IN THE SUPREME COURT OF MISSISSIPPI

CASE NUMBER 2007-CA-02023

DANNY HOLLAND — APPELLANT

VS.

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

REPLY BRIEF OF APPELLANT

Appeal from the Circuit Court of Panola County, Mississippi
Second Judicial District
Hon. L. Joseph Lee, Special Circuit Judge

ORAL ARGUMENT REQUESTED

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THE ISSUES ON APPEAL WERE RAISED BELOW

Although Danny Holland raised all of the issues before the trial judges that have been stated here on appeal, the Bank claims they are new issues that were not properly raised below. By his February 24, 2006 Order, Judge Coleman denied summary judgment on ***all of the issues*** raised by the Bank. [CP237-39; RE 256-58][CP 964; RE 9] This is the Order which the Bank sought to have reconsidered. Throughout all the subsequent attempts to have its motion reconsidered, the only issues the Bank raised were: (1) its alleged waiver and/or ratification defenses; and (2) the contention that Holland failed to prove causal connection between the Bank's misconduct and his damages. [CP 978-86; RE 419-27] The Bank's position overlooks the fact that Judge Coleman denied the Bank's waiver claim, which both sides raised and argued, and it wasn't until Judge Lee's order granting summary judgment, which was a final, appealable order, that waiver was applied. The application of the waiver/ratification doctrine was clearly contested below, and the scope of its application has been part of the ongoing dispute. The breach of fiduciary duty issue was also raised by the Bank and denied by Judge Coleman. The Bank's suggestion that Danny Holland did not argue the breach of fiduciary claim below is misleading, and this issue is properly before this Court. Holland recognizes that his theories of recovery are related, because the Bank's misconduct overlaps all of Holland's causes of action. Holland's brief filed below does not contain a separate "fiduciary duty" heading, but Holland's fiduciary arguments appear throughout his response, and the record before this Court supports this claim. By not asking for reconsideration of the breach of fiduciary duty claim for which Judge Coleman denied summary judgment, the Bank apparently conceded that summary judgment was not appropriate, and Judge Lee's October 9, 2007, order is silent on this issue. Likewise, Danny Holland raised the waiver of reconsideration issue about which the Bank

complains.[1]

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT

The Trial Court Exceeded Its Role

Danny Holland was the non-moving party to the summary judgment motion filed below, and as such, the trial court was required to give him the benefit of the doubt. *Williamson v. Keith*, 786 So.2d 390, 393 (Miss. 2001) and cases cited within. The trial court was also required to give him the benefit of all favorable inferences that could have been reasonably be drawn from the evidence. *Dailey v. Methodist Medical Center*, 790 So.2d 903, 915-16 (Miss. App. 2001). However, the trial court did neither, and its actions deprived Danny Holland of a full trial on the genuine fact issues he disputed.[2]

This Court has long recognized that summary judgment should only be granted with great caution. See, *e.g., Simpson v. Boyd*, 880 So.2d 1047, 1050 (Miss. 2004); *Evan Johnson & Sons Construction, Inc. v. State*, 877 So.2d 360, 365 (Miss. 2004, *reh. den.* 2004); and *Palmer v. Anderson Infirmary Benevolent Association*, 656 So.2d 790, 794 (Miss. 1995) A motion for summary judgment should be overruled unless the trial court finds beyond any reasonable doubt that the non-moving party would be unable to prove any facts to support its claim. See, *e.g., Yowell v. James Harkins Builder, Inc.*, 654 So.2d 1340, 1343-44 (Miss. 1994). See also *Simpson v. Boyd*, at 1050 (*quoting Palmer v. Anderson Infirmary*, at 794). Because summary judgment is such a

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[1] See *Plaintiff's Response to Defendant's Motion for Reconsideration of Order Denying Summary Judgment*, ¶17. [CP 987-93]

[2] The comment to Rule 56 provides that: "A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. It cannot be used to deprive a litigant of a full trial of genuine fact issues."

powerful tool that this Court does not favor, a trial judge should use it sparingly. *Bailey v. Wheatley Estates Corporation,* 829 So.2d 1278, 1282 (Miss. App. 2002) If the trial court is going to err, it should be in denying summary judgment, not in granting it. *Glover v. Jackson State University*, 968 So.2d 1267, 1275 (Miss. 2007) (citing *Brown v. Credit Center, Inc.*, 444 So.2d 358, 360 (Miss. 1983) This Court has held:

> [E]ven where what is before the court does not indicate a genuine dispute of material fact and the movant is technically entitled to summary judgment, the trial court would nevertheless be justified in denying summary judgment when . . . a full exposition of the facts may result in a triable issue or is warranted in the interest of justice. *Brown v. McQuinn*, 501 So.2d 1093, 1095 (Miss. 1986).

Great Southern National Bank v. Minter, 590 So.2d 129, 135 (Miss. 1991)

The trial court exceeded its permitted role by trying the issues raised. It was prohibited from doing that, and should have stopped at determining whether there were issues to be tried.

The record before this Court is replete with disputed, material, factual issues. If Danny Holland could have proceeded to trial under any reasonable set of facts, not just the myopic and slanted version presented by the Bank, summary judgment should have been denied. Put another way, the Bank's motion for summary judgment should have been overruled unless the trial court found, beyond a reasonable doubt, that the plaintiff would have been unable to prove any facts to support his claims. *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss. 1993)

REBUTTAL OF THE BANK'S ARGUMENTS

The Bank's Breach of Fiduciary Duty

William Jeffreys undertook the fiduciary obligations on behalf of the Bank when he agreed it would act as escrow agent for the Long Branch exchange. Although Jeffreys denies that he agreed to do so, this disputed fact is resolved in Danny Holland's favor. However, the Bank did not have to agree for the fiduciary duty to arise.

