, and under the terms of the executed Notes and Deeds of Trust the proceeds were to be applied to the debt, as was done and subsequently ratified by Holland. Holland can not, therefore, establish said elements.

Clearly as to the transaction by which Holland claims such fiduciary relationship arose, i.e. the sale or trade of the Lafayette County Property or the application of its sale proceeds to his debt, Renasant and he did not share any common goals. Clearly, Renasant was satisfied with its collateral as it existed on April 29, 1996, in making the loans in question and had no goal to acquire any additional property. This is implicit in the fact that it conditioned its acceptance of any substitution in collateral in maintaining its loan to value ratio to be the same. Thus, it was not of any consequence to Renasant whether or not such collateral was added. Holland had other goals in mind. No shared goals existed, and the record is devoid of proof of such.

Likewise, Holland can not state that he "justifiably" placed trust in Renasant to apply the sale proceeds as he saw fit. There was no meeting of the minds on this point and no contract to apply them per Holland's whims. Instead, there were several Notes and Deeds of Trust that mandated application to Holland's indebtedness. Moreover, Holland can not "justifiably" rely upon the escrow and exchange agreements, which were never executed or agreed to in any way.

A party can not "justifiably" rely upon an unaccepted contractual offer. Expounding on the requirement that one party justifiably place confidence in the other, this Court has held that there can be no fiduciary relationship between a lender and borrower when the lender did not offer any assurance on which the borrower could reasonably base his trust. AmSouth, 838 So. 2d at 217. Likewise, if a borrower can not show knowledge on the part of the lender of the proposed trust and confidence placed in it by the borrower, a fiduciary relationship can not be found to exist. Hopewell, 680 So. 2d at 816.

Lastly, Renasant did not exercise any control over Holland. He entered into each aspect of the proposed land swap agreement prior to and independent of Renasant. This Court has stated that even where the parties have shared goals in each other's commercial activities and one of the parties places justifiable confidence or trust in the other party's fidelity, an absence of control by the trusted party precludes finding of a fiduciary relationship. Cermack, 658 So. 2d at 1359. In that case, this Court found the control exercised by the lender bank to be insufficient to support a finding of a fiduciary relationship when the borrower did not act on the bank's recommendations. Id. Here, no such recommendations were even made. The record is void of any evidence to support said required element. The mere allegation that Renasant was purportedly to have acted as an escrow agent, alone does not satisfy the requirements of a fiduciary relationship. See, Monumental Life Ins. Co. v. Hayes-Jenkins, 403 F.3d 304, 318-19 (5th Cir. 2005)(holding escrow agreement did not impose fiduciary duty); Richardson v. New Cent. Mortg., Cause No. Civ.A. 2:03CV372PA, 2005 WL 1554026, *9 (N.D. Miss. 2005)(unreported)(citing, Hopewell, for proposition that summary judgment was mandated in favor of escrow agent relating to claim of misapplication of loan proceeds where plaintiff could not establish requisite control required for fiduciary relationship). Further, "if both parties stand on equal or nearly equal footing, there is less likelihood a fiduciary relationship exists, since

equity will not be necessary to protect a party." Carter Equip., Co., 681 F.2d at 391. As such, Holland, a former banker and sophisticated borrower, could not rely upon Renasant as a fiduciary. Therefore, this arms length transaction involving only a normal debtor-creditor relationship can not constitute a fiduciary relationship. Hopewell, 680 So. 2d at 817.

VI. HOLLAND'S ARGUMENTS BASED UPON THE LAW OF THE CASE DOCTRINE AND AN ALLEGED WAIVER BY RENASANT ARE WITHOUT MERIT.

Holland lastly argues two propositions, each relating to the original order of Judge Coleman, which denied summary judgment summarily and without any legal findings, and the subsequent order of Judge Lee granting Renasant's motion with legal findings. Holland first argues that the original order somehow created the "law of the case," and that as such it can not later be reconsidered, and that Judge Lee's reconsideration of the same was somehow improper. Secondly, Holland argues that the passage of time, from the denial of Renasant's petition seeking permission to file an interlocutory appeal by this Court in June of 2006, until the filing of the Motion to Reconsider Summary Judgment by Renasant in July of 2007, would in and of itself constitute a waiver of Renasant's legal position.

The Plaintiff correctly cites the procedural history of this case as it relates to the existence of an order denying summary judgment, and the subsequent denial of the request to bring an interlocutory appeal. However, the record is silent as to any legal findings that would support the denial of summary judgment in this cause. In fact, the only findings of record to that end by Judge Coleman were: 1) that the Defendant's motion for summary judgment should be "overruled," without any specific legal or factual findings justifying that determination, and 2) that "at least two (2) arguments asserted by Renasant are **legal rather than factual, in nature. . . . [and if] correct, either argument would be dispositive of all claims asserted in this cause."** (R.V. 7 pp. 964; 983; RE 527, 545)(emphasis added). Said contradiction in findings was a

primary basis, among others, for Renasant's Motion to Reconsider. (R.V. 7 p. 978; RE 540). These legal, rather than factual issues, were well within the province of the trial court to address and to resolve. Questions of law are always within the province of the court, regardless of when raised, and may be urged at any time.[37] Holland incorrectly argues that Renasant should not be allowed multiple "bites" at the proverbial summary judgment apple. However, this ignores the fact that the Rules of Civil Procedure contemplate just that.[38]

Holland attempts to argue that Judge Lee, sitting in place of Judge Coleman, should have somehow been prohibited from reconsidering the legal issues raised on summary judgment by Renasant. Contrary to such assertion, a successor judge is not precluded from correcting errors of law of a prior judge in a case where the prior rulings were not in the nature of a final determination on the merits. Mauck v. Columbus Hotel Co. et al, 741 So. 2d 259, 268 (Miss. 1999). While it may be the "general rule, [that] a successor judge is precluded from correcting errors of law made by his predecessor or changing the latter's judgment or order on the merits, . . . **this rule does not apply where the order or judgment is not of a final character.**" Mauck,

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[37] State Farm Auto Ins. Co. v. Davis, 887 So. 2d 192, 193 (Miss. Ct. App. 2004)(citing, Cantrell v. Lusk, 73 So. 885, 886 (Miss. 1916)); Brown ex rel. Ford v. J.J. Ferguson Sand & Gravel Co., 858 So. 2d 129, 131 (Miss. 2003).

[38] This Court is well aware of the fact that a motion under Rule 12 tests the legal sufficiency of a pleading, as a matter of law, generally at an initial stage. Subsequently, a party might choose to bring to the Court's attention matters outside of the pleadings in order to test a plaintiff's claim as a matter of law, pursuant to Rule 56. Thereafter, even if any such preceding motions have been denied, a party is allowed to request as a matter of law a directed verdict pursuant to Rule 50. See, Breland v. Gulfside Casino Partnership, 736 So. 2d 446, 448 (Miss. Ct. App. 1999) (recognizing the relationship between Rules 50 and 56). The Breland Court stated that: "the standards employed for a summary judgment and directed verdict are the same, just employed at different times during a proceeding. In fact Rule 56, in its comment, states, '[t]he directed verdict motion, which rests on the same theory as a Rule 56 motion, is made either after Plaintiff has presented his evidence at trial or after both parties have completed their evidence; it claims that there is no question of fact worthy of being sent to the jury and the moving party is entitled, as a matter of law, to have a judgment on the merits entered in his favor.'" Breland, 736 So. 2d at 448. Even, thereafter, errors of law may always form the basis of an appeal. If such were not true, Holland himself would not be entitled to seek redress from this Court on this appeal. Accordingly, Holland's arguments implying that the court could not have addressed these points are wholly without merit.