This Court has stated that three factors should be analyzed to determine whether a fiduciary relationship arises in a commercial transaction, to-wit: (1) whether the parties have "shared goals" in the other's commercial activity; (2) whether one party justifiably places trust or confidence in the integrity and fidelity of the other; and, (3) whether the trusted party has effective control over the other party.[3] The parties shared purpose included the continued, successful operation of the cotton business so that Holland could promptly repay his notes to the Bank according to their terms. Holland "justifiably" placed his trust in the Bank so that the fiduciary relationship came into being even without the explicit agreement by the Bank. The Bank's exercise of control over Holland is demonstrated by how it held Holland's $237,000 in its vault to be used, in the Bank's view, at its sole discretion, including its application to Holland's notes that weren't due.

The Bank, upon receipt of the $237,000.00 check, did not act with integrity or fidelity toward Holland. It did nothing with the check for almost two whole weeks and when it finally did, the Bank misappropriated the $237,000 for its own benefit, contrary to explicit and specific instructions from Holland and without informing him of its actions.[4]

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[3] In *Carter Equipment Co. v. John Deere Indus. Equipment Co.*, 681 F.2d 386, 391 (5th Cir. 1982) stated:

> The Eighth Circuit recognized the need for mutual or shared purposes, and indicated that such intentions were demonstrated through proof that "both parties have a common interest and profit from the activities of the other." [Citation omitted.] Of course, mutual or shared purpose gives rise to, and is demonstrated by, "trust or confidence placed by one person in the integrity and fidelity of another person." [Citation omitted.] Indeed, whether the parties repose trust or confidence in one another is critical to an ultimate determination regarding the existence of a fiduciary relationship.

[4] Holland's loan package with the Bank was closed on April 29, 1996, and the Bank took the $237,000 on May 22nd, less than thirty days later. Only under the principle of "set-off" did the Bank have a right to apply the $237,000 to Holland's notes, but only which were due or in default. When the Bank misappropriated Holland's funds, none of his notes were due or in default! See, *Union Planters National Bank, N.A. v. Jetton*, 856 So.2d 674, 678 (Miss. App. 2003)

So that Holland would know that the Jeffreys and the Bank were serious about committing to the Long Branch exchange on April 29th, Jeffreys directed Bill McKenzie to draw up the escrow/exchange agreements, which McKenzie did and mailed to Jeffreys and others. The Bank does not agree that McKenzie prepared these fiduciary documents at Jeffreys' request, and in doing so it contends that this is "incorrect." However, for summary judgment purposes, "disputed" is more fitting, and with that in mind, Holland's version must be true.

The Bank's suggestions that Holland instigated the preparation of the escrow documents preparation following do not comport with the facts or reasonable inferences to be drawn therefrom. Its claim that during the April 29th closing, Bill McKenzie was Danny Holland's attorney when he was instructed to prepare the agreements, misstates the law, because banks view closing attorneys such as McKenzie as being their attorneys, and not those of borrowers such as Danny Holland. See Mississippi Bar, *Ethics Opinion No. 147* (June 2, 1988), and *Ethics Opinion No. 248* (April 12, 2001).[5] Ethically and legally, Bill McKenzie was acting on the bank's behalf.

Being composed of former legal practitioners, this Court should ask itself why would a busy real estate attorney like McKenzie take time from his schedule to draft the complex and detailed legal agreements? It is doubtful that he did it gratuitously. The logical conclusion, based on the disputed evidence below, is that McKenzie prepared them because Jeffreys told him to, meaning that the Bank initiated and undertook the fiduciary duty.

In now challenging its fiduciary role, the Bank puts primary focus on the fact that it never signed the McKenzie's escrow documents, but for the reasons stated above, that focus is misplaced.

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[5] In fact, Renasant Bank has on occasion invoked attorney-client privilege to shield it from disclosing loan and closing documents from the closing attorney's file. *Roger Echols Jr. et.al. v. Artis Walton et.al.*, Chancery Court of Marshall County, Mississippi, No. 07-0297 R.

Whether a fiduciary relationship exists between Holland and the Bank is a question of fact which may only be determined by a jury, and all of the relevant facts should be examined. *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144, 150 (Miss. 1998) This Court's broader *de novo* inquiry should include all of the relevant circumstances surrounding the documents from their inception through the Bank's breach.

Other facts in support of the Bank's acknowledgment of its fiduciary undertaking here come from Jeffreys. When he received Kay Cobb's check on May 9th, he still thought the Bank was doing the escrow. [CP 527]; and when Danny Holland called on May 22nd and instructed Jeffreys to use the $237,000 in escrow to pay his cotton business checks, Jeffreys represented to Holland he would do so. [CP79-80; RE 435-36] The inescapable reason for doing this is because Jeffreys still believed the Bank had a fiduciary role.