741 So. 2d at 268(quoting 48 C.J.S. Judges § 68, at 654 (1981)(emphasis added). Therefore, there is no prohibition for a successor judge reconsidering a denial of summary judgment due to the fact that "**[a]n order denying summary judgment is neither final nor binding upon the court or successor courts.**" Id. at 268 (citing, Great So. Nat'l Bank v. Minter, 590 So. 2d 129, 133, 35 (Miss. 1991); Newman v. Newman, 558 So. 2d 821, 826 (Miss. 1990))(emphasis added). "Obviously, such a ruling was subject to change at the time that the case was finally submitted, even if no facts had changed." Amiker v. Drugs For Less, Inc., 796 So. 2d 942, 946 (Miss. 2000). Moreover, a Court is duty bound to follow the law and apply it to the record before it, regardless of prior rulings on summary judgment. Mauck, 741 So. 2d at 268. This is true even where there has been an intervening denial of a petition for permission to file an interlocutory appeal. Id. The mere denial of the right to bring an interlocutory appeal is determinative of nothing. Likewise, such a denial does not constitute a final determination of any legal argument on the merits. Id. Accordingly, Judge Lee was not prohibited from considering or granting Renasant's Motion for Summary Judgment.[39]

Holland also attempts to couch his argument under the "law of the case doctrine." He wrongfully relies upon the Mauck decision for this point. Said decision found the law of the case doctrine to be inapplicable on the basis that the higher court in that matter had not rendered a final opinion on the matters for which the doctrine's application was sought. Mauck, 741 So. 2d at 267. Accordingly, said doctrine has no application to a non-final order, such as a summary judgment order at issue here. Said doctrine is most commonly encountered "when an appellate

[39] Holland attempts to state that the Mauck decision is limited to a review of Uniform Chancery Court Rule 1.07. While certainly, the above cited portion of that decision relates to that rule, the analysis is not so limited. Mauck, and the principles for which it stands have been cited by this Court in subsequent matters as giving "guidance" on the issues raised herein and without reference specifically to such rule. Amiker, 796 So. 2d at 946. Moreover, Mauck itself stated that it stood for the "**general rule**" that a successor judge could reconsider a non-final decision of a predecessor. Mauck, 741 So. 2d at 268.

court issues a ruling and sends the case back on remand, [in that instance] the ruling is the law of the case." Southland Ent., Inc. v. Newton County, 940 So. 2d 937, 942-43 (Miss. 2006), citing, Moeller v. Am. Guarantee & Liab. Ins. Co., 812 So. 2d 953, 960 (Miss. 2002)(for proposition that on remand opinion of higher court is the "law of the case"); Continental Turpentine & Rosin Co. v. Gulf Nat'l Stores, Co., 142 So. 2d 200, 206-07 (Miss. 1962)(comparing law of the case doctrine to *res judicata,* but stating that its application is limited to questions of law as decided by an appellate court). The "doctrine prevents altering the earlier-determined legal principles at the time of **later** proceedings in the same case." Wilner v. White, 929 So. 2d 343, 346 (Miss. 2005)(emphasis added). The Wilner Court goes on to state that the doctrine "relates entirely to questions of law, and is confined in its operation to **subsequent proceedings** in the case. Whatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, so long as there is a similarity of facts." Wilner, 929 So. 2d at 346(emphasis added). Clearly, the doctrine requires some final determination of law in an earlier proceeding to be utilized, and even then it is not without exception.[40] The mere denial of an interlocutory appeal does not constitute a final decision to determine the law of the case. Anderson v. R & D Foods, Inc., 913 So. 2d 394, 400 (Miss. Ct. App. 2005)(holding "the Supreme Court's denial of . . . petition for an interlocutory appeal did not solidify the trial court's original decision as the law of the case.").[41]

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[40] See, Simpson v. State Farm Fire & Cas. Co., 564 So. 3d 1374, 1376-77 (Miss. 1990)(discussing the exceptions, which include a change in facts or circumstances).

[41] Further, Holland incorrectly relies on post judgment Rule 60 in an effort to argue that reconsideration was not appropriate in this cause. However, Rule 60, like the arguments raised above, relates only to the reconsideration of matters that are **final** in nature. Miss. R. Civ. Pro. 60. As set forth above, a denial of summary judgment is in no way final, particularly where detailed legal findings are not made. Holland concedes this point in his pleadings and states that the summary judgment order entered in this cause was "not a final order on the merits." (R.V. 7 p. 992; RE 554). Accordingly, Holland's reliance upon such Rule and the standards cited relating thereto is wholly inappropriate as relates to the reconsideration of a summary judgment motion.

Holland also attempts to argue that Renasant waived the questions of law raised in its summary judgment motion. In an effort to bolster his position, Holland states that "both sides continued to invest substantial time and money in anticipation of trial, including, but not limited to, depositions (specifically including expert witnesses), expert's fees, deposition transcripts, travel expenses, and other expenses." Appellants Brief pp. 34-35. This statement is in error, has little, if any, basis in fact and is not supported by the record. Renasant filed its Petition for Permission to Appeal Interlocutory Order on March 16, 2006. Counsel for Holland, due to serious health issues, did not respond to such Petition. Thereafter, the Supreme Court denied said Petition on March 29, 2006, prior to receipt of Judge Coleman's Statement in Support of Interlocutory Order dated March 28, 2006. Thereafter, Renasant requested reconsideration of the denial of the interlocutory appeal on April 4, 2006. Then and only then did Holland's counsel respond on May 18, 2006, after having obtained an agreed time extension due to continuing health concerns. On June 16, 2006, this Court entered its order denying any reconsideration of the request for permission to file interlocutory appeal. No substantive findings were made. During this interim time period no depositions were taken by any party. Thereafter, a few letters were exchanged in regard to seeking trial dates between counsel and several attempts were made in an attempt to contact Judge Coleman, who was unavailable due to personal reasons. Subsequently, on January 8, 2007, an order was entered replacing the recused Judge Coleman with Judge Lee. Thereafter, a telephone call was held between Judge Lee and the counsel for the parties in January of 2007. During this call, the need for reconsideration of the denial of summary judgment was discussed. In response thereto, and with the expectation of Judge Lee, on January 23, 2007, the undersigned counsel forwarded a complete bound set of all prior pleadings relating to summary judgment to Judge Lee for that purpose. (R.V. 7 pp. 1006-08; RE 568-70). Thereafter, Renasant caused two minor **fact**, as opposed to expert, depositions, to be

taken on April 26, and 27, 2007, in the office of Mr. Whitwell, at Renasant's notice and expense. (R.V. 7 pp. 972, 974; RE 534, 536). Thereafter, a second call was held by counsel and Judge Lee in order to set this matter for trial. Again, reconsideration was mentioned. Said call was held in March of 2007, and the order setting this case immediately followed. (R.V. 7 p. 976, RE 538). Recognizing that no formal pleading was in place relating to reconsideration, Renasant filed its motion to that end on July 19, 2007. (R.V. 7 p. 978, RE 540). On August 8, 2007, Renasant next deposed a purported expert, Mr. Brian Pray, a real estate appraiser, at its expense in the office of Mr. Whitwell. Mr. Pray testified that he had not been paid by the Plaintiff since the year of 2000. (R.V. 7 pp. 1006-08; RE 568-70). Mr. Pray was only named as an expert due to the fact that he had appraised some of the real property at issue in the case. These three minor depositions, fact and appraisal, had been expected and contemplated by the parties for a number of years and had not been of any priority absent a trial setting. The timing of these depositions was in no way related to either the summary judgment hearing or its denial. This fact should be readily apparent to this Court in that the transcripts of said depositions have not been made a part of the record for this appeal. Contrary to his response quoted above, Holland has not undertaken any depositions since at least 2005, has not yet deposed the experts of Renasant and has not expended any significant efforts in regard to prosecuting this case during the time in question. Likewise, Renasant's actions in tying up three minor "loose end" depositions in a case this size due to the trial having been scheduled was neither substantial nor active participation in this litigation of sufficient nature to justify a finding of waiver.[42]

From the appointment of Judge Lee in January of 2007 and up to and including July of 2007, the trial court was aware of Renasant's desire for reconsideration of the issues surrounding

[42] Such discretionary determination is left to the trial court on a case by case basis considering the facts and circumstances. Ms. Credit Ctr. v. Horton, 926 So. 2d 167, 181 (Miss. 2006).

its motion for summary judgment. For Holland to suggest undue delay on the part of Renasant in bringing this motion ignores the fact that there was a period from June of 2006 until January of 2007, where the Court was essentially unavailable, and that since that time, Renasant has attempted to both formally and informally prosecute its motion and seek reconsideration. Likewise, Holland's position that Renasant has somehow waived these arguments due to the passage of time is unsupported.[43] From the entry of Judge Coleman's order, through interlocutory appeal, and thereafter, Renasant has raised these questions of law at each available opportunity, and understood that the court had the matter under advisement from the initial conference with Judge Lee in January of 2007.