Although the Bank contends that Jeffreys was "unaware" that the escrow and exchange documents were sitting on his desk, there is proof that the others to whom the papers were mailed, particularly Kay Cobb, received them. Justice Cobb received her copies before the Bank received her trust account check, and her correspondence to Jeffreys indicates an awareness contrary to Jeffreys' testimony. Under these circumstances, it would be reasonable to conclude that "unaware" equates to unopened and unread mail, which is consistent with the other instances of Jeffreys' less than prudent banking. Jeffreys' and Springfield's representations that Jeffreys denied committing to the escrow before the Bank decided to seize Holland's funds is just as likely to be a "covering their backsides" strategy after the train ran off the track. Jeffreys subsequently left the Bank's employ, and Springfield was reassigned. The inconsistencies between word and deed in the way bank officers' acted demonstrate the existence of a jury question on the issue of whether a fiduciary duty existed.

A fiduciary is obligated to make full disclosure to its beneficiary. *Memphis Hardwood v. Daniel*, 771 So.2d 924, 931 (Miss. 2000) However, the Bank never disclosed anything. After receiving the $237,000 check from Kay Cobb and during the two weeks it sat on it, no Bank employee advised Holland that it had the funds, and if it was concerned that it hadn't received or reviewed McKenzie's documents, then it is more than unusual that no one followed up with Holland or McKenzie to ask of the documents whereabouts, or to advise them that the documents were unacceptable and needed revision, or that they needed to be signed, or that the Bank was not going to go through with the escrow. Instead, the Bank chose to tell Danny Holland nothing before taking his funds. Summary judgment was in error on this issue and should, therefore, be reversed.

HOLLAND'S NEGLIGENCE, NEGLIGENT MISREPRESENTATION AND FRAUD CLAIMS DO NOT FAIL AS A MATTER OF LAW

The Negligence Claims

The trial judge made no final ruling except finding that Holland's negligent misrepresentation claims were "oral promises to lend future monies." [CP 1015; RE 7] Holland's negligence claims are much more pervasive than misrepresentation in that they extend to the Bank's negligent processing and administration of his loans. Bank liability for its employees' negligence follows traditional tort law in that a plaintiff must show that a defendant owes some duty to the him – to do some act required under the circumstances, or to refrain from doing something it shouldn't do. That is fundamental tort law.

With his negligent processing and administration claims, Holland would show that negligence took place during the preparation and processing of his loan application, and it continued through the administration of the loans after they were signed. Among the disputed facts that fall Holland's way are: prior to his loans being approved by the Bank's board on March 28, 1996, Danny

Holland requested that his business line of credit increase to $700,000, and the Long Branch exchange be included in his loan package. William Jeffreys knew these requests and accepted that he owed Holland a duty of due care; more specifically, his duty was to present an accurate loan request for what his customer wanted. [CP 519; RE 272] Once Jeffreys, with the aid of Springfield, undertook that obligation, prudence required them to prepare the application with diligence and accuracy. Jeffreys and Springfield failed to do that by misstating Holland's credit needs and by failing to tell Danny Holland of the material variances. Reasonably, prudent bank officers could have and should have done so. They also should have told him of the differences after that date, but failed to do so. Jeffreys didn't reveal the true nature of Holland's loans until they sat down at the closing on April 29th. The negligence continued with the misrepresentations about Long Branch and the eventual misappropriation of Holland's $237,000.

In deciding this issue for the Bank, the trial court ignored Holland's evidence of the Bank's negligence provided through a disinterested third-party, Floyd McGehee, an experienced former loan officer of Mechanics Bank, who was one of Holland's previous bankers.[6] McGehee also spoke with Jeffreys prior to closing about the $700,000 – not $500,000 – line of credit that Peoples Bank was furnishing, which was significant to McGehee because it meant there would be funds sufficient to satisfy Holland's Mechanics Bank loan. [CP 546-50]

The Bank has repeatedly attempted to portray Danny Holland in an unfavorable light, by making personal attacks and leveling accusations that have nothing to do with the issues in this

[6] Areas where the Bank failed to use due care include: *1.* Jeffreys' lack of due diligence by not understanding the nature of Holland's cotton business; *2.* a reasonably, prudent bank officer would not have sat down at the closing on April 29th and represented he could provide a customer with another $200,000, if the bank officer didn't have authority to do so; *3.* it was imprudent of Jeffreys to represent that the Bank would escrow funds to be used by Holland if the Bank was not going to do it; and *4.* it would be detrimental to Holland's business if the Bank failed to provide the funds Jeffreys represented Holland would get. [CP 547-48]

action.[7] It obviously offers these charges to gain some kind of upper hand with its suggestions that Danny Holland was the misrepresenting party and misled the Bank into lending him money, and not the other way around. This tactic does not resolve the factual disputes though. It is nonsense and does not fit squarely with the facts developed below. Instead, the more logical set of inferences drawn from the facts before this Court support Danny Holland's claims and demonstrate the overall lack of due diligence by Jeffreys, Springfield and other bank employees.[8]

The amounts realized from the forced sales of Holland's assets contradict the Bank's portrayal of Danny Holland as the misrepresenting party. Even at reduced prices, Holland's values and other information proved accurate. [CP 530-31; 555] The Bank now acknowledges that Danny Holland – the accused check kiter and cattle thief – repaid it every penny that was borrowed.