CONCLUSION

Based upon the arguments of the parties set forth herein or otherwise in the record, it is clear that the lower court was correct in reconsidering Renasant's motion for summary judgment in this cause. Likewise, based upon the legal authorities and doctrines discussed above, there were no issues of material fact which would alter the legal finding of Judge Lee. Consequently, the trial court was correct in granting summary judgment in favor of Renasant, and the judgment of the trial court should be affirmed in all respects.

Respectfully Submitted, this the 26th day of June, 2008.

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[43] However, it is interesting that Holland who has argued that his affirmative and contrary actions do not rise to the level to constitute a waiver of his claims would even attempt to raise the simple passage of time as a basis for waiver of the legal issues consistently raised by Renasant.

CERTIFICATE OF SERVICE

I certify that I have this day served a true and correct copy of the above and foregoing Brief of Appellee on the attorneys for appellant, by placing said copy in the Federal Express, prepaid, addressed to them at their usual addresses as follows:

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And by United States mail, postage prepaid to:

Hon. L. Joseph Lee
Mississippi Court of Appeals
P. O. Box 22847
Jackson, MS 39225

This the 26th day of June, 2008.

Scott R. Hendrix

CERTIFICATE OF FILING

The undersigned, of Mitchell, McNutt & Sams, P.A., certifies that on June 26, 2008, he deposited in Federal Express overnight delivery, addressed to the clerk of the Mississippi Supreme Court, the original and three copies of the Brief of Appellee.

SCOTT R. HENDRIX, MSB [redacted]

TESTIMONY APPENDIX

Mr. Holland testified as follows:

Q. Going back historically, I'm just trying to figure, you can't tell me today what your actual margin calls were in May, June, 1996, is what I understand; is that right?

A. No, not without looking at -- I can not tell you exactly what margin calls we had with the company with Refco and Jernigan or Fimat...

Q. Mr. Holland, you have made complaint, if I understand correctly, that the bank failed to pay certain margin calls that were due in the month of May, 1996. Do you have complaint about that?

A. Yes, I do.

Q. Identify for me the margin calls that the bank failed to pay in May, 1996, by date and amount, please, sir.

A. Steve, without referring, going back to the folders and going through the whole folders, I can't do that here.

Q. Well, there were certain checks. Did you write checks for those margin calls that the bank failed to fund, did you go ahead and write checks for them, or did you just not write checks for them?

A. Did not write checks for them, because we asked the funds to be wired.

Q. Do you know the amount?

A. The exact amount, no.

Q. Okay. Back to this exhibit that we have identified, do you have any reason to believe, this is talking about Exhibit 69, any reason to believe sitting here today, that the margin calls that you make complaint about, that the bank failed to fund, are any different than the margin calls that are exhibited by Exhibit 69?

A. Steve, there is no way for me to know sitting right here.

Q. What are you going to have to do to determine that, Mr. Holland? BY MR. CORBAN: I think we are entitled to that information, Bob.

A. I would say we would have to get down and go through each folder and try to match it up, and we would probably have to bring Richard Devoe in also, my accountant.

Q. (Mr. Corban) Well, first of all, is there a way that you can go back to your folder and determine for us what your total margin calls were for each one of your brokers during the year 1996?

A. Total margin calls?

Q. Yeah, each one.

A. There should be a way, yes, sir.

Q. Can you break that down by amount and date?

A. If the folders -- if the folders are complete and each individual -- Refco would be easier than the Jernigan, I believe, but you should be able to, yes. . . .

Q. Well, help me out. I mean, were there more than $200,000.00 in margin calls that you needed the bank to fund, were there less than

$200,000.00 in margin calls that you needed the bank to fund, were all the margin calls that you needed the bank to fund to Refco, or were part of the margin calls that you needed the bank to fund to Jernigan? I think we need that information.