Making no finding of the Bank's negligence and lack of due diligence is another example of where the trial court incorrectly tried disputed factual issues and erroneously granted summary judgment which this Court should reverse

The Bank's Misrepresentations Were More Than Expressions of Opinion

In mischaracterizing Danny Holland's claims, the Bank glossed over its officers' misrepresentations and lumped them into two broad categories – misleading Holland about the

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[7] Throughout this litigation, especially the summary judgment proceedings before this Court and below, the Bank has conducted a smear campaign against Danny Holland. They have essentially called him a cattle thief for the selling mortgaged cattle – something that he did out of desperation after the Bank misappropriated his $237,000, and which he promptly self-reported to the Bank. The Bank has also been quick to accuse Danny Holland of possible check-kiting over twelve years ago, though it knows no criminal charges were ever brought.

[8] Jeffreys and Springfield had sufficient information and documentation that educate themselves and the Bank about Holland's business and financial health. All that Jeffreys, Springfield or any other reasonably, prudent bank employee had to do was to read them, and ask questions about what they didn't understand. Had they done so, Holland's loan would have been accurate, and the Bank wouldn't have destroyed his business.

additional $200,000 for his line of credit, and not being truthful about acting as escrow agent for the tax-free exchange. Apparently everything else were unimportant and insignificant details. The record reflects that William Jeffreys and/or Corky Springfield made numerous misrepresentations to Danny Holland regarding the additional $200,000 and the tax free exchange both before and after the Bank's loans were signed, and the trial court's acceptance of them as "promises of future action" was incorrect.

Though some form of future financing for Holland might have been involved, this Court should analyze the means that were used toward that end. Holland would put forward that Jeffreys' misrepresentations were so repetitious and factual in nature that he was induced to believe that getting the extra monies needed were a certainty and required no further action by him.

The trial court erred in finding that the absence of the mention of additional funding or the Bank's escrow role in board minutes weighed against Holland. [CP 1015; RE 7] If this Court is going to consider matters that are absent from the board minutes, it should afford Holland equal play and weigh Jeffreys' admissions to Holland that were made during a breakfast meeting between them in December, 1997, during which Jeffreys admitted that he knew, before the loan package was presented to the board, that Holland needed $700,000, and not $500,000, for his cotton business. [CP 465] Jeffreys also went on to say that the additional $200,000 should have been mentioned and documented in the Bank's records. [CP 499-503]

The loan proposal that Jeffreys and Springfield prepared for Holland was at best inaccurate, and at worst, false and misleading. The application misstated what Holland furnished Jeffreys about his cotton business, Because of the loan items omitted, it did not represent the true credit needs of Holland of which the preparers were aware. These were past and present facts, not merely some request for future funds that this Court finds necessary to sustain negligent and fraudulent

misrepresentation claims. *Moran v. Fairley*, 919 So.2d 969, 973-75 (Miss. App. 2005) Fraud can also be predicated on future promises where the promise is made with the present, undisclosed intent not to perform them. *Kidd v. Kidd*, 210 Miss. 465, 49 So.2d 824, 827 (1951)

The cumulative effect of Jeffreys' and Springfield's misrepresentations was to create a legitimate expectation for Holland that all of the financial needs he had sought were presented to the board in March, 1996. When Jeffreys informed Holland his loans had been approved, he never informed Holland that it was for something less, or that subsequent approval for the rest would be necessary.

There are numerous examples detailed elsewhere in these briefs of the misrepresentations that continued thereafter, including Jeffreys' lying to Danny Holland about the Bank acting as escrow agent for Long Branch, directing Bill McKenzie to draw up the paperwork, and assuring Holland that the $237,000 in escrow would be used to cover Holland's checks.[9]

It should be evident that the Bank's ongoing misrepresentations are much more comprehensive than just a "promise of future money," contrary to the trial court's ruling below. Giving Danny Holland the benefit of all reasonable doubt, at the very least bank officers should have known that these statements were not true and were items they couldn't deliver. Even worse for the Bank, they are expressions of promises made that no one at the Bank intended to honor. Either way, the trial court's grant of summary judgment on this issue was in error and should be reversed, because there are genuine issues of fact which only a jury, and not Judge Lee, is permitted to resolve.

THE BANK'S BAD FAITH

Danny Holland agrees with defendant's statement that under Mississippi law, all contracts

[9] The Bank held Holland's $237,000 without interest for two weeks in its vault. It certainly wouldn't have held its own money like that!

carry an inherent covenant of good faith and fair dealing. In *Cenac v. Murry*, 609 So.2d 1257 (Miss. 1992), this Court looked not only to bad faith conduct that occurred during the period after a contract was created, but also to the negotiation behavior of the parties in applying the implied covenant, and stated:

> In addition to Murry's bizarre [post-negotiation] behavior, [Murry] ***clearly misrepresented material facts to the Cenacs when they were negotiating for the "purchase" of the store***. Under our standard of review, we can conclude only that the lower court erred in its application of the law to the facts of this case. ***If the covenant of good faith and fair dealing has no meaning in this case, it has no meaning in any case.***

Id. at 1272-73 (***Emphasis supplied***)

Accordingly, the Bank's misrepresentations and other misconduct detailed herein before the loans were closed on April 29th should have been considered.

The trial court should have also taken into consideration the bad-faith post-closing misrepresentations, misappropriation, self-dealing and other misconduct that Danny Holland has shown here. Of particular importance was the Bank's misappropriation of Holland's $237,000. When the Bank finally reneged on the extra $200,000 credit line, Holland and Jeffreys agreed that the $237,000 would be used to cover Holland's outstanding checks. Instead of doing that, panic ensued and Springfield took that money and applied it to one of Holland's notes that was not due or in default. This action was something that Holland and the Bank had never discussed or contemplated in their many meetings and conversations. It amounts to overreaching by the Bank to take Danny Holland's property and self-dealing to protect the Bank at Holland's expense. To say that taking the $237,000 as the Bank did was of benefit to Holland is ridiculous. What this did was take away Holland's only remaining source liquid source of capital that would keep the doors of the cotton company open. When the Bank overreached and treated itself to Holland's money, the benefit

that Danny Holland received was being put out of business. Other courts have applied the covenant of good faith and fair dealing as a check on lenders' rights in compelling situations involving the kind of lender overreaching and self-dealing that happened here. See *Duffield v. First Interstate Bank*, 13 F.3d 1403, 1406 (10th Cir. 1993); *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490 (2nd Cir. 1995); and *Berry v. First National Bank*, 894 S.W.2d 558 (Tex. App. 1995)

The trial court also failed to take into consideration the "bad faith" testimony of Floyd McGehee detailed in Holland's earlier brief. [CP 838-39; RE 402-03] It also ignored that the Bank's due diligence that only began after Danny Holland pledged all of his collateral. Part of that due diligence has been the Bank's smear campaign against Holland, which has been conducted to offset, or even justify, the Bank's bad faith. This Court should treat that conduct like the "post-claims underwriting" practices for which this Court has punished insurance companies in bad-faith insurance litigation. See *Anglin v. Gulf Guaranty Insurance Company*, 956 So.2d 853 (Miss. 2007)

Summary judgment on the breach of implied covenant issue was improper.

THE BANK'S "ORAL PROMISES" ARGUMENTS

The Parol Evidence Rule Does Not Apply

In finding that the parol evidence rule prevented proof of the discussions between Holland and Jeffreys prior to closing, the trial court overlooked long-standing exceptions to the rule's application. Under existing case law and the Uniform Commercial Code, it has been well established that where fraud and misrepresentation are alleged with respect to the formation of a written contract, the parol evidence rule will not bar consideration of a prior or contemporaneous oral agreement. The applicable code provision, Miss. Code Ann. §75-1-103 (1972) explicitly provides the common law exceptions of fraud and misrepresentation to supplement the code, and these exceptions continue to be recognized by this Court. *Franklin v. Lovitt Equipment Co.*, 420 So.2d

1370, 1372 (Miss. 1982); see also *Memphis Hardwood Flooring Co. v. Daniel*, at 932

The loan documents of April 29th do not represent the parties' complete agreement when examining them in conjunction with the above described post-closing conduct of the Bank which is inconsistent with them. Had Jeffreys not agreed to the Long Branch escrow and exchange, there would have been no reason for McKenzie to "gratuitously" prepare and mail his documents, or for Kay Cobb to express her knowledge of escrow agreement's existence in her May 9th letter to Jeffreys, which clearly states that she had spoken with someone at the Bank who represented that funds were being escrowed. This letter refutes the Bank's lack of knowledge of this issue. Further, the Bank would have immediately deposited the $237,000 or applied it against one of the loans that Holland would have directed after canceling the Yocona Bottom deeds of trust. Because of the escrow agreement, Jeffreys agreed to clean the dust and cobwebs off Cobb's $237,000 check and use that money to cover Holland's outstanding checks. The incompatibility of these actions with the Bank's position lead to the conclusion that the loan documents of April 29th were not the complete agreement, and the trial court erred in applying the parol evidence rule.

Supplying Alleged Missing Material Terms

It has been Danny Holland's position throughout these proceedings that he requested Jeffreys to make the additional funds for his line of credit and the Long Branch financing part of the April 29th loan package, and though Jeffreys and Springfield knew about these items, they misled Holland and failed to present them. Holland didn't learn otherwise until April 29th. It was reasonable for Danny Holland to believe that the bank terms for the additional $200,000 and the Long Branch funds would have been the same as the like items that were given to Holland on April 29th.

This Court employs a standard of reasonableness in ascertaining whether a contract is sufficiently definite to be enforceable, and should supply incidental terms, consistent with the

structure of the agreement when it is reasonable to do so. *Leach v. Tingle*, 586 So.2d 799, 802 (Miss. 1991) Even price can be inserted if from the terms of the contract, one familiar with elementary principles of mathematical reasoning may deduce with certainty the sales price, and the contract will not fail. *Gordon v. Fechtel*, 220 Miss. 722, 729-30, 71 So.2d 769, 771 (1954).

Danny Holland never requested anything but the additional $200,000 to cover his cotton business, and determining the difference between $500,000 and $700,000 is not rocket science. The Bank suggests that Holland's true financial needs would have been millions of dollars rather than $200,000, and though their estimates and support logic are flawed and misleading, the effect of this competing proof is to create another disputed fact issue that should have been resolved for Danny Holland. The amount of the Long Branch loan can be deduced in a similar, uncomplicated fashion, because the appraisal, sales price, earnest money deposit were all known to the Bank when Jeffreys agreed to the tax free exchange on April 29th.[10] The funds to be escrowed by the Bank became a liquidated and certain amount soon thereafter.