A. Steve, I think we ended up funding margin calls to Refco, and this is an assumption without going back and looking at everything, but we had farmers that we had written checks to that were not paid because of lack of funds, roughly at the same time. We ended up paying Refco and Jernigan in full before it was over with. So we ended up, after the date that the funds weren't there, we were in a situation where we paid Jernigan and Refco before we paid farmers, and we ended up owing the farmers. So we ended up using funds that we could have paid the farmers with to pay Refco and Jernigan.

Q. And I need to know how much that you had to pay to Refco, how much you had to pay to Jernigan, what dates they were due, and which of those did you make complaint about that the bank failed to fund? Can you do that for me?

A. Steve, I will have to go back, and like I say, we may have to bring Richard in to help me do it.

Q. I'm a little bit concerned and I don't know how many shots Mr. Whitwell is going to give me to ask you questions under oath. He is smiling, and I can understand that, and I think he can maybe appreciate my dilemma, but there is an allegation that the bank failed to fund margin calls as one of the basic allegations in this suit that you are making claim against the bank, that the bank failed to fund those, and that caused this damage, and I think we are entitled to have that information. I don't know how we could proceed with the defense of it until we have it. You are telling me that Exhibit 69 is not the margin calls that the bank -- or you don't know whether that is the margin calls that the bank did or did not fund?

A. No, I do not. That is not the list of margin calls, wire instructions that I sent, no, it is not.

Q. But that is the margin calls that would have been identified by those wire instructions?

A. The best of my knowledge, based upon that letter.

Q. So what I'm puzzled about is the fact that we have already determined that all but one of those checks cleared. So if all but one of those checks cleared, why would you be sending a list of checks for wire funds to be wired for when, in fact, all but one of those actually cleared the bank?

A. Unless there was some other funds to be wired that is not listed there.

Q. Well, that's what I need to know.

A. Okay. Steve, I can't answer your question.

Q. Do you believe that you had more than $206,000 in margin calls in May of '96?

A. In May of '96 or on that very day?
Q. Sometime during the period of May, 1996, May 1 to May 31st, do you believe you had more than the $206,482 in margin calls that is identified on Exhibit 69?
A. We could -- yes, I would say we could have or could not have. It's possible.
Q. You don't know?
A. Don't know. . . .
Q. Mr. Holland, part of the reason we recessed the deposition was to try to obtain, as you might recall, more information regarding the margin call requirements that your company may have been faced with in April, May, and June 1996.
A. Yes.
Q. I'll ask you, have you, since August of last year, been able to determine from any source whatsoever what margin calls, if any, that your company had in April, May, and June 1996?
A. Steve, I haven't found any new -- new margin calls made or any new statements that I had. . . .
Q. Well, can you tell us, from having done that review, can you tell us how many margin calls that your company had in April, May, and June 1996, from any brokerage house?
A. No, Steve, I can't give you the total dollar amounts, no. . . .
Q. Well, how can you tell me? It's the same question I asked last time in terms of we want to know, Mr. Holland, particularly from January 1st, 1996 through June of 1996, the margin calls that your company had by amount, by date, and by brokerage house. Do you have that information?
A. No, I do not. . . .
Q. Is there any way from your own records yourself that you can obtain that information?
A. No, sir. Y'all have the same information I have.
Q. Why is it that your own records will not reveal that information?
A. I have no idea.
Q. There is no files or folders that you have in your office that, if examined, would be able to tell us or you or anyone else the number of margin calls you had?
A. Steve, I have the same records that y'all took copies of. . . .
Q. Well, I understand we have the same records. My question, though, was pertaining to those records. Will those records tell you or us or anyone else the number of margin calls that you had from January 1st, 1996 through, say, end of 1996? Will those records show that?
A. Steve, undoubtedly, it won't because we didn't have it complete at the last deposition. . . .
Q. Well, my question to you is, can you -- having reviewed those records, and you reviewed the same records that we received from the brokerage houses. And, of course, the other records we obtained, we obtained from your office. From those records, whether it's farmers' files, records you have in your office, or the

most recent records that we obtained pursuant to request from the brokerage houses, having reviewed those records, can you tell us your margin calls in April, May, and June 1996?

A. Total dollarwise, I can not. . . .

Q. Do you know the dollar amount of the margin calls that were issued to your company in -- from any brokerage house in May 1996?

A. No, sir.

Q. Do you know the number of margin calls that were issued to your company in May 1996?

A. No. . . .

Q. Do you know the amount of those margin calls?

A. No, I do not.

Q. Do you know the number of those margin calls?

A. I was dealing with Refco and Jernigan, but to tell you whether it was one margin call or two margin calls, I do not.

Q. Right. And do you know the number of margin calls by amount, date, and number that you had from Dean Witter Jernigan in April, May, and June 1996?

A. No, I do not.

Q. You had also indicated to us that Richard Devoe might have that information. Do you -- have you had any conversations with Richard Devoe to determine whether he has that information?

A. No, I have not. . .

Q. Let me ask you, during the same time period, whether or not you know amounts that were due the various farmer customers of yours during the same time period, April, May, and June 1996? Do you know the date, timing, and amounts of payments that were due farmers?

A. No, . . .

Q. During the same period, April, May, and June 1996, in addition to paying farmers and paying margin calls with your brokerage houses, I understand there might be occasions where you need to repurchase positions on the board, actually buy contracts on the board, would there not?

A. They were times we've repositioned our hedge, yes.

Q. All right. Do you know how many times -- or how many occasions that came up where there was a need to reposition your hedge on the board during April, May, and June 1996?

A. Steve, I do not. . . .

Q. But in terms of being able to give me any detail in terms of the amounts due by date, amount, to farmers, margin calls, buying position on the board during that period of time, April, May, and June 1996, you can not give me that information this morning?

A. No, I can not.

Q. In order to get that information, what would you have to do?

A. Steve, we can't find the files, so I don't know what we're going to do.

(R.V. 3 pp. 349, 352-57; RE 322-28).

Similarly, Mr. Devoe testified as follows:

Q. Can you tell me how many margin calls he had, let' say, beginning January 1, 1996, through July 1, 1996, how many margin calls he's had?
A. Not off the top of my head.
Q. Do you have any idea what the amount was?
A. No, I don't.
Q. Okay. Did you do for 1996 -- at any point in time in the course of your work from -- with Danny from the point you were engaged to the present, have you done any sort of a cash flow analysis for Danny Holland's cotton company from January 1, 1996, say, through the end of the year 1996? A cash flow analysis. What I mean by there is a report that would record on a month-by-month basis what income he had coming in, what disbursements that were due, and what expenses that had to be paid, something that would show what his cash needs were at any point in time. Have you prepared that?
A. Well, we looked at basically the year, yearly figures, and that's what we used. . . .
A. What his, I guess, net income was for the year. We didn't specifically go into --
Q. Well, if I asked -- what I'm getting to is, do you have a document or have you made a review and an analysis that you could tell me, say, May 1 of 1996 to May 31st, 1996, where Mr. Holland would have been on any daily basis regarding what expenses that would have been outstanding or what calls would have been outstanding, and what anticipated money?
A. No. Again, we just looked at the overall picture. . . .
Q. But that doesn't tell you where he would be at any point in time from a cash flow standpoint, though, would it?
A. Well, it wouldn't give you a detailed cash flow, no.
Q. In other words, a detailed cash flow would tell you as of any particular date or month end during that calendar year where you would be in terms of what your cash needs were, what you had to pay out, what you had anticipated coming in? That's what you'd get by a detailed report?
A. That's correct.
Q. And you don't have that?
A. No. . . .
Q. Okay. Tell me how many margin -- I mean, can you tell me how many margin calls, then -- you've already told me, you can't tell me how many margin calls he had in 1996?
A. No. . . .
Q. Do you know what happened to cotton prices in May, 1996?