In its brief, the Bank refers to a conversation that Danny Holland allegedly had with Corky Springfield and John Smith on May 13, 1996, wherein Springfield and Smith requested that Holland come up with an additional $121,000 for the Long Branch loan. Although Danny Holland went with Jeffreys to the bank in Tupelo that day, he flatly denies and disputes the conversation with Springfield and Smith regarding their supposed request for more collateral. The only conversation where Springfield and Jeffreys requested additional collateral occurred after Holland funds were seized. This was during the meeting in June, 1996, when Holland self-reported selling the cattle.

Consideration

[10] The Bank handily provides all of the indeterminate Long Branch numbers that are not capable of proof - loan amount, earnest money, and escrow funds - in its Brief (pp. 7-8).

The Bank's belief that consideration is lacking is founded on its belief that the only consideration the additional funds and the escrow/exchange "would be in the form of promissory notes . . ." It is an overly restrictive view of what constitutes consideration, because consideration can take many different forms.[11]

The Bank's complaint that it would have received no benefit is incorrect. The obvious benefit that the Bank would have received from the Long Branch exchange is the increased loan balance (a bank asset), with corresponding increase in collateral value, on Long Branch than it had on Yocona Bottom. Long Branch was a more expensive piece of property. The Bank fails to look at the other side of the equation, because consideration can also consist of Holland doing something he was not otherwise legally obligated to do - which here meant what he did with Yocona Bottom. The only reason Holland pledged Yocona Bottom to the Bank was because of Jeffreys' commitment to the Long Branch exchange, and he would not have sold Yocona Bottom but for the financing Jeffreys promised for Long Branch. Accordingly, Holland gave up a property right that he was not legally obligated to do. The Bank's benefit and Holland's detriment each constitute "legally sufficient consideration," and the Bank's argument here must fail.

The Bank Officers' Authority

The Bank contends that Danny Holland's claims against it must fail as a matter of law because he supposedly knew that William Jeffreys and Corky Springfield didn't have the actual authority to extend the credit that they promised, and in doing so, it tries to portray Holland as a sophisticated borrower due to his previous bank employment. However, there is no proof that

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[11] This Court has defined consideration for a promise as: an act other than a promise; a forbearance; or the creation, modification or destruction of a legal relation; or a return promise, bargained for and given in exchange for the promise . . ." *City of Starkville v. 4-County Electric Power Association*, 819 So.2d 1216, 1220 (Miss. 2002) (citations therein omitted)

Holland was familiar with the internal operations of Peoples Bank, nor was he ever made aware of Jeffreys' or Springfield's lending limits. The argument also fails to address Jeffreys' apparent authority to tell Holland that the $237,000 in escrow would be used to cover Holland's checks.

The Bank's factual references in support of the lack of authority defense is incomplete and misleading. What Danny Holland knew was that his original loan package would have to get board approval. He was not aware nor was he ever told that the modifications he requested also had to. Also, the Bank ignores that Jeffreys misled Holland into believing that there was "no problem" because Jeffreys and Springfield had already presented the items in controversy, and no further approval was needed.

The question of Jeffreys' and Springfield's apparent authority was not proper for consideration under defendant's motion here, because "[u]nder Mississippi law, the determination of whether an agent has the apparent authority to bind the principal is a question of fact to be determined . . . in circuit court, by the jury. *Alexander v. Tri-County Cooperative (AAL)*, 609 So.2d 401, 403 (Miss. 1992), and it is the fact finder who determines whether there is sufficient evidence to meet the . . . test for recovery under the theory of apparent authority, and the applicable test requires a factual determination. *Andrew Jackson Life Insurance Co. v. Williams*, 566 So.2d 1172, 1181 (Miss. 1990).

Danny Holland would state that soliciting, preparing, closing and servicing loans to customers such as him were "of the same general nature" as Jeffreys' and Springfield's authorized conduct. By sending Jeffreys to the closing as the Bank's representative, Holland and any other reasonably, prudent person would be justified in believing that Jeffreys had the power to make the representations and assurances that he did. *Ford v. Lamar Life Insurance Co.*, 513 So.2d 880, 888 (Miss. 1987) In short, the representations made by Jeffreys and Springfield were of the kind and

character that a reasonable person would expect a bank officer to make. Such employees who engage in unauthorized acts do not necessarily fall outside the scope of their employment if the acts are of the same general nature as the conduct authorized or incidental to that conduct. *Adams v. Cinemark USA, Inc.*, 831 So. 2d 1156, 1159 (Miss. 2002) There is no doubt that Holland relied on these bank officers' acts and statements and did so to his detriment.

The Bank received the benefits and collateral pledged with Danny Holland's loans, and it should be estopped from denying its officers' authority. Under that doctrine, the Bank clothed Jeffreys and Springfield with the semblance of authority, and should not be permitted to deny what it affirmed its officers' powers to be, after Holland was led to act in reliance on their conduct. See *Bailey v. Worton*, 752 So.2d 470, 476 (Miss. App. 1999)

The Bank relies heavily on the fact that William Jeffreys only had $50,000 in lending authority at the time he was working with Danny Holland, and since the extra $200,000 that Holland was seeking exceeded that limit, Jeffreys would have had to return before the Board. What the Bank fails to mention was that Corky Springfield, who actively participated in Holland's loans, had lending authority up to $250,000, and these limits exceeded what Holland needed. Danny Holland would submit that one of the reasons Jeffreys advised him the extra money would be no problem was because Springfield was in agreement.

Viewing the disputed facts in a light favorable to Danny Holland, the trial court clearly erred in finding for the Bank here.