A. I believe they went down.
Q. Have you done any study to the extent to know where they were and how far they went down?
A. Nothing I have here. . . .
A. We, again, looked at the big picture, what happened, what caused it to happen.
Q. Well, I want to get -- I want to get narrowed in, then, on -- away from the big picture to the small picture. The 200,000.00 which Mr. Holland indicated to you that he requested from the bank, you indicate that he intended to pay margin calls?
A. Right.
Q. Okay. Do you know which margin calls he intended to pay?
A. No.
Q. Do you know the number of margin calls he had?
A. No.
Q. And you don't know the number that he had?
A. No. . . .
Q. You've not made any investigation of that?
A. No. . . .
Q. Okay. Have you done a detailed analysis to tell us that had he had $200,000.00 in his hands at the time he requested it from the bank that with that $200,000, he could have prevented the downfall of the cotton company? Have you done an analysis?
A. Not a detailed analysis, no. . . .
Q. Have you done any analysis of that?
A. Just general knowledge.
Q. Okay. Tell us in general knowledge -
A. Going through the process with him.
Q. All right. Tell us, then, in general knowledge how the 200,000.00 would have prevented.
A. He could have ridden the market back up to where it was, wouldn't have had the exposure of having to pay those farmers on his own, cashed the farmers out and paid them with the profits just like he normally would have.
Q. That's what he's told you, right?
A. Yes.
Q. And you've relied upon what he told you in that regard?
A. That's correct. . . .
Q. As far as putting the numbers to that in terms of the amount of money that he owed farmers and the amount of the margin calls, how he would have done that, you would have had that information -
A. How he did that on an annual basis.
Q. You don't have specifically for that particular time, do you?
A. That particular time period, no. . . .
Q. You don't have, again . . . At that point in time, how the $200,000.00 would have enabled him to be able to make all his obligations as of May, 1996, you can't tell us that?
A. Exact amount, no.

Q. Can you tell us an inexact amount?
A. Well, as I said, 200,000.
Q. If he had had 200,000.00 to pay margins and the market had continued to drop, would he have had another margin call he would have had to make?
A. Probably.
Q. And would he have needed more money?
A. Probably. . . .
A. Again, we looked at the big picture. We didn't get into detail in May and June.
Q. Okay. Well, let's look at the big picture. Do you have a copy of the 1996 tax return there? . . .
Q. Okay. Does that have year-end information on the cotton company?
A. Yes.
Q. Okay. Are these a part of the year-end numbers that you were looking at when you were speak -- you used the term looking at the big picture. And you were looking at year-end . . .
A. Right. . . .
Q. Okay. What is it about the numbers here, in the year-end numbers 1996, that tell you what that cash flow shortage was in May and June, 1996?
A. There's nothing in the numbers. . . .
Q. Okay. All right. But what I'm trying to get at, you're saying you're looking at the big picture. And what I'm trying to get at is, in May and June, 1996, can you take these year-end numbers and tell me anything about what his cash flow needs were in May and June, 1996?. . .
A. Not the detail. . . .
Q. Okay. And as I understand from prior testimony, you don't have that detail?
A. No, that's correct. . . .
Q. Okay. All right. Was his shortfall exactly 200,000, the cash flow shortfall that he had, the need for additional funding? Is it your testimony that it was exactly 200,000?
A. No.
Q. What was it?
A. We don't -- we don't know the exact amount. . . .
A. I don't have any documentation here. Just discussion with Danny. And he ended up paying all the farmers off after several years, so . . . Just general knowledge from what Danny has told us.
Q. Do you know -- was it a number in excess of 200,000.00 that was his shortfall?
A. I don't know.
Q. Was it a number less than 200,000.00 that was his shortfall?
A. I don't have the specific number. . . .

Q. Did you take any investigation to verify whether the number of margin calls was less than or more than 200,000?. . .
A. I did not get into detail about what his specific cash flow needs were during that two-month period.

Q. Would it be fair to say that your opinion, then, is predicated on Danny Holland as having $200,000, and only $200,000, in margin calls in May and June of 1996? , . . Would it be fair to say that your opinion that you've given in your report is predicated on Danny Holland having 200,000.00 margin calls in 1996? In May and June, 1996, I'm sorry.

A. Yes.

Q. Okay. So you've made the assumption, based upon your conversations with Danny Holland, that in May, June of 1996, he had $200,000.00 worth of margin calls. And had he had $200,000, then that would have made a difference?

A. Yes.

(R.V. 3 pp.360-68; RE 330-38).