THE DOCTRINES OF RATIFICATION AND/OR WAIVER DO NOT APPLY

Because Holland's claims related to the Bank's misappropriation of the $237,000 Yocona Bottom sale proceeds lie outside the scope of the work-out agreement and any renewal notes between Danny Holland and the Bank, these claims cannot fall within "the doctrines of waiver/ratification."

The Bank's assertion to the contrary gives rise to an obvious question of fact, whether the work-out agreement was so broad as to include claims related to the Yocona Bottom farm, which makes summary judgment improper.

The rule that execution of a new or renewal note constitutes a waiver of defenses to the old note, has been followed in a number of cases. See *Gay v. First National Bank*, 172 Miss. 681, 160 So. 904 (1935) and its progeny.[12] However, those cases can have no application here, because the work-out agreement and renewal notes between Holland and the Bank do not include the transactions related to the Yocona Bottom sale, and the Bank's subsequent misappropriation of Holland's $237,000.00. [CP 148-56; RE 203-11]

The agreement between Holland and the Bank that was executed in October, 1996, states that "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" thereof. [CP 155; RE 210] The misappropriation of Danny Holland's $237,000 from Yocona Bottom took place long before that date. It was not an ongoing act, and whether the prior misappropriation of those funds was covered by the execution of the subsequent, unrelated work-out agreement is a question of fact for which summary judgment is not appropriate, and Judge Lee erred in doing so.

A portion of the rationale behind the waiver/ratification rule that the Bank asks to employ here has been to fulfill the contract to which the parties have entered. However such reasoning

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[12] *Austin Development Co., Inc. v. Bank of Meridian (Branch of Great Southern National Bank)*, 569 So.2d 1209, 1212 (Miss. 1990), *Turner v. Wakefield*, 481 So.2d 846, 848 (Miss. 1985), *Citizens National Bank v. Waltman*, 344 So.2d 725, 728 (Miss. 1977), *Salitan v. Ford*, 231 Miss. 616, 622, 97 So.2d 232, 235 (Miss. 1957), *Brown v. Ohman*, 43 So.2d 727, 741 (Miss. 1949), and *McArthur v. Fillingame*, 184 Miss. 869, 186 So. 828, 829 (Miss. 1939)

actually thwarts what both parties knew to be the case when the work-out agreement was executed in October, 1996. The uncontradicted proof in the trial record, is that both the Bank and Danny Holland knew that Holland was not waiving or releasing any lender liability claims against the Bank. That is what his attorney, Scot Spragins, told the Bank, and that he did so is not denied.

Additionally, the waiver/ratification doctrine that the Bank wants this Court to enforce is an archaic and outdated doctrine with Draconian results. Its application in this case rewards a misfit lender by allowing it to hide behind loan documents it prepared while overlooking its employees' and officers' misconduct. A more sensible and balanced rule that encourages both lender and borrower accountability for their acts and omissions is contained in Justice Lee's dissent in *Citizens National Bank v. Waltman*, 344 So.2d 725, 728-29 (Miss. 1977), as follows:

> [T]he rule in *Gay* is too antiquated and harsh, and should be modified or enlarged to harmonize with the better, more reasonable position of other states. I think that before it can be said appellee waived her cause of action (right) against the bank, she must (1) have full knowledge of the fact that she had a cause of action, and (2) she intended to waive or relinquish that right. . . .
>
> The better rule is that, unless the renewal gives the defrauded party something in addition to what he had before, such party has not waived his existing cause of action. . . .

There is no doubt that Danny Holland did not expressly waive his claims, and any additional benefit to him is hard to conceive considering all that he lost because of the Bank. What the Bank tries to suggest, that Holland actually benefitted from the Bank's actions because the $237,000 was applied to his notes, is painfully difficult for Danny Holland to swallow. When Corky Springfield and the Bank took Holland's $237,000, it offset it against a note that less than was less than 30 days old and was neither due or in default. There was no benefit to Holland in doing that. By choosing to pay Holland's note early, the Bank left him with no money at all to keep his cotton company going, and this ruined Holland financially as has been shown. Being forced out of business and

losing a substantial other assets because of the Bank's misconduct is the kind of benefit that Danny Holland could have easily done without.

Another unrealistic aspect of the waiver/ratification doctrine is how it unfairly punishes a borrower like Danny Holland who mitigates his damages. Even though the Bank's misconduct ruined him financially, Holland undertook more than reasonable efforts to repay everything he owed. Under the circumstances of this case, application of waiver and ratification serves to reward the Bank for its wrongful conduct, while penalizing Danny Holland for mitigating his damages.

For these reasons, summary judgment on this issue was in error and should be reversed.

THE BANK CAUSED DANNY HOLLAND'S LOSSES

The Bank makes a fact-heavy, circuitous argument, in support of its claim that Danny Holland failed to demonstrate a causal connection between the Bank's misconduct and his financial ruin. It exemplifies the Bank's lack of due diligence and how little it understood about Holland's cotton company. On the other hand, Danny Holland would suggest that the Bank's argument relates to causation in fact, and not legal cause.

In *Glover v. Jackson State University*, 968 So.2d 1267, 1277 (Miss. 2007), this Court had a recent opportunity to consider the two components of proximate causation with regard to torts grounded in negligence. Distinguishing causation in fact from legal cause, the Court noted a defendant's negligence that is a cause in fact, will also be the legal cause of damages, provided the damages are "the type, or within the classification, of damage the negligent actor should reasonably expect (or foresee) to result" from the defendant's negligence. (Citing *Dobbs, The Law of Torts*, §180 at 443) This Court further held that "a plaintiff is not required to prove that the exact injury sustained by the plaintiff was foreseeable; rather, it is enough to show that the plaintiff's injuries and damages fall within a particular kind or class of injury or harm which reasonably could be expected

to flow from the defendant's negligence." *Id.* at 1278.

Though some of Danny Holland's claims here are based on intentional or fraudulent misconduct, the two components of proximate causation remain the same. The losses that Danny Holland suffered to his cotton business and his other financial losses are precisely within the particular kind or class of injury which the Bank could reasonably have to result from its negligence, misrepresentations and other misconduct complained of above. The Bank's experts opine that Danny Holland's potential losses, had the Bank not shut him down when it did, would have been up near $5,000,000.00. Apparently, the Bank believes that its acts were beneficent, and rather than causing Danny Holland harm, it did him a favor. Danny Holland obviously disputes the Bank's possible projections as being grossly speculative and absurd.[13]

While the missing records hinder Holland's and the Bank's ability to prepare daily projections of margin calls, Holland would submit that once the Bank's misconduct shut down his business, daily margin calls were no longer relevant, and the Bank is hypothesizing a scenario that could no longer occur, and one which the Bank's misconduct prevented from happening. After the Bank cut off his funds and misappropriated his $237,000, daily margin calls and every other aspect of Holland's cotton business quickly halted, and the ultimate losses Danny Holland suffered were from broker and farmer accounts that he could not pay. That number was readily determinable and provided. At the end of 1996, Danny Holland still owed some of his farmers approximately $131,000.00, an amount which was less than the additional line of credit and also the $237,000.00 that the Bank paid itself. [CP 495]

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[13] With the millions of dollars in exposure that the Bank suggests that Danny Holland had, one would have expected the Bank to have presented a litany of lawsuits and judgments against Holland by the cotton companies and farmers with whom he did business. However, the Bank has not offered any such lists for the simple reason that they do not exist. Its projections are glaringly exaggerated.

Mississippi law requires that Holland to provide a "reasonable basis" to compute his damages based on the best evidence obtainable under the circumstances, and which will enable the trier to arrive at a fair, approximate estimate of loss. *MBF Corporation v. Century Business Communications*, 663 So.2d 595, 599 (Miss. 1995) Danny Holland has done that here through his own testimony and that of his CPA expert, Richard DeVoe.[14] Both have testified that the dramatic event, *i.e.*, legal cause, that killed Holland's cotton business was the "failure to pay farmers in a timely fashion," which was caused by the Bank's failure to provide needed funds. [CP 486; 584-86] Considering the flexibility that Holland has in the form of necessary damage proof, the end-of-year unpaid farmer amount is the type of evidence this Court has allowed as relevant proof. *Lynn v. Soterra Incorporated*, 802 So.2d 162, 171 (Miss. App. 2001); and *Cenac v. Murry*, 609 So.2d 1257, 1274 (Miss. 1992)

The method of calculating damages proposed by the Bank is a factual, and not legal question, and the affidavit and flawed logic of its cotton market expert relate more to the extent of damages, and not their cause. The Bank suggests Danny Holland's losses would have been one number while Holland claims another. This is a factual dispute that was not proper for decision by summary judgment, because the opposing expert opinions are for a jury to resolve. The record before this Court is that the Bank's misconduct resulted in Holland's inability to timely pay his farmers and cover margin calls. It triggered a chain of events that destroyed Holland's cotton business. It was error for the trial court to grant summary judgment motion here.

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[14] According to DeVoe's litigation report, from 1996 to 1997, the net income from Holland's cotton business fell from "over $250,000 a year down to a mere $40,000." According to DeVoe, the demise of Holland's cotton business was "caused or contributed to" by the Bank. DeVoe calculated the following losses sustained by Holland: $1,702,018 for the loss of the cotton company; $1,157,733 in losses due to the forced liquidation of livestock and real estate; $2,072,834 as lost revenues from terminated farming operations. The total losses of $4,932,583, do not include interest calculations required to bring these sums to present day numbers. [CP 601, 611; RE 372, 382]

CONCLUSION

Danny Holland has demonstrated that the trial court exceeded its role by deciding disputed fact issues in this case, and because of that error, the Appellant, Danny Holland, respectfully renews his request that this Court reverse summary judgment and remand this case to the Circuit Court of Second Judicial District of Panola County, Mississippi for a jury trial.

Respectfully submitted,

DANNY HOLLAND

BY: _____

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CERTIFICATE OF SERVICE

I, Robert Q. Whitwell, attorney for Appellant, Danny Holland, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing REPLY BRIEF OF APPELLANT to the following by placing said copy in the United States Mail, postage prepaid, at their usual address as follows:

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CERTIFIED, this the 18TH day of August, 2008.

ROBERT Q. WHITWELL

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
Case Number: 2007-CA-02023

DANNY HOLLAND **APPELLANT**

vs.

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

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I have, this date, placed the original of the above and foregoing *Reply Brief of Appellant, Plaintiff-Appellant of Danny Holland,* together with three (3) copies of same and an electronic disk containing the text of the brief in WordPerfect 12.0 format, in first class United States Mail, postage pre-paid, addressed to:

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THIS, the 12th day of August, 2008.

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